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Basic Law: Selected Drafting Materials and Significant Cases

Volume Two

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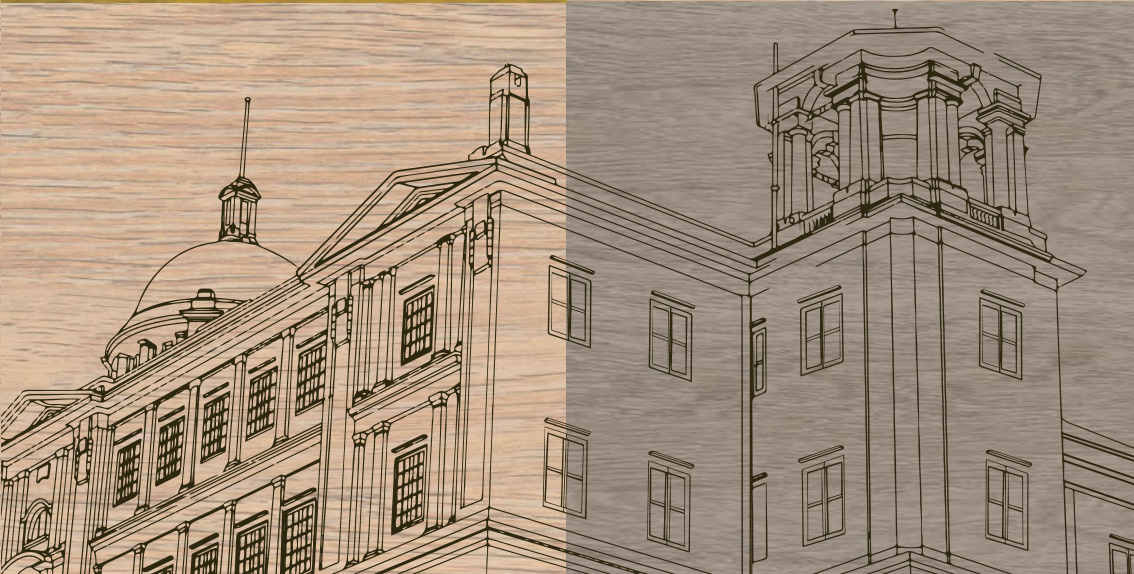

BASIC LAW:

SELECTED DRAFTING MATERIALS AND SIGNIFICANT CASES

Volume Two

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Content

Interpretations of the Basic Law by the Standing Committee of the National People's Congress

Appendices

Cases Directory

Basic Law provisions - Case Directory

BL Articles	Courts	Cases
Preamble	CFI	• *Lee Bing Cheung (李炳章) v Secretary for Justice* [2013] 3 HKC 511
	CA	• *Re Cheng Kai Nam* [2002] 2 HKLRD 39
	CFA	• *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442 • *Chen Li Hung & Others v Ting Lei Miao & Others* (2000) 3 HKCFAR 9
BL 1	CFI	• *The Hua Tian Long (No. 2)* [2010] 3 HKLRD 611 • *Chan Ho Tin v Lo Ying Ki Alan* [2018] 2 HKLRD 7 • *Chow Ting v Teng Yu Yan Anne (Returning Officer)* [2019] 4 HKLRD 459
	CA	• *HKSAR v Luo Shui Ji* [2007] HKCLRT 137
	CFA	• *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No. 1)* (2011) 14 HKCFAR 95
BL 2	CFI	
	CA	
	CFA	• *Chen Li Hung & Others v Ting Lei Miao & Others* (2000) 3 HKCFAR 9 • *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518
BL 4	CFI	• *Chu Woan Chyi & Others v Director of Immigration* [2007] 3 HKC 168
	CA	
	CFA	

BL Articles	Courts	Cases
BL 5	**CFI**	• *HKSAR v Au Kwok Kuen* [2010] 3 HKLRD 371
	CA	
	CFA	
BL 6	**CFI**	• *Michael Reid Scott v The Government of the Hong Kong Special Administrative Region* (unreported, 7 November 2003, HCAL 188/2002) • *HKSAR v Au Kwok Kuen* [2010] 3 HKLRD 371
	CA	• *Good Faith Properties Ltd v Cibean Development Co Ltd* [2014] 5 HKLRD 534 • *Interush Ltd v Commissioner of Police* [2019] 1 HKLRD 892 • *Cheung Tak Wing v Director of Administration* [2020] 1 HKLRD 906
	CFA	• *Wong Hon Sun v HKSAR* (2009) 12 HKCFAR 877 • *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372
BL 7	**CFI**	• *The Hua Tian Long (No. 2)* [2010] 3 HKLRD 611 • *Lee Bing Cheung (李炳章) v Secretary for Justice* [2013] 3 HKC 511
	CA	• *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553
	CFA	

BL Articles	Courts	Cases
BL 8	CFI	• *Koninljike Philips Electronics N.V. v Utran Technology Development Ltd* (unreported, 26 October 2001, HCMP 4509/2000) • *Wong Tai Wai David & Another v Commissioner of Inland Revenue* (unreported, 15 September 2003, HCIA 2/2003) • *Prime Credit Leasing Sdn Bhd v Tan Cho Lung & Another* [2006] 4 HKLRD 741 • *Victor Chandler (International) Ltd v Zhou Chu Jian He* (unreported, 24 October 2007, HCA 2475/2006) • *Re BJB Career Education Co Ltd* [2017] 1 HKLRD 113
	CA	• *HKSAR v Ma Wai Kwan, David & Others* [1997] HKLRD 761 • *Re Chong Bing Keung (No. 2)* [2000] 2 HKLRD 571 • *HKSAR v Luo Shui Ji* [2007] HKCLRT 137 • *Tang Che Tai (鄧枝泰) & Others v Tang On Kwai (鄧安桂) & Others* [2008] 3 HKC 521
	CFA	• *Re Yung Kwan Lee & Others* (1999) 2 HKCFAR 245 • *Chen Li Hung & Others v Ting Lei Miao & Others* (2000) 3 HKCFAR 9 • *Suen Toi Lee v Yau Yee Ping* (2001) 4 HKCFAR 474 • *Solicitor v Law Society of Hong Kong (Secretary for Justice, Intervener)* (2003) 6 HKCFAR 570 • *Unruh v Seeberger* (2007) 10 HKCFAR 31 • *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117 • *China Field Ltd v Appeal Tribunal (Buildings) (No. 2)* (2009) 12 HKCFAR 342 • *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No. 1)* (2011) 14 HKCFAR 95

BL Articles	Courts	Cases
BL 9	CFI	• *Re Cheng Kai Nam* [2002] 2 HKLRD 39
	CA	
	CFA	
BL 11	CFI	• *Wong Tai Wai David & Another v Commissioner of Inland Revenue* (unreported, 15 September 2003, HCIA 2/2003) • *Ch'ng Poh v The Chief Executive of the Hong Kong Special Administrative Region* (unreported, 3 December 2003, HCAL 182/2002)
	CA	
	CFA	• *Chen Li Hung & Others v Ting Lei Miao & Others* (2000) 3 HKCFAR 9
BL 12	CFI	• *The Hua Tian Long (No. 2)* [2010] 3 HKLRD 611 • *Chan Ho Tin v Lo Ying Ki Alan* [2018] 2 HKLRD 7
	CA	
	CFA	• *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No. 1)* (2011) 14 HKCFAR 95
BL 13	CFI	• *Lubiano Nancy Almorin v Director of Immigration* [2018] 1 HKLRD 1141 • *Win More Shipping Ltd v Director of Marine* (unreported, 2 May 2019, HCAL 1520/2018)
	CA	
	CFA	• *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No. 1)* (2011) 14 HKCFAR 95

BL Articles	Courts	Cases
BL 17	**CFI**	• *Right to Inherent Dignity Movement Association & Another v HKSAR Government & Another* (unreported, 21 August 2008, HCAL 74/2008)
	CA	
	CFA	
BL 18	**CFI**	• *Salt & Light Development Inc & Others v Sjtu Sunway Software Industry Ltd* [2006] 2 HKLRD 279 • *The Hua Tian Long (No. 2)* [2010] 3 HKLRD 611
	CA	• *HKSAR v Ma Wai Kwan, David & Others* [1997] HKLRD 761 • *Re Chong Bing Keung (No. 2)* [2000] 2 HKLRD 571 • *Tang Che Tai (鄧枝泰) & Others v Tang On Kwai (鄧安桂) & Others* [2008] 3 HKC 521
	CFA	• *HKSAR v Lai Chee Ying (黎智英)* (2021) 24 HKCFAR 33
BL 18(1)	**CFI**	
	CA	• *Kwok Cheuk Kin v Secretary for Justice* [2021] 3 HKLRD 140
	CFA	• *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117
BL 19	**CFI**	• *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKLRD 114
	CA	• *HKSAR v Ma Wai Kwan, David & Others* [1997] HKLRD 761 • *Re Chong Bing Keung (No. 2)* [2000] 2 HKLRD 571 • *Koon Wing Yee v Financial Secretary* [2013] 1 HKLRD 76 • *Kwok Cheuk Kin v Secretary for Justice* [2021] 3 HKLRD 140

BL Articles	Courts	Cases
BL 19	**CFA**	• *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No. 1)* (2011) 14 HKCFAR 95
BL 22	**CFI**	
	CA	• *HKSAR v Luo Shui Ji* [2007] HKCLRT 137
	CFA	• *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4
BL 22(4)	**CFI**	• *Li Nim Han & Another v Director of Immigration* [2012] 2 HKC 299
	CA	
	CFA	• *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 • *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300 • *Ng Siu Tung & Others v Director of Immigration* (2002) 5 HKCFAR 1
BL 23	**CFI**	
	CA	
	CFA	• *HKSAR v Lai Chee Ying (黎智英)* (2021) 24 HKCFAR 33
BL 24	**CFI**	
	CA	
	CFA	• *Director of Immigration v Lau Fong* (2004) 7 HKCFAR 56 • *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59
BL 24(2)(1)	**CFI**	
	CA	
	CFA	• *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211

BL Articles	Courts	Cases
BL 24(2)(3)	CFI	• *Lui Sheung Kwan & Another v Director of Immigration* [1998] 1 HKLRD 265 • *Li Nim Han & Another v Director of Immigration* [2012] 2 HKC 299
	CA	
	CFA	• *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 • *Chan Kam Nga & Others v Director of Immigration* (1999) 2 HKCFAR 82 • *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300 • *Tam Nga Yin & Others v Director of Immigration* (2001) 4 HKCFAR 251 • *Ng Siu Tung & Others v Director of Immigration* (2002) 5 HKCFAR 1
BL 24(2)(4)	CFI	• *Lubiano Nancy Almorin v Director of Immigration* [2018] 1 HKLRD 1141
	CA	
	CFA	• *Fateh Muhammad v Commissioner of Registration & Another* (2001) 4 HKCFAR 278 • *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26 • *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45 • *Gutierrez v Commissioner of Registration* (2014) 17 HKCFAR 518
BL 24(3)	CFI	
	CA	
	CFA	• *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4

BL Articles	Courts	Cases
BL 25	CFI	• *Wong Tai Wai David & Another v Commissioner of Inland Revenue* (unreported, 15 September 2003, HCIA 2/2003) • *Michael Reid Scott v The Government of the Hong Kong Special Administrative Region* (unreported, 7 November 2003, HCAL 188/2002) • *Chau Tsun Kiu v Secretary for Justice* [2014] 5 HKLRD 414 • *Choi King Fung & Another v Hong Kong Housing Authority* (unreported, 17 March 2017, HCAL 191/2015) • *Lubiano Nancy Almorin v Director of Immigration* [2018] 1 HKLRD 1141 • *Chung Chiu v Secretary for Justice* [2018] 3 HKLRD 323 • *Navarro Luigi Recasa v Commissioner of Correctional Services* [2018] 4 HKLRD 38 • *Re Leung Kwan Tsan Kelvin (a bankrupt)* [2019] 1 HKLRD 1051 • *Yeung Chu Wing v Secretary for Justice* [2019] 3 HKLRD 238 • *MK v Government of HKSAR* [2019] 5 HKLRD 259 • *Infinger v Hong Kong Housing Authority* [2020] 1 HKLRD 1188
	CA	• *Leung v Secretary for Justice* [2006] 4 HKLRD 211 • *Chan Yu Nam (陳裕南) v Secretary for Justice* [2012] 3 HKC 38 • *HKSAR v Lee Kwok Wah Francis* [2013] 2 HKLRD 1009 • *Kwok Cheuk Kin v Director of Lands* [2021] 1 HKLRD 737

BL Articles	Courts	Cases
BL 25	**CFA**	• *So Wai Lun v HKSAR* (2006) 9 HKCFAR 530 • *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 • *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 • *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950 • *QT v Director of Immigration* (2018) 21 HKCFAR 324 • *Leung Chun Kwong v Secretary for Civil Service* (2019) 22 HKCFAR 127
BL 26	**CFI**	• *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166 • *Wong Hin Wai v Secretary for Justice* [2012] 4 HKLRD 70 • *Chau Tsun Kiu v Secretary for Justice* [2014] 5 HKLRD 414 • *Leung Lai Kwok Yvonne v The Chief Secretary for Administration & Others* (unreported, 5 June 2015, HCAL 31/2015) • *Chan Ho Tin v Lo Ying Ki Alan* [2018] 2 HKLRD 7 • *Chow Ting v Teng Yu Yan Anne (Returning Officer)* [2019] 4 HKLRD 459 • *Wong Ho Ming (黃浩銘) v Secretary for Justice* [2020] 3 HKLRD 419
	CA	• *Chan Yu Nam (陳裕南) v Secretary for Justice* [2012] 3 HKC 38 • *Junior Police Officers' Association of Hong Kong Police Force v Electoral Affairs Commission (No. 2)* [2020] 3 HKLRD 39
	CFA	• *Secretary for Justice & Others v Chan Wah & Others* (2000) 3 HKCFAR 459 • *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353

BL Articles	Courts	Cases
BL 27	CFI	• *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804 • *Chan Hau Man Christina v Commissioner of Police* [2009] 4 HKLRD 797 • *HKSAR v Au Kwok Kuen* [2010] 3 HKLRD 371 • *Wong Chi Fung v Secretary for Justice* [2016] 3 HKLRD 835 • *University of Hong Kong v Hong Kong Commercial Broadcasting Co Ltd (No. 2)* [2016] 4 HKLRD 113 • *Lai Man Lok v Director of Home Affairs* [2017] 3 HKLRD 338 • *MTR Corp Ltd v Tsang Kin Shing* [2019] 3 HKLRD 285
	CA	• *Hong Kong Television Network Ltd v Chief Executive in Council* [2016] 2 HKLRD 1005 • *Chee Fei Ming v Director of Food and Environmental Hygiene* [2020] 1 HKLRD 373 • *Cheung Tak Wing v Director of Administration* [2020] 1 HKLRD 906 • *Kwok Hay Kwong v Medical Council of Hong Kong* [2008] 3 HKLRD 524
	CFA	• *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442 • *Yeung May Wan & Others v HKSAR* (2005) 8 HKCFAR 137 • *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229 • *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248 • *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 • *T v Commissioner of Police* (2014) 17 HKCFAR 593 • *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425 • *Secretary for Justice v Wong Chi Fung (黃之鋒)* (2018) 21 HKCFAR 35 • *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518

BL Articles	Courts	Cases
BL 28	**CFI**	• *HKSAR v Siu Yat Leung* [2002] 2 HKLRD 147 • *Clean Air Foundation Ltd & Another v The Government of the HKSAR* (unreported, 26 July 2007, HCAL 35/2007) • *Sony Rai v Coroner* [2011] 2 HKLRD 245 • *Lai Man Lok v Director of Home Affairs* [2017] 3 HKLRD 338 • *Navarro Luigi Recasa v Commissioner of Correctional Services* [2018] 4 HKLRD 38 • *HKSAR v Godson Ugochukwu Okoro* [2019] 2 HKLRD 451 • *Horsfield Leslie Grant & Others v Chief Executive of the HKSAR & Others* (unreported, 22 May 2020, HCAL 952/2020)
	CA	
	CFA	• *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 • *Lau Cheong & Another v HKSAR* (2002) 5 HKCFAR 415 • *Yeung May Wan & Others v HKSAR* (2005) 8 HKCFAR 137 • *So Wai Lun v HKSAR* (2006) 9 HKCFAR 530 • *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138
BL 29	**CFI**	• *HKSAR v Au Kwok Kuen* [2010] 3 HKLRD 371 • *Wong Wai Hing Christopher & Others v Director of Lands* (unreported, 24 September 2010, HCAL 95, 97, 98 & 99/2010) • *Chim Sui Ping v Hong Kong Housing Authority & Another* (unreported, 17 September 2012, HCAL 139/2009)

BL Articles	Courts	Cases
BL 29	**CA**	• *Chan Mei Yiu Paddy v Secretary for Justice (No. 2)* [2012] 3 HKLRD 65 • *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise* [2016] 2 HKLRD 1372 • *Cheung Tak Wing v Director of Administration* [2020] 1 HKLRD 906
	CFA	
BL 30	**CFI**	• *Leung Kwok Hung & Another v Chief Executive of the Hong Kong Special Administrative Region* (unreported, 9 February 2006, HCAL 107/2005) • *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804 • *Secretary for Justice v Commission of Inquiry Re Hong Kong Institute of Education* [2009] 4 HKLRD 11
	CA	• *Sham Wing Kan (岑永根) v Commissioner of Police* [2020] 2 HKLRD 529
	CFA	• *Koo Sze Yiu & Another v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441 • *HKSAR v Muhammad Riaz Khan* (2012) 15 HKCFAR 232 • *Ho Man Kong v Superintendent of Lai Chi Kok Reception Centre* (2014) 17 HKCFAR 179

BL Articles	Courts	Cases
BL 31	CFI	
	CA	
	CFA	• *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 • *Director of Immigration v Lau Fong* (2004) 7 HKCFAR 56 • *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing & Another v Chan Wing Hing (Secretary for Justice, Intervener)* (2006) 9 HKCFAR 545 • *Gutierrez v Commissioner of Registration* (2014) 17 HKCFAR 518
BL 32	CFI	• *Chu Woan Chyi & Others v Director of Immigration* [2007] 3 HKC 168
	CA	
	CFA	
BL 33	CFI	
	CA	• *Leung Sze Ho Albert v Bar Council of Hong Kong Bar Association* [2016] 5 HKLRD 542
	CFA	• *GA v Director of Immigration* (2014) 17 HKCFAR 60
BL 34	CFI	• *Secretary for Justice v Commission of Inquiry Re Hong Kong Institute of Education* [2009] 4 HKLRD 11
	CA	
	CFA	

BL Articles	Courts	Cases
BL 35	CFI	• *Pang Yiu Hung v Commissioner of Police & Another* [2003] 2 HKLRD 125 • *Right to Inherent Dignity Movement Association & Another v HKSAR Government & Another* (unreported, 21 August 2008, HCAL 74/2008) • *Koon Ping Leung（梁官平）v Director of Lands* [2012] 2 HKC 329 • *Ho Chee Sing James v Secretary for Justice* [2015] 4 HKLRD 311 • *Zhi Charles v Lim Hosok* [2017] 2 HKLRD 35
	CA	• *Lee Yee Shing Jacky v Inland Revenue Board of Review* [2012] 2 HKLRD 981 • *Yu Chi Shing Paul v Or Sin Yi Windy* [2013] 5 HKLRD 326 • *Re Hui Kee Chun* (unreported, 1 February 2013, CACV 4/2012) • *K v Commissioner of Police* [2021] 2 HKLRD 645
	CFA	• *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Others* (2006) 9 HKCFAR 234 • *Unruh v Seeberger* (2007) 10 HKCFAR 31 • *Mok Charles Peter v Tam Wai Ho* (2010) 13 HKCFAR 762 • *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735 • *Secretary for Justice v Florence Tsang Chiu Wing* (2014) 17 HKCFAR 739

BL Articles	Courts	Cases
BL 36	**CFI**	• *MS & Others v Director of Social Welfare* (unreported, 15 February 2016, HCAL 57/2015) • *Choi King Fung & Another v Hong Kong Housing Authority* (unreported, 17 March 2017, HCAL 191/2015) • *Re Leung Kwan Tsan Kelvin (a bankrupt)* [2019] 1 HKLRD 1051
	CA	
	CFA	• *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950
BL 37	**CFI**	• *Gurung Deu Kumari v Director of Immigration* [2010] 5 HKLRD 219 • *MK v Government of HKSAR* [2019] 5 HKLRD 259 • *Li Nim Han & Another v Director of Immigration* [2012] 2 HKC 299
	CA	
	CFA	• *W v Registrar of Marriages* (2013) 16 HKCFAR 112 • *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59
BL 39	**CFI**	• *Pang Yiu Hung v Commissioner of Police & Another* [2003] 2 HKLRD 125 • *MTR Corp Ltd v Tsang Kin Shing* [2019] 3 HKLRD 285
	CA	• *Chee Fei Ming v Director of Food and Environmental Hygiene* [2020] 1 HKLRD 373

BL Articles	Courts	Cases
BL 39	**CFA**	• *Chan Kam Nga & Others v Director of Immigration* (1999) 2 HKCFAR 82 • *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442 • *Secretary for Justice & Others v Chan Wah & Others* (2000) 3 HKCFAR 459 • *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 • *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 • *Wong Hon Sun v HKSAR* (2009) 12 HKCFAR 877 • *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16 • *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743 • *GA v Director of Immigration* (2014) 17 HKCFAR 60 • *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138 • *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425 • *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59
BL 39(1)	**CFI**	• *MS & Others v Director of Social Welfare* (unreported, 15 February 2016, HCAL 57/2015) • *Lubiano Nancy Almorin v Director of Immigration* [2018] 1 HKLRD 1141
	CA	
	CFA	• *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480

BL Articles	Courts	Cases
BL 39(2)	CFI	• *Chan Hau Man Christina v Commissioner of Police* [2009] 4 HKLRD 797 • *Lai Man Lok v Director of Home Affairs* [2017] 3 HKLRD 338
	CA	
	CFA	• *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 • *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518
BL 40	CFI	• *Brisilver Investment Ltd v Wong Fat Tso & Another* (unreported, 4 July 2000, HCMP 2038/1997) • *Koon Ping Leung（梁官平）v Director of Lands* [2012] 2 HKC 329 • *Secretary for Justice v Chung Kam Ho* [2013] 5 HKLRD 203
	CA	• *Lai Hay On v Commissioner of Rating and Valuation* [2010] 3 HKLRD 286 • *Kwok Cheuk Kin v Director of Lands* [2021] 1 HKLRD 737
	CFA	• *Secretary for Justice & Others v Chan Wah & Others* (2000) 3 HKCFAR 459 • *Kwok Cheuk Kin v Director of Lands* (5 November 2021, FACV 2, 3 & 4/2021)
BL 41	CFI	• *Chu Woan Chyi & Others v Director of Immigration* [2007] 3 HKC 168
	CA	
	CFA	• *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138 • *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59

BL Articles	Courts	Cases
BL 42	**CFI**	• *Chan Hau Man Christina v Commissioner of Police* [2009] 4 HKLRD 797
	CA	
	CFA	
BL 43	**CFI**	
	CA	
	CFA	• *HKSAR v Lew Mon Hung (劉夢熊)* (2019) 22 HKCFAR 159
BL 45	**CFI**	• *Leung Lai Kwok Yvonne v The Chief Secretary for Administration & Others* (unreported, 5 June 2015, HCAL 31/2015)
	CA	
	CFA	
BL 48	**CFI**	• *Clean Air Foundation Ltd & Another v The Government of the HKSAR* (unreported, 26 July 2007, HCAL 35/2007)
	CA	• *HKSAR v Lew Mon Hung (劉夢熊)* [2019] 2 HKLRD 1004
	CFA	
BL 48(2)	**CFI**	
	CA	• *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460
	CFA	
BL 48(3)	**CFI**	• *Wong Kei Kwong v Principal Assistant Secretary for the Civil Service & Another* [2008] 2 HKC 555
	CA	
	CFA	
BL 48(4)	**CFI**	
	CA	
	CFA	• *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409

BL Articles	Courts	Cases
BL 48(7)	**CFI**	• *The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive of HKSAR* [1998] 1 HKLRD 615 • *Wong Kei Kwong v Principal Assistant Secretary for the Civil Service & Another* [2008] 2 HKC 555
	CA	
	CFA	
BL 48(12)	**CFI**	• *Yau Kwong Man & Another v Secretary for Security* [2002] 3 HKC 457 • *Ch'ng Poh v The Chief Executive of the Hong Kong Special Administrative Region* (unreported, 3 December 2003, HCAL 182/2002)
	CA	
	CFA	
BL 54	**CFI**	• *Television Broadcasts Ltd v Communications Authority* [2016] 2 HKLRD 41
	CA	
	CFA	
BL 56	**CFI**	• *The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive of HKSAR* [1998] 1 HKLRD 615
	CA	
	CFA	• *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518
BL 57	**CFI**	
	CA	• *HKSAR v Lew Mon Hung (劉夢熊)* [2019] 2 HKLRD 1004
	CFA	• *HKSAR v Lew Mon Hung (劉夢熊)* (2019) 22 HKCFAR 159

BL Articles	Courts	Cases
BL 62	CFI	• *Clean Air Foundation Ltd & Another v The Government of the HKSAR* (unreported, 26 July 2007, HCAL 35/2007)
	CA	
	CFA	• *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 • *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518
BL 63	CFI	
	CA	• *Re C (A Bankrupt)* [2006] 4 HKC 582 • *Re Leung Lai Fun* [2018] 1 HKLRD 523 • *Tong Ying Kit v Secretary for Justice* [2021] 3 HKLRD 350
	CFA	• *Chiang Lily v Secretary for Justice* (2010) 13 HKCFAR 208
BL 64	CFI	• *Inglory Ltd v Director of Food and Environmental Hygiene* [2012] 3 HKLRD 603 • *Hui Sin Hang v Chief Executive in Council* (unreported, 15 March 2016, HCAL 99/2015)
	CA	
	CFA	
BL 66	CFI	
	CA	
	CFA	• *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518
BL 68	CFI	
	CA	• *Chan Yu Nam (陳裕南) v Secretary for Justice* [2012] 3 HKC 38
	CFA	

BL Articles	Courts	Cases
BL 72	CFI	
	CA	
	CFA	• *Leung Kwok Hung v President of the Legislative Council (No. 1)* (2014) 17 HKCFAR 689
BL 73	CFI	
	CA	
	CFA	• *Leung Kwok Hung v President of the Legislative Council (No. 1)* (2014) 17 HKCFAR 689
BL 73(1)	CFI	• *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387
	CA	
	CFA	• *Leung Kwok Hung v President of the Legislative Council (No. 1)* (2014) 17 HKCFAR 689 • *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518
BL 73(3)	CFI	• *Raza & Others v Chief Executive in Council & Others* [2005] 3 HKLRD 561 • *Hui Sin Hang v Chief Executive in Council* (unreported, 15 March 2016, HCAL 99/2015)
	CA	
	CFA	
BL 73(10)	CFI	• *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555
	CA	
	CFA	

BL Articles	Courts	Cases
BL 74	**CFI**	• *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387
	CA	
	CFA	• *Leung Kwok Hung v President of the Legislative Council (No. 1)* (2014) 17 HKCFAR 689
BL 75	**CFI**	• *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387
	CA	• *Kwok Cheuk Kin v President of Legislative Council* [2021] 1 HKLRD 1247
	CFA	• *Leung Kwok Hung v President of the Legislative Council (No. 1)* (2014) 17 HKCFAR 689
BL 77	**CFI**	
	CA	• *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460
	CFA	• *Secretary for Justice v Leung Kwok Hung* (27 September 2021, FACC 3/2021)
BL 78	**CFI**	
	CA	
	CFA	• *HKSAR v Leung Hiu Yeung (梁曉陽)* (2018) 21 HKCFAR 20
BL 79(1)	**CFI**	
	CA	• *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460
	CFA	
BL 79(6)	**CFI**	• *Chim Pui Chung v The President of the Legislative Council* [1998] 2 HKLRD 552
	CA	
	CFA	

BL Articles	Courts	Cases
BL 80	**CFI**	• *Yau Kwong Man & Another v Secretary for Security* [2002] 3 HKC 457 • *Koon Ping Leung（梁官平）v Director of Lands* [2012] 2 HKC 329
	CA	• *Koon Wing Yee v Financial Secretary* [2013] 1 HKLRD 76
	CFA	
BL 81	**CFI**	• *Re Cheng Kai Nam* [2002] 2 HKLRD 39
	CA	• *HKSAR v Ma Wai Kwan, David & Others* [1997] HKLRD 761
	CFA	
BL 82	**CFI**	• *Re Flesch QC & Another* [1999] 1 HKLRD 506
	CA	• *China International Fund Ltd v Dennis Lau & Ng Chun Man Architects & Engineers (HK) Ltd* [2015] 4 HKLRD 609
	CFA	• *Chen Li Hung & Others v Ting Lei Miao & Others* (2000) 3 HKCFAR 9 • *Solicitor v Law Society of Hong Kong (Secretary for Justice, Intervener)* (2003) 6 HKCFAR 570 • *Mok Charles Peter v Tam Wai Ho* (2010) 13 HKCFAR 762 • *Incorporated Owners of Po Hang Building v Sam Woo Marine Works Ltd* (2017) 20 HKCFAR 240
BL 83	**CFI**	
	CA	
	CFA	• *HKSAR v Lam Kwong Wai & Another* (2006) 9 HKCFAR 574 • *Incorporated Owners of Po Hang Building v Sam Woo Marine Works Ltd* (2017) 20 HKCFAR 240

BL Articles	Courts	Cases
BL 84	**CFI**	• *Salt & Light Development Inc & Others v Sjtu Sunway Software Industry Ltd* [2006] 2 HKLRD 279
	CA	
	CFA	• *HKSAR v Lam Kwong Wai & Another* (2006) 9 HKCFAR 574 • *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117
BL 85	**CFI**	
	CA	• *Ma Kwai Chun v Leong Siu Chung* [2001-2003] HKCLRT 286 • *Chong Yu On v Kwan SH Susan* [2020] 2 HKLRD 407
	CFA	
BL 86	**CFI**	• *Chiang Lily & Others v Secretary for Justice* (unreported, 9 February 2009, HCAL 42 & 107/2008)
	CA	• *HKSAR v Chan Huandai* [2016] 2 HKLRD 384 • *Tong Ying Kit v Secretary for Justice* [2021] 3 HKLRD 350
	CFA	
BL 87	**CFI**	• *Pang Yiu Hung v Commissioner of Police & Another* [2003] 2 HKLRD 125
	CA	• *HKSAR v Ma Wai Kwan, David & Others* [1997] HKLRD 761 • *HKSAR v Lee Kwok Wah Francis* [2013] 2 HKLRD 1009 • *HKSAR v Chan Huandai* [2016] 2 HKLRD 384 • *HKSAR v Wu Wing Kit (No. 1)* [2016] 3 HKLRD 386 • *HKSAR v Yu Lik Wai William (余力維)* [2019] 1 HKLRD 1149 • *Tong Ying Kit v Secretary for Justice* [2021] 3 HKLRD 350

BL Articles	Courts	Cases
BL 87	**CFA**	• *HKSAR v Hung Chan Wa & Another* (2006) 9 HKCFAR 614 • *HKSAR v Ng Po On* (2008) 11 HKCFAR 91 • *Fu Kor Kuen Patrick v HKSAR* (2012) 15 HKCFAR 524 • *HKSAR v Minney* (2013) 16 HKCFAR 26 • *HKSAR v Hon Ming Kong* (2014) 17 HKCFAR 727 • *HKSAR v Choi Wai Lun (蔡偉麟)* (2018) 21 HKCFAR 167
BL 87(2)	**CFI**	
	CA	
	CFA	• *HKSAR v Lam Kwong Wai & Another* (2006) 9 HKCFAR 574 • *Yeung Chung Ming v Commissioner of Police* (2008) 11 HKCFAR 513 • *Lee To Nei v HKSAR* (2012) 15 HKCFAR 162
BL 92	**CFI**	• *Re Flesch QC & Another* [1999] 1 HKLRD 506 • *Re Cheng Kai Nam* [2002] 2 HKLRD 39
	CA	
	CFA	
BL 94	**CFI**	• *Re Flesch QC & Another* [1999] 1 HKLRD 506
	CA	
	CFA	
BL 95	**CFI**	
	CA	• *Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li* [2016] 3 HKLRD 303
	CFA	• *HKSAR v Hon Ming Kong* (2014) 17 HKCFAR 727

BL Articles	Courts	Cases
BL 96	**CFI**	• *Koninljike Philips Electronics N.V. v Utran Technology Development Ltd* (unreported, 26 October 2001, HCMP 4509/2000) • *Re BJB Career Education Co Ltd* [2017] 1 HKLRD 113
	CA	
	CFA	
BL 97	**CFI**	• *Chan Shu Ying v Chief Executive of the HKSAR* [2001] 1 HKLRD 405
	CA	
	CFA	
BL 98	**CFI**	• *Chan Shu Ying v Chief Executive of the HKSAR* [2001] 1 HKLRD 405
	CA	
	CFA	
BL 100	**CFI**	• *The Association of Expatriate Civil Servants of Hong Kong v The Secretary for the Civil Service* (unreported, 9 November 1998, HCAL 9/1998) • *Michael Reid Scott v The Government of the Hong Kong Special Administrative Region* (unreported, 7 November 2003, HCAL 188/2002)
	CA	
	CFA	• *Secretary for Justice v Lau Kwok Fai & Another* (2005) 8 HKCFAR 304
BL 102	**CFI**	• *Michael Reid Scott v The Government of the Hong Kong Special Administrative Region* (unreported, 7 November 2003, HCAL 188/2002)
	CA	
	CFA	

BL Articles	Courts	Cases
BL 103	**CFI**	• *The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive of HKSAR* [1998] 1 HKLRD 615 • *Michael Reid Scott v The Government of the Hong Kong Special Administrative Region* (unreported, 7 November 2003, HCAL 188/2002)
	CA	
	CFA	• *Secretary for Justice v Lau Kwok Fai & Another* (2005) 8 HKCFAR 304
BL 104	**CFI**	• *Chan Ho Tin v Lo Ying Ki Alan* [2018] 2 HKLRD 7 • *Chow Ting v Teng Yu Yan Anne (Returning Officer)* [2019] 4 HKLRD 459
	CA	• *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460
	CFA	• *Yau Wai Ching v Chief Executive of HKSAR* (2017) 20 HKCFAR 390
BL 105	**CFI**	• *Yook Tong Electric Co Ltd v Commissioner for Transport* (unreported, 7 February 2003, HCAL 94/2002) • *Michael Reid Scott v The Government of the Hong Kong Special Administrative Region* (unreported, 7 November 2003, HCAL 188/2002) • *Raza & Others v Chief Executive in Council & Others* [2005] 3 HKLRD 561 • *HKSAR v Au Kwok Kuen* [2010] 3 HKLRD 371 • *Wong Wai Hing Christopher & Others v Director of Lands* (unreported, 24 September 2010, HCAL 95, 97, 98 & 99/2010) • *Win More Shipping Ltd v Director of Marine* (unreported, 2 May 2019, HCAL 1520/2018)

BL Articles	Courts	Cases
BL 105	CA	• *Kowloon Poultry Laan Merchants Association v Director of Agriculture, Fisheries and Conservation* [2002] 4 HKC 277 • *Kaisilk Development Ltd v Urban Renewal Authority* [2004] 1 HKLRD 907 • *Weson Investment Ltd v Commissioner of Inland Revenue* [2007] 2 HKLRD 567 • *Fine Tower Associates Ltd v Town Planning Board* [2008] 1 HKLRD 553 • *黃榮生 v Lands Department & Another* (unreported, 20 June 2008, CACV 157/2008) • *Good Faith Properties Ltd v Cibean Development Co Ltd* [2014] 5 HKLRD 534 • *Interush Ltd v Commissioner of Police* [2019] 1 HKLRD 892 • *Cheung Tak Wing v Director of Administration* [2020] 1 HKLRD 906
	CFA	• *Director of Lands v Yin Shuen Enterprises Ltd & Another* (2003) 6 HKCFAR 1 • *Dragon House Investment Ltd & Another v Secretary for Transport & Another* (2005) 8 HKCFAR 668 • *Wong Hon Sun v HKSAR* (2009) 12 HKCFAR 877 • *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372
BL 106	CFI	• *Secretary for Justice v Penta-Ocean Construction Co Ltd & Others* [2004] 1 HKC 414
	CA	
	CFA	

BL Articles	Courts	Cases
BL 107	**CFI**	• *曹敏儀 v Carrie Lam Cheng Yuet-ngor, Chief Executive of HKSAR* (unreported, 20 May 2021, HCAL 2405/2020)
	CA	
	CFA	
BL 108	**CFI**	
	CA	• *Weson Investment Ltd v Commissioner of Inland Revenue* [2007] 2 HKLRD 567
	CFA	
BL 110	**CFI**	• *Secretary for Justice v Penta-Ocean Construction Co Ltd & Others* [2004] 1 HKC 414
	CA	
	CFA	
BL 120	**CFI**	• *Lee Bing Cheung (李炳章) v Secretary for Justice* [2013] 3 HKC 511
	CA	• *黃榮生 v Lands Department & Another* (unreported, 20 June 2008, CACV 157/2008) • *Kwok Cheuk Kin v Director of Lands* [2021] 1 HKLRD 737
	CFA	• *Dragon House Investment Ltd & Another v Secretary for Transport & Another* (2005) 8 HKCFAR 668
BL 121	**CFI**	• *Secretary for Justice v Chung Kam Ho* [2013] 5 HKLRD 203
	CA	• *Lai Hay On v Commissioner of Rating and Valuation* [2010] 3 HKLRD 286
	CFA	• *Commissioner of Rating & Valuation v Agrila Ltd & Others* (2001) 4 HKCFAR 83

BL Articles	Courts	Cases
BL 122	CFI	• *Secretary for Justice v Chung Kam Ho* [2013] 5 HKLRD 203
	CA	• *Lai Hay On v Commissioner of Rating and Valuation* [2010] 3 HKLRD 286 • *Kwok Cheuk Kin v Director of Lands* [2021] 1 HKLRD 737
	CFA	
BL 124	CFI	• *Win More Shipping Ltd v Director of Marine* (unreported, 2 May 2019, HCAL 1520/2018)
	CA	
	CFA	
BL 125	CFI	• *Win More Shipping Ltd v Director of Marine* (unreported, 2 May 2019, HCAL 1520/2018)
	CA	
	CFA	
BL 130	CFI	• *Hui Sin Hang v Chief Executive in Council* (unreported, 15 March 2016, HCAL 99/2015)
	CA	
	CFA	
BL 136	CFI	• *Ng Wing Hung v Hong Kong Examinations and Assessment Authority* (unreported, 22 September 2010, HCAL 79/2010)
	CA	
	CFA	• *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754
BL 137	CFI	• *Secretary for Justice v Commission of Inquiry Re Hong Kong Institute of Education* [2009] 4 HKLRD 11
	CA	• *Yu Hung Hsua Julie v Chinese University of Hong Kong* [2016] 5 HKLRD 393
	CFA	

BL Articles	Courts	Cases
BL 141	**CFI**	• *Chu Woan Chyi & Others v Director of Immigration* [2007] 3 HKC 168
	CA	
	CFA	• *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754
BL 142	**CFI**	• *Cheung Man Wai Florence v Director of Social Welfare* (1998-99) 8 HKPLR 241
	CA	
	CFA	
BL 144	**CFI**	• *Cheung Man Wai Florence v Director of Social Welfare* (1998-99) 8 HKPLR 241
	CA	
	CFA	
BL 145	**CFI**	• *Cheung Man Wai Florence v Director of Social Welfare* (1998-99) 8 HKPLR 241 • *MS & Others v Director of Social Welfare* (unreported, 15 February 2016, HCAL 57/2015) • *Choi King Fung & Another v Hong Kong Housing Authority* (unreported, 17 March 2017, HCAL 191/2015) • *Re Leung Kwan Tsan Kelvin (a bankrupt)* [2019] 1 HKLRD 1051 • *Infinger v Hong Kong Housing Authority* [2020] 1 HKLRD 1188
	CA	
	CFA	• *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950
BL 147	**CFI**	• *Re Leung Kwan Tsan Kelvin (a bankrupt)* [2019] 1 HKLRD 1051
	CA	
	CFA	

BL Articles	Courts	Cases
BL 151	CFI	
	CA	• *Re Chong Bing Keung (No. 2)* [2000] 2 HKLRD 571
	CFA	
BL 153	CFI	• *Koninljike Philips Electronics N.V. v Utran Technology Development Ltd* (unreported, 26 October 2001, HCMP 4509/2000)
	CA	
	CFA	• *Re Yung Kwan Lee & Others* (1999) 2 HKCFAR 245
BL 154	CFI	• *Gurung Deu Kumari v Director of Immigration* [2010] 5 HKLRD 219
	CA	
	CFA	• *GA v Director of Immigration* (2014) 17 HKCFAR 60 • *QT v Director of Immigration* (2018) 21 HKCFAR 324 • *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59
BL 158	CFI	• *Leung Lai Kwok Yvonne v The Chief Secretary for Administration & Others* (unreported, 5 June 2015, HCAL 31/2015)
	CA	
	CFA	• *Ng Ka Ling & Others v Director of Immigration (No. 2)* (1999) 2 HKCFAR 141 • *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300 • *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 • *HKSAR v Lam Kwong Wai & Another* (2006) 9 HKCFAR 574

BL Articles	Courts	Cases
BL 158(1)	CFI	
	CA	• *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460
	CFA	• *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 • *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300 • *Ng Siu Tung & Others v Director of Immigration* (2002) 5 HKCFAR 1 • *Yau Wai Ching v Chief Executive of HKSAR* (2017) 20 HKCFAR 390
BL 158(2)	CFI	• *Secretary for Justice v Chung Kam Ho* [2013] 5 HKLRD 203
	CA	
	CFA	• *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 • *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300
BL 158(3)	CFI	• *Secretary for Justice v Chung Kam Ho* [2013] 5 HKLRD 203
	CA	
	CFA	• *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 • *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300 • *Ng Siu Tung & Others v Director of Immigration* (2002) 5 HKCFAR 1 • *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No. 1)* (2011) 14 HKCFAR 95 • *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45

BL Articles	Courts	Cases
BL 159	CFI	
	CA	
	CFA	• *Chen Li Hung & Others v Ting Lei Miao & Others* (2000) 3 HKCFAR 9
BL 160	CFI	• *Leung Kwok Hung & Another v Chief Executive of the Hong Kong Special Administrative Region* (unreported, 9 February 2006, HCAL 107/2005) • *Prime Credit Leasing Sdn Bhd v Tan Cho Lung & Another* [2006] 4 HKLRD 741 • *Victor Chandler (International) Ltd v Zhou Chu Jian He* (unreported, 24 October 2007, HCA 2475/2006)
	CA	• *HKSAR v Ma Wai Kwan, David & Others* [1997] HKLRD 761
	CFA	• *Koo Sze Yiu & Another v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441 • *HKSAR v Hung Chan Wa & Another* (2006) 9 HKCFAR 614 • *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No. 1)* (2011) 14 HKCFAR 95 • *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743
Annex I	CFI	• *Leung Lai Kwok Yvonne v The Chief Secretary for Administration & Others* (unreported, 5 June 2015, HCAL 31/2015)
	CA	
	CFA	

BL Articles	Courts	Cases
Annex III	CFI	• *Azan Aziz Marwah v Director of Immigration & Another* (unreported, 9 December 2008, HCAL 38/2008)
	CA	
	CFA	• *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442 • *HKSAR v Lai Chee Ying (黎智英)* (2021) 24 HKCFAR 33

BL Articles	Courts	Cases
Interpretation by the Standing Committee of the National People's Congress on Some Questions Concerning Implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region (Adopted at the 19th Meeting of the Standing Committee of the Eighth National People's Congress on 15 May 1996)	**CFI**	• *Azan Aziz Marwah v Director of Immigration & Another* (unreported, 9 December 2008, HCAL 38/2008)
	CA	
	CFA	
Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Twenty-fourth Session of the Standing Committee of the Eighth National People's Congress on 23 February 1997)	**CFI**	
	CA	• *HKSAR v Ma Wai Kwan, David & Others* [1997] HKLRD 761
	CFA	• *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No. 1)* (2011) 14 HKCFAR 95

BL Articles	Courts	Cases
Interpretation by the Standing Committee of the National People's Congress Regarding Annex I (7) and Annex II (III) to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Eighth Session of the Standing Committee of the Tenth National People's Congress on 6 April 2004)	**CFI**	• *Leung Lai Kwok Yvonne v The Chief Secretary for Administration & Others* (unreported, 5 June 2015, HCAL 31/2015)
	CA	
	CFA	
Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress (Adopted at the Twenty-fourth Session of the Standing Committee of the Twelfth National People's Congress on 7 November 2016)	**CFI**	• *Chan Ho Tin v Lo Ying Ki Alan* [2018] 2 HKLRD 7
	CA	• *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460
	CFA	• *Yau Wai Ching v Chief Executive of HKSAR* (2017) 20 HKCFAR 390

HKSAR v Ma Wai Kwan, David & Others [1997] HKLRD 761

Background

The defendants were charged in August 1995 with conspiracy to pervert the course of public justice, contrary to the common law. They argued, among other things, that the common law offence had not survived 1 July 1997 when the PRC resumed exercise of sovereignty in Hong Kong ("Reunification") and therefore prosecutions brought against them before the Reunification were no longer valid, since under the Basic Law it was necessary to have a positive act of adoption (which was missing as contended by the defendants) before laws previously in force in Hong Kong could become laws of the HKSAR.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 8 and BL 160. The CA also referred to BL 18, BL 19, BL 81 and BL 87.

What the Court held

The CA held that the common law had survived the Reunification. Continuity after the Reunification was of vital importance. Both the Joint Declaration and the Basic Law carried the overwhelming theme of a seamless transition. The effect of BL 8 was that the common law continued and that it did so under BL 8 and 18 (rather than BL 160). BL 160, whether construed by itself or in conjunction with BL 8, 18, 19, 81 and 87, did not have the effect of requiring the laws previously in force to be formally adopted in order to be effective after 30 June 1997. The use of the word "shall" in these articles could only be used in the mandatory and declaratory sense, otherwise anomalous results would occur.

The indictments against the defendants survived the Reunification and the pending proceedings continued. In the light of the predominant theme of a seamless transition, the terms "documents", "rights" and "obligations" under BL 160(2) covered indictments, the right of the

HKSARG to prosecute offenders and the obligation of an accused to answer to the allegations made against him. The HKSAR courts stood established by the imperative words of BL 81(1). By virtue of BL 8, 18, 19, 81(2) and 87, the legal and judicial systems continued after the Reunification.

The CA held that the NPCSC's Decision adopted on 23 February 1997 on Treatment of the Laws Previously in Force in Hong Kong in Accordance with BL 160 ("NPCSC's Decision") did not suggest that it was necessary to have an act of adoption before laws previously in force in Hong Kong could become effective after the Reunification.

The CA also held that the Hong Kong Reunification Ordinance was lawfully and validly passed by the Provisional Legislative Council which was legally established by the Preparatory Committee for the HKSAR. The Preparatory Committee was established by the NPC, the highest state organ of the State, and it was within the authority and power of the Preparatory Committee to set up the Provisional Legislative Council.

What the Court said

Chan CJHC (as he then was) considered that it was necessary to bear in mind the history, nature and purpose of the Basic Law in its interpretation. He said at 772I – J:

"13. The Basic Law is not only a brainchild of an international treaty, the Joint Declaration. It is also a national law of the PRC and the constitution of the HKSAR. It translates the basic policies enshrined in the Joint Declaration into more practical terms. The essence of these policies is that the current social, economic and legal systems in Hong Kong will remain unchanged for 50 years. The purpose of the Basic Law is to ensure that these basic policies are implemented and that there can be continued stability and prosperity for the HKSAR. Continuity after the change of sovereignty is therefore of vital importance."

As to the intention of the Basic Law, Chan CJHC said at 774E – F:

"17. In my view, the intention of the Basic Law is clear. There is to be no change in our laws and legal system (except those which contravene the Basic Law). These are the very fabric of our society. Continuity is the key

to stability. Any disruption will be disastrous. Even one moment of legal vacuum may lead to chaos. Everything relating to the laws and the legal system except those provisions which contravene the Basic Law has to continue to be in force. The existing system must already be in place on 1 July 1997. That must be the intention of the Basic Law."

Chan CJHC held that there was a sense of continuity in BL 160. He rejected the defendants' argument that a formal act of adoption was necessary to maintain the law previously in force in Hong Kong. At 774I – 775C, Chan CJHC said:

"19. The respondents' argument is based mainly on Article 160 which uses the words 'shall be adopted'. It is suggested that 'shall' in this term is used in the future tense. In my view, that provision cannot be read in isolation but must be considered in the light of the rest of the Basic Law including in particular the articles to which I have referred above. It cannot be construed to have a meaning which is inconsistent with the other articles relating to the adoption of the existing laws and legal system.

20. In any event, Article 160 even on its own has the same theme as the other provisions. There is a sense of continuity in this article. In the first paragraph of this article, it is provided that any laws which are later to be found to be in contravention of the Basic Law *shall be amended* or *cease to have force*. Laws which have not yet come into force cannot cease to have force. In my view, this paragraph clearly indicates that the laws previously in force in Hong Kong are to be effective on 1 July 1997 without any act of adoption. Paragraph 2 of that article puts the matter beyond argument. It provides that documents, certificates, contracts, rights and obligations valid under the laws previously in force *shall continue* to be valid. How can these continue to be valid if the laws which govern their validity cannot even apply without an act of adoption? It simply makes no sense that the Basic Law continues the validity of these documents, certificates, contracts, rights and obligations but requires the laws which upholds them to be adopted.

21. I would also agree that apart from confirming that the laws previously in force are to be the laws of the HKSAR at the time the Region comes into existence, the purpose of Article 160 is to provide for the exclusion of laws which are later found to be in contravention of the Basic Law.

22. Construing Article 160 either by itself or in conjunction with the other articles, I am firmly of the view that it does not have the effect of requiring the laws previously in force in Hong Kong to be formally adopted in order to

be effective after 30 June 1997. In fact, no other article in the Basic Law has such effect."

Chan CJHC further elaborated on the effect of the NPCSC's Decision. He said at 776B – F:

"27. It is submitted on behalf of the respondents that the NPC saw fit to make a Decision on 23 February 1997 which purported to adopt the laws previously in force. This, it is argued, suggests that it is necessary to have an act of adoption before such laws can become effective after 1 July 1997. In my view, this argument cannot be sustained in the light of the purpose and contents of that Decision.

28. The Decision on 23 February 1997 was made for the expressed purpose of exercising the NPC's right under Article 160 of the Basic Law to declare which laws previously in force contravene the Basic Law and are thus excluded from operation after 1 July 1997. The title of the Decision refers to the treatment of laws *in accordance with Article 160* and begins with a recital of the relevant part of that article. The reference to Article 8 in fact reinforces the view that the laws previously in force in Hong Kong will automatically become effective as the laws of the HKSAR except for those that contravene the Basic Law. It also supports the view that Article 160 must be read in conjunction with Article 8.

29. Under Paragraph 1 of the Decision, the laws previously in force in Hong Kong are adopted as the laws of the HKSAR. Paragraph 2 refers to those laws which are considered as contravening the Basic Law and therefore not to be adopted when the HKSAR comes into existence. It is also significant to note paragraph 4 which refers to the laws 'which *have been* adopted'.

30. In my view, this Decision is clear enough. It adopts the laws previously in force in Hong Kong as the laws of the HKSAR when it comes into existence on 1 July 1997. This is strictly speaking not necessary in the light of the clear provisions in the Basic Law. But since it purports to declare invalid those laws which contravene the Basic Law (as it does), it is natural that it also, for the sake of clarity, refers to the laws which are to be adopted on 1 July 1997."

Lui Sheung Kwan & Another v Director of Immigration

[1998] 1 HKLRD 265

Background

Madam Ngan Sau Ying ("Madam Ngan") had three children with her late husband, who passed away in 1982. In 1986, Madam Ngan was married to Mr Lui Sheung Kwan ("Mr Lui SK"), a Hong Kong permanent resident, and was permitted to settle in Hong Kong in 1991 with only two of her children. As the application to have Madam Ngan's youngest son, Mr Lui Chung Ming ("Mr Lui CM") to come and settle in Hong Kong was unsuccessful, Mr Lui CM arrived in Hong Kong on a two-way permit and overstayed even after the permit was expired. The Immigration Department issued a removal order against Mr Lui CM on 28 November 1997. Mr Lui SK and Madam Ngan applied for judicial review of the removal order, arguing that under BL 24(3), Mr Lui CM, as the step-child of Mr Lui SK should be treated as a Hong Kong permanent resident.

Basic Law provisions in dispute

The major provision in dispute was BL 24(2)(3). The CFI also referred to BL 24(2)(1) and BL 24(2)(2).

What the Court held

The application for judicial review was refused. The CFI held that the emphasis of BL 24(2)(3) was on children "born of" Hong Kong permanent residents and not on their children "outside Hong Kong". BL 24(2)(3) referred to the children of Chinese nationality "born of" Hong Kong permanent residents. Although Mr Lui SK was a Hong Kong permanent resident, he was only the stepfather but not the natural father of Mr Lui CM. Accordingly, Mr Lui CM failed to satisfy the requirement under BL 24(2)(3) to be a Hong Kong permanent resident, and the removal order was issued on a reasonable basis.

What the Court said

At 267E – G, the CFI interpreted BL 24(2)(3) in light of BL 24(2)(1) and (2):

"6. … Article 24[(2)](1) and (2) relate to the status of the residents themselves while art.24[(2)](3) relates to the status of the children of these residents. The emphasis of this provision is on children 'born of' them and not on their children 'outside Hong Kong'. This is because if these children were born in Hong Kong, they would be included in art. 24[(2)](1) and need not fall under the ambit of their parents under art.24[(2)](3). The words 'born of' are the verb which goes with the subject 'resident'. I am of the view that art.24[(2)](3) refers to the children of Chinese nationality *born of* Hong Kong permanent residents under categories (1) and (2)."

The Association of Expatriate Civil Servants of Hong Kong v The Chief Executive of HKSAR [1998] 1 HKLRD 615

Background

By the judicial review proceedings, the applicant challenged (i) the decision of the CE to promulgate the Public Service (Administration) Order 1997 ("Executive Order") and the Public Service (Disciplinary) Regulation ("Regulation") and (ii) various provisions in the Executive Order and the Regulation.

In relation to (i), the applicant argued that establishing the procedures by which public servants were to be appointed and dismissed by way of an executive order constituted a failure to maintain the previous system for the appointment and removal of public servants and was accordingly inconsistent with BL 103. Alternatively, the applicant argued that the procedures established by way of an executive order did not amount to legal procedures within the meaning of BL 48(7). Furthermore, the applicant also argued that the Executive Order and the Regulation were unconstitutional since they applied retrospectively.

In relation to (ii), the applicant argued that s. 17 of the Executive Order, which prevented an officer under interdiction from leaving Hong Kong

without the permission of the CE, was an unreasonable restriction on the freedom to leave Hong Kong protected by BoR 8(2). The applicant also challenged the constitutionality of reg. 8(3)(a) of the Regulation which in effect prevented an officer from being legally represented at a disciplinary hearing unless the CE permitted. The applicant argued that reg. 8(3)(a) constituted an unreasonable restriction on the right of access to public service under BoR 21(c).

Basic Law provisions in dispute

The major provisions in dispute were BL 103 and BL 48(7). The CFI also referred to BL 56.

What the Court held

After examining the previous system of recruitment and discipline for public service, the CFI held that the previous system was not established by the LegCo in Hong Kong nor with its approval. Instead, it was established by the Crown in the exercise of its prerogative and by the Governor in the exercise of powers expressly conferred upon him by the Crown. The hallmark of the previous system was that, where procedures were to be established locally, they were established by the Governor by executive action. Accordingly, establishing procedures for the appointment and dismissal of public servants by way of an executive order was consistent with BL 103.

The CFI held that the phrase "in accordance with legal procedure" in BL 48(7) did not require the procedures for the appointment and removal of public servants to receive legislative approval. The CFI noted the difference between the phrase "in accordance with legal procedure" and the phrase "prescribed by law" adopted by other Basic Law articles and held that the course of action was not required by the Basic Law to be prescribed by law. BL 48(7) should be construed in conjunction with BL 103. It followed that since the procedures established by the Executive Order maintained the previous system of recruitment and discipline in the public service, those procedures were lawfully established and fell within the phrase "legal procedure" in BL 48(7).

The CFI held that there was no legal principle (in the Basic Law, s. 23(3) of the Reunification Ordinance (No. 110 of 1997), or the common law) which prevented any subordinate legislation or administration action from being valid merely because of its retrospective effect.

The CFI held that although s. 17 of the Executive Order was a necessary restriction and was consistent with other rights recognized in the Hong Kong Bill of Rights Ordinance (Cap. 383) in accordance with BoR 8(3), it was not provided by law. The "provided by law" requirement could only be satisfied if a restriction was imposed by a legislation (as opposed to an administrative provision) or by the common law. BL 103 could not be the law that provided for the restriction in s. 17 of the Executive Order since BL 103 could not have contemplated the maintenance of a system which contravened the Bill of Rights.

The CFI also held that the right of access to public service did not require identical treatment for all officers. Thus, if the vast majority of officers were treated equally with all but a few officers in certain identifiable groups, that did not necessarily mean that their right of access to the public service on general terms of equality had been restricted.

What the Court said

In relation to BL 103, the Court said at 621J – 622B:

"10. In summary, while there are undoubtedly constitutional differences between 'Hong Kong's previous system of recruitment [and] … discipline … for the public service' and the current system established by the executive order and the regulation, the maintenance of the previous system did not require the current system to have the approval of the legislature. The hallmark of the previous system was that, where procedures were to be established locally, they were established by the Governor by executive action. It follows that art.103 of the Basic Law did not require any system which replaced the previous system to have the approval of the Legislative Council."

The CFI also expressed its view on the phrase "prescribed by law" used in a number of provisions in the Basic Law at 622G – H:

"13. I should add that even if a course of action must be prescribed by law,

that does not mean that it has to be sanctioned by legislation. Article 39, for instance, provides that the rights and freedoms enjoyed by Hong Kong residents 'shall not be restricted unless as prescribed by law'. The right of freedom of expression is, of course, restricted by laws other than legislation – for example, by the common law of defamation. Moreover, art.8 provides that the laws of Hong Kong include the common law, rules of equity and customary law as well."

The CFI construed the meaning of BL 48(7) and said at 622H – J:

"14. Chapter IV of the Basic Law concerns Hong Kong's political structure. Section 6 of chapter IV relates to public servants. Accordingly, the power conferred on the Chief Executive by art. 48(7) to appoint and remove holders of public office has to be construed in the light of the provisions in s.6. The article in s.6 which addresses the appointment and removal of public servants is art.103. Accordingly, art. 48(7) has to be construed with art.103 in mind. In my judgment, the construction of the words 'in accordance with legal procedures', which takes into account (a) the provisions of art.103, and (b) the fact that the phrase used in art. 48(7) is not 'in accordance with procedures prescribed by law', is 'in accordance with such procedures as are lawfully established to maintain Hong Kong's previous system of recruitment and discipline for the public service'. Since the procedures laid down by the Chief Executive by the Executive Order maintain Hong Kong's previous system of recruitment and discipline in the public service and were therefore lawfully established, it follows that those procedures fall within the phrase 'legal procedures' in art. 48(7)."

The CFI also expressed its view on the meaning of BL 56 in relation to the argument that legislation was not necessary for the regulation of the public service at 623B – D:

"15. … Mr Fok argued that if the Chief Executive was to be solely responsible for the appointment and removal of public servants, it was unlikely that legislation was necessary for the regulation of the public service. I cannot go along with that argument. In my view, the Chief Executive's power in art.56 to dispense with consulting the Executive Council relates to decisions of the Chief Executive to appoint and remove particular public servants. The procedures by which such decisions should be taken could only be established once the Executive Council had been consulted (provided that their establishment could properly be characterized as an important policy decision)."

Chim Pui Chung v The President of the Legislative Council

[1998] 2 HKLRD 552

Background

The applicant was a member of the LegCo. On 1 August 1998, he was convicted of conspiracy and was sentenced to 3 years' imprisonment. He applied for leave to appeal against his conviction and sentence and the application was due to be heard on 12 November 1998. The President of the LegCo ("President"), decided that a motion, pursuant to BL 79(6), that the applicant be removed from office be placed for debate on 9 September 1998. BL 79(6) provides that the President of the LegCo shall declare a member no longer qualified for the office "when he or she is convicted and sentenced to imprisonment for one month or more for a criminal offence … and is relieved of his or her duties by a motion passed by two-thirds of the members of the Legislative Council present."

Before the motion was heard, the applicant applied for leave to apply for the judicial review against the President's decision. The applicant claimed that it was arguable that on a true construction of BL 79(6) "conviction" and "sentence" related to convictions and sentence which had been sustained on appeal. Hence the President's power under BL 79(6) was not triggered until all avenues of appeal from the original conviction and sentence had been exhausted and had failed. The applicant also argued that the President's decision was unreasonable given that the President knew, or ought to have known, that the applicant had applied for bail pending appeal.

Basic law provisions in dispute

The major Basic Law provision in dispute was BL 79.

What the Court held

The CFI dismissed the applicant's application for leave to apply for judicial review and held that it was not arguable that the President's decision was legally flawed. The language of BL 79(6) did not justify

the applicant's construction. In their natural and ordinary meaning, the words "convicted" and "sentenced" related to a defendant having been convicted and sentenced by a court of first instance exercising an original jurisdiction.

Those drafting the Basic Law must consider that the full complement of LegCo members ensuring proper representation for the electorate was more important than the right of a convicted individual member to have his or her seat in the LegCo held in abeyance while an appeal was being pursued. The requirement that there be a two-thirds majority vote reflected, not the need for all appellate procedures to be exhausted, but the desirability of leaving the ultimate decision as to whether a member should be removed, as a result of his or her conviction, to the LegCo members. It was open to the LegCo members to postpone the issue of whether a member should be removed until the appeal had been heard.

The President's decision was not unreasonable as it merely gave the members the opportunity to decide whether the motion should be debated on 9 September 1998.

What the Court said

On the construction of BL 79, the CFI said at 554G – 555C:

"4. … Mr Philip Dykes SC for Mr Chim argues that the words 'convicted' and 'sentenced' in art. 79(6) relate to convictions and sentences which have been sustained on appeal. In other words, the power of the President of the Legislative Council to declare that a member is no longer qualified for office under art.79(6) is not triggered until all avenues of appeal from the original conviction and sentence have been exhausted and have failed.

5. There is nothing in the language of art. 79(6) to justify that construction of it. If that construction had been intended, I would have expected express words to be used. In their natural and ordinary meaning, the words 'convicted' and 'sentenced' relate to a defendant having been convicted and sentenced by a court of first instance exercising an original jurisdiction.

6. I recognize that the provisions of the Basic Law should be construed, if possible, in such a way as to avoid anomalies. In that connection, I do not overlook Mr Dykes' point that his construction of art. 79(6) avoids the situation where, after a successful appeal against conviction or

sentence, the grounds for seeking a declaration by the President of the Legislative Council would no longer have existed. But I do not believe that the situation is anything like as anomalous as Mr Dykes suggests. There is a need for the constituents of a member of the Legislative Council to continue to be represented in the Legislative Council. If the removal of a member, who has been convicted of a criminal offence and sentenced to a term of one month's imprisonment or more, has to be postponed for a number of months before his appeal can be heard, his constituents will be disenfranchised for that period of time. The absence of any express words in art. 79(6) relating to the exhaustion of all avenues of appeal leads me to conclude that those responsible for drafting the Basic Law thought it more important that there be a full complement of members of the Legislative Council ensuring proper representation for the electorate than the right of a convicted individual member to have his or her seat in the Legislative Council held in abeyance while an appeal is being pursued."

In relation to the requirement that there be two-thirds majority vote to disqualify a member, the CFI said at 555E – F:

"7. … The fact that two-thirds of the members present have to vote for a member's removal reflects, therefore, not the need for all appellate procedures to be exhausted, but the desirability of leaving the ultimate decision as to whether a member's conviction or sentence should result in his removal from office to the good sense of members of the Legislative Council. Thus, it is open to members of the Legislative Council to defer the question of a member's removal under art. 79(6) until his appeal has been heard. …"

Re Flesch QC & Another [1999] 1 HKLRD 506

Background

The applicants sought admission to the Hong Kong Bar for the purpose of appearing in particular cases under s. 27(2) of the Legal Practitioners Ordinance (Cap. 159). The Department of Justice and the Hong Kong Bar Association indicated their consent, but the Court called for submissions as it was concerned about the lack of information provided on counsel in similar applications for admissions and that such

applications were made shortly before the hearing dates. The Court was also of the view that it was an appropriate time to review the existing guidelines for the admission of overseas counsel.

Basic Law provisions in dispute

The CFI referred to BL 82, BL 92 and BL 94.

What the Court held

The CFI held that since 1 July 1997, one important aspect of the public interest for admission of overseas counsel was for our legal system to develop and acquire international recognition for its quality and reliability. The court must have regard to all aspects of the public interest and perform a balancing exercise when dealing with an admission application under s. 27(2) of Cap. 159.

The CFI also held that admitting overseas counsel with sufficiently high quality and standing might have a positive impact on the development of our jurisprudence.

What the Court said

At 511E – J, the CFI explained the objective to acquire international recognition of quality and reliability:

"12. Since 1 July 1997, the Hong Kong legal system no longer has the Privy Council as its highest court. For the first time in the history of Hong Kong, we now have our own court with the power of final adjudication - the Court of Final Appeal. If Hong Kong is to remain as an international financial and commercial centre, it is vital that our legal system with all the jurisprudence which our courts, particularly the Court of Final Appeal, can develop should acquire international recognition for its quality and reliability. This is clearly in the public interest. In order to develop such jurisprudence, it may be helpful to have the benefit of the talents and experience of overseas counsel.

13. In my view, this objective is also in line with the spirit and intention of the relevant provisions in Chapter IV, section 4 of the Basic Law. Article 94 permits the Government to make provisions for lawyers from outside Hong

Kong to work and practise in the HKSAR. Article 92 permits the recruitment of judges and judicial officers from other common law jurisdictions. Article 82 allows for the invitation of judges from other common law jurisdictions to sit on the Court of Final Appeal. Hence, it is contemplated that our legal system can, under certain circumstances, draw on the talents and experience of lawyers, judges and jurists from other common law jurisdictions. Such talents and experience coming both from counsel who appear before our courts and from judges who preside in them, particularly the Court of Final Appeal, would not only enhance the international image of our legal system, but also contribute to the quality of the judgments which are handed down by our courts."

At 513I – 514B, the CFI explained why and when overseas counsel should be admitted:

"20. In my view, since it is in the public interest to develop our own jurisprudence which can enjoy international recognition and reputation, overseas counsel with sufficiently high quality and standing may be admitted to appear in our courts in cases involving the determination of legal principles which may have an impact on the development of our jurisprudence. Such cases would be cases which, quite apart from the size of their claims, are likely to go all the way up to the Court of Final Appeal for a determination of some principles of law. It is clear that the burden is always on the applicant to show that the case in which he is briefed to appear is a suitable case which involves the determination of legal principles which may have an impact on the development of local jurisprudence and that he is of a sufficiently high quality and standing to be in a position to make a useful contribution."

The Association of Expatriate Civil Servants of Hong Kong v The Secretary for the Civil Service (unreported, 9 November 1998, HCAL 9 of 1998)

Background

The Association of Expatriate Civil Servants of Hong Kong ("Association") sought judicial review of a new condition imposed by

the Government after June 1997 that all agreement officers serving on local terms, including former overseas agreement officers serving on locally modelled agreement terms, should satisfy a Chinese language proficiency requirement ("language requirement") before being allowed to transfer to the permanent establishment. The Association argued that the language requirement was in breach of BL 100 and incompatible with the non-Chinese speaking officers' right for access on general terms of equality to public service.

Basic Law provisions in dispute

The major provision in dispute was BL 100.

What the Court held

The Association argued that the language requirement was in breach of BL 100 as it was a condition of service less favourable than before. The CFI held that principally BL 100 was intended to ensure continuity of employment so that no public servant would suffer as a consequence of the transition itself. BL 100 was not intended to inhibit the introduction of new measures for the good governance of Hong Kong. A bilingual Civil Service was certainly such a measure. The Court further held that the imposition of the new condition did not contravene the right to participate in public life under BoR 21(c). This was because the requirement that officers on locally modelled agreement terms should attain a certain level of proficiency in Chinese language was fair, rational and proportionate to such need to develop a Civil Service that was at least bilingual in Chinese and English.

What the Court said

The CFI agreed that it was appropriate to have a team of civil servants who were bilingual in Chinese and English. The Court said at paragraph 1:

"1. There is in Hong Kong a long standing policy to localize the Civil Service. It is a wholly understandable and sensible policy. It has stood up to scrutiny in the courts. The Government of the Hong Kong Special Administrative

Region also has a policy to develop a Civil Service that is at least bilingual in Chinese and English. It cannot in my view be gainsaid that such a policy is entirely appropriate for Hong Kong where the great majority of the population uses Chinese. It is plainly essential that the Government, through its Civil Service, and the population should be able easily to communicate with each other. The implementation of this latter policy, however, has given rise to complaint on the part of officers from overseas who have no background or training in Chinese. Hence, this application for judicial review brought by their Association - AECS."

The Court said at paragraph 17 that the language requirement did not contravene BL 100:

"17. In my judgment, while Article 100 is designed to meet elements of the intentions contended for by both Mr Fok and Mr Scott, principally it is intended to ensure continuity of employment so that no public servant suffers as a consequence of the transition itself. Whatever else may have been the intention, I am confident that Article 100 is not intended to inhibit the introduction of new measures for the good governance of Hong Kong. A bilingual Civil Service is certainly such a measure. I am satisfied it does not contravene Article 100."

Ng Ka Ling & Others v Director of Immigration (1999) *2* HKCFAR 4

Ng Ka Ling & Others v Director of Immigration (No. 2) (1999) 2 HKCFAR 141

Background

The appellants were Chinese nationals, born in the Mainland, and each had at least one parent who was a Hong Kong permanent resident at the time of the judicial review proceedings.

They claimed that they had the right of abode, pursuant to BL 24(2)(3), which provided that permanent residents had the right of abode. BL 24(2) set out six categories of permanent residents, the third category

being persons of Chinese nationality born outside Hong Kong of those residents listed in the first and second categories.

The first and second categories in BL 24(2) are "Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region" and "Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region" respectively.

The scheme in the Immigration (Amendment) (No. 3) Ordinance 1997 ("No. 3 Ordinance") dealt with the third category permanent residents, providing that permanent residence could only be established by affixing a certificate of entitlement to a valid travel document. Applications for a certificate were to be made to the Director of Immigration ("Director"). For applicants residing in the PRC, applications were to be made to the administration in the PRC ("Mainland administration"). The Mainland administration would affix the certificate to a one-way permit (a travel document issued to those coming to settle in Hong Kong). The right of abode was therefore subject to the discretionary control of the authorities in the PRC.

The stance of the Director was that, under the No. 3 Ordinance, the appellants did not have the right of abode as none of the appellants held a one-way permit with the certificate of entitlement affixed.

Key issues in the case included the constitutional jurisdiction of the courts in Hong Kong and the constitutionality of the scheme in the No. 3 Ordinance.

Apart from the 4th appellant, the other appellants' application for judicial review were dismissed by the CFI and the CA. The appellants appealed to the CFA and the Director cross-appealed on the issue of the permanent residence of the 4th appellant.

Basic Law provisions in dispute

The major provision in dispute was BL 24. BL 22(4) and BL 158 were also discussed.

What the Court held

The CFA handed down its judgment on 29 January 1999. The Court allowed the appellants' appeal and dismissed the Director's cross appeal. The CFA held that it had jurisdiction to examine whether legislation enacted by the legislature or acts of the executive were consistent with the Basic Law.

In the interpretation of the Basic Law, a purposive approach was to be applied. The courts should consider the purpose of the instrument and its relevant provisions as well as the language of its text in light of the context.

The CFA also held that, under BL 158(3), it was under a duty to make a reference to the NPCSC for interpretation of the Basic Law if two conditions were satisfied. First, if the provision was an excluded provision (i.e. a provision which: (a) concerned affairs which were the responsibility of the CPG; or (b) concerned the relationship between the Central Authorities and Hong Kong). Secondly, if the CFA in adjudicating the case needed to interpret such provisions and such interpretation would affect the judgment on the case.

In the present case, since the predominant provision to be interpreted was BL 24, the CFA held that it did not have to make a reference, even though BL 22(4) was arguably relevant to the interpretation of BL 24.

Further, the CFA held that the right of abode in BL 24(2)(3) was not qualified by BL 22(4). BL 24(2)(3) conferred the right in unqualified terms.

As to the No. 3 Ordinance, the CFA held that it was unconstitutional to the extent that it required permanent residents residing in the PRC to hold the one-way permit before they could enjoy the constitutional right of abode.

However, the scheme in the No. 3 Ordinance was constitutional in requiring that a claimant to apply for and obtain a certificate from the Director and providing that the claimant's status as a permanent resident could only be established by holding such a certificate. A distinction should be drawn between a permanent resident who enjoyed the right of abode and a person who claimed to be a permanent resident.

A retrospective provision in the No. 3 Ordinance purported to take away the right of abode of permanent residents by descent who had arrived in Hong Kong and had the right of abode was held to be unconstitutional.

The formation of the Provisional Legislative Council (which had enacted the No. 3 Ordinance), was also held by the CFA to be consistent with the Basic Law.

Subsequently the CFA clarified in *Ng Ka Ling (No. 2)* that the Court's judgment on 29 January 1999 did not question the authority of the NPCSC to make an interpretation under BL 158 which would have to be followed by the courts of the Region. The Court accepted that it could not question, the authority of the NPCSC to do any act which was in accordance with the provisions of the Basic Law and the procedure therein.

What the Court said

The CFA stated that the HKSAR was vested with independent judicial power. The CFA held at 25G – J that:

"61. In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. Although this has not been questioned, it is right that we should take this opportunity of stating it unequivocally. In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law."

When explaining the proper approach to the interpretation of the Basic Law, the CFA at 28D – F held that:

"73. We must begin by recognizing and appreciating the character of the document. The Basic Law is an entrenched constitutional instrument to

implement the unique principle of 'one country, two systems'. As is usual for constitutional instruments, it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances.

74. It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument."

As to whether reference should be made to the NPCSC under BL 158(3), the CFA said at 30I – 31F that:

"89. As far as the Court of Final Appeal is concerned, it has a duty to make a reference to the Standing Committee if two conditions are satisfied:

(1) First, the provisions of the Basic Law in question (a) concern affairs which are the responsibility of the Central People's Government; or (b) concern the relationship between the Central Authorities and the Region. That is, the excluded provisions. We shall refer to this as 'the classification condition'.

(2) Secondly, the Court of Final Appeal in adjudicating the case needs to interpret such provisions (that is the excluded provisions) and such interpretation will affect the judgment on the case. We shall refer to this as 'the necessity condition'.

90. In our view, it is for the Court of Final Appeal and for it alone to decide, in adjudicating a case, whether both conditions are satisfied. It is for the Court, not the National People's Congress, to decide whether the classification condition is satisfied, that is, whether the provision is an excluded provision. This is accepted by both counsel for the applicants and counsel for the Director.

91. If the classification is not satisfied, that would be an end of the matter. Even if the Court needs to interpret the provisions concerned and the interpretation will affect the judgment on the case, the necessity condition could not be satisfied since the provision in question would not be an

excluded provision.

92. If the classification condition is satisfied, it is again for the Court of Final Appeal alone to decide whether the necessity condition is met in the case concerned.

93. If the Court of Final Appeal is satisfied of both conditions, it would be obliged to seek an interpretation of the relevant excluded provisions from the Standing Committee. It is significant that what has to be referred to the Standing Committee is not the question of interpretation involved generally, but the interpretation of the specific excluded provisions."

As to the proper test to apply in determining whether a reference should be made to the NPCSC, the CFA held at 33C – 33H:

"103. In our view, the test in considering whether the classification condition is satisfied is that put by Mr Chang SC for the applicants. As a matter of substance, what predominantly is the provision that has to be interpreted in the adjudication of the case? If the answer is an excluded provision, the Court is obliged to refer. If the answer is a provision which is not an excluded provision, then no reference has to be made, although an excluded provision is *arguably* relevant to the construction of the non-excluded provision even to the extent of qualifying it.

104. The test gives effect to both of the two main objects of Article 158, that of vesting interpretation of the Basic Law, particularly the excluded provisions, in the Standing Committee and that of authorizing the courts of the Region to interpret the non-excluded provisions, in particular to interpret 'on their own' the provisions within the limits of the Region's autonomy.

105. It is, in our view, of considerable significance that Article 158 requires a reference to the Standing Committee of the interpretation of the relevant excluded provisions only. The Article does not require a reference of the question of interpretation involved generally when a number of provisions (including an excluded provision) may be relevant to provide the solution of that question.

106. Applying that test, in adjudicating this case, as a matter of substance, the predominant provision which we are interpreting is Article 24, which provides for the right of abode of a permanent resident, and the content of that right. That Article is the very source of the right which is sought to be enforced by the applicants in these appeals. That being so, the Court, in our view, does not have to make a reference, although Article 22(4) is *arguably*

relevant to the interpretation of Article 24."

At 34G – J, the CFA held that BL 24(3) conferred the right of abode in unqualified terms on permanent residents and stated that:

"111. … If the argument that art.22(4) qualifies the right of abode in art.24(3) is correct, the right of abode of persons who are undoubtedly permanent residents but who are residing on the Mainland is a most precarious one. The Region's constitution, whilst conferring the constitutional right of abode in the Region on the one hand, would have with the other hand subjected that right to the discretionary control of the Mainland authorities, that discretionary control being beyond the authority of the Region. The control by one-way permits would relate to the determination of both the quota as well as allocation within the quota. Further, on this argument, there would be a difference in the constitutional right of abode between on the one hand those in the third category of permanent residents in art. 24(2) who are resident in the Mainland whose right would be qualified by art.22(4) and those in the same category who are resident outside the Mainland whose right would not be so qualified on the other hand."

At 36E – H, the CFA also explained why a verification process for people who claimed to be a permanent resident under the scheme in the No. 3 Ordinance was reasonable:

"119. It follows that the No. 3 Ordinance is unconstitutional to the extent that it requires permanent residents of the Region residing on the Mainland to hold the one-way permit before they can enjoy the constitutional right of abode.

120. However, it does not follow that the entire scheme introduced by the No. 3 Ordinance is unconstitutional. One must distinguish between a permanent resident who enjoys the right of abode on the one hand and a person *claiming* to be a permanent resident on the other hand. It is reasonable for the legislature to introduce a scheme which provides for verification of a person's *claim* to be a permanent resident. In our view, the scheme, apart from the requirement of the one-way permit, is constitutional as it cannot be said to go beyond verification. Therefore, the scheme is constitutional in requiring a claimant to apply for and obtain a certificate of entitlement from the Director and providing that his status as permanent resident can *only* be established by his holding such a certificate. Further, the provisions of the scheme whereby he must stay in the Mainland whilst applying for such a certificate and whilst appealing against any refusal

of the Director to issue a certificate are also constitutional. He has a right to land as part of his right of abode as a permanent resident. But his *claim* to that status must first be verified."

At 39C – E, the CFA held that the retrospective provision was unconstitutional:

"134. Before 10 July 1997 when the No. 3 Ordinance was enacted, the permanent residents by descent who had arrived in Hong Kong had the constitutional right of abode. Indeed they had exercised it. They could not have been removed to the Mainland. The No. 3 Ordinance *as severed* introduced a scheme whereby their status as permanent residents can *only* be established by their holding a certificate of entitlement and, without it, they are regarded as not enjoying the right of abode. They of course could not have held the certificate of entitlement before 10 July 1997. If the retrospective provision were constitutional, they would be regarded as not enjoying the right of abode. This would take away the constitutional right of abode they were already enjoying under the Basic Law. In our view, the retrospective provision is unconstitutional."

On 26 February 1999, the CFA handed down its judgment in *Ng Ka Ling & Others v Director of Immigration (No. 2)*. The Court unanimously held at 142B – E:

"5. The courts' judicial power is derived from the Basic Law. Article 158(1) vests the power of interpretation of the Basic Law in the Standing Committee. The courts' jurisdiction to interpret the Basic Law in adjudicating cases is derived by authorization from the Standing Committee under Articles 158(2) and 158(3). In our judgment on 29 January 1999, we said that the Court's jurisdiction to enforce and interpret the Basic Law is derived from and is subject to the provisions of the Basic Law which provisions include the foregoing.

6. The Court's judgment on 29 January 1999 did not question the authority of the Standing Committee to make an interpretation under Article 158 which would have to be followed by the courts of the Region. The Court accepts that it cannot question that authority. Nor did the Court's judgment question, and the Court accepts that it cannot question, the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein."

Chan Kam Nga & Others v Director of Immigration (1999) 2 HKCFAR 82

Background

The appellants were born in the Mainland China and came to Hong Kong. Their parents were not Hong Kong permanent residents when they were born but at least one parent later became a Hong Kong permanent resident upon continuously resided in Hong Kong for 7 years by virtue of BL 24(2)(2). The respondent made removal orders against the appellants based on para 2(c) of Sched. 1 to the Immigration Ordinance (Cap. 115). The appellants commenced judicial review proceedings against the respondent on the ground that pursuant to BL 24(2)(3), a child could become a Hong Kong permanent resident if his parent had acquired permanent residence status not only before but also after the child's birth.

The trial judge agreed with the appellant's construction, but the CA reversed the judgment on the grounds, *inter alia*, that the term "born … of" related to birth and that the appellants' construction would lead to a "family tree" of permanent residents which could not have been the intention of the Basic Law drafters.

Basic Law provisions in dispute

The main provision in dispute was BL 24. The CFA also referred to BL 19, BL 23, BL 31 and BL 39.

What the Court held

The CFA allowed the appeal, declaring that the appellants could become permanent residents under BL 24(2)(3) by virtue of a parent's Hong Kong permanent resident status whether it was acquired before or after the appellants' birth. Adopting a purposive construction, the obvious purpose of BL 24 was to secure the unity of the family by conferring the right of abode on a child through a parent who had that right. This purpose was reinforced by Article 23(1) of the ICCPR.

The words "if the parent had the right of abode at the time of the birth of the person" in para 2(c), Sched. 1 of Cap. 115 contravened BL 24 and

were therefore unconstitutional and null and void.

What the Court said

Regarding the natural construction of BL 24, the CFA said at 89F – G:

"13. Simply as a matter of giving words their natural meaning, I am of the view that the construction for which the appellants contend is correct.

14. Let me explain why I am of that view. Take any parent and birth child. Asked if the child is a person born of the parent, one is bound to answer 'yes'. Now take the same parent and child, adding the fact that the parent is a Hong Kong permanent resident. Asked if the child is a person born of a Hong Kong permanent resident, one would surely still answer 'yes'. One would not pause to enquire when the parent became a Hong Kong permanent resident. As a matter of ordinary language, that is irrelevant to the question of whether the child is a person born of a Hong Kong permanent resident."

As for its purposive construction, the CFA said at 89H – 90A:

"15. That natural meaning gives effect to an obvious purpose of Article 24. That article, in conferring upon a child the right of abode in Hong Kong through a parent who has that right, serves the purpose of enabling that child to be with that parent here, thereby securing the unity of the family. If such a purpose needs reinforcement then it is to be found in article 19(1) of the Bill of Rights which provides – word for word as article 23(1) of [the ICCPR] does – that: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. And Article 39 of the Basic Law provides that the 'provisions of [the ICCPR] as applied to Hong Kong shall remain in force'. For this humane purpose it matters not whether the parent's right of abode here had been acquired before the child's birth or afterwards."

In relation to the respondents' addition of the words "time of birth" under section 5 of the Immigration (Amendment) (No. 2) Ordinance 1997 (No. 122 of 1997), the CFA said at 92G – H:

"30. … The 'time of birth' limitation would be unconstitutional if the Director's construction of Article 24 is wrong and the appellants' construction thereof is right. For the reasons which I have given, I am of the view that the Director's construction is indeed wrong and that the appellants' construction is indeed right. And there is no getting around this by way of legislative amendment."

Re Yung Kwan Lee & Others (1999) 2 HKCFAR 245

Background

The appellants were Hong Kong permanent residents convicted in Thailand and sentenced to terms of imprisonment. They were transferred to Hong Kong to serve the remainder of their sentences pursuant to an Anglo-Thai treaty before 30 June 1997. The Anglo-Thai treaty was made part of Hong Kong domestic law by virtue of two Orders-in-Council, both of which ceased to apply to Hong Kong after the handover on 1 July 1997. The appellants commenced *habeas corpus* proceedings claiming their continued detention was unlawful. The respondent argued that their continued detention could be justified by s. 10 of the Transfer of Sentenced Persons Ordinance (Cap. 513). In response, the appellants argued that, *inter alia*, s. 10(1) of Cap. 513 was unconstitutional for contravening BL 8 and BL 153.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 8 and BL 153. The CFA also referred to BL 28.

What the Court held

The CFA held that s. 10(1) of Cap. 513 was constitutional and was maintained by BL 8. The first sentence of the second paragraph of BL 153 provided that "International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in Hong Kong." The Anglo-Thai treaty was an international agreement to which the People's Republic of China was not a party and it ceased to apply to Hong Kong upon the handover. However, it was being implemented in Hong Kong at the time of the handover by means of s. 10(1) of Cap. 513. Therefore s. 10 of Cap. 513 was expressly permitted by BL 153 and was constitutional.

What the Court said

Regarding the constitutionality of s. 10(1) of Cap. 513, the CFA said at 253D – J:

"29. The appellants' arguments based on these provisions of the Basic Law run thus. First they argue that s. 10(1) of the Ordinance contravenes Articles 8 and 153 in that it makes provision for the enforcement of a foreign penal law other than through the medium of a treaty. And then they argue that detention pursuant to warrants which had been issued under the Orders-in-Council but which are now, after the Orders-in-Council have ceased to apply, deemed to be warrants issued under the Ordinance is arbitrary or unlawful detention within the meaning of Article 28.

30. As I see it, these arguments are completely answered by the first sentence of the second paragraph of Article 153 of the Basic Law which, as we have seen, provides that 'International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region'. This carries into our constitution the promise in article XI of Annex I of the Sino-British Joint Declaration on the Question of Hong Kong made in Beijing on 19 December 1984 that 'International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region'.

31. The Anglo-Thai treaty is an international agreement to which the People's Republic of China is not a party, and it ceased to apply to Hong Kong upon the handover. Any further prisoner transfers would of course require fresh treaty arrangements. But the Anglo-Thai treaty was being implemented in Hong Kong at the time of the handover. It was being implemented by means of s. 10(1) of the Ordinance. The purpose of that provision is therefore a purpose expressly permitted by Article 153 of the Basic Law. The provision itself is therefore constitutional under the Basic Law, and is maintained by Article 8 thereof.

32. It follows from the foregoing that the detention for which the provision caters is not arbitrary, unlawful or for the purpose of enforcing a foreign penal law. It is detention for a Hong Kong purpose expressly permitted by the Basic Law."

Lau Kong Yung & Others v Director of Immigration (1999) 2 HKCFAR 300

Background

In February 1999, the Director of Immigration ("Director") made removal orders under s. 19(1)(b) of the Immigration Ordinance (Cap. 115) against the seventeen respondents. They were Mainland residents who had entered Hong Kong illegally or had overstayed. They claimed that they were entitled to the right of abode in Hong Kong under BL 24(2) and (3). They applied to challenge the removal orders by judicial review and *habeas corpus*. The challenge failed before the CFI but succeeded before the CA. The Director appealed to the CFA.

BL 24(3) provides that permanent residents have the right of abode. BL 24(2) sets out six categories of permanent residents. The first and second categories in BL 24(2) are "Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region" and "Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region" respectively. The third category being persons of Chinese nationality born outside Hong Kong of those residents listed in the first and second categories.

BL 22(4) provides that, "[f]or entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region."

The NPCSC upon a request from the State Council, the latter had received a request from the CE, adopted an interpretation of BL 22(4) and BL 24(2) ("the Interpretation") on 26 June 1999. The first key issue before the CFA was whether the NPCSC had power to make the Interpretation, and if so, its effect.

The Interpretation explained first that BL 22(4) meant "persons from

[the Mainland] including persons of Chinese nationality born outside Hong Kong of permanent residents, who wish to enter Hong Kong for whatever reason, must apply to the relevant [Mainland] authorities … and must hold valid documents [i.e. one-way permits] before they can enter Hong Kong"; and that the provisions of the third paragraph of BL 24(2) meant that the persons in the third category could only be permanent residents if both parents of such persons or either parent was a permanent resident at the time of the birth of the person.

Under BL 158, the NPCSC has power to interpret the Basic Law. BL 158 also provides that Hong Kong courts can interpret Basic Law provisions, but if these provisions concern affairs which are the responsibility of the CPG, or concern the relationship between the authorities of the PRC and the HKSAR ("the excluded provisions"), then the Court is under a duty to seek an interpretation from the NPCSC. The question in this case was whether the NPCSC could only interpret the Basic Law pursuant to a judicial reference made under BL 158(3).

The second issue was whether removal orders made by the Director against the respondents should be restored. The respondents were Mainland residents, who had entered Hong Kong illegally or had overstayed. The removal orders were made in the period after the CFA's decision in *Ng Ka Ling* but before the Interpretation, on the basis that the respondents did not hold certificates of entitlement. During this period there was no way a Mainland resident could apply for a certificate. The respondents contended that they were third category permanent residents, and that the Director could not rely on the absence of certificate of entitlement. The CA's ruling, made before the Interpretation, had quashed the removal orders.

Basic Law provisions in dispute

The major provision in dispute was BL 158. The CFA also referred to BL 22(4) and BL 24.

What the Court held

The CFA held that the NPCSC had a general power to interpret the Basic

Law, originating from the Constitution, and not limited by BL 158. The NPCSC had power to make the Interpretation, which was binding on the HKSAR courts.

The effect of the Interpretation was that:

(1) permanent residents by descent must obtain exit approval from the Mainland authorities and must hold the one-way permit before entry into the HKSAR. Further, permanent residents by descent are subject to the one-way permit quota system.

(2) to qualify as a permanent resident under BL 24(2)(3), it is necessary that both parents or either parent of the person concerned must be a permanent resident, under BL 24(2)(1) or BL 24(2)(2), at the time of the birth of the person concerned.

(3) the Interpretation is applicable from 1 July 1997 when the Basic Law came into force.

Further, the CFA held that the removal orders should be restored. A claimant could only establish his status as a permanent resident by descent by holding a certificate of entitlement.

What the Court said

When considering the power of the NPCSC, the CFA held at 322D – E that:

"54. Article 67(4) of the Chinese Constitution confers on the Standing Committee the function and power to interpret laws. This power includes the Basic Law which is a national law. The Basic Law itself provides in art. 158(1) that the power of interpretation of this Law shall be vested in the Standing Committee."

At 323C – F, the CFA clarified the circumstances in which the HKSAR should seek interpretation from the NPCSC and when it was not required:

"58. That power and its exercise is not restricted or qualified in any way by art.158(2) and 158(3). By art.158(2), the Region's courts are authorized to interpret on their own in adjudicating cases the provisions within the limits of the Region's autonomy. The words 'on their own' underline the absence of a duty to refer the provisions in question to the Standing Committee

for interpretation in contrast to the mandatory requirement relating to the excluded provisions provided for in art.158(3). That provision enables the courts to interpret provisions other than those within the limits of the Region's autonomy but, where the conditions provided for are satisfied, obliges the Court of Final Appeal not to interpret the excluded provisions and to seek an interpretation from the Standing Committee. So, there is no question of art.158(3) restricting the Standing Committee's general power in art.158(1). That provision is directed to limiting the Court's power by requiring a judicial reference of the excluded provisions in the circumstances prescribed."

When considering the applicable date of the Interpretation, the CFA held at 326D – E that:

"72. The Interpretation, being an interpretation of the relevant provisions, dates from 1 July 1997 when the Basic Law came into effect. It declared what the law has always been. Compare the common law declaratory theory of judicial decisions, see *Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095 at pp.1117–1119 and 1148."

At 326H – 327A, the CFA summarized on the effect of the Interpretation:

"74. In summary:

(1) The Standing Committee has the power to make the Interpretation under Article 158(1).

(2) It is a valid and binding Interpretation of Article 22(4) and Article 24(2)(3) which the courts in the HKSAR are under a duty to follow.

(3) The effect of the Interpretation is:

(a) Under art.22(4), persons from all provinces, autonomous regions or municipalities directly under the Central Government including those persons within art.24(2)(3), who wish to enter the HKSAR for whatever reason, must apply to the relevant authorities of their residential districts for approval in accordance with the relevant national laws and administrative regulations and must hold valid documents issued by the relevant authorities before they can enter the HKSAR.

(b) To qualify as a permanent resident under art.24(2)(3), it is necessary that both parents or either parent of the person concerned must be a permanent resident within art.24(2)(1) or art.24(2)(2) at the time of birth of the person concerned.

(4) The Interpretation has effect from 1 July 1997."

Cheung Man Wai Florence v Director of Social Welfare

(1998-99) 8 HKPLR 241

Background

The applicant was employed by a voluntary social service organization subvented by the Social Welfare Department as a social work assistant in September 1996. The Social Workers Registration Ordinance (Cap. 505) was enacted and the registration provisions under which social workers were required to register came into effect on 16 January 1998. The applicant refused to register and her employment was subsequently terminated for that reason. The applicant sought to challenge the constitutionality of the registration provisions, i.e. ss. 34(1), 35(h) and 35(i) of Cap. 505, arguing that they were inconsistent with BL 144 since at the time the Basic Law was adopted there was no requirement for social workers (whether within Government or working for a subvented agency) to register with a central registry, and that any change in policy as incorporated in new legislation could not affect the rights guaranteed by the Basic Law.

Basic Law provisions in dispute

The major provision in dispute was BL 144. The CFI also referred to BL 142, BL 145 and BL 160.

What the Court held

The CFI held that there was no inconsistency and the applicant's application for judicial review was dismissed. First, the relevant "cut-off dates" for the purpose of BL 144 were when the Basic Law came into effect (1 July 1997) and Cap. 505 came into operation on 6 June 1997. Accordingly, the registration requirement under Cap. 505 was within the "previous system" in BL 144. Second, the Applicant failed to pay

due regard to BL 142 which provided the context for BL 144. Third, pursuant to BL 145, the HKSARG was obliged to develop and improve the social welfare system in light of the economic conditions and social needs. The protection under BL 144 could not stultify the requirement under BL 145.

What the Court said

As to the relevant cut-off date and the proper interpretation of BL 144, Stone J said at 249H – 250I:

"22. So far as the relevant date is concerned, the answer seems to me to be tolerably clear. Mr Mok submitted, and I agree, that the relevant date could only sensibly be construed as 30th June/1st July 1997, which is made clear by the wording in Article 142 …

23. He further pointed out that in a decision relating to the meaning of the words '*the laws previously in force in Hong Kong*' under Article 160, the Court of Appeal has held that the 'cut-off date' was neither the date of the Joint Declaration nor that of the promulgation of the Basic Law, but '*could only be 30th June 1997*' when the Basic Law came into effect: see *HKSAR v. Ma Wai Kwan David* [1997] 2 HKC 315 at 316.

24. Mr Mok further submitted that the statutory system of registration was established, at the latest, by 6th June 1997, when the SWRO came into operation, and that accordingly it was this which was the 'previous system', within the meaning of Article 144. He argued, further, that if indeed the word 'previous' had the meaning ascribed to it by the Applicant, that is prior to the promulgation of the Basic Law on 4th April 1990, then the Applicant herself (who was first employed by a subvented agency on 1st September 1996) accordingly would not have been 'previously serving in the subvented organizations' to qualify for protection under Article 144.

25. In my view, Mr Mok's analysis as to the relevant 'cut-off dates' is correct. Perhaps more to the point, however, is that the Applicant's argument fails to pay due (or indeed any) regard to the specific provisions of Article 142:

Article 142 The Government of the Hong Kong Special Administrative Region shall, on the basis of maintaining the previous systems concerning the professions, formulate provisions on its own for assessing the qualifications for practice in the various professions.

which provides the statutory context for the provisions of Article 144, and

also Article 145, viz.:

Article 145 On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs.

Pursuant to this Article the Government has the duty and is obliged to develop and improve the social welfare system as Hong Kong society requires, and I find it difficult to understand how the provisions of Article 144 could, in effect, stultify this requirement given that the legislation complained of falls squarely within the area of the development of the social welfare system.

26. At the end of the day I am unable to discern any prospect of success within the Applicant's argument under the Basic Law head. Accordingly, I reject the submissions in this regard, and decline the declaration as sought."

HKSAR v Ng Kung Siu & Another (1999) 2 HKCFAR 442

Background

The respondents were charged with desecration of the national flag and the regional flag contrary to s. 7 of the National Flag and National Emblem Ordinance (No. 116 of 1997) ("National Flag Ordinance") and s. 7 of the Regional Flag and Regional Emblem Ordinance (No. 117 of 1997) ("Regional Flag Ordinance") respectively. They argued that the statutory provisions which criminalized desecration of the national and regional flag were inconsistent with the freedom of expression guaranteed under the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383). The respondents were convicted. Their appeals were allowed at the CA. The Prosecution appealed the CA decision.

Basic Law provisions in dispute

The major provision in dispute was BL 27.

What the Court held

The CFA held that s. 7 of the National Flag Ordinance and the Regional Flag Ordinance did not contravene the Basic Law and the Bill of Rights, in particular the freedom of speech guaranteed under BL 27 and the freedom of expression guaranteed under BoR 16 and BL 39. Both provisions were necessary for the protection of public order (*ordre public*) and were therefore justified restrictions on the right to the freedom of expression.

The CFA held that flag desecration was a form of non-verbal speech or expression, and criminalizing flag desecration did constitute a restriction of such freedoms. However, freedom of expression was not absolute. It was subject to certain restrictions that were necessary for the protection of public order *(ordre public)*. The concept of public order *(ordre public)* included what was necessary for the protection of the general welfare or for the interests of the collectivity as a whole. The national flag was the symbol of the PRC representing her dignity, national unity and territorial integrity. The regional flag was the unique symbol of the HKSAR as an inalienable part of the PRC under the principle of "one country, two systems". They symbolized the resumption of the exercise of sovereignty over Hong Kong by the PRC which was recited in the Preamble of the Basic Law. These legitimate interests formed part of the general welfare and the interests of the collectivity as a whole and therefore fell within the concept of public order *(ordre public)*.

In terms of whether the restriction on freedom of expression was necessary or proportionate to the protection of the flags as unique symbols, the CFA held that the prohibition of desecration of the national and regional flag constituted a limited restriction on the right to freedom of expression. It banned one mode of desecrating the flags, but it did not interfere with the person's freedom to express the same message by other modes. Hence, the criminalization of flag desecration was a justifiable restriction on the right to the freedom of expression.

What the Court said

At 447A – C, the CFA discussed the importance of protecting the

national flag and the regional flag:

"3. The national flag is the symbol of the People's Republic of China. It is the symbol of the State and the sovereignty of the State. It represents the People's Republic of China, with her dignity, unity and territorial integrity.

4. The regional flag is the unique symbol of the Hong Kong Special Administrative Region as an inalienable part of the People's Republic of China under the principle of 'one country, two systems'.

…

5. The intrinsic importance of the national flag and the regional flag to the HKSAR as such unique symbols is demonstrated by the fact that at the historic moment on the stroke of midnight on 1 July 1997, the handover ceremony in Hong Kong to mark the People's Republic of China's resumption of the exercise of sovereignty over Hong Kong began by the raising of the national flag and the regional flag."

The CFA elaborated on the freedom of expression at 455F – I:

"40. Flag desecration is a form of non-verbal speech or expression. Mr McCoy SC, for the Government, accepts that the freedom of speech or the freedom of expression are engaged in this case. He accepts that section 7 criminalizing flag desecration in both Ordinances constitutes a restriction of such freedoms. For the purposes of this appeal, it makes no difference whether the restriction is considered as a restriction of the freedom of speech or the freedom of expression. This is because, as is accepted by Mr McCoy, by virtue of Article 39(2) of the Basic Law, a restriction on either freedom cannot contravene the provisions of the ICCPR. Both the Magistrate and the Court of Appeal have referred to the freedom of expression rather than the freedom of speech. I shall do likewise. But my judgment would apply equally if the restriction is considered in relation to the freedom of speech.

41. Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticize governmental institutions and the conduct of public officials."

The CFA held that flag desecration was a limited restriction at 456F – H:

"44. The prohibition of desecration of the national and regional flags by

the statutory provisions in question is not a wide restriction of the freedom of expression. It is a limited one. It bans one mode of expressing whatever the message the person concerned may wish to express, that is the mode of desecrating the flags. It does not interfere with the person's freedom to express the same message by other modes. Further, it may well be that scrawling words of praise on the flags (as opposed to words of protest which is usually the message sought to be conveyed) would constitute offences within section 7 of both Ordinances, namely, that of desecrating the flag by scrawling on the same. If this be right, then it would mean that the prohibition not only bans expression by this mode of a message of protest, but also other messages including a message of praise. But a law seeking to protect the dignity of the flag in question as a symbol, in order to be effective, must protect it against desecration generally."

At 456I – 457A and 459I – 460D, the CFA discussed the concept of public order *(ordre public)*:

"45. Freedom of expression is not an absolute. The Preamble to the ICCPR recognizes that the individual has duties to other individuals and to the community to which he belongs. Article 19(3) itself recognizes that the exercise of the right to freedom of expression carries with it special duties and responsibilities and it may therefore be subject to certain restrictions. But these restrictions shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputation of others;

(b) For the protection of national security or of public order *(ordre public)*, or of public health or morals.

…

54. … First, the concept is an imprecise and elusive one. Its boundaries cannot be precisely defined. Secondly, the concept includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole. Examples include: prescription for peace and good order; safety; public health; aesthetic and moral considerations and economic order (consumer protection, etc). Thirdly, the concept must remain a function of time, place and circumstances.

55. As to the time, place and circumstances with which we are concerned, Hong Kong has a new constitutional order. On 1 July 1997, the People's Republic of China resumed the exercise of sovereignty over Hong Kong being an inalienable part of the People's Republic of China and established

the Hong Kong Special Administrative Region under the principle of 'one country, two systems'. The resumption of the exercise of sovereignty is recited in the Preamble of the Basic Law, as 'fulfilling the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong'. In these circumstances, the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests which are within the concept of public order *(ordre public)*. As I have pointed out, the national flag is the unique symbol of the one country, the People's Republic of China, and the regional flag is the unique symbol of the Hong Kong Special Administrative Region as an inalienable part of the People's Republic of China under the principle of 'one country, two systems'. These legitimate interests form part of the general welfare and the interests of the collectivity as a whole."

In considering whether the restriction on the right to freedom of expression was necessary, the CFA said at 460E – 461F:

"56. That these legitimate interests are within public order *(ordre public)* does not conclude the question. One must examine whether the restriction on the guaranteed right to freedom of expression is necessary for the protection of such legitimate interests within public order *(ordre public).*

…

58. On 1 July 1997, the Standing Committee added the PRC Law on the National Flag to Annex III so that the Hong Kong Special Administrative Region has to apply it by legislation or promulgation in the Region. And the HKSAR's legislature discharged that obligation by enacting the National Flag Ordinance. At the same time, the HKSAR's legislature considered it appropriate to enact the Regional Flag Ordinance.

59. In considering the question of necessity, the Court should give due weight to the view of the HKSAR's legislature that the enactment of the National Flag Ordinance in these terms including section 7 is appropriate for the discharge of the Region's obligation to apply the national law arising from its addition to Annex III by the Standing Committee. Similarly, the Court should accord due weight to the view of the HKSAR's legislature that it is appropriate to enact the Regional Flag Ordinance.

60. In applying the test of necessity, the Court must consider whether the restriction on the guaranteed right to freedom of expression is proportionate to the aims sought to be achieved thereby. … As concluded above, by criminalizing desecration of the national and regional flags, the

statutory provisions in question constitute a limited restriction on the right to freedom of expression. The aims sought to be achieved are the protection of the national flag as a unique symbol of the Nation and the regional flag as a unique symbol of the Hong Kong Special Administrative Region in accordance with what are unquestionably legitimate societal and community interests in their protection. Having regard to what is only a limited restriction on the right to the freedom of expression, the test of necessity is satisfied. The limited restriction is proportionate to the aims sought to be achieved and does not go beyond what is proportionate.

61. Hong Kong is at the early stage of the new order following resumption of the exercise of sovereignty by the People's Republic of China. The implementation of the principle of 'one country, two systems' is a matter of fundamental importance, as is the reinforcement of national unity and territorial integrity. Protection of the national flag and the regional flag from desecration, having regard to their unique symbolism, will play an important part in the attainment of these goals. In these circumstances, there are strong grounds for concluding that the criminalization of flag desecration is a justifiable restriction on the guaranteed right to the freedom of expression."

Chen Li Hung & Others v Ting Lei Miao & Others (2000) 3 HKCFAR 9

Background

Mr Ting Lei Miao ("Mr Ting"), the President of a group of companies ("Group"), was adjudged bankrupt by Taiwanese District Court after it held that Mr Ting was to be responsible for the liability of the Group. The trustees appointed by Taiwanese District Court sought to enforce the bankruptcy order in Hong Kong in relation to some shares in a Hong Kong company, as those shares were alleged by the trustees to be held on trust for Mr Ting.

Basic Law provisions in dispute

No specific Basic Law provision was in dispute but the CFA considered the role of non-permanent judges from other common law jurisdictions.

The issues being considered were:

(i) Does the Taiwanese bankruptcy order extend to Mr Ting's assets situated in Hong Kong?

(ii) If so, should that order be given effect by Hong Kong courts?

What the Court held

The CFA gave a unanimous decision in favour of the trustees.

In relation to (i), the CFA held that since the trustees had, under the law of Taiwan in which they were appointed, a right to sue in their own names in another jurisdiction to recover a debt due to the bankrupt, the same right would also be recognized in Hong Kong. The CFA held that there was no material difference between a trustee in bankruptcy suing to establish the bankrupt's beneficial interest in some shares and suing to recover debts due to the bankrupt.

In relation to (ii), the CFA held that Hong Kong courts would give effect to the orders of "non-recognized" courts where: (i) the rights covered by those orders were private rights; (ii) giving effect to the bankruptcy order accorded with the interests of justice, the dictates of common sense and the needs of law and order; and (iii) giving them effect would not be inimical to the sovereign's interests or otherwise contrary to public policy, as the present case had no natural connection with national politics.

What the Court said

The CFA considered the function of a judge from other common law jurisdictions. The CFA stated at 22G – 23B that:

"46. By art.2 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the National People's Congress authorizes the Region to enjoy independent judicial power, including that of final adjudication, in accordance with the provisions of the Basic Law. Article 19 elaborates on this, but not in any way material to the present case. By Article 8, the common law shall be maintained except to the extent that it contravenes the Basic Law and subject to any amendment by the legislature of the Region. By Article 11, however, no law enacted by that

legislature shall contravene the Basic Law, which includes extensive human rights provisions. Similarly, by Article 159, the power of amendment of the Basic Law, vested in the National People's Congress, does not extend to amendments contravening the established basic policies of the People's Republic of China regarding Hong Kong; and the Preamble to the Basic Law makes it clear that these policies are elaborated by the Chinese Government in the Sino-British Joint Declaration, thus in effect guaranteeing the independence of the courts of the Region. By Article 82 of the Basic Law, the power of final adjudication of the Region is vested in the Court of Final Appeal, which may as required invite judges from other common law jurisdictions to sit on this Court.

47. Having regard to those provisions and to the purposes of the Basic Law as a whole, I think that it may be inferred that, in appropriate cases, a function of a judge from other common law jurisdictions is to give particular consideration to whether a proposed decision of this Court is in accord with generally accepted principles of the common law."

Further, the CFA stated at 24J – 25B that, in the context of public policy, particular attention should be given to the interests of the PRC:

"52. … In this context public policy invites particular attention to the interests of sovereign power, the People's Republic of China. This corresponds with art.9(6) of the Rules of the Supreme People's Court concerning the recognition by the People's Court of civil judgments delivered in Taiwan District. Article 9(6) provides that a Taiwan civil judgment should not be recognized if it violates the basic principles of the national law or is injurious to the public interest of the society. Here the public interest of the society points to the enforceability in Hong Kong of the Taiwan bankruptcy order. The interests to be protected thereby are those of the creditors in the bankruptcy, not those of the Taiwan Government. If the Taiwan Government were the sole or perhaps the main creditor, the position might be different."

The CFA considered at 25C – F that the enforcement of the bankruptcy order would serve the interests of reunification:

"53. As Godfrey JA points out in his judgment in the Court of Appeal, the Preamble to the Constitution of the People's Republic of China declares that Taiwan is a part of the sacred territory of the People's Republic of China and that it is the lofty duty of the entire Chinese people, including the compatriots in Taiwan, to accomplish the great task of reunifying the motherland. I think that reunification will tend to be promoted rather than

impeded if people resident in Taiwan, one part of China, are able to enforce in Hong Kong, another part of China, bankruptcy orders made in Taiwan. … Commercially Taiwan and Hong Kong are both relatively highly developed parts of China. It is in the interests of the People's Republic of China, and necessary as a matter of common sense and justice, that bankruptcy orders made in one of these parts should be enforceable in the other."

Re Chong Bing Keung (No. 2) [2000] 2 HKLRD 571

Background

The appellant was arrested in Hong Kong pursuant to the Fugitive Offenders Ordinance (Cap. 503) and committed by a Magistrate to custody to await the CE's decision as to his surrender to the United States of America ("USA"). In the meantime, a judgment of the US District Court ("said Judgment") dismissed an application by the HKSAR for the extradition of a person from the US for trial in the HKSAR. The said Judgment held that, under certain provisions of a US statute, the extradition agreement, i.e. the Agreement for the Surrender of Fugitive Offenders signed between the US Government and the Government of Hong Kong on 20 December 1996 should be treated as a nullity. The US Government filed an appeal against the said Judgment but the appeal was yet to be heard.

Mr Chong applied for a writ of *habeas corpus*. He argued that as a matter of US law, as declared in the said Judgment, the US Government was deprived by an Act of Congress of capacity to enter into the relevant extradition agreement with Hong Kong, so that the said agreement must be treated as a nullity. He argued that because there was in substance no treaty in place between the HKSAR and the USA, the Magistrate lacked jurisdiction to order his committal and *habeas corpus* should accordingly be issued.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 19. The CA also

referred to BL 8, BL 18, BL 151 and BL 153.

What the Court held

The CA refused the application for *habeas corpus*. The CA held that the municipal courts of Hong Kong were not competent to adjudicate upon treaty obligations on the plane of international law. The CA held that this principle reflected the adoption in Hong Kong, as part of the common law, of the constitutional position which had long been taken by the English courts, and that position had been maintained by BL 19. The CA held that whether developments had in fact progressed to a point involving abrogation of the treaty by the other contracting party was a question to be determined by the CE in accordance with BL 19.

What the Court said

At 575F – 577F, the CA set out the recent history of the extradition treaties, with particular reference to the treaty with the USA. The CA referred to, amongst others, the publication of the Sino-British Joint Declaration and the promulgation of the Basic Law:

"12. Prior to 25 April 1997, when the current [Cap. 503] came into force, the statutory basis for extradition between Hong Kong and the United States was a United Kingdom Order in Council. The position, dating back to 1972, is succinctly summarized … as follows:

On 8 June 1972, a treaty was concluded between the Government of the United Kingdom and the Government of the United States of America for the reciprocal extradition of offenders. On 21 October 1976, the treaty was ratified and by Order in Council of that same year was brought into operation [United States of America (Extradition) Order 1976]. Article 11(a) of the treaty stated that it should apply not only to the United Kingdom and the United States but to those of the United Kingdom's overseas territories in respect of whose international relations it still bore responsibility. Such a territory was Hong Kong and the Order in Council itself (No. 2144 of 1976) extended the treaty to this jurisdiction.

13. A few years after that Order in Council came into force, negotiations commenced between the Governments of the United Kingdom and the People's Republic of China (PRC) concerning the future of Hong Kong,

leading to publication of the Sino-British Joint Declaration in 1984 (the Joint Declaration). As Stock J has pointed out, the two sovereign powers specifically agreed in the Joint Declaration that after resumption of sovereignty over Hong Kong by the PRC, the HKSAR would be authorized to deal with appropriate international agreements, as follows:-

… The Hong Kong Special Administrative Region may on its own using the name 'Hong Kong, China' maintain and develop relations and conclude and implement agreements with other states, regions and international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, touristic, cultural and sporting fields.

… The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Hong Kong Special Administrative Region, and after seeking the views of the Hong Kong Special Administrative Region Government. International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the Hong Kong Special Administrative Region Government to make appropriate arrangements for the application to the Hong Kong Special Administrative Region of other relevant international agreements." (Annex 1, §XI, Joint Declaration).

14. The Sino-British Joint Liaison Group, set up by Annex II of the Joint Declaration, was expressly charged (by §4(b) of that Annex) with considering:

… action to be taken by the two Governments to ensure the continued application of international rights and obligations affecting Hong Kong.

15. On 4 April 1990, the National People's Congress of the PRC adopted and promulgated the Basic Law of the HKSAR as the Region's constitution. By arts.8 and 18, it preserved in force in the HKSAR, *inter alia*, the laws previously in force in Hong Kong, including ordinances and subsidiary legislation, subject to amendment by the HKSAR legislature. The Chapter on External Affairs in the Basic Law includes arts.151 and 153 which essentially reproduce the extracts from Annex 1, §XI of the Joint Declaration set out above.

16. In line with the developments mentioned above, and with the support and authority of the United Kingdom Government, the Hong Kong Government proceeded to negotiate bilateral agreements with other governments, including the Government of the United States, to replace arrangements for Hong Kong that had been put in place under the aegis of international agreements entered into by the United Kingdom …

On 20 December 1996, an extradition agreement, known as the agreement for the Surrender of Fugitive Offenders (the Agreement) was signed in Hong Kong between the United States Government and the Government of Hong Kong (acting with the authority of the United Kingdom Government).

17. In the final run up to the transfer of sovereignty, diplomatic notes were exchanged between the Governments of the PRC and the USA on 31 March 1997 and 23 May 1997 respectively, mutually confirming that the Agreement would continue to apply.

18. It was against this diplomatic background (and after sovereignty over Hong Kong had been resumed by the People's Republic of China on 1 July 1997) that the United States Senate ratified the Agreement on 23 October 1997, bringing it into effect on 28 July 1998."

At 582B – 583F, the CA held that that the municipal courts of Hong Kong were not competent to adjudicate upon treaty obligations on the plane of international law, and that this position had been maintained by BL 19:

"32. … the appellant [is] inviting the Court to rule that the international treaty constituted by the Agreement has effectively been abrogated by the USA as a result of Congress rendering it incapable of performing its obligations thereunder. This is an invitation which the Court must decline as it is clearly established that the municipal courts of Hong Kong are not competent to adjudicate upon treaty obligations on the plane of international law.

33. This principle reflects the adoption in Hong Kong, as part of the common law, of the constitutional position which has long been taken by the English courts …

…

That position has been maintained by art.19 of the Basic Law …"

At 586I – 587E, the CA further held that whether developments had in fact progressed to a point involving abrogation of the treaty was a

question to be determined by the CE in accordance with BL 19:

"42. In my judgment, the scheme of [Cap. 503] precluding attempts to challenge the validity of extradition treaties in the courts by the introduction of evidence of foreign law is not only constitutionally essential, but a matter of practical common sense. The state of foreign relations at any particular time between the HKSAR and some other state or international entity may be subject to ambiguity, inconsistency and on-going diplomatic discussions. It is not conducive to legal scrutiny by the courts. This case presents a good illustration of the difficulties.

…

44. Given the equivocality of such considerations, it is in my view good sense and good law that the Hong Kong courts must regard the Orders promulgated under s. 3 [of Cap. 503] as providing the conclusive basis for determining whether a treaty binding on the HKSAR remains in force and whether [Cap. 503] applies to the request for extradition in question. Whether developments have in fact progressed to a point involving abrogation of the treaty by the other contracting party is a question to be determined by the Chief Executive in accordance with art.19 of the Basic Law …"

Brisilver Investment Ltd v Wong Fat Tso & Another

(unreported, 4 July 2000, HCMP 2038 of 1997)

Background

The plaintiff was the two-thirds co-owner of a property in the New Territories ("Property"), while Wong Fat Tso ("1st defendant"), which was a Tso, owned the remaining one-third of the Property and Wong Cho Mui was the 1st defendant's manager. The plaintiff was not a Tso. The defendants sought determination on whether the Court had jurisdiction to order the sale of the Property under the Partition Ordinance (Cap. 352) as sought by the plaintiff.

The defendants argued, among other things, that an order for sale of land owned by a Tso under Cap. 352 would be contrary to Chinese customary law, which intended a Tso land to be perpetual, inalienable and

indivisible and prohibited the disposal of Tso's land by Tso's members in the absence of unanimous consent of all members. The defendants argued that if there was conflict between Chinese customary law and Cap. 352, Chinese customary law should override Cap. 352 pursuant to BL 40 and s. 13(1) of the New Territories Ordinance (Cap. 97).

Basic Law provisions in dispute

The Court considered BL 40.

What the Court held

The CFI held that the question of Chinese customary law, custom and rights was a matter of evidence. The Court found that the evidence adduced in all the case authorities adduced by the defendants concerned prohibition of disposal of Tso land by Tso members in the absence of unanimous consent under Chinese customary law. There was no evidence to demonstrate such prohibition under Chinese customary law should also apply to non-Tso outsiders, i.e. the plaintiff. Hence, the Court held that although Cap. 352 has no application to the land wholly owned by a Tso due to its conflict with Chinese customary law, such conflict did not exist in this case because the present application for sale under Cap. 352 was made by a non-Tso co-owner under Cap. 352.

The CFI found in favour of the plaintiff.

What the Court said

In considering whether the need for unanimous consent for the sale of Tso land under Chinese customary law extended to cover the non-Tso outsiders, the CFI held at paragraphs 9 – 11 that:

"9. In reply, Mr Tang for the Plaintiff observed that all the Court decisions relied upon by the Defendants were concerned only with applications for the disposal of tso land by tso member(s). The evidence adduced in all these decisions was only that Chinese law and custom prohibits a disposal of *tso* land by tso member(s) in the absence of a unanimous consent of all tso members. There has not been any evidence (whether adduced in those cases or the present application) that this prohibition extends to the

world at large. Mr Tang submitted that the Plaintiff is not a tso member or otherwise related to the *tso* (except as a co-owner). In these circumstances, he argued that the apparent conflict between the Plaintiff's claim for a sale order and those decisions (contended for by the Defendants) does not in fact exist.

10. … Mr Mok contended the prohibition against the sale of *tso* land applies whether or not the application for sale is made by a *tso* member.

11. As stated earlier, Chinese law and custom is a matter of evidence. All the Court decisions referred to by the Defendants were decided based on the evidence adduced therein. I therefore agreed with Mr Tang's submissions and disagreed with those of Mr Mok. In the absence of evidence, I found that the Court cannot and should not somehow conclude that the need for unanimous consent for the sale of land should also apply to outsiders or strangers not related to the *tso*."

In relation to the effect of BL 40, the Court added at paragraph 12 that:

"12. … Reliance has also been placed on Article 40 of the Basic Law:-

The lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administrative Region.

However, it is not argued that Article 40 by itself created any additional rights over and above those recognized in the decisions relied on by the Defendants. I therefore do not find that Article 40 should affect my conclusion relating to this issue."

Secretary for Justice & Others v Chan Wah & Others (2000) 3 HKCFAR 459

Background

Mr Chan Wah ("Mr Chan") and Mr Tse Kwan Sang ("Mr Tse"), were excluded as a voter and from standing as a candidate respectively in the electoral arrangements in 1999 for the position of village representative of two established New Territories villages, on the ground that they were not indigenous villagers. Mr Chan and Mr Tse challenged the validity of these electoral arrangements by judicial review proceedings

on the ground that they were inconsistent with BL 26 and BoR 21(a), and succeeded at the CFI and CA. The Government and an indigenous villager of the New Territories appealed the CA decision.

Basic Law provisions in dispute

The major provision in dispute was BL 40. The CFA also referred to BL 26, BL 68(2) and BL 122.

What the Court held

The CFA held that by virtue of BL 39, the provisions of the ICCPR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. The Hong Kong Bill of Rights Ordinance (Cap. 383) incorporated the provisions of the ICCPR as applied to Hong Kong into Hong Kong law. In order to engage Cap. 383, the Government, a public authority or a person acting on behalf of either of them must be involved since Cap. 383 only bound them. Under s. 3(3)(a) of the Heung Yee Kuk Ordinance (Cap. 1097), approval by the Secretary for Home Affairs ("SHA") was essential before a person elected to represent a village could become a village representative. SHA, as part of the Government, was bound by Cap. 383.

Having regard to the functions of the village representative at the village level, and in the Rural Committees, District Councils, Heung Yee Kuk and LegCo, the CFA held that the village representative should be regarded as engaging in the conduct of public affairs within BoR 21(a). The restrictions on the rights of Mr Chan and Mr Tse on the ground that they were not indigenous inhabitants could not be considered as reasonable since the village representative represented the village as a whole and had a role to play beyond the village level. Accordingly, the electoral arrangements in question were inconsistent with BoR 21(a).

BL 40 protected the lawful traditional rights and interests of indigenous inhabitants but the article did not expressly cover the right to vote and to stand as candidates in village representative elections to the exclusion of others. The CFA found that there was no justification for deriving such rights from BL 40.

What the Court said

At 470H – I, the CFA considered the relationship between BL 39, the ICCPR and Cap. 383:

"27. Article 39 of the Basic Law provides among other things that the provisions of the International Covenant on Civil and Political Rights ('ICCPR') as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The Bill of Rights Ordinance incorporates into the law of Hong Kong the provisions of the ICCPR as applied to Hong Kong. The Hong Kong Bill of Rights is set out in Part II of the Ordinance ('the Bill of Rights')."

The CFA held at 477D – J that BL 40 did not cover the indigenous villagers' political rights:

"61. There is no doubt that the lawful traditional rights and interests of the indigenous inhabitants are protected by Article 40 … The question is whether one could derive the political rights contended for from the lawful traditional rights and interests of the indigenous inhabitants within Article 40.

62. … Assuming (but without deciding) … that it is possible and legitimate to deduce derivative rights from rights and interests expressly provided for in the Basic Law, the political rights contended for can only be derived if they are necessarily implicit within the rights and interests expressly protected by Article 40. This would require the Court to conclude that the traditional rights and interests cannot be adequately protected without the political rights contended for. Even on this assumption, such rights cannot be deduced in the present case.

63. The lawful traditional rights and interests of indigenous inhabitants that are within Article 40 are protected by the Basic Law. In addition, there is specific protection in domestic legislation in relation to some of them … With the constitutional protection in Article 40, there is no justification for deriving the political rights contended for from the rights and interests within Article 40 to ensure their adequate protection."

Chan Shu Ying v Chief Executive of the HKSAR [2001] 1 HKLRD 405

Background

In January 2000, the HKSARG assumed executive and administrative responsibility for municipal affairs, taking over from two municipal councils which were then abolished. In place of the two municipal councils, 18 District Councils were created which were purely advisory.

The applicant challenged the constitutionality of this "new framework" for the conduct of municipal affairs in Hong Kong. The applicant's case was that, while the new District Councils might give Hong Kong permanent residents the right, either directly or through freely chosen representatives, to advise Government on municipal affairs, this was not sufficient and that Art. 25(a) of the ICCPR and BL 97 were infringed. At issue was whether the requirements of Art. 25(a) could be met by an advisory body.

Basic Law provisions in dispute

The major provisions in dispute were BL 97 and BL 98.

What the Court held

The CFI held that Art. 25(a) of the ICCPR, i.e. BoR 21, provided that every citizen shall have the right not only to participate in institutions which had legislative, executive or administrative powers but also in institutions which, while not possessed of those powers, did have the power by way of open debate, consultation and advice to have a real influence on public affairs. The Court held that a jurisdiction could comply with Art. 25(a) of the ICCPR through a merely advisory body.

In Hong Kong, executive and administrative powers were in the hands of the HKSARG while legislative power remained with the LegCo. The District Councils were able to debate local needs and to influence the HKSARG in the formulation and implementation of policies to meet those needs. The HKSARG considered the District Councils an integral part of the machinery of Hong Kong's regional and local governance.

The CFI agreed that the requirements of Art. 25(a) of the ICCPR had been met through the LegCo and District Councils.

The CFI held that BL 97 was no more than an empowering provision and permitted the establishment of district organizations but did not create a constitutional obligation to establish them. No obligation existed to create district organizations which possessed executive or administrative powers.

What the Court said

The CFI held at 411E – G that BL 97 and BL 98 contained the following elements:

"16. …

(i) That, if established, district organizations shall not be organs of political power.

(ii) That, if established, their powers and functions and how they come into being shall be set by law.

(iii) That they may be established as advisory bodies to consult with Government on what I have called municipal affairs but may also be established to provide services in such traditional municipal areas as culture, creation and environmental sanitation."

As to the interpretation of BL 97, the CFI said at 424B – E:

"68. Clearly, art. 97 is no more than an empowering provision. It is permissive in the sense that it permits the establishment of district organizations but does not create a constitutional obligation to establish them.

69. But the matter goes further. For, in my view, it is equally plain that if Government and the Legislature do decide to establish district organizations, they may do so either to act as consultative bodies on matters of district administration and related affairs or to be responsible for providing local services. No obligation exists therefore to create district organizations which possess executive or administrative powers. As it transpires, in terms of the District Councils Ordinance, district organizations have been established to fulfil the function anticipated by the first limb of art. 97; namely to act as consultative bodies on district affairs."

Commissioner of Rating & Valuation v Agrila Ltd & Others

(2001) 4 HKCFAR 83

Background

The case concerns the assessment of rent during the construction and development period, payable by Government lessees. The respondents were lessees of 59 sites which were all acquired after the Sino-British Joint Declaration came into effect, but before 1 July 1997. The sites fell into 3 categories: (i) development sites; (ii) redevelopment sites; and (iii) agricultural land. The sites were not in rateable occupation during the period of construction so they were not rateable under the Rating Ordinance (Cap. 116). Until June 1997, the respondents had been paying a nominal or no rent for these sites.

In June 1997, the Government Rent (Assessment and Collection) Ordinance (Cap. 515) was enacted which provided that a lessee of an applicable lease was liable to pay an annual rent of 3% of the rateable value and that Cap. 116 applied to the ascertainment of rateable value for rent purposes (subject to any specific provision of Cap. 116).

The Government Rent (Assessment and Collection) Regulation (Cap. 515, Sub. Leg.) ("Regulation") came into force on 6 June 1997. Pursuant thereto the Commissioner of Rating and Valuation ("Commissioner") claimed rent in respect of the relevant sites. The sums were substantial and the Commissioner mainly used a decapitalized value of the market value of the relevant sites to reach the rateable value. The respondents, however, argued that rent was not payable as rates were not payable.

Basic Law provisions in dispute

The Basic Law provision in dispute was BL 121.

What the Court held

The CFA held that the concept of "rateable value" under BL 121 must be understood as extending at least to the ways in which rateable value had been employed for Government rent purposes. It does not refer to rateable value in the fixed and limited sense as provided for in Cap. 116.

Concepts as expressed in a constitutional instrument like the Basic Law should be read more widely. In the premises, there was no inconsistency between the various statutory provisions mentioned, and BL 121.

What the Court said

At 112B – J, the CFA referred to the proper way to interpret rating law concepts mentioned in the Basic Law:

"113. The respondents submit that the reference to 'the rateable value' in art. 121 must mean 'the rateable value' of the property within the meaning of the Rating Ordinance. In the absence of the Hong Kong history of legislation relating to leases (which has already been related) and Annex III to the Joint Declaration, it might well be said for the view that a reference to 'the rateable value' means 'the rateable value for rating purposes'. In the light of that history, however, a very different context emerges. The antecedent legislation, the Rent Conditions and the Joint Declaration show that the concept of 'rateable value' was understood in two senses, one signifying a value for rent purposes, the other a value for rating purposes. The history also shows that, although the concept employed for rent purposes made use of the rateable value assessed for rating purposes, the former was not exclusively tied to the latter. Rateable value for rent purposes was ascertained where no rateable value existed for rating purposes and, where the LARV formula was applicable, the rateable value for rating purposes was disregarded.

114. In these circumstances, art. 121 cannot be construed as if it referred to rateable value in the fixed and limited sense provided for in the Rating Ordinance. The expression must be understood as extending at least to the ways in which rateable value had been employed for Government rent purposes. Indeed, it may well be that the concept as expressed in a constitutional instrument like the Basic Law should be read more widely. Just how widely is not a matter which the Court needs to explore on this occasion. The history assists in demonstrating that the Rent Ordinance and regulations were intended to and do give effect to the relevant provisions of the Basic Law which is itself to be interpreted in the light of the Joint Declaration.

115. The respondents' submission seeks to incorporate in the Basic Law sections 7 and 7A of the Rating Ordinance along with the *rebus* principle. The effect would be to make them unalterable except by amendment of the

Basic Law. It is not an acceptable approach to a constitutional instrument to interpret it in such a rigid fashion leaving the legislature with no discretion in relation to a matter which, in its very nature, may require legislative change from time to time, unless the constitutional language is compelling.

116. There is, accordingly, no inconsistency between s. 8, regulations 2, 4 and 5 and the Basic Law. And in view of the interpretation already given to art. 121 and sections 8 and 18(3) of the Rent Ordinance in their application to land exempt from rates under s. 36 of the Rating Ordinance, there is no conflict between these provisions of the Rent Ordinance and the Basic Law."

Director of Immigration v Chong Fung Yuen (2001) 4 HKCFAR 211

Background

The respondent was a Chinese citizen born in Hong Kong after the establishment of the HKSAR. The respondent's parents were both Chinese citizens and were lawfully in Hong Kong under two-way visit permits at the time the respondent was born. The respondent claimed that he was a permanent resident pursuant to BL 24(2)(1).

Relying on para. 2(a) of Schedule 1 to the Immigration Ordinance (Cap. 115), the appellant rejected the respondent's claim since neither of the respondent's parents were settled or had the right of abode in Hong Kong at the time of the respondent's birth or at any time later. The respondent argued that para. 2(a) of Schedule 1 of Cap. 115 was inconsistent with BL 24(2)(1) and was accordingly unconstitutional. The appellant argued that the purpose of BL 24(2)(1) was not to confer a right of abode on Chinese citizens who were born in Hong Kong to illegal immigrants, overstayers, or people temporarily residing in Hong Kong and hence para. 2(a) of Schedule 1 of Cap. 115 was consistent with the Basic Law. The appellant also contended that BL 24(2)(1) fell within the excluded provisions of the Basic Law and the CFA was bound to make a reference to the NPCSC for its interpretation under BL 158.

Basic Law provisions in dispute

The major provisions in dispute were BL 24(2)(1) and BL 158. The CFA also referred to BL 8, BL 18, BL 19, BL 84 and BL 87(1).

What the Court held

The CFA confirmed that Hong Kong courts were bound to adopt the common law approach in interpreting the Basic Law. This accorded with the continuation of the common law as provided under BL 8 and BL 18(1). The Basic Law also provided that the courts in the HKSAR shall adjudicate cases in accordance with laws applicable in the Region which included the common law. In essence, the Basic Law provided for a separate legal system in the HKSAR based on the common law.

The CFA also confirmed the general and freestanding nature of the NPCSC's power of interpretation of the Basic Law under art. 67(4) of the Constitution and BL 158. Hence, courts in Hong Kong were bound to interpret the Basic Law with the common law approach, subject to being bound by any interpretation by the NPCSC.

The CFA held that BL 24(2)(1) was not an excluded provision. The CFA ruled that the test for determining whether a Basic Law provision was an excluded provision was by considering the character of the provision in question, i.e. whether the provision had the character of one which concerned the affairs which were the responsibility of the CPG or the relationship between the Central Authorities and the HKSAR. The character of BL 24(2)(1) was one that defined the category of permanent residents who were entitled to the right of abode in Hong Kong. It was a provision within the HSKAR's autonomy and not an excluded provision. Hence, no reference had to be sought by the CFA.

The CFA ruled that the meaning of BL 24(2)(1) was clear. It meant that Chinese citizens born in Hong Kong before or after 1 July 1997, no more, no less. The CFA also declined to take into account the statement in the NPCSC's interpretation on 26 June 1999 ("Interpretation") that "the legislative intent of all other categories of art. 24(2) had been reflected in the Preparatory Committee's Opinions on the implementation of art. 24(2)". Applying the common law approach,

since there was no ambiguity in the meaning of BL 24(2)(1), the CFA was unable to depart from what it considered to be the clear meaning of BL 24(2)(1) in favour of a meaning which the language could not bear.

The CFA also declined to take into account the view expressed in the Preamble in the Interpretation since that Interpretation was made for both BL 22(4) and BL 24(2)(3) but not BL 24(2)(3) alone. Hence, the Preamble did not mean that BL 24(2)(3) itself was an excluded provision. The CFA concluded that para. 2(a) of Schedule 1 of Cap. 115 was inconsistent with BL 24(2)(1) and was unconstitutional.

What the Court said

In relation to the NPCSC's power of interpretation, the CFA said at 222J – 223C:

"… The Standing Committee's power to interpret the Basic Law is derived from the Chinese Constitution and the Basic Law. In interpreting the Basic Law, the Standing Committee functions under a system which is different from the system in Hong Kong. As has been pointed out, under the Mainland system, legislative interpretation by the Standing Committee can clarify or supplement laws. Where the Standing Committee makes an interpretation of a provision of the Basic Law, whether under art.158(1) which relates to any provision, or under art.158(3) which relates to the excluded provisions, the courts in Hong Kong are bound to follow it. Thus, the authority of the Standing Committee to interpret the Basic Law is fully acknowledged and respected in the Region. This is the effect of the Basic Law implementing the 'one country, two systems' principle as was held by the Court in *Lau Kong Yung*. Both systems being within one country, the Standing Committee's interpretation made in conformity with art.158 under a different system is binding in and part of the system in the Region."

In confirming the common law approach to the interpretation of the Basic Law, the CFA said at 223H – 223I:

"… The courts' role under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain *the legislative intent as expressed in the language*. Their task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain what was meant by the language used and to give effect to *the legislative intent as expressed in the language*."

In order to ascertain the purpose and context of the provision in question, the CFA said at 224D – 225B:

"… To assist in the task of interpretation of the provision in question, the courts consider what is within the Basic Law, including provisions in the Basic Law other than the provision in question and the Preamble. These are internal aids to interpretation.

Extrinsic materials which throw light on the context or purpose of the Basic Law or its particular provisions may generally be used as an aid to the interpretation of the Basic Law. Extrinsic materials which can be considered include the Joint Declaration and the Explanations on the Basic Law (draft) given at the NPC on 28 March 1990 shortly before its adoption on 4 April 1990. The state of domestic legislation at that time and the time of the Joint Declaration will often also serve as an aid to the interpretation of the Basic Law …

… For the purpose of this case, it is sufficient to state that on the common law approach which the courts are bound to apply in the absence of a binding interpretation by the Standing Committee, extrinsic materials, whatever their nature and whether pre or post-enactment, cannot affect interpretation where the courts conclude that the meaning of the language, when construed in the light of its context and purpose ascertained with the benefit of internal aids and appropriate extrinsic materials, is clear. The meaning of the language is clear if it is free from ambiguity, that is, it is not reasonably capable of sustaining competing alternative interpretations.

Once the courts conclude that the meaning of the language of the text when construed in the light of its context and purpose is clear, the courts are bound to give effect to the clear meaning of the language. The courts will not on the basis of any extrinsic materials depart from that clear meaning and give the language a meaning which the language cannot bear."

As to the meaning of BL 24(2)(1), the CFA held at 233B – C:

"… When the language of art.24(2)(1) is considered in the light of its context and purpose, its clear meaning is that Chinese citizens born in Hong Kong before or after 1 July 1997 have the status of permanent residents. The meaning of the provision is not ambiguous, that is, it is not reasonably capable of sustaining competing alternative interpretations."

In relation to whether the Interpretation should be taken into account when construing whether BL 24(2)(1) was an excluded provision, the

CFA held at 228G – J and 233F – H:

"… the Preamble to the Interpretation cannot be read as expressing a clear view that art.24(2)(3) on its own is an excluded provision. It must be read in the context of the motion before the Standing Committee which was for an interpretation of both arts.22(4) and 24(2)(3) which Mr Qiao stated are inseparable. … The Standing Committee was not faced with a request for an interpretation of art.24(2)(3) on its own, without art.22(4) being involved. Read in context, the view expressed in the Preamble on what should have been referred could not be taken to relate to art.24(2)(3) on the footing that it was before the Standing Committee on its own because that was not the case.

…

On the common law approach, which the Court is under a duty to apply in the absence of a binding interpretation by the Standing Committee, the statement in question cannot affect the clear meaning of art.24(2)(1) properly reached, applying the common law approach.

As discussed above, on the common law approach, the Court's task is to construe the language in art. 24(2)(1) in the light of its context and purpose in order to ascertain *the legislative intent as expressed in the language*. As concluded earlier, the meaning of art. 24(2)(1) is clear; there is no ambiguity. It means Chinese citizens born in Hong Kong before or after 1 July 1997. In conformity with the common law, the Court is unable, on the basis of the statement in question, to depart from what it considers to be the clear meaning of art.24(2)(1) in favour of a meaning which the language cannot bear."

As to whether BL 24(2)(1) was an excluded provision requiring a judicial reference, the CFA held as 229C – H:

"In describing the excluded provisions, art. 158(3) focuses on the provision in question. It does not refer to the effect of its implementation. In our view, art. 158(3) cannot be interpreted to prescribe, as the test whether a provision is an excluded provision, the factual determination of the substantive effect of its implementation. The use of such a test is not justified on the language of art. 158(3), when interpreted in the light of its context and purpose.

…

Article 158(3) in focusing on the provision in question requires the Court to consider the character of the provision. The question is whether the

provision has the character of one which concerns affairs which are the responsibility of the Central People's Government or the relationship between the Central Authorities and the Region. Article 24(2)(1) prescribes the category of Chinese citizens born in Hong Kong before or after 1 July 1997 to be permanent residents. Its character is that of a provision defining one category of permanent residents who are entitled to the right of abode. In our view, having regard to its character, art. 24(2)(1) does not concern affairs which are the responsibility of the Central People's Government or the relationship between the Central Authorities and the Region. It is a provision within the Region's autonomy and is not an excluded provision. Accordingly, a judicial reference to the Standing Committee is not required."

Tam Nga Yin & Others v Director of Immigration (2001) 4 HKCFAR 251

Background

The appellants were Chinese citizens born in the Mainland. They were adopted in accordance with Mainland law by parents who had become Hong Kong permanent residents. In the judicial review proceedings against the Director of Immigration, the appellants contended that they were permanent residents with the right of abode in Hong Kong within BL 24(2)(3), which succeeded at the CFI but subsequently failed at the CA. The appellants appealed to the CFA.

Basic Law provisions in dispute

The major provision in dispute was BL 24(2)(3). The CFA also referred to BL 158(3).

What the Court held

The CFA held that the Interpretation by the NPCSC of BL 22(4) and 24(2)(3) adopted on 26 June 1999 did not contain an interpretation of BL 24(2)(3) in relation to adopted children. Hence, there was no binding interpretation by the NPCSC for the Hong Kong courts to follow in

relation to BL 158(3).

Further, BL 24(2)(3) did not concern affairs which were the responsibility of the CPG or the relationship between the Central Authorities and the HKSAR. It was a provision within the HKSAR's autonomy. Thus, the CFA held that a judicial reference to the NPCSC pursuant to BL 158(3) was not required.

Accordingly, the CFA had to consider the proper interpretation of BL 24(2)(3) in relation to adopted children. The CFA held that the language of BL 24(2)(3) was not ambiguous. It referred plainly to natural children only. Those not included were excluded. Adopted children were therefore not within BL 24(2)(3).

What the Court said

The CFA discussed the character of BL 24(2)(3) and explained why it was not necessary to make a judicial reference at 257I – 258A:

"18. As the Court stated in *Chong Fung Yuen* … , art. 158(3) in focusing on the provision in question requires the Court to consider the character of the provision. The character of art. 24(2)(3) is that of a provision prescribing one category of permanent residents who are entitled to the right of abode namely, persons of Chinese nationality born outside Hong Kong of those permanent residents listed in the categories in arts 24(2)(1) and 24(2)(2). Having regard to its character, the article in question does not concern affairs which are the responsibility of the Central People's Government or the relationship between the Central Authorities and the Region. It is a provision within the Region's autonomy and is not an excluded provision. Accordingly, a judicial reference to the Standing Committee is not required."

At 258C – H, the CFA discussed the common law approach to the interpretation of the Basic Law and the purpose of BL 24(2):

"20. In the absence of a binding interpretation by the Standing Committee of art. 24(2)(3) in relation to adopted children, the courts in Hong Kong apply the common law in interpreting the Basic Law. This was discussed in *Chong Fung Yuen* … That the common law should apply was common ground in that case, as it is in this case. In *Ng Ka Ling* and *Chong Fung Yuen* … the Court discussed the common law approach to the interpretation of the Basic Law and it is that approach that should be applied here.

21. In essence, the courts' role is to construe the language used in the text of the Basic Law in order to ascertain the legislative intent as expressed in the language. The language of the article in question must be considered in the light of its context and purpose. Whilst the courts must avoid a literal, technical, narrow or rigid approach, the language cannot be given a meaning which it cannot bear. Once the courts conclude that the meaning of the text when construed in the light of its context and purpose is clear, the courts are bound to give effect to the clear meaning of the language. The meaning of the language is clear if it is free from ambiguity, that is, it is not reasonably capable of sustaining competing alternative interpretations.

Purpose

22. As pointed out in *Chong Fung Yuen* … , the purpose of art. 24(2) taken together with art. 24(3) is to confer the right of abode on the persons defined to be the permanent residents of the HKSAR. Certain persons are included and this necessarily means that those not included are excluded. In this sense, it can be said that the purpose of art. 24(2) is to limit the persons who are permanent residents of the HKSAR and hence its population."

The appellants argued that the CFA should interpret BL 24(2)(3) to include adopted children to be consistent with the right to family protected by BoR 19(1). The CFA rejected the appellants' argument at 263C – G:

"39. If the language of art. 24(2)(3) were ambiguous, that is, it is reasonably capable of sustaining competing alternative interpretations, the principles that the Court must have regard to, namely the right of the family to protection under art. 19(1) of the Bill of Rights and that an adopted child is as much a part of the family as a natural child would be, would require the Court to lean in favour of an interpretation that adopted children are included since that would be conducive towards achieving some measure of family union.

40. But is the language of art. 24(2)(3), with the phrase 'born … of', when considered in the light of its purpose and context, ambiguous? It is plain that the language refers only to natural children. The language is simply incapable of sustaining an interpretation that adopted children are included. To hold otherwise would involve reading 'born' as relating only to the place of birth, that is, outside Hong Kong, and treating the word 'of' in 'born of' as virtually meaningless."

Fateh Muhammad v Commissioner of Registration & Another (2001) 4 HKCFAR 278

Background

The appellant was a Pakistani-national. He applied for Hong Kong permanent identity card in 1998, relying on BL 24(2)(4) that he was "ordinarily resided in Hong Kong for a continuous period of not less than seven years", but his application was rejected by the respondent. The appellant had lived in Hong Kong since 1960s but was in prison from 1994 to 1997. The lower courts held that he was not a permanent resident and the appellant appealed to the CFA. The issue was whether the appellant had permanent resident status in Hong Kong.

Basic Law provisions in dispute

The Basic Law provision in dispute was BL 24(2)(4).

What the Court held

Being in prison or a training or detention centre pursuant to a criminal conviction which had never been quashed and a sentence or order which had never been set aside did not constitute "ordinary residence" for the purpose of attaining permanent resident status and right of abode in Hong Kong. BL 24(2)(4) was to be construed accordingly.

The seven continuous years required by BL 24(2)(4) must come immediately before the time when an application for permanent residence was made in reliance on those seven continuous years. Therefore, s. 2(4)(b) and para. 1(4)(b) of Schedule 1 to the Immigration Ordinance (Cap. 115) were not unconstitutional.

What the Court said

Bokhary PJ said at 283J – 284F in relation to the meaning of "ordinarily resident":

"15. No single judicial pronouncement or combination of such pronouncements in regard to the meaning of the expression 'ordinarily

resident' can be conclusive for the purposes of every context in which that expression appears. But as a starting point at least, Viscount Sumner's observation in *IRC v Lysaght* [1928] AC 234 at p.243 that 'the converse to "ordinarily" is "extraordinarily"' is, I think, of wide utility. Serving a term of imprisonment, at least when it is not of trivial duration, is something out of the ordinary. Of course it does not mean that a person in prison in any given jurisdiction is never to be regarded as ordinarily resident in that jurisdiction for any purpose. Certainly I would not be disposed to hold, for example, that the fact of being in prison somewhere would of itself render a person not ordinarily resident there when his being so would render him liable to tax.

16. The present context is a different and somewhat special one. For the question to which it gives rise is this. Does being in prison or a training or detention centre in Hong Kong pursuant to a criminal conviction which has never been quashed and a sentence or order which has never been set aside constitute ordinary residence here when seven years' ordinary and continuous residence here is a qualification prescribed by the Basic Law for attaining a valuable status and right, namely Hong Kong permanent resident status and the right of abode here? In such a context, there is a very strong case for saying that residence while serving a substantial term of imprisonment or detention in a training or detention centre is not ordinary residence. So in my judgment: (i) the answer to the question posed above is 'no'; (ii) art.24 of the Basic Law is to be construed accordingly; and (iii) s. 2(4)(b) of the Immigration Ordinance (construed in the way explained above) is therefore constitutional."

As for the meaning of "immediately before", Bokhary PJ said at 285B – G:

"20. Article 24(2)(4) of the Basic Law confers the right of abode on non-citizens in certain circumstances. I think that it may even be fairly said that it concedes that right to them in those circumstances. In the context of setting out the categories of persons who shall have the right of abode in Hong Kong, it is scarcely realistic to suppose that it was intended to confer that right on persons whose seven years' ordinary and continuous residence ended long before they took, or ends long before they take, Hong Kong as their home. It would be surprising indeed if the right of abode were to be conferred upon persons who ordinarily resided in Hong Kong without taking Hong Kong as their home and thereafter severed all connections with Hong Kong.

21. So unless its wording simply cannot support such a reading, a purposive construction of art.24(2)(4) drives the Court to say that the seven continuous years required by art.24(2)(4) must come immediately before the time when an application for Hong Kong permanent resident status is made in reliance on those seven continuous years. In my view, the wording of art.24(2)(4) supports such a reading. Such support is to be found generally in the tenor of the provision and particularly in the implicit link between the twin requirements of seven years' ordinary and continuous residence and of having taken Hong Kong as one's place of permanent residence. In my judgment, the seven continuous years required by art.24(2)(4) of the Basic Law must come immediately before the time when an application for Hong Kong permanent resident status is made in reliance on those seven continuous years."

Koninljike Philips Electronics N.V. v Utran Technology Development Ltd (unreported, 26 October 2001, HCMP 4509 of 2000)

Background

A Master dismissed the defendant's application to set aside the registration of a judgment, obtained in the Netherlands. The defendant argued that s. 3(1) of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) which enabled the CE in C to extend the coverage of the ordinance to judgments given in the Netherlands was unconstitutional. S. 3(1) provides that:-

"The Governor in Council, if he is satisfied that, in the event of the benefits conferred by this Ordinance being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the superior courts of the Colony, may by order direct -

(a) that the provisions of this Ordinance shall extend to that foreign country; and

(b) that such courts of that foreign country as are specified in the order shall be deemed superior courts of that foreign country for the purposes of this Ordinance."

In its appeal against the Master's decision, the defendant argued that as the original treaty between the United Kingdom and the Netherlands had fallen away with the handover, and as no new treaty or arrangement had been made pursuant to BL 96, and it having been confirmed that judgments of the superior courts of Hong Kong would be recognized only but not enforced or executed in the Netherlands, there was no reciprocity within the meaning of s. 3(1) of Cap. 319 and the continued inclusion of the Netherlands was accordingly unconstitutional and it was within the power of the Court to declare Cap. 319 null and void in so far as it related to the Netherlands.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 96. The Court also referred to BL 8 and BL 153 in reaching its decision.

What the Court held

The CFI dismissed the defendant's appeal, and held that Cap. 319 was constitutional. The Court considered that BL 96 was an empowering provision in relation to new agreements, which could not be used to strike down legislation that was already in existence. As BL 8 provided for all legislation to be maintained, except insofar as any that contravened the Basic Law, Cap. 319 should survive the handover.

In particular, the Court held that Cap. 319 did not impose a duty upon the CE to ensure that reciprocity was assured, nor a duty to revoke an order if such reciprocity was no longer assured. The CE had discretion and flexibility to allow Cap. 319 to continue in force in respect of any country pending either clarification of its position, or the formulation of further agreements as to the enforcement of judgments or other reciprocal judicial assistance, which would have to comply with BL 96.

What the Court said

The Court commented at paragraphs 7 – 8 the nature and scope of BL 96:

"7. However, Article 96 is clearly an empowering provision. It enables the Hong Kong SAR to enter into new reciprocal arrangements with foreign countries, as was recognized by Stock J in *Chong Bing Keung, Peter v The Government of the United States and anor* HCAL 127 of 1999. The only relevance of that article would be in respect of any fresh treaty negotiated with the Netherlands. I must consider the situation as it is now.

8. As to his argument that there is presently no treaty in force with the Netherlands in respect of reciprocal enforcement of judgments, I can find no fault with it. It is apparent from the stance of the Netherlands authorities that they no longer consider the treaty as to reciprocal enforcement of any effect in relation to Hong Kong. Equally, it is apparent from Article 96 that any new treaty or arrangement in respect of reciprocal juridical assistance, not restricted to enforcement of judgments, must be made with the assistance or authorization of the Central People's Government. It is also clear that Article 153, which provides for international agreements to which the People's Republic of China is not a party, but which were implemented in Hong Kong on 30 June 1997, to continue to be implemented, applies only to acts done under a treaty before 1 July 1997, which continue afterwards. The judgment of Bokhary PJ in *Re Yung Kwan Lee & ors* [1999] 4 HKC 281 confirmed that in finding that detention of persons under a treaty made in 1990 between Thailand and the United Kingdom in respect of prisoner transfers, did not become unlawful on the treaty falling away in 1997, but any future transfers would require fresh treaty arrangements. Similarly, Mr Dykes maintains, a judgment registered before 1 July 1997 could continue to be enforced, but any fresh application for enforcement of a judgment would require a new treaty or arrangement with the country from which the judgment emanates."

The Court explained its approach at paragraph 9:

"9. … The correct approach to this matter in my view is to return to the ordinance itself and the intentions of the Basic Law in relation to the continuing effect of legislation already in place. Article 8 provides for all legislation to be maintained, except in so far as any contravene the Basic Law. As I have found above, the only Article upon which reliance is placed by the defendant, Article 96, is an empowering provision in relation to

new agreements, and cannot strike down legislation which is already in existence. This ordinance does not contravene any part of the Basic Law and therefore survived the handover."

The Court concluded at paragraphs 13 – 14 that Cap. 319 was valid:
"13. … the wording of this ordinance gives both discretion and flexibility to the Chief Executive to allow the ordinance to continue in force in respect of any country pending either clarification of its position, or the formulation of further agreements as to enforcement of judgments or other reciprocal juridical assistance, which would have to comply with Article 96. That discretion not having been exercised to revoke any part of the ordinance, it follows that it continues in force in full.

14. I am asked by the defendant to set aside this registration under section 6(1)(a)(i) of the ordinance, that it is not a judgment to which the provisions of the ordinance apply or that it was registered in contravention of them. I am unable to do that. This is a valid ordinance which has been unaffected by the change of sovereignty and remains in force until the Chief Executive in Council decides to vary or revoke it or any part of it. …"

Re Cheng Kai Nam [2002] 2 HKLRD 39

Background

The criminal trial of the applicant would be conducted in the District Court before a monolingual English-speaking Judge. The applicant had made two applications to the Listing Judge in order to have his trial conducted before a judge who spoke Cantonese but failed. He sought leave to apply for judicial review of those two decisions on the ground, among others, that he had a constitutional right to have his case listed before a Cantonese-speaking judge.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 9. The CFI also made references to BL 81 and BL 92.

What the Court held

The CFI refused the applicant's leave application. The Court held that the constitutional right of a person under BL 9 to use the Chinese language in a court of law in Hong Kong meant no more than the right of that person to employ or utilize that language, but did not imply an obligation on the part of the court to speak and read that language. It was sufficient if processes, such as the employment of interpreters or translators, existed to facilitate the court in comprehending what was said or written.

What the Court said

In interpreting BL 9, the CFI made references to the special history of Hong Kong, the Preamble of the Basic Law, BL 81 and BL 92. The CFI stated at 44I – J and 45A – E that:

"16. The Basic Law, while upholding the territorial integrity of the People's Republic of China, recognizes that Hong Kong has a special history. The Preamble to the Basic Law makes specific reference to this history and to Hong Kong's other 'realities', such as its capitalist system of commerce and its system of law …

17. Accordingly, as a work of constitutional architecture, the Basic Law is built upon the foundations of Hong Kong's special history. Part of that history is its adoption of the common law, the root language of which is English. The common law was the law of Hong Kong upon the resumption of sovereignty and art.81 of the Basic Law enshrines that system.

18. The Basic Law not only enshrines the common law but, in order to give continuing effect to that enshrinement, allows for the recruitment of judges from other common law jurisdictions, there being no suggestion that those judges should speak a Chinese tongue. In this regard, art. 92 reads:

Judges and other members of the judiciary of the Hong Kong Special Administrative Region shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdiction."

The CFI held at 45G – I that the right of a litigant to use Chinese did not imply a reciprocal obligation on the court to use the same language of the litigant:

"19. In my judgment, the constitutional right of a person to use the Chinese language in a court of law in Hong Kong, means no more than the right of that person to employ that language, that is, to utilize it, for the purpose of forwarding or protecting his interests. That right to employ or utilize the language does not imply a reciprocal obligation on the part of the court to speak and read that language. It is sufficient if processes, such as the employment of interpreters or translators, exist to facilitate the court comprehending what is said or written."

At 46A – C, the CFI stated that there was no denial of the applicant's right to fair trial:

"21. If language rights are distinct from the principles of fundamental justice, it is not therefore a denial of the applicant's fundamental right to a fair trial to be denied a judge who speaks the official language that the applicant chooses to employ. The applicant's fundamental right to a fair trial is contained in art.11 of the Bill of Rights. In respect of language, that article says only that in the determination of any criminal charge against him, a person shall be entitled to have the free assistance of an interpreter of he cannot understand of speak the language of the court. That is the minimum guarantee given."

Suen Toi Lee v Yau Yee Ping (2001) 4 HKCFAR 474

Background

Mr Sung married his wife in 1929 in Shanghai and purportedly took two concubines, Madam Sung and Madam Chu, in 1933 and 1945 respectively. Mr Sung moved to Hong Kong in 1951 and Madam Chu joined him in 1952. Mr Sung's wife and Madam Sung remained in the Mainland. The appellant was the child of Mr Sung and Madam Sung born in 1940. Mr Sung and Madam Chu died intestate in 1985 and 1987 respectively. The appellant contended that she was entitled to a share of Madam Chu's estate. Whether her claim was good depended on whether she was an "issue" of Madam Chu for the purpose of the Intestates' Estates Ordinance (Cap. 73). The appellant was Madam Chu's "issue" only if both Madam Sung and Madam Chu were Mr Sung's "concubines"

within the meaning of Cap. 73. The status of concubinage was abolished in the Mainland by the Republican Civil Code in 1931. In Hong Kong, concubinage was permitted under Chinese law and custom which was part of the domestic law until its abolition in 1971 by legislation. Those who had lawfully become concubines prior to the abolition were not affected. The first instance judge found that the appellant was entitled to a share in Madam Chu's estate. The CA (Godfrey V-P dissenting) allowed the appeal. The appellant appealed to the CFA.

Basic Law provisions in dispute

The CFA referred to BL 8 in reaching its decision.

What the Court held

The CFA held that the general rule was that the direct application of Chinese law and custom as Hong Kong domestic law was only confined to Chinese persons domiciled in Hong Kong. Being an ethnic Chinese or a Chinese inhabitant of Hong Kong was not enough. Hong Kong law did not treat Chinese law and custom as the personal law of all ethnic Chinese, irrespective of domicile. Whatever exceptions to the general rule might exist, no exception existed when it came to capacity to enter into a union of concubinage.

Accordingly, the CFA held that neither Madam Sung nor Madam Chu was Mr Sung's concubine within the meaning of Cap. 73, since Madam Sung and Madam Chu were not domiciled in Hong Kong at the time when they sought to enter into unions of concubinage.

What the Court said

Delivering the plurality judgment of the Court, Bokhary PJ explained the effect of BL 8 in preserving Chinese law and custom at 487D – H:

"33. The Application of English Laws Ordinance, which also stated which United Kingdom statutes applied to Hong Kong up to 30 June 1997, did not survive the 1 July 1997 handover. But Hong Kong's pre-handover legal system, including the room which it left for the application of Chinese law and custom here, is preserved by art.8 of our constitution the Basic Law

which provides that:

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and ***customary law*** *shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.* (Emphasis added.)

34. All of that goes to the direct application in Hong Kong of Chinese law and custom as domestic law rather than as foreign law applied indirectly via the rules of private international law. The practice of the Hong Kong courts to receive expert evidence on the content of Chinese law and custom, while perhaps anomalous, is pragmatic and well established. "

Bokhary PJ explained the general rule at 487J – 488H:

"37. At the time when the Chinese law and custom of traditional China applied in the Mainland, the Hong Kong courts would not have been doing anything narrow by confining direct application of such law and custom to Chinese persons domiciled in Hong Kong. In regard to Chinese persons domiciled in the Mainland, there was scope, so long as such law and custom applied in the Mainland, for the Hong Kong courts to apply such law and custom to them indirectly via the rules of private international law (even though not directly as Hong Kong domestic law). Upon the abrogation of such law and custom in the Mainland, such scope naturally disappeared. And it would be plainly wrong for a Hong Kong court to extend direct application of such law and custom to anyone domiciled in the Mainland after such law and custom had been abrogated in the Mainland.

38. I am satisfied that the general rule is, and has always been, that the application of Chinese law and custom applied directly as Hong Kong domestic law is confined to Chinese persons domiciled in Hong Kong, though the concept of domicile may have been applied somewhat loosely in some of the cases.

39. Whatever exceptions to this general rule may exist or have existed, I hold that no such exception ever existed when it came to capacity to enter into a union of concubinage. I so hold for the following reasons. As I pointed out earlier in this judgment, the Hong Kong courts have, justifiably as I see it, proceeded on the view that a concubine's status is that of a wife, albeit only a secondary wife. Her status is therefore a matrimonial one, and unions of concubinage are therefore matrimonial unions. Under the rules of private international law applicable in Hong Kong, capacity to enter

into a matrimonial union and therefore to acquire a matrimonial status is determined by reference to the law of each party's place of antenuptial domicile. There was a time when Hong Kong permitted Chinese persons to enter into unions of concubinage. But it never conferred on them capacity to enter into matrimonial unions, whether of concubinage or of any other type, if they had no such capacity under the law of their place of antenuptial domicile outside Hong Kong. They had to be domiciled in Hong Kong or in some other place where the law conferred such capacity on them. The fact of their Chinese ethnicity was not enough on its own. Hong Kong law does not treat, and has never treated, Chinese law and custom as the personal law of all ethnic Chinese everywhere irrespective of domicile."

Bokhary PJ held that neither Madam Sung nor Madam Chu was Mr Sung's concubine under Hong Kong law and said at 489A – C:

"41. … And it is only if they had been domiciled in Hong Kong at the time when they sought to enter into unions of concubinage that Hong Kong law would have operated to give them capacity to do so under Chinese law and custom. Throughout they were domiciled in the Mainland where concubinage had been abolished by the time they purported to enter into unions of concubinage. So under their domiciliary law none of them had capacity to enter into a union of concubinage. In the eyes of Hong Kong law therefore neither Madam Sung nor Madam Chu ever became Mr Sung's concubines under Chinese law and custom."

Ng Siu Tung & Others v Director of Immigration (2002) 5 HKCFAR 1

Background

BL 24(2)(3) conferred the status of permanent resident and right of abode on Chinese nationals born outside Hong Kong of permanent residents who were Chinese citizens. The Immigration (Amendment) (No. 2) Ordinance ("No. 2 Ordinance") was enacted to provide that BL 24(2)(3) was limited to those born after at least one parent had become a Hong Kong permanent resident. On 10 July 1997, the Immigration (Amendment) (No. 3) Ordinance ("No. 3 Ordinance") was enacted with

retrospective operation from 1 July 1997, to introduce a scheme for verification of permanent resident status under BL 24.

On 29 January 1999, the CFA held in *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4 that the part of the No. 3 Ordinance requiring those persons to hold one-way exit permits and the retrospective provision were unconstitutional; and the CFA held in *Chan Kam Nga & Ors v Director of Immigration* (1999) 2 HKCFAR 82 that the part of the No. 2 Ordinance which purported to exclude Chinese nationals born before at least one of their parents became a permanent resident of Hong Kong was also unconstitutional.

On 26 June 1999 the NPCSC made an interpretation ("Interpretation") with the effect of reversing the two CFA judgments (i.e. *Ng Ka Ling* and *Chan Kam Nga*) save as to the decision on retrospectivity. On the same day, the HKSARG made an announcement of a policy to the effect that it would allow persons who had arrived in Hong Kong between 1 July 1997 and 29 January 1999, and who had claimed the right of abode, to have their status as permanent residents verified in accordance with the two CFA judgments ("Concession").

At issue were who was entitled to the benefit of the two judgments and therefore not affected by the Interpretation, as well as the true scope of the Concession and who was entitled to the benefit of the Concession. The appeals arose from applications from applicants who were Chinese nationals born in the Mainland with at least one parent who was a permanent resident of the HKSAR, who claimed they should be permanent residents within BL 24(2)(3). One group of the applicants were persons born after a parent had already become a permanent resident in Hong Kong and the other group consisted of persons born before either parent had ordinarily resided in Hong Kong for 7 years.

Basic Law provisions in dispute

The major provision in dispute was BL 158.

What the Court held

The CFA held that the principle "judgments previously rendered

shall not be affected" in BL 158(3) meant formal orders and not the reasoning. The principle applied equally to an interpretation made under BL 158(1). Judgments only bound parties to the litigation, and non-parties would only enjoy the benefit of the judgment by virtue of the operation of precedent.

On the argument on legitimate expectation, the CFA held that legitimate expectations should not mean the Director of Immigration had to act contrary to law, or in a way as to undermine the statutory scheme (*e.g.* to allow innominate classes of persons into Hong Kong). The Director would be entitled to decide that legitimate expectations were overridden by overwhelming force of immigration policy.

But applicants who had received specific representations were in a different position, so the Director was obliged to consider whether, in the light of those applicants' legitimate expectations, he ought to exercise his powers in their favour, to allow them to reside in Hong Kong.

The language of BL 22(4) was clear and did not cover persons who had arrived in Hong Kong before 1 July 1997. Those who entered HKSAR between 1 and 10 July 1997 were in a different position, as the exit-permit requirement in BL 22(4) applied to them. They could not take the benefit of BL 24(2)(3).

HKSARG was free to formulate its policy, but it was for the Court to ascertain what the decision meant. Misinterpretation of the meaning of a policy would be an error of law. Understanding the Concession in its proper context, to benefit from the two judgments, an applicant must have been in Hong Kong from 1 July 1997 to 29 January 1999, and have lodged a claim for right of abode to the Immigration Department during the period. There were also various requirements for such claim to be valid, though as long as the document reasonably conveyed that it was a claim for right of abode, rejection of such document would amount to a misapplication of the policy decision.

What the Court said

At 24J – 25H, the CFA held that the principle "judgments previously rendered shall not be affected" applied also to an interpretation made

under BL 158(1):

"27. An interpretation given by the Standing Committee on a judicial reference mandated by art. 158(3) is nonetheless an interpretation given in the exercise of the general power of interpretation vested in the Standing Committee by art. 158(1). So the protection given to judgments previously rendered from the application of an interpretation given on a judicial reference under art. 158(3) is to be seen as an express recognition of the consequences which follow from the making of an interpretation under art. 158(1), namely, that judgments previously rendered shall not be affected. …

28. It would make little sense to protect judgments previously rendered in the case of an interpretation made on a reference under art. 158(3) but not in the case of a free-standing interpretation. To read the protection as applying in both cases conforms with the vesting of judicial power in the courts of the Region (art. 80) and the vesting of the power of final adjudication in the Court of Final Appeal (art. 82). If a judgment of the Court of Final Appeal were not to stand unaffected by an interpretation issued under art. 158(1), the Court's power of final adjudication would to that extent be compromised. Even if such an interpretation displaces a previous judgment, as the Interpretation of 26 June 1999 did in the cases of *Ng Ka Ling* and *Chan Kam Nga*, and states the law to be applied as from 1 July 1997, the previous judgment is unaffected as a final determination of the rights of the parties to the litigation.

29. It is to be noted that the penultimate sentence in the last paragraph of the Interpretation proceeds on the footing that the principle 'judgments previously rendered shall not be affected' applies to a free-standing interpretation under art. 158(1). That sentence states:

This Interpretation does not affect the right of abode in the [HKSAR] which has been acquired under the judgment of the Court of Final Appeal on the relevant cases dated 29 January 1999 by the parties concerned in the relevant legal proceedings.

30. We do not suggest that the question for decision here is to be answered by reference to the sentence just quoted or the last paragraph of the Interpretation. The question is to be determined by reference to the true construction of art. 158 itself. Although the Interpretation was not an interpretation of that article, the Interpretation took the view, as we do, that 'judgments previously rendered shall not be affected' applies to a free-standing interpretation under art. 158(1)."

At 26J – 27G, the CFA held that BL 158(3) embodied the common law principle of finality and explained who could benefit from the Court's decisions in *Ng Ka Ling* and *Chan Kam Nga*:

"36. … A judgment of a competent court, if it is allowed to stand, finally determines and disposes of the rights of the parties to the litigation. It is their rights alone that the judgment determines. The judgment binds the parties to the litigation (who will include the class of persons represented by a representative party pursuant to a court order in the action) but not strangers to the litigation. A judgment may operate, by virtue of the doctrine of precedent, to compel a similar outcome in other like cases, but it has no binding force as between strangers to the litigation or even as between a party to the litigation and someone who is not a party to the litigation.

37. In this context, the last sentence of art.158(3) expresses the common law principle of finality. According to that principle, a final judgment which is unappealable, or from which no appeal is taken, determines the rights of the parties for all purposes. Such a judgment cannot be re-opened by reason of a subsequent alteration in the relevant law and would, but for the judgment, alter the rights of the parties to the litigation. The judgment is unaffected by the subsequent alteration of the law.

38. It is important to note the form of the relief granted in the two decisions. In *Ng Ka Ling* this Court declared that certain parts of the Immigration Ordinance (Cap. 115) and Regulations (Cap. 115, Sub. Leg.), the Notice dated 11 July 1997 and s. 1(2) of the No. 3 Ordinance were null and void, quashed certain decisions of the Director of Immigration and declared that the plaintiffs in that case have as from 1 July 1997 been and are permanent residents of the HKSAR within the third category in art. 24(2) of the Basic Law and as such entitled to enjoy the right of abode. The declaration of right was confined to the plaintiffs in those proceedings and they were not representative parties. It was not a declaration of right in favour of anyone else. Likewise, the declaration of right made by this Court in *Chan Kam Nga* was in favour of 'Each appellant' in that case and did not extend more widely. Although *Ng Ka Ling* and *Chan Kam Nga* were regarded as 'representative cases', neither case was constituted by a court order to make the plaintiffs representative parties."

HKSAR v Siu Yat Leung [2002] 2 HKLRD 147

Background

The defendant was charged with offences of incitement to rob and possession of arms without a licence. The defendant's application for bail was first refused by a Magistrate; his application to the CFI for a review was later refused. The defendant was subsequently committed to face trial in the CFI and applied for bail pending trial. The CFI had to decide whether it had jurisdiction to review the previous CFI decision on bail and grant application for bail.

Basic Law provisions in dispute

The major provision in dispute was BL 28.

What the Court held

The CFI refused to grant bail for want of statutory jurisdiction. Pursuant to s. 9J(1) of the Criminal Procedure Ordinance (Cap. 221), a judge of the CFI would be precluded from reviewing an earlier decision of another CFI judge made in accordance with s. 9J of Cap. 221. Nonetheless, the CFI considered the overriding imperatives in BL 28 and BoR 5(3) and held that the defendant would be entitled to apply to the CFI for bail under its inherent jurisdiction. Despite so, since there were no material changes in the relevant circumstances, the defendant's bail application was refused.

What the Court said

At 152B – 153A, the CFI held that the defendant did have the entitlement to apply for bail under CFI's inherent jurisdiction:

"11. … Further, it has been said, even in the Victorian era, that it would take unmistakably clear and precise language to abrogate the inherent jurisdiction of the Court of First Instance to grant bail …

12. However, I venture to suggest that as a matter of constitutional law, because of overriding imperatives in:

(a) Article 28 of the Basic Law …

(b) and (b) Article 5(3) of the Bill of Rights (Cap.383) …

… The very right to grant bail is innate in a superior court of unlimited jurisdiction: s. 3(2), s. 12(3)(a) and 12(3)(b) of the High Court Ordinance (Cap.4). There is, and remains, a general right to bail at common law, independent of statute: *Re Wong Tai* (1911) 6 HKLR 67 at p.69, *per* Sir Francis Piggott CJ. It is a residual jurisdiction and is not therefore parallel to Pt. IA of the Criminal Procedure Ordinance. …

13. Therefore, in my judgment, in the window of opportunity between the decision of Jackson J under s. 9J and the completion of the applicant's committal under s. 85A of the Magistrates Ordinance, although no application had been made to any magistrate, the applicant would have been entitled to apply to this Court for bail under its inherent jurisdiction. However, this Court would have, as a matter of jurisdiction (not discretion) during that period, required the applicant to establish 'a material change in relevant circumstances' – the enduring common law test."

The CFI concluded at 154G – I that the defendant's application for bail was refused because:

"21. … The only different circumstance is that he has now been in custody longer since the hearing before Jackson J and he is much closer to his trial in this Court than he was before. This is wholly inadequate basis and cannot possibly qualify. Being committed by a magistrate for trial in the Court of First Instance is not a development in favour of the applicant's position; indeed, as it now presupposes the existence of a *prima facie* case against him of an indictable offence, it may very well be an *adverse* change of material circumstances. … "

Shum Kwok Sher v HKSAR (2002) 5 HKCFAR 381

Background

The defendant was convicted of misconduct in public office contrary to the common law. He was a Senior Government Officer and he was related to the directors and shareholders of X, a security company. Relying on his position, the defendant provided preferential treatment to X and its associates and allowed X to pre-qualify for tenders for

Government security and building contracts even though it did not have the required experience. Large contracts were awarded to X and associated companies. The defendant never disclosed any conflict of interest.

The defendant argued that the offence of public misconduct was so uncertain as to be unconstitutional.

Basic Law provisions in dispute

The Basic Law provisions in dispute were BL 28 and BL 39.

What the Court held

In interpreting Chapter III of the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383), the CFA held that it may consider appropriate to take into account established principles of international jurisprudence, decisions of international and national courts and tribunals on like provisions in the ICCPR, other international instruments, and national constitutions.

The CFA held that the expression "prescribed by law" mandated the principle of legal certainty and the requirement of accessibility. A norm had to be formulated with sufficient precision to enable a citizen to regulate his conduct, and to have an adequate indication of the legal rules applicable to a given case.

The CFA considered the elements of the offence of misconduct in public office and concluded that the offence was not so imprecise as to fall foul of the requirements of BL 39 or BoR 5 or BoR 11, or too arbitrary for BL 28. Further, the standard of dishonesty as set down in *R v Ghosh* was an objective standard, and was not so arbitrary, imprecise or vague as to violate the requirements of BL 39 or BoR 11. The appeal was dismissed.

What the Court said

At 401E – 401I, the CFA held that BL 39 should be interpreted in a purposive and generous way:

"58. It is established that art. 39, being part of Ch. III of the Basic Law which

provides for the fundamental rights and duties of the residents of the HKSAR, is to be given both a purposive and generous interpretation *(Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4 at 28D-29A, *per* Li CJ). The same approach is to be adopted to the provisions of the Bill as the object of those provisions is to guarantee the fundamental rights and freedoms of the residents of the HKSAR.

59. In interpreting the provisions of Ch. III of the Basic Law and the provisions of the Bill, the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the ICCPR, other international instruments and national constitutions. …"

At 401J – 402B, the CFA held that the expression "prescribed by law" mandated the principle of legal certainty:

"60. International human rights jurisprudence has developed to the point that it is now widely recognized that the expression 'prescribed by law', when used in a context such as art.39 of the Basic Law, mandates the principle of legal certainty. This principle is likewise incorporated in the expression 'according to law' in art.11(1) of the Bill."

The CFA then at 402G – 403B referred to some English cases to explain the meaning of legal certainty in this context:

"63. In *Sunday Times v United Kingdom (No. 1) (A/30)* (1979–80) 2 EHRR 245, the Court rejected an argument that the English law of contempt of court was so vague and uncertain and that the principles of contempt of court enunciated by the House of Lords in *A-G v Times Newspapers Ltd* [1974] AC 273 so novel that the restraint imposed upon freedom of expression by the law of contempt could not be considered as 'prescribed by law' within the meaning of art.10 of the Convention. The majority, with reference to that expression, said (at p.271 para.49):

First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be

unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

At 410D – 410F, the CFA held that the common law offence of misconduct did not offend BL 39 or BoR 5:

"88. The common law offence as so explained is not so imprecise as to offend the requirement of Basic Law art. 39 or of arts 5(1) and 11(1) of the Bill. Nor is it arbitrary within the meaning of art. 28 of the Basic Law. The offence is unusual in that it applies to various forms of misconduct by a public officer with the result that what the prosecution needs to establish varies with the form of culpable misconduct alleged. That variation does not, however, lead to the existence at common law of more than one offence. Despite its variations, it has always been recognized as the one offence.

89. In expressing the view that there is no relevant imprecision, I bear in mind the passages in *Sunday Times v. United Kingdom*, *Sabapathee v. The State* [1999] 1 WLR 1836 and *R v. Nova Scotia Pharmaceutical Society* (1992) 74 CCC (3d) 289 to the effect that a law must be adequately accessible in the sense that it gives a person an adequate indication of the law relevant to his situation so that (if need be with advice) he can regulate his conduct. On the other hand, it is well settled that the degree of precision required will vary according to the context of the law. …"

The CFA held at 411I – 412D that the common law offence of misconduct in public office was necessarily cast in general terms:

"91. The common law offence of misconduct in public office is necessarily cast in general terms because it is designed to cover many forms of misconduct on the part of public officers. An alternative way of dealing with misconduct by public officers would be to enact a statute formulating specific offences for particular categories of misconduct in public office. The adoption of that course would involve a loss of flexibility and run the risk that the net would fail to catch some forms of serious misconduct. To suggest that the offence requires further definition would be to pursue a degree of definition which is unattainable, having regard to the wide range of acts and omissions which are capable of amounting to misconduct by a public officer in or relating to his office. The offence serves an important

purpose in providing a criminal sanction against misconduct by public officers.

92. The broad terms in which the offence is cast are sufficient to enable the public officer to regulate his conduct. The elements of the offence, quite apart from its title or description, alert the public officer to the risk that he runs by engaging in misconduct and that is all that art. 39 of the Basic Law and art. 11(1) of the Bill require. …"

Kowloon Poultry Laan Merchants Association v Director of Agriculture, Fisheries and Conservation [2002] 4 HKC 277

Background

The appellant was a poultry wholesalers' association representing 10 poultry wholesalers in the business of selling chicken and water birds in rented stalls in Cheung Sha Wan Temporary Poultry Market. After the outbreak of the bird flu virus in December 1997, the Public Health (Animals and Birds) (Amendment) (No. 2) Regulations was enacted which required that chickens were to be sold separately from water birds. Affected wholesalers were also provided with an alternative location to continue the trade of water birds, namely, the Western Wholesale Food Market. The appellant's case was that these wholesalers had suffered severe financial loss as a result of the decision to separate the locations for selling chicken and water birds. On behalf of the wholesalers, the appellant sought leave to apply for judicial review against the Government's decision not to compensate them for such separation. The judge at CFI refused the application on grounds that the appellant had not suffered a "deprivation of property" within the meaning of BL 105. The appellant appealed to the CA.

Basic Law provisions in dispute

The major provision in dispute was BL 105.

What the Court held

The CA dismissed the appellant's appeal and held that the appellant had not made out an arguable case that they had suffered a "deprivation of property" as it was understood in BL 105 such that they should be given leave for judicial review. There was no deprivation of land. The reduction of the appellant's profit, if any, did not result from any "deprivation of property".

What the Court said

The CA held that the appellant had not made out an arguable case at 281F – 282A:

"15. The crux of this dispute as we see it is whether or not the appellant had made out an arguable case that they have suffered a 'deprivation of property' as it is understood in art 105 of the Basic Law such that they should be given leave for judicial review. Accepting for present purposes that the profits, business or goodwill, even relating to the future, can amount to 'property' has there been any deprivation? In our view, there has not been any deprivation made out in this case for the following reasons. The appellants have not been deprived of the land rented to them by the Government at the Cheung Sha Wan Temporary Poultry Market. They are still selling chicken there. They are prohibited by the new regulations and By-laws to sell water birds there. That is not deprivation but rather control of use of land. Moreover and so far as their businesses of selling water birds is concerned, they have not been deprived of that business either by the new regulations and/or by the new By-laws. Their reduction of profit, if any, does not result from any 'deprivation of property'.

16. Indeed, the Government had provided them with an alternative location, namely the Western Wholesale Food Market, from which to sell water birds. In that sense, there is no deprivation. Even if they have suffered a reduction of profit selling water birds at this alternative location for the reasons advanced by them, that does not equate with a 'deprivation of property' under art 105 of the Basic Law. To that extent, we agree with the judge below that the appellants have not made out any case to show that there has been a deprivation of property under art 105."

The CA held at 282H – J that their view above could be tested in a simple way:

"18. The view that we have taken can be tested in a very simple way. If the appellant be correct in the view that they have taken, then it follows that future legislative restrictions on land use, such as planning control and zoning, can amount to 'deprivation of property' and would have to be compensated for under art 105. That cannot be correct and underlines the fallacy of the argument presented by the appellants. …"

Lau Cheong & Another v HKSAR (2002) 5 HKCFAR 415

Background

The appellants were convicted of murder and mandatory life sentences were imposed on them. At trial, the jury was directed that a killing accompanied by an intention to cause grievous bodily harm ("grievous bodily harm rule") constituted murder. The appellants' appeal to the CA against conviction and sentence was dismissed. The appellants appealed to the CFA, challenging the sufficiency of an intention to cause grievous bodily harm as the *mens rea* for murder, and argued that the grievous bodily harm rule contravened provisions of the Basic Law and the BoR which prohibited, among other things, arbitrary detention or imprisonment. The appellants also argued that the mandatory life sentence for murder (a) was arbitrary; (b) amounted to cruel, inhuman or degrading punishment; and (c) violated their constitutional right to a review by a higher tribunal, therefore contrary to the Basic Law and the BoR.

Basic Law provisions in dispute

The major provision in dispute was BL 28.

What the Court held

The CFA held that the grievous bodily harm rule was settled law and no further judicial narrowing of the *mens rea* requirement was permissible.

In respect of the constitutional challenge, the CFA held that the grievous bodily harm rule was not arbitrary under BL 28 as there was nothing

capricious or unreasonable in classing conduct where one acted with the intention of causing someone really serious bodily harm and whose actions in the event caused another's death, as murder as a matter of legal policy. The CFA also held that BoR 11 (regarding presumption of innocence) was not engaged as the grievous bodily harm rule did not give rise to any presumption as to an intention to kill or as to guilt, and all the elements of the offence required to be established. As to the right of equality before the law under BL 25 and BoR 10, the CFA held that unless the imprisonment was held to be arbitrary, it was not suggested that any infringement of the equality protection arose.

Relying on BL 28, the appellants argued that the imposition of life sentence in all murder cases was arbitrary and unconstitutional. Taking into account the legislative judgment that murder called for a mandatory life sentence was tenable and rational and should be respected, the CFA held that the mandatory life sentence was not a manifestly disproportionate sentence so as to contravene BL 28 on the grounds of arbitrariness. The CFA further held that the threshold for establishing gross disproportionality under BoR 3 was either the same or higher than the threshold for arbitrariness. The CFA held that the appellants' sentences were not grossly disproportionate.

What the Court said

At 434E – I, the CFA considered the scope of the protection afforded by BL 28 as compared with BoR 5(1):

"40. The argument in the two Court of Appeal cases proceeded on the basis of BOR art.5(1) and involved asking (i) whether that article extends its protection to offenders lawfully imprisoned after conviction by a court; and (ii) whether it is capable of invalidating, on the grounds of arbitrariness, substantive criminal laws founding a conviction and consequent imprisonment, such as the grievous bodily harm rule in the present case. Both questions are better answered under BL art.28.

41. The terms of BL art. 28 differ from those of BOR art.5(1). Article 28 expressly provides a constitutional guarantee against arbitrary 'imprisonment' and not just against arbitrary 'arrest or detention' as in the case of BOR art.5(1). Plainly, 'imprisonment' covers incarceration pursuant to a sentence lawfully imposed by a court after a criminal conviction. The

first question is therefore plainly answered in the affirmative in relation to BL art.28, whatever may be the position under BOR art.5(1).

42. The second question must also be answered affirmatively. Article 28 prohibits not merely 'unlawful' imprisonment but 'arbitrary or unlawful' imprisonment. It envisages that a term of imprisonment lawfully ordered may nonetheless be 'arbitrary'. It follows that such arbitrariness may reside in the substantive rules of criminal liability whose breach led to the imprisonment ordered."

At 436I – 437C, the CFA elaborated on the meaning of "arbitrary" in BL 28 and its application to the grievous bodily harm rule:

"48. … Applying it to the present case, one asks: Can it be said, given the asymmetry resulting from the grievous bodily harm rule, that such rule is arbitrary in that it is capricious or unreasoned or without reasonable cause? Can the imprisonment which followed be said to have been imposed without reference to an adequate determining principle?

49. In our view, the answer is clearly 'No'. A person convicted of murder under the rule is one who acts with the intention of causing someone really serious bodily harm and whose actions in the event cause another's death. A person who takes another's life in such circumstances brings to realization the risk which is necessarily inherent in his conduct. In our view, there is nothing capricious or unreasonable in classing such conduct as murder as a matter of legal policy. A person may not subjectively intend or even foresee that he will cause death. He may desire to limit the consequences of his actions to the infliction of grievous bodily injury. However, as a matter of common sense it is impossible to predict that the consequences of an intentional infliction of really serious bodily harm will necessarily be successfully limited and will not prove to be life-threatening."

On the weight to be given to the view of the legislature in the present context, the CFA said at 447I – 448E and at 449A – E:

"101. The Basic Law enshrines the principle that there must be a separation of powers as between the executive, the legislature and the judiciary. The legislature is constitutionally entitled to prescribe by legislation what conduct should constitute criminal offences and what punishment those found guilty by the courts should suffer … But in the exercise of their independent judicial power, the courts have the duty to decide whether legislation enacted is consistent with the Basic Law and the Bill of Rights. If found to be inconsistent, the duty of the courts is to hold that legislation

invalid …

102. It is also established that when deciding constitutional issues, the context in which such issues arise may make it appropriate for the courts to give particular weight to the views and policies adopted by the legislature. In *R v DPP, Ex p Kebilene* [2000] 2 AC 326, speaking of the Human Rights Act 1998 which took effect on 2 October 2000, incorporating the European Convention on Human Rights ('ECHR'), Lord Hope stated :

In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. (at 381B-C)

…

105. The context and circumstances of the present case render this approach relevant and justify the courts giving proper weight to the decision of the legislature. As is clear from the legislative history of the mandatory life sentence provisions, the question of the appropriate punishment for what society regards as the most serious crime is a controversial matter of policy involving differing views on the moral and social issues involved. The legislature has to make a difficult collective judgment taking into account the rights of individuals as well as the interests of society. It has to strike a balance bearing in mind the conditions and needs of the society it serves, including its culture and traditions and the need to maintain public confidence in the criminal justice system. As Lord Woolf pointed out in *Attorney-General v Lee Kwong Kut* [1993] AC 951:

In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the legislature. (at 975 C-D)"

At 454J – 455G, the CFA discussed the approach for assessing disproportionality:

"130. In our view, the threshold for establishing such disproportionality as would suffice to make a punishment which is prescribed by law cruel,

inhuman or degrading (i.e. 'grossly disproportionate'), is either the same or higher than the threshold for arbitrariness ('manifestly disproportionate'). …

132. Accordingly, the appellants' case based on BOR art 3 also fails. Having fallen at the hurdle of arbitrariness, they face an equal or higher obstacle in seeking to establish that the mandatory life sentence is cruel, inhuman or degrading punishment. The approach to assessing disproportionality is the same in each case, with the court not being confined to considering individual culpability but factoring in also other legitimate penological aims and giving due weight to the legislative choice of sentence."

Gurung Kesh Bahadur v Director of Immigration (2002) 5 HKCFAR 480

Background

Gurung Kesh Bahadur ("respondent") was a non-permanent resident. When he returned to Hong Kong from a trip to Nepal, he was refused permission to land, even though his permission to stay with a limit of stay had not expired. The refusal was made pursuant to provisions of the Immigration Ordinance (Cap. 115). S. 11(10) of Cap. 115 provided that "Any permission … to land or remain in Hong Kong shall, if … that person departs from Hong Kong, expire immediately". Under s. 7(1) of Cap. 115, a person could not land in Hong Kong without the "permission" of an immigration officer. Subsequently, the Director of Immigration ("Director") made a removal order against the respondent under s. 19(1)(b) of Cap. 115. The respondent challenged that the decision to refuse him permission to land and the removal order were unlawful under BL 31.

Basic Law provisions in dispute

The major provisions in dispute were BL 31 and BL 39. The CFA also referred to BL 24 and BL 26.

What the Court held

The CFA unanimously dismissed the appeal from the Director and found in favour of the respondent. It was held that s. 11(10) of Cap. 115 itself was not unconstitutional. It was its application to a non-permanent resident, whose limit of stay had not expired, which was inconsistent with his rights under BL 31.

Chapter III of the Basic Law provided for the rights and freedoms of residents. Apart from the right of abode (BL 24) and the rights to vote and stand for election (BL 26), those rights were enjoyed by all residents, permanent and non-permanent. A generous approach should be adopted to the interpretation of those rights whilst restrictions to them should be narrowly interpreted.

What the Court said

Li CJ rejected the Director's primary submission that the rights in BL 31 were subject to BL 39 and held at 490D – 491E:

"24. In considering the Director's primary submission, the starting point must be the proper approach to the interpretation of chap. III of the Basic Law in which art. 31 and 39 are contained. A generous approach should be adopted to the interpretation of the rights and freedoms whilst restrictions to them should be narrowly interpreted *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 at pp.28I-29A and *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442 at p.457B. (In this context, right and freedom are used interchangeably). So, art.31 providing for the right to travel and the right to enter should be generously interpreted. On the other hand, art.39(2), which deals with the question of restrictions to rights and freedoms, should be narrowly interpreted.

25. Article 39(1) provides for the incorporation into the laws of Hong Kong of the ICCPR as applied to Hong Kong. As has been pointed out, the Hong Kong Bill of Rights Ordinance containing the Bill has effected such incorporation. The ICCPR as applied to Hong Kong as incorporated by the Bill only provides for minimum standards for rights which are internationally recognized. The Basic Law can provide for rights additional to such minimum standards.

26. When art.39(2) proceeds to deal with the question of restrictions on rights and freedoms, it refers to 'the rights and freedoms enjoyed by Hong Kong residents'. A right may be provided for (i) in both the Basic Law and

the Bill; or (ii) only in the Basic Law and not in the Bill; or (iii) only in the Bill but not in the Basic Law. An example of (i) is the freedom of speech or the freedom of expression. It is to be found both in the Basic Law (art.27) and in the Bill (art.16). Here, one is concerned with the right to travel and the right to enter conferred on non-permanent residents. These rights are an example of (ii) above. They are not provided for and are additional to those in the Bill. They are created by the Basic Law and are only provided for therein.

27. Article 39(2) is protective of the rights and freedoms of Hong Kong residents. Its provisions make it clear first, that such rights and freedoms may not be restricted unless as prescribed by law. Secondly, even if the restrictive measures are prescribed by law, art.39(2) provides that the restrictions shall not contravene provisions of the ICCPR as applied to Hong Kong, that is, as incorporated by the Bill. Thus, in the context of rights recognized by the ICCPR as applied to Hong Kong, (whether or not such rights are also enshrined in the Basic Law), art.39(2) spells out the two requirements which any purported restriction must satisfy.

28. But where as in the present case, one is concerned with rights conferred by the Basic Law, which are not found in and are additional to those provided for by the ICCPR as applied to Hong Kong, art.39(2) does not imply that such rights may be freely qualified or limited simply by restrictions which are prescribed by law. In the context of rights contained only in the Basic Law, the second requirement in art.39(2), which any purported restriction must satisfy, has no application because the rights in question are conferred by the Basic Law and not by the ICCPR as applied to Hong Kong. But it does not follow that rights found only in the Basic Law can be restricted without limitation provided the restrictions are prescribed by law. The question of whether rights found only in the Basic Law can be restricted and if so the test for judging permissible restrictions would depend on the nature and subject matter of the rights in issue. This would turn on the proper interpretation of the Basic Law and is ultimately a matter for the courts."

Li CJ rejected the Director's supplementary submission and held at 492I – 493D:

"34. The Director's supplementary submission can be disposed of shortly. Assuming (without deciding) that having regard to their nature and subject matter, the right to travel and the right to enter in art.31 of the Basic

Law could be subject to restrictions and that the test of proportionality is the appropriate test for judging the extent of permissible restrictions, the restrictions must be 'prescribed by law'. In the present context, this would have to involve the introduction of a statutory scheme specifically designed for the purpose of prescribing restrictions on the constitutional rights of non-permanent residents to travel and to enter together with such safeguards as may be thought appropriate. The expression 'prescribed by law' was recently considered by this Court in *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 para.60-65. The expression signifies that a law must be formulated with a sufficient degree of precision - just how much depends upon the nature and content of the subject matter in question - so that the individual is given some indication as to how he may regulate his conduct. The requirement that restrictions must be 'prescribed by law' could not be satisfied by the existence of general discretionary powers for immigration control vested in immigration officials under the Ordinance and by their undertaking administratively the exercise of considering the imposition of restrictions on such constitutional rights of non-permanent residents on a case by case basis at immigration counters at entry points. Accordingly, the Director's supplementary submission must also be rejected."

Li CJ considered at 493J – 495B the protection under BL 31:

"37. The rights to travel and to enter are constitutionally guaranteed by art.31 of the Basic Law and the courts must give them a generous interpretation. In the case of a non-permanent resident whose permitted limit of stay had not expired, his right to re-enter Hong Kong after travelling is an essential element of these rights. To deprive such a non-permanent resident of his right to re-enter Hong Kong by reason of his travelling outside Hong Kong is to contravene his rights to travel and to enter under art.31. Any application of s. 11(10) to such a non-permanent resident would contravene these rights. This is because that provision fastens on the exercise of his right to travel, that is his departure, as the reason which triggers automatically the termination of the permission previously granted to him with a limit of stay which had not expired. Indeed, by effecting such termination, the application of s. 11(10) to him would destroy his status as a non-permanent resident which is the foundation of the rights conferred by art.31.

…

40. Section 11(10) itself is not unconstitutional. It is its application to a non-

permanent resident, whose permitted limit of stay has not expired, which is inconsistent with his rights under art.31 of the Basic Law. Section 11(10) continues validly to apply to persons who are not non-permanent residents with an unexpired limit of stay, for example, to visitors.

41. As with any person, including a permanent resident who enjoys the right of abode, a non-permanent resident with an unexpired permitted limit of stay may be examined by immigration officials under s. 4 of the Ordinance. But he does not require permission to land under s. 7 because the previous permission with the unexpired limit of stay remains effective. … such a non-permanent resident in effect would enjoy an important element of the right of abode. … But this is only one of the elements of the right of abode and is enjoyed by such a non-permanent resident during and only during the unexpired permitted limit of stay. There is nothing surprising in this result. It follows from his rights to travel and to enter guaranteed by art.31. These rights in the new order were created by the Basic Law."

Ma Kwai Chun v Leong Siu Chung [2001-2003] HKCLRT 286

Background

The plaintiff claimed that the first defendant, the Chief Judge of the High Court, dealt with her complaints in a discriminatory and nonchalant manner and had been oppressive to her as a litigant in person. She also claimed that the second defendant, the Master of the High Court, had instructed the other side's counsel to change trial strategy and insulted her using malicious language. The claim was struck out and the plaintiff appealed.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 85.

What the Court held

The CA held that the absolute immunity under BL 85 did not contravene

the plaintiff's right to public and fair trial under BoR 10, BoR 13 and BoR 22. The absolute immunity ensured that judicial officers could deal with cases without bias, favour or fear. The purpose of the immunity was not to protect the personal interest of judges, but the public interest in an independent and impartial justice system.

What the Court said

At 288, the CA held that BL 85 was consistent with BoR 10, BoR 13 and BoR 22:

"7. The second defendant's conduct at the hearing of HCA 101/2001 that Madam Ma complained of in her Statement of Claim, was 'conduct in the performance of [the second defendant's] judicial function', and therefore he is immune from legal action by virtue of art.85. This does not contravene Madam Ma's right to public and fair trial under s. 8 arts.10, 13 and 22 of the Hong Kong Bill of Rights Ordinance. In the circumstances of the present case, there is no conflict between the two statutes."

At 288, the CA cited with approval Judge Rothman's judgment in *Royer v Mignault*:

"9. In *Royer et al v Mignault* (1988) 50 DLR (4th) 345, Judge Rothman of the Court of Appeal of Quebec, Canada elaborated on the immunity of judicial officers from civil liability. …

Judge Rothman went on to say:

The purpose of the principle is not, of course, to protect the personal interests of judges, but rather to protect the public interest in an independent and impartial justice system. To this end, judges, in performing their judicial functions, must be able to do so without fear of personal liability for what they say or do in their judicial capacities. Any errors they make may be corrected on appeal (or judicial review, as the case may be), but they should not have to fear that they may be threatened by dissatisfied litigants, or others, with civil actions charging them with malice, bias, or excess of jurisdiction. A judge should not be subject to the influence of personal concerns, conscious or unconscious, when performing his judicial functions."

At 289, the CA explained the scope of the immunity under BL 85:

"10. … Article 85 of the Basic Law provides an absolute protection for acts done by judicial officers in the administration of justice, in order to ensure

that these officers deal with cases without bias, favour or fear and to effectively prevent litigants from commencing proceedings against these officers personally, such as what Madam Ma is seeking to do now."

At 290, the CA concluded that:
"13. … All acts done by masters and judges on various levels in the performance of their judicial functions enjoy absolute protection under art.85 of the Basic Law."

Yau Kwong Man & Another v Secretary for Security [2002] 3 HKC 457

Background

The applicants were convicted of murder in the 1980s. They were both 16 years old at the relevant time and were sentenced to an indeterminate term of detention at Her Majesty's pleasure in accordance with s. 70 of the Criminal Procedure Ordinance (Cap. 221). In 1997, Cap. 221 was amended to add s. 67C, empowering the CE to determine a minimum term of indeterminate sentence that the applicants must serve in order to address the retributive and deterrent elements of their offences. The CE made the determinations that for the first applicant, the minimum term should be 15 years' imprisonment, and for the second applicant, 20 years' imprisonment. As a result, the Long-term Prison Sentences Review Board was unable to order their release until the minimum terms had been served. The applicants sought judicial reviews of the validity of s. 67C and s. 12(2) of the Long-term Prison Sentences Review Ordinance (Cap. 524) contending that they were inconsistent with the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383).

Basic Law provisions in dispute

The major provision in dispute was BL 80. The CFI also referred to BL 39 and BL 48(12).

What the Court held

The CFI said that under BL 80, judicial power was vested in those appointed to hold judicial offices. However, s. 67C of Cap. 221 in substance gave the CE the power to exercise what was inherently a judicial power and was therefore inconsistent with BL 80.

The applicants also argued that s. 67C of Cap. 221 infringed BoR 10. The CFI decided that while BoR 10 concerned the process for determining a criminal charge, s. 67C of Cap. 221 was an entirely different review process which involved persons whose trials and appeals had been fully concluded and who were serving their sentences. Accordingly, s. 67C of Cap. 221 did not fall within the ambit of BoR 10.

The applicants further challenged the constitutional validity of s. 12(2) of Cap. 524 on the basis that it contravened BoR 5(4). The applicants argued that if a young offender was held longer than was justified, whether his minimum term had expired or not, he was held unlawfully. Under BoR 5(4), he was entitled to apply to a court at any time during his detention to challenge the lawfulness of his detention. They pointed out that the Long-term Prison Sentences Review Board (the "Board") was not a court. Those detained had no right to go before it to seek redress when they chose to, and under s. 12(2) of Cap. 524, it had no power to order the release of a prisoner before that person had served his minimum term.

The CFI said that although the Board could not order the conditional release of a prisoner until the expiration of the minimum term, it might make recommendations to the CE at any time during the serving of the minimum term or after and, if accepted, the CE might exercise his jurisdiction under BL 48(12) to release the prisoner even though the minimum term had not yet expired.

Further, for those sentenced before the new statutory regime came into force in 1997, once the inconsistency with BL 80 was removed and they had their minimum terms determined by the exercise of judicial power, then there would be no difference between their situations and those sentenced afterwards. Any supervision by the courts that might be required under BoR 5(4) would then be incorporated in the exercise of

that judicial power.

What the Court said

At 470H – I and 471G – I, the CFI held that judicial power was vested in the judiciary under the Basic Law:

"38. It has not been disputed that the Basic Law is founded on what is commonly called the Westminster model. As such, the powers of the legislature, the executive and the judiciary are separate. In terms of art 80, judicial power is vested in those appointed to hold judicial office. That being so, what the legislature cannot do, consistent with the separation of powers, is to place judicial power in the hands of the executive."

"42. … Is the determination by the Chief Executive of a minimum term under s 67C the determination of a punishment, more particularly as to its severity, or is it no more than an integral part of the exercise of his executive power under art 48(12) of the Basic Law to commute a punishment already lawfully determined and imposed by the courts? If it is the former, s 67C must be inconsistent with art 80 of the Basic Law. If it is the latter, the legislature has not placed the exercise of judicial power in the hands of the executive and s 67C must be declared constitutionally valid."

At 478G – H and 479A – D, the CFI held that the CE's power under s. 67C was a judicial power:

"65. … while the assessment of a minimum term may not dictate absolutely the final length of sentence to be served, it does (critically) primarily address and primarily determine that period that must be served to reflect the imperatives of retribution and deterrence. It would, in my view, be artificial to suggest that it does not thereby, to a material degree, dictate the severity of the sentence …

66. It is important also to remember that the Chief Executive, in determining a minimum term, must look to individual circumstances; that is, to the circumstances of the offence, the moral culpability of the prisoner in the commission of the offence and his current personal circumstances. These are all matters inherent in the judicial act of sentencing. …

67. In the circumstances, I must reject the submission that s 67C bestows on the Chief Executive an administrative power only, even if it is a power that must be exercised judicially. I am satisfied that s 67C, whatever its form, in substance gives the Chief Executive the power to exercise is an inherently

judicial power."

The Court held at 484D – F, 489B – E and 490I – 491B that the minimum term was not a complete bar to earlier release:

"90. … while the conditional release of a prisoner may be determined in advance by the Board, it cannot *order* that such release be made effective until the minimum term has expired. However, the Board may make recommendations to the Chief Executive in terms of s 15(1)(a)(i) or (ii) at any time during the serving of the minimum term or after and, if accepted, the Chief Executive may exercise his jurisdiction under art 48(12) of the Basic Law to bring about the release of a prisoner even though the minimum term has not yet expired. In short, the specification of a minimum term is not a complete bar to release before the term has expired although the Board cannot itself order such release. …"

"104. … The power of the Board to conduct reviews may be limited pending the expiration of the minimum term but, as I have said, the minimum term is not constituted as a tariff period to effectively determine the full length of sentence. It is constituted only as the initial, minimum period that must be served before the determination of the full sentence is assessed according to the measure of a prisoner's rehabilitation. …

105. … Under the legislation, indeterminate sentences are now split into two periods: the initial minimum period to reflect retribution and deterrence and thereafter the remainder of the sentence in which rehabilitation is demonstrated. There is therefore a balance achieved (by our legislature) between the punitive demands of the indeterminate sentence and the welfare of the offender. That, in my judgment, is fundamentally different from the administrative determination of sentences contained in the concept of a tariff period. …"

"112. It is correct, of course, that the applicants were sentenced before the new statutory regime came into law. It is correct too that their minimum terms have been specified by an administrative not a judicial process. But I have found that the legislation mandating that administrative process is inconsistent with art 80 of the Basic Law. If, however, that inconsistency is removed and the applicants have their minimum terms determined by the exercise of judicial power then there will be no difference between their situation and those sentenced under the new statutory regime. Any supervision by the courts that may be required under art 5(4) will then be incorporated in the exercise of that judicial power."

Pang Yiu Hung v Commissioner of Police & Another [2003] 2 HKLRD 125

Background

The applicant was a barrister. He was briefed by F, a firm of solicitors, to represent a client, X, who had been accused of defrauding a bank of millions of dollars. The applicant was arrested under s. 50 of the Police Force Ordinance (Cap. 232) after X had made an attempt to sell certain securities valued at $9 million in order to place the proceeds into a client account of F.

The offence alleged against the applicant was a contravention of s. 25A of the Organized and Serious Crimes Ordinance (Cap. 455). What was alleged was that the applicant knew or must have suspected that the value of those securities represented the proceeds of an indictable offence. Despite that knowledge or suspicion, however, the applicant failed to report the matter to an authorized officer in accordance with the section. The applicant, the Bar Council and the Law Society, sought declarations, *inter alia*, that s. 25A of Cap. 455 was subject to legal professional privilege ("LPP"); and that the arrest and detention of the applicant was unlawful.

Basic Law provisions in dispute

The major provisions in dispute were BL 35, BL 39 and BL 87.

What the Court held

The CFI held that when enacting s. 25A of Cap. 455, the legislature had recognized the fundamental human right of confidentiality protected by BL 35, BL 39 and BL 87 and the section did not in any way limit or abrogate common law rule of LPP. The Court, however, held that the applicant's arrest and detention had been unlawful.

What the Court said

At 134F – 135B, the CFI held that LPP was recognized as a fundamental

human right:

"16. LPP is today recognized as a fundamental human right, one protected in such conventions as the International Covenant for Civil and Political Rights ('the ICCPR'). In *R (Morgan Grenfell & Co. Ltd) v. Special Commissioner of Income Tax and another* [2002] 2 WLR 1299, Lord Hoffmann expressed it thus (at 1302):

LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.

17. In Hong Kong, LPP is protected by the Basic Law as a fundamental right. Article 35 of the Basic Law guarantees that—

Hong Kong residents shall have ***the right to confidential legal advice****, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. [Emphasis added]*

18. Article 87 of the Basic Law makes it plain that such a fundamental safeguard as LPP, central to Hong Kong's administration of justice prior to the change of sovereignty, shall remain of equal force and effect after it—

In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained."

At 135H, the Court made the following summary:

"22. In summary, therefore, LPP is an ancient rule of common law, a rule which reflects a fundamental right of confidentiality between a client and his legal advisor, a right protected by the Basic Law. It is a rule recognized as constituting one of the pillars upon which the administration of justice rests in an open society."

At 135I – J, the CFI held that LPP might be limited by legislation in two scenarios:

"23. With regard being had to any constitutional restraints, it is accepted that LPP may be limited by legislation. This will be so when there is express statutory language to that effect or when, as a matter of interpretation, the implication that it is limited is clearly necessary."

At 153B – 153I, the CFI held that s. 25A of Cap. 455 had not abrogated

the LPP:

"91. If s. 25A was intended by the legislature, if only by necessary implication, to abrogate legal professional privilege why then was that privilege not referred to in subsection(3)(a)? It can only mean that it was not because LPP — unlike a contractual obligation or one laid down by an enactment — was never intended to be the subject of any breach; in short, was never intended in any way to be limited or abrogated.

92. Finally on this issue, it must be remembered that in 1995 when s. 25A was enacted the Letters Patent provided that those provisions of the ICCPR made applicable to Hong Kong (which included what I will describe as fundamental litigation rights) were to be implemented through the laws of Hong Kong and no laws were to be implemented which restricted the rights contained within those provisions in a way which was inconsistent with the ICCPR. Art.14, para. 3(b) of the ICCPR directs that in the determination of a criminal charge or in a civil suit everyone shall 'have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing'. That provision, it has been said, incorporates what in common law we call LPP.

93. The legislature, at the time s. 25A was enacted, would have been cognizant of the fact that a restriction on the fundamental right of LPP in the Ordinance would have been inconsistent with Art.14 of the ICCPR. How then can it be said that, in the absence of express provision, the legislature must nevertheless be implied to have intended to abrogate a right protected by the ICCPR and as such entrenched in our law pursuant to the Letters Patent?

94. Being satisfied therefore that s. 25A does not in any way limit nor abrogate common law LPP, there is no need for me to consider whether, if the section did so, that it would be inconsistent with the Basic Law or art. 14 of the ICCPR."

At 158H – 158J, the CFI concluded:

"120. But while, in a general sense, I believe it is patent on a plain reading of s. 25A that the Legislature intended both solicitors and barristers to be subject to s. 25A, they, in particular, are exempted from the obligations imposed by the section, if, in order to fulfil those obligations, a breach of LPP would be required. The Legislature has therefore recognized the fundamental human right of confidentiality protected by arts. 35, 39 and 87 of the Basic Law and art.14 of the ICCPR. What is required, however, is that information which is *not* protected by that fundamental right must be

reported."

Director of Lands v Yin Shuen Enterprises Ltd & Another

(2003) 6 HKCFAR 1

Background

The respondents held agricultural land under Government leases subject to restrictive covenants including *inter alia* a user covenant prohibiting the use of the land for building purposes other than for occupation as agricultural or garden ground, and a building covenant which prohibited the erection of any building on the land without approval of the Government's surveyor ("Land"). The Land was resumed in 1999 for public housing. The respondents produced comparable for the purpose of compensation which reflected a price in excess of the value of the Land subject to the restrictions, *i.e.* the amount a purchaser would be prepared to pay in excess in the hope or expectation of obtaining a modification of the terms of the lease to permit development.

The Lands Tribunal ruled in favour of the respondents. The decision was upheld by the CA which emphasized that the respondents were entitled to the intrinsic value of their land with development potential and that s. 12 of the Lands Resumption Ordinance (Cap. 124) did not affect this principle. The Director of Lands ("Director") appealed.

Basic Law provisions in dispute

The Basic Law provision in dispute was BL 105.

What the Court held

The CFA held that the statutory language of s. 12(c) of Cap. 124 must be decisive. In other words, compensation was not given in respect of use (whether in conformity with the terms of the lease or not), nor in respect of any expectancy or probability (whether of obtaining a modification of the terms of the lease or otherwise). No account should be taken

of any value which the land might have by reason of its use or any probability or expectancy of obtaining any "licence, permission, lease, or permit whatsoever" which the claimant was not entitled to as of right. Such value attributable to the land by reason of use or probability or expectancy was to be disregarded.

Insofar as BL 105 was concerned, the CFA held that BL 105 did not require compensation to be based on the open market value, but on its "*real value*". The right to exploit the development potential of the land was not disposed of by the Government and remained its property for which it ought not be required to pay (under BL 105 or otherwise).

What the Court said

At 18F – I, the CFA set out the proper interpretation of ss. 12(b) and (c) of Cap. 124:

"29. In these circumstances, the statutory language must be decisive. The first thing to note about ss. 12(b) and 12(c) is that they are both in derogation of s. 12(d). To the extent that they apply, the open market value of the land which forms the basis of valuation under s. 12(d) is excluded.

30. Neither subsection is expressed with great felicity. Compensation is not given in respect of use whether in conformity with the terms of the lease or not; nor is it given in respect of any expectancy or probability whether of obtaining a modification of the terms of the lease or otherwise. It is given, and given only, in respect of the land taken. But in each case the sense is clear enough. In assessing the amount of compensation for the land taken, no account is to be taken of any value which the land may have by reason of its non-conforming use, or by reason of the probability or expectancy of obtaining any 'licence, permission, lease, or permit whatsoever' to which the claimant is not entitled as of right."

At 25B – E, the CFA considered the relevance of BL 105 in the context of s. 12 of Cap. 124, and held that BL 105 did not require compensation on the basis of open market value of the property:

"56. Two points call for comment. First, art.105 does not require compensation to be based on the open market value of the property concerned but on its 'real value'. In general, property is worth what it will fetch, and its open market value reflects its real value. But as the Courts of Hong Kong have repeatedly emphasized, this is not always the

case. Sometimes the market is prepared to pay a speculative price which exceeds the true value of the property and reflects an element for which the resuming authority ought not to be required to pay. There is nothing in art.105 which requires it to do so.

57. Secondly, compensation is only required to be paid for 'the property concerned', that is to say for the interest acquired. In the present case, that means for the land for the duration of the Crown lease and subject to the user restrictions in the lease. The right to exploit the development potential of the land by using it as building land was not disposed of by the Crown and remains the property of the Government for which it ought not to be required to pay. If the claimants' argument is correct, then the Government's practice in charging a full premium on modification of the terms of a Crown lease is also open to challenge under the Basic Law; and I do not consider that that is right."

Yook Tong Electric Co Ltd v Commissioner for Transport **(unreported, 7 February 2003, HCAL 94 of 2002)**

Background

The applicant operated as a wholesaler and retailer in electrical goods at Tai Yuen Street, Wan Chai. The applicant's business relied heavily on direct vehicular access to the shopfront of its building for delivery of goods. On 15 June 2001, the Commissioner of Transport ("Commissioner") designated a greater length of Tai Yuen Street to be a "prohibited zone" for all motor vehicles between 10:00 a.m. and 6:00 p.m. daily to improve pedestrian safety. The applicant's building fell within the "prohibited zone". The applicant applied for judicial review of the Commissioner's decision on various grounds including that the decision was inconsistent with the applicant's right under BL 105 to use its property.

Basic Law provisions in dispute

The major provision in dispute was BL 105. The CFI also referred to

BL 6.

What the Court held

The CFI held that the Commissioner's decisions did not interfere with the applicant's right to use its property under BL 105, and accordingly, the applicant was not entitled to any compensation. This was because the applicant did not have any exclusive right to the use of the parking spaces in front of or near its building. The parking spaces were public facilities that the applicant had to compete with other users in order to exploit them. The CFI concluded that while BL 105 afforded protection to the applicant to use its property, it did not extend to the use by the applicant of public facilities. Reading alongside with BL 6, BL 105 provided protection for the use of private property but not property in the public domain.

What the Court said

At paragraph 54, the CFI considered that the restriction was placed on public facilities instead of private property:

"54. … As I have said, the applicant's building has no integral facilities for vehicles. At all times therefore the applicant, in running its business, has had to look to public facilities in so far as they permitted vehicles to draw up in front of or near its building. It shared these facilities with other members of the public. The applicant has never pretended to have any exclusive right to the use of the parking spaces in front of or near its building."

In addition, the CFI noted at paragraph 55 that the facilities had not been removed:

"55. The facilities which it has shared have not been removed. They have been restricted. Vehicles may still enter Tai Yuen Street outside normal working hours. Nor can it be said that the restriction has prevented the applicant from receiving or delivering goods during normal working hours. That can still be done but the required vehicles may not park in Tai Yuen Street itself, they must park at alternative sites, the main one being just 38-40 metres from the applicant's premises."

The CFI held at paragraphs 57 – 59 that there had not been interference

with the applicant's use of its property:

"57. It seems to me that art.105, while it affords protection to the applicant to use its property, does not extend to the use by the applicant of public facilities … the applicant is not entitled to a guaranteed use of a public street to suit its business operations. If it was otherwise, it would mean that, if a business, for the enhancement of its operations, placed itself close to public facilities, it would thereby assume a constitutional right protected by art.105, in respect of those facilities. In my view, it would be misconceived to suggest that art.105 had any such purpose. Read with art.6, art.105 provides protection for the 'acquisition, use disposal and inheritance' of private property not property in the public domain.

58. But even if I am wrong in this regard, the use of property must always be subject to the principle of general regulation in the public interest and the actions of the Commissioner were of a regulatory nature carried out for the protection of the public.

59. I accept, of course, that in matters of this kind what counts is the substance of the matter not form. But, in looking to the substance, it is clear to me that there has been no hindrance or interference with the applicant's right to the use of its property."

The CFI held at paragraph 65 that there had not been any deprivation of the applicant's property entitling it to compensation:

"65. In the circumstances, I am satisfied that, in terms of art.105, the Commissioner's decisions have not interfered with the applicant's right to use its property. It must follow that any restrictions imposed by the Commissioner do not amount to a deprivation of the applicant's property, entitling it to compensation. …"

Prem Singh v Director of Immigration (2003) 6 HKCFAR 26

Background

The appellant was an Indian national who first arrived in Hong Kong in January 1988. He applied for unconditional stay in October 1998 so that he could apply for permanent resident status with the right

of abode in Hong Kong. The Director of Immigration ("Director") refused his application in June 1999 on the grounds, *inter alia*, of his criminal record in May 1999 which resulted in a sentence of two weeks' imprisonment. As a result, the appellant remained subject to a condition of stay and did not meet the "settled in Hong Kong" requirement under Sched. 1 para. 3(1)(c) of the Immigration Ordinance (Cap. 115). At issue was whether that the unconditional stay requirement was inconsistent with BL 24(2)(4).

Basic Law provisions in dispute

The major provision in dispute was BL 24(2)(4).

What the Court held

The CFA allowed the applicant's appeal. The CFA held that BL 24(2)(4) implicitly regarded satisfaction of the permanence requirement as achievable at a time when the appellant was still subject to a limit of stay. It followed the unconditional stay requirement under Sched. 1 para. 3(1)(c) of Cap. 115 was unconstitutional: it was incompatible with BL 24(2)(4).

The CFA also held that the appellant's two week period of imprisonment was not *de minimis*. The exclusion of periods of imprisonment from the natural meaning of "ordinary residence" in BL 24(2)(4) did not depend on the duration of such period being substantial or on their amounting to a substantial fraction of the seven-year qualifying period but it was the qualitative aspect of time spent in prison that has led to such periods being excluded from the concept of "ordinary residence" in the Basic Law. The incarceration in this case, reflecting sufficiently serious criminal conduct to warrant an immediate custodial sentence, fell outside what could qualify as "the settled purpose" underlying a person's ordinary residence in the ordinary and natural meaning of those words.

Regarding the issue of the time of application, the CFA held that the seven-year qualifying period must come immediately before the application. On 24 October 1998, acting at the suggestion of the

Immigration Officer, the appellant had initiated his application for permanent resident status under BL 24(2)(4). Accordingly, as at that date, the requisite seven-year requirement had not been interrupted by any period of imprisonment. His subsequent periods of incarceration did not bear upon his entitlement to permanent resident status judged at October 1998 when the relevant application was made. The CFA therefore quashed the decisions of the Director refusing the appellant's application for an unconditional stay and referred the applicant's application for permanent resident status to the Director for decision in accordance with the CFA's judgment.

What the Court said

On the requirement under BL 24(2)(4) to qualify for permanent resident status, Ribeiro PJ said at 45B – D that:

"49. It follows that BL art.24(2)(4) requires non-Chinese persons to satisfy three conditions if they are to qualify for permanent resident status. They must:

(a) have entered Hong Kong with valid travel documents (the entry requirement);

(b) have ordinarily resided in Hong Kong for a continuous period of not less than seven years (the seven year requirement); and

(c) have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region (the permanence requirement)."

On constitutionality of the unconditional stay requirement under the statute, Bokhary PJ said that paragraph 3(1)(c) of Sched. 1 to Cap. 115 was unconstitutional at 35D – G that:

"8. Having the right of abode in Hong Kong, which right comes with Hong Kong permanent resident status, entitles a person to stay here without any limit. Therefore no limit on a person's stay in Hong Kong can co-exist with his or her enjoyment of the right of abode here. Any such limit would have been imposed under ordinary law, namely the Immigration Ordinance. But the right of abode is a constitutional right conferred and entrenched by the Basic Law. Basic Law rights and freedoms are neither dependent upon nor defeasible by ordinary law. Therefore no limit on a person's stay in Hong Kong can impede the verification of his or her acquisition of the right

of abode here by ordinarily residing here for a continuous period of not less than seven years, treating Hong Kong as his or her home indefinitely rather than for a limited period and applying for permanent resident status in reliance upon having so resided here immediately before making that application. …"

Ribeiro PJ also said at 51B – C that:
"63. … While the Director may undoubtedly exercise his discretions as to whether a non-Chinese person should be allowed to enter Hong Kong and whether permission to remain should be extended, these discretions bearing on the entry and the seven year requirements respectively, the discretionary removal of a limit of stay forms no part of the permanence requirement."

At 54B – C, Ribeiro PJ elaborated on the *de minimis* principle:
"76. I would be prepared to accept that the *de minimis* principle may apply, for instance, where a person, in a fit of temper, has acted in contempt of court and is sent down to the cells for a few hours or even overnight for his temper to cool and his contempt to be purged. But I would not be disposed to regard imprisonment of any greater substance as capable of engaging the *de minimis* principle. In the present case, the two week sentence was one of substance merited by the offence in all the circumstances. I see no basis for disregarding it for the purposes of BL art.24(2)(4) or s. 2(4)(b)."

When deciding on the time for the application for permanent resident status, Ribeiro PJ held at 56B – E that:
"86. It is evident that at the times material to this appeal, including 24 October 1998, everyone concerned was acting on the basis of provisions which I would declare constitutionally invalid. Sched. 1, para.3(1)(c) and para.1(5)(b) of the Ordinance required removal of any applicable limit of stay before an applicant could be found entitled to permanent resident status. A person seeking verification of such status would have been directed first to apply for an unconditional stay. If on 24 October 1998, this was what had in fact happened to the appellant, and if he and the Immigration Department had both in fact been processing what was known and intended to be the first step in his application for permanent resident status on the basis of his having met the seven year requirement, one would be driven to conclude that if the unconstitutionality of the requirement had then been appreciated, the appellant would instead have been making an unequivocal application for permanent resident status. On such facts,

justice would require that the appellant be treated as if the unconstitutional requirement had not been introduced and accordingly, that his application on 24 October 1998 be treated as a permanent residence application."

Kaisilk Development Ltd v Urban Renewal Authority [2004] 1 HKLRD 907

Background

The plaintiff, a property developer, claimed damages against the defendant, a corporation established under the repealed Land Development Corporation Ordinance (Cap. 15). The purpose of the defendant was to conduct urban renewal according to prudent commercial principles. The defendant could under Part IV of Cap. 15 submit development schemes to the Town Planning Board for approval. Once approved, any land development by the land owners that was incompatible with the development schemes submitted by the defendant was prohibited. Under s. 15 of Cap. 15, the defendant could request the Secretary for Planning, Environment and Lands to make a recommendation to the CE in C that land be resumed under Lands Resumption Ordinance (Cap. 124), but only after it had taken reasonable steps to negotiate with the plaintiff a property on terms which were fair and reasonable. The plaintiff complained that the mechanism of Cap. 15 would deprive a land owner of the opportunity to develop the property itself or otherwise deal with the property once the defendant had commenced steps with a view to redevelop the property.

The plaintiff argued *inter alia* that the defendant was in breach of its statutory duty and claimed that it was entitled to the difference between the true value of the property it held and the amount of compensation payable under Cap. 124.

Basic Law provisions in dispute

The major provision in dispute was BL 105.

What the Court held

The CA held that the plaintiff's way of putting the claim, that the mechanism of Cap. 15 should be regarded as depriving the land owner of some of the rights of ownership of the land or a restriction on the exercise of those rights, did not establish a private law cause of action. Any loss suffered by the plaintiff was already dealt with by way of compensation under Cap. 124. Also, BL 105 did not give a right of action to the plaintiff in respect of the formulation and submission of proposals for development, the obtaining of planning permission and the grant of that permission. BL 105 did not require the payment of compensation to anyone whose private rights were restricted by a legislation of general application which was enacted for the public benefit.

Assuming that the defendant's actions could be considered as amounting to a restriction or disposal, it was not legitimate to divide the right of property in such a way that the court would recognize a right of a land owner to be protected against a restriction on use or disposal.

What the Court said

In rejecting the plaintiff's claim that the defendant's acts constituted a deprivation of the property rights of the land, the CFI said at 920I – 921D:

"33. This rule was referred to by Lord Hoffmann in giving the opinion of the Privy Council in the case of *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574. He explained the rationale for the rule when he said at page 583C:

It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid. The best example is planning control …

34. After referring to *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508, he continued:

The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest. The principles which underlie the right of the individual not to be deprived of

his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the state and, secondly, that when the public interest does so require, the loss should not fall upon the individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for the public benefit. This is so even if, as would inevitably be the case, the legislation in general terms affects some people more than others."

The CA also held that it was important to distinguish cases of acquisition of property from cases of mere deprivation of the ability to exercise a right at 921G – J:

"36. Lord Hoffmann also drew a distinction between cases in which the authority concerned had acquired a particular right from the individual and cases in which an individual had simply been deprived of the ability to exercise a right by the use of statutory powers in the public interest. This distinction follows as a natural consequence of the rationale for the rule …

37. It is perhaps also noteworthy that Lord Hoffmann cited with approval a statement by Brennan J. in *Penn Central Transportation Co v New York City* (1978) 438 US 104 at p. 130:

'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment had been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this court focuses rather both on the character of the action and on the nature and extent of the interference with the rights in the parcel as a whole. …"

The CFI held at 922B – F that the matter must be looked at as a whole:

"39. Therefore, even on the basis that the defendant's actions could be considered as amounting to a restriction other than analogous to a planning restriction, which is very doubtful, it does not seem to me to be legitimate, on authority, to divide the right of property in such a way that the court would recognize a right for a land owner to be protected against a restriction on use or disposal. The matter must be looked at as a whole. The whole in the context being compensation on the basis of section 15 of the Ordinance with the backdrop of the LRO.

40. There is then the fact that the so-called blight amounts at the most to a restriction; it does not amount to an acquisition by the defendant of

the plaintiff's property. The plaintiff's property is acquired on resumption. Fundamentally, the Ordinance is of general application. It applies to areas that are in need of urban renewal. The area in which the Properties lie are such an area. There is no allegation that the statutory parameters have been exceeded. No case can be founded by the plaintiff simply on the proposition that some scheme or planning consent encompasses the area within which the Properties lie. The fact that the legislation affects the plaintiff but does not affect a property owner in an area which is not in need of urban renewal does not assist the plaintiff."

Wong Tai Wai David & Another v Commissioner of Inland Revenue (unreported, 15 September 2003, HCIA 2 of 2003)

Background

The taxable income of Mr Wong and his wife ("appellants") included personal salary and house rent. For each of the three years in 1998/1999, 1999/2000 and 2000/2001, the appellants elected "personal assessment". As a result, the total income of the two was aggregated and the tax liability of the appellants was accordingly assessed.

The appellants raised objections against the personal assessment. The gist of Mr Wong's complaint was that as a result of his and his wife's election for personal assessment they were required to pay a higher amount of tax than each of them was liable to pay if they had not been married. He claimed that the result was unjust, absurd and contrary to the rules of construction of a tax statute. He further claimed that this was contrary to BL 8, BL 11 and BL 25. The appellants appealed to the Board of Review against the Commissioner of Inland Revenue's assessment. The Board of Review dismissed their appeal. The appellants appealed by way of case stated against the Board's decision to the CFI.

Basic Law provisions in dispute

The main Basic Law provisions in dispute were BL 8, BL 11 and BL 25.

What the Court held

The CFI held that the combined effect of ss. 41 and 42A of the Inland Revenue Ordinance (Cap. 112) was that the income of the husband and wife should be aggregated and a single assessment on the aggregated income should be made and that an individual might not elect for personal assessment unless the spouse did the same.

On BL 8 which preserved the laws previously in force in Hong Kong, including the rules of equity, the Court held that there was never any equity about a tax and there was no room for any equitable interpretation of a tax statute, therefore Part VII of Cap. 112 did not contravene BL 8.

On BL 11, the Court held that the appellants had failed to pinpoint how the tax policy regarding taxing a married couple as one unit under personal assessment had contravened the Basic Law.

On equality before the law under BL 25, the Court held that given that the question of tax policies was determined by the legislature with consequences being applied across the board to all married taxpayers, it could not be said that the appellants were being treated unequally before the law as compared to other Hong Kong residents. Quite the contrary, in applying Cap. 112 to every person in accordance with the machinery provided without regard to the personal circumstances of the individuals involved, the Commissioner of Inland Revenue was complying with BL 25.

What the Court said

The CFI held at paragraph 8 that tax was, by nature, inequitable:

"8. … there is no equity about a tax, as by nature it is 'inequitable' in that it takes away what one has earned by his sweat and labour. It is therefore a contradiction in terms to say that a taxing statute should be construed 'equitably'. Since a taxing statute purports to deprive a person of what he has, it should be construed restrictively so that a person would only be taxed if he is caught within the letter of the law. Apart from that, there is no room

for giving any taxing statute an 'equitable construction' as suggested by the Appellants. Thus, in interpreting a taxing statute, one just look at what the statute clearly said. Nothing is to be read in, nothing is to be implied."

The Court rejected the appellants' case on BL 8 at paragraph 15:

"15. … the 1st Appellant misunderstood the meaning of equity in its legal sense and equated it with general notion of fairness and justice and probably his own notion. There never was any equity about a tax. There never was any room for any equitable interpretation of a tax statute. There never was the kind of equity as the 1st Appellant alleged in the Inland Revenue Ordinance to be preserved by the Basic Law. In my view, Part VII of the Ordinance clearly does not contravene Article 8 of the Basic Law."

The Court further rejected the appellants' case on BL 11 at paragraph 16:

"16. Article 11 of the Basic Law provides that the systems and policies practised in the Hong Kong Special Administrative Region shall be based on the provisions of the Basic Law and no law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene the Basic Law. The Basic Law sets out very broad general principles. The Appellants' complaint is in essence about treating the married couple as one tax unit. As analyzed above, there is no room for 'equitable interpretation' of a tax statute. The Appellants have the choice whether to elect for personal assessment. Whether it is beneficial to do so depends on the actual figures, the nature of their various forms of income and their expenditure. It is all a matter of mathematics. If personal assessment is not available, the Appellants together would definitely have to pay more by way of property tax and salaries tax. In my view, the Appellants have failed to show in what respect the tax policy regarding taxing a married couple as one unit under personal assessment contravenes the Basic Law".

As to BL 25, the Court held at paragraph 17 that:

"17. As for Article 25, which provides that all Hong Kong residents shall be equal before the law, the Appellants argued that they should not be penalized by way of increased tax liability for being married to one another. … As a matter of tax law, the change of status of an individual may bring about fiscal consequences. A married couple is treated as one tax unit under certain circumstances. As a matter of tax law, the change of status of an individual may bring about fiscal consequences. A married couple is treated as one tax unit under certain circumstances. This is a question of tax

policy for the legislature. These consequences apply across the board to all married taxpayers. Similarly, people earning higher salaries are taxed at a higher rate under the progressive scale than those earning less. It cannot be said that the Appellants, and similarly higher salary earners, are not being treated equally before the law as compared to other Hong Kong residents, nor can it be argued that they are being discriminated."

Michael Reid Scott v The Government of the Hong Kong Special Administrative Region (unreported, 7 November 2003, HCAL 188 of 2002)

Background

The applicant was an employee of the HKSARG employed on civil service terms of appointment. He was appointed before 1 July 1997. After the promulgation of the Public Officers Pay Adjustment Ordinance (Cap. 574) in July 2002, the applicant's salary was subject to a reduction. Insofar as a variation of the terms and conditions of the applicant's contract of employment was required, s. 10 of Cap. 574 expressly authorized the adjustments to pay and the amounts of the allowances. The applicant challenged the constitutional validity of Cap. 574 by way of judicial review proceedings on the ground that the pay reduction was inconsistent with various articles of the Basic Law.

Basic Law provisions in dispute

The Basic Law provisions in dispute were BL 6, BL 25, BL 100, BL 102, BL 103 and BL 105. BL 39 and BL 160 were also discussed.

What the Court held

The applicant argued that Cap. 574 was inconsistent with BL 100 which guaranteed that the pay, allowances, benefits and conditions of service of civil servants would be no less favourable than before the establishment of the HKSAR. The CFI held that Cap. 574 was not inconsistent with

BL 100 insofar as the reduction in pay did not result in pay less than that received on 30 June 1997. Relying on *Lam Yuk Ming and Others v Attorney General* [1980] HKLR 815, the CFI found that legislation had been ruled to be a lawful means by which the contracts of employment of public officers might be unilaterally varied in respect of pay, which was the position before resumption of sovereignty. Thus, the variation put in place by Cap. 574 did not expose the applicant to a less favourable position than he was prior to the change of sovereignty.

The CFI further held that BL 102 was not offended by Cap. 574 since neither the applicant's level of future pension entitlements nor the terms and conditions of public service pensions had been varied by the legislation.

With regard to BL 103, the CFI considered that the pay reduction was calculated with reference to the existing mechanisms in an entirely orthodox manner. Accordingly, there was no departure from the Hong Kong's previous "system" of employment for the public service.

As regards the applicant's challenge based on BL 160, the CFI found that the HKSARG had the power to vary the contracts of civil servants as a class, including such fundamental contractual conditions as those related to pay, by means of legislation before the resumption of sovereignty. Pursuant to BL 160, that power must remain after 1 July 1997.

The CFI held that "property" protected under BL 6 and BL 105 must in most cases be capable of (1) being possessed and (2) being transferred. The applicant's contract of employment was not in any manner capable of being transferred by the applicant. The Court held that contracts of employment was not "property" within the meaning of BL 6 or BL 105. In any event, BL 6 and BL 105 protected only existing property rights, not future pay unless such pay had been earned.

The CFI further dismissed the applicant's contention that Cap. 574 imposed *de facto* taxation and therefore offended BL 25, BoR 21(c) and BoR 22. A reduction in remuneration which benefited the public purse did not necessarily constitute a form of indirect taxation. Moreover, whilst judicial officers and judges were exempted from the pay reduction

under Cap. 574, the departure from literal equity served a legitimate purpose of ensuring judicial independence.

What the Court said

At paragraphs 29 – 30, Hartmann J (as he then was) said that the reduction in pay under Cap. 574 did not amount to a violation of BL 100:

"29. In respect of art.100, the Ordinance brings about a reduction in the pay of public officers but that reduction, it is accepted, does not result in the pay itself being less than that received on 30 June 1997; that is, immediately before the change of sovereignty. As to pay therefore in substance the Ordinance is not inconsistent with art.100. As to any adverse variation of the terms of employment of public officers, the variation put in place by the Ordinance does not constitute a variation that leaves public officers in a position where the Executive can unilaterally reduce their pay at any time in the future by relying on the wording of that variation alone. The variation relates to the single reduction only and does not, other than in that respect, alter the terms of the employment contracts of public officers. Accordingly, any further variation will require further legislation with the checks, balances and scrutiny inherent in the legislative process. That being the case, I do not see how it can be said that in substance the result of the variation renders the terms of employment of public officers 'less favourable than before'.

30. In any event, as I found in the June judgment, prior to the transfer of sovereignty the use of legislation had been ruled to be a lawful means by which the contracts of employment of public officers may be unilaterally varied even in respect of such fundamental matters as pay. The authority in point is *Lam Yuk Ming and Others v. Attorney General* [1980] HKLR 815, a decision of the Court of Appeal. That being the case, the variation put in place by the Ordinance has not in substance placed public officers in a less favourable position than they were in prior to the change of sovereignty."

The CFI discussed the guarantee under BL 100 at paragraph 35:

"35. … Art.100 does not place public officers in a better position in respect of their terms of service than they enjoyed prior to the change of sovereignty, it offers a constitutional guarantee only that they will be in a no worse position; that is, a no less favourable position. In this regard, I

refer again to the observations of Barnett J in *AECS v. Secretary for the Civil Service* (supra); namely, that art.100 is intended:

… to ensure continuity of employment so that no public servant ***suffers*** *as a consequence of the transition itself.* [my emphasis]"

On the question of whether contracts of employment of public officers constituted "property" under BL 6 and BL 105, the CFI said at paragraphs 71, 72, 75 and 76:

"71. Art.105 protects the right of individuals to the 'acquisition, use, disposal and inheritance of property' and to their right to compensation for lawful deprivation of that property. The word 'property' has not been defined but is qualified by the fact that its 'acquisition, use, disposal and inheritance' is protected. Those qualifications, in my view, constitute an aid in interpreting the meaning and extent of 'property' as it is used in the article.

72. If 'property' within the meaning of art.105 may be acquired, used and disposed of, including disposal by way of inheritance, then it must surely be capable of being brought into possession and being transferred out of possession. In short, it must in most cases have two features: it must be capable of being possessed and of being transferred. I have qualified those attributes with the phrase 'in most cases' because I accept of course that in common law the word 'property' is of very wide import and when used in a document of constitution demands wide and purposive interpretation. I have also made the qualification because my purpose in this judgment is to consider only the limited question of whether contracts of employment of public officers constitute 'property' within the meaning of art.105 ….

75. Manifestly, the contracts of employment of public officers are dependent upon a mutual 'personal confidence'. A public officer may not transfer his rights under the contract to a third party, he certainly may not dispose of his rights and obligations by way of inheritance. In my judgment, this inability to transfer rights and obligations is in the present case conclusive. If there are alienable interests that flow from a public officer's contract of employment, such as pay and other emoluments, they are only alienable after they have been earned in terms of the contract by the officer and after they have therefore become his property. But the contract itself is not an alienable interest.

76. In my view, therefore, viewed in the round, I am unable to see how contracts of employment of public officers can be 'property' within the meaning of either art.6 or art.105. The contracts are not property, they

are an expression of a personal relationship, one between employee and employer, a relationship subject to such fundamental restrictions as the ability to bring about the unilateral termination of that relationship with no compensation other than in terms of the applicable contracts themselves."

The CFI then considered at paragraphs 77 – 79 that the amount of pay reduced by Cap. 574 was not an existing property right protected under the Basic Law:

"77. But if I am wrong in this regard, I am satisfied that art.6 and art.105 protect only *existing* property rights and that the property in issue in this matter; namely, the amount of pay reduced by the Ordinance, is not, in terms of that legislation, an existing property right …

78. Pay earned for work done is a debt due. The right to receive future pay may, however, be lawfully subject to variation. I have found that pay for public officers has at all material times been subject to variation, if necessary by way of legislation. Read in context, therefore, I do not see how arts.6 and 105 can protect as 'property' the pay of public officers not yet earned when that anticipated pay may be subject to lawful variation, a variation contemplated by arts.100 and 103 of the Basic Law which deal directly with the constitutional protections afforded to public officers in respect of their pay.

79. In my judgment, arts.6 and 105 extend their protection to existing rights in property, not to anticipated rights, rights still uncertain as to their delineation. In short, they do not extend their protection to what in effect is no more than an expectation."

At paragraphs 81 – 85, the CFI said that the reduction of pay did not amount to either formal or *de facto* deprivation of property under BL 105:

"81. Deprivation, in its ordinary sense, means the action of dispossessing or divesting; the word 'divesting' itself meaning to strip or rid of possessions, rights or attributes. The word therefore looks to an extinction rather than a restriction or limitation. That certainly appears to be the interpretative approach adopted by the European Court of Human Rights in respect of Art.1 of the First Protocol of the European Convention …

83. In looking to whether there has been a *de facto* deprivation, the underlying realities must be taken into account. That has been the approach of the European Court. In *Sporrong and Lonnroth v. Sweden* (1982) 5 E.H.R.R.

35 (para.63) the Court said:

In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearance and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are 'practical and effective', it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants.

84. In light of the underlying realities, has the Ordinance brought about a *de facto* deprivation of the property of public officers; namely, their pay and their rights to pay in terms of their contracts of employment? In my opinion, it has not. Pay has been reduced, yes, but only by the percentages stated in para.2 *supra*; that is, by 4.42% for upper band officers, 1.64% for those in the middle band and 1.58% for those in the lower band. Importantly, in my view, these reductions have been calculated by exact adherence to a long established mechanism for assessing the changing pay levels of public servants …

85. Accordingly, while I accept that pay has been limited and rights under contract restricted, I fail entirely to see how it can be said that there has been such a substantial interference with either the pay of public officers or their rights in respect of pay in their contracts of employment as to constitute a 'deprivation' of their property in terms of art.105."

Regarding the applicant's challenge that Cap. 574 contravened BL 25 since judicial officers and judges had been given favourable treatment, the CFI held at paragraphs 94 – 95 that:

"94. Access to the public service in Hong Kong is on 'general terms of equality'. In *R v. Man Wai Keung (No.2)* (1992) 2 HKPLR 164, the Court of Appeal per Bokhary J (as he then was) observed that—

Clearly, there is no requirement of literal equality in the sense of unrelentingly identical treatment always. For such rigidity would subvert rather than promote true even handedness. So that, in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment. And any departure therefrom must be justified. To justify such a departure it must be shown: one, that sensible and fair minded people would recognize a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need.

95. In my judgment, the fundamental requirement in any society governed by the rule of law to ensure the independence of the judiciary was quite manifestly the reason why the Ordinance exempts judicial officers and judges from the pay reduction. Protection of judicial remuneration is given expression in numerous common law jurisdictions in constitutional or statute form as a means of ensuring judicial independence. That being so, the Ordinance, in departing from literal equality, did so, in my view, for a legitimate purpose and, in the absence of evidence to the contrary, must be held to have done so in a way that meets the three tests propounded in *Man Wai Keung*."

Ch'ng Poh v The Chief Executive of the Hong Kong Special Administrative Region (unreported, 3 December 2003, HCAL 182 of 2002)

Background

In July 1994, the applicant was convicted of two offences (conspiracy to defraud a publicly listed company, and of publishing a false statement). He was sentenced to imprisonment. His appeals were dismissed. He served his sentence and was released in February 1998.

In January 2000, the applicant petitioned the CE seeking either a pardon or the agreement of the CE to exercise his power under s. 83P of the Criminal Procedure Ordinance (Cap. 221) to refer his case to the CA for fresh consideration, contending that fresh evidence had come to light which would have had a material impact on the appeal. In around July 2002, the CE rejected the petition. The applicant was then informed, but no reasons had been provided.

The applicant commenced judicial review application against the CE's decision on his petition.

Basic Law provisions in dispute

The Basic Law provisions in dispute were BL 11 and BL 48(12).

What the Court held

The Basic Law and Cap. 221 did not dictate the procedure to be adopted by the CE in discharging his responsibilities, and the CE could delegate to those given the task of advising him, subject to a fair procedure. Such concept of fairness was a flexible, changing concept dependent on the context. But a process chosen could not be struck down simply because a petitioner believed a fairer one should have been chosen; it must be shown objectively that the process chosen was in fact unfair.

Whilst the merits of the decision of the CE pursuant to BL 48(12) were not open to review, the lawfulness of the process was. The courts had jurisdiction to hear such a challenge.

It was open to the CE to look at all relevant matters when considering a pardon. Pardons are not to be given lightly. The materials supporting them should not be considered within artificial parameters.

The applicant relied on an allegation that an affidavit sworn by the prosecuting authorities was unfair and misleading (a fact he only discovered later). But as the accusations made against the affidavit were found to be wrong and unmeritorious, no claim of apparent bias could arise, as a bare claim was not itself sufficient. Those within the Department of Justice could not be said to have been pre-disposed against the applicant. There was no conflict of interest or real risk of injustice having occurred as a result of bias, unconscious or otherwise.

Fairness required that all submissions of relevance were reported to the CE, but not that all submissions were necessarily placed physically before the CE. In this case, those advising the CE had laid out the whole story before the CE so that a properly informed decision could be made. Failure to physically place two documents before the CE did not render the procedure unfair.

There was no rule that an oral hearing must be given as some flexibility must be inherent in the process.

As a matter of fact, the judge also held there was no failure to render fair and balanced advice. Those serving the CE were expected to employ their knowledge and experience of the law, of how evidence was to be viewed in context. To decide whether advice given was one-sided and

hence unfair required objective consideration of the advice as a whole, and was in many respects an intuitive exercise. In this case, reading the advice given in light of the matters raised in the petition and other documents, it was a fair advice.

What the Court said

At paragraphs 21 – 22, Hartmann J (as he then was) set out the principles governing what was meant by "fairness":

"21. I will turn shortly to a consideration of art.48(12) of the Basic Law and s.83P of the Ordinance. At this juncture, however, it suffices to record that neither the Basic Law nor the Ordinance dictates the procedure to be adopted by the Chief Executive in discharging his responsibilities under those two instruments. That being the case, the authorities are unambiguous in saying that it must rest with the decision maker himself; in this case, the Chief Executive, to determine the most appropriate procedure. In respect of the Chief Executive, that determination in practice is delegated to those given the task of advising him. The procedure, of course, must be fair. The concept of fairness is not written in stone; it is a flexible, changing concept dependent on the context in which it is exercised. The seminal description, in my view, was given by Lord Mustill in *R v. Home Secretary, ex parte Doody* [1994] 1 AC 531, at 560, when he spoke of the concept in its general sense:

What does fairness required in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the

decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

22. But if it is for the decision maker to determine the most appropriate procedure, one which adheres to the principles of fairness, it cannot be the case that the process chosen can be struck down as being unfair simply because, in the view of a petitioner, a process that is more fair to him should have been chosen. What must be demonstrated is that, viewed objectively, the process chosen was in fact unfair. …

The core issue therefore in the present case may be expressed in the question: has the applicant shown that the procedures adopted in bringing his petition before the Chief Executive, judged objectively, were not simply capable of being more fair but were actually unfair?"

At paragraphs 34 – 38, the judge explained the basis of the Chief Executive's powers:

"34. In Hong Kong, the power vested in the Chief Executive pursuant to art.48(12) is to be read within the context of the Basic Law itself, our primary document of constitution. It is the Basic Law which gives the power and fashions its nature. Art.11 of the Law (which appears in Chapter 1 under the heading 'General Principles') speaks to this in the following terms:

In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law.

35. Art.11 defines the basis of executive power. That power is to be found not by looking to the history of the royal prerogative but by looking at the Basic Law itself, a Law that protects the fundamental freedoms of all residents. In my judgment, it is evident that the Basic Law, while giving the Chief Executive certain prerogative powers, does not seek to place him above the law; his powers are defined by and therefore constrained by the Basic Law. The Chief Executive is a creature of the Basic Law and he enjoys

no powers, no rights or privileges which are not afforded to him by that Law. That being the case, I do not see that his powers exercised pursuant to art.48(12) can be classified as purely personal acts of grace, a species of private acts carried out by the official who, in terms of art.43, is the head of the HKSAR. To the contrary, when the Chief Executive acts pursuant to art.48(12), in my judgment, he acts within the greater constitutional scheme, a scheme which looks to the protection of the rights of all residents according to law …

37. In my judgment, it would offend the Basic Law — and do so manifestly — if, for example, those advising the Chief Executive in respect of his discretion under art.48(12) were able with impunity to subvert the honesty of that advice on the basis of racial, sexual or religious grounds or were able with impunity to refuse to put before the Chief Executive evidential material which did not for whatever reason suit their private ends. If such was the case, the Chief Executive would not, in making a determination on the basis advice, be discharging his obligations in terms of the Basic Law. That is because the Basic Law, as a document of constitution that safeguards the rights and freedoms of all residents in accordance with law (see : art.4), does not permit such pollution of lawful process, executive or otherwise.

38. In the circumstances, I am satisfied that in terms of the Basic Law, while the merits of any decision made by the Chief Executive pursuant to art.48(12) are not subject to the review of the courts, the lawfulness of the process by which such a decision is made is open to review. Accordingly, the applicant's challenge in respect of art.48(12) is not vitiated by a lack of jurisdiction."

The judge explained at paragraph 111 that the CE was not exercising a judicial function in considering the exercise of the prerogative of mercy:
"111. As to the contention that in appropriate cases the Chief Executive should himself hear oral representations, it must be remembered that, in considering the exercise of the prerogative of mercy, he is exercising a purely discretionary function not a judicial one. He does not sit as a court. He is not constrained by the laws of evidence and, in my judgment, it would be wrong in principle for this court to impose judicial or quasi-judicial procedures and attitudes on what is the essence of an executive act. Nor can the practical ramifications be ignored. What is to be the extent of an oral hearing? Is the petitioner or his counsel only to be heard? What of the prosecuting authorities, are they to be denied the right to be present and, if appropriate,

to render assistance? In short, is a hearing to be *ex parte* or *inter partes*? If only *ex parte*, may that not offend the *audi alteram partem* principle? If oral representations can be made, can a witness also be called, one perhaps whose assertions are contested? If so, can the witness be cross-examined? What emerges is a form of judicial hearing; that at least must be the danger, one that constrains the broad exercise of executive discretion. In *McInnes v. Onslow-Fane* [1978] 1 WLR 1520, at 1535, Megarry VC warned that 'the concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens'. That, it was said, cannot be in the public interest. I consider that warning to be applicable to the present case."

Secretary for Justice v Penta-Ocean Construction Co Ltd & Others [2004] 1 HKC 414

Background

The respondents were joint venture that were pre-qualified to submit a tender for an engineering works contract for the Central Reclamation Phase III (the "Contract"). The procurement for the Contract was subject to the provisions of the Agreement on Government Procurement of the World Trade Organization ("WTO GPA"). The respondents' tender was not successful. The respondents lodged a bid challenge in accordance with the Rules of Operation of the Review Body on Bid Challenges ("Review Body"). A Panel was appointed by the Review Body to consider the respondents' challenge.

The respondents and the procuring entity, the Territory Development Department, had a dispute over the production of certain documents. The respondents applied *ex parte* for a writ of subpoena under Order 38 rule 19 of the Rules of the High Court (Cap. 4A) for the production of the documents. A Master granted the writ.

The Secretary for Justice, on behalf of the Territory Development Department, sought to set aside the writ. The parties then reached an agreement as to the production of certain documents and to discontinue

the writ.

The main issue to be determined was whether the Panel appointed by the Review Body was a tribunal recognized by law such that the court's jurisdiction to issue the subpoena could be invoked to assist the Review Body to compel the production of the subject documents.

Basic Law provisions in dispute

The CFI referred to BL 106 and BL 110 in giving its judgment.

What the Court held

The CFI held that the essence of a tribunal were that (i) the body must have derived its power from a lawful source of authority; (ii) it must exercise its power for the interest of the public; (iii) it had the duty to act judicially in dispensing justice; and (iv) there was in place a mechanism which would give effect to its decision. On the facts, the Court found that the Panel appointed under the Review Body of the WTO GPA satisfied all of the first three limbs of the above test but there was no mechanism in place to give effect to the Panel's recommendations to make monetary compensation. Hence the recommendations of the Panel had no binding effect and no force of law. The Review Body was not an inferior tribunal recognized by law on this ground alone.

It was held that the court had no jurisdiction under Order 38 rule 19 to issue the subpoena since the Panel or the Review Body was not an inferior tribunal recognized by law. The Court concluded that the subpoena should be set aside.

The Court recognized that though the HKSAR was not a sovereign state, it enjoyed a high degree of autonomy in its independent finances.

What the Court said

The Court referred to BL 106 and BL 110 at 422B – 423E:

"12. Though the Hong Kong SAR is not a sovereign state, it enjoys a high degree of autonomy. Under art 106 of the Basic Law, the Hong Kong SAR shall have independent finances. In respect of financial matters, the Hong

Kong SAR is its own sovereign. Article 110 of the Basic Law provides that the monetary and financial systems of the Hong Kong SAR shall be prescribed by law. Accordingly, the Public Finance Ordinance (Cap 2) of Laws of Hong Kong, provides the statutory framework for the control and management of the public finances of the Hong Kong SAR … though the Review Body was not constituted by any statutory authority, it derives its power to determine the validity of a bid challenge and the recommended corrective measures or compensation from a lawful source, i.e. the Stores and Procurement Regulations made under the Public Finance Ordinance."

Solicitor v Law Society of Hong Kong (Secretary for Justice, Intervener) (2003) 6 HKCFAR 570

Background

The appellant was the sole practitioner of a firm of solicitors. He was found by the Solicitors Disciplinary Tribunal to have breached the Solicitors Practice Promotion Code. The appellant's appeal to the CA under s. 13 of the Legal Practitioners Ordinance (Cap. 159) was dismissed. He appealed to the CFA. An issue arose as to whether the CFA had jurisdiction to entertain the appeal, given the finality provision under s. 13 of Cap. 159 which provided that the decision of CA on the appeal against the Tribunal "shall be final" ("Finality Provision").

In dealing with this issue, two sub-issues arose, namely: (i) whether the Finality Provision was part of the laws of Hong Kong; and (ii) whether it was consistent with BL 82.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 8 and BL 82. BL 18 was also referred to by the CFA.

What the Court held

The CFA allowed the appeal and found that the Finality Provision was

repugnant and remained absolutely void. The Finality Provision had no force at all before 1 July 1997 and could not be a law previously in force in Hong Kong under BL 8. As a result, it could not be part of the laws in Hong Kong on or after 1 July 1997.

The CFA recognized that the power of final adjudication in the CFA, vested by virtue of BL 82, could be limited by the legislature but the limitation imposed must pass the "proportionality test". Under s. 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484), it was only possible to appeal to the CFA in narrowly defined circumstances, i.e. the issue was "of great general or public importance or otherwise". The absolute ban imposed by the Finality Provision constituted a further limitation and was not reasonably proportionate to any underlying legitimate purpose. Therefore, the proportionality test had not been satisfied and the Finality Provision was held to be unconstitutional and invalid under the Basic Law.

What the Court said

The CFA held at 579F – 580A that the Finality Provision was not part of the laws of Hong Kong on 1 July 1997:

"11. The continuing of existing laws is a most important theme of the Joint Declaration and the Basic Law. Article 8 of the Basic Law (in Chapter 1: General Principles) provides:

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Article 18(1) provides that the laws in force in the Region 'shall be this law, the laws previously in force in Hong Kong as provided for in art. 8 of this Law, and the laws enacted by the legislature of the Region.' The courts shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in art.18: art.84. By virtue of art.160, upon the establishment of the Region on 1 July 1997, the laws previously in force in Hong Kong were adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declared to be in contravention of the Basic Law.

12. It is clear from these articles of the Basic Law that the laws previously *in force* in Hong Kong, including ordinances, have been maintained and are part of the laws in force in Hong Kong on and after 1 July 1997. Obviously, a law which was previously not in force does not qualify."

The CFA considered the words "in force" at 582A – D:

"20. … The Colonial Laws Validity Act 1865 of course ceased to apply to Hong Kong on 1 July 1997. But under the relevant articles of the Basic Law, only laws previously *in force* in Hong Kong form part of our laws on 1 July 1997. The words 'in force' must be given their proper meaning. The effect of repugnancy was provided for in the plainest terms by the Colonial Laws Validity Act 1865. The repugnant finality provision was and remained absolutely void and inoperative. Such a provision simply had no force at all prior to 1 July 1997 and could not be a law previously in force in Hong Kong. This conclusion is consistent with the observation by Lord Diplock in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 at p.1161A that under the Colonial Laws Validity Act 1865, a repugnant law 'will be void and inoperative and will not be the law of Hong Kong'."

The CFA discussed the nature of its final adjudicative power vested by BL 82 at 584D – F:

"29. Having regard to the purpose of the Court's establishment and the context of the hierarchy of courts, it is clear that the Court's power of final adjudication, as contemplated by the Basic Law, is by its nature, a power exercisable only on appeal and indeed on final appeal. The Court's function as envisaged by the Basic Law is not merely to exercise an appellate power, but a *final* appellate power which, by its nature, is usually exercisable upon appeal from an intermediate appellate court, such as the Court of Appeal."

The CFA acknowledged the power of final adjudication required regulation, which might include limitations, at 584F – 585D:

"30. That being the nature of the power of final adjudication vested in the Court of Final Appeal by art. 82, it is obvious that the intent of the Basic Law was not to give every party to every dispute a right to have the dispute resolved by final adjudication by the Court. By its very nature, the Court's power of final adjudication vested by art. 82 calls for and indeed requires regulation, which may include limitation. Such limitation is permitted by implication, having regard to the nature of the power. It may be dealt with by the enactment of statutes by the legislature or it may be dealt with

by rules of court made by the rules committee exercising subordinate legislative powers.

31. Courts do not have inherent appellate jurisdiction. Appeals are creatures of statutes, whether they be appeals from statutory tribunals to the courts or appeals from lower courts to higher courts. (In this case, one is not concerned with and need not discuss the right to seek judicial review from the courts). The legislature in providing for appeals in statutes may limit recourse to the Court for final adjudication and thus, may limit its power of final adjudication to appeals permitted by such statutes. But limitation cannot be imposed arbitrarily by the legislature. The limitation imposed must pursue a legitimate purpose and there must be reasonable proportionality between the limitation and the purpose sought to be achieved. These dual requirements will be referred to collectively as 'the proportionality test'.

32. In the exercise of their independent judicial power, it is the duty of the courts to review any legislation enacted which seeks to impose any limitation on the power of final adjudication vested in the Court by art.82 and to consider whether the limitation satisfies the proportionality test. If the courts decide that it does not satisfy this test, the limitation must be held to be unconstitutional and hence invalid. The limitation imposed would have exceeded the parameters of proper limitation of the Court's power of final adjudication vested by art.82."

The CFA held at 586F – 587A that the Finality Provision was unconstitutional:

"38. Section 13 provides for a statutory right of appeal from a decision of the Tribunal to the Court of Appeal. Having been entrusted with the task by statute, the Tribunal's decision on matters of professional discipline of solicitors carries considerable weight and the Court of Appeal will only interfere if satisfied that the Tribunal was plainly wrong. …

39. In the absence of the finality provision, any further appeal to the Court from a judgment of the Court of Appeal under s. 13 is already limited by s. 22(1)(b) of the Court of Final Appeal Ordinance. Such an appeal is only permitted where the Court of Appeal or the Court in its discretion grants leave on being satisfied that the criteria set out in s. 22(1)(b) are satisfied, namely, that the question is one 'which, by reason of its great general or public importance or otherwise' ought to be submitted to the Court for decision. Thus, the finality provision constitutes a further limitation. The

limitation is an absolute one and precludes any appeal to the Court, even where such criteria are satisfied.

40. But, as stated above, s. 22(1)(b) permits an appeal from the Court of Appeal only in narrowly defined circumstances: where the question is one which should be submitted to the Court by reason of its great general or public importance, or otherwise. The total ban imposed by the finality provision where questions of this order of importance arise cannot, in my view, be said to be reasonably proportionate to any legitimate purpose which may underlie the finality provision."

Director of Immigration v Lau Fong (2004) 7 HKCFAR 56

Background

The respondent was a non-permanent resident who held a Hong Kong identity card. She was refused permission to land under s. 11(1) of the Immigration Ordinance (Cap. 115) after being examined by an immigration officer under s. 4(1) of Cap 115. The decision to refuse permission to land was on the grounds that (a) the respondent's one-way Permit for her settlement in Hong Kong was obtained by fraud and her resident status in Hong Kong should be revoked; (b) her permission to stay in Hong Kong had expired on her last departure pursuant to s. 11(10) of Cap. 115; and (c) her previous permission to land and remain in Hong Kong and her identity card were vitiated by the fraud.

The respondent's application for judicial review of the above decision was dismissed by the CFI, but the CA found in favour of the respondent. The Director of Immigration ("Director") appealed to the CFA, arguing that the respondent was not a non-permanent resident under BL 24 as her previous permission to remain and resident status was obtained by fraud and therefore BL 31 (regarding freedom to travel) did not apply.

Basic Law provisions in dispute

The major provisions in dispute were BL 24 and BL 31.

What the Court held

According to BL 24, non-permanent residents of the HKSAR were persons qualified to obtain Hong Kong identity cards in accordance with the laws of the HKSAR. The CFA held that an identity card amounted to official recognition and confirmation that the holder was a resident of Hong Kong, subject, in the case of non-permanent resident, to the holder having, at any given time, unexpired permission to remain in Hong Kong. An identity card was valid until declared invalid.

As to the respondent's status and her right to travel under BL 31, the CFA held that the respondent's status as a non-permanent resident could not be determined on the procedure adopted by the Director, given that such procedure adopted was only appropriate for simple, straightforward cases, but not in important cases where an issue of resident status was involved, for which there was another appropriate procedure. In the absence of a determination of the respondent's status according to the appropriate procedure, the CFA held that preventing the respondent from entering Hong Kong was an interference with her constitutional freedom to travel under BL 31.

What the Court said

At 60C – E, the CFA discussed non-permanent residents' right to travel under BL 31:

"6. The appeal raises important questions of constitutional and immigration law. In *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 (*Gurung),* this Court decided that when a non-permanent resident returns to Hong Kong during the currency of a previous permission to remain, he or she is entitled to be readmitted by virtue of art.31 of the Basic Law (the freedom to travel) and that s. 11(10) of the Immigration Ordinance (Cap.115) (the Ordinance) does not apply. The principal issue in the appeal is whether the same conclusion follows if an immigration officer concludes that the previous permission to remain and the status of non-permanent resident was obtained by fraud or deception. In such a case, does an immigration officer have power under s. 11(1) of the Ordinance to refuse permission to enter Hong Kong, to remove the person from Hong Kong under s. 18(1) of the Ordinance and to detain him from s. 32 pending removal?"

The CFA discussed the qualifications of non-permanent residents at 64H – 65B:

"31. Article 24 defines the non-permanent residents of the Hong Kong Special Administrative Region. They:

… shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the Region but have no right of abode.

Although art.31 of the Basic Law confers on non-permanent residents certain rights and freedoms, including 'freedom to travel and to enter or leave the Region', their status as non-permanent residents rests on their having qualifications prescribed by the laws of Hong Kong.

32. For these qualifications it is necessary to turn to the ROP Ordinance and Regulations. Every person in Hong Kong is required to be registered under that Ordinance, unless exempted or excluded by the s. 3(1). The respondent was not exempted or excluded. Application for registration is to be made in the manner prescribed by regulations made under s. 7 (s. 3(2))."

At 66B – I, the CFA discussed the legal significance of an identity card:

"37. … an identity card amounts to official recognition and confirmation that the holder is a resident of Hong Kong, has satisfied the qualifications for registration and, in the case of a non-permanent resident, that he has the status of a non-permanent resident of Hong Kong, subject to the holder having, at any given time, unexpired permission to remain in Hong Kong.

38. It has to be recognized that an identity card is valid until declared invalid and that it is an official document which, subject to the qualification just mentioned, recognizes and confirms that the holder is a resident of Hong Kong, thereby indicating that he has satisfied the qualifications for registration and, in the case of a non-permanent resident, that he has the status of a non-permanent resident of Hong Kong. …

39. The Director's case is that art.24 defines the class of non-permanent residents by reference to their qualifications to obtain Hong Kong identity cards not by reference to their holding such cards. There can be no argument about that. The point of the definition is to include in the class of non-permanent residents those who do not yet hold identity cards but are qualified to obtain them in accordance with the laws of Hong Kong. But it does not follow that the holding of a non-permanent identity card, subject to the holder having, at any given time, unexpired permission to remain in Hong Kong, is of no effect simply because facts of the kind referred to in reg.19(2C) and (3) exist or may exist. Article 31 links the status of a non-

permanent resident to the laws of Hong Kong and, under those laws, the respondent was recognized as having the relevant qualifications until appropriate steps were taken under those laws to establish that she lacked those qualifications."

At 67A – C, the CFA said that s. 11(10) of Cap. 115 had no application on the respondent:

"40. … Although the respondent had, at the time of her re-entry into Hong Kong, an unexpired permission to remain in Hong Kong, the Director argues that this permission had expired earlier on her departure from Hong Kong, pursuant to the operation of s. 11(10). Whether s. 11(10) applied to the respondent depended upon her status as a non-permanent resident. *Gurung* decided that s. 11(10) does not apply to such a resident with an unexpired permission to remain when the resident seeks to re-enter Hong Kong in the exercise of the freedom to travel under art. 31 of the Basic Law."

The CFA held that the procedure adopted by the Director to determine the respondent's resident status was not authorized by law at 68G – 69A:

"45. It follows, as a matter of interpretation of the Ordinance and the ROP Ordinance and Regulations, that the procedure adopted by the Director was not authorized by the Ordinance. It would be surprising if it were otherwise. Had the respondent not sought to exercise her constitutional freedom to travel under the Basic Law flowing from the non-permanent status she enjoyed by virtue of her permission to remain in Hong Kong and her identity card, the Director would plainly not have been able to resort to ss 4(1)(a), 11 and 18. He would have been compelled to resort to s. 19 with its attendant safeguards.

46. In the circumstances, the actions of the Director amounted to an interference with the exercise by the respondent of her constitutional freedom to travel, on the basis of an administrative decision that her permission to remain in Hong Kong had been procured by fraud, a decision taken under a procedure which did not incorporate the safeguards appropriate to the determination of the important issue of status under the Basic Law. In the absence of a determination of that issue according to the appropriate procedure, preventing the respondent from entering Hong Kong was an interference with her constitutional freedom to travel under the Basic Law."

Raza & Others v Chief Executive in Council & Others [2005] 3 HKLRD 561

Background

On 25 February 2003, the CE in C made two Orders:

a. approving the scheme for importation of foreign domestic helpers ("FDHs") as a "labour importation scheme", pursuant to s. 14(3) of the Employees Retraining Ordinance (Cap. 423), which made their employers liable, from 1 October 2003, to pay a levy to the Government of $400 per month in respect of each helper employed; and

b. ordering that, with effect from 1 April 2003, the minimum allowable wage of FDHs should be reduced by $400 per month.

The applicants, who were FDHs, challenged both Orders on various grounds, including:

a. the two Orders, read together, constituted in substance a tax on the applicants, which was unlawful in that it had not been approved by the Legislature as demanded by BL 73(3);

b. the levy was a discriminatory tax upon the employers of FDHs and, through them, upon FDHs too. As a discriminatory tax, the levy infringed Article 26 of the ICCPR; and

c. there had been no gazettal or publication of the "labour importation scheme". The applicants argued that the scheme did not amount to "law". The levy, based on the scheme, was unlawful deprivation of property in breach of BL 105.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 73(3) and BL 105.

What the Court held

The application for judicial review was dismissed. The CFI held that the two Orders did not create a tax on FDHs. The constitutional requirement

of LegCo approval under BL 73(3) did not arise. The Court held that the levy was not discriminatory as the levy served a legitimate purpose and was objective and reasonable. As the labour importation scheme had no legislative effect and as the levy was not a tax, the lack of publication would not engage BL 105."

What the Court said

At 584G – H and 585E – H, the Court considered that the levy was a fee charged for a privilege:

"77. I have found that the levy, while imposed on their employers, has not been imposed on foreign domestic helpers themselves. But even if I am wrong in that regard, I have come to the conclusion that in any event the levy does not constitute 'taxation' for the purposes of art.73(3)."

"79. In my judgment, at its heart, the levy imposed under the Ordinance is a fee charged for taking up a privilege. In this regard, it seems to me that the Ordinance is to the following effect. Hong Kong has long administered a restrictive policy of immigration. In the ordinary course, therefore, an employer may only engage a person to work in Hong Kong who has the right to reside here. He may not engage a person who does not have that right. If, however, the Chief Executive in Council, in terms of an approved scheme, permits persons to enter Hong Kong to work who would otherwise not have that permission, and if an employer wishes to take advantage of that special concession (i.e. that privilege) then that employer must pay a fee for that advantage."

The Court pointed out that the levy had not been imposed to raise general revenue. The Court said at 586 B – E:

"81. I believe it is significant that in the present case, the levy has not been imposed in order to raise general revenue for the Government. The levy has been imposed on one segment of society (employers of foreign domestic helpers) for the benefit not of the state at large but for one other segment of society (unskilled workers). That, in my view, constitutes in substance the expropriation of money from one group for the benefit of another.

82. To approach the matter from a slightly different angle, taxes normally constitute general revenue for the government although they may of course be raised for specific purposes. But the statutory scheme created by the Ordinance provides for levies raised to go not to the purse of the Exchequer

but instead direct to the Employees Retraining Board which may only use the monies for the purpose of increasing the vocational skills of local workers. That again does not seem to me to a mark of 'taxation'."

The Court also considered relevant that the levy constituted no more than a civil debt. The Court said at 586I – 587A and 587E – G:

"85. In the present case, however, as I have read the Ordinance, a failure by an employer to pay a levy constitutes no more than a civil debt recoverable as any civil debt is recoverable in private law. There is no criminal sanction nor any statutory compulsion visiting a failure to make payment. Nor does the Ordinance provide the Administration with any special evidential tool to enhance its management of the levy scheme."

"87. It seems to me that there is nothing in the Ordinance which, expressly or by necessary implication, states that a failure on the part of an employer to pay a levy constitutes a criminal offence.

88. As I have said, the levy due under the Ordinance is, of course, payable like any private, unsecured debt is payable and an employer who does not pay may be sued. But, as Lord Shankerton observed in the *Mainland Diary Products* case, 'compulsion is an essential feature of taxation'. Clearly, the compulsion he spoke of was something greater than the law gives to every citizen who is owed an unsecured debt by another. But, on a true construction of the Ordinance, no such compulsion applies to the levy."

The Court concluded at 588A – B that the levy was not a "tax":

"90. … I have been drawn to the conclusion that s. 14 of the Ordinance is not a taxing provision. A levy imposed pursuant to that section is not a 'tax'. It is instead more in the nature of a fee charged for the privilege of employing non-local workers who would otherwise not have permission to work here."

The Court set out the relevant principles in considering whether the levy constituted a discriminatory law. The Court said at 594H – 595B:

"120. … the issue of whether the levy constitutes a discriminatory law may be defined as follows:

(i) On the accepted basis that persons who seek to work in Hong Kong are treated differently, can it be shown that the policy is nevertheless objective and reasonable?

(ii) Or, to express it as it was expressed in *R v. Man Wai Keung (No.2)*, can it be shown, first, that sensible and fair-minded people would recognize a genuine need for some difference of treatment, second, that the

difference in treatment is rational and, third, that it is proportionate to the need?

(iii) In looking to these issues, as they concern socio-economic matters, a wider margin of appreciation must be given to the legislature and the policy-makers than would be given in respect of matters concerning rights that are fundamental."

At 595E – H, the Court said the levy served a legitimate purpose:

"122. In my judgment, the purposes of the levy must be legitimate. The report of the task force has spoken of an increasing mismatch of demand for skills and the ability of our local workforce to supply those skills. According to the report — its findings not being disputed — there is already an over-supply of lower-skilled workers, a situation which can be expected to worsen. Lower-skilled workers can therefore expect greater competition for available jobs and greater pressure placed on them to accept lower wages. As the report noted: 'This will bring about social and welfare ramifications'. Translated into common parlance, this may be understood to mean greater discontent among the lower-skilled and higher unemployment in their ranks leading to greater demands on the social welfare system. No government wants such a situation. One rational answer of course is to teach vocational skills to the lower-skilled."

The Court further found the levy to be reasonable. The Court said at 596I – 597D:

"130. The applicants say that the imposition of the levy on the employers of some imported workers and not on others is unreasonable. If there is to be a levy then, to be reasonable, it should be imposed on all imported workers whatever their differences in skill levels.

131. I disagree. The report of the task force made it clear that Hong Kong needs higher-skilled workers and that without them the economy as a whole will suffer. The report also made it clear that there was competition in many places in the world to attract skilled workers. If higher-skilled workers (and the companies that employed them) are to be attracted to Hong Kong then encouragement is required not bureaucratic discouragement. In the circumstances, again giving a wide margin of appreciation to the Administration, I do not see how it can be said to be disproportionate to the aim to be achieved to say, as the policy does say: Hong Kong has a pressing requirement for higher-skilled workers (bankers, accountants, technical experts, lecturers and the like) and they will be encouraged to

work here without hindrance for the greater social and economic good of the community. But if a lower-skilled worker is to be imported then the employer of that worker must assist to train and retrain the surfeit of lower-skilled workers who are already here and, as permanent residents of Hong Kong, have a legitimate call to be assisted in securing suitable vocational skills."

The Court concluded at 597J – 598C that the levy was not discriminatory:
"134. In all the circumstances, I am satisfied that the imposition of the levy is both objective and reasonable. To employ the test set out in *R v. Man Wai Keung (No.2)*, I am satisfied:

(i) That sensible and fair-minded people would recognize the genuine need for a difference in treatment between those who wish to employ higher-skilled workers (for whom there is a pressing economic need) and those who wish to take advantage of a labour importation scheme to bring in lower-skilled workers, including foreign domestic helpers, when Hong Kong has a surfeit of lower-skilled workers who themselves, unless given new skills, face an uncertain future.

(ii) That the difference in treatment by not imposing a levy on those who wish to bring in higher-skilled workers and imposing a levy on those who wish to bring in lower-skilled workers, having regard to the nature of the levy, is both rational and proportionate."

The Court also held that the lack of publication did not infringe BL 105. The Court said at 602I – 603E:
"155. It has been said on behalf of the applicants that, as there has been no formal authentication of the terms of the scheme nor formal publication in the Gazette, the scheme does not amount to a law for the purposes of art.105 of the Basic Law, the only means by which deprivation of property by way of taxation is lawful.

156. I have, however, in this judgment made two findings. First, I have found that the approval of the labour importation scheme by the Chief Executive in Council has had no legislative effect. To put it another way, it has not created a law. Second, I have found that the $400 per month levy charged to employers of foreign domestic helpers under the scheme does not constitute a tax.

157. The Ordinance does not require the Chief Executive in Council to approve a scheme and thereafter to publish it in the Gazette. The Ordinance

requires only that he approves a scheme. …

158. Provided the terms of administrative scheme are formulated with sufficient precision and are adequately accessible, there is no need for that scheme to be formally published."

Yeung May Wan & Others v HKSAR (2005) 8 HKCFAR 137

Background

The appellants demonstrated outside the Liaison Office of CPG in 2002. The demonstration was peaceful and included displaying a banner. The police commander at the scene concluded that the appellants were causing an obstruction. This was because people had to use the vehicular driveway and people using the pavement had to make detours. A series of police warnings were given but ignored by the appellants. They were arrested subsequently but they forcefully resisted the policy's attempts to remove them from the police vehicle when it arrived at the police station. The appellants were alleged to have assaulted the police officers in question. They were subsequently convicted of, *inter alia*, obstruction of public place, wilfully obstructing a police officer and assaulting a police officer.

Upon appeal to the CA, the convictions of public place obstruction were quashed but the latter two charges were upheld. The appellants then appealed to the CFA on the remaining convictions.

Basic Law provisions in dispute

The major provisions in dispute were BL 27 and BL 28. The CFA also referred to BL 39 and BL 41.

What the Court held

The CFA held at the outset that the fact that the appellants were at the time of arrest engaged in a peaceful demonstration meant that the

constitutionally protected right to demonstrate was engaged. This had an important bearing on the scope of the offence of obstruction and consequentially on the scope of police powers of arrest on suspicion of that offence.

The CFA held that where an obstruction to the public place resulted from a peaceful demonstration, it was essential that the protection given to the constitutional right to demonstrate under BL 27 was recognized and given substantial weight when assessing the reasonableness of the obstruction. The CFA ruled that the appellants would only be guilty of public place obstruction if they caused the obstruction without lawful excuse. A person who created an obstruction was not acting without lawful excuse if his conduct involved a reasonable use of the public place. In this regard, the CFA also pointed out that what was considered reasonable was a question of fact and degree depending on all the circumstances, including its extent and duration, time and place where it occurred and the purpose for which it was done. Having considered the findings and reasoning of the CA, the CFA endorsed the quashing of the convictions of public place obstruction.

As regards the power of arrest under s. 50(1) of the Police Force Ordinance (Cap. 232), the CFA held that such power had to be construed in accordance with BL 28 which provided for the freedom from arbitrary arrest. The CFA held that the arresting officer had to form a genuine suspicion that the person in question had committed the relevant offence, having in mind the material elements of the offence, and the suspicion must base on objectively reasonable grounds.

After having perused the evidence available, the CFA held that there was insufficient evidence to satisfy the objective requirement of reasonable suspicion of a public place obstruction without lawful excuse and therefore the police officers' arrest was unlawful. Accordingly, the wilful obstruction and assault convictions could not stand.

What the Court said

At 148D – E, the CFA (plurality) held that the freedom to demonstrate should be given a generous interpretation:

"1. The freedom to demonstrate is a constitutional right. It is closely associated with the freedom of speech. These freedoms of course involve the freedom to express views which may be found to be disagreeable or even offensive to others or which may be critical of persons in authority. These freedoms are at the heart of Hong Kong's system and it is well established that the courts should give a generous interpretation to the constitutional guarantees for these freedoms in order to give to Hong Kong residents their full measure."

The CFA (plurality) considered the bearing of constitutional rights in the present case at 154D – I:

"31. Central to the case is the fact that the arrests were made and the charges of public place obstruction laid against the defendants because of their conduct in the course of a peaceful public demonstration. This was not a simple case of obstruction, for instance, by inconsiderate parking of a vehicle or by dumping waste building materials on a road or by a hawker impeding pedestrians on a pavement. Here, the fact that the defendants were at the time of arrest engaged in a peaceful demonstration meant that the constitutionally protected right to demonstrate was engaged. Indeed, a peaceful demonstration, may also engage the closely related guaranteed freedoms of opinion, expression and assembly. Such fundamental rights, when engaged, have an important bearing on the scope of the offence of obstruction and consequentially on the scope of police powers of arrest on suspicion of that offence.

32. Article 27 of the Basic Law is directly in point and relevantly states:

Hong Kong residents shall have freedom of speech … of assembly … and of demonstration …

33. By art.39 of the Basic Law, constitutional protection is also given to freedom of opinion, of expression and of peaceful assembly as provided for in arts. 16 and 17 of the Hong Kong Bill of Rights, those articles being the equivalents of arts. 19 and 21 of the International Covenant on Civil Political Rights and representing part of the ICCPR as applied to Hong Kong."

The CFA (plurality) further elaborated at 157D – E:

"44. Where the obstruction in question results from a peaceful demonstration, a constitutionally protected right is introduced into the equation. In such cases, it is essential that the protection given by the Basic Law to that right is recognized and given substantial weight when assessing the reasonableness of the obstruction. While the interests

of those exercising their right of passage along the highway obviously remain important, and while exercise of the right to demonstrate must not cause an obstruction exceeding the bounds of what is reasonable in the circumstances, such bounds must not be so narrowly defined as to devalue, or unduly impair the ability to exercise, the constitutional right."

Delivering a separate concurring judgment, Bokhary PJ (as he then was) said at 185F – H:

"148. … The law also calls upon demonstrators to accommodate other people's rights, especially ordinary highway users' right of free passage. For that purpose demonstrators have to tolerate some interference with their own freedom to demonstrate. Such tolerance is expected of demonstrators however strongly they may feel about their cause. …"

At 159H – 160C, the CFA (plurality) considered the consequence of quashing the obstruction convictions:

"52. … The starting point is that every resident is entitled to freedom of the person. Anyone who seeks to interfere with that freedom can only do so with proper legal justification. This was well-established at common law and is now laid down in art.28 of the Basic Law …

53. If a person is subjected to an unlawful arrest by a police officer, the continued detention of that person pursuant to the arrest perpetuates the unlawfulness and constitutes a false imprisonment. It matters not that the continued detention is placed in the hands of officers other than the original arresting officers and it is irrelevant that the latter officers may know nothing of the circumstances of the arrest. The act of maintaining custody which is unlawful forms no part of the duty of any police officer and if he is obstructed or assaulted while doing so, he is not obstructed or assaulted while acting in the due execution of his duty. On the contrary, persons unlawfully in custody are entitled to use reasonable force to free themselves."

At 162E – H and 163E – F, the CFA (plurality) considered s. 50 of Cap. 232 in light of BL 28:

"61. It is true that, on its face, PFO s. 50 appears to provide two alternative bases for the exercise of the power of arrest: (i) where the officer reasonably believes that the arrested person will be charged with a relevant offence; and (ii) where the officer reasonably suspects that person of being guilty of a relevant offence.

62. However, art.28 of the Basic Law prohibits arbitrary arrest (as does art.5 of the Hong Kong Bill of Rights). If PFO s. 50 were to be construed as permitting a resident to be arrested where there is *no* reasonable suspicion that such person has committed any relevant offence, but merely where the arresting officer believes that (notwithstanding the absence of reasonable suspicion) the person in question will be charged with an offence, PFO s. 50 would open the door to arbitrary arrest.

63. The need for there to be some acceptable objective justification for an arrest, as reflected in a requirement of reasonable suspicion of guilt, is essential if residents are to be safeguarded from arbitrary arrest. …"

"66. If PFO s. 50 is to be construed consistently with our constitutional guarantees against arbitrary arrest, the provision authorizing a police officer to apprehend a person 'who he reasonably believes will be charged' must be read to mean 'who he reasonably believes will be charged *on the basis of a reasonable suspicion that the arrested person is guilty of the offence to be charged*'. So understood, the first limb of PFO s. 50 encompasses the second limb and does not eliminate or dilute the requirement for there to be a reasonable suspicion of guilt."

Leung Kwok Hung & Others v HKSAR (2005) 8 HKCFAR 229

Background

The appellants were convicted of holding an unauthorized assembly and assisting the holding of such unauthorized assembly under the Public Order Ordinance (Cap. 245). According to s. 14(1) of Cap. 245, the Commissioner of Police ("Commissioner") had a discretion to object to a public procession being held if he reasonably considered that the objection was necessary in the interest of "national security or public safety, public order (*ordre public*) or the protection of the rights and freedoms of others". The Commissioner also had a discretion to impose conditions to a public procession under s. 15(2) of Cap. 245. The appellants contended that the statutory scheme for regulating public processions was inconsistent with the right to freedom of assembly

protected by BL 27 and BoR 17.

Basic Law provisions in dispute

The major provision in dispute was BL 27.

What the Court held

The CFA held that the freedom of peaceful assembly was a fundamental constitutional right (as stipulated in BL 27 and BoR 17) which must be given a generous interpretation, and restrictions on it must be narrowly interpreted. The right could only be subject to restrictions that were:

(i) prescribed by law; and

(ii) necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others ("legitimate purposes").

The CFA held that the expression "prescribed by law" mandated the principle of legal certainty. A law which conferred discretionary powers on public officials, the exercise of which might interfere with fundamental rights, must give an adequate indication of the scope of the discretion. However, the concept of "public order (*ordre public*)" was an imprecise and elusive one. Its boundaries beyond public order in the law and order sense, i.e. the maintenance of public order and prevention of public disorder, could not be clearly defined. Accordingly, the CFA held that the Commissioner's discretion in relation to the purpose of "public order (*ordre public*)" under Cap. 245 was unconstitutional.

As to the "necessity requirement", the CFA applied the proportionality test which should be formulated in the following terms: (a) the restriction must be rationally connected with one or more of the legitimate purposes; and (b) the means used to impair the right of peaceful assembly must be no more than was necessary to accomplish the legitimate purpose in question.

In relation to the Commissioner's exercise of his statutory discretion to restrict the right of peaceful assembly, he must, as a matter of law, apply

the proportionality test. He must consider whether a potential restriction was rationally connected with a legitimate purpose and whether the potential restriction was no more than necessary to accomplish the relevant legitimate purpose. The CFA held that the legal requirement to apply the proportionality test in this context ensured the full protection of the fundamental right of peaceful assembly against any undue restriction.

The CFA decided that even though the Commissioner's discretion with "public order (*ordre public*)" as a purpose did not satisfy the "prescribed by law" requirement, there was no doubt that it covered "public order" (in the law and order sense). As "public order" (in the law and order sense) was sufficiently certain, the appropriate remedy would be the severance of public order from "public order (*ordre public*)" so that the Commissioner's discretion could satisfy the "prescribed by law" requirement and the necessity requirement.

What the Court said

At 248C – D, the CFA discussed the freedom of peaceful assembly:

"16. As has been emphasized at the outset of this judgment, the freedom of peaceful assembly is a fundamental constitutional right. It is well established in our jurisprudence that the courts must give such a fundamental right a generous interpretation so as to give individuals its full measure. … On the other hand, restrictions on such a fundamental right must be narrowly interpreted. … Plainly, the burden is on the Government to justify any restriction. This approach to constitutional review involving fundamental rights, which has been adopted by the Court, is consistent with that followed in many jurisdictions. Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them."

In relation to the "prescribed by law" requirement, the CFA said at 251B – C and H that:

"27. To satisfy this principle, certain requirements must be met. It must be adequately accessible to the citizen and must be formulated with sufficient precision to enable the citizen to regulate his conduct. …"

"29. A law which confers discretionary powers on public officials, the

exercise of which may interfere with fundamental rights, must give an adequate indication of the scope of the discretion."

The CFA held at 262A – C that the concept of "public order (*ordre public*)" was wide and its scope could not be clearly defined:

"69. There is no doubt that the concept of 'public order (*ordre public*)' includes public order in the law and order sense, that is, the maintenance of public order and prevention of public disorder. But it is well recognized that it is not so limited and is much wider …

70. But the concept is an imprecise and elusive one. Its boundaries beyond public order in the law and order sense cannot be clearly defined. …"

The CFA distinguished at 263H – 264E a requirement at statutory level from one at constitutional level:

"75. As has been observed, adopting an unusual technique, the concept of 'public order (*ordre public)*' used in the ICCPR has been incorporated into the Ordinance in relation to the Commissioner's discretion. The question therefore arises whether the Commissioner's discretion to restrict the right of peaceful assembly for the purpose of 'public order (*ordre public*)' satisfies the constitutional requirement of 'prescribed by law'.

76. In contrast to the use of the concept which is relatively abstract at the constitutional level, different considerations apply to its deployment at the statutory level. A statutory discretion conferred on a public official to restrict a fundamental right must satisfy the constitutional requirement of 'prescribed by law'. Such a discretion must give an adequate indication of the scope of the discretion with a degree of precision appropriate to the subject matter. The public official is part of the executive authorities which of course stand in a fundamentally different position from that of an independent Judiciary.

77. Here, the subject matter of the discretion is the regulation of public processions subject to the statutory scheme. As the situations that may arise for his consideration are of an infinite variety and would involve many different circumstances and considerations, it is important for the Commissioner to have a considerable degree of flexibility. But even taking this into account, the Commissioner's discretion to restrict the right of peaceful assembly for the statutory purpose of 'public order (*order public*)' plainly does not give an adequate indication of the scope of that discretion. This is because of the inappropriateness of the concept taken from the ICCPR as the basis of the exercise of such a discretionary power vested in

the executive authorities. That being so, the Commissioner's discretion to restrict the right for the purpose of 'public order (*ordre public*)' falls foul of the constitutional requirement of 'prescribed by law'. … Accordingly, the Commissioner's discretion in relation to the purpose of 'public order (*ordre public*)' in ss. 14(1), 14(5) and 15(2) of the Ordinance must be held to be unconstitutional."

The CFA applied the remedy of severance at 265D – G and 266A – C:

"83. As public order is sufficiently certain, the Commissioner's discretion to restrict the right of peaceful assembly for this purpose would give an adequate indication of its scope. It would satisfy the constitutional requirement of 'prescribed by law' and would be constitutionally valid. That being so, the essential question is whether the appropriate remedy is to sever public order from 'public order *(ordre public)*'. With such severance, one would only be left with public order. The part which is constitutionally valid remains after the severance of the part which is constitutionally invalid. …

85. Applying this approach, the constitutional part remaining after severance, namely public order, can independently survive. It can be said with confidence that had the Legislature appreciated the unconstitutionality of the rest of 'public order *(ordre public)*' in the context of the Commissioner's discretion to restrict the right of peaceful assembly, it would nevertheless have enacted the statute only with public order. Accordingly, the proper remedy is to sever public order from 'public order *(ordre public)*' in ss. 14(1), 14(5) and 15(2) of the Ordinance."

As to whether the restriction was necessary, the CFA applied the proportionality test at 267J – 268B and 268G – I:

"93. … the Commissioner's discretion to restrict the right in relation to public order should be held to be no more than is necessary to accomplish the constitutional legitimate purpose of 'public order (*ordre public*)'. It is limited to public processions consisting of more than 30 persons on a public highway or thoroughfare or in a public park. The discretion is of assistance in enabling Government to fulfil its positive duty. It is a limited discretion, constrained by the proportionality test. Adequate reasons have to be given for any objection or imposition of conditions. There is a right of appeal and a right of recourse to judicial review. …

96. In relation to the exercise of his statutory discretion to restrict the right of peaceful assembly, it must be emphasized that the Commissioner

must, as a matter of law, apply the proportionality test. He must consider whether a potential restriction is rationally connected with one or more of the statutory legitimate purposes and whether the potential restriction is no more than is necessary to accomplish the legitimate purpose in question. His discretion is thus not an arbitrary one but is a constrained one. The proportionality test is well recognized internationally as appropriate in relation to the protection of fundamental rights. The legal requirement to apply it in this context ensures the full protection of the fundamental right of peaceful assembly against any undue restriction."

Secretary for Justice v Lau Kwok Fai & Another (2005) 8 HKCFAR 304

Background

Two Ordinances, namely the Public Officers Pay Adjustment Ordinance (Cap. 574) and the Public Officers Pay Adjustments (2004/2005) Ordinance (Cap. 580) were introduced in the later part of 1997, among other things, to reduce public officers' pay. Mr Lau Kwok Fai and the others ("applicants"), public officers appointed before 1 July 1997, brought a judicial review to challenge the constitutionality of s. 10 of Cap. 574 and s. 15 of Cap. 580 (collectively, "provisions") that allowed adjustment of public officers' pay.

The applicants argued that the provisions were in breach of BL 100 which guaranteed that the conditions of contracts of service would not be less favourable than those before 1 July 1997. The applicants further challenged that the HKSARG's failure to conduct a Pay Trend Survey ("PTS") when assessing the adjustment of public officers' pay had contravened BL 103. They succeeded before the CA and the HKSARG appealed to the CFA.

Basic Law provisions in dispute

The provisions in dispute were BL 100 and BL 103.

What the Court held

The CFA allowed the appeal and ruled that the provisions effecting actual pay reductions were not in contravention of BL 100. BL 100 was to be given a purposive construction. The purpose of BL 100 was to preclude a legislative reduction of public officer's pay and to ensure the continuity of employment so that a public officer would be no worse off than he was before 1 July 1997. BL 100 did not seek to prohibit or inhibit changes to pay, allowances, benefits or conditions of service of public officers appointed before 1 July 1997, except to the extent that such changes were less favourable than before 1 July 1997.

The CFA held that the purpose of BL 103 was to preserve the continuity of Hong Kong's previous system. Preservation of system did not entail preservation of all of its elements. Some degree of change was to be expected for the good governance of the public service. The PTS was not so inherent an element in the pay adjustment scheme before 1 July 1997 that its omission would of itself constituted a breach of BL 103. A provision such as BL 103 designed to offer transitional protection to employees was not intended to stultify the processes of the HKSARG.

What the Court said

The CFA considered the nature of the two Ordinances at 313A – B:

"6. The two Ordinances were introduced as austerity measures following the South East Asian economic crisis which occurred in the later part of 1997 and had a profound impact on Hong Kong. The Ordinances were part of measures adopted to address what was regarded as a structural problem facing the Territory's public finances, which had resulted in persistent fiscal deficits."

The CFA considered that BL 100 must be given a purposive construction. At 320I – 321B, the CFA said:

"35. … art.100 must be given a purposive construction … In *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service* (unrep., HCAL No 9 of 1998, [1998] HKEC 161), Court of First Instance, Barnett J said of art.100 (at p.12):

… principally it is intended to ensure continuity of employment so that no public servant suffers as a consequence of the transition itself."

The CFA elaborated on the purpose and interpretation of BL 100 at 321B – F:

"35. … In stating that the principal object of art.100 was to ensure that a public officer would be no worse off than he was before 1 July 1997 in consequence of the transition, Barnett J was expressing the general understanding of transitional provisions of this kind governing continuation of employment. Continuity of employment, as provided by art.100, was an element in a more general theme of continuity reflected in the Basic Law of the Hong Kong Special Administrative Region …

36. The words 'no less favourable than before' are significant in two respects. First, the word 'before' means before 1 July 1997 so that it is the 'pay, allowances, benefits and conditions of service' immediately before that date which are identified as the standard by which the comparison of what is 'no less favourable' is to be made. Secondly, the article does not seek to prohibit or inhibit changes to pay, allowances, benefits or conditions of service of public officers appointed before 1 July 1997, except to the extent that such changes are less favourable than those entitlements before that date."

At 325D, the CFA concluded on BL 100:

"50. It follows from what I have said about art.100, that it operates only to preclude a legislative reduction of a public officer's pay below the level of pay which prevailed before 1 July 1997. The article does not guarantee any higher level of pay than that."

The CFA considered at 326G – 327C whether the provisions constituted conditions less favourable than before 1 July 1997:

"57. The critical question is whether the provision introduced into the contracts of service by ss. 10 and 15 renders the conditions of service of the relevant public officers 'less favourable' than they were before. If the effect of the two sections was to enable the Government by its future Executive action unilaterally to reduce public officers' pay and vary their conditions of service to that extent, it could be said that the legislation introduced provisions into the contract of service which exposed public officers to detrimental Executive action to which they were not exposed before 1 July 1997 and, in this respect, rendered their conditions of service 'less favourable' than they were before that date.

58. … The critical point is, however, that the two sections did not render the conditions of service less favourable than they were before 1 July 1997.

The conditions of service, both before and after that date, were exposed to a variation by way of a reduction of pay through legislative action which was not dependent for its validity on contractual authority. In these circumstances, neither s. 10 nor s. 15 introduced a term into the contracts which made the conditions of service 'less favourable' than they were before 1 July 1997, within the meaning of art.100 of the Basic Law of the Hong Kong Special Administrative Region."

As to the interpretation of BL 103, the CFA held at 330C – 330E:

"65. The second sentence of art.103 is designed to preserve the continuity of Hong Kong's previous *system* of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, excepting provisions for privileged treatment of foreign nationals. It is the continuity of that *system* that is preserved. Preservation of that system does not entail preservation of all the elements of which the system consists. Some elements may change and be modified or replaced without affecting the continuity of the system as a whole. Some degree of change is to be expected in any system governing the public service, not least in the aspects of the system mentioned in art.103. It could not have been contemplated that there was to be no change at all in the aspects of the system to which art.103 refers. …"

In this relation, the CFA further considered the broad and specific questions of BL 103 at 330G – H:

"66. The broad question is … whether the system continues or whether it is so materially changed that it becomes another system. The more specific question is whether the failure to conduct the PTS for the purposes of Cap.580 was such a material change that it resulted in the abandonment of the previous system, involving the prevention of the 'special bodies' responsible for pay and conditions from fulfilling their protected functions."

The CFA further elaborated at 330I – 331B:

"67. … what the second sentence in art.103 relevantly guarantees is the continuation of Hong Kong's system of public service 'employment' and 'management', not the continuation of any system of public service 'pay and conditions of service". Instead, it guarantees the continuation of the 'special bodies', whatever they may be, responsible for public service pay and conditions of service.

68. It follows that while these special bodies must be maintained, they are not obliged to maintain any previous mechanism regulating pay and conditions of service, such mechanism being only an element of the system. These bodies may change the previous mechanism regulating pay and conditions of service provided, as Hartmann J pointed out, that the change does not change the previous system of public service 'recruitment, employment, assessment, discipline, training and management'. Identification of the 'special bodies' requires an examination of the previous system of pay adjustment."

The CFA held at 332D – G the failure to conduct a PTS did not contravene BL 103:

"74. … the history of the Government's use of the PTS demonstrated that the Government had a discretion to take account of the principle of fair comparison but was not bound to do so. As the Government was able wholly to set aside a consideration of the fair comparison principle, it could be under no obligation to conduct a PTS when to do so would amount to a sterile exercise. In other words, the conduct of a PTS was not so inherent an element in the scheme of determining pay adjustments that a failure to conduct a survey would of itself, no matter what the circumstances, constitute a breach of art.103. In the nature of things, a provision which is designed to offer transitional protection to employees, such as art.103, is not intended to stultify the processes of government and prevent the capacity of government to reform and improve its processes when it appears that some aspect of the processes is serving no useful purpose or is not making a significant contribution to beneficial outcomes."

The CFA held at 332H – 333B that there was no requirement to maintain PTS under BL 103:

"75. … the PTS are carried out by a body called the Pay Survey and Research Unit ('the Unit'). This unit operates under the Standing Commission. The results of the surveys are then 'analyzed and validated' by the Pay Trend Survey Committee ('the Committee'). This committee is chaired by a member of the Standing Commission and has members drawn from the Standing Commission, the Standing Committee on Disciplined Services Salaries and Conditions of Service, the staff sides of the central consultative councils and the Government.

76. Hartmann J found that the Unit and the Committee produce gross pay indicators which are submitted to the Government so that adjustments

may be made according to a settled formula in order to produce net pay indicators. The Executive has regard to these net pay indicators in determining any pay adjustment. The staff sides of the central consultative councils are consulted before the Chief Executive in Council reaches a final decision on any pay adjustment.

77. Contrary to Mr Scott's submission, the Unit and the Committee are not 'special bodies' within the meaning of art.103. There being no requirement to conduct a PTS, there can be no art.103 requirement to maintain the bodies responsible for a PTS."

Dragon House Investment Ltd & Another v Secretary for Transport & Another (2005) 8 HKCFAR 668

Background

The claimants appeared before the Lands Tribunal (the "Tribunal") in claims for compensation arising from resumption of land. The claims concerned land which was suitable and had significant potential for residential development and was either in a Comprehensive Development Area or zoned for residential use, but was held under Government leases on terms which did not permit building.

Under s. 12(d) of the Lands Resumption Ordinance (Cap. 124), the value of the land resumed for the purpose of compensation shall be taken to be the amount of its open market value, but subject to s. 12(c) which provided that "no compensation shall be given in respect of any expectancy or probability of the grant or renewal or continuance, by the Government … of any licence, permission, lease or permit whatsoever".

The Tribunal's initial assessments of the claimants' compensation were set aside by the CA. Where the resumed land was held under a Government lease, the CA held that no account might be taken of any element in the open market value which reflected the prospect of a modification of the terms of the lease.

Before the CFA, the claimants advanced two contentions: first, "the development potential" of the land was part of its "intrinsic" value and

must always be taken into account in assessing compensation, only any "speculative element" should be excluded; second, the claimants argued that the favourable zoning was an existing feature of the subject land which was not excluded from consideration by s. 12(c) of Cap. 124 and must be taken into account.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 105 and BL 120.

What the Court held

The CFA held that in determining the amount of compensation payable on resumption, the value of the land must be taken to be its value subject to the restrictions in the lease. The right to exploit the development potential of the land belonged to the Government, not the lessee; and no account might be taken of the prospects of obtaining a modification of the terms of the lease.

The claimants' second argument also failed. The CFA held that zoning was a present, accrued feature of the land and must be taken into account in any proper valuation. The question, however, was not whether it should be taken into account but whether any value could properly be attributed to it. Zoning did not have an independent value of its own, and zoning for residential purposes was of value only if it could be realized by developing the land for such purposes. Zoning for a use which was not permitted by the lease had no value capable of being realized unless the terms of the lease were modified. In assessing the compensation to be paid on resumption, no account might be taken of the prospect of obtaining such a modification. Therefore no value might be attributed to zoning which would only be realized by obtaining modification.

What the Court said

At 679G – H, the Court cited the CFA's judgment in *Director of Lands v Yin Shuen Enterprises Ltd and Nam Chun Investment Ltd* (2003) 6 HKCFAR 1:

"23. In disposing of an argument which the claimants had advanced in

reliance on art. 105 of the Basic Law of the Hong Kong Special Administrative Region, Lord Millett NPJ said (para. 57) that:

*The right to exploit **the development potential** of the land by using it as building land was not disposed of by the Crown and remains the property of the Government for which it ought not to be required to pay.* (Emphasis Added)"

The Court discussed at 681I – 682E the effect of BL 120:

"30. At the beginning of para.27 [of *Director of Lands v. Yin Shuen Enterprises Ltd and Nam Chun Investment Ltd*] Lord Millett NPJ said that the Government's right to charge the full value of the modification had not been and could not be challenged. Clause 6 of the Joint Declaration provides that land leases in Hong Kong and other related matters would be dealt with in accordance with the provisions of Annex III. Clause 5 of Annex III provides:

*Modifications of the conditions specified in leases granted by the British Hong Kong Government may continue to be granted before 1 July 1997 **at a premium equivalent to the difference between the value of the land under the previous conditions and its value under the modified conditions.***" (Emphasis added.)

31. This provides good evidence of the Crown's practice before 1997. As a transitional provision it did not have to be enacted as part of the Basic Law. However, by art. 120 the Basic Law recognizes such modifications, providing that:

All leases of land granted, decided upon or renewed before the establishment of the Hong Kong Special Administrative Region which extend beyond 30 June 1997, and all rights in relation to such leases, shall continue to be recognized and protected under the law of the Region."

The CFA rejected the two contentions of the claimants at 683F – J:

"35. Properly understood there is nothing in the *Yin Shuen* judgment which lends any support to the claimants' contention that what falls to be excluded by s.12(c) is anything less than the full amount of the 'development potential' of the land, that is to say the difference between the value of the land subject to the restrictions and its open market value which takes account of the prospects and cost of obtaining a modification of the terms of the lease. We reject the first of the claimants' contentions.

36. The second can be disposed of shortly. The claimants rightly observe that there is nothing conditional or prospective about the zoning of the

subject land. It is a present, accrued feature of the land, like its physical features such as its infrastructure which make it suitable for development, and must be taken into account in any proper valuation.

37. The question, however, is not whether it should be taken into account but whether any value can properly be attributed to it. Zoning does not have an independent value of its own, and zoning for residential purposes is of value only if it can be realized by developing the land for such purposes. …"

Leung Kwok Hung & Another v Chief Executive of the Hong Kong Special Administrative Region (unreported, 9 February 2006, HCAL 107 of 2005)

Background

S. 33 of the Telecommunications Ordinance (Cap. 106) authorized the CE, whenever he considered that public interest so required, to order interception or disclosure of telecommunication messages to the Government. In 2005, to deal with doubts over the constitutionality of covert surveillance practised by law enforcement agencies, the CE issued the Law Enforcement (Covert Surveillance Procedure) Order ("Executive Order").

Leung Kwok Hung and Koo Sze Yiu ("applicants") challenged the validity of the above legislative and administrative framework authorizing and regulating covert surveillance by judicial review proceedings. They argued, *inter alia*, that s. 33 of Cap. 106 was in breach of BL 30 and the Hong Kong Bill of Rights Ordinance (Cap. 383), and the Executive Order did not constitute a body of "legal procedures" for the purposes of BL 30.

Basic Law provisions in dispute

The major provisions in dispute were BL 30 and BL 160.

What the Court held

The CFI held that s. 33 of Cap. 106 was inconsistent with BL 30 and BoR 14. Both BL 30 and BoR 14 required that the right to freely and privately communicate with others shall be protected by "law". When the framework of BL 30 was considered as a whole, such a requirement must be read as being complemented by the provision that any limitation of the right must be "in accordance with legal procedures". Being a body of purely administrative directions, the Executive Order was not sufficient to meet this requirement of protection by the law. Further, s. 33 of Cap. 106 did not satisfy the other constitutional requirements of legal certainty and proportionality under BL 30 and BoR 14 in that it failed to regulate the scope of the CE's discretion and was not formulated with sufficient precision.

The CFI ruled that in view of the context that BL 30 went to fundamental rights guaranteed to all Hong Kong residents, the phrase "legal procedures" in BL 30 meant procedures which were laid down by law in the sense that they formed part of substantive law. The Executive Order did not purport to be legislation and was not capable of constituting a set of "legal procedures" for the purposes of BL 30.

Pending corrective legislation, the CFI made a "temporary validity order" that s. 33 of Cap. 106 and the Executive Order, despite being unconstitutional, would be valid and of legal effect for six months.

What the Court said

The CFI held that BL 30 and BL 39 were to be read as a whole in paragraphs 103, 108 and 109:

"103. While the language in the Basic Law cannot, of course, be given a meaning which it cannot bear, in identifying the meaning of the language, considered in the light of its context and purpose, too 'literal, technical, narrow or rigid' an approach must be avoided. Importantly, in matters going to fundamental constitutional rights that protect individual liberties, such as the right to the freedom and privacy of communication, the Court of Final Appeal said that such rights must be given a generous interpretation …

108. The Basic Law therefore requires that the fundamental right to freely and privately communicate with others shall be protected 'by law'. First,

it does so 'directly' by way of art.30. Second, it does so, in terms of art.39, by the indirect means of incorporating the provisions of the ICCPR, in so far as they have been applied to Hong Kong, thereby giving constitutional recognition to art.14 of the Bill of Rights.

109. By way of a general observation, I am of the view that, if both articles protect the same right, both requiring that the right be protected by law, they should, as far as the language allows, be interpreted so that they complement rather than contradict each other."

The CFI found at paragraphs 122 – 124 that the Executive Order was not sufficient to meet the requirement of protection by the law under both BL 30 and BoR 14:

"122. When the framework of art.30 is considered as a whole, the requirement that the right to freely and privately communicate with others 'shall be protected by law' must, in my view, be read as being complemented by the provision that any limitation of the right must be 'in accordance with legal procedures'. Those legal procedures, therefore, are not distinct from but are part and parcel of the protection of the right which must be provided by law.

123. The protection of the law demanded by both art.30 of the Basic Law and art.14 of the Bill of Rights does not mean that legislation only will be sufficient even though legislation invariably is employed. It is clear to me, however, that purely administrative directions which are not themselves part of any framework of substantive law, and therefore have no general effect, will not be sufficient. In this regard, the Executive Order, although made pursuant to constitutional power, is no more than a body of administrative directions binding only on government servants.

124. In respect of art.30, without saying this is decisive, for it is not, I would add that, interpreting the article purposively and in context, I am satisfied that it is also qualified by the provisions of art.39(2). The article states that 'the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law'. That, it seems to me, to be a statement of general application not just to the rights protected in art.39(1) but to all rights protected in Chapter [3]."

At paragraphs 126 – 127 and 132 – 133, the CFI ruled that s. 33 of Cap. 106 did not satisfy the constitutional requirements of legal certainty and proportionality under BL 30 and BoR 14:

"126. … art.30 of the Basic Law and art.14 of the Bill of Rights (both as read with art.39(2) of the Basic Law), in protecting the same fundamental right in essentially the same manner, incorporate into their constitutional requirements the need for the existence of laws which make for legal certainty and require that any limitations on the right, as a characteristic of that legal certainty, be proportionate. On that basis, I fail to see how it can be said that s. 33 meets the requirements of those constitutional articles upon which the applicants have relied.

127. S. 33, as enacted, does not in any detail regulate the scope of the Chief Executive's discretion or the manner in which it may be exercised. It is plainly inadequate.

…

132. … there is not sufficient clarity as to the scope of the Chief Executive's discretion nor is there any measure of legal protection provided to protect against abuse of executive power. There is certainly no measure of any independent control.

133.It is plain, I think, on an ordinary reading, that s. 33 has not been formulated with sufficient precision to enable Hong Kong residents, with legal advice if necessary, to foresee to a degree that is reasonable in the circumstances the consequences of any telecommunication intercourse they may have with others even if those consequences may not be foreseeable with absolute certainty."

The CFI held at paragraphs 149 – 151 that the Executive Order was not capable of laying down a body of "legal procedures" for the purposes of BL 30:

"149. In my view, it is a formalistic outcome to say that the fundamental right contained in art.30, which the article requires shall be protected by law, may nevertheless be restricted by a body of purely administrative procedures which are not law and which bind only public servants who, in the event of abuse, are subject only to internal disciplinary proceedings. That, in my view, would derogate substantially from the practical and effective value of the right guaranteed by the article. That, I am satisfied – giving the article a generous interpretation in order to protect the full measure of the value of the right it guarantees – cannot have been the intention of those who drafted the Basic Law.

150. I am satisfied, therefore, that the use of the phrase 'in accordance with legal procedures' in art.30 means procedures which are laid down by law

in the sense that they form part of substantive law, invariably, in order to comply with the requirements of legal certainty, within legislation, primary and/or secondary.

151. That being the case, having found that the Executive Order does not purport to be legislation of any kind or to have the effect of legislation, I am further satisfied that the Executive Order, while it is entirely legitimate and of value as an administrative tool in regulating the internal conduct of law enforcement agencies, is not capable of constituting a set of 'legal procedures' for the purposes of art.30."

The CFI ruled that BL 160 did not preclude the court from declaring invalid laws temporarily valid. The Court said at paragraph 172:

"172. Mr Dykes was concerned that art.160 of the Basic Law, by its specific wording, prohibits the assumption by the courts of any power to declare invalid laws temporarily valid. I do not agree. Art.160 provides that, if any laws are discovered to be in contravention of the Basic Law, they shall be amended or shall cease to have effect in accordance with the procedures prescribed in the Basic Law itself. Art.160 is silent on the issue of the result of any legal vacuum that may come into existence when laws cease to have effect or while they are under a process of amendment. In terms of art.8, however, the Basic Law states that the common law and rules of equity shall remain the law of Hong Kong. To my understanding, the inherent jurisdiction identified by the Supreme Court of Canada in *Re Manitoba Language Rights* sprung from our common inheritance of the common law."

Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Others (2006) 9 HKCFAR 234

Background

The first respondent, New World Development Co Ltd ("New World"), was a company listed on the stock exchange operated by the appellant, Stock Exchange of Hong Kong Ltd ("SEHK"). New World publicly announced its interim results in March 2001. A report by SEHK's Listing Division concluded that, an employee of New World had, prior to the public announcement of New World's interim results, disclosed

the interim figures to certain investment analysts. The Listing Division recommended that the respondents (New World and its directors) should be publicly censured and invited SEHK's Disciplinary Committee to impose remedial measures on New World. The Chairman of the Disciplinary Committee sent out draft procedural directions for the hearing, proposing to limit the role of legal advisers at the hearing by not permitting them to address the committee (whether in respect of oral submission, the examination of witnesses of fact or otherwise). The respondents sought to change the draft directions without success and the directions were issued in June 2003 which triggered the respondents' application for judicial review. The respondents argued that the directions, which purported to deny legal representation, or proper and effective legal representation to the respondents at the hearing, was in breach of BL 35 and BoR 10.

The CFI dismissed the respondents' application, and held that the Disciplinary Committee was not "a court" for the purposes of BL 35 (regarding, among other things, the right to choice of lawyers for representation in the courts) and that the procedural arrangements catered for by the directions and the disciplinary procedures did not deny the respondents a fair hearing and involved no breach of either BoR 10 (regarding right to a fair hearing) or the common law principles of fairness. The respondents succeeded on appeal to the CA. The appellant then appealed to the CFA.

Basic Law provisions in dispute

The major provision in dispute was BL 35.

What the Court held

The CFA held that BL 35 applied to the "courts of law", that was the courts exercising the independent judicial power in the HKSAR. The Disciplinary Committee was not a "court" within the meaning of BL 35 and therefore BL 35 did not apply to it.

The CFA held that the mode and extent of legal representation permitted at the hearing depended on what was fair in the circumstances and

proportionate. Under the common law, there was no absolute right to have counsel address the tribunal or question witnesses. The tribunals had a discretion whether to permit legal representation, depending on the needs of fairness.

Since in relation to the operation of the principles of fairness, everything must depend on the circumstances of the particular case, it must follow that an assessment of what procedures were dictated by fairness could only be made where those circumstances were known. The CFA held that the features of the case did not compel it to conclude that unfairness inexorably followed if directions authorizing full legal representation were not given at the material point of time.

The CFA further held that in the present case, there were no exceptional circumstances that the court should depart from the general rule requiring exhaustion of domestic remedies before seeking the court's intervention by judicial review. On the contrary, given the lack of definition in the issues and the lack of disclosure regarding the likely evidence, a judicial review requiring the court to assess the likely procedural fairness of the disciplinary proceedings could not sensibly be undertaken. Accordingly, the CFA allowed the appeal and dismissed the application for judicial review. The CFA held that the applicability of common law principles of fairness made it unnecessary to embark on a parallel inquiry into the applicability of BoR 10.

What the Court said

In interpreting the meaning of "the court" under BL 35, the CFA said at 252G – 253B:

"39. The Court's approach to that task is explained in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211. As Li CJ stated:

The courts' role under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain the legislative intent as expressed in the language. (at p.223)

In doing so, the courts 'do not look at the language of the article in question in isolation' but consider the language 'in the light of its context and purpose'; and:

To assist in the task of interpretation of the provision in question, the courts

consider what is within the Basic Law, including provisions in the Basic Law other than the provision in question and the Preamble. These are internal aids to interpretation. (at p.224)

40. This is particularly apposite in the present case. The Basic Law contains numerous other provisions making reference to 'the courts' which form the context in which art.35 is found and which may provide important guidance as to what the provisions of art.35 intend. One asks: What are the institutions referred to as 'courts' in those other provisions? Construing the language of art.35 in the light of those provisions, is it referring to the same or to some different institutions when it speaks of 'representation in the courts'?"

At 253C – D, 254A, 254E and 254H – J, the CFA considered the purpose and objectives of the Basic Law:

"41. There can be no doubt as to the identity of the bodies referred to as 'the courts' in the other provisions of the Basic Law. Moreover, the principal purposes of the Basic Law underpinning those articles are clear.

42. The first evident objective of the Basic Law is the establishment of the HKSAR as a Region having a legal system which is separate from the legal system of the Mainland in accordance with the principle of 'one country two systems'.

…

43. Secondly, the Basic Law aims to provide for continuity between the pre-existing and the present courts and judicial systems.

…

44. A third evident purpose of the Basic Law in relation to the courts is to entrench the independence of the judiciary who operate those courts.

…

45. It is therefore entirely clear that when, in such articles, the Basic Law refers to 'the courts' it is referring to the courts of judicature: the institutions which constitute the judicial system, entrusted with the exercise of the judicial power in the HKSAR. I will refer to them simply as 'courts of law'. The purpose of the Basic Law provisions referred to is to establish the constitutional architecture of that system revolving around the courts of law, catering for the system's separation from that of the Mainland, its continuity with what went before and safeguarding the independence of the judiciary."

At 255D – 256B, the CFA considered the two dimensions to BL 35:

"48. There are two dimensions to art.35 that should be noted for present purposes. In the first place, it lays down constitutional rights which need have nothing to do with court proceedings. Thus, for instance, the right to confidential legal advice is a right which is protected even where such advice does not bear on any existing or contemplated court proceedings. This was recognized in the decision recently handed down in *Solicitor v Law Society of Hong Kong* [2006] 2 HKLRD 116, which concerned the constitutionality of provisions empowering an inspector, appointed by the Law Society to investigate disciplinary complaints against a solicitor, to inspect documents which may contain privileged information derived from a client who is not involved in the disciplinary complaint. That client's privilege qualifies for independent protection notwithstanding the absence of his involvement in any related proceedings whether in a court of law or in any tribunal. These aspects of art.35 do not bear on the issues in this appeal and nothing said in this judgment is intended in any way to affect the free-standing vigour of those rights.

49. What is of prime relevance to this appeal is the second dimension of art.35. As appears from its language, art.35 is also concerned with entrenching the individual's rights in relation to 'the courts': individuals are to have the right of 'access to the courts', the right of 'choice of lawyers … for representation in the courts', the right 'to judicial remedies' and 'the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel'.

50. This is a crucial additional feature of the constitutional architecture of the Basic Law in relation to the judicial system of the Region. Article 35 ensures that the fundamental rights conferred by the Basic Law as well as the legal rights and obligations previously in force and carried through to apply in the HKSAR are enforceable by individuals and justiciable in the courts. It gives life and practical effect to the provisions which establish the courts as the institutions charged with exercising the independent judicial power in the Region. This dimension of art.35 is therefore concerned with ensuring access to the courts for such purposes, buttressed by provisions aimed at making such access effective. The 'courts' in this context are plainly the courts of law. They are the same bodies as those referred to in the other provisions of the Basic Law discussed above. I therefore reject Mr Griffiths' argument to the contrary."

Since the CFA had held that neither the Medical Council or the

Solicitors Disciplinary Tribunal were a court within the meaning of BL 35, two CA cases which held otherwise were overruled by the CFA at 280E – G:

"134. The Court is unanimous. We allow the appeal, set aside the Court of Appeal's orders, dismiss the respondents' application for judicial review and award the appellant costs here and in the courts below. In the course of holding that the Listing Committee is not a court within the meaning of art.35 of the Basic Law, we have held that neither are the Medical Council or the Solicitors Disciplinary Tribunal. To the extent that the Court of Appeal held otherwise in *Dr Ip Kay Lo v Medical Council of Hong Kong (No. 2)* [2003] 3 HKLRD 851 and *Solicitor v Law Society of Hong Kong* (unrep., CACV No. 302 of 2002, [2004] HKEC 219), those two Court of Appeal cases are overruled."

Salt & Light Development Inc & Others v Sjtu Sunway Software Industry Ltd [2006] 2 HKLRD 279

Background

The plaintiffs agreed to sell and the defendant agreed to buy a company incorporated in Hong Kong and conducted business in Hong Kong and China (the "company"). The defendant failed to complete the purchase by the completion date and the plaintiffs brought action against the defendant. The defendant's case was that the plaintiffs falsely represented and falsely warranted the position as to the company's compliance with the Mainland Chinese law, including but not limited to, failure to apply for a business licence, failure to submit any application for tax registration and failure to pay any business tax. During the course of the proceedings, the defendant obtained an order from a Master requiring the plaintiffs to answer six interrogatories. In particular, the sixth interrogatory asked whether the company had applied, since 10 September 2004, to recommence its business. The plaintiffs appealed the Master's order and, with respect to the sixth interrogatory, they invoked the privilege against self-incrimination under s. 65 of the Evidence Ordinance (Cap. 8). It was common ground that the plaintiffs were at risk of prosecution in the Mainland with respect to a range of

possible offences arising out of the abovementioned non-compliance with the Mainland Chinese law. The plaintiffs submitted that offences under the Mainland Chinese law should be covered by the expression "the law of Hong Kong" found in s. 65(1)(a) of Cap. 8, and hence the plaintiffs should not be compelled to answer the sixth interrogatory. The plaintiffs further submitted that as the HKSAR was in law part of the PRC, the Mainland Chinese Law should not be seen, for the purpose of the privilege against self-incrimination, as "foreign law" but as "domestic law".

Basic Law provisions in dispute

The CFI referred to BL 18 and BL 84.

What the Court held

The CFI rejected the submission that Mainland Chinese criminal law was "domestic law" in the HKSAR. The wording of s. 65 of Cap. 8 expressly provided that privilege against self-incrimination could only be invoked with respect to "criminal offences under the law of Hong Kong and penalties provided for by such law". The criminal law of Mainland China was not "the law of Hong Kong" under s. 65(1)(a) of Cap. 8.

What the Court said

The CFI considered whether the criminal law of Mainland China was "the law of Hong Kong" under s. 65 of Cap. 8 at 297D – 298E:

"60. But for the plaintiffs it was submitted that (1) offences under Mainland China law should also be included within the expression 'the law of Hong Kong' found in s. 65(1)(a) Evidence Ordinance, or alternatively (2) that the Court should in any event retain a supplementary discretion despite s. 65(1)(a) to decline to compel an answer in relation to foreign offences, including offences under Chinese law.

…

62. But the contrast drawn between foreign and domestic law is not a contrast always between two different countries. … In Hong Kong a vivid contrast exists between its law and the law in the other parts of the

constituent areas comprising the same country — the People's Republic of China. By s. 2 of the Interpretation and General Clauses Ordinance, 'People's Republic of China' is defined as 'includes Taiwan, the Hong Kong Special Administrative Region and Macau'.

63. It is the plaintiffs' case that the Hong Kong SAR, being in law part of the country of the People's Republic of China, it follows that Mainland Chinese Law should not be seen, for the purpose of the privilege against self-incrimination, as 'foreign law' but as 'domestic law'.

64. I reject the submission that Mainland Chinese criminal law is 'domestic law' for this or any purpose in Hong Kong. In a non-pejorative, technical sense only, the criminal law of Mainland China is for the Hong Kong SAR external law and is therefore given either the appellation 'foreign law' or 'non-domestic law' — being in either event, not "the law of Hong Kong" within s. 65(1)(a) of the Evidence Ordinance.

65. A combination of arts.18 and 84 of the Basic Law at a minimum, make it unarguable, that the criminal law of Mainland China, ('National Law' as it is properly described in the Basic Law), may be applied in Hong Kong, outside the very special pre-conditions set out there in art.18.

66. Mr Fee's submission would structurally and functionally subvert the separate constitutional model of the HKSAR. Hong Kong is an inalienable constituent part of China, but it enjoys under the Basic Law a separateness that critically includes a legal system operating under the Rule of Law. The paradox which supplies the covalent unifying power between China and the Hong Kong SAR, is that Hong Kong is a part of China yet apart from it, with its own laws — one country: two legal systems.

67. There may be some eventual reciprocity in the enforcement of certain civil law matters, but no such mutuality or convergence exists in criminal law."

Koo Sze Yiu & Another v Chief Executive of the HKSAR

(2006) 9 HKCFAR 441

Background

S. 33 of the Telecommunications Ordinance (Cap. 106) authorized the

Chief Executive to order interception or disclosure to the Government whenever he considered that public interest so required. The Chief Executive issued the Law Enforcement (Covert Surveillance Procedure) Order ("the Executive Order") in 2005 with a view to deal with doubts over the constitutionality of covert surveillance practised by law enforcement agencies in Hong Kong.

The appellants successfully brought judicial review proceedings and obtained a declaration that s. 33 of Cap. 106 was unconstitutional and the Executive Order was not a set of "legal procedures" for the purpose of BL 30. The Judge made a "temporary validity order" to the effect that notwithstanding the declaration, s. 33 of Cap. 106 and the Executive Order were valid and of legal effect for a six-month period ("Temporary Validity Order"). In the meantime, (i) the Government was permitted, during the temporary validity period, to function pursuant to what had been declared unconstitutional; and (ii) the Government was shielded from legal liability for so functioning. The appellants' appeal against the Temporary Validity Order was dismissed at the CA and they further appealed to the CFA.

Basic Law provisions in dispute

The major provisions in dispute were BL 30 and BL 160.

What the Court held

The CFA held that covert surveillance involving the interception of communications impacted upon the privacy and freedom of the communications. Nevertheless covert surveillance was an important tool in the detection and prevention of crime and threats to public security. The CFA held that the position reached upon a proper balance of rival considerations was that covert surveillance was not to be prohibited but was to be controlled. Such control must sufficiently protect fundamental rights and freedoms, particularly freedom and privacy of communication as constitutionally guaranteed in BL 30.

In order to meet the needs of law and order and provide a legal system to be able to function effectively, exceptional circumstances might call

for exceptional judicial measures. Temporary validity or suspension were examples of such measures and BL 160 did not preclude temporary validity orders or suspension. There was nothing in this case as serious as a virtual legal vacuum or a virtually blank statute book, which justified a temporary validity order. Nevertheless, the danger to be averted in the present case was of a sufficient magnitude to justify a suspension for a fixed period of six months to afford an opportunity for the enactment of corrective legislation. The Government could during that period of suspension function pursuant to what had been declared unconstitutional, doing so without acting contrary to any declaration in operation. But it was not shielded from legal liability for so functioning.

What the Court said

Delivering the plurality judgment of the Court, Bokhary PJ held at 499F – I that overt surveillance would have an impact on privacy of communications:

"3. By its nature covert surveillance involving the interception of communications impacts upon the privacy of the communications which are intercepted. And the knock-on effect of that is an impact upon freedom of communication, too. For it is only natural that even law-abiding persons will sometimes feel inhibited in communicating at all if they cannot do so with privacy. Nevertheless covert surveillance is an important tool in the detection and prevention of crime and threats to public security ie the safety that the public is entitled to enjoy in a free and well-ordered society. The position reached upon a proper balance of the rival considerations is that covert surveillance is not to be prohibited but is to be controlled. Such control must sufficiently protect — and enjoy public confidence that it sufficiently protects — fundamental rights and freedoms, particularly freedom and privacy of communication. The 'legal procedure' requirement contained in art.30 of the Basic Law exists to ensure such protection."

When considering whether BL 160 precluded temporary validity orders, Bokhary PJ held at 452G – H:

"17. Let me say at once that I agree with the courts below that the cessation of force clause of art.160 of the Basic Law does not preclude temporary validity orders. Still less does it preclude suspension. The clause provides that '[i]f any laws are later discovered to be in contravention of this Law,

they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.' That simply does not go to whether temporary validity or suspension can be accorded."

Bokhary PJ explained the effect of the suspension order at 459A – B:

"50. The Government can, during that period of suspension, function pursuant to what has been declared unconstitutional, doing so without acting contrary to any declaration in operation. But, despite such suspension, the Government is not shielded from legal liability for functioning pursuant to what has been declared unconstitutional."

Mason NPJ, in a separate concurring judgment, considered the responsibilities and powers of the courts in contemporary world. His Lordship said at 460E – 461B:

"59. The postponement of the making of the declaration will enable the authorities to decide what course they wish to take, though actions taken pursuant to the legislation which is the subject of the postponed declaration will be affected by the effect of that declaration, subject, of course, to remedial legislation, if any, which might be enacted.

60. Although I agree that a court should not postpone the making of a declaration of invalidity unless it is necessary to do so, the level of necessity in such a case is substantially lower than the level of necessity which would be required before the court would make an order for temporary validity, assuming the court to have power to make such an order.

61. Whether this Court has jurisdiction or power to make an order for temporary validity is a very large question, involving fundamental doctrinal questions relating to the separation of powers, the role of the courts, the relationship between the courts and the legislative branch of government, as well as the rule of law and considerations of justice, and of community protection and welfare.

62. In considering this question, it may well be that the responsibilities and powers of the courts are no longer to be measured exclusively by reference to the traditional concept of adjudication of disputes between parties. This is the position in England in relation to matters of public law (see, for example, *R v. Home Secretary, ex parte Salem* [1999] 1 AC 450 …). Further, the protection of wide-ranging human rights and fundamental freedoms has generated new and not infrequent problems arising from the invalidity of statutes, leaving a 'gap' in the law, with novel and serious problems for the community (See K Roach, *Constitutional Remedies in Canada*, para.14.1480

(2003), with its reference to 'a constructive dialogue' between courts and legislatures, which has been a feature of the developing Canadian jurisprudence on this topic)."

So Wai Lun v HKSAR (2006) 9 HKCFAR 530

Background

The defendant was charged with unlawful sexual intercourse with a girl under the age of 16, contrary to s. 124 of the Crimes Ordinance (Cap. 200). The defendant was acquitted before the Magistrates' Court but on the prosecution's appeal to the CA, the CA remitted the case to the magistrate with a direction to convict. The defendant then appealed to the CFA. The defendant argued that s. 124 of Cap. 200 was unconstitutional as it criminalized the conduct of the male to the exclusion of the female and therefore deprived the male of equality before law protected by BL 25 and BoR 22.

The defendant also argued that the imposition of absolute liability under s. 124 of Cap. 200 was contrary to BL 28 and BoR 5(1), being arbitrary and harsh but to no useful purpose.

Basic Law provisions in dispute

The major provisions in dispute were BL 25 and BL 28.

What the Court held

Regarding the inequality argument on the criminalization of the male's conduct only, the CFA held that s. 124 of Cap. 200 was constitutional as there was no requirement of literal equality in the sense of unrelenting identical treatment always. The legislation might depart from identical treatment so long as it was justified by reference to genuine need, rationality and proportionality. Thus, in the present case, having regard to the considerations which the legislature was entitled to take into account in enacting s. 124, the CFA held that the departure from

identical treatment was justified and did not contravene BL 25 and BoR 22.

Regarding the alleged "arbitrariness" of absolute liability, the CFA held that "arbitrariness" was not to be equated with "against the law" but must be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability. The court would not strike down an absolute liability offence merely by reason that it would be preferable for the offence to admit of a defence of belief or reasonable belief. The CFA concluded that s. 124 of Cap. 200 was not arbitrary as it carried deterrent effect and would add materially to the protection for young girls. S. 124 thus did not contravene BL 28 and BoR 5(1).

What the Court said

The CFA held at 539D – G that the following principle laid down by Bokhary J (as he then was) in *R v Man Wai Keung (No. 2)* [1992] 2 HKCLR 207 was applicable to complaints of inequality:

"20. …

Clearly, there is no requirement of literal equality in the sense of unrelentingly identical treatment always. For such rigidity would subvert rather than promote true even-handedness. So that, in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment. And any departure therefrom must be justified. To justify such a departure it must be shown: one, that sensible and fair-minded people would recognize a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need."

The CFA concluded at 541D – G that s. 124 did not contravene the equality guarantees under BL 25 and BoR 22:

"27. … Various considerations were canvassed. These included: the problem of teenage pregnancies; not criminalizing the female's conduct because that might deter her from reporting the matter; the legislature's role in resolving issues engaging society's code of sexual morality; and the extent to which it was for the legislature to form a view on issues such as whether the

initiative in these matters is generally taken by the male, often older than the female, sometimes very considerably so.

28. Considerations of that kind are ones which the legislature are entitled to take into account and weigh. In our view, the legislation under challenge, while it departs from identical treatment, is justified by reference to genuine need, rationality and proportionality. It does not violate the equality guarantees of the constitution. In so holding we are not deferring to the legislature. Rather are we acknowledging the legislature's proper role."

In considering the concept of "arbitrariness", the CFA held at 542B – G that the following decision in *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415 was applicable:

"34. … The Court [in *Lau Cheong*] noted what the United Nations Human Rights Committee said in *Hugo van Alphen v Netherlands* (UN Doc CCPR/C/39/D/305/1988 (1990)) … Dealing with art.9(1) of the International Covenant on Civil and Political Rights with which art.5(1) of the Bill of Rights is identical, the Committee said "that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability."

35. The Court also referred to this statement of Lord Cooke of Thorndon delivering the advice of the Privy Council in *Fok Lai Ying v Governor in Council* [1997] HKLRD 810 at p.819G:

The expression 'arbitrary interference' can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provision, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."

The CFA concluded at 542J – 543D that the imposition of absolute liability under s. 124 of Cap. 200 did not contravene BL 28 and BoR 5(1):

"39. Imposing absolute liability is a strong course which the law is generally if not always reluctant to take. But it is not a course which the law is never willing to take whatever is to be achieved by it. … The deterrent effect of the criminal law is not confined to deterring people from doing what they know is unlawful. It also encourages them to take care to avoid what may be unlawful. This idea is captured in the expression, used in the *Noise Control Authority & Another v Step In Ltd* (2005) 8 HKCFAR 113 at p.120H, 'steer well

away from the line between legality and illegality'. In the context of s. 124, care to avoid what may be unlawful and steering well away from the line between legality and illegality would add materially to the protection for young girls which the section provides.

40. Having regard to the vital importance of protecting young girls, and in all the circumstances, we feel unable to say that imposing absolute liability for unlawful sexual intercourse with a girl under the age of 16 is arbitrary. It is a choice constitutionally open to the legislature."

Official Receiver & Trustee in Bankruptcy of Chan Wing Hing & Another v Chan Wing Hing (Secretary for Justice, Intervener) (2006) 9 HKCFAR 545

Background

Chan Wing Hing ("Chan") and Lin Hai San ("Lin") were permanent residents of the HKSAR and they enjoyed the right to travel under the Basic Law. They were first-time bankrupts and they had made frequent trips to the Mainland without notifying the Official Receiver ("OR"), their trustee in bankruptcy. S. 30A(10)(b)(i) of the Bankruptcy Ordinance (Cap. 6) required a bankrupt who intended to leave Hong Kong to notify the trustee of his itinerary and where he could be contacted ("the notification requirement"). Non-compliance with the notification requirement would lead to the suspension of the running of a four-year period, the expiration of which would have led to the automatic discharge of the bankrupt ("the relevant period").

Before the expiration of the relevant period, the OR made applications against both Chan and Lin for an order to postpone the time of their discharge. The Master who heard the applications found that since Chan and Lin had left Hong Kong frequently without notifying the trustee, their respective periods of bankruptcy had ceased to run from the very first day they left. Accordingly, their periods of bankruptcy had not expired and the applications were premature. On the OR's appeal, the CA held that the notification requirement was constitutional.

The CA's ruling on the notification requirement would mean that the OR would have to obtain information of the bankrupts' movements from the Immigration Department and to search his own records in relation to a substantial number of bankruptcies, thus adding an onerous administrative burden on the OR.

Hence, the OR appealed to the CFA arguing that the notification requirement constituted a disproportionate interference with the right to travel guaranteed by BL 31 and BoR 8(2) and was accordingly unconstitutional.

Basic Law provisions in dispute

The major provision in dispute was BL 31.

What the Court held

In relation to the constitutionality of the notification requirement, the CFA held that the need to notify together with the sanction for failure to notify in s. 30A(10)(b)(i) was a restriction on the right to travel, specifically the right to leave Hong Kong, guaranteed by both BL 31 and BoR 8(2). By virtue of BL 39(2) and BoR 8(3), any restriction on the right must first be prescribed by law and must be necessary to protect the rights of others. The CFA agreed that the legitimate purpose for the notification requirement was the protection of bankrupt's creditors and that there was rational connection between that purpose and the notification requirement.

The majority (Ribeiro PJ dissenting) held that the notification requirement went beyond what was necessary for the protection of the rights of creditors and constituted a disproportionate impairment of the freedom to travel. The trustee and creditors could already object to the discharge of the bankrupt under ss. 30A(3) and (4) of Cap. 6 at the expiration of the relevant period. Moreover, the sanction for failure to notify should also be taken into account. If a bankrupt failed to notify the trustee, the relevant period would be suspended indefinitely until the bankrupt returned to Hong Kong and notified the trustee of his return. Also, the sanction operated irrespective of the reason for the

bankrupt's failure to notify which triggered it. Further, the courts had no discretion to disapply the sanction or to mitigate its consequences, however meritorious or deserving the circumstances. The sanction was a harsh one and could not be justified. The majority concluded that the notification requirement under s. 30A(10)(b)(i) was unconstitutional.

Ribeiro PJ in the minority was of the view that the notification requirement constituted a legitimate and proportionate limitation of the freedom to travel. If the bankrupt complied with the notification requirement, then there would be no further impact on his freedom. Thus, the notification requirement alone was simple to operate and not onerous and was a minimal impairment on the freedom to travel rationally linked to securing the bankrupt's cooperation with a view to facilitating the proper administration of the bankrupt estate. The proportionality of the requirement should not be judged on the footing of some assumed unmitigated and open ended consequences flowing from an assumed failure to comply.

What the Court said

In considering whether the restriction on right to travel was justified, the majority of the CFA said at 559F – I:

"34. As the right to travel is guaranteed by both the Basic Law and the BOR, by virtue of art.39(2) of the Basic Law, any restriction on the right must satisfy two requirements. First, it must be prescribed by law. In the present case, no issue arises in relation to this requirement which is plainly satisfied. Secondly, any restriction must be necessary to protect the rights of others. This is a legitimate purpose for restricting the right which is specified in art.8(3) of the BOR. …

35. As the legitimate purpose for restricting the right to travel is constitutionally specified, the following proportionality test should be applied in considering whether the restriction is necessary: (1) The restriction must be rationally connected to the protection of the rights of others. (2) The means used to impair the right to travel must be no more than is necessary to protect the rights of others. …"

The majority of the CFA held at 563A – D:

"50. Applying a generous approach to the interpretation of the right to

travel, having regard to the harshness of the sanction, the restriction on the right cannot be regarded as no more than is necessary to protect primarily the rights of creditors. The protection of their rights require that the trustee is able to administer the bankrupt's estate effectively with the co-operation of the bankrupt. Taking into account that the trustee and the creditors are already able to object to the bankrupt's discharge at the expiration of the relevant period on grounds including his failure to co-operate and his unsatisfactory conduct, the harsh sanction for failure to notify cannot be justified. The restriction goes beyond what is necessary for the protection of the rights of creditors. Accordingly, s. 30A(10)(b)(i) is unconstitutional and a declaration should be made accordingly."

HKSAR v Lam Kwong Wai & Another (2006) 9 HKCFAR 574

Background

The respondents were charged with and convicted of having in their possession an imitation firearm, contrary to s. 20(1) of the Firearms and Ammunition Ordinance (Cap. 238). The respondents relied on s. 20(3)(c) of Cap. 238 which provided that if a person satisfied the court that he was not in possession of the imitation firearm for an unlawful purpose, he did not commit an offence. The question was whether s. 20(3)(c) of Cap. 238, by placing an onus on a defendant, was consistent with the presumption of innocence and the right to a fair trial. If it was not consistent, the question was whether the courts have power or a duty to so construe s. 20(1) when read with s. 20(3)(c) as to preserve its validity, even if the interpretation might involve the use of judicial techniques such as reading down, reading in and striking out.

Basic Law provisions in dispute

The major provision in dispute was BL 87(2). The Court also referred to BL 83, BL 84 and BL 158.

What the Court held

The presumption of innocence was protected by BL 87(2) and BoR 11(1). The right to a fair trial was protected by BL 87(2) and BoR 10. The presumption of innocence required the prosecution to prove the defendant's guilt beyond reasonable doubt. Yet, s. 20(3)(c) of Cap. 238 shifted the persuasive onus of proof on to the defendant to satisfy the court that the possession was not for a purpose dangerous to public peace or committing an offence.

The CFA held that the presumption of innocence was not an absolute right and was capable of derogation, but the derogation must be justified. Specifically, the derogation:

(i) must have a rational connection with the pursuit of a legitimate aim (the rationality test); and

(ii) should be no more than is necessary to achieve that legitimate aim (the proportionality test).

The CFA held that s. 20(3)(c) of Cap. 238 derogated from the presumption of innocence, but satisfied the rationality test since it was imposed in pursuit of the legitimate aim of preventing, suppressing and punishing serious crime. However, s. 20(3)(c) of Cap. 238 was disproportionate and did not satisfy the proportionality test. An evidential onus would have been sufficient for the prosecution to prove a case of being in possession of an imitation firearm for an unlawful purpose.

The CFA further held that in the context of the Basic Law, the concept of judicial power necessarily included the making of remedial interpretations. The Basic Law recognized that Hong Kong courts were equipped with powers to grant appropriate remedies. The implied powers of the CFA included the obligation to adopt a remedial interpretation of a legislative provision which would as far as possible, make it Basic Law-consistent. In applying a remedial interpretation, the CFA held that s. 20(1) in conjunction with s. 20(3) of Cap. 238 should be read and given effect as imposing on the defendant an evidential burden only. A mere evidential onus was consistent with the presumption of innocence and the right to a fair trial.

What the Court said

At 594B – G and 597F – H, the CFA considered the presumption of innocence protected by BL 87(2) and its relationship with the reverse onus of proof:

"23. At common law, the presumption of innocence is the basis of the central rule of the criminal law which requires the prosecution to prove the defendant's guilt of the offence charged beyond reasonable doubt …

25. A reverse onus, which places an onus on the defendant to prove all or any of the elements of the offence, appears to be inconsistent with the presumption of innocence because it allows the defendant to be convicted on failing to discharge the reverse onus, even though the prosecution fails to prove all the elements of the offence beyond reasonable doubt. …

36. … the right to be presumed innocent is an essential element in the individual's right to a fair trial and is protected expressly, along with the right to a fair trial, by art. 87(2) of the Basic Law, … the right to be presumed innocent, as one of the rights and freedoms which are constitutionally guaranteed and lie at the heart of Hong Kong's separate system, is to be given a generous interpretation …"

At 599G – 600A, the CFA considered that s. 20(3)(c) of Cap. 238 derogated from the presumption of innocence:

"41. … s. 20(3)(c) throws the onus of proof on to the defendant, the prosecution being required to do no more than prove bare or physical possession plus knowledge of possession. Accordingly, there exists the real risk that a defendant, in failing to satisfy the magistrate of the s. 20(3)(c) defence, might nevertheless raise a doubt as to the purpose of his possession, yet be convicted."

At 593A – B, the CFA said that the presumption of innocence was not absolute:

"21. Although these rights are expressed in absolute terms and are not subject to explicit exceptions or qualifications, it has generally been accepted elsewhere that an encroachment on these rights by way of presumption or reverse onus of proof may be justified if it has a rational connection with the pursuit of a legitimate aim and if it is no more than necessary for the achievement of that legitimate aim."

For the rationality test, the CFA said at 600C – F that:

"42. … It is clear enough that the persuasive onus of proof provided for by s. 20(3)(c) was imposed in pursuit of a legitimate aim. The aim was the prevention, suppression and punishment of serious crime, being the use of imitation firearms for a purpose dangerous to the public peace or of committing an offence. … That the use of imitation firearms for these purposes is a serious problem and a matter of community concern cannot be doubted. … these weapons often are used to frighten and intimidate victims in order to reinforce unlawful demands. They are weapons which are hard to distinguish, and may in the circumstances be impossible to distinguish, from the real thing. The intimidating impact of their use is therefore very similar to the intimidating impact of the threatening use of a real firearm."

With regard to the proportionality test, the CFA held at 603C – G and 604C – D that:

"50. … as the substance of the offence is being in possession for an unlawful purpose, proof of possession throws the onus on to the defendant when possession for an unlawful purpose cannot be said to be more likely than not to flow from being in possession of an imitation firearm. In this respect, the defendant is unfairly called upon to disprove his moral blameworthiness. … Further, the offence is a serious one, punishable by 2 years' imprisonment and, if there is a previous conviction for a scheduled offence, up to 7 years' imprisonment. The more serious the offence, the more important it is that there should be no interference with the presumption …

51. True it is that the defendant knows better than anyone else what the purpose of his possession is. … The existence of the relevant purpose can usually be informed from the circumstances of the defendant's possession and conduct. The prosecution should have no abnormal difficulty in proving the purpose of the defendant's possession where that possession is for an unlawful purpose.

…

54. It follows that an evidential onus would have been sufficient to enable the prosecution to prove a case of being in possession of an imitation firearm for an unlawful purpose without being exposed to the degree of difficulty apprehended by the appellant."

On the question of whether the Basic Law conferred on the courts remedial power, the CFA held at 608F, 608I – 609B, 609J – 610B and

611B – C that:

"67. … The function of the courts of the Region is described by or referred to, in the expressions 'adjudicate cases' and 'adjudicating cases' which are to be found in the Basic Law (arts.84 and 158). …

68. The Basic Law neither sets out the powers of the courts nor the remedies which they may grant. The absence of provisions in the Basic Law dealing with these matters is not surprising. Article 83 of the Basic Law provides that the powers and functions of the courts 'shall be prescribed by law'. No doubt this provision enables the legislature to confer powers and functions on the courts but it does not exclude the implication of powers and functions from the Basic Law itself.

69. … The Basic Law recognizes that the courts of the Region (including this Court) are equipped with powers to grant appropriate remedies. … As the courts are established by the Basic Law, the powers which they possess and the remedies which they may grant should be characterized primarily as implied, though some powers to be implied under the Basic Law may be ultimately traced back to the common law.

70. The grant of judicial power and, for that matter, the investing of jurisdiction in a court, carry with them all those powers that are necessary to make effective the exercise of judicial power and jurisdiction so granted. 'Necessary', in this context, means 'reasonably required' … These powers will include power to grant and employ such remedies as may be appropriate. …

73. In the context of the Basic Law, which arms the HKSAR with a modern constitution including entrenched rights and freedoms, the concept of judicial power necessarily includes the making of remedial interpretations in the sense already discussed. It is recognized as an incident of the exercise of judicial power in other jurisdictions.

74. Even according to a strict and narrow interpretation of judicial power, namely that it is confined to the adjudication of disputes, the making of a remedial interpretation is an exercise of that power. …

78. … The Court must proceed on the footing that the courts of the Region, including this Court, possess all necessary powers to deal with all manner of questions which may legitimately arise in connection with the interpretation and enforcement of the provisions of the Basic Law, including their impact on Hong Kong legislation. It follows that the implied powers of this Court include the obligation to adopt a remedial interpretation of a legislative

provision which will, so far as it is possible, make it Basic Law-consistent. Only in the event that such an interpretation is not possible, will the Court proceed to make a declaration of contravention, entailing unconstitutionality and invalidity."

In applying a remedial interpretation, the CFA declared that s. 20(1) in conjunction with s. 20(3) of Cap. 238 should be read as imposing on the defendant an evidential burden only and explained at 612A that:
"82. … This interpretation does no violence to fundamental or essential elements of the legislation. And there is, on the view already expressed, no doubt that a mere evidential onus is consistent with the presumption of innocence and the right to a fair trial."

HKSAR v Hung Chan Wa & Another (2006) 9 HKCFAR 614

Background

The respondents were convicted of trafficking in dangerous drugs. They admitted possession of a container and that they were aware that the container housed a substance. However, the respondents insisted that they did not know the substance in the container was a dangerous drug. S. 47(1) of the Dangerous Drugs Ordinance (Cap. 134) presumed that a person who had physical possession of anything containing a dangerous drug or the keys to such container, had knowledge of the presence of the drug. S. 47(2) of Cap. 134 presumed the person to have knowledge of the nature of the drug if he was proved or presumed to have in his possession a dangerous drug. The respondents challenged the constitutionality of ss. 47(1) and (2) of Cap. 134 ("the Sections") in that they were inconsistent with the presumption of innocence guaranteed by BoR 11(1) and the right to fair trial protected by BL 87 and BoR 10 and thus were unconstitutional. The CA agreed that the Sections derogated from the presumption of innocence disproportionately and applied a remedial interpretation to read down the persuasive onus to an evidential one. The appellant appealed and argued that the persuasive onus satisfied

the rationality and proportionality tests.

The appellant further argued that the court should engage in a prospective overruling to limit the retrospective effect of the judgment should the Sections be given a remedial interpretation.

Basic Law provisions in dispute

The provisions in dispute were BL 87 and BL 160.

What the Court held

The CFA held that the Sections imposed a persuasive onus on defendants. The effect of the Sections was that once physical possession was established, there would be a double presumption of legal possession of the drug and that of knowledge of the presence of the thing possessed. The presumption under s. 47(1) could only be rebutted by a defendant proving, on probabilities, that he was unaware of the presence of a substance in the container. S. 47(2), on the other hand, enabled the defendant to prove that he was unaware of the presence of a dangerous drug.

The CFA held that the Sections derogated from the presumption of innocence and consequently from the right to a fair trial. Although there was a rational connection between the Sections and the legitimate objective of preventing and suppressing the trade and use of dangerous drugs, the Sections were disproportionate means to achieve the legitimate objective. The derogation from the presumption of innocence was so severe that it was not sustainable unless it could be shown at least that the legitimate objective could not be achieved otherwise than by the imposition of reverse burdens. The CFA held that it had not been shown that an evidential onus would be inadequate to achieve that objective.

Hence, the Sections were given a remedial interpretation by treating the burdens of proof as creating an evidential onus only. The remedial approach was to be based on implied powers conferred upon the Hong Kong courts by the Basic Law itself.

In relation to the appellant's submission that BL 160(1) applied to a

court judgment holding a law previously in force to be in contravention of the Basic Law and established the norm that such a judgment only had prospective effect, the CFA held that BL 160(1) which provided that pre-1 July 1997 laws discovered after 1 July 1997 to be in contravention with the Basic Law "shall be amended or cease to have force in accordance with the procedure as prescribed by law", did not apply to judicial procedure. The phrase "the procedure as prescribed by this Law" at the end of BL 160(1) covered only legislative procedure, but not judicial procedure.

What the Court said

Commenting on the reverse onus under the Sections, Sir Anthony Mason NPJ said at 644E, 645D – E, 645G and 646F – H:

"74. … the reverse onus under s. 47(2), as well as that under s. 47(1), derogates from the presumption of innocence and consequently from the right to a fair trial. …

76. The imposition of presumptions as to legal possession and the defendant's knowledge of the nature of the drug possessed is rationally connected with the legitimate objective of preventing and suppressing the trade and use of dangerous drugs and punishing those who participate in them. …

78. As noted in *HKSAR v Lam Kwong Wai & Another* [2006] 3 HKLRD 808, it is accepted that, in some situations, a reverse onus provision may satisfy the proportionality test; see, for example, *L v. DPP* [2003] QB 137; *R v. Matthews* [2003] 2 Cr. App R 19. But, the burden of justification rests with the State and the reasons supporting the justification must be compelling. …

80. … The very purpose of s. 47(1) and (2) is to throw on to the defendant the burden of disproving legal possession and knowledge of the nature of the contents, these elements being the substratum of a possession-based offence under s. 4 or s. 8.

81. This derogation from the presumption of innocence is so severe that it is not sustainable unless it can be shown at least that the legitimate objective cannot be achieved otherwise than by the imposition of these reverse burdens of proof. This has not been shown. The appellant has not demonstrated that an evidential onus of proof would be inadequate to achieve that objective. Indeed, it does not appear that the legislative

endorsement of s. 47(1) and (2) was based on a considered judgment that an evidential onus would not have achieved the legitimate objective."

Li CJ explained the effect of BL 160 at 628I – 629B:

"9. Article 160 is the last article of the Basic Law. It is the only article in Chapter IX, the last Chapter, which is headed 'Supplementary Provisions'. It has two parts. Article 160(1) deals with the continuation of laws whilst art.160(2) relates to the continuation of documents, certificates, contracts, and rights and obligations. The latter provides that the specified matters valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the HKSAR provided that they do not contravene the Basic Law. Article 160(1) supplements articles such as arts.8 and 18 in making it clear that laws previously in force shall be adopted except for those which the Standing Committee declares to be in contravention of the Basic Law. Apart from the laws so declared to be in contravention, the article recognizes that there may be laws which are discovered after 1 July 1997 to be in contravention. In relation to them, art.160(1) provides that 'they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law'."

Li CJ ruled at 629C – 630B that BL 160 did not apply to judicial procedure:

"10. The context of art.160 of course includes the continuation of a common law system in Hong Kong as provided by the Basic Law. Under the common law, the well-established position is that a judgment determining a legal question operates retrospectively as well as prospectively. …

11. The crucial question is whether on its proper interpretation, the phrase 'the procedure as prescribed by this Law' at the end of art. 160(1) covers judicial procedure. If it does, judgments of the courts determining pre-1 July 1997 laws to be in contravention of the Basic Law would only have prospective effect, since the article provides that the law in question 'shall cease to have effect' in accordance with the procedure prescribed. Such a result would be extraordinary. Article 160 would be according to such judgments a treatment which represents a radical departure from the established common law position. Further, a sharp distinction would have to be drawn between pre-1 July 1997 laws and post-1 July 1997 laws. Whereas a court judgment determining a post-1 July 1997 law to be in contravention of the Basic Law would operate retrospectively as well as prospectively in accordance with the common law position, a wholly different rule would

prevail in relation to a judicial declaration of contravention in relation to a pre-1 July 1997 law. Article 160 should not be interpreted to lead to such an extraordinary result in the absence of clear words.

12. An examination of the language of art. 160(1) lends no support to the appellant's argument that judicial procedure is included within its purview. On the contrary, its language indicates that the judicial process is not included and that it is only the legislative procedure which is contemplated by the article. The article refers to the situation where a pre-1 July 1997 law is discovered after that date to be in contravention of the Basic Law. Discovery marks the commencement of the process. It is by the operation of the procedure as prescribed by the Basic Law that the relevant law 'shall be amended or cease to have force' in accordance with that procedure.

13. As to the first limb, 'shall be amended', this phrase connotes a legislative procedure. A law is amended by the enactment by the legislature of a subsequent statute to amend it. The courts do not amend laws. That 'amend' should be interpreted in this way is supported by the use of the word in other articles of the Basic Law where it is plain that the reference is to a legislative act. For example, art.8 refers to laws being subject to amendment by the legislature of the HKSAR. And art. 73(1) provides that the legislature's powers and functions include the amendment of laws. As to the second limb, 'shall cease to have force', the phrase also suggests a legislative procedure. It is when the legislature repeals a law that it ceases to have effect so that the phrase 'shall cease to have effect' connotes the legislative context."

Leung v Secretary for Justice [2006] 4 HKLRD 211

Background

The applicant, a homosexual man aged 20, challenged in judicial review proceedings the validity of certain provisions of the Crimes Ordinance (Cap. 200), namely s. 118C and s. 118F(2)(a) relating to the offence of buggery and s. 118H and s. 118J(2)(a) relating to the offence of gross indecency, as infringement of his rights to equality and privacy protected by the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383) ("Bill of Rights"). For the buggery provisions, he argued that there

was discrimination because while 16-year-old heterosexuals could engage in sexual intercourse, the minimum age of consent for buggery was 21. He succeeded before the CFI and the Secretary for Justice ("SJ") appealed only in respect of the constitutionality of s. 118C of Cap. 200, submitting that s. 118C did not breach the rights of equality and privacy.

Basic Law provisions in dispute

The major provision in dispute was BL 25.

What the Court held

The CA held that s. 118C of Cap. 200 infringed the rights to privacy and equality because heterosexuals could engage in sexual intercourse at the age of 16 (the age of consent for a girl being that age) whereas the age of consent for buggery was 21. The SJ, while accepting that homosexuality was a status for the purpose of BoR 1 and BoR 22, argued that buggery was not to be equated with sexual intercourse between a man and a woman and there was no inequality in the sense that the provision was not gender-specific and the minimum age restrictions on buggery applied equally to both men and women. The CA considered that the only form of sexual intercourse available to homosexual couples was anal intercourse, whereas for heterosexuals, the common form of sexual intercourse opened to them was vaginal intercourse, which was obviously unavailable as between men. S. 118C significantly affected homosexual men in an adverse way compared with heterosexuals.

On whether the infringement could be justified by the Government, the CA found that the SJ had not sufficiently demonstrated any justification for the age limit of 21 or the different treatment of male homosexuals compared with heterosexuals. There were limits to the margin of appreciation that could be accorded to the Legislature; where there was an apparent breach of rights based on race, sex or sexual orientation, the court would scrutinize with intensity the reasons said to constitute justification. Where the court did not see any justification for the alleged infringement, the court must be aware of its role to protect minorities and to strike down unconstitutional laws. S. 118C was declared

unconstitutional as it breached the Basic Law and the Bill of Rights.

What the Court said

The CA held at 234F – 235A that a "two-stage" analysis should be adopted for inquiry into whether a piece of legislation was unconstitutional:

"43. As with most inquiries into whether a piece of legislation is unconstitutional, two stages should be analyzed as a matter of legal approach:

(1) First, has a right protected by the Basic Law or the Bill of Rights (the ICCPR) been infringed?

(2) Second, if so, can such infringement be justified?

An infringement that cannot be justified will mean that the relevant piece of legislation will be held to be unconstitutional and of no effect.

44. As a matter of the burden of proof, it is for the applicant to make good the first stage inquiry, viz, whether the Basic Law or the Bill of Rights has been breached. If this cannot be shown, that is the end of the matter. But if an infringement is proved, then the second stage comes into play and it is for the respondent (usually the Government or one of its arms) to demonstrate that the breach is justified. It is at the second stage that the court examines whether the constitutional infringement can be legally justified by the application of the proportionality test. Any restriction on a constitutional right can only be justified if: (a) it is rationally connected to a legitimate purpose; and (b) the means used to restrict that right must be no more than is necessary to accomplish the legitimate purpose in question. …"

On the question of whether BL 25 and 39 and BoR 1, 14 and 22 had been infringed, the CA held at 235F – 237A that s. 118C of Cap. 200 was inconsistent with the rights to privacy and equality:

"47. … I agree with Hartmann J's conclusion that buggery and sexual intercourse between a man and a woman are to be regarded as being similar:

(1) Sexual intercourse between men and women is not just for the purposes of procreation. It also constitutes an expression of love, intimacy and constituting perhaps the main form of sexual gratification. For homosexual men, buggery fits within these definitions. At one stage, societal values dictated that buggery was some form of unnatural act, somehow to be

condemned and certainly not condoned. These values have changed in Hong Kong and perhaps one needs to look no further than the 1991 amendments that led to the legalization of buggery to confirm this.

(2) The courts have consistently treated buggery as a form of sexual intercourse and have certainly treated the two acts as being comparable when examining the constitutionality of legislation dealing with buggery …

48. In my judgment, the answer lies in what Hartmann J held, namely that 'for gay couples the only form of sexual intercourse available to them is anal intercourse.' For heterosexuals, the common form of sexual intercourse open to them is vaginal intercourse. This is obviously unavailable as between men. It is clear then that s. 118C of the Crimes Ordinance significantly affects homosexual men in an adverse way compared with heterosexuals. The impact on the former group is significantly greater than on the latter."

The CA held at 237H – 238C that the infringement of the applicant's rights had not been justified:

"51. Adopting this approach, I reach the conclusion that the Respondent has not sufficiently demonstrated any justification for the infringement of the Applicant's rights : -

(1) The purpose of the legislation can be said to be the protection of the young from sexual activities which are, for want of a better term, for more mature persons …

(2) The focus therefore shifts to the age limit of 21 that the Legislature has imposed in our legislation. For my part, I fail to see on any basis the justification of this age limit. No evidence has been placed before us to explain why the minimum age requirement for buggery is 21 whereas as far as sexual intercourse between a man and a woman is concerned, the age of consent is only 16. There is, for example, no medical reason for this and none was suggested in the course of argument."

In response to the argument that a margin of appreciation should be accorded by the courts to the Legislature, the CA held at 239H – 240A that:

"53. There are, however, limits to the margin of appreciation that can be accorded to the Legislature. Where there is an apparent breach of rights based on race, sex or sexual orientation, the court will scrutinize with intensity 'the reasons said to constitute justification' … Where the court does not see any justification for the alleged infringement of fundamental

rights, it would be its duty to strike down unconstitutional laws, for while there must be deference to the Legislature as it represents the views of the majority in a society, the court must also be acutely aware of its role which is to protect minorities from the excesses of the majority. In short, the court's duty is to apply the law; in constitutional matters, it must apply the letter and spirit of the Basic Law and the Bill of Rights."

Re C (A Bankrupt) [2006] 4 HKC 582

Background

The Official Receiver ("the OR") sought orders by *ex parte* applications under s. 138 of the Bankruptcy Ordinance (Cap. 6) to prosecute two bankrupts, C and L for offences contrary to Cap. 6. Particularly, L was sought to be prosecuted for an offence under ss. 133 and 134 of Cap. 6, whereby each contained a provision that "a prosecution shall not be instituted against any person under this section except by order of the court". However, s. 138 of Cap. 6 provided that "no such order shall be a condition antecedent to any prosecution under the Ordinance". The CFI dismissed the applications on the ground that the power conferred upon the court under s. 138 of Cap. 6 was constitutionally impermissible as it was inconsistent with BL 63 which provided that the Department of Justice of the HKSAR shall control criminal prosecutions, free from any interference. The OR appealed against the CFI decision and the Secretary for Justice ("SJ") obtained leave to intervene.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 63.

What the Court held

The CA held that BL 63 referred to the Department of Justice, with the SJ as its head, as the depository of the guarantee of prosecutorial independence. The prerogatives covered by that guarantee ultimately rested with the SJ. The prosecutorial independence of the SJ was

the linchpin of the rule of law. The Basic Law, in particular, BL 63 preserved the fundamental principle that the prosecutorial role should be free from interference. Apart from political interference, which BL 63 was primarily directed at, the SJ should also be free from judicial encroachment upon his right to decide whether to institute a prosecution, what charge to prefer, whether to take over a private prosecution and whether to discontinue proceedings, subject only to issues of abuse of the court's process and possibly judicial review of decisions taken in bad faith.

The CA held that in making an order under s. 138 of Cap. 6, the court did not interfere with or control any of the prosecutorial prerogatives of the SJ. The power under s. 138 was ancillary to a function that was judicial and the power must be construed as subject to the rights of the SJ to decline to proceed, including to withhold his authorization for the institution or continuation of a prosecution where that authority was needed, or to intervene and bring an end to such proceedings. The CA thus held that the court's power under s. 138 of Cap. 6 to order a prosecution did not interfere with the SJ's decision-making process as that process had not commenced. The CA concluded that s. 138 did not contravene BL 63.

What the Court said

The CA held that prosecutorial independence was enshrined under BL 63 and said at 590C – D:

"17. Article 63 of the Basic Law refers to the depository of the guarantee of prosecutorial independence as the Department of Justice, but it is convenient and appropriate to refer in this judgment to the depository as the Secretary for Justice, for he heads that Department and with him ultimately rest the prerogatives covered by that guarantee.

18. The prosecutorial independence of the Secretary for Justice is a linchpin of the rule of law. He is in the discharge of that duty to be 'actuated by no respect of persons whatsoever' (Sir Robert Finlay, 1903, *Parliamentary Debates Vol 118*, col 349-390) and 'the decision whether any citizen should be prosecuted or whether any prosecution should be discontinued, should be a matter for the prosecuting authorities to decide on the merits of the case without political or other pressure. … any practice savouring of political

pressure, either by the executive or Parliament, being brought to bear upon the Law officers when engaged in reaching a decision in any particular case, is unconstitutional and is to be avoided at all costs.': *The Law Officers of the Crown* Edwards (1964), p 224. That these statements of fundamental principle were made in reference to the prosecutorial role of the Attorney General in England is of no present consequence for they reflect accepted and applied fundamental principle in this jurisdiction the continuation of which is preserved by the entire theme of the Basic Law as well, specifically, as by art 63 …"

As to the kind of interference that BL 63 was directed at, the CA said at 591G:

"20. I apprehend that it is to such interference, that is to say, interference of a political kind, to which art 63 is directed. But the rule that ensures the Secretary's independence in his prosecutorial function necessarily extends to preclude judicial interference, subject only to issues of abuse of the court's process and, possibly, judicial review of decisions taken in bad faith …"

The CA described the purposes of BL 63 at 592E – F:

"21. … What art 63 does, apart from its prime purpose of prohibiting political interference is to reflect the boundary that protects the Secretary from judicial encroachment upon his right to decide whether to institute a prosecution, what charge to prefer, whether to take over a private prosecution, and whether to discontinue proceedings."

At 593B – F, the CA explained that in making an order under s. 138 of Cap. 6, the court did not control any of the prosecutorial prerogatives:

"23. … I suggest that the question is this: In making an order under s 138 of the Ordinance, does the court thereby control any of the prosecutorial prerogatives of the Secretary for Justice; that is to say, his discretion to institute, or direct the institution of, a prosecution; to decline to institute a prosecution; to take over proceedings commenced by others; and to discontinue proceedings he has commenced?

24. Viewed thus, it seems to me sufficiently clear that the answer to the question posed is 'No', for by the exercise of the s 138 power the court interferes with, and controls, none of those prerogatives. In neither of the cases before us had the Secretary sought to put into motion any prosecution or to make any decision in relation to a subsisting prosecution, in respect

of which a court has intervened. Nor has there been any decision by him not to institute proceedings which a court has by order sought to overturn. That being so, it is difficult to see how it can be said that the court has interfered with or controlled the Secretary in the exercise of any one of his prosecutorial prerogatives unless it be that a s 138 order is a direction to the Secretary that he is to institute proceedings for a specific offence under the Ordinance, an issue to which I must return."

The CA held at 594H – 595B that an order made under s. 138 was not directed at the SJ:

"27. Where then does room remain for asserting accurately that a power such as that provided by section 138 constitutes control or interference? There would be such room were the order to prosecute directed at, and bind, the Secretary himself or were the direction to prosecute be one that indirectly bound the Secretary. It will be remembered in this regard that section 138 does not contain a provision … that where an order to prosecute was made the Director of Public Prosecutions (or the Secretary) is bound to prosecute. …

28. The position adopted by the Secretary for Justice in the Notice of Appeal is that since neither the Secretary nor the Director of Public Prosecutions were in these cases parties to the applications – and in practice they never are – the orders cannot be treated as directed at them; and that as for the potential liability for contempt of court by a non-party in allegedly thwarting the purpose which the court, in making its order, was intending to fulfil, … this does not arise, the argument goes, if section 138 of the Ordinance is so construed as to be consistent with article 63 of the Basic Law.

29. I am of the opinion that the position taken by the Secretary for Justice in this regard is correct. It is true that the power we see in section 138 is unusual, in that the normal course to be adopted by a court that uncovers from the evidence before it in a civil action a prima facie case of crime, is to refer the papers to the Secretary for examination and for such course as he then sees fit. …"

In considering whether the power under s. 138 of Cap. 6 would constitute judicial intervention upon prosecutorial independence, the CA said at 596A – B:

"30. … The answer to that question is, in my opinion, 'No', first because the power under s 138 is ancillary to a function that is judicial and, secondly, because the power may reasonably, and therefore must, be construed

as subject to the rights of the Secretary to decline to proceed where his signature to a charge sheet or an indictment is required, or to stop a prosecution by the entry of a *nolle prosequi* where he sees fit so to do."

Prime Credit Leasing Sdn Bhd v Tan Cho Lung & Another

[2006] 4 HKLRD 741

Background

The judgment creditor obtained a judgment in Malaysia and registered the same in Hong Kong pursuant to the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319). The judgment debtor applied to set aside the registration arguing, *inter alia*, that the Malaysian judgment could not be registered according to s. 2A(2)(b) of the Interpretation and General Clauses Ordinance (Cap. 1), which provides:

In any Ordinance, provisions conferring privileges on the United Kingdom or other Commonwealth countries or territories, other than provisions giving effect to reciprocal arrangements between Hong Kong and the United Kingdom or other Commonwealth countries or territories shall have no further effect.

The issue was whether the application of s. 2A(2)(b) of Cap. 1 to the provisions in Cap. 319 would compel a construction that the judgment obtained in Malaysia could no longer be registered after 1 July 1997.

Basic Law provisions in dispute

The major provisions in dispute were BL 8 and BL 160.

What the Court held

The CFI dismissed the judgment debtor's application. The Court held that s. 2A of Cap. 1 laid down the general principle for construing all laws immediately in force in Hong Kong before 1 July 1997 by reference to two fundamental requirements: (a) all such laws should not contravene the Basic Law; and (b) they should conform with the status

of Hong Kong as a special administrative region of the PRC. The Court held that statutory provisions giving effect to reciprocal arrangements shall continue to have force only if the reciprocal arrangements in question continued after 1 July 1997.

As regards the reciprocal enforcement of judgments between Hong Kong and Malaysia under Cap. 319, the Court held that it was not a pre-requisite for designating a particular country under s. 3(1) of Cap. 319 that the particular country did give *actual* reciprocal enforcement at the time. It would be sufficient if the CE in C was satisfied that substantial reciprocity of treatment would be assured.

The Court further found that the CE in C must have been satisfied that substantial reciprocity of treatment by Malaysia would be assured upon and after the handover. Further, on the facts, reciprocity in enforcement of judgments did exist because Malaysia recognized and enforced judgments obtained in Hong Kong under the Malaysian Reciprocal Enforcement of Judgments Act 1958.

What the Court said

On the continuity of laws previously in force in Hong Kong, the Court held at 747I – J:

"22. … A general principle of continuity emerged from arts.160 and 8. All the laws previously in force in Hong Kong before 1 July 1997 shall be adopted and maintained as the laws of the HKSAR except for:

(1) those which the [NPCSC] declares to be in contravention of the Basic Law;

(2) those which contravene the Basic Law; and

(3) those which are amended by the Legislature of the HKSAR."

The Court summarized at 749B – D the effect of the NPCSC's decision made on 23 February 1997 on the Treatment of the Laws Previously in Force in Hong Kong in Accordance with BL 160:

"27. In summary, the Decision:

(1) declared what statutory provisions previously in force in Hong Kong are in contravention of the Basic Law so that they will not be adopted as the laws of the HKSAR;

(2) prescribed how the laws previously in force in Hong Kong and adopted

as the laws of HKSAR are to be applied; and

(3) required any laws previously in force in Hong Kong and adopted as the laws of the HKSAR which are later discovered to be in contravention of the Basic Law to be amended or to cease to have force."

The Court examined s. 2A(2)(b) of Cap. 1 and said at 750E – H and 751B – D:

"31. Section 2A firstly lays down in subsection (1) the general principle for construing all laws, including Ordinances and subsidiary legislation, immediately in force in Hong Kong before 1 July 1997 and adopted as laws of the HKSAR by reference to two fundamental requirements:

(1) they should not contravene the Basic Law; and

(2) they should conform with the status of Hong Kong as a Special Region of the People's Republic of China.

This ensures that all the laws previously in force in Hong Kong before 1 July 1997, though adopted as the laws of the HKSAR, must fully comply with the requirements so that any non-compliance, when subsequently discovered, will be properly addressed by applying the requisite construction. In the case of statutory provisions, no amendment or express repeal will be required if a particular provision is later found to be in contravention of any of the requirements. The offending part can be dealt with by applying the requisite construction.

…

33. I now examine section 2A(2)(b) more closely. The subsection first renders the statutory provisions conferring privileges on the United Kingdom and other Commonwealth countries or territories to be of no further effect, although they still remain on the statute books. The reason is obvious. Those provisions are plainly incompatible with the status of Hong Kong as a Special Administrative Region of the People's Republic of China. They cannot have any further force.

34. The subsection then retains those statutory provisions that give effect to the reciprocal arrangements between Hong Kong and the United Kingdom or other Commonwealth countries or territories. … such reciprocal arrangements, which might take various forms, were plainly made because Hong Kong was a British colony or a member of the Commonwealth . Upon the handover, different scenarios might arise:

(1) The reciprocal arrangement lapsed automatically because Hong Kong

ceased to be a British colony or a member of the Commonwealth.

(2) The Government of the HKSAR discontinued the reciprocal arrangement unilaterally.

(3) The United Kingdom or the Commonwealth country or territory concerned discontinued the reciprocal arrangement unilaterally.

(4) The reciprocal arrangement continues.

35. It is inconceivable that when a reciprocal arrangement ceased to exist in any of scenarios (1) to (3) upon the handover, the statutory provisions giving effect to it immediately before the handover would still continue to have further force. … It is only in scenario (4) that the statutory provisions concerned must continue to be in force in order to give effect to the reciprocal arrangement.

36. Thus analyzed, statutory provisions giving effect to reciprocal arrangements shall continue to have force only if the reciprocal arrangements in question continue after the handover. It follows that when applying the construction in s. 2A(2)(b) to a particular statutory provision purporting to give effect to a reciprocal arrangement, it must be ascertained if that reciprocal arrangement continues after the handover. And for this purpose, each reciprocal arrangement must be considered in its own context."

The Court commented at 754H – 755A on CE in C's power under s. 3(1) of Cap. 319:

"43. … It is not a pre-requisite for designating a particular country under s. 3(1) that that particular country does give actual reciprocal enforcement at the time. It will be sufficient if the Chief Executive-in-Council is satisfied that substantial reciprocity of treatment *will be assured* (Emphasis added). The wording of s. 3(1) gives the Chief Executive both discretion and flexibility to allow [Cap. 319] to continue in force in respect of any country pending either clarification of its position, or the formulation of further agreements as to enforcement of judgments or other reciprocal juridical assistance …"

On the facts, the Court found at 755E – H that:

"45. … I am of the view that although the Government of Malaysia had not explicitly stated its position, the Chief Executive-in-Council must have been satisfied that substantial reciprocity of treatment by Malaysia would be assured upon and after the handover, even assuming that no actual reciprocity existed at the time. I therefore rule that the provisions in [Cap.

319] relating to Malaysia continue to have force after 1 July 1997.

46. Even assuming that it is necessary to ascertain whether Malaysia gives reciprocal enforcement to judgments obtained in Hong Kong after 1 July 1997 in order for the provisions of [Cap. 319] relating to Malaysia to have force under s. 2A(2)(b) of [Cap. 1], the fact-finding exercise shows that Malaysia does recognize and enforce judgments obtained in the Hong Kong under the Malaysian [Reciprocal Enforcement of Judgments Act 1958]."

Leung Kwok Hung v President of Legislative Council [2007] 1 HKLRD 387

Background

In July 2006, after the second reading of the Interception of Communications and Surveillance Bill ("Bill"), LegCo members proposed a substantial number of committee stage amendments to the Bill. In August 2006, the President of the LegCo ("President") ruled that a number of those proposed amendments had a charging effect, and in terms of rule 57(6) of the rules of procedure ("r. 57(6)"), could not go forward for consideration. R. 57(6) prevented LegCo members from introducing committee stage amendments with charging effect.

The applicant was a member of the LegCo. He applied for judicial review to challenge the constitutionality of r. 57(6). It was his case that r. 57(6) by restricting the right of members to propose committee stage amendments which had a financial impact on would-be legislation, was inconsistent with BL 73(1) and BL 74.

Basic Law provisions in dispute

The major provisions in dispute were BL 73(1), BL 74 and BL 75(2).

What the Court held

The CFI dismissed the application and held that r. 57(6) was not inconsistent with the Basic Law. BL 75(2) gave the LegCo power

to regulate, as it deemed best, the manner in which it discharged the enacting process. The LegCo was not answerable to outside authority in setting the rules of procedure provided that the rules did not violate the Basic Law.

BL 74 was not to be read as engaging the enacting process. It circumscribed the rights of members before but not after a bill had been introduced into the LegCo. The CFI held that proposing amendments to bill was part of the enacting process and was not caught by BL 74.

The Court held that r. 57(6) was found on the separation of powers principle and the particular constitutional principle that no charge on public funds could be incurred except on the initiative of the Executive and the administration.

What the Court said

The CFI recognized that the Basic Law did not allow LegCo members to introduce bills with a charging effect. The Court said at 390:

"2. The Basic Law does not permit members of LegCo to introduce bills which have a charging effect but is silent on the question of whether, once a bill is introduced, members may propose committee stage amendments which will have the same effect. However, LegCo has a rule of procedure – r.57(6) – which effectively prevents members from proposing such amendments. It is the applicant's case that this rule of procedure is inconsistent with the Basic Law."

The CFI held at 390 that the powers under BL 73 were given to the LegCo, not its individual members, and the LegCo must act in accordance with law:

"4. The powers and functions described in art.73 are not given to members of LegCo as individuals but to LegCo itself sitting as a legislative body. …

5. Being subordinate to the Basic Law, LegCo must, of course, act in accordance with that Law. In this regard, art.73(1) directs that LegCo, in enacting, amending or repealing laws, must exercise its powers and functions in accordance with the Basic Law. In addition, however, it directs that LegCo must do so in accordance with 'legal procedures'."

The Court held at 391 that legal procedures included the rules of

procedure:

"7. In the context of art.73(1), I am satisfied that the phrase, 'in accordance with … legal procedures' means that the Legislative Council must act not only in accordance with the Basic Law itself but also in accordance with the rules of procedure which the Council has the power to set for itself in order to govern the manner in which it enacts, amends or repeals laws. …

10. In Hong Kong … although LegCo has inherited many of the constitutional attributes of Parliament, the Basic Law is supreme. That being said, in my judgment, the qualifying phrase 'on its own' in art.75(2) underscores the fact that the Basic Law recognizes LegCo to be a sovereign body under that Law. In setting rules of procedure to govern how it goes about the process of enacting, amending and repealing laws, provided those rules are not in conflict with the Basic Law, LegCo is answerable to no outside authority."

The Court held at 391 – 392 that BL 74 was silent on whether it applied to committee stage amendments:

"11. … Members of LegCo, acting individually or in a group, may introduce bills. But, as I have indicated earlier, the nature of those bills is restricted. Included in those restrictions, bills which relate to public expenditure; that is, which have a charging effect, may not be introduced. Art.74 reads:

Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.

12. Art.74, while it directly prohibits members from introducing bills into LegCo which have a charging effect, is silent on the matter of later proposed committee stage amendments which have the same effect."

The CFI ruled at 401 that BL 74 was not to be read as engaging the enacting process:

"65. In my judgment, however, within the framework of the Basic Law, art.74 is not to be read as engaging the enacting process. To put it more broadly, on my reading of the Basic Law, the introduction of bills to LegCo is not dealt with as being part and parcel of the enacting process but rather as a preliminary and discrete process.

66. The Basic Law enshrines the separation of powers. A reading of the Law makes it evident that the executive, the administration and the legislature are each to perform their constitutionally designated roles in a co-ordinated and co-operative manner for the good governance of Hong Kong. Mr Thomas [counsel of the 2nd respondent] described it as the 'workability principle'.

67. Hong Kong has an executive-led government. It is the function of the Chief Executive to lead the government, to decide on government policies and to approve the introduction of motions regarding revenues or expenditure to the Legislative Council: art.48. It is the function of the Government; that is, the executive authorities (led by the Chief Executive) to formulate and implement policies, to conduct administrative affairs and to draw up and introduce (into LegCo) budgets and final accounts: art.62. LegCo does not exercise executive or administrative functions of the kind I have just described. To put it plainly, it does not run any 'mirror' Ministry of Finance. It is instead the function of LegCo to enact, amend or repeal laws, to examine and approve budgets introduced by the executive authorities and to 'approve' (not create or decide upon) taxation and public expenditure: art.73.

68. Accordingly, while it is for the executive and the administration to formulate policy, expressing it in terms of legislation and financial proposals, it is for the legislature to enact that legislation and to approve those financial proposals. What the Basic Law defines is the method of inter-action; that is, the nexus, both introductory and consequential, which connects the executive and administration on the one part with the legislature on the other. To put it another way, who carries responsibility for this inter-action, the manner in which it is to be executed and how the consequences are to be managed are fundamental matters defined in the Basic Law. …"

The CFI held at 402 that r. 57(6) was not inconsistent with BL 74:

"69. In my judgment, considered in that context, art.74 is not to be read in the manner advocated on behalf of the applicant; that is, as applying to, and in some way governing, the entire enacting process, but only as defining the limit of the power given to members of LegCo (in addition to the power given to the executive and the administration) to introduce bills. Art.74 therefore circumscribes the rights of members *before* anything has been brought within the purview of LegCo while proposing amendments to bills is part of the process that takes place *after* bills have been brought within the

purview of LegCo.

…

71. I am of the view that nothing is to be construed from the fact that art.74 is silent on the question of whether members do or do not have the power to propose amendments to bills which have a charging effect. Nothing is to be construed because any power to propose amendments when bills are before LegCo is a matter independent of the scope of art.74.

72. … I am satisfied that r.57(6) of LegCo's Rules of Procedure is not rendered inconsistent with the Basic Law by the application of art.74."

Weson Investment Ltd v Commissioner of Inland Revenue

[2007] 2 HKLRD 567

Background

Weson Investment Limited ("plaintiff") was assessed for profits tax but raised an objection upon the grounds that the profit was a capital gain and should be exempted. The Commissioner of Inland Revenue ("Commissioner") pressed for payment pending final determination. Finally the plaintiff did pay up, but appealed to the Board of Review. The plaintiff won and the assessment was wholly set aside. The plaintiff claimed a refund of the tax paid together with the surcharge of 5% for late payment. The Commissioner agreed but the plaintiff made a further demand for interest on the amount paid for the period it was out of pocket. The Commissioner rejected this demand. The plaintiff argued that it was entitled to interest on the ground that the Commissioner would otherwise be unjustly enriched. The Commissioner primarily relied on s. 79(1) of the Inland Revenue Ordinance (Cap. 112) which provided for refund of the tax and late payment surcharge to the plaintiff, but did not provide for payment of the interest. At first instance, the Deputy Judge rejected the plaintiff's claim. The plaintiff appealed. The case raised the issue whether taxation would constitute "deprivation" under BL 105.

Basic Law provisions in dispute

The major provisions in dispute were BL 105 and BL 108.

What the Court held

The CA dismissed the plaintiff's appeal and held that BL 105 did not apply as there was no deprivation of the plaintiff's property. "Deprivation" in BL 105 was used in the sense of expropriation, which was the expression used in its original Chinese. A genuine attempt to tax, even though it ultimately turned out to be wrong, did not amount to expropriation under BL 105 because the Commissioner was not seeking to take away the property of the taxpayer but was only recovering that which was due to him.

BL 105 had no application to legitimate taxation, which was governed under BL 108. Cap. 112 provided for objections and appeals and came within the ambit of BL 108, so that a payment which turned out not to have been payable because of a successful objection or appeal, was nevertheless covered by BL 108. The taxpayer's remedies would not depend on BL 105 and the statutory remedy could be found in Cap. 112, in particular, s. 79(1).

What the Court said

Rogers V-P held at 575B and F that BL 105 did not apply to legitimate taxation:

"18. In my view, art.105 of the Basic Law has no application to legitimate taxation. Taxation is governed under art.108 of the Basic Law …

When the Government imposes tax on the individual, of necessity it deprives the individual of his property without any right to compensation. …"

Tang V-P (as he then was) held at 585E – 586B and 588D – E that genuine tax would not constitute deprivation:

"79. … In my opinion, BL 105 has no application. 'Deprivation', in BL 105, is used in the sense of expropriation, which is the expression used in its original Chinese. In my opinion, BL 105 concerns essentially a taking, as under eminent domain. I do not believe that suing for tax by action or for example, the recovery of a penalty or fine by action, even if it subsequently

turned out to be wrong, would amount to or come within the scope of lawful expropriation under BL 105.

…

81. I have no doubt that the Ordinance, which provided for objections and appeals, came within the ambit of BL 108, so that a payment which turned out not to have been payable because of a successful objection or appeal is nevertheless covered by BL 108.

82. Hence, I do not agree with Mr Mok's submission that … only taxes properly payable under the Ordinance are covered by BL 108. Thus, there is no difference between an excessive assessment, whether due to mathematical errors or otherwise, and a payment which was made pursuant to an ultra vires regulation. I do not believe that is so. In any event, I do not believe that a genuine attempt to tax, even though it ultimately turned out to be wrong, amounted to lawful expropriation under BL 105.

…

87. … I do not accept Mr Mok's submission that there has been an expropriation of the property of the taxpayer. In other words, the Commissioner was not seeking to take away the property of the taxpayer, but to recover that which was due to the Commissioner. If the Commissioner turned out to be wrong, the taxpayer would have his remedies, but the remedies would not depend on BL 105. Here, the statutory remedy is to be found in the Ordinance in particular s. 79(1). It is then a question of construction whether in addition to the statutory remedy, the taxpayer has other remedies at common law. If so, again, they do not depend on BL 105. On my construction of s. 79(1), the only remedy is to be found in the Ordinance."

At 587C – F, Tang V-P rejected the plaintiff's case that the court must strike a fair balance between BL 105 and BL 108:

"85. Mr Mok submitted that BL 105 and 108 should be read in the same way. In other words, the court must strike a fair balance, so that there must be a reasonable relationship of proportionality between the means employed and the aims pursued. He submitted that if one were to apply the proportionality test, s. 79(1) whether read alone or considered together with s. 71, failed the test. I do not believe it is right to read BL 105 and 108, as if the right of the HKSARG to tax has to strike such a fair balance. Rather, I am of the view that unless the taxation scheme cannot be regarded as genuine, but was in fact a disguised expropriation of property, BL 105 has

no application. And the court has no power to interfere. Mr Mok accepted that, on his submission, even if the Ordinance had provided for the payment of interest, that would not be a sufficient compliance with BL 105, unless the interest so provided corresponded to 'the real value of the property concerned at the time'. I do not believe BL 105 could have such wide ranging effect."

Unruh v Seeberger (2007) 10 HKCFAR 31

Background

The plaintiff, ("Mr Unruh") claimed for payment of a Special Bonus. The claim for the Special Bonus arose pursuant to a Memorandum of Agreement, ("MoA"), made in 1992, between Mr Unruh and the 1st defendant, ("Mr Seeberger"). The MoA was made as part of the documentation entered into during the course of the sale by Mr Unruh to, ultimately, the 2nd defendant, Eganagoldpfeil (Holdings) Limited ("Egana"), of the entire issued share capital in Eco Swiss China Time Limited ("ESCT"), a company owned by Mr Unruh.

At the time the MoA was signed by Mr Unruh and Mr Seeberger, ESCT was engaged in an arbitration proceeding in the Netherlands between ESCT and Bulova International Watch Company Inc, as plaintiffs, and Benetton International NV, ("Benetton") as defendant. The arbitration proceedings were known as NAI 1325.

The MoA made provision for the payment to Mr Unruh of a "Special Bonus", to be calculated pursuant to a formula set out in the MoA, that formula being dependent upon there being an award of compensation in the arbitration proceedings, exceeding US$10 million. The Special Bonus was to be paid in return for assistance given by Mr Unruh to ESCT and Egana in the conduct of the arbitration proceedings, and any other litigation in which ESCT was involved.

There was another set of arbitration proceedings, known as NAI 1616, with Benetton as plaintiff and ESCT as defendant. Mr Unruh gave assistance on both arbitrations. Both arbitrations were eventually settled

for a sum in excess of US$42 million.

One of Mr Seeberger's defences was that the MoA was a champertous agreement, and accordingly unenforceable.

The lower courts, finding for the plaintiff, held that Mr Seeberger was liable and rejected the defendants' argument that the MoA was champertous and unenforceable. The defendants appealed to the CFA.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 8 and 35.

What the Court held

The CFA dismissed the 1st defendant's appeal but allowed the 2nd defendant's appeal. The CFA held that the common law rules making maintenance and champerty criminal offences, torts and a ground of public policy for invalidating tainted contracts were part of the law of Hong Kong prior to 1 July 1997 and remained applicable by virtue of BL 8. The scope of maintenance and champerty had shrunk over the years and the courts had developed categories of conduct excluded from the sphere of maintenance and champerty. One such excluded category was cases involving "access to justice" considerations.

The CFA held that four points would be relevant in considering the modern public policy which resulted in conduct being characterized as maintenance or champerty:

(a) The traditional legal policies underlying maintenance and champerty continued to apply though they must be substantially qualified by other considerations.

(b) The fact that an arrangement might be caught by the broad definitions of maintenance or champerty was not itself sufficient to find liability but the court would consider the totality of the facts asking whether they posed a genuine risk to the integrity of the court's processes.

(c) Countervailing public policies must be considered, especially policies in favour of ensuring access to justice and of recognizing legitimate common interests of a social or commercial character in the

legal proceedings.

(d) It was important not to confuse related but separate policies with those which properly underlay the operation of maintenance and champerty. For example, an agreement to take a share of litigation proceeds might be primarily objectionable because it involved the unconscionable exploitation of a vulnerable litigant. It might be right to strike down the arrangement in some cases. But in others, doing so (and characterizing the conduct as criminal) in reliance on the law of maintenance and champerty might be to use too blunt an instrument.

The CFA held that the MoA was not a champertous agreement as the plaintiff had a genuine commercial interest in the outcome of the arbitrations. Further, an agreement, which was to be performed in arbitral proceedings in a jurisdiction like the Netherlands where maintenance and champerty did not exist, should not be struck down in a Hong Kong court on those grounds.

What the Court said

The CFA held at 62 that maintenance and champerty formed part of Hong Kong law:

"78. The view has generally been taken that maintenance and champerty form part of Hong Kong law. In *Low Chun Song v Ka Wah Bank Ltd*, the Court of Appeal was content to take that for granted. In *Cannonway Consultants Limited v Kenworth Engineering Ltd*, decided in 1994, Kaplan J held that they applied by virtue of s 3 of the Application of English Law Ordinance (Cap 88), which imported the common law and rules of equity into Hong Kong. I respectfully agree. The common law rules making maintenance and champerty criminal offences, torts and a ground of public policy for invalidating tainted contracts, were part of Hong Kong law prior to 1997 and remain applicable by virtue of Article 8 of the Basic Law."

The CFA recognized that "access to justice" was an excluded category. The Court said at 66 – 67:

"95. A second excluded category involves what might today be referred to as cases involving 'access to justice' considerations. In Hong Kong, Article 35 of the Basic Law recognizes access to the courts as a fundamental right. It has never been a defence to an action nor a ground for a stay to show

that the plaintiff is being supported by a third person in an arrangement which constitutes maintenance or champerty. Neither does liability for maintenance or champerty depend on the action or the defence being bad in law. It follows that an attack on an arrangement said to constitute maintenance or champerty could well result in a claim which is perfectly good in law being stifled where the plaintiff, deprived of the support of such an arrangement, is unable to pursue it. This is a powerful argument for such cases to be excluded from the ambit of maintenance and champerty. This was recognized by the Privy Council in *Ram Coomar Coondoo v Chunder Canto Mookerjee* [(1876) LR 2 App Cas 186 at 210] where their Lordships stated:

… a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, per se, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner."

The CFA held at 74 – 75 that Hong Kong public policy should not invalidate a contract to be performed in other jurisdictions under which the contract was lawful:

"118. It is common ground that the doctrines of maintenance and champerty are unknown to Netherlands law. It is, in other words, not against Netherlands public policy for a third person to provide assistance or support to a party to an arbitration or to legal proceedings in that jurisdiction, whether or not for a share in the proceeds. Assuming for the purposes of this argument that the MoA would, as a matter of purely domestic law be regarded as champertous, should the court refuse to enforce it, being a contract made in Hong Kong and subject to Hong Kong law, on the ground that it is champertous notwithstanding the absence of objection under Netherlands law?

119. In my view, as a matter of principle, Hong Kong public policy should not invalidate such a contract. As discussed … considerations regarding access to justice are of increasing importance in discussions of public policy in this area. Access to a court is recognized internationally as a fundamental right and the many countries which have acceded to relevant international instruments can be expected to pursue measures appropriate to their individual circumstances to give effect to that right. They will strike their

own balances between countervailing demands, determining the scope to be accorded to that right in the light of their resources, institutions and traditions. Moreover, as we have noted, public policy in a particular jurisdiction in this respect is apt to change. The continued retention by Hong Kong of criminal and tortious liability for maintenance and champerty may not be justified and this question merits serious legislative attention. This makes it particularly inappropriate for Hong Kong to seek to impose its current public policy against maintenance and champerty on mature commercial parties (who are likely to include foreigners) who have chosen to arbitrate in a jurisdiction which does not recognize those concepts and who may accordingly have made arrangements in Hong Kong to finance the arbitral (or judicial) proceedings without being aware of any constraints."

HKSAR v Luo Shui Ji [2007] HKCLRT 137

Background

The applicant was convicted after trial of four offences, including the offence of assisting the passage within Hong Kong of an unauthorized entrant, contrary to s. 37D(1)(a) of the Immigration Ordinance (Cap. 115). Pursuant to s. 37B(1) of Cap. 115, the Immigration (Unauthorized Entrants) Order (Cap. 115D) was made on 7 August 1979 ("Immigration Order"), declaring (at para. 2(1)(aa)) "*all persons who leave, or seek to leave, the People's Republic of China when not in possession of documents issued in that country permitting them to do so in accordance with its laws*" to be unauthorized entrants.

The applicant applied for leave to appeal against the conviction. In reliance on BL 1 and BL 8 and the Interpretation and General Clauses Ordinance (Cap. 1), he contested that the 2nd defendant was not an unauthorized entrant. It was submitted that the Immigration Order, which had not been amended since 1 July 1997, was the law previously in force in HKSAR to which s. 2A(1) of Cap. 1 referred. It was argued that when the Immigration Order was made in 1979, persons who left or sought to leave PRC certainly included those who entered Hong Kong directly from Mainland China. However, after 1997, the Immigration

Order could not be interpreted in a way that contravened BL 1. The applicant submitted that as from 1997, HKSAR was an inalienable part of PRC, and "*persons who leave, or seek to leave China*" under the Immigration Order could not include those who entered HKSAR directly from PRC.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 1. The CA further referred to BL 8 and BL 22 in the judgment.

What the Court held

The CA held that BL 1 was absolute in the sense that no ordinance or subsidiary legislation could contravene it. The legislative intent of Cap. 115 and the Immigration Order was to control the entry into Hong Kong of people from other territories. The focus was plainly on the territorial distinction, i.e. the distinction between Hong Kong itself and places outside the territory of Hong Kong. Such legislative intention or focus was not affected by the reunification of HKSAR with the PRC. BL 22 served to indicate that the relevant provisions did not contravene the principle of "Hong Kong is an inalienable part of China" under the Basic Law.

Further, according to the NPCSC's interpretation of BL 22(4) and 24(2)(3) and the Sino-British Joint Declaration, there was a territorial distinction between HKSAR and other parts of PRC as far as immigration matters were concerned. This distinction was not in conflict with the exercise by PRC of its sovereignty over HKSAR and was indeed expressly retained by the relevant laws.

What the Court said

The CA held at 146 – 147 that there was a territorial distinction between Hong Kong and places outside Hong Kong:

"21. It is clear that Article 1 of the Basic Law is absolute in the sense that no ordinance or subsidiary legislation can contravene it. However, we do not agree with the argument of Counsel for the Applicant. It is well-known

that Hong Kong is a tiny but densely populated place. It is necessary for the government to control the entry into Hong Kong of people from other territories in order to maintain a reasonable allocation of social resources such as employment, education and medical services. The legislative intent of the Immigration Ordinance and the Immigration Order is to control the entry into Hong Kong of people from other territories. People subject to such control include those to whom para.2(1)(aa) of the Immigration Order refers, namely those who leave, or seek to leave, China when not in possession of documents issued in that country permitting them to do so in accordance with its laws.

22. This legislative intent is also apparent from the wording of the relevant provisions. When interpreting the legislative intent of the Immigration Order, the Court cannot merely look at the literal meaning of the Order, but also has to consider the Order in conjunction with s. 37D(1) of the Immigration Ordinance. The focus of these provisions is plainly on territorial distinction, i.e. the distinction between Hong Kong itself and places outside the territory of Hong Kong. This legislative intent or focus is not affected by the reunification of Hong Kong with China on 1 July 1997. Article 22 of the Basic Law serves to indicate that the relevant provisions do not contravene the principle of 'Hong Kong is an inalienable part of China' under the Basic Law …

25. … there is a territorial distinction between Hong Kong and other parts of China as far as immigration matters are concerned. This distinction is not in conflict with the exercise by Mainland China of its sovereignty over Hong Kong, and is indeed expressly retained by the relevant laws."

The CA further distinguished the judgment of Ma J (as he then was) in *Shandong Textiles Import & Export Corp v Da Hua Nonferrous Metals Co Ltd* [2002] 2 HKLRD 844 at 148:

"28. The applicant cited the judgment of Ma J (as he then was) in *Shandong Textiles Import & Export Corp v Da Hua Nonferrous Metals Co Ltd* [2002] 2 HKLRD 844 on the question of whether Mainland arbitral awards can be enforced in Hong Kong. Ma J pointed out that Mainland arbitral awards made between 1 July 1997 and February 2002 were not 'Convention Awards' within the meaning of the Arbitration Ordinance. Although he did refer to art.1 of the Basic Law, his judgment was made on the basis of the definition of 'Convention Awards' in the New York Convention and cannot be applied generally to other circumstances or other ordinances. In our

view, before determining whether a statutory provision contravenes the Basic Law, the legislative intent or context of that provision must first be ascertained."

Chu Woan Chyi & Others v Director of Immigration [2007] 3 HKC 168

Background

The first four applicants were all from Taiwan and were members of Falun Gong. Each was in possession of valid multiple entry permits issued by the Hong Kong immigration authorities. They flew to Hong Kong to attend a conference organized by the Hong Kong Association of Falun Dafa (the sixth applicant), under the chairmanship of the fifth applicant, but were refused entry by the Director of Immigration ("Director")'s officers who informed the first four applicants that it was believed that they presented a security risk. However, they were not informed of the basis for such belief. The first four applicants contended that they were refused entry because of their religious affiliation. They argued that: (a) having landed at Chek Lap Kok Airport, they were entitled to enjoy the same fundamental freedoms as Hong Kong residents; and (b) they had a legitimate expectation that they were entitled to the protection of procedural fairness and to know why their entry was refused. The fifth and sixth applicants contended that the Director's decision constituted a breach of their freedoms under BL 141(4) to maintain and develop relations with representatives of the international Falun Gong movement.

Basic Law provisions in dispute

The major provisions in dispute were BL 4, BL 32, BL 41 and BL 141.

What the Court held

The CFI held that the concepts of "religious belief" and "religious

activities" under BL 32 should be given a generous interpretation. Under the Basic Law, the Falun Gong movement should be recognized as a religious movement, its beliefs being religious beliefs.

The CFI rejected the first four applicants' argument that having landed at Chek Lap Kok Airport, they were "in" Hong Kong for the purposes of BL 41 and were therefore able to enjoy the same fundamental freedoms as Hong Kong residents. The CFI held that BL 4, which was a reflection of BL 41, did not seek to have extra-territorial effect and it safeguarded only the rights and freedoms of those persons who were "in" Hong Kong but not those who were outside it but would like to enter. In addition, since the first four applicants did not have the right to enter and remain in Hong Kong, the ICCPR and the Hong Kong Bill of Rights were not engaged.

The CFI also rejected the contention that the first four applicants were denied permission to enter Hong Kong substantially because of their religious or spiritual beliefs. It was not the court's function to consider the merits of the Director's intelligence assessment, unless any assessment made and action taken in respect of that assessment was so unreasonable as to be perverse. The court's function was to consider whether the government acted lawfully. Accordingly, it could not be asserted that the fifth and sixth applicants were denied their freedom of religious association under BL 141(4).

The CFI further held that for a multiple entry permit to constitute a representation capable of giving rise to a legitimate expectation, the representation must be clear, unambiguous and devoid of relevant qualification. Multiple entry permits contained standard conditions that the holder was subject to immigration control under the provisions of the Immigration Ordinance (Cap. 115). The first four applicants still had to seek permission to land and that permission could be refused. On this basis, the issue of the permits to the first four applicants did not vest them with any sort of legitimate expectation.

What the Court said

The CFI held at 184H – I and 185F – G that a generous interpretation

should be given to the concept of "religious belief" under BL 32 and the Falun Gong movement was to be recognized as a religious movement:

"53. In considering the concepts of 'religious belief' and 'religious activities' under the Basic Law, a technical, narrow or rigid approach must be avoided. The concepts are to be given a generous interpretation in order to ensure the full measure of the freedoms contained in those concepts …

57. As I have said, Falun Gong adherents, who certainly form an identifiable group, do accept a reality of the spirit that extends beyond the perception of our physical senses. They acknowledge the supernatural; that is, a dimension of the spirit that is above and/or outside of nature. They seek to place themselves in harmony with this reality. Importantly, they bind themselves to a code of ethical and moral behaviour which is integral to their spiritual aspirations. As such, I am satisfied that, under the Basic Law; that is, as a constitutionally protected freedom, the Falun Gong movement is to be recognized as a religious movement, its beliefs being religious beliefs."

At 190I – 191C, the CFI construed the scope of BL 4 and BL 41:

"79. In my judgment, however, the fact that in criminal matters Hong Kong assumes a territorial jurisdiction is not determinative. The issue is one of interpretation; that is, of defining the intent of the Basic Law.

80. Article 4 of the Basic Law directs that —

The Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law.

81. Article 4 does not seek to have extra-territorial effect. It safeguards only the rights and freedoms of those persons who are 'in' the Special Administrative Region not those who are outside it but would like to enter. In this regard art 4 is a reflection of art 41.

82. In my judgment, even on a purposive construction, I do not see that art 4 or art 41 are intended to apply to persons who are not in Hong Kong but who are merely seeking permission to enter. To use a simple analogy, such persons are only at the front door asking to come in. The fact that, in some physical sense, they have a foot on Hong Kong soil is no more than a practical consequence of modern travel. To employ the language of the Immigration Ordinance, they are however still seeking the 'right to land'."

At 192B – 193A, the CFI explained that the ICCPR had been applied

subject to a reservation on immigration matters:

"86. … But the ICCPR — as applied to Hong Kong — has been adopted subject to a reservation in respect of immigration matters and that, in the present case, I find decisive.

…

88. The ICCPR was applied to Hong Kong when it was a dependent territory of the United Kingdom which made the following reservation:

The Government of the United Kingdom reserve the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time and, accordingly, their acceptance of … the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom. The United Kingdom also reserves a similar right in regard to each of its dependent territories.

This reservation was reflected in s. 11 of the Bill of Rights:

As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.

89. As the Court of Final Appeal observed in *Tam Nga Yin & Ors v Director of Immigration* (2001) 4 HKCFAR 251, at 260:

The effect of the reservation and s. 11 is that the ICCPR and the Bill of Rights do not apply to and do not affect immigration legislation regarding persons not having the right to enter and remain in Hong Kong.

90. In February 2003, the first four applicants did not have the right to enter and remain in Hong Kong. As such, I do not see how it can be said that, in seeking to enter Hong Kong – as visitors only – in accordance with Hong Kong's immigration legislation, the ICCPR and the Bill of Rights were engaged."

At 199C – D, the Court further rejected the fifth and sixth applicants' case based on BL 141:

"128. That the fifth and sixth applicants were denied their freedom of religious association under art.141(4) of the Basic Law could only be asserted if I found that the first four applicants were denied entry to Hong Kong solely on the basis of their adherence to the Falun Gong movement.

I have not come to that finding. To the contrary, I have come to a finding that, as the Director has asserted, they were denied entry because, on an assessment of intelligence, they were thought, rightly or wrongly, to pose a security risk."

Democratic Party v Secretary for Justice [2007] 2 HKLRD 804

Background

The applicant, a political party, chose to be incorporated and all its members became members of both the party and the company. The applicant sought a declaration that s. 98 of the then Companies Ordinance (Cap. 32), insofar as it gave the public the right to inspect the register of members of a political party registered as a company, was inconsistent with the right to freedom of association under BL 27 and BoR 18, and the right to privacy under BL 30 and BoR 14.

Basic Law provisions in dispute

The major provisions in dispute were BL 27 and BL 30.

What the Court held

The CFI held that while the right to freedom of association was a fundamental right under BL 27 and BoR 18 and the right to privacy was protected under BL 30 and BoR 14, such rights were not absolute and might be subject to restrictions provided that the proportionality test was satisfied. The Court held that though the right to privacy was not absolute, pursuant to BoR 14, no one should be subjected to "unlawful" or "arbitrary" interference with his privacy. "Unlawful" meant there could be no interference unless envisaged by law. "Arbitrary" might extend to an interference which was envisaged by law but was nevertheless capricious or amounting to an abuse of power.

The CFI did not find s. 98 of Cap. 32 inconsistent with the right to

freedom of assembly or the right to privacy. First, the restrictions imposed on the freedom of association or the right to privacy by s. 98 of Cap. 32 was prescribed by law or envisaged by law. Second, the provision struck a fair balance between the demands of the legitimate interests of the society, particularly in the commercial and financial sphere, and the requirements of the protection of an individual's fundamental freedoms.

The CFI also found that the applicant was not under any obligation to incorporate and could have chosen a number of viable alternatives. The applicant and its members were able to enjoy the advantages brought by incorporation and had extensive powers to operate commercially. They were at the same time provided with a measure at least of protection by the statutory regime against demands which improperly invaded their freedom to associate in private. Hence, the restrictions on the constitutional rights were proportionate and justified. S. 98 of Cap. 32 was therefore not unconstitutional.

What the Court said

At 818B, 818E and 818H – I, the CFI discussed the right to freedom of association:

"46. While … the right to freedom of association is a fundamental constitutional right, it is not an absolute right.

…

49. Accordingly, as a right that is not an absolute right, freedom of association, whether under the Basic Law or the Bill of Rights, may be subject to restrictions provided [the] requirements are satisfied …

51. … In respect of associations, such as political parties which choose to incorporate, do the provisions of s.98 of the Companies Ordinance (Cap. 32) achieve a fair balance between the legitimate interests of society and the requirement to protect fundamental freedoms accruing to every individual? That question … requires the application of the proportionality test."

At 819F – G, the CFI defined the scope of BL 30:

"55. It will be seen that art.30 of the Basic Law does not seek to protect privacy *simpliciter*. It is more narrow in its scope. Article 30 protects only the right of Hong Kong residents freely and in private to communicate with

others whether by the spoken word, in writing or by telecommunication. It includes therefore the right of persons who wish to associate together to attain a common goal to communicate with each other freely and in private. To that extent, it may be said that the right to freely associate must include the right to communicate, the one right being an essential part of the other."

The CFI held at 822G and 822I that the applicant could invoke s. 98(4) of Cap. 32 to prevent inspection of its register:

"70. … s. 98(4) gives to the courts a discretion whether or not to make an order compelling inspection or delivery up …

71. Read in context, the discretion to refuse an order under s. 98(4) may be a narrow one but, in my judgment, the courts must be able to exercise that discretion, either by refusing to make an order or by making one in qualified terms."

The CFI held at 828E – 828A that the restrictions imposed by s. 98 on the applicant were no more than necessary to achieve the legitimate aim:

"98. It is accepted that the restrictions imposed by s. 98 on the applicant (and, through the applicant, its members) are prescribed by law.

99. It must equally be accepted … that the restrictions imposed by s. 98 seek to achieve a legitimate purpose. … That there is a rational connection between the restrictions imposed by s. 98 and the legitimate purpose that the section seeks to achieve must also be accepted.

100. Members of a company, it seems to me, have a legitimate interest, in the great majority of cases, in knowing who are the other members. Members are entitled to know who they stand in association with. Interaction between members is an essential part of the operation of a company. Equally, it seems to me that, in the great majority of cases, third parties have a legitimate interest in knowing who stands behind a company.

101. In respect of a political party (such as the applicant), it seems to me that the fundamental rationale must still apply. Persons dealing with an incorporated political party – whether, for example, to make a donation to it or enter into some commercial relationship with it – if they are to be able to place trust in the party, are entitled to learn who stands behind it.

102. The real issue, it seems to me, is whether it can be said that the restrictions imposed by s. 98, in so far as they apply to incorporated political parties, are no more than is necessary.

103. … I have been drawn to the conclusion that, to protect the rights and freedoms of others, the restrictions imposed by s. 98, insofar as they may affect

political parties that have chosen to incorporate, are no more than is necessary."

At 829J – 830A, the CFI concluded that:
"105. … it seems to me that the provisions of the Companies Ordinance do strike a fair balance between the demands of the legitimate interests of Hong Kong society, particularly in the commercial and financial sphere, and the requirement of the protection of the individual freedoms of the applicant's members."

Secretary for Justice v Yau Yuk Lung (2007) 10 HKCFAR 335

Background

The respondents were charged with having committed homosexual buggery otherwise than in private, contrary to s. 118F(1) of the Crimes Ordinance (Cap. 200). The issue was whether s. 118F(1) of Cap. 200 was discriminatory and infringed the right to equality under BL 25 and BoR 22.

Basic Law provisions in dispute

The major provision in dispute was BL 25.

What the Court held

The CFA held that equality before the law was a fundamental human right. The right to equality was in essence the right not to be discriminated against. It guaranteed protection from discrimination. The right to equality was enshrined in numerous international human rights instruments and was widely embodied in the constitutions of jurisdictions around the world. It was constitutionally protected in Hong Kong.

The right to equality was guaranteed by BL 25. Further, the right was protected by BoR 22. Discrimination on the ground of sexual orientation was plainly unconstitutional under both BL 25 and BoR 22. The CFA

held that s. 118F(1) of Cap. 200 in criminalizing only homosexual buggery otherwise than in private gave rise to differential treatment on the ground of sexual orientation while heterosexuals were not subject to any criminal liability comparable to that prescribed in s. 118F(1) of Cap. 200.

The CFA considered that differences in legal treatment might be justified if it could be shown that the differential treatment:

(i) pursued a legitimate aim;

(ii) was rationally connected to that aim; and

(iii) was no more than was necessary to accomplish the aim.

The CFA held that there must be a genuine need for the differential treatment which could not be established from the mere act of legislative enactment. Yet, no genuine need was shown. Therefore, the matter failed at the first stage of the justification test, and the CFA held that s. 118F(1) of Cap. 200 was unconstitutional as it infringed the right to equality.

What the Court said

At 349A – D, the CFA laid down the justification test for differential treatment:

"20. However, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment may be justified for good reason. In order for differential treatment to be justified, it must be shown that:

(1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.

(2) The difference in treatment must be rationally connected to the legitimate aim.

(3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim.

The above test will be referred to as 'the justification test'. …"

At 349I – 350B, the held that s. 118F(1) of Cap. 200 gave rise to differential treatment:

"23. Section 118F(1) in criminalizing only homosexual buggery otherwise

than in private plainly gives rise to differential treatment on the ground of sexual orientation which requires to be justified.

24. All persons, whatever their sexual orientation, are subject to the common law offence of committing an act outraging public decency. Irrespective of sexual orientation, a person may be exposed to criminal liability for this offence for committing in the required circumstances a sexual act of a lewd, obscene or disgusting nature which outrages public decency. But homosexuals alone are subject to the statutory offence in s. 118F(1) for committing buggery otherwise than in private. In contrast, heterosexuals are not subject to any criminal liability comparable to that prescribed in s. 118F(1) in relation to the same or comparable conduct, namely, vaginal intercourse or buggery otherwise than in private. Thus, as a result of s. 118F(1), a dividing line is drawn on the basis of sexual orientation between homosexuals on the one hand and heterosexuals on the other in relation to the same or comparable conduct."

At 350D – 351B, the CFA held that the differential treatment was not justified:

"25. As s. 118F(1) gives rise to differential treatment on the ground of sexual orientation, justification for the difference in treatment is required. The justification test must now be applied. The first stage of that test is to consider whether the differential treatment pursues a legitimate aim. For this purpose, a genuine need for the difference in treatment must be made out …

27. … What must be established is a genuine need for the differential treatment. That need cannot be established from the mere act of legislative enactment. It must be identified and made out. In the present case, no genuine need for the difference in treatment has been shown. That being so, it has not been established that the differential treatment in question pursues any legitimate aim. The matter fails at the first stage of the justification test.

28. In enacting a package of measures to reform the law governing homosexual conduct, the Legislature was entitled to decide whether it is necessary to enact a specific criminal offence to protect the community against sexual conduct in public which outrages public decency. But in legislating for such a specific offence, it cannot do so in a discriminatory way. Section 118F(1) is a discriminatory law. It only criminalizes homosexual buggery otherwise than in private but does not criminalize heterosexuals

for the same or comparable conduct when there is no genuine need for the differential treatment.

29. Homosexuals constitute a minority in the community. The provision has the effect of targeting them and is constitutionally invalid. The courts have the duty of enforcing the constitutional guarantee of equality before the law and of ensuring protection against discriminatory law.

30. Accordingly, s. 118F(1) is discriminatory and infringes the right to equality. It is unconstitutional. …"

Clean Air Foundation Ltd & Another v The Government of the Hong Kong Special Administrative Region (unreported, 26 July 2007, HCAL 35 of 2007)

Background

The applicants contended that the air quality in Hong Kong was polluted and poisoning. They argued that the HKSARG had failed to combat air pollution and thus had failed to fulfil its legal duty entrenched in the Basic Law to guarantee the right to life of all residents, including a duty to provide the best possible health care. The applicants asserted that the HKSARG had not ensured that there was adequate legislation in place and/or had not pursued effective policies. They contended that this constituted a breach of the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383).

Basic Law provisions in dispute

The major provisions in dispute were BL 28 and BoR 2. The CFI also referred to BL 62 and BL 48.

What the Court held

The CFI held that BL 28 and BoR 2 provided for the right to life in the context of detention, trial and punishment. However, on a purposive interpretation, the CFI held it was arguable that the constitutional right

to life might impose on the HKSARG a duty to combat air pollution.

That said, the CFI made clear that BL 62 and BL 48 conferred the power and discretion to formulate policies on the HKSARG. The Court's supervisory jurisdiction had no right to challenge government policies unless the policy was unlawful. Thus, the CFI, with the reasoning that the application challenged the merits of policies instead of legality, rejected the application.

What the Court said

The CFI said at paragraph 17:

"17. Art.28 of the Basic Law and art.2 of the Bill of Rights provide for the right to life in the context of detention, trial and punishment. The question arises, therefore, of whether, on a purposive interpretation, the constitutional protection can be extended to matters of air pollution control. … I accept therefore that it is at least *prima facie* arguable that the constitutional right to life may apply in the circumstances advocated by the applicants; that is, by imposing some sort of duty on the Government to combat air pollution."

The CFI at paragraphs 31 – 32 considered the role of the HKSARG in implementing public policies, pursuant to BL 62 and BL 48:

"31. Art.62 of the Basic Law provides that it is for the Government to formulate and implement policies. Art.48 provides that it is for the Chief Executive, once a policy has been formulated, to decide whether, and to what degree, it should be executed.

32. A policy may, of course, be unlawful. But because a policy is considered to be unwise, short-sighted or retrogressive does not make it unlawful. It has long been accepted that policy is a matter for policy-makers and that to interfere with the lawful discretion given to policy-makers would amount to an abuse of the supervisory jurisdiction vested in the courts."

The CFI at paragraph 43 concluded that the issues raised in the application were not issues of legality but of merits of policies:

"43. … I am satisfied that it must be refused on the basis that it is fundamentally misconceived. While it purports to seek the determination of issues of law, on an objective assessment it is clear that it seeks in fact to review the merits of policy in an area in which Government must make

difficult decisions in respect of competing social and economic priorities and, in law, is permitted a wide discretion to do so. While issues of importance to the community may have been raised, it is not for this court to determine those issues. They are issues for the political process."

Fine Tower Associates Ltd v Town Planning Board [2008] 1 HKLRD 553

Background

The appellant was a company which held the Government lease to two lots of land in Quarry Bay ("Lots"). Under the conditions of exchange, the Lots were restricted to industrial or similar use and contained a height restriction of 85 meters.

The appellant subsequently requested an amendment of the Quarry Bay Outline Zoning Plan ("Plan") so that the Lots could be put to commercial use. The respondent agreed in part but proposed a draft with a considerably lower height limit of 35 meters.

Despite objections by the appellant, the respondent refused to alter the draft. The appellant applied for judicial review of the refusal on the ground that the proposed restrictions amounted to a deprivation of property, contrary to BL 105. CFI dismissed the case and the appellant appealed to the CA.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 105. The CA also referred to BL 7.

What the Court held

The CA held that action adversely affecting use of property, despite falling short of formal expropriation, might in certain circumstances properly be described as *de facto* expropriation, in which case there would be a right to compensation. The CA held that in order to ascertain

whether there had been a deprivation of property under BL 105, the courts would look to the substance rather than to the form.

Absent a formal expropriation, the question whether there had been a *de facto* expropriation was perforce case specific, a question of fact and degree. The CA held that *de facto* deprivation for the purpose of establishing a right to compensation, contemplated the removal of any meaningful use, or of all economically viable use.

On the facts, the CA held that the appellant did not establish that it had lost all economically viable use of its land and held the facts of the case would not justify a finding of deprivation of property under BL 105.

Subsequent to the CA's decision, the appellant sought leave to appeal to the CFA before the Appeal Committee, which agreed with the CA's decision.

What the Court said

The CA held at 560 – 561 that the court would look to the substance rather than the form to see if there had been expropriation under BL 105:
"16. … it is correctly conceded that it is to the reality rather than to the form to which the courts will look to see whether there has been expropriation, and that if the effect of regulation is to denude a property of all meaningful economic value, deprivation in the sense intended by art. 105 has occurred even though through no formal act by that name.

17. What we are concerned with in this case is a restriction on the use of property. It can safely be postulated as a general proposition that regulatory restriction on use, imposed in the public interest, that does not amount to a taking or deprivation of the property, gives no right to compensation … But it is well established that action adversely affecting use of property, despite falling short of formal expropriation, may in certain circumstances nonetheless properly be described as deprivation, in which case there is a right to compensation. To ascertain whether there has been a deprivation, the court looks to the substance of the matter rather than to the form …"

The CA cited at 561 the following dictum from *Pennsylvania Coal Co v Mahon* 260 US 393 at 415 (1922) to reiterate the fact sensitive nature of the matter:
"18. … Absent a formal expropriation, the question whether there has been

a *de facto* deprivation of property is perforce case specific, a question of fact and degree:

The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

In this regard, the CA cited at 561 the following passage from *Human Rights and Civil Practice* (2001) to illustrate the approach to *de facto* deprivation:

"21. …

A de facto expropriation of this kind can only occur where there has been so substantial an interference with the ownership and use of the possession concerned that it effectively equates to the total extinction of ownership notwithstanding the fact that the owner retains legal title. Deprivation may thus occur if the owner is deprived of all meaningful use of his property. However, any form of provisional or temporary loss of rights is very unlikely to constitute deprivation. Equally, interferences which do not affect the value of the possession at all, or which affect its value to a severe degree but not so as to render it worthless, are also unlikely to be considered deprivations. A finding of de facto expropriation is accordingly, and is likely to remain, extremely rare."

The CA also held at 567 that BL 105 should be construed in light of BL 7:

"33. Article 105 of the Basic Law does not sit alone. It is to be read in conjunction with art. 7 which provides that:

… the Government of the Hong Kong Special Administrative Region shall be responsible for [the] management, use and development [of land and natural resources within the Region].

There can be no expectation upon the purchase of land that the use permitted by the lease will forever after match the use permitted by town planning regulation. It is an incident of ownership that the uses permitted by the authorities may change. Land is purchased with that knowledge, actual or imputed. The value of these lots upon acquisition were enjoyed under the limitation that is implied by this knowledge … So if we talk of investment-backed expectations, such expectations are always qualified by that knowledge. It is to be remembered that a mere restriction on use, falling short of *de facto* deprivation, is not compensable …"

The CA concluded at 568:

"36. The reality in this case is that Fine Tower seeks compensation for a

limitation on use that, in its detail, does not suit it. There is no challenge to the validity of the statutory powers invoked nor is it suggested that the outline zoning plan is somehow disproportionate to the public benefit which it seeks to achieve. … Both in the hands of Fine Tower and in the assessments of prospective purchasers, these lots have meaningful use, use that is self-evidently economically viable. The facts of this case are remote from any that would justify a finding of deprivation of property. I would dismiss this appeal and make a costs order nisi in favour of the respondent."

Victor Chandler (International) Ltd v Zhou Chu Jian He (unreported, 24 October 2007, HCA 2475 of 2006)

Background

The plaintiff, a Gibraltar-incorporated company, provided credit facilities to the defendant, a Beijing resident, to carry out phone betting. In October 2004, the defendant drew seven cheques and delivered the same to the plaintiff. All the cheques were drawn on a bank in Hong Kong and all were dishonoured. The plaintiff obtained an *ex parte* order in Hong Kong to issue and serve Writ of Summons and Statement of Claim out of jurisdiction upon the defendant.

The defendant applied to set aside the *ex parte* order on grounds, *inter alia*, that the seven cheques were unenforceable because the consideration for them was deemed to be illegal under Hong Kong law. The defendant accepted that under the common law, cheques for repayment of loans advanced for gambling was lawful and enforceable but this had been changed by the Gaming Act 1710 (and its later amendments) under which cheques for the repayment of loans advanced for gambling were deemed illegal. The defendant's case was that the Gaming Act had been applied in Hong Kong by virtue of the Application of English Law Ordinance (Cap. 88).

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 8 and BL 160.

What the Court held

The CFI dismissed the defendant's application. The Court rejected the defendant's argument and held that as Cap. 88 no longer applied in Hong Kong since 1 July 1997 ("the handover"), it must follow that only the common law position (without it being amended by English Statute, namely the Gaming Act of 1710 and its later amendment) would apply in Hong Kong after the handover and therefore the cheques were not illegal.

What the Court said

At paragraphs 24 – 25, the Court said that not all laws previously in force in Hong Kong would continue to apply after 1 July 1997:

"24. Counsel for the defendant, in putting forward his arguments, had unfortunately placed too much emphasis on the words 'the laws previously in force in Hong Kong shall be adopted as laws of the Region' in Article 160 and the words 'The laws previously in force in Hong Kong … shall be maintained' in Article 8 of the Basic Law.

25. However, in both Article 160 and Article 8 of the Basic Law, the words relied on by counsel for the defendant are qualified. The qualifying words in Article 160 are 'except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law …' and the qualifying words in Article 8 are 'except for any which contravenes this Law'."

In dismissing the defendant's application to set aside the orders, the Court said at paragraphs 30 – 32 that:

"30. … it must be clear that the reason for non-adoption of the Application of English Law Ordinance in Hong Kong after 1 July 1997 was to stop English Statutes being a part of the laws of Hong Kong after the handover, one such statute being the Gaming Act 1710 and its later amendments.

31. This would further support my view that the submission of counsel for the defendant cannot be right since the position he put forward in his submission is based on the continued effect of the Gaming Act upon the common law in Hong Kong after the handover.

32. Once it is accepted that the Application of English Law Ordinance no longer applied in Hong Kong after 1 July 1997, due to a decision by the

National People's Congress, it must follow that only the common law position (without it being amended by English Statute, namely the Gaming Act of 1710 and its later amendments) would apply in Hong Kong after that date, particularly when it is accepted that there is no local Ordinance equivalent or even similar to the Gaming Act 1710 or its later amendments enacted in Hong Kong."

Kwok Hay Kwong v Medical Council of Hong Kong [2008] 3 HKLRD 524

Background

The applicant, a medical practitioner, challenged four restrictions in the Professional Code and Conduct for the Guidance of Registered Medical Practitioners ("Code") on practice promotion imposed by the Medical Council of Hong Kong ("Council"). He argued that those restrictions infringed his freedom of expression (which included the right to advertise) guaranteed under the Basic Law, the ICCPR and the Hong Kong Bill of Rights.

Four restrictions were being challenged. First, there was a prohibition on providing in newspapers, magazines or other print media the same objective, accurate and basic information about the doctors as was permitted on signboards, service information notices outside surgeries, doctors' directories and medical practice websites under existing rules. Second, doctors could only list five items each respectively of medical services provided in surgeries, those provided outside surgeries, and medical procedures and operations. Third, there was the restriction on doctors referring to their experience, skills, reputation or practice in a manner which was promotional while giving lectures, participating in TV or radio programmes or publishing books to further public health education. Fourth, there was a strict liability imposed on doctors for infringing advertising or promotion by a medical organization (such as a private hospital) with which they were associated.

The CFI held that the restrictions contravened the applicant's right to

freedom of expression guaranteed by BL 27 and BoR 16. The Council appealed.

Basic Law provisions in dispute

The major provision in dispute was BL 27.

What the Court held

The CA held that the first restriction was not constitutionally justifiable. Since medical practitioners were permitted to provide the relevant information to the public on signboards and service information notices outside surgeries, stationery, telephone directories, doctors' directories and websites under the Code, there was no reason or logic why the same accurate, basic and objectively verifiable information could not be made available to the public by a wider means of circulation, i.e. in newspapers, magazines and other print media. As for the proportionality test, the restriction was considered rationally connected to a legitimate purpose which was to avoid the danger of misleading advertisements, but a total and absolute ban on advertising in newspapers, magazines and other print media, irrespective of whether the information provided was misleading or not, was much more than was necessary to achieve the legitimate purpose.

The CA also held that the second restriction was not justified. The Council could impose conditions (particularly against the provision of misleading or inaccurate information) without having an arbitrary cut-off point of five items. There was no sense or logic in restricting a doctor to just five items when he or she could, legitimately and accurately, point to more. Such a restriction went very much against one of the cornerstones of the Code: the desirability of good communication and the passage of information enabling patients to make informed choices.

The CA held that the third restriction was not justifiable. On a true construction of the Code, particularly given its broad definition of "practice promotion", a doctor was at risk of disciplinary proceedings on charges of unacceptable practice promotion whenever he made reference to his experience, skills, qualifications or reputation. The CA found that

in order for the public (or fellow doctors) to attach any weight to what was being said about, say new medical developments or techniques, a reference to a doctor's experience, skills, qualifications and reputation might well be essential.

Finally, the CA held that the fourth restriction was a disproportionate response to dealing with unacceptable practice promotion. The perceived abuse consisting of doctors shielding behind limited companies to benefit from uncontrolled advertising or from uncontrolled medical centres could be dealt with by suitable conditions without the imposition of strict liability, even where due diligence had been exercised.

What the Court said

At 535 – 536, the CA stated that a two-stage inquiry was required in a constitutional challenge based on the freedom of expression:

"19. We are in this appeal only concerned with the first aspect, namely, whether the decision of the respondent complies with the law. Here, the relevant law is, as stated earlier, the Basic Law, the ICCPR and the Hong Kong Bill of Rights. The challenge is of course a constitutional one based on the freedom of expression.

20. A constitutional challenge is no less a challenge based on illegality than, say, a challenge based on the misapplication by the decision-maker of a statute. However, the approach of the court may be quite different. A challenge based on the decision-maker having misapplied a statute may simply require the court to construe the relevant statute and then see whether the decision-maker has got the law right. This will usually provide the answer to whether or not the decision-maker has acted properly. A constitutional challenge is often more complicated for the court. Constitutionally guaranteed rights such as the freedom of expression are usually couched (deliberately) in wide terms. Even given the approach that such rights must be generously construed (and the freedom of expression is no exception: see *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442, at p.455H–I), the court still has nevertheless to construe the relevant right to see whether it is relevant to the decision or matter under review. However, where the right is construed to be applicable, this does not necessarily dispose of the question whether or not the decision-maker has acted properly or in accordance with constitutionally accepted norms. In many

instances where a constitutionally protected right is involved, a two-stage inquiry is therefore required, namely:

(1) First, has a right protected by the Basic Law or the Hong Kong Bill of Rights (the ICCPR) been infringed?

(2) Second, if so, can such infringement be justified? …"

The CA held at 540 – 542 that the right to freedom of expression covered the freedom of advertisement:

"29. The freedom of expression includes the right to advertise and this is so even where the intention is for personal financial gain …

32. Next, it is important also to recognize the following facets of advertising which I believe to be relevant considerations in the present case:

(1) The public interest as far as advertising is concerned lies in the provision of relevant material to enable informed choices to be made. …

(2) The provision of relevant material to enable informed choices to be made includes information about latest medical developments, services or treatments. …

33. In contrast to these what may be called the advantages of advertising just highlighted, it is, however, also important to bear in mind the need to protect the public from the disadvantages of advertising. Misleading medical advertising must of course be guarded against. In *Rocket v Royal College of Dental Surgeons (Ontario)*, McLachlin J referred (at p.81g) to the danger of 'misleading the public or undercutting professionalism'. In *Stambuck v Germany*, the European Court of Human Rights said, 'nevertheless, it [advertising] may sometimes be restricted, especially to prevent unfair competition and untruthful or misleading advertising'. There were references made in both cases to the need to limit commercialism to enable high standards of professionalism to be maintained.

34. The body that imposes restrictions (in our case the respondent) must therefore carefully balance the interests of the person who seeks the right to exercise the freedom of expression (such as the applicant) against other aspects of the public interest. Where the public interest is in favour of allowing advertising, the fact that the person who places the advertisement will incidentally benefit is no reason to justify restrictions. I should also add this. In the context of medical advertising, there is in addition the important consideration that the 'public' which is exposed to advertising will include particularly vulnerable members of society, namely, the sick and infirm. The

interests of these persons must be particularly borne in mind. The balancing exercise may not always be easy to perform, and in any given case, the scales may be tipped one way or the other by the importance of any factor in the circumstances."

Tang Che Tai (鄧枝泰) & Others v Tang On Kwai (鄧安桂) & Others [2008] 3 HKC 521

Background

The plaintiffs were members of Tang Kwong Yu Tong ("Tong"), which was established over 200 years ago. In March 2002, the defendants, who were managers of the Tong, caused $201,000 ("sum") to be paid by way of "pai-ji" (relief of poverty) to its members against the objection of the plaintiffs. The plaintiffs sought an order that the defendants returned the sum with interests to the Tong and an injunction to restrain the defendants from further distribution of assets of the Tong in the absence of unanimous consent of all of the Tong's members. The defendants counterclaimed for orders in respect of the operation of the Tong's bank accounts and distribution of compensation money received by the Tong for resumption of its land. The defendants' case was that distribution of the compensation money should be in accordance with a 1982 decision of the Tong. The CFI gave judgment to the plaintiffs without granting injunctive relief and dismissed the counterclaim. The defendants appealed to the CA.

Basic Law provisions in dispute

No Basic Law provisions were in dispute but Lam J (as he then was) referred to BL 8 and BL 18 in explaining the applicable law in relation to the distribution of the compensation money.

What the Court held

The CA unanimously dismissed the appeal and held that the 1982

decision should be governed by Chinese law and that it was not binding or enforceable under Chinese law. Lam J, in a separate judgment, stated that BL 8 and BL 18 provided that the law in force in Hong Kong was, amongst others, the laws previously in force in Hong Kong which included common law and customary law. Hence, the restrictions on the application of the English common law and the rules on the applicability of Chinese customary law continued to apply in Hong Kong.

What the Court said

At 541D – 542B Lam J explained the constitutional basis for Chinese customary law to continue to apply in Hong Kong since 1 July 1997:

"80. Article 18 of the Basic Law provides that the law in force in Hong Kong shall be, amongst others, the laws previously in force in Hong Kong as provided for in Article 8. Article 8 says that the laws previously in force in Hong Kong includes common law and customary law. Hence, the restrictions on the application of the English common law and the rules on the applicability Chinese customary law previously in force before the 1 July 1997 shall continue to be the law in Hong Kong.

81. Before 1 July 1997, the restriction on the application of English common law to Hong Kong had been set out in Supreme Court Ordinance 1844 and the Application of English Law Ordinance 1966. Section 3 of the 1844 Ordinance reads:

'3. And be it further enacted and ordained, that the law of England shall be in full force in the said Colony of Hong Kong, except where the same shall he inapplicable to the local circumstances of the said Colony, or of its inhabitants …'

82. Section 3 of the 1966 Ordinance provided that common law shall be in force in Hong Kong 'so far as they may be applicable to the circumstances of Hong Kong and subject to such modifications thereto as circumstances may be required'.

83. It has been established in Hong Kong that these statutory provisions mean that English common law is not applicable if its application would cause injustice or oppression and in such circumstances, the court can apply Chinese customary law: see *Re Tse Lai-chiu* [1969] HKLR 159.

84. It follows that the non-application of a particular English common law principle to cases where it would cause injustice or oppression is part of the

law previously in force in Hong Kong prior to 1 July 1997. In such situations, the court in Hong Kong can apply Chinese customary law. As explained above, by reason of Articles 8 and 18 of the Basic Law, this remains to be the position today."

Lam J concluded at 543B that the Chinese customary law should continue to apply to the Tong:

"88. Hence, Chinese customary law should continue to apply to a Tso or Tong that originally held land in the New Territories after the land had been changed to other form of assets."

Wong Kei Kwong v Principal Assistant Secretary for the Civil Service & Another [2008] 2 HKC 555

Background

The applicant was a senior engineer with the Highways Department in HKSARG. He was charged with 2 charges of common law conspiracy to defraud and 3 charges of acting as an agent using a document with intent to deceive his principal, contrary to ss. 9(3) and 12(1) of the Prevention of Bribery Ordinance (Cap. 201). The charges were commonly known as a private tenancy fraud. He was acquitted of all charges in November 2005.

In June 2006, the applicant was informed that it was alleged that he had misconducted himself in relation to the receipt of private tenancy allowance. He was offered with an opportunity to provide explanation why there should not be an inquiry under the Public Service (Administration) Order ("PSAO"). His explanation was not accepted and a formal inquiry under s. 10 of PSAO was to be conducted.

The applicant brought judicial review proceedings seeking to stop the disciplinary inquiry. He argued, among others, that the disciplinary inquiry would be in breach of his right against double jeopardy under BoR 11(6) and there was no lawful basis upon which the CE could delegate his power under BL 48(7) in relation to the dismissal of a public officer.

Basic Law provisions in dispute

The major provision in dispute was BL 48(7).

What the Court held

The CFI held that the bringing of the disciplinary inquiry did not offend the right against double jeopardy under BoR 11(6) as this principle did not apply to employer / employee disciplinary proceedings.

The CFI also held that the CE could delegate his power under BL 48(7) in relation to the appointment and dismissal of a public officer. The CFI adopted a purposive approach to the interpretation of BL 48(7) and found that the CE did not need to be personally concerned in the appointment or dismissal of every single public officer. The application for judicial review was dismissed.

What the Court said

The CFI held at 566C – F that not all the powers under BL 48 were personal and non-delegable:

"51. … There is no restriction at all in the Basic Law on the powers contained in Article 48. While I accept that it is inconceivable that the Chief Executive could delegate powers such as those contained in Article 48(3), that of signing bills passed by the Legislative Council or that of signing a budget passed by the Legislative Council, it is perfectly conceivable that the Chief Executive should not have to be personally concerned in the appointment or removal of the holders of public office in a civil service containing thousands of officers.

52. That that is so is made clear by the use of the words:

'*in accordance with legal procedures.*'

The use of those words makes it abundantly clear that it is intended that proper procedures should be established for the appointment or removal of the holders of public office. On the other hand the act of signing bills or budgets are plainly an individual act which ought to be undertaken by the Chief Executive personally."

The CFI adopted a purposive approach in the interpretation of BL 48. The court held at 566F – 567A:

"53. Just as the court found in *AG v Chui Tat Cheong David & Ors* [1992] 2 HKLR 84, that the construction of a constitutional instrument, such as the Letters Patent, required a generous and purposive approach, which would include, when necessary, the implication of incidental powers, so in my view must the Basic Law be interpreted.

54. In particular, Fuad VP said, at p 101, in response to the submission that the Governor had no power to delegate, and personally must make all civil service appointments:

It seems to me unrealistic to expect that the Governor could effectively retain the responsibility for all appointments and dismissals in the entire civil service which the application of that principle requires unless it is to be a complete fiction.

55. The proposition is equally applicable in relation to the Chief Executive and the Basic Law. A purposive approach to interpretation, including as it must a clear recognition of the fact that the Chief Executive need not be personally concerned in the appointment or disposal of every single public officer, plainly leads necessarily to the implication of a power to make executive orders which include the delegation of the powers established by those executive orders."

The CFI concluded at 567C:

"67. I am accordingly satisfied that there is nothing in the Basic Law to prohibit the Chief Executive from making an executive order in which he grants a power to himself, and then makes provision for the delegation of that power."

HKSAR v Ng Po On (2008) 11 HKCFAR 91

Background

The respondents were convicted of failing to comply with a notice issued under s. 14(1) of the Prevention of Bribery Ordinance (Cap. 201). Pursuant to s. 24 of Cap. 201, the burden of proving a defence of reasonable excuse shall lie upon the accused. The respondents appealed the decision of the Magistrate on the ground that they were required to bear the persuasive burden of proving that they had a reasonable excuse

for the non-compliance and the persuasive burden encroached on the presumption of innocence. They succeeded at the CA. The HKSARG appealed the CA decision.

Basic Law provisions in dispute

The major provision in dispute was BL 87.

What the Court held

The CFA held that the constitutional principle of presumption of innocence was protected under BL 87 and BoR 11(1). The persuasive burden of proof should therefore lie on the prosecution, and the accused should in some sense be given the benefit of the doubt. However, the constitutional protection was not absolute and the burden might be reversed so long as it was proportionate and justified.

Ss. 14(4) and 24 of Cap. 201 read together expressly imposed on the defendant the persuasive burden of establishing the existence of a reasonable excuse on the balance of probabilities. This derogation from the presumption of innocence did not satisfy the proportionality test and therefore contravened BL 87(2) and BoR 11(1).

First, the imposition of a reverse onus under s. 14(4) of Cap. 201 satisfied the rationality test: it was rationally connected with the pursuit of a legitimate societal aim, namely the suppression of corruption. Making non-compliance with s. 14 notices an offence was a rational means of enforcing the ICAC's investigative and prosecutorial powers.

Second, however, the persuasive burden did not satisfy the proportionality test. The Court took into account the gravamen of the offence, the relatively low level of penalty, the procedural safeguards under s. 14(1), the defendant's peculiar knowledge of the facts constituting his excuse, the fact that s. 14(4) was an ancillary offence, and the sufficiency of an evidential burden in assessing the proportionality issue. It concluded that it had not been shown that the imposition of a persuasive burden was no more than necessary in the pursuit of the legitimate aim of Cap. 201 and that an evidential burden did not suffice.

The CFA applied a remedial interpretation to read down s. 24 of Cap. 201 in conjunction with s. 14(4) of Cap. 201 so that they imposed an evidential burden instead of a persuasive burden.

What the Court said

At 100E – F and 101A – B, the CFA held that the presumption of innocence was protected under BL 87 and BoR 11(1):

"20. Article 87 of the Basic Law materially provides: 'Anyone who is lawfully arrested … shall be presumed innocent until convicted by the judicial organs.' Article 11(1) of the Bill of Rights (given constitutional effect by art.39 of the Basic Law) states: 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.' Both provisions therefore confer constitutional protection on the presumption of innocence, there being no difference between them in this respect. …

22. While the criminal standard of proof beyond reasonable doubt is ingrained in the common law, it is not expressly prescribed in the Bill of Rights or the Basic Law. However, it may well be implicit in art.87(1) of the Basic Law which affords constitutional protection to 'the principles previously applied in Hong Kong and the rights previously enjoyed by parties' to both criminal and civil proceedings. Moreover, there is a clear basis for suggesting that such standard of proof is implicit within art.11(1) of the Bill of Rights. Protection of the presumption of innocence necessarily means that the prosecution is required to prove the guilt of the accused, who must therefore in some sense be given the benefit of the doubt. …"

However, at 101H – 102A and 102H – 103A, the CFA held that the constitutional protection was not absolute:

"25. Yet, many statutory offences reverse the burden of proof, requiring the accused to prove 'an ultimate fact which is necessary to the determination of his guilt or innocence.' Where such a reverse onus is employed, the accused is required to satisfy that burden on the balance of probabilities. …

28. … it is established that the constitutional protection accorded to the presumption of innocence is not absolute and that derogation from it may be justified if such derogation has a rational connection with the pursuit of a legitimate aim and if it is no more than necessary for the achievement of that aim. …"

In considering whether there was a breach of BL 87 and BoR 11(1), the CFA held at 103D – F that the following test laid down in *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 was applicable:

"29. It is against this background that the approach set out by Sir Anthony Mason NPJ [in *Lam Kwong Wai*] proceeds:

Our first task is to ascertain the meaning of [the relevant statutory provision] according to accepted common law principles of interpretation as supplemented by any relevant statutory provisions. Our second task is to consider whether that interpretation derogates from the presumption of innocence and the right to a fair trial as protected by the Basic Law and the BOR. If that question is answered 'Yes', we have to consider whether the derogation can be justified and, if not, whether it could result in contravention of the Basic Law or the BOR and consequential invalidity. If invalidity could result, then it will be necessary to decide whether the validity of the section or part of it can be saved by the application of any rule of construction, severance of the offending part, reading down, reading in or any other remedial technique available to the Court."

The CFA held at 115G – H that s. 24 of Cap. 201, read together with s. 14(4) of Cap. 201, placed a persuasive burden on the defence, and was inconsistent with the presumption of innocence:

"76. The foregoing reasons, individually and cumulatively, fall short of being compelling reasons justifying abrogation of the presumption of innocence in the present case. It has not been shown that imposition of a persuasive burden of proving a reasonable excuse in s. 14(4) cases is no more than necessary in the pursuit of the legitimate aim of the Ordinance. The reverse persuasive burden therefore contravenes art.87(2) of the Basic Law and art.11(1) of the Bill of Rights."

The CFA held at 115I – 116C that a remedial interpretation should be adopted to read down the persuasive burden to an evidential burden:

"77. The obvious remedy in the present case is to read down section 24 in conjunction with section 14(4) so that they are understood as imposing an evidential burden instead of a persuasive burden. So read down, the accused would be required to raise the issue of reasonable excuse, supported by sufficient credible evidence to engender a reasonable doubt as to the prosecution's case, but the prosecution would retain throughout the persuasive burden of proving non-compliance, encompassing a burden of negativing any purported reasonable excuse. Read in this way, the two

sections would be consistent with the presumption of innocence and the validity of the section 14(4) offence would be preserved. It would accord with the intent, which may properly be attributed to the legislature, of arming the ICAC with appropriate investigative powers, backed by criminal sanctions, in a manner compatible with the Basic Law and the Bill of Rights."

Solicitor (24/07) v Law Society of Hong Kong (2008) 11 HKCFAR 117

Background

The appellant appeared before the Solicitors Disciplinary Tribunal ("Tribunal") on eight complaints of professional misconduct. The Tribunal applied the "civil standard albeit with the higher degree of probability commensurate with the gravity of the allegations" and found all eight complaints proved. The Tribunal ordered that the appellant be censured, fined, suspended from practice and placed restrictions on how he might practice for the first two years of any resumed practice. On the appellant's appeal to the CA, the CA set aside the findings on two of the complaints and affirmed the other six. The appellant appealed to the CFA.

The issues before the CFA were: (i) the extent to which the CA might depart from its previous decisions; and (ii) the standard of proof to be applied in disciplinary proceedings.

Basic Law provisions in dispute

The provisions in dispute were BL 8, BL 18(1) and BL 84.

What the Court held

The CFA dismissed the appeal. The CFA held that before 1 July 1997, the decisions of the Privy Council on appeals from Hong Kong were binding on the courts in Hong Kong. By virtue of BL 8 and BL 18(1), the body of jurisprudence represented by Privy Council decisions on

appeal from Hong Kong continued to be binding in Hong Kong after the handover on courts below the CFA. Before 1 July 1997, Privy Council decisions on non-Hong Kong appeals and the decisions of House of Lords were persuasive authority but were not binding in Hong Kong.

The CFA held that after 1 July 1997, the persuasive effect of the decisions of the Privy Council and the House of Lords decisions would depend on all relevant circumstances, including the nature of the issue and the similarity of the any relevant statutory or constitutional provision. After 1 July 1997, the CFA's decisions were binding on the CA and lower courts. The CFA might depart from previous Privy Council decisions on appeal from Hong Kong and its own previous decisions, but it would approach the exercise of such power with great circumspection and exercise such power most sparingly.

Regarding the extent to which the CA could depart from its own decisions, the CFA held that the CA was bound by its previous decisions, but it might depart from a previous decision where it was satisfied that it was plainly wrong. The plainly wrong test was satisfied only where the CA was convinced that the contentions against its previous decisions were so compelling that it could be demonstrated to be plainly wrong. Applying the plainly wrong test to the present case, the CFA held that the CA would not have been justified in departing from its previous decisions which established civil standard of proof for solicitors' disciplinary proceedings, as those decisions could not be considered to be wrong, let alone plainly wrong.

As to the standard of proof for disciplinary proceedings in Hong Kong, the CFA held that the appropriate standard of proof for disciplinary proceedings in Hong Kong was the civil standard of a preponderance of probability. The CFA further held that there was no error on the Tribunal's part regarding the standard of proof as would vitiate its findings against the appellant and therefore no findings were to be overturned for such error.

What the Court said

At 131B – D, the CFA discussed the effect of BL 8 and BL 18(1) on the

continuity of the legal system in Hong Kong:

"8. The Basic Law enshrines the theme of continuity of the legal system. Article 8 of the Basic Law provides that the laws previously in force in Hong Kong shall be maintained except for any that contravene the Basic Law and subject to any amendment by the legislature. This is reinforced by art.18(1). By virtue of these articles, the body of jurisprudence represented by Privy Council decisions on appeal from Hong Kong continues to be binding in Hong Kong after the Basic Law came into effect on 1 July 1997."

At 133G – I, the CFA held that BL 84 enabled that courts to refer to precedents of other common law jurisdictions:

"16. After 1 July 1997, in the new constitutional order, it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence. This includes the decisions of final appellate courts in various common law jurisdictions as well as decisions of supra-national courts, such as the European Court of Human Rights. Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them. This is underlined in the Basic Law itself. Article 84 expressly provides that the courts in Hong Kong may refer to precedents of other common law jurisdictions."

The CFA stated at 134E – J that the decisions of the CFA were binding on the CA and lower courts:

"18. As from 1 July 1997, with the Court of Final Appeal as Hong Kong's final appellate court, its decisions are of course binding on the Court of Appeal and lower courts. As the final court at the apex of Hong Kong's judicial hierarchy, this Court may depart from previous Privy Council decisions on appeal from Hong Kong and this Court's own previous decisions. This is consistent with the approach adopted by final appellate courts in numerous common law jurisdictions as well as by the Privy Council itself as a final appellate court.

19. The doctrine of precedent is a fundamental feature of our legal system based on the common law. It gives the necessary degree of certainty to the law and provides reasonable predictability and consistency to its application. Such certainty, predictability and consistency provide the foundation for the conduct of activities and the conclusion of business and commercial transactions. But at the same time, a rigid and inflexible adherence by

this Court to the previous precedents of Privy Council decisions on appeal from Hong Kong and its own decisions may unduly inhibit the proper development of the law and may cause injustice in individual cases. The great strength of the common law lies in its capacity to develop to meet the changing needs and circumstances of the society in which it functions.

20. Recognizing the importance of these considerations, this Court will approach the exercise of its power to depart from any previous decision of the Privy Council on appeal from Hong Kong or any previous decision of the Court with great circumspection. In this connection, the risks of disturbing existing rights would have to be borne in mind. It is a power which will be exercised most sparingly."

黃榮生 v Lands Department & Another (unreported, 20 June 2008, CACV 157 of 2008)

Background

The plaintiff, whose flat was one of the affected properties in the Comprehensive Redevelopment Programme at Four Streets, Hanoi Road, Tsim Sha Tsui, applied to the Court for an interim injunction ordering the Lands Department of the HKSAR and the Urban Renewal Authority to cease all redevelopment works in the comprehensive renewal area at Four Streets, Hanoi Road, Tsim Sha Tsui, No. 1 Kowloon Development Area and ordering the two defendants to pay compensation in accordance with his application for compensation.

The CFI held that, in light of s. 9 of the Lands Resumption Ordinance (Cap. 124) as the plaintiff had not raised any arguable case against the decision to resume the land and had failed to raise any serious dispute or to show that the damages were not sufficient to make good any loss due, the application did not meet the requirements for granting an interim injunction. The plaintiff appealed to the CA against this decision. The plaintiff alleged that the resumption of the flat was in breach of his interest under BL 120.

Basic Law provisions in dispute

The major provisions in dispute were BL 105 and BL 120.

What the Court held

The CA dismissed the plaintiff's appeal. In relation to the plaintiff's claim that the resumption of the land was in breach of his interest under BL 120, the Court noted that the plaintiff's interest in the land had been subject to Cap. 124, both before and after the reunification. The Government, therefore, had the power to resume land in accordance with the Ordinance, whether before or after the establishment of the HKSAR, and the interest of the land title holder was limited to claims for compensation after the land has been resumed.

That position was consistent with BL 105. Under BL 105, when the private property was lawfully expropriated by the Government, his right was to receive appropriate compensation for the expropriated property. For the above reasons, the Court refused to grant an interim injunction to the plaintiff.

What the Court said

In relation to the legal rights of an owner whose land had been resumed in accordance with Cap. 124, the CA stated in paragraph 12 that:

"12. After the land has been resumed, the plaintiff's interest in law under the Lands Resumption Ordinance is limited to a claim for compensation in the Lands Tribunal in accordance with the Ordinance. The plaintiff cannot seek an injunction from the Court to prevent the resumption of the land in question, let alone an injunction to prevent the Government or the Urban Renewal Authority from carrying out development projects on the land after the resumption."

In relation to the plaintiff's allegation that the resumption was in breach of his interest under BL 120, the CA stated in paragraphs 14 – 16 that:

"14. It is true that the plaintiff's interest in the land in question has continued to be recognized and protected under the laws of the HKSAR after June 30, 1997. However, the plaintiff's interest in the land in question is subject to the Lands Resumption Ordinance, whether before or after June

30, 1997. Thus, whether before or after the establishment of the HKSAR, the Government has the power to resume land in accordance with the Ordinance, and the interest of the land title holder is limited to claims for compensation after the land has been resumed.

15. The above analysis is clearly reflected in the relevant provisions of BL 105:

The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

16. Under BL 105, when the private property is lawfully expropriated by the Government, his right is to receive appropriate compensation for the expropriated property. BL 105 also makes provisions for such compensation:

Such compensation shall correspond to the real value of the property concerned at the time."

Yeung Chung Ming v Commissioner of Police (2008) 11 HKCFAR 513

Background

The appellant was a police sergeant. Following the laying of criminal charges against him, the respondent interdicted him and withheld 7% of his pay under s. 17(2)(a) of the Police Force Ordinance (Cap. 232). The appellant was later convicted whereupon he ceased to be paid. Subsequently, he was dismissed from the Police Force.

The appellant challenged the respondent's decision to withhold his pay by 7% prior to his conviction. The appellant's challenge was successful before the CFI, although he had not challenged the constitutionality of s. 17(2)(a) itself in the first instance. The respondent's appeal to the CA was allowed. On that appeal, the appellant was refused leave to widen his challenge to the constitutionality of s. 17(2)(a) which he contested was contrary to the presumption of innocence under BL 87(2). The appellant appealed to the CFA.

The sole ground relied on by the appellant in the appeal was the alleged violation of the constitutional guarantee of presumption of innocence under BL 87(2) and BoR 11(1). It was contended that s. 17(2)(a) of Cap. 232 was inconsistent with the presumption.

Basic Law provisions in dispute

The major provision in dispute was BL 87(2).

What the Court held

By a majority (Bokhary PJ dissenting), the CFA dismissed the appeal.

The CFA held that s. 17(2)(a) of Cap. 232 did not violate the constitutional guarantee of presumption of innocence. The presumption was essentially an element of a fair trial and was the basis of the cardinal rule that the prosecution had the burden of proving the guilt of the accused beyond reasonable doubt.

The CFA held that where a public authority took action in relation to a person charged merely on the basis that he might be guilty, his presumption of innocence would not be violated. By taking action on this basis, the public authority would not be prejudging his guilt in any way prior to the trial and the fairness of his trial would not be prejudiced. Thus, the proper test to be applied in the present context was whether the Commissioner's decision to withhold a portion of the pay of the appellant charged with criminal offences implied a view that the appellant was guilty. The test was an objective one.

On the facts, the CFA held that the Commissioner's decision merely implied a view that the appellant might be found guilty after trial. The CFA held that there was no question of any prejudgment of his guilt or any prejudice to his fair trial at which he was presumed to be innocent. The CFA also held that such a decision also envisaged that the appellant might be acquitted after trial upon which he would be entitled to the full amount of the pay withheld.

Bokhary PJ (dissenting) considered that the power to withhold part of the police officer's pay during suspension was not, upon scrutiny,

compatible with the presumption of innocence.

What the Court said

At 524F – H, the majority acknowledged the importance of the presumption:

"18. Article 87(2) of the Basic Law provides:

Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.

The right to be presumed innocent is also enshrined in the Hong Kong Bill of Rights Ordinance (BORO) which, as required by art 39 of the Basic Law, implements the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong. Article 11(1) of BORO, which corresponds with art 14(2) of the ICCPR, provides:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

For present purposes, there is no difference between the presumption of innocence as it is protected by the Basic Law and BORO."

The majority held at 527G – H that the presumption of innocence was an element of fair trial:

"27. … the presumption of innocence is essentially an element of a fair trial and is the basis of the cardinal rule that the prosecution has the burden of proving the guilt of the accused beyond reasonable doubt. Where a person has been charged with a criminal offence, he is only at the beginning of due process. He is presumed to be innocent and is entitled to a fair trial at which he might be found guilty or might be acquitted."

At 528A – G, the CFA held that the proper test to be applied was an objective one:

"29. Taking into account the decisions of the ECHR, the proper test to be applied in the present context in considering whether s 17(2)(a) infringes the constitutional guarantee of the presumption of innocence should be stated as follows: Whether the Commissioner's decision to withhold any proportion of the pay of an interdicted officer who has been charged with criminal offences as contemplated by the provision implies a view that the person charged is *guilty*. The test is of course an objective one.

30. In applying this test, it is important to consider the Commissioner's decision in the light of the circumstances leading to it as contemplated by the statutory scheme. The officer has been interdicted on the ground that the Commissioner considers that the public interest requires his interdiction. Having been interdicted, he is relieved from his duties and is doing no work. A decision by the Commissioner to withhold a proportion of the officer's pay, not exceeding half, taken pursuant to s 17(2)(a) in such circumstances as envisaged by the scheme plainly does not imply any view that he is guilty.

31. The Commissioner's decision merely implies a view that he might be found guilty after trial. There is no question of any prejudgment of his guilt or any prejudice to his fair trial at which he is presumed to be innocent. Such a decision also envisages that he might be acquitted after trial as the statutory scheme expressly provides that on acquittal, he shall be entitled to the full amount of the pay withheld. Accordingly, a decision to withhold any proportion of the pay of an interdicted officer facing criminal charges as contemplated by s 17(2)(a) would not violate the presumption of innocence. Therefore, the provision is constitutional and the decision in the present case is also constitutional."

Right to Inherent Dignity Movement Association & Another v HKSAR Government & Another (unreported, 21 August 2008, HCAL 74 of 2008)

Background

The applicants applied for leave to seek judicial review of the constitutionality of Order 53 Rule 3 of the Rules of High Court (Cap. 4A). The applicants sought to challenge the leave requirement for judicial review without any facts in support. Nevertheless, it was contended, *inter alia*, that Order 53 rule 3 had violated BL 35 since (i) the remedy of judicial review required leave; (ii) there was a limitation on the timing for lodging an application; and (iii) the relief was discretionary.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 35, though the Court also referred to BL 17.

What the Court held

The CFI held that BL 35 guaranteed the right of a HKSAR resident to judicial remedies and the right to institute legal proceedings in courts against the acts of the executive authorities and their personnel. Judicial review was not the only way by which a Hong Kong resident could sue in respect of the acts of the executive authorities and their personnel. A Hong Kong resident could start an ordinary civil action in court if such an act had constituted private wrong and caused damages to the resident.

The leave requirement was not laid down by Order 53 Rule 3 but by s. 21K(3) of the High Court Ordinance (Cap. 4). As such, leave requirement was laid down by a primary legislation and the applicants were in effect challenging a primary legislation. Since the legislative power for the HKSAR was exercised by the legislature under BL 17 rather than by the executive, the Court held that the applicants' challenge did not fall within the right to sue the executive under BL 35(2) and BL 35 was not engaged.

The Court held that discretionary nature of judicial remedies did not impair the right of access to court protected by BL 35. Nor did the leave requirement for judicial review impair such access. This was because the right of access to court was not an absolute right and the leave requirement had imposed proportionate and necessary measures to prevent the court's process from being abused. Similarly, time limit for commencing judicial review was necessary in order to advance the public interest in good administration.

What the Court said

The Court explained at paragraph 10 the right protected under BL 35:

"10. I do not accept this as an arguable challenge. Article 35 guarantees the right of a Hong Kong resident to judicial remedies and the right to institute legal proceedings in courts against the acts of the executive authorities and

their personnel. Judicial review is not the only way by which a Hong Kong resident can sue in respect of the acts of the executive authorities and their personnel. If such an act constitutes private wrongs and causes damages to a resident, he can start an ordinary civil action in court."

The Court then held at paragraphs 11 – 12 that the leave requirement did not constitute a breach of BL 35(2):

"11. Although Mr Ma [counsel for the applicant] mainly made reference to Order 53 Rule 3, the leave requirement is laid down by primary legislation, see Section 27K(3) of the High Court Ordinance. Thus, in substance, Mr Ma is challenging Section 27K(3) instead of the exercise of the rules making power conferred on the Rules Committee.

12. In respect of a challenge to the constitutionality of a piece of legislation, I do not think it comes within the second part of Article 35. Under Article 17 of the Basic Law, the legislative power for the Hong Kong Special Administrative Region is exercised by the legislature rather than the executive. Hence, the exercise of the legislative power per se is not an act of the executive authorities and their personnel."

The Court further held at paragraphs 17 – 20 that there was also no breach of BL 35(1):

"17. As regards the first part of the Article, viz. the right to judicial remedies, it is the same as the right of access to court. I do not think one can seriously argue because certain judicial remedies are discretionary in nature, the right of access is impaired. Under our legal system, equitable remedies are all discretionary. The grant of declaration is also discretionary. Likewise, the remedies of certiorari and mandamus that could be granted in judicial review. But the discretion has to be exercised judicially in accordance with established principles. The principles are all developed over the years based on cogent and sound judicial reasoning and they are indeed part of our common law.

18. Thus although Mr Ma is correct in saying that an application for leave to seek judicial review involves discretionary consideration on the part of the court, that alone cannot be a valid reason for saying that there is no effective judicial remedies.

19. As regards the leave requirement, given the purpose of the same as explained by the Chief Justice in *Po Fun Chan*, it is a necessary and proportionate measure. As held by the Court of Final Appeal in *Ng Yat Chi v Max Share Ltd* (2005) 8 HKCFAR 1, the constitutional right of access

to court is not an absolute right and the court should and could impose proportionate measures to prevent the abuse of its process. Like a Restricted Proceedings Order, the leave requirement is a means to prevent the court's process from being abused. To permit unarguable judicial review application to be pursued with the attending uncertainties occasioned to the decision of a public authority is an abuse of the judicial process. Thus, the leave requirement is not unconstitutional.

20. Moreover, the leave application will be considered by the court. Hence, there is no question of an applicant being denied with access to the court."

Luk Ka Cheung v Market Misconduct Tribunal [2009] 1 HKLRD 114

Background

This judicial review application challenged the constitutionality of proceedings instituted by the Market Misconduct Tribunal ("Tribunal") to determine whether the applicant had engaged in market misconduct under Part XIII of the Securities and Futures Ordinance (Cap. 571). The applicant argued that, (a) under the Basic Law, the exercise of judicial power was reserved exclusively for the Judiciary; and (b) in substance, what Cap. 571 required the Tribunal to do was to decide whether or not insider dealing had taken place, and thus whether a criminal offence had been committed, by acting as a court or "shadow court".

Basic Law provisions in dispute

The provision in dispute was BL 19.

What the Court held

The CFI (constituted by Hartmann JA sitting as an additional judge of the CFI and A Cheung J (as he then was)) dismissed the application. The CFI held that the principle of separation of powers was enshrined in the Basic Law, and the judicial power of the HKSAR was exclusively

vested in the Judiciary. However, in a modern society like Hong Kong, administrative tribunals had an important role to play. Specialized tribunals possessed technical expertise and offered speedier, cheaper and more accessible justice than courts of law. The predecessor to the Tribunal, the Insider Dealing Tribunal, was in existence for some years before 1 July 1997.

Having considered all the relevant circumstances, including the novelty of insider dealing and the theme of continuity, the CFI held that the Tribunal was not required by Cap. 571 to exercise the judicial power of the HKSAR.

The Court cited Sir Anthony Mason's article, "The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong" (2007) 37 *HKLJ* 299 and warned against an indiscriminate reliance on Australian jurisprudence to construe the principle of separation of powers under the Basic Law.

What the Court said

A Cheung J delivered the judgment of the Court and stated at 129 – 130 that the HKSAR was vested with independent judicial power:

"29. It is true that the principle of separation of powers is enshrined in the Basic Law, and the judicial power of the Special Administrative Region is exclusively vested in the Judiciary: see *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, pp.447–448 (para.101). The task in the present case is to determine whether the Tribunal is required by the Ordinance to exercise such a power. That necessarily involves the interpretation of the relevant provisions in the Basic Law in order to understand what the judicial power of the State (or the HKSAR) is …

32. … under the principle of 'one country, two systems' the HKSAR is vested with independent judicial power, including that of final adjudication (art 19). A main theme of the Joint Declaration and the Basic Law … is that of continuity, including continuity between the pre-existing and the present court and judicial systems … And art 8 of the Basic Law specifically provides that subject to exceptions, the laws previously in force in Hong Kong shall be maintained."

A Cheung J held at 134 that specialized tribunals had an important role

to play in Hong Kong:

"36. It is plain that in a modern society like Hong Kong, administrative tribunals and bodies have an important role to play. This is not a new phenomenon. It was already the case before the Basic Law was promulgated. Given the theme of continuity, it would be very surprising if the effect of the Basic Law, upon its proper interpretation, were to outlaw these administrative tribunals and bodies for ousting the jurisdiction or usurping the judicial functions of the courts of judicature of the HKSAR. Or put another way, the Basic Law should be interpreted in such a way as to enable, so far as violence is not done to the principle of separation of powers as understood in the tradition of English common law, the continued existence and development of administrative tribunals and bodies. This calls for a flexible and realistic, as opposed to an idealistic, approach to the doctrine of separation of powers, and a purposive and contextualized interpretation of the scope and meaning of 'judicial power' in the Basic Law, …

37. This theme of continuity brings me to the fact that the Insider Dealing Tribunal, the predecessor of the Tribunal, was already in existence for some years before 1997, pursuant to the provisions in the Securities (Insider Dealing) Ordinance (Cap.395) (now repealed)."

A Cheung J highlighted the importance of the theme of continuity at 136:

"40. That, if nothing else, tends to support my earlier observation that the (pertinent) philosophy behind the Basic Law is one of continuity, and it would be a very surprising suggestion indeed if anybody were to suggest that the Insider Dealing Tribunal, which had been established before 1997 to deal with a particular type of evils affecting the financial markets that had been identified by the executive/legislature, had suddenly become a usurper of judicial authority after the coming into force of the Basic Law.

41. This is a highly relevant background fact, in the sense that how, historically, the subject matter under discussion has been dealt with and how the present regime came into being are material to determining whether the judicial power of the State is involved …"

A Cheung J held at 136 – 137 that insider dealing was a novel matter not traditionally adjudicated by the courts:

"42. Another important fact, in my view, is this: … if the subject matter is one that has, traditionally or historically, been the subject of adjudication

by the courts of judicature, that is an indication that what is involved is the judicial power of the State. Thus, subjects such as crimes, or claims in contract or tort, are subjects traditionally dealt with by the courts in exercise of their judicial power of the State. Hiving off any such subject matters from the court's jurisdiction to a tribunal could therefore be problematic.

43. The same consideration does not apply where the subject matter is novel to the common law. Insider dealing is such a subject. …

45. In short, it is not a case of removing from the jurisdiction of the court a subject matter and giving it to a statutory tribunal to deal with. What actually happens is that by legislative intervention, a new subject matter is identified as one that requires regulation or policing, and, for policy or administrative reasons, the task is given, not to the traditional courts, but to a statutory tribunal specially established for such purposes. In those circumstances, the case for saying that the judicial power of the State, exercisable only by the courts of judicature, is removed from the courts and given to a statutory tribunal, is not particularly convincing."

A Cheung J concluded at 137 – 139 that the Tribunal was regulatory in nature:

"47. … As has been observed by Sir Anthony Mason NPJ in *Koon Wing Yee v Insider Dealing Tribunal*, the new Ordinance provides for dual civil and criminal regimes to deal with six types of market misconduct. At the choice of the Financial Secretary, the same conduct may be referred to the criminal courts for trial or the Tribunal for investigation (but not both). If the Pt.XIV route is taken, it is a criminal court, applying criminal rules and procedures, including the criminal standard of proof, which will decide whether a criminal offence has been committed and the appropriate criminal punishment. The Tribunal will have nothing to do with it. On the other hand, if the Pt.XIII route is chosen, the Tribunal will, applying its own rules and procedures which are civil (and inquisitorial) in nature, carry out investigations into the matter and determine whether market misconduct has taken place. That determination will not be the determination of the commission of a crime. … Nobody will be labelled a criminal — to do so would be defamatory, for the Tribunal's determination, based on the civil standard and according to rules and procedures that are civil and inquisitorial in nature, is not a determination of *criminal* guilt.

48. Nor is the Tribunal required to determine civil liability. It is noteworthy that the Ordinance creates a civil cause of action based on market

misconduct (s. 281) but does not give the jurisdiction to determine such liability to the Tribunal. Rather such civil liability is to be determined by the civil courts. What the Legislature has done is to render the determination by the Tribunal admissible evidence in the civil proceedings and to create a rebuttable presumption based on the determination of market misconduct against the defendant.

49. That does not make the Tribunal the adjudicator of civil liability or of the primary facts necessary to found such liability. What has been done is nothing more than the creation of an evidential aid in the civil proceedings before the courts. …

52. In my view, quite plainly, looking at the dual regimes under the Ordinance, and particularly the Pt. XIII scheme, the purpose is to protect and maintain the integrity of the financial markets in Hong Kong, thereby enhancing and preserving Hong Kong's reputation as an international financial centre. It is regulatory in nature. The investing public, and therefore public interest at large, is protected in the sense that the regime ensures the integrity of the financial markets in which the investing public carry on their investment or trading activities."

Chan Kin Sum v Secretary for Justice [2009] 2 HKLRD 166

Background

Mr Chan and Mr Choi were Hong Kong permanent residents, both convicted of robbery and were sentenced to imprisonment. Mr Chan, who had not registered as an elector prior to sentencing, was not entitled to do so while serving sentence pursuant to s. 31(1)(a) and (b) of the Legislative Council Ordinance (Cap. 542). Both of them were excluded from voting in the then 2008 LegCo election as they were legally disqualified by s. 53(5)(a) and (b) of Cap. 542 (collectively "disenfranchisement provisions") as persons serving a sentence of imprisonment on the election day even if Mr Choi had registered as an elector prior to sentencing. Mr Chan and Mr Choi challenged the validity of the disenfranchisement provisions by judicial review on the

ground that those provisions were unreasonable restrictions of their right to vote guaranteed under BL 26 and BoR 21.

Basic Law provisions in dispute

The major provision in dispute was BL 26.

What the Court held

The CFI held that the right to vote was a fundamental right of permanent residents in Hong Kong. Although BL 26 was expressed in apparently absolute terms and did not contain any built-in restriction, it must be read together with BoR 21 which allowed reasonable restrictions on the right to vote. The right to vote might be restricted if the restriction (i) was "prescribed by law" (which was not in issue) and (ii) did not contravene BoR 21, in accordance with BL 39(2).

In determining whether a restriction was unreasonable, the court would apply the proportionality test. The burden was on the HKSARG to justify any restriction by showing: (i) the legitimate aims pursued; (ii) that there was a rational connection between the aims pursued and the restrictions employed; and (iii) that the restrictions so employed were proportionate responses to the achievement of the legitimate aims.

The CFI accepted that the following were legitimate aims for disenfranchisement to prisoners: to prevent crime by sanctioning the conduct of convicted prisoners; to give an incentive to citizen-like conduct; and to enhance civic responsibility and respect for the rule of law; and as an additional punishment in the form of forfeiture of right for breaking the law. But these legitimate aims were held to have failed the proportionality test as the relevant provisions of Cap. 542 constituted a blanket and total disenfranchisement which did not take into account the nature and gravity of the offence and sentence in question as well as the culpability and individual circumstances of the prisoner. The CFI held that the disenfranchisement provisions contravened BL 26 and BoR 21 so far as they affected those convicted persons who had been sentenced to death or imprisonment, and those who had not served their sentences or received a free pardon.

In relation to remanded persons, the CFI accepted that none of the provisions under challenge, nor other provisions in Cap. 542 disqualified or prohibited them from voting on election day. Their difficulties were more on the practical aspect as they lacked access to polling stations on election day. The CFI held that when practical difficulties led to a denial of a remanded person's right to vote in practice, it would give rise to a legal objection and special arrangements should be made to enable them to vote on election day whilst being held in custody.

What the Court said

The CFI held at 200 – 201 that right to vote was not an absolute right:

"94. … the prisoner's other constitutional rights remain, *prima facie*, intact; that is to say, they remain intact unless they are by law restricted *constitutionally*. In other words, any such restriction must be constitutionally justifiable. And in this regard, I take the view that different constitutional rights may admit of different constitutional justifications for their restriction and there are probably some which can never be justifiably restricted or deprived. In relation to the latter, I have in mind, for instance, the right to be free from torture and to cruel, inhuman or degrading treatment or punishment guaranteed by art.3 of the Hong Kong Bill of Rights which is generally considered to be an absolute right.

95. I do not consider the right to vote, though no doubt a highly important right, belongs to such a category of rights. As described, it is not an absolute right and can be restricted. And if punishment can justify the deprivation of a convicted person's right to liberty, I see no logic or reason to say that (additional) punishment can *never* be a constitutional justification for restricting the right to vote of a prisoner.

96. Of course, since a highly important constitutional right is involved, the courts must vigorously scrutinize the supposed justification based on additional punishment (and indeed any other ground). But in my view, the possible existence of extreme, difficult or borderline cases does not require a total ban against any form of restriction or deprivation that is based on additional punishment as justification even when they could otherwise be justified under the proportionality test. …"

The CFI held at 207 that there was sweeping disenfranchisement under Cap. 542:

"112. In the Hong Kong context, the automatic and blanket disenfranchisement includes a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. Unlike the position in the United Kingdom, no exception is made for those imprisoned for contempt of court or default in paying a fine. The disenfranchisement draws no distinction as to the type, nature or seriousness of different offences, the length of custodial sentences and the stage of completion of the terms of imprisonment. It operates without regard to the degree of culpability save to the extent that the offence in question merits imprisonment (or a suspended sentence), nor to personal circumstances.

113. It covers those who are released on bail pending appeal – including those whose appeals against convictions are subsequently allowed and those whose appeals against the sentences of imprisonment are wholly successful.

114. The disenfranchisement equally affects those serving a suspended sentence. A prisoner released on parole stands in no better position.

115. The disenfranchisement also covers all overseas sentences of imprisonment that have not been served out or freely pardoned. No distinction is drawn between sentences imposed in different countries or places."

The CFI held at 213 – 215 that there was insufficient evidence to justify the restrictions of the prisoners' right to vote:

"139. That depriving a prisoner of the right to vote (or to be registered as an elector) can help the prevention of crime is an indefensible notion. No evidence whatsoever has been produced by the Government, and the burden is certainly on the Government to justify, that a meaningful number of prisoners would have thought twice before committing their crimes if they had known that if caught, convicted and sentenced to imprisonment, they would lose the right to be registered as an elector or to vote. Nor is there any evidence that consideration of that sort ever affected their decisions to commit crimes, if it had ever entered into their minds at all.

140. Likewise, as regards the suggested aim to give an incentive to citizen-like conduct, this is really a matter of evidence. And there is simply no evidence, expert or otherwise, coming from the Government to say that prisoners who have been deprived of the right to vote whilst serving their sentences would, after release, treasure more the right to vote, and that would in turn act as an incentive for them to behave in a citizen-like manner.

The same can be said about enhancing civic responsibility and respect for the rule of law. …

142. For my part, I do not necessarily say that depriving the right to vote can never achieve these aims. But they are factual assertions which must be backed by evidence. And there is no such evidence before the Court. …

144. … in the present case, the Court simply has no such evidence, expert or otherwise, to suggest that disenfranchisement in a total and blanket manner would help serve the aims of prevention of crime and of giving an incentive to citizen-like conduct, or that it would help enhance civic responsibility and respect for the rule of law. These are matters that common sense alone is not sufficient to establish."

The CFI held at 212 that the disqualification from registration was not justified:

"132. The disqualification from registration is also difficult to justify in the sense that it applies regardless of whether the prisoner is expected to be released from prison by the time of the next election. Thus the current provision, by itself, prevents a prisoner from registration as an elector and thus prevents him from voting at the next election when he is not expected to be released by the time of the next election. It also prevents a prisoner from registration as an elector and thus prevents him from voting at the next election even if he is expected to be released by then, unless the release should take place before the registration deadline. In other words, the treatment of these two prisoners is exactly the same, even though their circumstances are quite different. So far as the suggested legitimate aims are concerned, it is difficult to see how the failure to differentiate these two different situations can be justified on account of those supposed legitimate aims."

On remanded persons' and prisoners' access to polling stations, the CFI held at 228 – 229 that special arrangements should be put in place to enable them to vote:

"184. In my view, the authorities cannot have it both ways. They cannot, on the one hand, detain a remanded person in a place of detention on election day thereby preventing him from physically attending a normal polling station to cast his vote (if he so wishes), yet argue, on the other hand, that they are, nonetheless, under no duty, in those circumstances, to make special arrangements in the place of detention (or elsewhere) so as to enable the remanded person to exercise his constitutional right to vote.

The lack of special arrangements available to those on remand to enable them to vote on election day is indefensible. The Court fully recognizes the possible concerns, including security ones, that such special arrangements might entail. But similar arrangements have been made elsewhere, and I do believe that if one tries hard enough, reasonably satisfactory arrangements can be worked out.

188. Returning to the position of prisoners, unless some valid restrictions are imposed on the right to vote that comply fully with the constitutional requirements of art.26 of the Basic Law and art.21 of the Hong Kong Bill of Rights, they are entitled to vote whilst serving sentences in prison.

189. Their position on access to polling stations and special arrangements is no different from that of remanded persons. …"

Azan Aziz Marwah v Director of Immigration & Another

(unreported, 9 December 2008, HCAL 38 of 2008)

Background

The applicant was born in Hong Kong in August 1983. His father was a native Indian born in India. The father became a Hong Kong permanent resident in January 1998 and a Chinese national by naturalization in September 2003. The applicant's mother was a US citizen and became a Hong Kong permanent resident in December 1997.

The applicant was granted US citizenship at birth as a citizen of the USA born abroad. The applicant became a Hong Kong permanent resident in January 1998 and obtained the Hong Kong permanent identity card in January 2002. He also held an US passport.

In July 2006, the applicant applied for a HKSAR passport. His application was rejected on the ground that he did not qualify as a "Chinese citizen" under the Nationality Law of the People's Republic of China as applied to Hong Kong ("Nationality Law"). The applicant's appeal was summarily dismissed by the HKSAR Passports Appeal Board in November 2007.

The applicant challenged the Director's and the Appeal Board's refusal

to grant him a HKSAR passport on various grounds, including that they wrongly viewed the applicant as not a "Chinese national" under the Nationality Law. At the hearing, the applicant's counsel also argued that the implementation of the Nationality Law in Hong Kong was discriminatory.

Basic Law provisions in dispute

The Court referred to Annex III to the Basic Law. This case was primarily resolved by interpretation of the Nationality Law.

What the Court held

The CFI firmly concluded that on a proper construction of the Nationality Law, a person acquired Chinese nationality under Article 4 only if at least one of his parents was a Chinese national at the time of his birth. The applicant could not bring himself within Article 4 as his father became a Chinese national only after the applicant's birth.

What the Court said

The Court recognized that the Nationality Law was applicable in Hong Kong. The Court said at paragraphs 8 – 9 that:

"8. At issue is whether the applicant's case falls within art 4 of the Nationality Law of the People's Republic of China as applied to Hong Kong.

9. The Nationality Law of the People's Republic of China is one of the national laws which applies locally with effect from 1 July 1997 pursuant to Annex III of the Basic Law."

The Court acknowledged that the Nationality Law must be construed together with the Explanations of Some Questions by the Standing Committee of the National People's Congress concerning the implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region (also known as "Interpretation by the Standing Committee of the National People's Congress on Some Questions concerning Implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region"). The Court said at paragraph 11:

"11. Given the peculiar circumstances of Hong Kong residents in terms of their nationalities and rights of abode overseas, the Standing Committee of the National People's Congress has given certain explanations concerning the implementation of the Nationality Law in Hong Kong after 1997. As mentioned, those explanations are known as 'Explanations of Some Questions by the Standing Committee of the National People's Congress concerning the implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region' (the Explanations), which were adopted at the 19th meeting of the Standing Committee of the National People's Congress at the 8th National Congress on 15 May 1996. The relevant part of the Explanations reads (English translation):

… Taking account of the historical background and the existing circumstances of Hong Kong, the Standing Committee gives the following explanations concerning the implementation in the Hong Kong Special Administrative Region of the Nationality Law of the People's Republic of China-

1. Where a Hong Kong resident is of Chinese descent and was born in the Chinese territories (including Hong Kong), or where a person satisfies the criteria laid down in the Nationality Law of the People's Republic of China for having Chinese nationality, he is a Chinese national.

2. All Hong Kong Chinese compatriots are Chinese nationals, whether or not they are holders of the 'British Dependent Territories Citizens passport' or 'British Nationals (Overseas) passport'. With effect from 1 July 1997, Chinese nationals mentioned above may, for the purpose of travelling to other countries and territories, continue to use the valid travel documents issued by the Government of the United Kingdom. However, they shall not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China on account of their holding the above mentioned British travel documents.

3. According to the Nationality Law of the People's Republic of China, the British Citizenship acquired by Chinese nationals in Hong Kong through the 'British Nationality Selection Scheme' will not be recognized. They are still Chinese nationals and will not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China.

4. Chinese nationals of the Hong Kong Special Administrative Region with right of abode in foreign countries may, for the purpose of travelling to other countries and territories, use the relevant documents issued by the foreign

governments. However, they will not be entitled to consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China on account of their holding the above mentioned documents.

5. If there is a change in the nationality of a Chinese national of the Hong Kong Special Administrative Region, he may, with valid documents in support, make a declaration at the authority of the Hong Kong Special Administrative Region responsible for nationality applications.

6. The Government of the Hong Kong Special Administrative Region is authorized to designate its Immigration Department as the authority of the Hong Kong Special Administrative Region responsible for nationality applications. The Immigration Department of the Hong Kong Special Administrative Region shall handle all nationality applications in accordance with the Nationality Law of the People's Republic of China and the foregoing provisions."

The Court emphasized at paragraph 17 the importance of looking at the Chinese text of the Nationality Law:

"17. In interpreting the Nationality Law as enacted, one must bear in mind that it is a piece of Mainland legislation, which was enacted only in Chinese. It is the original Chinese text that one must look at closely. The English translation is no more than a translation. Art 4 reads in Chinese:

'父母雙方或一方為中國公民，本人出生在中國，具有中國國籍。'"

The Court held that the Nationality Law must be construed in light of its purposes and context. The Court said at paragraphs 40 – 47 that:

"40. But more importantly, when construing the provisions in light of their purpose and context, one must ask: is there any real purpose to be served by Mr Kwok's construction?

41. This takes me to consider even more closely the case of a person born in China.

42. For such a person, if one or both of his parents are Chinese nationals, he has Chinese nationality at birth. That is natural enough. If none of his parents is a Chinese national at the time of his birth, then given the emphasis on the nationality of the parents to determine a person's nationality (the so-called '血統主義' *(jus sanguinis)*) under the Chinese Nationality Law *(infra)*, it is only natural that such a person does not have Chinese nationality at birth. If the parents have foreign nationality, the

chances are that the child, even though born in China, would have foreign nationality at birth.

43. If the person is born to stateless parents or parents of uncertain nationality, it is perfectly understandable why under art 6 of the Nationality Law, that person has Chinese nationality at birth.

44. For those who are born in China but who do not have Chinese nationality at birth, that need not be the end of the matter if they want to acquire Chinese nationality. This is because they can always apply for naturalization as a Chinese national pursuant to arts 7, 8 and 14. …

45. … why does the Nationality Law, upon its true construction, should still want to provide for yet another way of conferring Chinese nationality at a later point in life on a person who was born in China but did not have Chinese nationality at birth?

46. Mr Kwok … can only postulate two examples where a 'deserving' person may need the construction he advocates in order to have Chinese nationality at a later point in life. First, a person born in China of parents who were foreign nationals at the time of birth, but who did not have any foreign nationality at birth. Secondly, an abandoned child found in China who has subsequently been adopted by a foreign national. In either case, neither art 4 nor art 6 gives the person Chinese nationality at birth, and his construction, Mr Kwok contends, would give such a person Chinese nationality upon the acquisition of Chinese nationality by one of the person's parents or adoptive parents.

47. I do not believe that these relatively rare examples take Mr Kwok's case very far, in terms of discovering the purpose and intent of the articles under examination. In the first example, the short answer is that the person in question can apply for naturalization under art 7, particularly if he has settled in China."

The Court also considered Chinese academic materials in giving its judgment. The Court said at paragraph 51 that:

"51. In this regard, it is highly significant that in none of the Chinese academic and other materials that the parties have put in to assist the Court in interpreting the provisions of the Nationality Law is it specifically mentioned that Chinese nationality can be had by a person under art 4 (or art 5) after his birth, upon the naturalization as a Chinese national of one of his parents, without a separate application for naturalization by the person himself. It is fair to observe, and counsel are in agreement, that all academic

writers focus on how a person can have Chinese nationality at birth pursuant to arts 4, 5 or 6."

The Court disallowed the running of the applicant's argument based on BL 25. The Court said at paragraphs 69 – 71 that:

"69. In so far as Mr Kwok further contends that if such be the case, the provisions in the Explanations are discriminatory against those who are not of Chinese descent and therefore breach the provisions in the Basic Law and the Hong Kong Bill of Rights, they are arguments only raised for the first time by Mr Kwok at the substantive hearing. They are not arguments contained in the Form 86A. No relief has been sought by Mr Kwok in relation to the provisions in the Explanations. They raise important questions. Amongst other things, they raise the question of whether the provisions in the Basic Law (a fortiori, the provisions in the Hong Kong Bill of Rights) take precedence over or otherwise override the Explanations made by the Standing Committee of the National People's Congress, and the further question of whether the courts have the necessary jurisdiction to deal with these questions by way of judicial review: cf *Ng Ka Ling v Director of Immigration (No. 2)* (1999) 2 HKCFAR 141. Furthermore, as an unequal treatment can be justified, Mr Kwok's argument is fact-sensitive and we simply lack the necessary evidence to deal with the matter.

70. It is fair to say that once all these difficulties have been pointed out to Mr Kwok, Mr Kwok has not seen fit to press his arguments in his submission. Nor has he applied for leave to amend the Form 86A.

71. In so far as it may be necessary, I would formally disallow these points to be run in these judicial review proceedings."

Chiang Lily & Others v Secretary for Justice (unreported, 9 February 2009, HCAL 42 & 107 of 2008)

Background

The two applicants were granted leave to judicially review a decision by the Secretary for Justice ("respondent") to transfer their trials to the District Court. Each applicant characterized the facts of the underlying charges against him/her as bringing the offences into a serious category.

The applicants argued that they should be tried in the CFI in front of a jury. The applicants challenged the adequacy of the reasons of the respondent's decision to transfer the trials to the District Court and his refusal to alter his decision. The applicants placed particular emphasis on two factors, first, the contention that BL 86 had an effect beneficial to the applicants of which they would be deprived if they were to be tried in the District Court and, secondly, that the pool of jurors now available in Hong Kong had increased substantially.

Basic Law provisions in dispute

The major provision in dispute was BL 86.

What the Court held

The CFI held that the effect of BL 86 was to preserve the position of the applicants prior to the Basic Law coming into effect, but not to allow the applicants to be in a better position.

What the Court said

The CFI noted in paragraphs 15 – 19 that:

"15. Article 86 of the Basic Law reads:

The principle of trial by jury previously practised in Hong Kong shall be maintained.

16. The Article is clear and unambiguous. All that it is saying is that whatever principle applied in relation to jury trials prior to the Basic Law coming into effect would continue to apply thereafter. The applicants cannot be in any better position now than they would have been prior to the Basic Law coming into effect: they will be in the same position.

17. What was that principle which was previously practised? A challenge to the jurisdiction of the District Court based on the contention that the District Court Ordinance was *ultra vires* because its effect was to extinguish a right to trial by jury was unsuccessful – see *R v WONG King Chau & Others* [1964] DCLR 94 …

18. Three judgments, Pickering JA and Li and Cons JJ, were delivered in the Court of Appeal consequent upon an appeal against that decision: see *David*

Lam Shu-tsang & another v Attorney General CACV42/1977. The appeal was dismissed. Pickering JA, having noted in the decision in *Wong King Chau and others* said, at 6:

'… the section providing for mandatory transfer of indictable offences upon the application of the Attorney General contained no saving clause, nothing to the effect that the Attorney General must consult the wishes of the accused and nothing giving the accused any right of objection to the transfer. The discretion as to whether to apply for transfer was invested solely in the Attorney General and, upon his exercising that discretion by making a transfer, the obligation to transfer lying upon the magistrate was absolute. The scheme of the legislation is clear beyond a peradventure and it entails, with equal clarity, the deprivation of the former common law right to trial by jury.

Mr Leggatt would have it that there is no necessity for his client to elect trial by jury since he enjoys the right to such trial and could only be put to election by statute. For the reasons I have given it appears to me that there is no right to election and no right to trial by jury and that the result has not been arrived at by what Mr Leggatt terms "a side wind" but by the unambiguous pattern of the legislation. It is not, with respect, correct to say that the right to trial by jury has not been taken away by either the District Court Ordinance or the Magistrates Ordinance. Certainly it has not been wholly taken away but it has so been taken by the former Ordinance in the case of any criminal charges which are bought in the District Court whilst the latter Ordinance provides the ***mandatory machinery for transferring to that court such cases as the Attorney General in his unfettered discretion determines to prosecute there.****'* [emphasis supplied]

19. Consequently, the principle of trial by jury that applied prior to the Basic Law coming into effect was clear: an indictable offence was triable either by judge and jury, in the High Court, or by judge alone, in the District Court, at the discretion of the Attorney General. The order of the magistrate transferring the trial to the District Court is one which is not subject to appeal … Article 86 preserved the *status quo ante*."

Secretary for Justice v Commission of Inquiry Re Hong Kong Institute of Education [2009] 4 HKLRD 11

Background

The CE in C appointed a Commission of Inquiry ("Commission") to ascertain if the Government had applied improper pressure on certain academics and made any improper attack on the Hong Kong Institute of Education's academic freedom. Mrs Fanny Law ("Mrs Law"), a senior Government official, approached Mr Ip, a member of the faculty of the Institute of Education, direct to remonstrate with him as to the validity of his criticisms on the Government. The Commission found that the direct contact of Mrs Law constituted an improper interference with Mr Ip's academic freedom and she should have expressed her views "through proper channels" rather than in a manner which gave the semblance of "intimidation and reprisal". The Secretary for Education applied for judicial review challenging the Commission's findings.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 34 and BL 137. The CFI also referred to BL 30.

What the Court held

The CFI held that BL 137 recognized academic freedom as a self-contained right vested in educational institutions. Such right extended not simply to administration of the institutions but also to the faculty of academics, giving it freedom to pursue the search for knowledge without fear of external sanction. Meanwhile, an individual's right to publish academic works was protected by the freedom of communication under BL 30 and the freedom of expression under BoR 16(2).

The CFI held that both Mrs Law and Mr Ip enjoyed equal rights to express and criticize others' view. And it was a legitimate aim of such debate to persuade the other side to change its opinion. However, the freedom of expression was not absolute. A confrontation which contained, directly or by implication in the whole manner of the

approach and its circumstances, a threat of sanction against the institution or the academic by a person in authority with the actual or ostensible power to bring about the imposition of that sanction, constituted an unlawful attack on academic freedom under BL 137. Nonetheless, whether such confrontation would amount to an unlawful attack would depend on the context. In this case, it was held that Mrs Law, while taking a confrontational approach, had not made any direct or indirect threats of sanction. The challenge against the Commission's findings was successful.

What the Court said

The CFI said at 22 – 23 that under BL 137, academic freedom was an independent and self-contained freedom vested in Hong Kong's educational institutions:

"48. Pursuant to art.34 of the Basic Law, all persons have the 'freedom to engage in academic research, literary and artistic creation and other cultural activities'. Equally, pursuant to art.30, all persons enjoy the right to 'the freedom … of communication'. However, while the major constituent parts of any definition of academic freedom must include freedom to engage in academic research and freedom to communicate, the concept of academic freedom under the Basic Law is not defined as being simply a part of either of those freedoms and would appear to be recognized as an independent, self-contained freedom. Nowhere does the phrase 'academic freedom' appear in Chapter III of the Basic Law which lists the fundamental rights of Hong Kong residents. Instead, the phrase appears in Chapter VI (which bears the heading: Education, Science, Culture, Sports, Religion, Labour and Social Services). In this respect, to cite art.137 again, it provides that:

Educational institutions of all kinds may retain their autonomy and enjoy academic freedom …

49. Without deciding the issue, we understand the phrase 'educational institutions of all kinds' to refer to institutions of higher learning, universities and the like where, in all open and democratic societies, autonomy and academic freedom are essential to their functioning.

50. Article 137, in our judgment, recognizes academic freedom as being vested not in all individual academics but rather in Hong Kong's educational institutions; the autonomy of those institutions being a prerequisite of

academic freedom.

51. Academic freedom may be recognized as an 'institutional' freedom rather than one that is 'personal'…"

At 24, the CFI held that academic freedom protected the freedom to pursue for the search of knowledge:

"55. As we have indicated, we are of the view that art.137 of the Basic Law recognizes academic freedom as a self-contained freedom, one that is vested in Hong Kong's educational institutions, enabling them to determine for themselves on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

56. But that being said, the academic community of an educational institution is in many ways the embodiment of the institution itself. In our view, academic freedom vested in an educational institution must therefore extend not simply to the administration of that institution but to the faculty of academics too, giving it freedom to pursue the search for knowledge without fear of external sanction.

57. The extent to which art.137 determines the nature and extent of internal relationships between an educational institution and its academic faculty is not an issue which arises in this judgment."

The CFI held at 24 – 25 that publication of academic work was protected under BL 30 and BoR 16(2):

"58. In our view, however, if an academic chooses to publish the result of his research, he is, as an individual, in no better position than any other Hong Kong resident who chooses to disseminate his opinions in the public domain …

59. Academic work that is published is protected by art.30 of the Basic Law, protecting freedom of communication and art.16(2) of the Hong Kong Bill of Rights which provides that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

The CFI ruled that both Mrs Law and Mr Ip enjoyed freedom of expression at 25:

"60. Freedom of expression is a freedom enjoyed by all Hong Kong residents.

In the factual context of the present case, as the Commission recognized, Mrs Law had equal enjoyment of the right as Mr Ip.

61. The freedom to express views and to criticize others' views is not qualitative. It is not therefore deprived of protection because it is strident, misguided or of no merit.

62. It must also be said that, when two sides debate conflicting opinions, it is invariably the primary aim of one side to persuade the other to change its opinions. That of itself is a legitimate aim.

63. It is, of course, fundamental that freedom of expression must, and does, allow for the expression of contrary views."

The CFI held at 25 – 26 that freedom of expression was not absolute:

"60. But freedom of expression is not an absolute right. In this respect, art.16(3) of the Hong Kong Bill of Rights reads:

The exercise of the rights provided for in para.(2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) for respect of the rights or reputations of others; or

(b) for the protection of national security or of public order (ordre public), or of public health or morals."

The CFI held at 26 that a threat of sanction from a person with authority to impose such sanction would violate BL 137:

"69. Within the factual context of the present case, the essential issue, it seems to us, is one of degree and that must always be judged in context. The issue may be described in the following question. At what point does an expression of contrary views by a senior public administrator expressed in private to an academic constitute an unlawful attack on academic freedom under art.137?

70. In our judgment, in the context of the factual issues considered by the Commission, it constitutes an unlawful attack when an expression of contrary views contains, directly or by implication, a threat of sanction against the institution itself or against the academic by a person who is in a position of authority with the power, actual or ostensible, to bring about the imposition of that sanction.

71. … A threat by a senior government official to impose some sanction on an educational institution; for example, to bring about a reduction in

funding, may be a threat which can only be realized in a year or more. The wheels of public administration grind slowly. But nevertheless it remains very much a threat. However, a threat of some distant sanction may be so remote as to constitute no threat at all. Context is everything."

The CFI concluded at 27 that:
"75. Accordingly, the fact that a senior public administrator privately confronts an academic to criticize that academic's published opinions on any particular matter does not itself constitute a violation of art.137 or the academic's own right to freedom of expression. It only does so when the confrontation contains, directly or by implication, a threat of sanction of the kind we have described earlier in this judgment. That, as we see it, is the position in law."

Wong Hon Sun v HKSAR (2009) 12 HKCFAR 877

Background

On 5 October 2006, the appellant bought a batch of 42 silver slabs for $1,644,167 in cash. On 7 October 2006, the Customs and Excise Service found the silver slabs hidden in the driver's compartment of a container lorry which was about to leave Hong Kong and enter the Mainland. As the goods were not recorded in a manifest, they constituted unmanifested cargo within the meaning of the Import and Export Ordinance (Cap. 60). The goods were then seized and were liable to forfeiture under s. 27(1)(a) of Cap. 60. Having decided not to restore the goods to the appellant (as the owner of the goods) under s. 27(2), the Commissioner of Customs and Excise ("Commissioner") served a notice of seizure on the appellant in accordance with s. 27(3). The appellant then gave notice to the Commissioner under s. 27(5) claiming that the goods were not liable to forfeiture.

As required by s. 28(1) of Cap. 60, the Commissioner then applied to the Magistrates' Court for the forfeiture of the goods. Upon hearing the application, the Magistrate ordered the goods to be forfeited. The Magistrate refused to exercise discretion conferred by s. 28(7) for the goods to be delivered to the appellant, taking the view that the appellant

was not an innocent owner of the goods. The appellant appealed against the decision to the CFA after failing at High Court.

Basic Law provisions in dispute

The major provisions in dispute were BL 6 and BL 105.

What the Court held

The CFA unanimously dismissed the appellant's appeal and held that the forfeiture process, including the discretion under s. 28(7) of Cap. 60 were of civil character and did not involve the determination of a criminal charge for the purposes of BoR 10 and BoR 11(1). However, such proceedings might potentially affect property rights safeguarded by the Basic Law. Hence, in exercising the discretion under s. 28(7) of Cap. 60, there had to be a level playing field.

What the Court said

Bokhary PJ held that the move from a mandatory forfeiture regime to a discretionary forfeiture regime was an enlightened development which sat well with BL 105 at 889D – H:

"21. The move from a mandatory regime to a discretionary one was an enlightened development, and there is no reason to regard it as having been made grudgingly. It freed the law from a harsh history. And it is obviously remedial, as indeed s. 19 of the Interpretation and General Clauses Ordinance, Cap.1, deems it to be. Care must be taken not to read into reforming legislation anything that would render it only partially remedial. … Although it preceded the Basic Law, the move away from a harsh regime sits well with our constitution. Article 105 of the Basic Law provides that '[t]he Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property'. In the *Air Canada* case the European Court of Human Rights said (at p.173) that 'an interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'. There must a level playing field, for to the extent

that the playing field is slanted in favour of the state, property rights are unprotected.

22. Moreover such a slant would violate the 'equal protection' clause of art.22 of the Bill of Rights entrenched by art.39 of the Basic Law. Article 6 of the Basic Law provides that '[t]he Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law'. That would not be the position if a judicial discretion whether not to forfeit were saddled with an onus placed on the property owner. There is nothing in the letter or spirit of the legislation out of which to create such an onus. That goods are liable to forfeiture means no more than that the discretion arises. It says nothing as to how the discretion is to be exercised. The discretion must be exercised even-handedly. By virtue of art.10 of the Bill of Rights entrenched by art.39 of the Basic Law, the right to a 'fair' hearing before an 'impartial' tribunal is not confined to the determination of criminal charges. It extends to the determination of 'rights and obligations in a suit at law' and therefore covers forfeiture proceedings. To impose a slanted discretion on a court would be to deprive it of impartiality. The courts cannot countenance anything less than even-handedness, for nothing less would be constitutional. Anything less would be discriminatory. That the inequality would favour the state over the subject would only make it worse."

Chan Hau Man Christina v Commissioner of Police [2009] 4 HKLRD 797

Background

The Commissioner of Police prevented the applicant and her fellow demonstrators from holding a demonstration during the Hong Kong leg of the Beijing Olympic Games torch relay along Nathan Road. The applicant sought to challenge the Commissioner's decision to prevent her from exercising her right to free speech and demonstration under BL 27. She also contended that she had been subject to unlawful arrest or detention contrary to BL 28 and her freedom of movement under BL 31 had been unlawfully curtailed.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 27, BL 28 and BL 31. The Court also referred to BL 39(2) and BL 42.

What the Court held

The CFI held that the law on the right to demonstration had been settled by CFA decision in *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229. Alongside the constitutional rights to freedom of speech and demonstration under BL 27 was the police's duty to keep the peace. S. 10(a), (c), (e) and (g) of the Police Force Ordinance (Cap. 232) expressly provided that the duties of the police force shall be to take lawful measures for preserving the public peace, preventing injury to life and property, regulating assemblies in public places and preserving order in public places. What were reasonable and appropriate measures must depend on all the circumstances in the particular case. In this case, the Court held that the police were justified in removing the applicant from the scene of demonstration and their decision to do so did not infringe the applicant's right to hold a peaceful demonstration under BL 27.

Where the police action involved curtailment of an individual's constitutional rights, such as the right to demonstrate, the proportionality test should apply. The question always lied in whether the action, if warranted to be taken in the first place, was no more than reasonably necessary and proportionate. If the relevant person was culpably responsible for the imminent breach of the peace in the first place, that would certainly colour to a significant extent the application of the test. After all, BL 42 specifically requires residents and others in Hong Kong to abide by the laws in force in the HKSAR.

The Court held that the common law concept of "a breach of the peace" was sufficiently certain to meet the requirement of "prescribed by law" under BL 39(2).

Every police officer enjoyed the power, and was subject to a duty, to seek to prevent, by arrest or other action short of arrest, any breach of the peace occurring in his presence and that power and duty extended

to any breach of the peace which was about to occur. If he reasonably apprehended that a breach of the peace was imminent, his duty was to take reasonable steps to prevent it and various options including arrest and detention, restraint, warning, etc. would then become available. In the present case, the Court accepted the police's account that they had never arrested the applicant and her group whilst (or after) removing them from the scene.

What the Court said

On the right to demonstration under BL 27 and duty to keep the peace, the CFI said at 805 – 806:

"14. The law on the right to demonstration has been settled by the Court of Final Appeal decision in *Leung Kwok Hung v HKSAR*. The right of peaceful assembly involves a positive duty on the part of the Government to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully. It is not an absolute obligation because the Government cannot guarantee that lawful assemblies will proceed peacefully and 'it has a wide discretion in the choice of the measures to be used'. What are reasonable and appropriate measures must depend on all the circumstances in the particular case (at p.249 para.22). Where appropriate, these circumstances would include Hong Kong's density of population and its relatively narrow streets and roads in urban areas (at p.250 para.23). A demonstration may give offence to those with opposing views and demonstrators must be able to proceed without fear of physical violence by opponents; such a fear would have a deterrent effect. In a democracy, the right to counter-demonstrate cannot extend to inhibit the exercise of the right to demonstrate (at p.250 para.24).

15. Alongside these constitutional rights to freedom of speech and freedom of demonstration, which carry with them the positive duty on the part of the Government to take measures to enable lawful assemblies to take place peacefully, is the police's duty to keep the peace. Indeed, s. 10(a), (c), (e) and (g) of the Police Force Ordinance (Cap.232) expressly provide that the duties of the police force shall be to take lawful measures for preserving the public peace, preventing injury to life and property, regulating assemblies in public places and preserving order in public places. It is self-evident that these are also important matters involving directly or indirectly the constitutional and other rights of members of the public."

The Court held at 812 that the common law concept of "a breach of the peace" was sufficiently certain to meet the requirement of "prescribed by law":

"35. Human rights law additionally requires that the power to take steps must be 'prescribed by law'. This requirement is reflected in our jurisdiction in art.39(2) of the Basic Law which provides that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted 'unless as prescribed by law'. … For present purposes, I need only point out that the European Court has held that the common law concept of 'a breach of the peace' is sufficiently certain to meet the requirement of 'prescribed by law': *Steel v United Kingdom*."

At 829 – 830, the Court held that the police were justified in removing the applicant from the scene of demonstration and did not infringe the applicant's right under BL 27:

"81. In the present case, the police denied that they ever arrested the applicant and her group whilst (or after) removing them from the scene. I have no reason not to accept the police's account. In any event, as explained, once it became justifiable for the police to take action against even innocent third parties, the steps which the police could take might involve arresting the third parties. After all, every citizen has the duty to prevent a breach of the peace, and a duty not to obstruct the police in executing their duty. …

84. … I conclude that the police were justified in removing the applicant from the scene of demonstration on 2 May 2008. Their decision to do so did not infringe the applicant's right to hold a peaceful demonstration at the scene. The challenge against the decision to do so therefore fails and is dismissed."

Cheng Kar Shun v Li Fung Ying [2011] 2 HKLRD 555

Background

The applicants were senior executives in a group of companies which were the developer of flats in Hunghom Peninsula. The development led to a dispute between the Government and one of the companies, resolved in part by payment of HK$864 million for a lease modification

to convert the land into a private development. The Permanent Secretary for Housing Planning and Lands ("Secretary") handled the dispute. After he retired, one of the companies in the group appointed the Secretary as an executive director and deputy managing director.

The LegCo resolved to appoint a Select Committee to inquire into the Secretary's post-service work. S. 9 of the LegCo (Powers and Privileges) Ordinance (Cap. 382) provided for the ordering of witnesses to attend the LegCo or its committees. The applicants were summoned to give evidence and produce documents before the Select Committee, and the applicants sought judicial review on the grounds that (i) the Select Committee had no power to summon attendance of witnesses; and (ii) the Select Committee acted outside its remit under the resolution passed by the LegCo.

Basic Law provisions in dispute

The Basic Law provision in dispute was BL 73.

What the Court held

The CFI held that BL 73(10) provided the LegCo with the power to summon persons to give evidence when sitting as a full body or functioning through a Select Committee. Even if BL 73 only empowered the LegCo to act as a full body to summon witnesses, that power could be delegated to one of its committees.

The CFI pointed out that the courts generally did not interfere with the internal workings of the Legislature, as the Basic Law had recognized that the LegCo would be a sovereign body under the Basic Law with exclusive control over the conduct of its own affairs. But exceptionally if questions about whether the Legislature had acted in contravention of the Basic Law arose, the courts had jurisdiction to intervene, though such jurisdiction must be exercised with great restraint given the different constitutional roles assigned under the Basic Law to different arms of HKSARG.

In ascertaining the role intended by the Legislature in enacting Cap. 382, the task had to be undertaken bearing in mind the common law principle

and the principle of separation of powers, i.e. the Legislature should have control over conduct of its own affairs. Disputes between witnesses and a Select Committee should be dealt with by the LegCo itself.

An application like this should only be entertained if it was concerned with a clear-cut case of *ultra vires*, or an abuse or misuse of power. Otherwise, ambiguities or doubts should be resolved by the LegCo itself.

What the Court said

The CFI held at 610 – 611 that BL 73(10) provides the LegCo, whether sitting as a full body, or functioning through a select committee, the power to summon witnesses:

"197. In the proper interpretation of the Basic Law as a living instrument that has been designed to speak for 50 years, all these realities cannot be ignored lightly. The Basic Law must be interpreted flexibly to meet the challenge of the time. Expressing it in terms of the original intent of the drafters as expressed in the language they used, this approach must also have been part of the original intent of the drafters of the Basic Law, who knew fully well that what they drafted has to endure for 50 years. The Basic Law's use of ample and general language bears evidence to that intent.

198. Ultimately, the relevant provisions must be given a purposive interpretation. The advantages of giving a select committee the power to summon witnesses are obvious and hardly require repetition. Criticisms such as the power is a coercive power and an interference with fundamental human rights, the composition of the committee may not be representative enough, the power is susceptible to abuse or misuse, and so on, are more apparent than real. After all, it must be remembered that a select committee is formed by the full body of the Legislative Council in the first place. Whether it is appropriate to give the committee the power to summon witnesses is again a matter to be resolved by the Legislative Council sitting as a full body. Exercise of the power by a select committee, if authorized to do so, is governed by the detailed provisions in the Ordinance, which contains built-in mechanisms for raising objections on the ground that a question is of a private nature and does not affect the subject of inquiry. Furthermore, the work of the select committee, including how it exercises its power to summon witnesses, is always under the supervision of the full

body of the Legislative Council. Ultimately, the legislature is accountable to the people of Hong Kong, whether directly or indirectly. Moreover, the courts also play a supervisory role in appropriate circumstances (see below).

199. It therefore requires a particularly strong case to justify interpreting the Basic Law in such a way as to impose a straitjacket on the Legislative Council as to how it may go about its business, instead of leaving it to the discretion of the Council. When it is constitutional for the Securities and Futures Commission to have a power to compel people to attend before it to give evidence, as has been held by the Court of Final Appeal to be the case, it is difficult to see why a select committee of the Legislative Council cannot have a similar power in order to enable it to duly perform the job that it has been entrusted with by the full body of the Legislative Council. It is difficult to see how that result would reflect the original intent of the drafters of the Basic Law, nor can one easily discern why in modern-day Hong Kong, the Basic Law should be construed in that way. Certainly, the language of the Basic Law does not compel such a construction.

4.10 Conclusion on interpretation of article 73(10)

200. So for all these reasons, I have come to the firm conclusion that the interpretation of the applicants of article 73(10) must be rejected. On its proper interpretation, article 73(10) provides for the exercise by the Legislative Council, whether sitting as a full body, or, functioning through a select committee in accordance with its Rules of Procedure, the power to summon, as required when exercising the powers and functions set out in article 73(1) to (9), persons concerned to testify or to give evidence before the full body, or (as the case may be) the committee, of the Legislative Council. The exercise of that power must also be in accordance with the provisions of the Ordinance, which forms part of the laws in force in Hong Kong."

The CFI reiterated at 617 that the courts would not interfere with the internal work of the LegCo except when the LegCo has acted in contravention of the Basic Law:

"220. In other words, the courts of the Hong Kong Special Administrative Region do not, as a rule, interfere with the internal workings of the Legislature. Exceptionally, where questions of whether the LegCo, in going about its business, has acted in contravention of the provisions in the Basic Law arise, the courts do have jurisdiction to intervene. But the jurisdiction must be exercised with great restraint, having regard to the different

constitutional roles assigned under the Basic Law to different arms of the Government."

The CFI held at 619 that, in accordance with the principle of separation of powers, the Legislature should have control over its own affairs:
"232. In my view, this is simply in accordance with the general principle of separation of powers, that the legislature should have control over the conduct of its own affairs, and primarily, alleged irregularities in the conduct of parliamentary business are a matter for the legislature, rather than the courts, subject to any overriding provisions in the written constitution."

China Field Ltd v Appeal Tribunal (Buildings) (No. 2) (2009) 12 HKCFAR 342

Background

The appellants, China Field Ltd and Sun Honest Development Ltd ("Sun Honest"), were property developers. They proposed to redevelop two residential properties by converting them from low-rise to high-rise (two 39-storey buildings and one 40-storey building). The Building Authority ("Authority") rejected the building plans submitted on the basis, *inter alia*, that such developments would significantly increase the volume of traffic at the junction of Wang Fung Road with Tai Hang Road by the increased density of flats pursuant to s. 16(1)(h) of the Buildings Ordinance (Cap. 123) ("Access Issue").

Sun Honest's application was also refused on the ground that the proposed development exceeded the plot ratio. This was because, in calculating the plot ratio, the Authority deducted an area of land which was partly subject to rights of way acquired by the doctrine of lost modern grant (i.e. where there has been long enjoyment of a right, it gave rise to the presumption of lawful origin) ("Doctrine") in favour of the landowners and occupiers of the adjacent building ("Right of Way Issue").

The appellants appealed to the Appeal Tribunal (Buildings) ("Tribunal") but their applications concerning the Access Issue and Sun Honest's

appeal concerning the Right of Way Issue were all dismissed by the Tribunal. They applied for judicial review against the Tribunal's decision but was again dismissed by both the CFI and the CA. They then appealed to the CFA.

Basic Law provisions in dispute

The major provision in dispute was BL 8.

What the Court held

Concerning the Access Issue, the CFA quashed the Tribunal's decision on the Access Issue and held that it would be insufficient for the Authority to refuse approval on the basis that the massive increase in the volume of traffic as a result of the development generally would cause danger and inconvenience in the immediate vicinity of the site. Rather, the relevant cause, as stated in s. 16(1)(h) of Cap. 123, had to be attributable to "the place at or manner in which" the proposed means of access or other openings involved in the building works to be dangerous or likely to cause danger or inconvenience of traffic on the street.

Concerning the Right of Way Issue, the CFA held that the two restrictive rules, namely the fee simple rule (i.e. in order to acquire an easement by any form of prescription, including the Doctrine, the user had to be by or on behalf of the owner in fee simple against an owner in fee simple) and the common landlord rule (i.e. the doctrine of lost modern grant could not apply as between leaseholders holding under a common landlord) should not represent or continue to represent the law of Hong Kong. In other words, in Hong Kong an easement over land could be acquired by the Doctrine.

The CFA held that whilst BL 8 provided for the common law previously in force in Hong Kong to be maintained, except for any that contravened the Basic Law, it was well recognized that the common law was not monolithic and might evolve differently in the various common law jurisdictions. The Hong Kong judges were expected to develop the common law of Hong Kong to suit the circumstances of Hong Kong.

What the Court said

The CFA held at 371B – 372E that the courts of Hong Kong could develop Hong Kong's own version of common law:

"74. English law was first introduced into Hong Kong by the Supreme Court Ordinance 1844. This provided that:

the law of England shall be in full force in the said Colony of Hong Kong, except where the same shall be inapplicable to the local circumstances of the said Colony, or of its inhabitants: Provided nevertheless, that in all matters and questions touching the right or title to any real property in the same Colony, the law of England shall prevail …

75. This was replaced by another Ordinance in 1873 which contained the same exception and which it is not necessary to consider. In 1966 this was replaced by the Application of English Law Ordinance which remained in force until the resumption of the exercise of sovereignty by China on the 1 July 1997. Section 3 provided:

The common law and the rules of equity shall be in force in Hong Kong, so far as they may be applicable to the circumstances of Hong Kong or its inhabitants and subject to such modifications thereto as such circumstances may require …

76. Prior to 1 July 1997 'common law' was defined as 'the common law of England', but this was not limited by reference to any particular time. The common law as it was developed by the judges applied in Hong Kong provided that it was suited to local circumstances. This did not give Hong Kong judges a discretionary power to legislate by modifying the common law. They were required to apply English law, but a modified form of English law suited to local circumstances. On appeals to the Privy Council, the Board would defer to the views of the local courts on what was and what was not suited to the circumstances of Hong Kong.

77. On 1 July 1997 the 1966 Ordinance ceased to apply in Hong Kong as being contrary to the Basic Law. But the continuity of existing laws was of fundamental importance in the establishment of the Hong Kong Special Administrative Region under the principle of 'one country two systems' and constituted a vital element of the Joint Declaration and the Basic Law. Article 8 of the Basic Law provides:

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this law, and subject to any

amendment by the legislature of the Hong Kong Special Administrative Region.

Section 3 of the Interpretation and General Clauses Ordinance now defines 'the common law' as 'the common law in force in Hong Kong'.

78. The disappearance of any reference to local circumstances and the modification of English law was an inevitable consequence of the resumption by China of the exercise of sovereignty over Hong Kong. But it should not inhibit the courts of Hong Kong, and in particular this Court which has succeeded the Privy Council as the final appellate court of Hong Kong, from developing the common law in the context of Hong Kong. The language of the 1966 Ordinance was appropriate when Hong Kong was a British colony and Hong Kong judges were obliged to apply an occasionally modified version of English law. This is no longer the case. Just as Australian and New Zealand judges apply and develop their own versions of the common law, so in future our judges must develop the common law of Hong Kong to suit the circumstances of Hong Kong. It is well recognized that the common law is no longer monolithic but may evolve differently in the various common law jurisdictions."

Chiang Lily v Secretary for Justice (2010) 13 HKCFAR 208

Background

The applicant was charged with various offences. The prosecution intended to transfer the trial from the Magistrate Court to the District Court in accordance with s. 88 of the Magistrates Ordinance (Cap. 227), which was opposed by the applicant since she requested a jury trial in the CFI. Notwithstanding the applicant's objection, the Secretary for Justice ("SJ") maintained his decision to apply for trial in the District Court. The applicant obtained leave for judicial review to challenge that decision ("First Application"). The First Application was dismissed by the CFI and subsequently the Magistrate made an order for transfer. The applicant sought another leave for judicial review to challenge the Magistrate's order for transfer ("Second Application"). The Second Application was dismissed by the CFI and her appeals against both the First and Second Applications were dismissed by the CA. The applicant

sought leave to appeal against the CA's decision.

Basic Law provisions in dispute

The provision in dispute was BL 63.

What the Court held

The CFA rejected the applicant's application. The Court held that there was no right to trial by jury in Hong Kong. Since the applicant failed to demonstrate that she would suffer an unfair trial in the District Court, the decision of the SJ was not irrational.

The CFA ruled that the Second Application was an abuse of process since any challenge to the constitutionality of s. 88 of Cap. 227 should have been made in the First Application to avoid highly undesirable delays and disruption to the pending criminal proceedings. A matter could not be simply re-opened due to a difference of view between the subsequent set of lawyers and the earlier advisers unless the earlier advisers could be shown to be flagrantly incompetent. In any event, the constitutional challenge could not be made out since the choice of venue for a prosecution was covered by BL 63.

What the Court said

Li CJ held at 213 that the prosecution's choice of the venue for prosecution was covered by BL 63:

"15. While the Court of Appeal declined to deal with the merits, it is in our view clear that the contention that section 88 is unconstitutional because it allocates a judicial function to the Secretary for Justice is not reasonably arguable. Choice of the venue for a prosecution is clearly a matter covered by Article 63 of the Basic Law which gives control of prosecutions to the Secretary for Justice without any external interference. …

16. This becomes obvious once one considers the context and basis of any decision regarding venue. As to context, if selection of venue were a judicial function, the magistrate would have to hear submissions and take evidence bearing on that choice, looking in some detail at the alleged offence and the circumstances of the accused, turning the mere decision as to venue into a

mini-trial. That cannot be the proper function of the magistrate.

17. Moreover, the basis of making the selection shows that the function is not judicial. In the Statement of Prosecution Policy and Practice (2009), guidance as to choice of venue is given as follows:

In the selection of venue, the sentence which is likely to be imposed upon an accused after trial is an important factor for the prosecutor to examine. The prosecutor will also wish to consider the general circumstances of the case, the gravity of what is alleged, the antecedents of the accused and any aggravating factors. (para 14.1)

18. These are plainly matters that may properly guide the prosecutor but which it would be highly undesirable for a magistrate to explore before the trial. It would obviously be most inappropriate for there to be a debate as to likely sentence or antecedents or aggravating factors before the magistrate regarding a person fully entitled to the presumption of innocence. The present system avoids this by properly treating the question of venue as a prosecutorial choice with the transfer following on a mandatory basis."

Lai Hay On v Commissioner of Rating and Valuation [2010] 3 HKLRD 286

Background

New Territories land Lot 790A was assigned by way of gift to the appellant by his father in November 1992. The appellant was the only son of his father, who passed away in October 1994. The appellant applied for exemption from annual Government rent under s. 4 of the Government Rent (Assessment and Collection) Ordinance (Cap. 515), but the Director of Lands ("Director") refused the application, holding that the appellant was not a "lawful successor" within the meaning of s. 4(1)(a)(ii)(B) of Cap. 515. The appellant's appeal against the Director's decision was dismissed by the Lands Tribunal. He appealed to the CA.

Basic Law provisions in dispute

The Basic Law provisions in dispute were BL 40, BL 121 and BL 122.

What the Court held

The CA held that the land was not exempted under s. 4 of Cap. 515 as the *inter vivos* gift took effect as a gift, and not by way of lawful succession, since lawful succession in the New Territories (for indigenous villagers) could only take place by will or on intestacy by letters of administration.

S. 4 of Cap. 515 was not inconsistent with BL 122, as the latter (in referring to "lawful successor") did not permit or require a more extensive meaning than that in Hong Kong law. This was consistent with BL 8 as well.

Nor was s. 4 of Cap. 515 inconsistent with BL 40 (dealing with traditional rights and interests of indigenous inhabitants). The right to exemption from annual rent was governed by BL 122, which specifically provided for such an exemption in respect of a lease renewed under BL 121. BL 40 did not justify a different interpretation.

What the Court said

At 305 – 306, the CA held that BL 122 did not widen the meaning of "lawful succession" under Hong Kong law:

"69. Both the Joint Declaration and Art. 122 provided for exemption from the annual rent 'so long as' the property is held by an indigenous lessee on 30 June 1984 or by one of his lawful successors in the male line. Counsel submitted and I agree that the phrase 'so long as' in Art. 122 is important because it implies continuity of holding by that person or his lawful successor. Both section 9(2) of the Extension Ordinance and section 4(1)(a) of [Cap. 515] give effect to the requirement of continuity. I note also that a condition for exemption is that the land 'was on 30 June 1984' held by an indigenous inhabitant. The exemption was only extended to land in the New Territories held by an indigenous person 'on 30 June 1984' and continued to be held by his lawful successor(s) in the male line thereafter. The exemption does not come with the status of being an indigenous inhabitant.

73. It is also important to remember that but for the Joint Declaration and the Basic Law, no extension of such leases beyond 30 June 1997 could have been granted. In other words, for all intents and purposes the Joint Declaration and the Basic Law (Art. 121) enabled the government (during

the period from 27 May 1985 to 30 June 1997) to extend such leases beyond 30 June 1997 and to 30 June 2047, at the annual rent. Such extension was made possible by the Joint Declaration and Art. 121.

74. I believe 'lawful successors' in Article 122 refers to a person who has become such by lawful succession. Article 122 does not permit or require lawful succession to have a more extensive meaning than as recognized by the law in Hong Kong. That is consistent with Article 8 which provides that:

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

At 308, the CA held that BL 40 would not assist the appellant's case:

"83. The right to exemption from the Annual Rent is governed by art.122 which is the specific provision dealing with exemption to pay the Annual Rent in respect of a lease renewed by virtue of art.121. For the reasons I have given above, I believe 'lawful successors' in art.122 refer to a succession on the death of the relevant ancestor and do not include an *inter vivos* transfer. There is nothing in art.40 which requires a different interpretation. For the above reasons, I would dismiss the appeal."

The Hua Tian Long (No. 2) [2010] 3 HKLRD 611

Background

The plaintiff brought an action for breach of contract against the defendant, the owner of a derrick crane barge, "*Hua Tian Long*", for failing to honour to make the vessel available for the purpose of some offshore Malaysian and Vietnamese Projects. The defendant was identified as the Guangdong Salvage Bureau ("GZS"), an entity of the Ministry of Communications of the PRC. The principal facts were not in dispute. The issue was whether the defendant could enjoy Crown immunity and if so, whether that immunity had been waived on the facts of the case.

Basic Law provisions in dispute

The CFI referred to BL 1, BL 7, BL 8, BL 12 and BL 18 in its judgment.

What the Court held

The CFI held that "Crown immunity" at all times remained an attribute of the British Crown's sovereignty over Hong Kong prior to 1 July 1997. After 1 July 1997, the PRC, in turn enjoyed the like "Crown immunity" hitherto accorded to the British Crown. The Court held that "Crown immunity" still subsisted and could be invoked as a matter of Hong Kong law. In assessing whether GZS could enjoy Crown immunity, the test adopted was whether the CPG had control over the corporation and whether the corporation was able to exercise independent powers of its own. As control could be established in the instant case, the defendant could claim Crown immunity.

That notwithstanding, the CFI held that the defendant's conduct amounted to a submission to the jurisdiction of the Hong Kong Court and a waiver of its right to claim immunity against jurisdiction. The CFI admitted that an objective and fact-sensitive approach should be adopted in assessing whether the conduct of the defendant would amount to a waiver of its right to claim Crown immunity. As a matter of fact, the CFI held that the defendant had waived its right.

What the Court said

The CFI held at 634 that the primary issue of this case was the application of the principles of "Crown immunity" after 1 July 1997:

"42. Article 1 of the Basic Law makes it clear that the HKSAR is 'an inalienable part' of the PRC, Article 7 that the land and natural resources within the Hong Kong SAR 'shall be State property', whilst Article 12 reads:

The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.

43. Hence, in the context of the relationship between the PRC and Hong Kong, the concept of 'sovereign immunity' as generally understood is a logical misnomer. Doctrinally such immunity fundamentally is premised

upon considerations of comity and mutual respect for the dignity of foreign sovereign states, and should not apply in any form within the same state.

44. It follows, therefore, that in my view the primary issue in this case, at least in relation to the concept of immunity from suit, focuses upon the application of principles of 'crown immunity'."

At 625, the CFI explained the concept of Crown immunity:

"45. … 'Crown immunity' originated from the concept of the inequality of the ruling and the ruled, as represented by the maxim 'the sovereign can do no wrong'; thus the Crown is not bound by statute unless expressly named or by necessary implication, and at common law the Crown enjoys immunity from being sued in its own courts …"

At 626, the CFI agreed that the "control test" should be adopted when assessing whether the body corporate could be considered part of the Crown:

"52. For my part, I agree with the contention that when assessing whether a corporation can be said to be part of the Crown at common law, the material consideration is the *control* which the Crown has over that corporation, albeit the objects and function of that corporation also go into the evaluative 'mix'. In terms of 'control', I further agree that the salient question to be asked is whether the corporation in question is able to exercise independent powers of its own."

At 632 – 633, the CFI held that "Crown immunity" formed part of Hong Kong's common law:

"84. I do not accept that with the enactment of the [Crown Proceedings Ordinance] in Hong Kong in 1957 that, at a stroke, the concept of 'Crown immunity' - by which I mean the immunity of the British Crown in the Hong Kong courts - no longer formed part of the common law. To the contrary, in my view 'crown immunity' properly so-called at all times remained an attribute of the British Crown's sovereignty over her colonies, among which numbered Hong Kong prior to 1 July 1997, and the establishment of the new constitutional order did not alter this position. Constitutionally one 'sovereign' was replaced by another, and I see nothing in the Basic Law, which today forms Hong Kong's constitution, to gainsay that proposition.

84. I am buttressed in this instinctive view by the opinion of Chan CJHC (as he then was) in *HKSAR v Ma Wai Kwan David & ors* [1997] HKLRD 761 (CA) … who considered that even in colonial times the Hong Kong courts lacked the

legal basis to challenge acts of the British Crown; the learned Chief Judge noted (at 780):

I would accept the arguments … that regional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign. There is simply no legal basis to do so. It would be difficult to imagine that the Hong Kong courts could, while still under British rule, challenge the validity of an act of Parliament passed in UK or an act of the Queen in Council which had effect on Hong Kong …

86. It seems to me that the key to unravelling the present argument lies in the fact that prior to the handover as a matter of constitutional structure effectively there were two 'Crowns' in Hong Kong – Her Majesty's government in the then colony and Her Majesty's government in the United Kingdom and that whilst the Crown Proceedings Ordinance (CPO) enabled proceedings to be brought against the government of Hong Kong, it had no effect on, and did not remove, the concept of the 'Crown immunity' of the Queen in the UK. …

88. The short point is that in my view 'Crown immunity' in its true sense never was removed by the CPO, that as a concept imported from customary international law it continued to exist at common law unaffected by the CPO until the handover to the new sovereign power, the PRC, which in turn must enjoy the like crown immunity hitherto accorded to the British Crown …"

The CFI held at 643 – 644 that an objective and fact-sensitive approach was applicable to assess whether a party had waived the immunity:

"131. Clearly therefore waiver is a fact-sensitive issue, and in this regard this judgment has referred in some detail to the procedural history of this case …

133. The validity of the assertion by the defendants as to their actions not having amounted to the legal doctrine of waiver will depend on the knowledge of entitlement to claim sovereign immunity."

Applying an objective and fact-sensitive approach, the CFI concluded at 646 – 648 that the defendant had waived its right to claim Crown immunity:

"141. In my judgment the conduct of GZS to-date amounts to a submission to the jurisdiction of the Hong Kong court and a waiver of its right to claim immunity against jurisdiction.

152. At the end of the day I take the view that the stark chronology of events speaks volumes. In my judgment GZS must have been aware of its

rights as to the possibility of a claim for immunity - of either kind - since 30 April 2008, and that by its subsequent conduct has waived any immunity entitlement and has submitted to the jurisdiction of the Hong Kong court. I so hold."

Medical Council of Hong Kong v Helen Chan (2010) 13 HKCFAR 248

Background

The respondent, a registered medical practitioner under the Medical Registration Ordinance (Cap. 161), was found guilty of professional misconduct at disciplinary inquiries by the Medical Council of Hong Kong ("Council") for promoting certain health products in an advertisement which were being sold by a company with which she had a financial relationship. The Council made use of its Legal Adviser by having him present at the deliberations of the Council, giving additional legal advice if necessary, as well as producing a draft of the decision of the Council. The respondent contended that the Legal Adviser's presence at deliberations and decision-drafting were unlawful. The respondent also contended that a rule invoked by the Council violated her freedom of expression guaranteed under the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383).

Basic Law provisions in dispute

The major provision in dispute was BL 27.

What the Court held

The CFA held that there was no express or implied statutory prohibition on the presence of the Legal Adviser at the deliberations of the Council. Similarly, there was no express or implied statutory provision which either permitted or prohibited drafting by the Legal Adviser for the Council.

The CFA further held that the Legal Adviser's presence at deliberations and decision-drafting did not deprive the respondent of her right to procedural fairness since they did not render the Council less than a competent, independent and impartial tribunal contrary to BoR 10 and BL 39. Accordingly, the Legal Adviser's presence at the Council's deliberations was lawful and so was the decision-drafting which he did for it.

The respondent argued that it was contrary to natural justice for the Council to find that she had breached a "long-established rule that doctors are prohibited from public endorsement or promotion of a commercial brand of medical or health-related products" ("rule") without having warned her of the rule before the hearing commenced. The respondent argued that such a rule would be a restriction on freedom of expression. And since it was not a restriction "prescribed by law", it was not a lawful restriction under BL 27 and BoR 16(2).

The CFA held that there was no basis for rejecting the Council's view that the endorsement or promotion by a doctor was unethical. The restriction did not violate the freedom of speech under BL 27 and BoR 16(2). This was so even though free speech extended to commercial speech. The restriction involved was necessary for the protection of public health and proportionate to that need.

What the Court said

The CFA held at 277 – 280 that the rule did not violate the respondent's right to freedom of speech:

"72. What must the Medical Council have meant when (without citing any specific written rule) it spoke of a 'long-established rule that doctors are prohibited from public endorsement or promotion of a commercial brand of medical or health related products'? Plainly the Medical Council was referring to a consensus within the medical profession that such endorsement or promotion by a doctor is unethical.

73. I see no basis on which the courts can properly reject the Medical Council's view that such a consensus existed. Nor do I see anything unfair or contrary to natural justice in the Medical Council holding this doctor to the ethical standards the subject-matter of this consensus within her profession.

74. Article 27 of the Basic Law entrenches and guarantees 'freedom of speech'. And art.39 of the Basic Law entrenches the Bill of Rights. Paragraph (2) of art.16 of the Bill of Rights provides that everyone shall have 'freedom of expression'. And paragraph (3) of this article provides that restrictions on this freedom:

shall only be such as are provided by law and are necessary:

(a) for respect of the rights or reputations of others; or

(b) for the protection of national security or of public order (ordre public), or of public health or morals.

75. Free speech is a constitutional freedom even when it is only commercial speech. And I say 'only' not to diminish the importance of free commercial speech but to acknowledge the even greater importance of free political speech.

80. A constitutional right or freedom must always be protected with anxious care. This is so even when it is one like freedom of commercial speech rather than freedom of political speech. The position of a person facing a charge must also always be protected with anxious care. This is so even when the charge is disciplinary rather than criminal. All of this is so even when the aim of the restriction on the right or freedom and of the bringing of the charge is to protect something as vital as public health. To a greater or lesser extent, the definition of an offence, whether criminal or disciplinary, necessarily entails a degree of flexibility. Nevertheless the elements of the offence must be sufficiently precise. What would amount to a commission of the offence must be reasonably foreseeable – with appropriate advice, if need be. So the present case calls for very careful consideration of all the factors involved and the whole of the relevant circumstances.

81. Upon such consideration, I find myself in respectful agreement with the conclusion reached by the learned judges of the Court of Appeal on this part of the case. The speech involved was commercial rather than political speech, and the restriction thereon was necessary for the protection of public health. It was proportionate to that need.

82. Having regard to the realities of the circumstances, the finding that what Dr Chan did constituted misconduct in a professional respect is not unfair, contrary to natural justice, incompatible with free speech or with legal certainty. After all, the sort of professional misconduct alleged against Dr Chan can only be established if the governing body of her profession is satisfied, after a full and fair hearing, that what she did was

contrary to a consensus within her profession on what the ethics of that profession demand. And there is a right of appeal to the judiciary. It is not unconstitutional that, under the safeguards of a fair system of adjudication and appeal, persons are held to the customary ethics of their profession unless the particular rule of ethics involved is irrational. This one is by no means irrational."

HKSAR v Au Kwok Kuen [2010] 3 HKLRD 371

Background

A group of about 26 persons ("petitioners") assembled outside the private residential development ("Development") of a government official to present a petition and hold a demonstration. When the gates at the entrance were opened by the caretaker to allow a resident's vehicle in, the petitioners rushed through the gates. The policemen at the scene immediately formed a human chain to keep the petitioners away. The petitioners charged through the police cordon and reached the common space. Six of them ("defendants") were subsequently jointly charged and convicted of taking part in an unlawful assembly contrary to s. 18(3) of the Public Order Ordinance (Cap. 245).

The defendants appealed, arguing, among other things, that their constitutional right of assembly and freedom of expression did not stop at the entrance to the Development, regardless of whether they were permitted to enter or not. They also argued that the police officers were trespassers and were not acting in execution of their duty and they had unlawfully obstructed and interfered with the defendants' exercise of their constitutional rights.

Basic Law provisions in dispute

The major provisions in dispute were BL 6, BL 27, BL 29 and BL 105. The CFI also referred to BL 5.

What the Court held

The CFI held that notwithstanding the acknowledged importance of the right of peaceful assembly and the right to freedom of expression, neither the provisions in the Basic Law nor those in the BoR bestowed any freedom of forum for the exercise of those rights. None of the relevant provisions required the automatic creation of rights of entry to private residential property.

The CFI also held that the right of peaceful assembly and the right to freedom of expression stopped, so far as physical or geographical limits were concerned, at the boundary of private residential property belonging to others, in the absence of any permission to enter. BL 29 provided that the homes and other premises of Hong Kong residents shall be inviolable. The right to privacy must be given a generous interpretation to include common areas within the residential development.

A police officer's duty was to be a keeper of the peace and to take all necessary steps with that in view. If invited by a landowner, the police could enter private premises to keep the peace, prevent crime or protect property from criminal injury. As the defendants had no right to hold any assembly within the private residential development in the absence of permission, there was no question of the police interfering with their right to assembly.

What the Court said

The CFI discussed the right of assembly and the right to freedom of expression as well as the constitutional rights to property at 381:

"25. The right of assembly and the right to freedom of expression are not absolute. Article 17 of the Hong Kong Bill of Rights which is based on art.21 of the International Covenant on Civil and Political Rights (ICCPR) which guarantees the right of peaceful assembly, specifically provides that restrictions on the exercise of the right may be imposed in conformity with the law, provided that they are 'necessary in a democratic society in the interests of … the protection of the rights and freedoms of others'. Likewise, art.16(2) of the Bill guarantees the right to freedom of expression. However, art.16(3)(a) expressly provides that the right is subject to restrictions that

are provided by law and are necessary 'for respect of the rights … of others'.

26. In the present context where one is concerned with a private residential development, various rights of the co-owners of the development are involved. They are not mere common law rights to property. They are constitutional rights also found in the Hong Kong Bill of Rights as well as Ch.III of the Basic Law which govern the 'fundamental rights' of the residents of the Hong Kong Special Administrative Region. In particular, art.29 of the Basic Law specifically provides that 'the homes and other premises' of Hong Kong residents shall be 'inviolable', and 'arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited'. In the same vein, art.14 of the Hong Kong Bill of Rights clearly stipulates that no one shall be subjected to unlawful interference with his privacy or home, and everyone has the right to the protection of the law against such interference.

27. Furthermore, art.105 under Ch.V of the Basic Law expressly states that the Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals to, amongst other things, the use of their property."

At 381, the CFI recognized that the constitutional rights of property stemmed from the capitalist system in Hong Kong:

"28. All this is not surprising because art.5 of the Basic Law … specifically guarantees that the socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, whereas 'the previous capitalist system and way of life shall remain unchanged for 50 years'. It is trite that a hallmark of a capitalist society is its high respect for personal ownership and property rights. This finds expression in art.6 of the Basic Law which requires the Special Administrative Region to protect the right of private ownership of property in accordance with law."

After reviewing foreign case authorities in the European Court of Human Rights and the California Supreme Court, the CFI distinguished the present case from those authorities at 385 – 386:

"36. … In the instant case, there is no question of the private residential property performing the function of a town hall or similar public or quasi-public venue in which individuals may claim the right to exercise their freedom of expression or assembly in a reasonable manner. To the contrary, on the evidence, the emphasis on privacy and security is plain. Nor is one concerned with commercial premises, which are let to a

government department or public authority for its official use. What this case is concerned with is purely private residential property. It is true that a high-ranking government official resides within the premises. However, in my view, that does not make any difference to the analysis, because the premises are occupied by the high-ranking official as his private residence. Moreover, the high-ranking official here does not occupy the entire private residential development by himself. As is common in Hong Kong, he is just one of the many co-owners/co-occupiers in the several multi-storey blocks comprising the residential development.

37. Furthermore, in the context of Hong Kong at least, by the nature of things, it is next to impossible to imagine a situation where not to permit entry to a private residential development to exercise the right of assembly or the right to freedom of expression would be tantamount to depriving those intending to exercise such rights of any opportunities to exercise them in any meaningful manner, thereby amounting to an effective denial of the rights. In Hong Kong, opportunities to exercise those rights in public places, including the public street that Shuk Yuen Building faces, are abound."

The CFI rejected the defendants' argument that there was a distinction between the common areas of a residential development and the flat of a resident. The CFI held at 383:

"44. In my view, the fact that in Hong Kong, most people live in buildings and developments that are under co-ownership does not mean that the common areas within the land and buildings in question do not form part of the 'homes' of the co-owners and occupiers of those buildings and land, for the purposes of protection of their privacy under art.14 of the Hong Kong Bill of Rights. In my view, their right to privacy must be given a generous interpretation."

The CFI held at 391 that BL 29 prohibited arbitrary or unlawful intrusion of a resident's home or other premises:

"50. … this argument regarding what constitutes a 'home' is quite irrelevant because apart from art.14 of the Hong Kong Bill of Rights, we also have art.29 of the Basic Law which specifically goes beyond 'homes'. Article 29 specifically states that 'the homes and other premises of Hong Kong residents shall be inviolable'. It prohibits 'arbitrary or unlawful search of, or intrusion into, a resident's home or other premises'.

51. In other words, even if common areas such as a driveway do not form part of one's 'home', in a multi-ownership situation, they are nonetheless

'other premises', which like one's 'home', attract the protection of art.29 of the Basic Law."

The CFI concluded at 391 – 392 that:

"52. … In my view, in Hong Kong, notwithstanding the acknowledged importance of the right of peaceful assembly and the right to freedom of expression, neither the provisions in the Basic Law nor those in the Hong Kong Bill of Rights bestow any freedom of forum for the exercise of those rights. None of the relevant provisions require the automatic creation of rights of entry to private residential property.

53. In other words, the right of peaceful assembly and the right to freedom of expression stop, so far as physical or geographical limits are concerned, at the boundary of private residential property belonging to others, in the absence of any permission to enter. (This is said, it should be noted, without prejudice to any possible argument that in situations such as that found in *Brooker v Police*, even activities carried out outside the physical boundary, but within the immediate proximity, of private residential premises could, depending on the facts, amount to an unlawful interference with the constitutional right to privacy at home of the owner or occupier of the premises.)

54. In the present type of situation, there is no question of the restriction on the relevant rights not being prescribed by law or being uncertain. The restriction is well defined by property law as well as the law of trespass."

Gurung Deu Kumari v Director of Immigration [2010] 5 HKLRD 219

Background

The applicant, aged 58, was a Nepalese who lived with her former husband in Hong Kong from 1974 to 1977. One of her four children, S, was born in Hong Kong and came to reside in Hong Kong on a permanent basis in 1996. The applicant came to Hong Kong as a visitor in October 2008 and was permitted to remain in Hong Kong for 90 days. The applicant's health deteriorated and she applied to the Director of Immigration ("Director") to change her immigration status to that of

a dependant of S. In her application, the applicant emphasized that she would be left alone in Nepal and she was suffering from hypertension and ill health, and S was her only son who could take care of her.

The Director rejected the applicant's application, finding that her case fell outside the established policy in granting dependent visa as she had not yet reached 60. He also took the view that there was no reason for treating her application as an exception outside the existing immigration policy. The applicant challenged the Director's decision by way of judicial review.

Basic Law provisions in dispute

The major provisions in dispute were BL 37 and BL 154(2).

What the Court held

The CFI held that given Hong Kong's unique circumstances, the Director was given a wide margin of discretion by the Legislature. BL 154(2) also specifically authorized the Government to apply immigration controls. Hence the courts would not lightly interfere with the Director's policy in granting dependant visas in individual case.

The CFI held that the Hong Kog Bill of Rights could not be invoked by the applicant who had no right to enter and remain in Hong Kong, nor could it be invoked by S, a family member of the applicant. The CFI further held that BL 37 was not engaged since the provision used the term "自願生育的權利" which clearly referred to the right to procreate and to foster children voluntarily. The CFI ruled that the English text of BL 37 was consistent with the Chinese text. Should there be any discrepancy between the two texts, the CFI held that pursuant to the Decision of the NPCSC on the English text of the Basic Law of the HKSAR, the Chinese text would prevail.

The CFI held that even if BL 37 was engaged here, the interference with family rights was proportional and could be justified by the overall immigration picture in Hong Kong.

What the Court said

At 227 – 228, the CFI held that the role of the courts in immigration control was essentially supervisory in nature:

"19. In the light of Hong Kong's small geographical size, huge population, substantial daily intake of immigrants from the Mainland, relatively high per capita income and living standards, and local living and job market conditions, it is not at all surprising that the Director has consistently devised and implemented a restrictive immigration policy in general and a restrictive dependent policy in particular.

20. As has been pointed out in many cases concerning challenges against immigration decisions of the Director of Immigration (and his officers), the legislature has chosen to entrust the high responsibility for and discretions on immigration matters to the Director of Immigration. It is an important responsibility, given Hong Kong's unique circumstances, and the discretions conferred are wide. … The courts have therefore said repeatedly that they will not lightly interfere with the Director's policies or exercise of discretion. …

21. More generally speaking, the courts' consistent approach also demonstrates their recognition that under the Basic Law, it is the executive which has been given the right and responsibility to administer the affairs in Hong Kong generally. Indeed, article 154(2) of the Basic Law specifically authorizes the Government to apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions. The role to be played by the courts is essentially supervisory in nature.

22. That being the case, the courts do not lightly interfere with the Director's policy in granting dependant visas or with his exercise of discretion in granting those visas in individual cases."

The CFI refused to follow another CFI's interpretation of BL 37 in *Santosh Thewe v Director of Immigration* [2000] 1 HKLRD 717 as the CFA held that the Chinese text of BL 37 was relevant. The Court said at 233 – 234 that:

"51. … It is noteworthy that in *Santosh Thewe*, there was no discussion on the Chinese version of article 37. Article 37, in Chinese, reads:

'*香港居民的婚姻自由和自願生育的權利受法律保護。*'

52. The crucial term used is '自願生育的權利' in Chinese, or the 'right to raise a family freely' in English. The same terms were used in the Joint Declaration, Annex I, JD ref 150 to 151.

53. As a matter of Chinese usage, the term '自願生育的權利' clearly refers to the right to procreate and to foster children voluntarily. It has nothing to do with taking care of or maintaining one's parents (or, for that matter, one's spouse). According to the dictionary 辭源 (1987 ed) cited by Mr Hectar Pun appearing on behalf of the applicants, '生育' means '生長，養育' (p 1136). In my view, none of them apply to the maintenance by an adult child of his or her parent as a matter of Chinese usage.

54. More importantly, it has been pointed out that '自願生育的權利' in article 37 is specifically guaranteed under the Basic Law in order to exempt residents of Hong Kong from the one child policy practised on the Mainland …"

The CFI concluded at 235 – 236 that BL 37 was not engaged:

"58. In my view, the English version of article 37 of the Basic Law is consistent with the Chinese meaning. The 'right to raise a family freely' sits comfortably well with the interpretation, based on the Chinese version, that it is a right to procreate and to foster children, and has nothing to do with the maintenance or taking care of a parent by an adult child, or the formation or maintenance of a family comprising such a parent and adult child. In particular, 'to raise' means, in the context, to '[r]ear, bring up, (a person or animal)', according to the Shorter Oxford English Dictionary (6th ed), 2454.

60. … the above interpretation of the English version does not mean that if read on its own, the English wording could not have been given a more generous or wider interpretation, along the lines of the European jurisprudence on the European Convention. However, to the extent possible, both the English and Chinese versions must be read in harmony with each other in order to arrive at a uniform interpretation. And that can be achieved by giving the English wording its ordinary and natural meaning. Nonetheless, the bottom line is that if there should be any discrepancy between the two texts, the Chinese text shall prevail: Decision of the Standing Committee of the National People's Congress on the English text of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (adopted on 28 June 1990) …

61. … I take the view that article 37 of the Basic Law is simply not engaged in situations of the present type. … For the sake of completeness, I would simply indicate that if I had been of a different view, I would have nonetheless concluded that the interference with the alleged family rights of the applicants was proportional and could be justified by the overall immigration picture in Hong Kong."

Ng Wing Hung v Hong Kong Examinations and Assessment Authority (unreported, 22 September 2010, HCAL 79 of 2010)

Background

The applicant sought leave for judicial review against the decisions ("Decisions") announced by the Hong Kong Examinations and Assessment Authority ("EAA") concerning the 2011 Hong Kong Certificate of Education Examinations ("HKCEE") and the 2013 Hong Kong Advanced Level Examination ("HKALE") offered and held by the EAA. The applicant argued that in reducing subjects offered in the HKCEE in 2011 and offering the last round of the HKCEE and HKALE respectively in 2011 and 2013, the Decisions did not represent a reasoned, gradual and incremental change in the examination policy and thus contravened BL 136. The applicant ran a similar argument based on Article 13 of the ICESCR which related to the right to education. The applicant further argued that the Decisions in not offering 17 subjects in 2011 violated the legitimate expectation of candidates who took the HKCEE in 2010.

Basic Law provisions in dispute

The major provision in dispute was BL 136.

What the Court held

The CFI held that the applicant's claim in connection with BL 136 did not have any realistic chance of success since the relief of *mandamus* sought by him to require the EAA to continue to hold the HKCEE and HKALE was contrary to and inconsistent with his position not to challenge the decision to introduce the Hong Kong Diploma of Secondary Education Examinations. The application for leave was refused.

What the Court said

The CFI, at paragraphs 21 – 24, rejected the applicant's submission in relation to BL 136:

"21. … Mr Ng accepts that changes of the education policy and examination system in Hong Kong are permitted under Article 136 of the Basic Law, albeit (in his case) the change must be a gradual and incremental one.

22. At the same time, he is also *not* challenging the decision to introduce the Hong Kong Diploma of Secondary Education Examinations ('HKDSE') in 2012 as a result of the widely known underlying changes in the secondary and tertiary education structure and system. The HKDSE is intended to replace the HKCEE and HKALE. As such, changes are naturally and necessarily anticipated of the HKCEE and HKALE as result of the unchallenged changes in the secondary and tertiary education system and the introduction of the HKDSE.

23. However, Mr Ng in the intended judicial review … asks for the relief of *mandamus* to effectively require the EAA to continue to hold the HKCEE and HKALE in 'the coming future' (without a time limit) in the same way as they were held in 2010. This effectively permits *no* change at all to the HKCEE and HKALE.

24. In the premises, I see no realistic chance for Mr Ng to succeed in the judicial review, as this is contrary to and inconsistent with the position he himself adopts …"

Wong Wai Hing Christopher & Others v Director of Lands (unreported, 24 September 2010, HCAL 95, 97, 98 & 99 of 2010)

Background

Former owners of plots of land in a Tuen Mun-village ("the Land") challenged the Lands Department's decision to resume the Land. They brought judicial review proceeding to challenge the Lands Department's eviction process and the issuance of a clearance notice under s. 6(1) of the Land (Miscellaneous Provisions) Ordinance (Cap. 28). The

applicants argued that Cap. 28 was unconstitutional for violating BL 29 and BoR 14.

Basic Law provisions in dispute

The main provision in dispute was BL 29. The Court also discussed BL 105.

What the Court held

The CFI held that *prima facie*, the recovery of possession of land already resumed, undertaken by the Director of Lands ("Director") in the performance of his role as the land agent of the Government, was not judicially reviewable.

However, as the issuance of an s. 6(1) clearance notice had potential criminal consequences for the person in occupation and affected the legal ownership of chattels remaining in the land, the Court held that the Director's exercise of power had a sufficiently public element to render it susceptible to judicial review.

As to the constitutionality of s. 6(1) of Cap. 28, the Court noted that it was necessary to have regard to the scarce resources when striking the balance between the rights of an individual and the wider public interest in land resumption. Granting relief in this case could have an adverse impact on public housing.

The CFI held that BL 29 which protected the homes of Hong Kong residents and BoR 14 which protected the right of a person's home against arbitrary or unlawful interference did not confer any right to health, welfare benefit or housing. Whilst the Court would take into account the availability of compensation, alternative accommodation and other welfare needs of the applicants, there was no requirement that all these needs must be met to the applicants' reasonable satisfaction before the eviction.

The Court held that, pursuant to BL 105, the applicants were entitled to compensation corresponding to the real value of their properties resumed by the Government. Provided that there was a scheme of fair

compensation in place, the actual resolution of disputes pertaining to the quantum of compensation must be left to the forum entrusted with the assessment, namely the Lands Tribunal. BL 29 and BoR 14 were not infringed simply because the eviction took place before full resolution of the quantum of compensation.

The CFI concluded that the eviction mechanism under s. 6(1) of Cap. 28 was not unconstitutional.

What the Court said

In terms of the amenability to judicial review, the CFI said at paragraph 48:

"48. The recovery of possession of land already resumed (as opposed to the decision made by the Chief Executive in Council in resuming the land) is undertaken by the Director in the performance of his role as the land agent of the Government. As such, the decisions made in connection to such process and the steps taken thereunder is *prima facie* not judicially reviewable …"

However, after considering the implications of the Director's exercise of power, the Court said at paragraphs 58 – 59:

"58. … Though the issue of a Section 6(1) notice can be regarded as the commencement of the eviction process, it has ramifications beyond the recovery of possession of the land in question. It has potential criminal consequences for the person in occupation. It can affect the legal ownership of chattels remaining in the land.

59. In view of that, I think the exercise of the power of the Director under Section 6(1) has a sufficiently public element to render it susceptible to judicial review even though the primary objective of the Director is the recovery of possession of the land as the land agent of the Government."

The Court highlighted at paragraph 81 that a balance must be struck between the applicants' right and the demand for public housing:

"81. … However, when considering the balance to be struck between the rights of an individual and that of the wider interest of the society as a whole, the observations in *Kay* as to the scarcity of resources must be apposite. The demand for public housing in Hong Kong is great. Land available for the construction of public housing is scarce. The Chief Executive

in Council is entrusted by the legislature to make decisions with regard to resumption and these are difficult decisions which have to be made."

In terms of the nature of BL 29 and BoR 14, the Court stated at paragraph 83:

"83. Further, the nature of the Articles 29 (Basic Law) and 14 (Hong Kong Bill of Rights) right has to be borne in mind. … the right under these Articles does not confer any right to health or welfare benefits or to housing. Whilst the court will take into account the availability of compensation and alternative accommodation and other welfare needs of the applicants on a macro level in the determination of the reasonableness (including the proportionality) of the interference (with a view to see the interference is arbitrary and unlawful), there is no requirement that all these needs must be met to the reasonable satisfaction of the applicants before they could be displaced."

As to compensation, the Court made reference to BL 105 at paragraph 88:

"88. … Article 105 of the Basic Law provides for the right of individuals to compensation for lawful deprivation of their property. And the compensation shall correspond to the real value of the property concerned at the time of deprivation. Thus, as a matter of law, the applicants are entitled to compensation corresponding to the real value of their properties resumed by the Government. As explained at the outset of this judgment, the predicament of the applicants stems from the doubts over the legality of their structures and the use of their land. Under the scheme in the Lands Resumption Ordinance, if the applicants do not accept the non-statutory offers from the Director, they could seek to have their claims assessed by the Lands Tribunal. They are at liberty to challenge the constitutionality of Section 12(b) of the Lands Resumption Ordinance at the Lands Tribunal but the final resolution of such arguments takes time and it may also involve dispute of facts and expert evidence on valuation. Provided that there is a scheme of fair compensation in place (statutory or otherwise), the actual resolution of disputes pertaining to the quantum of compensation must be left with the [BoR 10] compliant forum entrusted with the function of assessment. I do not see any justification for holding that Articles 29 (Basic Law) and 14 (HKBOR) right is infringed simply because the eviction takes place before the full resolution of the quantum of compensation."

The Court stated at paragraph 89 that BL 29 and BoR 14 did not require the provision of alternative accommodation before eviction:

"89. … In my view, it would go beyond the bounds of an Articles 29 (Basic Law) and 14 (HKBOR) challenge to require the Government to provide alternative accommodation of comparable character, size and location before eviction."

The Court concluded at paragraph 88 that s. 6(1) of Cap. 28 did not violate BL 29 and BoR 14:

"88. … Provided that there is a scheme of fair compensation in place (statutory or otherwise), the actual resolution of disputes pertaining to the quantum of compensation must be left with the article 10 compliant forum entrusted with the function of assessment. I do not see any justification for holding that Articles 29 (Basic Law) and 14 (HKBOR) right is infringed simply because the eviction takes place before the full resolution of the quantum of compensation."

The Court highlighted at paragraph 92 the importance of the availability of judicial review:

"92. … I hold that by reason of the availability of judicial review which can properly address all possible challenges based on Article 29 of the Basic Law and Article 14 of the Hong Kong Bill of Rights to a decision of the Director, the mechanism under Section 6 is not unconstitutional notwithstanding that the Director needs not come before the court to get an order for possession before issuing a clearance notice."

Chan Yu Nam (陳裕南) v Secretary for Justice [2012] 3 HKC 38

Background

Mr Chan and Mr Lo, the applicants, were Hong Kong permanent residents. They challenged the constitutionality of ss. 25 and 26 of the Legislative Council Ordinance (Cap. 542) which enabled certain corporate bodies to be electors for functional constituencies. As the applicants were not able to vote in a functional constituency in the

LegCo election, they contended that ss. 25 and 26 of Cap. 542 had infringed their right to vote under BL 26 and their right to equality under BL 25. Their applications were dismissed by the CFI and they appealed to the CA.

Basic Law provisions in dispute

The major provisions in dispute were BL 25 and BL 26. The CA also referred to BL 68.

What the Court held

The CA held that BL 26 did not prohibit corporate bodies from voting in functional constituency elections. The CA found that in interpreting the Basic Law, a purposive and contextual approach should be applied, so that the whole of the Basic Law, including other provisions, extrinsic materials and history should be assessed in the interpretation of BL 26. The history of the development of Hong Kong's political system showed that major organizations, associations and institutions had participated as electors. As the assumption of continuity was reflected in the Basic Law itself and as BL 68 provided that the method for forming LegCo should be specified in light of the actual situation in HKSAR in accordance with the principle of gradual and orderly progress, the contention that the Basic Law was to promulgate a new regime to effect a sudden change in the electoral dispensation which precluded corporations from voting was rejected by the CA.

The CA further held that ss. 25 and 26 of Cap. 542 did not infringe BL 25. The CA held that the applicants' argument could not stand as the mere formation of a corporate body did not qualify it to vote in a functional constituency. The qualification for voting by a corporate body was not wealth or the ability to form a company but rather the recognition of it as a key player or stakeholder within certain sectors of society.

What the Court said

The CA considered in detail the history of BL 26 and concluded that the

Basic Law did not intend a change as fundamental as the abolition of corporate voting for functional constituencies. The Court said at 64B – C and 64I – 65E:

"81. … It is a history in the course of which functional constituencies, embracing corporate voting, have played a central role and in which functional constituencies have been viewed by policymakers as, in the main, comprising economic and other stakeholders rather than as individual members of professional or economic sectors of society. The interregnum was the phase of the relatively short-lived Patten changes.

87. Art. 68 is instructive. It refers to the actual situation in Hong Kong. The actual situation contemplated was self-evidently that pertaining from time to time and one further sees that art. 68 provides that the method for forming future legislative councils is to be 'in accordance with the principle of gradual and orderly progress' with an 'ultimate' aim of universal suffrage. The case advanced by the applicants is at odds with the sense of this provision.

88. The actual situation in 1990 was one which, for historical reasons thought then still to hold good, accorded electoral privilege to key corporate bodies in the territory. That that was then thought to hold good for 1997 was made clear by the reference in Annexes I and II to corporate bodies in the context of functional constituencies and by the notion of the 'through train', the perceived derailment of which led to the 1994 Decision of the NPCSC.

89. The actual situation in Hong Kong in 1996 and 1997 was dictated by the Measures introduced by the Preparatory Committee for the first Legislative Council including, in terms, voting by corporate bodies. Those measures hardly envisaged the abolition of corporate voting on 1 July 1997, the very same day upon which art. 26 came into effect, yet it is said by the applicants that art. 26 was intended to exclude corporate voting."

At 65H – I and 66A – E, the CA held that BL 26, when construed in context, did not preclude the Legislature from conferring a right to vote on corporates:

"93. There is, I think, an alternative and tenable view, that art 26 confers or records one of the rights which is inalienably accorded to permanent residents, namely the right, through elections, to take part in the conduct of public affairs of the Region, which is not to say that it is impermissible in any circumstances to confer the right on anyone else, regardless of the

principle of smooth transition, gradual development, the proposed voter's connection with or contribution to Hong Kong, or the particular nature of the election. In this regard, I note the following:

(1) Article 26 does not say that 'only' permanent residents may take part in voting in Hong Kong;

(2) Article 26 sits within Chapter III of Basic Law entitled 'Fundamental Rights and Duties of the Residents.' It deals, in other words, with the rights which are accorded to residents, rights of which they are not to be deprived save, in certain instances, as may lawfully be prescribed. One of the rights accorded to residents who are permanent residents is the right to take part in the conduct of public affairs through elections. It is a right of which they shall not be deprived, which is not the same as saying that the legislature is precluded from conferring a right on others to take part in the conduct of public affairs through elections, so long as the bestowal of that benefit on others accords with the Basic Law; and

(3) Article 26 is not placed within that Part of the Basic Law entitled 'Political Structure', namely Chapter IV, the provisions of which (including Annexes I and II) render it clear beyond peradventure that whatever are the rights conferred by art 26 on permanent residents to take part in public affairs, it is intended to *permit* others also to take part in certain elections, where permission to others is in accordance with the Basic Law."

The CA also rejected the applicants' challenge based on BL 25. The CA said at 69D – H:

"109.The discrimination argument advanced by Ms Li falls within a narrow compass. It is based upon art. 25 of the Basic Law, which provides that all Hong Kong residents shall be equal before the law and upon art. 1 of the Bill of Rights (a reflection of art. 2 of the ICCPR) that the rights recognized in the Bill of Rights 'shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

110.The argument is that there is inherent in the provisions under the Ordinance for voting in functional constituencies discrimination against individuals who have not the financial means to own and control companies so that the forbidden distinction is in this case based on property.

111.The problem with this argument is that it proceeds on a false premise. The qualification for voting, or empowering an authorized representative to vote on behalf of a body, is not wealth or the ability to form a company at a

given point in time, but rather the recognition as a key player or stakeholder within certain sectors of society. The mere formation of a corporate body does not of itself come anywhere near qualifying that corporate body for membership of an umbrella organization or for specification as a functional constituency elector."

Mok Charles Peter v Tam Wai Ho (2010) 13 HKCFAR 762

Background

The respondent was declared to be elected to the LegCo for the Information Technology Functional Constituency in the 2008 LegCo election. The petitioner lodged an election petition seeking an order that he be instead declared the winner because of material irregularities occurred in the election and he also alleged that the respondent had engaged in illegal and corrupt conduct. The CFI dismissed the petition and the petitioner appealed to the CA. The CA was of the view that it lacked jurisdiction since s. 67(3) of the Legislative Council Ordinance (Cap. 542) barred any further appeal from the CFI on an election petition. The petitioner appealed to the CFA.

Basic Law provisions in dispute

The major provision in dispute was BL 82. The CFA also referred to BL 35.

What the Court held

The CFA held that BL 82 on the CFA's power of final adjudication was engaged, and the issue was whether or not this function of the CFA had been justifiably restricted by s. 67(3) of Cap. 542.

The CFA applied the proportionality test to the restriction of s. 67(3) of Cap. 542. Having considered the importance of elections to the LegCo, the work and duties of that institution, and that a lengthy appellate process would be detrimental to the functioning of the LegCo, the CFA held that a speedy determination of an election petition was a legitimate

aim of s. 67(3), and the statutory provision was rationally connected to the aim.

However, the CFA held that s. 67(3) went much further than necessary to deal with the aim of speedy determination in election petitions, as the nature of the restriction was absolute and other comparable legislations (being Chief Executive Election Ordinance (Cap. 569) and s. 73 of Cap. 542 (which provided for another means of challenging the qualification of a member of the LegCo)) did not contain such restriction. The CFA held that s. 67(3) of Cap. 542 was inconsistent with BL 82 and was unconstitutional.

What the Court said

At 779 – 781, the CFA considered the facets that must be appreciated in relation to the power of final adjudication under BL 82:

"26. First, access to the Court is not unrestricted under art.82. Access to the Court can be and is regulated. In other words, there may be restrictions or limitations on the power of final adjudication by the Court. I have already referred to one such restriction or limitation: s. 22 of the HKCFAO (see para.11 above). In *Solicitor v Law Society of Hong Kong*, Li CJ referred to the existence of restrictions or limitations as being implied under the power of final adjudication of the Court (at p.584, para.30):

Limitation of the power of final adjudication

30. That being the nature of the power of final adjudication vested in the Court of Final Appeal by art.82, it is obvious that the intent of the Basic Law was not to give every party to every dispute a right to have the dispute resolved by final adjudication by the Court. By its very nature, the Court's power of final adjudication vested by art.82 calls for and indeed requires regulation, which may include limitation. Such limitation is permitted by implication, having regard to the nature of the power. It may be dealt with by the enactment of statutes by the legislature or it may be dealt with by rules of court made by the rules committee exercising subordinate legislative powers.

Incidentally, I take this opportunity to clarify what may be an ambiguity in the reference in this passage to 'a right to have the dispute resolved' by the Court of Final Appeal. This must not be taken out of context. It is clear from this paragraph read as a whole and from those other passages already

set out that the Chief Justice was not referring to art.82 as providing any constitutional right as such, but as setting out the function of the Court of Final Appeal. The reference to 'a right' in this passage means no more than that and further, that the power of final adjudication vested in the Court and therefore a party's access to it, may be restricted.

27. Secondly, any restriction or limitation on the power of final adjudication must satisfy the proportionality test. In *Solicitor v Law Society of Hong Kong*, 584–585, paras.31–34 (Li CJ):

31. Courts do not have inherent appellate jurisdiction. Appeals are creatures of statutes, whether they be appeals from statutory tribunals to the courts or appeals from lower courts to higher courts. (In this case, one is not concerned with and need not discuss the right to seek judicial review from the courts). The legislature in providing for appeals in statutes may limit recourse to the Court for final adjudication and thus, may limit its power of final adjudication to appeals permitted by such statutes. But limitation cannot be imposed arbitrarily by the legislature. The limitation imposed must pursue a legitimate purpose and there must be reasonable proportionality between the limitation and the purpose sought to be achieved. These dual requirements will be referred to collectively as the proportionality test.

32. In the exercise of their independent judicial power, it is the duty of the courts to review any legislation enacted which seeks to impose any limitation on the power of final adjudication vested in the Court by art.82 and to consider whether the limitation satisfies the proportionality test. If the courts decide that it does not satisfy this test, the limitation must be held to be unconstitutional and hence invalid. The limitation imposed would have exceeded the parameters of proper limitation of the Court's power of final adjudication vested by art.82.

33. In applying the proportionality test to a particular limitation, the purpose of the limitation must first be ascertained. In ascertaining its purpose, matters such as the subject-matter of the dispute, whether it concerns fact or law, whether it relates to substantive rights and obligations or only procedural matters, what is at stake, the need for speedy resolution and the cost implications of dispute resolution, including any possible appeals, will have to be considered. The legitimacy of any purpose will depend on whether it is consistent with the public interest, which of course has many facets, including the proper administration of justice. Then, in considering whether the limitation is reasonably proportionate to the legitimate purpose, it will be necessary to examine the nature and extent of the limitation.

34. Whether a particular limitation imposed by statute satisfies the proportionality test will depend on an examination of all the circumstances. There may be instances where a statutory limitation providing that a decision of the Court of Appeal or the Court of First Instance on appeal, whether from a statutory tribunal or a lower court, shall be final may be able to satisfy that test."

At 782, the CFA held that BL 35 was not relevant:

"35. I should perhaps at this point also deal with Art.35 of the Basic Law, which was relied on by the petitioner. In my view, this article does not advance the argument much further at all. That article deals with access to the courts (among other matters). It is not a provision that sheds much light on the issue with which we have to grapple.

36. For his part, Mr Michael Thomas SC … is correct when he observes that nothing in the Basic Law states in terms that a right of appeal exists against decisions of the courts. Art.83 of the Basic Law states that the structure, powers and functions of the courts in Hong Kong shall be prescribed by law. Mr Thomas is also correct to point out that there is no inherent jurisdiction in any particular court to hear appeals; the appellate jurisdiction of any particular court is the creation of statute …

37. However, as we have seen, the issue involves not a right of appeal but the Court of Final Appeal's function as a court of final adjudication. The Court's decision in *Solicitor v Law Society* is decisive in this respect. It is clear that by reason of that decision, Art.82 is engaged in the present appeal."

The CFA held at 786 – 788 that s. 67(3) of Cap. 542 could satisfy the first two steps of the proportionality test but it went beyond what was necessary to achieve the legitimate aim:

"51. There can be little doubt that the first two steps of the proportionality test are fulfilled. The Court of Appeal held this to be the case, and the petitioner did not really argue to the contrary …

61. However, I am not persuaded in the present case that the burden (on the first respondent and the intervener) on the issue of proportionality has been discharged. I am of the view that s. 67(3) goes much further than is necessary to deal with the said aim of speedy determination in election petitions.

62. One is first reminded that the nature of the restriction is absolute: there is simply no avenue of appeal, however much in error the Court of First Instance may have been. Further, the following point was raised by

Sir Anthony Mason NPJ in the course of submissions that, for my part, has considerable significance: it is perhaps easy to see the possibility of points of constitutional importance being raised in the course of an election petition and yet the effect of a provision such as s. 67(3) is that no appellate court (and in particular the Court of Final Appeal) will have an opportunity to deal with them.

63. Next, it is difficult to appreciate just why there should be an absolute bar on an appeal when comparable legislation (even within the same ordinance) does not contain such a restriction. I am here referring to relevant provisions in the CEEO and s. 73 of the LCO …"

The CFA concluded at 791 that s. 67(3) of Cap. 542 was unconstitutional: "73. Accordingly, in my judgment, the burden to demonstrate that the restriction in s. 67(3) of LCO satisfies the proportionality test, has not been discharged. It therefore follows that s. 67(3) of the LCO must be declared unconstitutional as being inconsistent with Art.82 of the Basic Law (insofar as the finality aspect is concerned). It may be that suitable changes can be made to the legislation to ensure that any restrictions or limitations on the right of appeal are indeed no more than necessary, but this is a matter for the Government and the Legislature to consider, taking into account no doubt those provisions in comparable legislation to which reference has been made."

Sony Rai v Coroner [2011] 2 HKLRD 245

Background

The applicant's husband was killed by a police officer. The Coroner conducted an inquest before five jurors. In the course of the inquest, at the applicant's request, the Commissioner of Police ("Commissioner") disclosed certain police training materials, but refused to disclose other documents relating to general crowd control tactics and techniques ("Documents"), claiming public interest immunity. The Coroner accepted that the Documents sought were relevant, but held that they were subject to public interest immunity. At the end of the inquest, the jurors returned a verdict of "lawful killing". The applicant applied for judicial review to quash the verdict on the basis that the Coroner took

too narrow a view of the inquest's purpose, resulting, *inter alia*, in the Coroner's failure to order the Commissioner to disclose the Documents.

Basic Law provisions in dispute

The major provision in dispute was BL 28.

What the Court held

The CFI held that BL 28 and BoR 2(1) constitutionally protected the lawful and inherent right to life. In pursuing such right, substantive and procedural obligations were imposed on the HKSARG. Procedurally, an independent body must be established to publicly investigate the circumstances in which someone might have been arbitrarily deprived of his or her life.

The CFI held that a narrow reading of the inquest's purpose under s. 27(b) of the Coroners Ordinance (Cap. 504) could not be justified. The reasoning of the House of Lords in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 that the word "how" should be read in the broader sense as meaning not simply "by what means" but "by what means and in what circumstances", and the implications of those obligations on the proper scope of a coroner's inquest must be equally applicable in Hong Kong in light of BL 28 and BoR 2(1). To comply with the procedural obligations arising from the protection under BL 28 and BoR 2(1), a coroner must retain the power or discretion, where circumstances warranted, to investigate in appropriate cases whether systemic factors (broad circumstances) caused or contributed to a death.

Nonetheless, the CFI held that the outcome of the inquest would not have been different since the Coroner, although expressed his preference for the narrow approach, had actually applied the wider approach, which was consistent with the relevant constitutional provisions.

What the Court said

The CFI held at 251 – 252 that the observations of the House of Lords in *R (Middleton) v West Somerset Coroner* on Article 2 of the European

Convention for the Protection of Human Rights and Freedoms ("ECHR") would equally apply to BL 28 and BoR 2(1):

"18. Their Lordships first observed that the European Court of Human Rights had repeatedly interpreted art.2 of the ECHR as imposing substantive and procedural obligations on member states (including the UK). The substantive obligation was …

[2] not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent practicable, protect life …

The procedural obligation was:

[3] … to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated …

19. The substantive and procedural obligations went hand in hand. They complemented each other. …

20. Given their similarity in wording and thrust to art.2 of the ECHR, the House of Lords' observations and reasoning in *R (Middleton) v West Somerset Coroner* must apply equally to art.28 of the Basic Law, art.2(1) of the Hong Kong Bill of Rights and art.6 of the ICCPR. Those latter provisions must impose identical substantive and procedural obligations on the Hong Kong Government. In particular, a mere affirmation of the substantive right to life in the Basic Law and Hong Kong Bill of Rights would be of little practical value without a supporting mechanism whereby an independent body can publicly investigate the circumstances in which someone may or may not have been wrongly deprived of life by another person.

21. In the UK, as in Hong Kong, a coroner's inquest is an important part of the established procedure for conducting an independent investigation into possible wrongful deprivation of life. An inquest is plainly not the only mechanism for such investigation, since (for example) an inquest into a death may lead to (and be adjourned pending the conduct of) criminal proceedings against the person whose conduct is being investigated. But the inquest is nonetheless the conventional means by which the procedural obligation imposed by art.2 of the ECHR in the UK, and art.28 of the Basic Law and art.2(1) of the Hong Kong Bill of Rights in Hong Kong, is discharged."

The CFI also considered at 252 – 253 that, in the UK context, the

coroner inquests met the procedural requirements of art.2 of the ECHR:

"23. The UK legislation at the time of *R (Middleton) v West Somerset Coroner* required the Coroner conducting an inquest to determine '(i) who the deceased was; and (ii) how, when and where the deceased came by his death'. In a series of judgments … on the conduct of inquests had not been not considered), the English Court had interpreted the word 'how' narrowly as meaning 'by what means' as opposed to 'in what broad circumstances'.

24. The House of Lords in *R (Middleton) v West Somerset Coroner* unanimously held that such narrow understanding of the Coroner's role could not meet the requirements of the ECHR in all cases. To comply with art.2 of the ECHR, it was instead necessary to read the relevant English legislation, specifically the word 'how', in 'the broader sense … namely as meaning not simply "by what means" but "by what means and in what circumstances"'.

25. The House of Lords so concluded because in some (although not necessarily all) cases too narrow a focus on the immediate or direct cause of a death would preclude an investigation into systemic circumstances which might have brought about the death …"

The CFI held at 254 that s. 27(b) of Cap. 504 should be construed to permit a wide range of enquiry:

"33. In my judgment, the reasoning in *R (Middleton) v West Somerset Coroner* on the UK's obligations arising from art.2 of the ECHR and the implications of those obligations on the proper scope of a coroner's inquest, must be equally applicable here. This must be so in light of art.28 of the Basic Law, art.2(1) of the Hong Kong Bill of Rights and the incorporation into Hong Kong law of art.6 of the ICCPR. Reading the word 'how' in s. 27(b) of the Coroners Ordinance as requiring in all situations a limited factual investigation into the immediate means (as opposed to broad circumstances) in which a deceased died, would mean that in some situations the Government would not be fulfilling its procedural obligation in connection with the right to life.

34. Obviously, as the House of Lords itself noted in *R (Middleton) v West Somerset Coroner*, it will not be in all situations that an inquiry into the broad circumstances of a death will be required. In many, possibly a majority of instances, it will be readily apparent how a person died and there will be nothing in the evidence suggestive of some systemic problem which caused or contributed to the death. But to be compliant with the

procedural obligations arising from the guarantee of the right to life in the Basic Law and Hong Kong Bill of Rights, a coroner must retain the power or discretion, where circumstances warrant, to investigate in appropriate cases whether systemic factors (broad circumstances) caused or contributed to a death. Thus, in light of the Basic Law and Hong Kong Bill of Rights, I do not believe that a narrow reading of 'how' in s. 27(b) of Coroners Ordinance can be justified.

35. Following the coming into effect here of the Basic Law and Hong Kong Bill of Rights, the Court has the duty to interpret legislation in a manner which is consistent with the obligations arising from those two documents. It seems to me therefore that, consistently with the Basic Law and Hong Kong Bill of Rights, I should construe the word 'how' in s. 27(b) of the Coroners Ordinance to permit a wider range of inquiry. In other words, much as suggested in *R (Middleton) v West Somerset Coroner* in relation to the corresponding UK legislation, the word 'how' in s. 27(b) of the Coroners Ordinance should be read as empowering an inquest, where appropriate, to investigate not just the means by which a person has died, but also the broad circumstances in which one has lost one's life."

Democratic Republic of the Congo v FG Hemisphere Associates LLC (No. 1) (2011) 14 HKCFAR 95

Background

The Democratic Republic of the Congo ("DRC") entered into credit agreements with a Yugoslavian company relating to electricity projects, but the DRC defaulted in its repayment obligations. Two arbitral awards were made in favour of the Yugoslavian company. FG Hemisphere ("FGH") acquired the benefit of the awards, and obtained leave in Hong Kong to enforce them against fees said to be payable to the DRC by a number of companies doing business in Hong Kong ("Companies'), and also sought injunctions to prevent payment to the DRC. The Companies had entered into a joint venture agreement with the DRC to develop the DRC's infrastructure, in consideration for various rights to exploit the DRC's mineral reserves. In response to the enforcement, the DRC

claimed state immunity.

Prior to 1 July 1997, the doctrine of state immunity available in Hong Kong was a restrictive one (whether under the UK State Immunity Act 1978, or the common law). The PRC, however, adopted a stance of absolute immunity. The Secretary of Justice ("SJ") intervened, stating that adoption of a divergent position by the HKSAR courts (from the stance of absolute immunity) would prejudice the sovereignty of the PRC and hamper its conduct of foreign affairs.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 13, BL 19 and BL 158. The CFA also referred to BL 160.

What the Court held

The CFA held by a majority that the doctrine of state immunity was based on mutual recognition of equality among sovereign states, and formed an important component in the conduct of a nation's foreign affairs with other States. The majority stated that the HKSAR was an inalienable part of the PRC. It was important for the courts and the executive to "speak with one voice" on matters of foreign affairs relating to the PRC as a sovereign State, and a region forming part of a unitary State could not establish its own practice at variance with that of the State.

The majority ruled that a common law doctrine inconsistent with the Basic Law would be subject to the latter, and in this case, as responsibility for "foreign affairs" was exclusively allocated to the CPG under BL 13, responsibility for determining state immunity policy rested with the CPG and not the HKSAR authorities. The courts had to respect and act in conformity with the decisions of the CPG, and the common law doctrine on state immunity had to be modified in accordance with the NPCSC's decision made on 23 February 1997 on the Treatment of the Laws Previously in Force in Hong Kong in accordance with BL 160.

The majority held that the doctrine of state immunity was a matter properly viewed as an "act of state" within BL 19(3), and was a matter

over which the HKSAR courts lacked jurisdiction. BL 19(3) prevented the courts from exercising jurisdiction "over acts of state such as defence and foreign affairs" and required them to be bound by the facts concerning such acts of state as declared in the CE's certificate but the courts still had to determine the legal consequences of such facts and to decide the case on such basis.

When a State entered into an arbitration agreement with a private individual or company, it involved an assumption of contractual responsibility *vis-à-vis* that party, and was not a submission to any other State's jurisdiction under common law. The State should only be regarded as having waived state immunity when it had unequivocally submitted to the jurisdiction of the forum State when the forum State's jurisdiction was invoked before it. The majority held that the DRC had not waived its immunity before the HKSAR courts.

The majority held that it was bound to make a reference under BL 158(3) to the NPCSC on the interpretation of BL 13(1) and BL 19 concerning affairs which were the responsibility of the CPG and the relationship between the Central Authorities and the Region. The majority identified 4 questions and referred the same to the NPCSC.

What the Court said

The CFA, by a majority, held at 182 that the HKSAR courts could not adopt a legal doctrine of state immunity different from that of the PRC:

"225. The fundamental question which falls to be determined in the present appeal is whether, after China's resumption of the exercise of sovereignty on 1st July 1997, it is open to the courts of the HKSAR to adopt a legal doctrine of state immunity which recognizes a commercial exception to absolute immunity and therefore a doctrine on state immunity which is different from the principled policy practised by the PRC.

226. In our view, for the reasons developed below, the answer is clearly 'No'. As a matter of legal and constitutional principle, it is not open to the HKSAR courts to take such a course. The doctrine of state immunity which presently applies in the HKSAR is the doctrine of absolute immunity. This is a conclusion compelled by the very nature of the doctrine of state immunity, the status of Hong Kong as a Special Administrative Region of the PRC and

the material provisions of the Basic Law. …"

The majority held at 210 – 211 that the constitutional status of the HKSAR was crucial in determining whether the Region could recognize a commercial exception:

"320. The very first Article of the Basic Law states : 'The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China.' Article 12 spells out the HKSAR's status:

The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.

321. … state immunity at common law is a doctrine, derived from international law, concerned with relations between States. It is for States to define the bounds of and exceptions to their own practice of state immunity. The 'one voice principle' and the acceptance of declarations of facts of state as conclusive are rules, whether judicially developed or statutory, are designed to avoid inconsistency between organs of government in defining national foreign policy. The debate tends to centre on which branch of government — usually either the executive or the legislature — ought to be allocated responsibility for authoritatively determining such policy, with the courts left to implement the same. It is unheard of for the courts of a region or municipality (which does not exercise sovereign powers) within a unitary State to declare their own separate policy on state immunity which differs from that practised by the State for the nation as a whole.

322. The position of the HKSAR is constitutionally defined by the Basic Law as an inalienable part of the Chinese State having the status of a local administrative region. The OCMFA Letters declare as a fact of state that China practises absolute immunity. Applying the common law principles as modified by the Basic Law, these matters taken together are decisive against FGH's contention that the HKSAR is entitled separately to recognize a commercial exception."

The majority held at 211 – 212 that the Basic Law has allocated to the CPG the responsibility for the foreign affairs of the HKSAR:

"324. The difficulties faced by FGH are accentuated by the provisions of the Basic Law which allocate to the CPG responsibility for the foreign affairs of the Region and exclude the management and conduct of foreign affairs from the sphere of the HKSAR's autonomy. Because the CPG's

responsibility for foreign affairs is exclusive, subject only to the 'external affairs' exception delegated by the CPG under Article 13(3), the institutions of the HKSAR, including the courts of the Region, are bound to respect and act in conformity with the decisions of the CPG on matters of foreign affairs relating to the PRC as a sovereign State. This, in our view, is a constitutional imperative."

The majority explained at 216 – 217 the court's jurisdiction under BL 19(2) and (3):

"343. Article 19(3) is indeed of a relatively narrow ambit. By Article 19(2), the HKSAR courts are given general jurisdiction 'over all cases in the Region'. Article 19(3) then removes jurisdiction 'over acts of state such as defence and foreign affairs', requiring the courts to obtain a certificate from the Chief Executive 'on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases'. The certificate then binds the courts.

344. Article 19(3) therefore does not deprive the courts of jurisdiction to decide the case in which such questions arise. There continues to be jurisdiction under Article 19(2). What Article 19(3) does is to prevent the courts from exercising jurisdiction 'over acts of state such as defence and foreign affairs' and requires them to be bound by the facts concerning such acts of state as declared in the Chief Executive's certificate. In other words, such facts become 'facts of state' binding on the courts, leaving the courts to determine their legal consequences and to decide the case on such basis."

At 232 – 233, the majority held that it was necessary to make a reference to the NPCSC, and set out the questions to be referred:

"406. On the view which we have taken of the arguments advanced by the parties with respect to waiver of state immunity, the DRC has not waived its immunity. Hence the case cannot be resolved without a determination of the questions of interpretation affecting the meaning of BL 13 and 19, in particular in relation to the words 'acts of state such as defence and foreign affairs'. The necessity condition is therefore satisfied.

407. … Having considered the draft questions put forward by the appellants and the Intervener, we conclude that the Court is bound to make a reference under BL 158(3) to the NPCSC of questions of interpretation of the Basic Law which involve BL 13(1) and 19 which concern respectively affairs which are the responsibility of the CPG and the relationship between the Central

Authorities and the Region. We make the obvious point that the duty to make a reference under BL 158(3) is limited to questions of interpretation of the Basic Law identified in that provision. The questions referred are:

1. whether on the true interpretation of BL 13(1), the CPG has the power to determine the rule or policy of the PRC on state immunity;

2. if so, whether, on the true interpretation of BL 13(1) and 19, the HKSAR, including the courts of the HKSAR;

(a) is bound to apply or give effect to the rule or policy on state immunity determined by the CPG under art.13(1); or

(b) on the other hand, is at liberty to depart from the rule or policy on state immunity determined by the CPG under art.13(1) and to adopt a different rule;

3. whether the determination by the CPG as to the rule or policy on state immunity falls within 'acts of state such as defence and foreign affairs' in the first sentence of BL 19(3); and

4. whether, upon the establishment of the HKSAR, the effect of art.13(1), art.19 and the status of Hong Kong as a Special Administrative Region of the PRC upon the common law on state immunity previously in force in Hong Kong (that is, before 1 July 1997), to the extent that such common law was inconsistent with the rule or policy on state immunity as determined by the CPG pursuant to art.13(1), was to require such common law to be applied subject to such modifications, adaptations, limitations or exceptions as were necessary to ensure that such common law is consistent with the rule or policy on state immunity as determined by the CPG, in accordance with BL 8 and 160 and the Decision of the NPCSC dated 23 February 1997 made pursuant to art.160."

Catholic Diocese of Hong Kong v Secretary for Justice

(2011) 14 HKCFAR 754

Background

The appellant was a corporation sole led by Roman Catholic Bishop of Hong Kong. The appellant had been sponsoring schools and providing education in Hong Kong for a long period. When the Education

Ordinance (Cap. 279) was amended in 2004 ("2004 amendments"), the appellant was aggrieved by the new statutory requirements on the composition of the incorporated management committee ("IMC") and the power given to the Permanent Secretary of Education to refuse approval of a draft constitution submitted by each aided school on the regulation of the IMC. The appellant objected to the 2004 amendments, contending that they were inconsistent with BL 136(1), BL 137(1) and BL 141(3) and therefore unconstitutional. Its essential complaint was that the 2004 amendments had resulted in its loss of absolute control over the management of the aided schools sponsored by it. Its challenge failed at first instance and in the CA. It appealed the CA's decision and contended that the 2004 amendments were inconsistent with BL 136(1) and BL 141(3) (the appellant abandoned the BL 137(1) ground before the CFA). The CFA dismissed the appeal.

Basic Law provisions in dispute

The major provisions in dispute were BL 136(1) and BL 141(3).

What the Court held

The CFA rejected the appellant's challenge based on BL 136(1). The CFA affirmed the CA's decision and held that the educational system before 1 July 1997 included powers given to the Director of Education by the Education Ordinance and by the Codes of Aid to require binding constitutions to be drawn up and to appoint managers to management committees. The powers in the 2004 amendments objected to by the appellant were not new requirements.

The CFA further held that the policy underlying the 2004 amendments was not a brand new policy. It was first formulated in 1991 and evolved in a continuous process which culminated into the 2004 amendments. It was a policy based on the previous educational system, elaborated and developed as part of that very system and carried over into the present.

BL 136(1) authorizes the HKSARG to "formulate policies on the development and improvement of education". Applying the same approach of the CFA in *Secretary for Justice v Lau Kwok Fai* (2005)

8 HKCFAR 304, the Court held that the 2004 amendments did not involve abandonment of the pre-1997 educational system and were not inconsistent with BL 136(1).

The CFA held that the challenge based on BL 141(3) failed since the appellant had not identified a protected constitutional right. The CFA rejected the appellant's argument that the words "according to their previous practice" in BL 141(3) enabled it to claim constitutional protection for what constituted its "practice" in running its schools prior to 1 July 1997. The appellant's argument would lead to bizarre results as the HKSARG would not be able to formulate policies on the development and improvement of education to be applied uniformly to all schools in Hong Kong. The CFA held that BL 141(3) was ancillary to the protection of the right to religious freedom. Policies without religious content would not engage the protection. The CFA dismissed the appeal.

What the Court said

The CFA held at 770 that the appellant failed to assert a legal right:

"38. It should be noted that the nature of the appellant's complaint involves a focus on its previous *practice* and not on any assertion of previous legal rights or privileges. This is so since clearly, *as a matter of law*, the appellant never enjoyed 'absolute control' over the management of Diocesan schools, and in particular, such control over the composition and constitution of their management committees."

The CFA held at 775 – 776 that no violation of BL 136(1) had been made out:

"57. In our view, from any relevant perspective, there is no basis for regarding the 2004 amendments as overstepping the limits of Article 136(1).

58. There are in the first place, two reasons of specific relevance to school-based management for reaching that conclusion. As we have seen, before 1st July 1997, the educational system included powers given to the Director by Ordinance and by the Codes of Aid to require binding constitutions to be drawn up and to appoint managers to management committees if he was of the opinion that the composition of such committees made it unlikely that the relevant schools would be managed satisfactorily. The powers in the

2004 amendments objected to by the appellant are in the same vein and do not in principle break any new ground.

59. Moreover, as demonstrated above, the policy underlying the 2004 amendments was first formulated in 1991 and evolved in a continuous process which culminated in the enactment of those amendments. The policy favouring school-based management is therefore not merely a policy resting on the previous educational system but one elaborated and developed as part of that very system and carried over into the present.

60. While these are points which are conclusive against the appellant's reliance on Article 136(1), we respectfully agree with the Court of Appeal that compliance with that Article does not require such specific historical connection to be demonstrated. As Stock VP put it, even if the relevant amendments had not found their origin before 1st July 1997, they were based on the previous educational system.

61. In *Secretary for Justice v Lau Kwok Fai*, this Court had occasion to consider the meaning of Article 103 of the Basic Law which provides for the 'previous system of recruitment, employment, assessment, discipline, training and management for the public service' to be maintained. It was held that the Article was designed to preserve the continuity of the system as a whole and not to prevent changes to elements of the system which could be expected to occur under any system governing public service. As Sir Anthony Mason NPJ put it, a constitutional provision in such terms would only inhibit a development which was 'such a material change that it resulted in the abandonment of the previous system'.

62. It is important to note that in authorizing the HKSAR government to formulate policies on the 'development and improvement of education', including the policies therein specified, Article 136(1) similarly accepts that changes may be made to elements of the previously existing system and, in our view, the *Lau Kwok Fai* approach is equally applicable. On that approach, the 2004 amendments plainly do not involve abandonment of the pre-1997 educational system and do not fall foul of Article 136(1)."

The CFA held at 780 – 781 that BL 141(3) must be read in the context of BL 141 as a whole. So read, BL 141(3) is ancillary to the core right of religious freedom:

"76. Meaning can and should be given to the phrase 'according to their previous practice' by reading Article 141(3) in the context of Article 141 as a whole.

77. Article 141(1) lays down the core constitutional right to freedom of religious belief, freedom from interference in internal affairs and freedom to take part in lawful religious activities in relation to religious organizations. The other parts of the Article are ancillary and shore up that core right. They ensure that international relations with religious organizations and co-religionists abroad can be maintained and that the property rights of religious organizations are preserved.

78. Article 141(3) is similarly ancillary to that core right. It seeks, like the other provisions of Article 141, to make that freedom an effective right in the context of educational, hospital and welfare institutions operated by religious organizations. Thus, Article 141(3)'s provision that religious organizations 'may, according to their previous practice, continue to run … schools …', read purposively, should be taken to mean that religious organizations 'may, according to their previous practice in so far as it involves the exercise of their right to freedom of religious belief and religious activity, continue to run … schools (etc.)'.

79. So read, the meaning given to the phrase 'according to their previous practice' relates to the core freedom addressed by Article 141. It is the religious dimension of their previous practice that receives protection as part of the core constitutional right to religious freedom as applicable to religious organizations. Thus, a legislative reform or executive direction which, for instance, banned morning prayers or religious instruction forming part of a religious organization's previous practice, would fall foul of Article 141(3) and be unconstitutional. However, policies which have no religious content, for instance, as to the teaching of second languages, providing more physical education or information technology classes, or providing student travel or textbook subsidies, would not engage the protections."

Li Nim Han & Another v Director of Immigration [2012] 2 HKC 299

Background

The 2nd applicant came to Hong Kong in 1999 by a One Way Permit which was subsequently found to be obtained unlawfully by misrepresentation. On 25 January 2006, the 2nd applicant married the

1st applicant. On 1 June 2006, a removal order was issued against the 2nd applicant. The 1st applicant gave birth to a son in 2008 and was subsequently diagnosed with depression and anxiety which was said to have substantially affected her ability to take care of the child.

The applicants challenged the removal order on the ground that the right of the 1st applicant to raise family freely under BL 37 would be infringed and urged reconsideration of the removal order in view of the 1st applicant's medical condition. The Immigration Department ultimately upheld the removal order. The applicants then applied for judicial review.

Basic Law provisions in dispute

The major provision in dispute was BL 37. The CFI also made references to BL 24 and BL 39.

What the Court held

The CFI held that BL 37 was not engaged in the present case.

Pursuant to s. 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383), the applicants could not rely on any rights under the Hong Kong Bill of Rights, in particular BoR 14 and BoR 19 for the purpose of the present proceedings. Neither could the applicants rely on the ICCPR in conjunction with BL 39 due to the immigration reservations made in respect of Hong Kong when the United Kingdom acceded to the ICCPR.

The CFI held that the right to raise a family freely under BL 37 was not a general right to respect for family life. BL 37 was more specific and limited in scope, and it provided for a regime different from that practised in the PRC as to family planning. It had nothing to do with spousal relationship or the right of a child to paternal support. It must be read together with BL 39 where immigration reservations had been incorporated.

What the Court said

At 305H – 306A, the CFI made it clear that BL 37 was not an absolute right:

"14. Further, no matter how one interprets the right under art 37 of the Basic Law, it cannot be an absolute right to have one's family members to enter and remain in Hong Kong without regard to immigration control. … Given the non-resident status of the 2nd applicant, counsel had to accept that he could only enjoy the right conferred under Chapter III of the Basic Law 'in accordance with law' under art 41. Since the law does not give him any right of abode in Hong Kong (as he is not a permanent resident as prescribed by art 24) and he has no right to enter or remain in Hong Kong, he cannot rely on art 37 to resist a removal order."

The CFI elaborated on the interpretation of BL 37 at 309B – C and 209I – 310A:

"29. Article 37 was considered by A Cheung J (as he then was) in *Gurung Deu Kumari v Director of Immigration* [2010] 6 HKC 137, [2010] 5 HKLRD 219. In respect of the right to raise a family in art 37, His Lordship interpreted its meaning in light of the Chinese version, viz. '自願生育', and its context in terms of article 49 of the Constitution of the People's Republic of China. '自願生育' in art 37 should be contrast with '計劃生育' in article 49. The purpose of art 37 was to provide expressly that Hong Kong residents are not under a duty to practise family planning as in the Mainland. …

34. So construed, it is impossible for the 1st applicant to contend that her right under art 37 would be infringed by the execution of the removal order. She is at liberty to raise her child in Hong Kong freely. It is clear from the Chinese text that this limb of art 37 has nothing to do with spousal relationship. Nor is it about the right of a child to paternal support. Therefore, art 37 is not about a general right to family life to anchor her contention that the Director must give proportionate consideration to grant permission under s 13 of the Immigration Ordinance to the 2nd applicant to remain in Hong Kong. As pointed out in correspondence, the 2nd applicant can apply to join the family lawfully through the One Way Permit system or to visit the family regularly through the Two Way Permit system. Alternatively, the 1st applicant could go to the Mainland with the child. …"

Further, at 311A – B, the CFI made reference to BL 39 when interpreting BL 37:

"38. … Article 39, being another provision in the Basic Law, also supplied the context as to the scope of art 37. It would be surprising that art 37 would give rise to a protection which is deliberately excluded by the immigration reservations incorporated by art 39."

The CFI also drew support from BL 22 and BL 24 in his interpretation of BL 37 at 311I – 312D:

"43. Article 24(2)(3) of the Basic Law specifically deals with persons of Chinese nationality born outside Hong Kong of Chinese citizens who are permanent residents under art 24(2)(1) or (2). According to the 1999 Interpretation, such persons have to apply for One Way Permit before they could join their parents in Hong Kong. That applies equally to persons who are of tender age.

44. If Mr Dykes were correct, it would tantamount to a substantial inroad to art 22(4) and the One Way Permit system. It would also be a significant negation of the immigration reservations which as explained in many cases in Hong Kong play an important role in our immigration policy. Our courts have emphasized from time to time the difficult problems faced by Hong Kong in terms of influx of migrants and our need for tight immigration control. I shall not repeat what had been said in earlier cases. The difference between the situation in Hong Kong and that in the United Kingdom called for the making of the immigration reservations when United Kingdom acceded to the ICCPR. Thus, this distinction must be borne in mind when one considers whether English cases based on European jurisprudence on immigration matters should be applied here."

Koon Ping Leung（梁官平）v Director of Lands [2012] 2 HKC 329

Background

The applicant was an indigenous villager of the Pak Ngau Shek Sheung Tsuen (白牛石上村) in Tai Po. He challenged the decision of the District Lands Officer of the Lands Department ("DLO") rejecting his application for the grant of a plot of Government land by way of private treaty grant to enable the applicant to build a small house.

Under the Small House Policy, an applicant who wished to apply for construction of a small house on Government land through a private treaty grant had to be either living in Hong Kong or to satisfy the DLO that he intended to return and reside in his village ("Residence

Requirement").

The DLO rejected the application for private treaty grant because the applicant had been (and still was) living outside Hong Kong and there was no concrete evidence of his intention to return to live in Hong Kong on a permanent basis.

The applicant challenged the legality of the Residence Requirement under the Small House Policy ("Legality Challenges") as well as the application of the Residence Requirement by the DLO in this instance.

In respect of the Legality Challenges, the applicant relied on BL 35, BL 40 and BL 80. He argued that the Residence Requirement contravened BL 40 which protected the lawful traditional rights and interests of indigenous villagers. Further, he contended that the determination of his eligibility by the DLO infringed his right of access to court under BL 35 and the designation of the court as the organ for exercising judicial power under BL 80.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 35, BL 40 and BL 80.

What the Court held

The CFI held that the Director's decision rejecting the applicant's application had sufficient public character to render it amenable to judicial review. The Court ruled that one must not assume that all the rights afforded to an indigenous inhabitant under the Small House Policy came within the scope of BL 40. The Small House Policy was only implemented by the Government in 1972 and the traditional rights and interests under BL 40 should be confined to rights and interests traceable to rights of the indigenous inhabitants in 1898 when the New Territories was leased to the British Government. The applicant had not demonstrated that as an indigenous inhabitant he had any traditional right to use land not owned by him to build a small house for his inhabitation.

Even assuming that all the rights of an indigenous inhabitant under the Small House Policy were within the scope of BL 40, any right to demand Government land for the building of small house must be prescribed by the terms of the Small House Policy. As an indigenous inhabitant, the applicant never had any greater right in terms of getting a piece of Government land by private treaty grant than those given to him under the Small House Policy (and thus subject to the Residence Requirement).

As to the challenges based on BL 35 and BL 80, the Court held that the DLO exercised an administrative power instead of performing a judicial function. There was no contravention of BL 80. As the applicant could challenge the administrative decision by way of judicial review, the right of access to court guaranteed by BL 35 was not compromised.

The Court further held that if an overseas villager had no intention to come back to live at the village, he had no housing need for a small house, there was no reason why the Government should provide for such eventuality by way of exception to the Residence Requirement.

What the Court said

The CFI rejected the applicant's challenge based on BL 40 and held at 339:

"31. … the Applicant has not demonstrated that as indigenous inhabitant he had any traditional right to use land not owned by him to build a small house for his inhabitation. On the materials before the court, a male descendant of an indigenous inhabitant did not have any right to demand the Government to give him land to build a small house prior to 1972. Even assuming … that all the rights of an indigenous inhabitant under the Small House Policy are within the scope of Article 40, any right to demand Government land for the building of small house must be prescribed by the terms of the Small House Policy. It therefore follows the Applicant cannot argue that he was given less than his due under Article 40 because of the Residence Requirement in the Small House Policy. As indigenous inhabitant, he never had any greater right in terms of getting a piece of Government land by private treaty grant than those given to him under that Policy (and thus subject to the Residence Requirement).

32. Therefore, the Applicant's challenge based on Article 40 must be rejected."

The Court further rejected the applicant's challenge based on BL 35 and BL 80. The Court held at 340:

"35. In the present case, plainly the DLO exercised an administrative power instead of performing a judicial function. There is no contravention of Article 80. As the Applicant can challenge the administrative decision by way of judicial review, the right of access to court guaranteed by Article 35 is not compromised. There is no question of the DLO acting above the law."

Winnie Lo v HKSAR (2012) 15 HKCFAR 16

Background

Madam Cheung ("Cheung"), who was not a lawyer, entered into an agreement with Madam Wong ("Wong") that Cheung would take 25% of the amount recovered if the personal injury claim of Wong's son succeeded and she would pay the fees and expenses to all related professionals on behalf of Wong. Winnie Lo ("appellant"), a solicitor was told of Wong's impecuniosity and agreed to take up the case on the basis that she would look to the defendant for her costs. The court eventually approved of a settlement at HK$3.5 million, and in particular, upon counsel's advice, HK$871,531.54 was paid into Wong's account as "accrued items" for her son's maintenance, care and benefit. HK$861,652 was then withdrawn from Wong's account and paid to Cheung, representing 25% of the settlement sum under the agreement.

The appellant subsequently learned of the withdrawal, asked Wong to account for this money, and her evidence was that after the sum was not repaid, she first learnt of the contingency fee arrangement and that the sum had been paid to Cheung. Cheung was convicted of champerty and, together with the appellant, of conspiracy to commit maintenance. The CA dismissed the appellant's appeal and she appealed to the CFA. The appellant argued, *inter alia*, that the offence of maintenance had failed to meet the requirement of legal certainty.

Basic Law provisions in dispute

The major provision in dispute was BL 39.

What the Court held

The CFA allowed the Appellant's appeal but rejected her argument that the offence of maintenance had failed the requirement of legal certainty. The CFA held that for legal certainty, the central requirement was that a criminal offence must have a sufficiently clearly formulated core to enable a person, with advice if necessary, to regulate his or her conduct so as to avoid liability for that offence. At the same time, the principles recognized the need for both flexibility and development. Such a process of development was not constitutionally objectionable provided that it did not result in judicially extending the boundaries of criminal liability. If the nature of a crime was such that its definition had to be broad and flexible enough to embrace many different ways of committing that offence, it was not legally uncertain.

The CFA further held that the offences of maintenance and champerty possessed the required legal certainty to qualify as measures duly "prescribed by law" for the purpose of BL 39. The kernel of the offence of maintenance involved a defendant's "intermeddling" in litigation in which he had no legitimate interest, and the crux of champerty involved a defendant who took a share of the proceeds of the litigation maintained. The scope of the offences had progressively narrowed over the years by courts carving out common interest and similar exceptions to liability to reflect changed public policy considerations. In doing so, the courts had unobjectionably narrowed, and not extended criminal liability. While doctrinal issues remained to be addressed and clarified regarding the offences, the existence of such debatable issues surrounding a settled core such as whether special damage must be proved as an element of the offence did not make the offence legally uncertain.

What the Court said

Delivering the plurality judgment of the Court, Ribeiro PJ considered the requirement of legal certainty at 43 – 44:

"72. The principles governing such a challenge are well-established and are set out in the judgments of Sir Anthony Mason NPJ in *Shum Kwok Sher v HKSAR* and *Mo Yuk Ping v HKSAR*.

73. They are principles based on art.39 of the Basic Law which provides that the rights and freedoms enjoyed by Hong Kong residents 'shall not be restricted unless prescribed by law'. As Sir Anthony Mason NPJ explained:

… the expression 'prescribed by law', when used in a context such as art.39 of the Basic Law, mandates the principle of legal certainty. This principle is likewise incorporated in the expression 'according to law' in art. 11(1) of the Bill of Rights.

74. In *Mo Yuk Ping*, his Lordship summarized the principles as follows:

[61] … A criminal offence must be so clearly defined in law that it is accessible and formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, whether his course of conduct is lawful or unlawful. It is, however, accepted that absolute certainty is unattainable and would entail excessive rigidity. Hence it is recognized that a prescription by law inevitably may involve some degree of vagueness in the prescription which may require clarification by the courts.

[62] The concept of legal certainty recognizes that in a common law system, the common law, declared as it is by the judges, involves an incremental element of judicial lawmaking, whether by way of moulding the law to meet new circumstances and conditions or to correct errors of principle or doctrinal error. In any event, with the common law, as with the interpretation of statute law, it is inevitable that questions continue to arise which require clarification by judicial decision. That is one reason why absolute certainty is unattainable and why some degree of vagueness is inherent in the formulation of laws, especially laws expressed in general terms.

[63] It is also to be expected that, in the case of a general offence expressed in broad and abstract terms, that the degree of vagueness will be perhaps greater than that to be expected in the case of a specific offence directed to a particular situation or particular situations.

75. The central requirement is therefore that the offence must have a sufficiently clearly formulated core to enable a person, with advice if necessary, to regulate his or her conduct so as to avoid liability for that offence. At the same time, the principles recognize the need for both flexibility and development.

76. A crime may be of such a nature that its definition has to be broad and flexible enough to embrace many different ways of committing that offence. Such was the case, for instance, with the offences of conspiracy to defraud, considered in *Mo Yuk Ping* and misconduct in public office, examined in *Shum Kwok Sher*. Offences so defined are not legally uncertain.

77. And, as noted in the summary above, in a common law system, the courts develop the law over time, clarifying it and modifying it to meet new circumstances and conditions. As Sir Anthony Mason NPJ made clear, such a process of development is not constitutionally objectionable provided that it does not result in judicially extending the boundaries of criminal liability …"

Applying the foregoing principles, Ribeiro PJ took the view that the offences of maintenance and champerty met the required legal certainty under BL 39 at 44 – 47:

"78. Applying the foregoing principles, it is in my view clear that the offences of maintenance and champerty possess the required legal certainty to qualify as measures duly 'prescribed by law' for art.39 purposes.

80. The kernel of the offence of maintenance has always involved a defendant's 'officious intermeddling' in litigation in which he has no legitimate interest. And the crux of champerty has always involved a defendant who takes a share of the proceeds of the litigation maintained …

81. … the scope of these two offences has progressively been narrowed over the years by the courts carving out common interest and similar exceptions to liability to reflect changed public policy considerations …

82. … the process of development is an instance of the courts clarifying and modifying a law with ancient origins to meet the needs of modern conditions, applying the traditional methods of the common law. In so doing, the courts have unobjectionably narrowed, and not extended, criminal liability.

83. In *Unruh v Seeberger*, this Court held that the traditional legal policies underlying maintenance and champerty continue to apply, with the mischief aimed at continuing to be 'officious intermeddling' in litigation in the case of maintenance. It acknowledged the continued relevance of the traditional concerns underlying champerty, namely, the tendency of an agreement to share the spoils of litigation to encourage the perversion of justice; to endanger the integrity of the judicial process or to involve trafficking in the outcome of litigation. It emphasized the need to consider the totality of the facts in ascertaining liability and the importance of considering countervailing policies and recognizing that other approaches may be more

suitable in a particular case.

84. Doctrinal issues undoubtedly remain to be addressed and clarified. Questions may, for instance, arise as to the extent to which the elements of maintenance and champerty as criminal offences might differ from their elements in the civil context … The existence of such debatable issues surrounding a settled core does not make the offence legally uncertain. In my view, the appellant's legal uncertainty argument must fail."

Lee Yee Shing Jacky v Inland Revenue Board of Review

[2012] 2 HKLRD 981

Background

The applicants were husband and wife. In the personal assessments of salaries income issued to the husband and the wife for years of assessment from 1993/94 to 1997/98, the Commissioner of Inland Revenue ("Commissioner") disallowed deductions claimed for the husband's losses on dealings in securities and futures on the ground that he was not carrying on a trade or business. Their appeal to the Board of Review ("the Board") was dismissed. Pursuant to s. 69 of the Inland Revenue Ordinance (Cap. 112), they appealed by way of case stated against the decision of the Board to the CFI. They were unsuccessful before the lower courts and the CFA.

The applicants then applied for judicial review to challenge the constitutionality of s. 69 of Cap. 112 which required an appeal from the Board to proceed by way of case stated. The application was dismissed by the CFI and the applicants appealed to the CA. The applicants argued that the lack of right to appeal against factual findings by the Board infringed the right of access to courts under BL 35.

Basic Law provisions in dispute

The Basic Law provision in dispute was BL 35.

What the Court held

The CA dismissed the appeal and held that the right of access to courts under BL 35 was not absolute. In assessing the sufficiency of the appellate procedure, it was necessary to have regard to whether there were measures in place to safeguard the fairness of the proceedings and whether the decision was subject to ultimate judicial control by a court with full jurisdiction to deal with the case as its nature required.

For those administrative decisions made by specialized tribunals where the fair trial principles were applicable, the possibility of adequate judicial review would make limitations on practical grounds on the right to a review of the findings of fact acceptable.

The CA held that appeals by way of case stated were an acceptable limitation on a taxpayer's right of access to the court under BL 35 and it was not a disproportionate restraint. Any difference between an appeal by way of case stated and judicial review was more apparent than real. Just because there was no appeal on facts, it did not mean that the appellate court was precluded from detecting and correcting errors of law buried beneath conclusions of fact. If the true and only reasonable conclusion contradicted the decision appealed against, the appellate court had a duty to substitute it for that of the fact-finding tribunal.

What the Court said

Although the applicants relied on BL 35, Tang V-P (as he then was) considered that it was relevant to note BoR 10, which was not materially distinguishable from Article 6 of the European Convention on Human Rights ("ECHR"). Tang V-P said at 987:

"12. The parties accept that:

It is well-established in the case law of the ECtHR that the requirements of Art.6 are satisfied if either (a) the initial decision-maker is independent and impartial or (b) there is control by a judicial body with full jurisdiction, which does satisfy the Art.6 requirements. In other words, the question is whether the composite procedure satisfies Art.6.

13. Or, in the words of the learned editors of *The Law of Human Rights* (2nd ed., 2009) (Clayton QC and Tomlinson QC):

11.415 When decisions are taken by administrative bodies which affect a person's civil rights, he is entitled to a hearing which satisfies the conditions of Article 6. This can be done in two ways:

- *the decision-making body must itself comply with the requirements of Article 6 (internal Article 6 compliance) or*
- *the decision-making body must be subject to control by a judicial body which provides Article 6 guarantees (external Article 6 compliance).*

There will be sufficient 'access to the court' where the decision-making body does not comply with Article 6(1) in some respects provided that the body exercising judicial control 'has full jurisdiction and does provide the guarantees of Article 6(1)'. In assessing the sufficiency of the review, it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which it was arrived at and the content of the dispute."

Tang V-P considered when supervision by a court with full jurisdiction would be required. He said at 989 – 990:

"24. A determination by such a tribunal may involve questions of fact, questions of law and/or the exercise of discretion. If the designated tribunal satisfies Article 6 [of the ECHR], no further access to court may be required. But if the tribunal does not satisfy Article 6, one has to consider whether there was 'external Article 6 compliance'. External Article 6 compliance requires supervision by a court with full jurisdiction. Hence, the question is often whether Article 6 can be satisfied if the supervising court is limited in its power because it cannot fully review findings of fact."

Tang V-P discussed at 990 the meaning of "full jurisdiction" with reference to European case law. His Lordship referred to the European Court of Human Rights ("ECtHR")'s decision in *Bryan v United Kingdom*:

"25. *Bryan v United Kingdom* (1995) 21 EHRR 342 is an important decision of the ECtHR. … It went on to consider whether the appeal to the High Court by way of judicial review was sufficient external Article 6 compliance.

26. After noting that:

[47] … while the High Court could not have substituted its own findings of fact for those of the Inspector, it would have had the power to satisfy itself that the Inspector's findings of fact or the inferences based on them were neither perverse nor irrational …

the ECtHR decided that the scope of review was sufficient to comply with Article 6."

Tang V-P provided further explanation at 991 – 992 by reference to *Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430:

"30. … The headnotes stated that *Begum* decided that:

… having regard to the scope of Article 6(1) as extended to administrative decisions which were determinative of civil rights, such a decision might properly be made by a tribunal which did not itself possess the necessary independence to satisfy the requirements of Article 6(1) so long as measures were in place to safeguard the fairness of the proceedings and the decision was subject to ultimate judicial control by a court with jurisdiction to deal with the case as its nature required …

31. I would also note the following observations by Lord Millet in *Begum v Tower Hamlets London Borough Council*:

*[103] In **Bryan** the Strasbourg court held that in assessing the adequacy of the appellate procedure which was available to the claimant, regard must be paid to the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal. The Court noted the extensive jurisdiction of the High Court and that, while it could not substitute its own conclusion for that of the inspector, it was bound to satisfy itself that his conclusion was neither perverse nor irrational …*"

Tang V-P then said at 993 that:

"33. Given the subject matter involved in tax cases, if the Board of Review lacked any of the essential attributes under Article 10, I would be receptive to the plea that to remedy the defect, there must also be available the possibility of a full merits review of the facts by a court. Otherwise there would not have been a full determination by an Article 10 compliant tribunal because the factual determination would have been made by a non-compliant tribunal. Here, I note that Lord Hoffmann said in *Begum v Tower Hamlets London Borough Council*:

*[37] … But, when, as in this case, the decision turns upon a question of contested fact, it is necessary **either** that the appellate court have full jurisdiction to review the facts **or** that the primary decision-making process be attended with sufficient safeguards as to make it virtually judicial. (Emphasis added.)*

34. But here it is rightly accepted that the determination by the Board of Review is Article 10 compliant."

However, Tang-VP held that the applicants' right of access of court under BL 35 was a right independent of BoR 10. He said at 993:

"35. … The BL 35 right of access is to be considered in the context where a taxpayer has had a determination by:

… decision-making process (which is) attended with sufficient safeguards as to make it virtually judicial."

At 993 – 994, Tang V-P said that the right of access to court under BL 35 was not absolute:

"36. Mr Swaine has rightly accepted that in any event the right of access to court under BL 35 is not absolute.

37. This is what *The Law of Human Rights* said about the right of access in the context of Article 6 which may be applied to BL 35 as well:

The right of access to court is not absolute, by its very nature it calls for regulation by State, regulation which may vary in time and place according to the needs and resources of the community and individuals. However, as the Court said in ***Ashingdane v United Kingdom:***

The limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired [and] a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. (para.11.374)

38. Section 69 provides for an appeal to the Court of First Instance by way of case stated. Furthermore, as Lam J has held, and I do not think Mr Swaine contends to the contrary, in appropriate cases, judicial review of the decision of the Board of Review is possible. So basically, what Mr Swaine complains about is the absence of the possibility of appeal against factual findings by the Board of Review."

And at 996 – 997, Tang V-P drew support from *Jauffur v Commissioner of Income Tax* [2007] 1 LRC 561 that appeals by way of case stated were an acceptable limitation on a taxpayer's right of access to court under BL 35:

"50. When dealing with this express right of access to the Court, their

Lordships regarded the argument that since the Tax Appeal Tribunal Act 1984 required appeals to be by way of case stated it contravened the Constitution, to be without substance. Lord Walker of Gestingthorpe, giving the judgment of the Privy Council, said:

… An appeal by way of case stated is recognized in many jurisdictions as the most convenient medium for an appeal from an inferior tribunal limited to points of law …

51. I would further note the following passages from the judgment of Lord Walker:

[1] Many countries have found that the complexity of their social organization and legislation calls for the establishment of specialized tribunals to serve as the first port of call for citizens who wish to contest official decisions on such matters as taxation, social security and planning permission. Such specialized tribunals (which are not courts) perform the function of ascertaining and evaluating facts relevant to a matter within their special expertise. There is almost invariably a right of appeal from a specialized tribunal to a court, but often the appeal is restricted to questions of law.

52. With respect, *Jauffur v Commissioner of Income Tax* provides further support for the view that appeals by way of case stated are an acceptable limitation on a taxpayer's right of access to the court under BL 35."

Tang V-P held that there was no real difference between an appeal by way of case stated, judicial review or an appeal on law. Tang V-P said at 999:

"62. For the reasons I have given above, there is no real difference between judicial review and an appeal on law only.

63. I must say I also regard any difference between an appeal by way of case stated and judicial review to be more apparent than real …"

Tang V-P concluded at 1002 that:

"73. I am of the view that the fact that the applicants could only appeal by way of case stated made no difference to the result. Furthermore, as the learned Judge has pointed out, and I agree, proceedings by way of judicial review was also possible. Moreover, I must say, I see no significant difference in substance between an appeal by way of case stated, judicial review or an appeal on law only although procedurally they are different."

Lee To Nei v HKSAR (2012) 15 HKCFAR 162

Background

There were two appeals being heard together, the defendants in the two cases were each convicted of possessing for sale goods to which forged trade marks had been applied contrary to s. 9(2) of the Trade Descriptions Ordinance (Cap. 362). In the first case, the defendant was present in a pharmacy and sold a bottle of Chinese herbal medicine which bore a forged trade mark and 25 other similar bottles were found in the shop. In the second case, the two defendants operated warehouses and shops which possessed garments with forged trade marks.

The defendants in both cases were convicted before the Kwun Tong Magistrates Court in the first instance. Their appeals before the CFI were not successful. They appealed with leave to the CFA. At issue was whether the defence provided in s. 26(4) of Cap. 362 had derogated from the presumption of innocence. S. 26(4) provided a defence for person charged under s. 9(2) to prove that he did not know, and had no reason to suspect and could not with reasonable diligence have ascertained, that a forged trade mark had been applied to the goods or that a trade mark or mark so nearly resembling a trade mark as to be calculated to deceive had falsely been applied to the goods.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 87(2).

What the Court held

The CFA held that s. 26(4) of Cap. 362 placed a reverse burden of proof on the defendant and derogated from the presumption of innocence which was constitutionally protected under BL 87(2) and under BoR 11(1). However, the presumption of innocence was not absolute and the constitutional validity of a provision like s. 26(4) was capable of being upheld if it passed both the rationality and proportionality tests.

The CFA held that s. 26(4) passed the rationality test. The protection of trade marks against forgery was obviously a legitimate societal aim, and

it was self-evident that a reverse onus provision requiring persons who dealt in goods bearing trade marks to demonstrate reasonable diligence to ascertain that the marks were not forgeries was rationally connected to those legitimate aims.

Whilst s. 26(4) of Cap. 362 passed the rationality test, the CFA considered that the proportionality test had not been satisfied. Therefore, s. 26(4) must be read down as imposing only an evidential burden on the accused and the persuasive burden remained with the prosecution. Upon a reading down of s. 26(4), the CFA allowed the appeal and quashed the conviction of the defendant in the first case. For the second case, the CFA found that applying the read-down provision to the second case would have made no difference to the outcome and therefore dismissed the appeal.

What the Court said

Citing BL 87(2) and BoR 11(2), the CFA said at 170:

"13. The presumption of innocence is constitutionally protected and the principles applicable when statutory reverse onus provisions encroach upon such protection are well-established. …

14. The starting point is the basic rule of the criminal law that an accused person is presumed innocent and that the prosecution bears the burden of proving his or her guilt beyond reasonable doubt. However, it is clear that a statute may reverse the burden, abrogating the presumption by placing a persuasive burden on the defendant to prove specified matters on a balance of probabilities as a condition of avoiding liability."

The CFA held at 170 – 171 that the reverse burden provision in s. 26(4) derogated from the presumption of innocence:

"15. The first task is therefore to construe the impugned provision to determine whether it does reverse the onus. As was pointed out in *Ng Po On*, little discussion is needed where the relevant provision expressly places the burden on the accused. Section 26(4) is such a provision. It says in terms that 'it shall be a defence for the person charged to prove' the specified matters and so clearly does reverse the burden.

16. The second task is to ascertain whether such reversal of the onus engages and derogates from the presumption of innocence. In the case of

s. 26(4), the answer is plainly 'Yes'."

The CFA held at 171 – 172 that s. 26(4) was capable of being upheld if it passed the rationality and proportionality tests:

"20. While that consequence of a reverse onus is prima facie objectionable, the presumption of innocence is not absolute. The constitutional validity of a provision like s. 26(4) is capable of being upheld if it passes the rationality and proportionality tests, the burden resting on the prosecution to justify the derogation with reasons which must be compelling."

The CFA found that s. 26(4) passed the rationality test at 172:

"21. The rationality test involves asking: 'Is the derogation rationally connected with the pursuit of a legitimate societal aim?' In the present appeal, defence counsel in both cases concede that s. 26(4) passes that test.

22. The concession is rightly made. The protection of trade marks against forgery is obviously a legitimate societal aim, both from the point of view of protecting the mercantile interests of the registered owner and of protecting the consumer. With many classes of brand-name goods, including medicines, forged trade marks raise serious concerns regarding consumer health and safety. It is self-evident that a reverse onus provision requiring persons who deal in goods bearing trade marks to demonstrate reasonable diligence to ascertain that the marks are not forgeries is rationally connected to those legitimate aims."

On the issue of proportionality, the CFA said at 172:

"23. … [s]ince it relates to the fundamental right to be presumed innocent, a stringent standard, sometimes called the standard of 'intense scrutiny' or 'minimal impairment', applies. One must ask whether s. 26(4)'s imposition of a persuasive burden on the accused instead of the prosecution is no more than necessary to achieve the legitimate aims of the legislation."

The CFA considered the English cases of *R v S* [2003] 1 Cr App R 35 (CA) and *R v Johnstone* [2003] 1 WLR 1736, both concerned the offence of the sale of counterfeit goods under s. 92(1) of the Trade Marks Act 1994 ("TMA") and the defence under s. 92(5) of the TMA in the United Kingdom. The CFA reiterated at 174 the need to relate the proportionality assessment to the specific statutory provision in question:

"32. Every assessment of proportionality — the inquiry, in a case like the

present, as to whether a particular encroachment on a constitutionally protected right is no more than is necessary to achieve the legitimate aims of the legislation — must relate to the specific statutory provision in question. This was recognized in *Ng Po On* where Lord Bingham of Cornhill was cited as stating:

The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances ***of the particular provision as applied in the particular case****.* (Emphasis added.)

33. The need to focus on the relevant provision was also acknowledged in *R v Johnstone* itself. Having noted that the consequence of reversing the burden is to permit a conviction in spite of the fact-finding tribunal having a reasonable doubt as to the guilt of the accused, Lord Nicholls stated:

This consequence of a reverse burden of proof should colour one's approach when evaluating the reasons why it is said that, in the absence of a persuasive burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons. ***The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access****. (Emphasis added.)*"

The CFA compared the defences under s. 26(4) of Cap. 362 with s. 92(5) of the TMA and said at 176 – 177:

"40. The differences in the respective statutory schemes have a major impact on the proportionality inquiry. The Court must decide whether there are compelling reasons for sustaining s. 26(4)'s prima facie objectionable encroachment upon the presumption of innocence. I should stress that this is not to question the appropriateness of the legislature fashioning an offence in which liability turns on knowledge or discoverability of the falsity of the trade mark. That is a matter for the legislature and reference has already been made to the legitimate societal aim of the relevant provisions. Instead, the inquiry focuses on the burden: Is it proportionate for the burden of proof regarding the relevant conditions bearing on liability to be

placed on the accused rather than on the prosecution?"

The CFA considered that in the two English decisions, a centrally important reason for concluding that the derogation from the presumption of innocence under s. 92(5) of the TMA was justified was the serious difficulty which would had been faced by the prosecution if it (instead of the accused) had been required to prove the absence of the accused's belief on reasonable grounds that the use of the mark involved no infringement. However, the CFA found that such consideration carried no such weight in relation to s. 26(4) of Cap. 362. The CFA explained at 178:

"47. The TDO's scheme makes the avoidance of liability under s. 9(2) dependent on the accused not knowing of, not having reason to suspect and not being able to discover by use of reasonable diligence, the falsity of the marks. All three conditions must be satisfied. If the prosecution instead of the accused were required to bear the burden of proof, it would in practice only need to surmount the lowest hurdle. It would need merely to satisfy the court that by taking certain steps constituting reasonable diligence, the accused could have ascertained the falsity of the trade marks. It would be no answer for the accused to say that he did not know and had no reason to suspect that the marks were genuine if, taking an objective view, the court were persuaded that in the circumstances, he *could have* discovered their falsity. That indeed was the Magistrate's finding in the *Lee* Case even though he acquitted the defendant of knowledge and of having any reason to suspect falsity.

48. Requiring the prosecution to prove the third condition, even applying the usual criminal standard of proof beyond reasonable doubt, is much less exacting than requiring the prosecution in England to negate the subjective defence specified in s. 92(5) of the TMA. Accordingly, it is my view that the concerns expressed in the English cases regarding the unworkability of their statutory regime in the absence of a reverse onus do not arise here."

The CFA decided to read down s. 26(4) of Cap. 362 to an evidential burden and said at 179 – 180:

"51. In Hong Kong, as in the United Kingdom, combating counterfeiting is strongly in the public interest. However, in our jurisdiction there is plainly a reasonable alternative to abrogating the presumption of innocence in the context of s. 9(2) and 26(4). It is to place the persuasive burden on

the prosecution to prove either that the accused knows, or has reason to suspect or could with reasonable diligence ascertain that the goods bear forged trade marks. That would be achieved by reading down s. 26(4) as imposing merely an evidential burden on the accused to raise as an issue the proposition that none of the three conditions apply, with the prosecution retaining the persuasive burden as to each element of liability throughout.

52. The accused would still have to adduce or be able to point to credible evidence indicating that he did not know, had no reason to suspect and could not, with reasonable diligence have ascertained that the trade marks were false. As pointed out in *Ng Po On*, evidence would have to be sufficiently substantial to raise a reasonable doubt as to his guilt. Where such evidence exists, it would be up to the prosecution to furnish sufficient evidence to prove the accused's guilt beyond reasonable doubt at the end of the day. In cases where the prosecution is unable to prove that the accused did know or did have reason to suspect the falsity, it would still succeed if the evidence of what could have been done by way of reasonable diligence at the relevant time, satisfies the Court beyond reasonable doubt that the accused could have discovered the falsity by taking the appropriate steps.

53. Such a read-down scheme would not infringe the presumption of innocence. And there is no reason to think that it would unduly impede the effective enforcement of the law. I can accordingly see no compelling reason for permitting derogation from the presumption of innocence in the present case. I would therefore declare that s. 26(4) must be read down as imposing merely an evidential burden on the accused, with the persuasive burden remaining throughout on the prosecution."

Fok Chun Wa v Hospital Authority (2012) 15 HKCFAR 409

Background

X was a woman from the Mainland who married a Hong Kong resident and gave birth to a child in a public hospital in Hong Kong. At the material time, X was in the course of applying to become a Hong Kong resident. She represented other women from the Mainland of similar background and challenged the three decisions made by the Hospital Authority and the Secretary for Food and Health ("respondents") under

which X and other Mainland women were charged a higher fee for obstetric services than Hong Kong resident women ("Decisions"). X argued that the Decisions had infringed their right to equality protected by BL 25 and BoR 22 as they had been discriminated on ground of their residence status. X's application was dismissed by both the CFI and the CA. X appealed to the CFA.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 25.

What the Court held

The CFA held that in equality matters, it would follow the Court's approach in *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335. In order for differential treatment to be justified, it must be shown that:

(1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.

(2) The difference in treatment must be rationally connected to the legitimate aim.

(3) The difference in treatment must be no more than that is necessary to accomplish the legitimate aim.

The CFA held that it was the responsibility of the executive to devise and implement socio-economic policies of a government, as stated in BL 48(4) and BL 62. In the context of healthcare and the setting of fees chargeable in public hospitals, the Hospital Authority Ordinance (Cap. 113) set out the obligation of the respondents to recommend and devise appropriate policies. Accordingly, it would not usually be within the province of the courts to adjudicate on the merits or demerits of such government socio-economic policies. However, it had been the consistent position of the courts that, where appropriate, the court would intervene as part of its responsibility to ensure that any measure or policy was lawful and constitutional.

The CFA held that using residence status as the dividing line in relation to health benefits, where Hong Kong residents holding a Hong Kong Identity Card were categorized as eligible persons and X and other Mainland women were categorized as non-eligible persons, was a mere question of general, social or economic policy which had less to do with personal characteristics of non-eligible persons. Drawing the line at residence status was entirely within the spectrum of reasonableness and did not infringe the right to equality. X's objections based on BL 25 failed.

What the Court said

The CFA held at 435 – 436 that principle of margin of appreciation recognized the different constitutional roles of the executive, the legislature and the judiciary:

"62. The concept of margin of appreciation, or deference (as it is sometimes referred to), derives from the jurisprudence of the European Court of Human Rights. …

64. … The principle reflects the different constitutional roles of the judiciary on the one hand, and the executive and legislature on the other. The role of the judiciary was succinctly (but accurately) described by Lord Hobhouse of Woodborough in *Wilson v First County Trust Limited (No. 2)* [2004] 1 AC 816, at 861 (para 131): 'The judiciary is the part of government which has the responsibility for applying the law'. Where matters of state or community policy are concerned, these are matters predominantly for the Executive or the Legislature.

65. A clear example of state or community policy are the socio-economic policies of a government. Here, it is the responsibility of the executive to devise and implement such policies. Article 48(4) of the Basic Law states that the Chief Executive has the responsibility of deciding on government policies (assisted of course by the Executive Council – Article 54). Article 62 of the Basic Law places the duty on the Government to formulate and implement policies (sub-para (1)) and to formulate budgets and final accounts (sub-para (4)). In discharging its responsibilities, the Executive will of course take into consideration many different factors and interests – no doubt these factors and interests often pulling in different directions – to arrive at the chosen policy. In the context of healthcare and the setting

of fees chargeable in public hospitals, the Hospital Authority Ordinance contains relevant provisions that place the obligation on the respondents to recommend and devise appropriate policies. …

66. Accordingly, it would not usually be within the province of the courts to adjudicate on the merits or demerits of government socio-economic policies. That said, where appropriate … the court will intervene, this being a part of its responsibility to ensure that any measure or policy is lawful and constitutional. This has been the consistent position of the courts."

The Court held at 439 that drawing the line at residence status was a clear line and convenient to administer:

"73. I am also of the view that when a line is drawn between those who are entitled to a benefit and those who are not, the court can legitimately take into account the clarity of the line and the administrative convenience of implementing the policy or scheme thereunder. Naturally, this factor must be weighed against other factors, but where, for instance, the line is drawn so vaguely or ambiguously that the underlying policy or scheme may effectively be undermined, if not frustrated, this is a factor that can be considered by the courts … Drawing the line at resident status is a clear line and also convenient to administer.

74. In this context of socio-economic policies, there may be open to the authorities a number of solutions to any perceived problem. In the present case, for example, as we have seen, the Government considered a number of options to deal with the problems of Mainland women giving birth in Hong Kong public hospitals … In such situations, the approach of the court will not be to try to find a better solution or alternative itself. That is really not the role of the court at all. …"

The CFA reiterated at 441 – 443 that the courts would intervene where there had been disregard for core values such as race, colour, gender:

"77. … The proposition that the courts will allow more leeway when socio-economic policies are involved, does not lead to the consequence that they will not be vigilant when it is appropriate to do so or that the authorities have some sort of *carte blanche*. After all, the courts have the ultimate responsibility of determining whether acts are constitutional or lawful. It would be appropriate for the courts to intervene (indeed they would be duty-bound to do so) where, even in the area of socio-economic or other government policies, there has been any disregard for core-values. This requires a little elaboration. Where, for example, the reason for unequal

treatment strikes at the heart of core-values relating to personal or human characteristics (such as race, colour, gender, sexual orientation, religion, politics, or social origin), the courts would extremely rarely (if at all) find this acceptable. These characteristics involve the respect and dignity that society accords to a human being. They are fundamental societal values. On the other hand, where other characteristics or status which do not relate to such notions or values are involved, and here I would include residence status, the courts will hesitate much more before interfering; in other words, more leeway is given to the executive, legislature or other authorities. …

81. … Where core values or fundamental concepts are involved, these are areas where the court have … expertise and experience, and it is part of their constitutional duty to protect these values or concepts. In policy matters not involving these matters, the courts do not have this expertise or experience and, more important, it is not within its constitutional remit to determine matters of government or legislative policy, save where questions of legality arise. …"

The CFA concluded at 445 – 446 that the Decisions were justified:
"90. These Decisions were made as part of the Government's socio-economic responsibilities and represent the implementation of policies in these areas. For my part, it is no part of the court's role to second-guess the wisdom of these policies and measures in the circumstances I have described above. Nor is it … the court's role in such matters of socio-economic policy to examine whether better alternative solutions could have been devised. It is sufficient to say in the present case that the line drawn by the respondents at residence status is entirely within the spectrum of reasonableness. In my view, all three aspects of the justification test are satisfied."

Chan Mei Yiu Paddy v Secretary for Justice (No. 2) [2012] 3 HKLRD 65

Background

The Public Prosecutor at the Milan Court of Italy requested the assistance from the Department of Justice for a search in Hong Kong

of the residential premises of Paddy Chan Mei Yiu ("Ms Chan") and Katherine Hsu May Chun ("Ms Hsu") and the office premises of Ms Chan and Ms Hsu and a corporate applicant ("applicants") in connection with an Italian criminal proceedings which involved tax fraud, false accounting and money laundering. DSI Leung, a police officer, was assigned to make the search warrant applications and four warrants were issued with DSI Leung named as the authorized officer in the warrants ("Warrants"). The Warrants were executed with the assistance of four representatives of the Italian prosecutor ("IOs") who came to Hong Kong, and some documents were seized at the specified premises. The IOs were present at the searches to help identify the relevant materials.

The applicants argued, *inter alia*, that the failure to draw to the attention of the Magistrate the fact that IOs would be present and might take part in the search constituted a material nondisclosure in an *ex parte* application ("material non-disclosure") and the issuance and execution of the Warrants pursuant to s. 12(3) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) had violated BL 29 which prohibited arbitrary or unlawful search or intrusion into residents' home and other premises.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 29.

What the Court held

The Court dismissed the appeals. On the issue of whether there was material non-disclosure in the application for the Warrants, the CA held that there was no doubt that an authorized officer applying a search warrant under Cap. 525 was under a duty to bring to the notice of the Magistrate issuing the warrant all facts material to the decision to be made by the Magistrate. This flew from the nature of the search warrant, being an infringement of the right to inviolability of homes and other premises guaranteed under BL 29. The CA, however, held that the participation of the IOs in the execution of the Warrants was lawful and it was not necessary for DSI Leung to disclose in the information that

the IOs would be present at the searches.

What the Court said

The CA held at 81 that search warrants would raise BL 29 issues:

"37. There can be no doubt that an authorized officer applying for a search warrant under the Ordinance is subject to a duty to bring to the notice of the magistrate issuing the warrant all facts material to the decision to be made by him. This flows from the nature of the search warrant, being an infringement of the right to the inviolability of homes and other premises and the protection against arbitrary or unlawful search or intrusion into such places guaranteed under art.29 of the Basic Law, and also from the *ex parte* nature of the application …"

The CA held at 83 that the IOs' participation was lawful and rejected the material non-disclosure ground:

"43. … it is my view that the participation of the Italian officers in the execution of these search warrants is properly to be characterized as falling within the phrase 'such assistance … as is necessary and reasonable' in s. 12(3) and was therefore lawful. It is also my view … that it is not necessary for the search warrant to identify by name each of the persons who may render assistance to the authorized officer in the course of its execution.

44. In the light of those conclusions, it follows, in my view, that it was not necessary for DSI Leung to disclose in the information that the Italian officers would be present at and participate in the searches. Their participation might or might not be assistance that was necessary and reasonable within s. 12(3) but that question would fall to be determined after the execution of the search warrants in the light of any challenge on the basis that their participation exceeded what was necessary and reasonable.

45. The matter can be tested by taking an uncontroversial example. It was not disputed that an authorized officer executing a search warrant under the Ordinance might enlist the assistance of a locksmith in order to gain entry to the premises to be searched. The authorized officer applying for a search warrant might hope that entry to the premises could be obtained with the consent of the occupier so that a locksmith would not be required. However, the fact that he might need to resort to the assistance of a locksmith is not a fact that would be material to the magistrate's decision whether or not to issue the search warrant.

46. I therefore conclude that there was no material non-disclosure in relation to (i), the intended role of the Italian officers."

HKSAR v Muhammad Riaz Khan (2012) 15 HKCFAR 232

Background

Three defendants, one of which was the appellant, stood trial before Deputy Judge Line and a jury for conspiracy to traffick in dangerous drugs, i.e. 1.9 kilograms of heroin inside a suitcase. All three were convicted. Each was sentenced to 24 years' imprisonment. On appeal, the CA affirmed the appellant's conviction but quashed the convictions of the other two defendants and ordered that those two be retried. The appellant appealed to the CFA.

At issue was a conversation held at a meeting between the 1st defendant, the appellant and an undercover agent which took place at the undercover agent's hotel room. The conversation related to the contents of a suitcase. That conversation had been secretly recorded by customs officers, and the recording was put in evidence at the trial. What was said in the conversation amounted to evidence in proof of the appellant having conspired as charged.

The appellant's case was that the recording was made in violation of his constitutional right to privacy protected under BL 30 and BoR 14 and that its use at the trial was an error of law for which his conviction ought to be quashed. The question before the CFA was:

"Where evidence has been obtained in breach of a defendant's fundamental rights protected by the Basic Law or the Bill of Rights, does the court have a discretion as to the admission or exclusion of such evidence and, if so, on what principles should such discretion be exercised?"

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 30.

What the Court held

The CFA held that there was a breach of this appellant's right to privacy, contrary to BL 30 and BoR 14 but there was under our law no absolute bar to the reception of evidence obtained in breach of a defendant's constitutional rights. It was a matter of discretion. The Court held that the discretion could have been properly exercised to receive the recorded conversation in evidence. The appellant's appeal was dismissed.

What the Court said

The CFA laid down at 241 – 242 the relevant test for the exercise of the discretion to admit evidence obtained in breach of a defendant's right to privacy:

"20. The test can be stated thus. Evidence obtained in breach of a defendant's constitutional rights can nevertheless be received if, upon a careful examination of the circumstances, its reception (i) is conducive to a fair trial, (ii) is reconcilable with the respect due to the right or rights concerned (iii) appears unlikely to encourage any future breaches of that, those or other rights. The risk-assessment called for under the third element will always be made by the courts, vigilantly of course, in the light of their up-to-date experience. Thus is achieved, consistently with the constitution, a proper balance between the interests of individual defendants and those of society as a whole. It cannot have been the framers' intention – and is not the constitution's effect – to stand in the way of such of balance being struck. Just as rationality and proportionality can justify an impact on a non-absolute constitutional right, so can they justify a discretion to receive evidence obtained in breach of a constitutional right. Under the test stated above, the discretion concerned is rational and proportionate. The factors to be taken into account in applying this test and the weight to be accorded to each such factor will depend on the circumstances of each case."

The CFA applied the test and dismissed the appeal at 242:

"21. Applying the test in the present case, it is appropriate to begin by stressing that the recording was not adverse to the appellant having regard to how his case was run. But that is not to say that the recording could not properly have been received in evidence if it had been adverse to him. … Even if the recording had been adverse to the appellant and even on the assumption that there existed a sufficient expectation of privacy in

the circumstances, the discretion could nevertheless have been properly exercised to receive it in evidence."

Fu Kor Kuen Patrick v HKSAR (2012) 15 HKCFAR 524

Background

For a period of 20 days between January 2004 and January 2005, the appellants bought and sold warrants back and forth to each other in order to earn commission rebate ("circular trading"). The appellants were convicted of creating a false or misleading appearance of active trading, contrary to s. 295(1)(a) and 295(6) of the Securities and Futures Ordinance (Cap. 571). S. 295(7) of Cap. 571 provided a defence to the accused to prove that the acts giving rise to the charge did not include the purpose of creating a false or misleading appearance of active trading in securities. The District Court rejected the appellants' defence, and found that the appellants' circular trading was not only for the purpose of earning rebates but also to create an appearance of an active market to ensure that they would be able to exit the market at the end of the trading day at a favourable price. The appellants' application for leave to appeal on conviction was dismissed by the CA, which decided that the defence under s. 295(7) of Cap. 571 was irrelevant. The appellants were then granted leave to appeal to the CFA.

In the appeal before the CFA, the CFA considered, *inter alia,* whether s. 295(7) of Cap. 571 imposed a persuasive burden of proof on the appellants that infringed the presumption of innocence in BL 87 and BoR 11(1).

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 87.

What the Court held

The CFA held that the defence under s. 295(7) of Cap. 571 applied and

imposed on a defendant a persuasive burden of proof to be discharged on the balance of probabilities. The presumption of innocence under BL 87 and BoR 11(1) was therefore engaged.

As to whether the defence under s. 295(7) of Cap. 571 infringed the presumption of innocence in BL 87 and BoR 11(1), the CFA held that there was a rational connection between the imposition of a persuasive burden on a defendant and the pursuit of a legitimate societal aim to maintain an orderly and fair securities market. The CFA found that the legislature was entitled to take the view that it would be inadequate to impose an evidential burden on the defendant, leaving the prosecution with the legal burden of proving that the defendant had the proscribed purpose. This was a matter of the defendant's state of mind, and was likely to be peculiarly within the defendant's knowledge. S. 295(7) of Cap. 571 only imposed a burden on the appellant which was to be discharged on a mere preponderance of probability, and the appellant remained duly protected against wrongful conviction. Therefore, the CFA held that the proportionality test was satisfied and the persuasive burden on defendants was constitutional.

What the Court said

In considering the issue of whether s. 295(7) of Cap. 571 infringed the presumption of innocence in BL 87 and BoR 11(1), the CFA held at 555:

"87. … Wash sales and matched orders are not prohibited *per se*, but, in Hong Kong, if they are transacted on the market, then they will involve an offence unless the parties can show that the purpose or purposes of the transaction was not, or did not include, a proscribed purpose. How does this measure up against art.87 of the Basic Law, and art.11(1) of the Hong Kong Bill of Rights (given constitutional effect by art.39 of the Basic Law), which give constitutional status to the presumption of innocence? The analysis to be undertaken to answer that question is well established. It is to be found, for example, in the judgment of Mr Justice Ribeiro PJ in *HKSAR v Ng Po On*, applying *HKSAR v Lam Kwong Wai*.

88. As a matter of construction of s. 295, it is clear that the combined effect of sub-s.(5) and (7) is to impose a persuasive burden of proof on a defendant which, according to settled principle, is to be discharged on the balance of probabilities.

89. The presumption of innocence is engaged. In the case of *Ng Po On*, Mr Justice Ribeiro PJ said:

[T]he presumption of innocence is abrogated where a statutory provision places a persuasive burden on the accused person to prove, on the balance of probabilities, an ultimate fact which is necessary to the determination of his guilt or innocence.

90. There is a rational connection between the imposition of a persuasive burden on a defendant and the pursuit of a legitimate societal aim: in this case the maintenance of an orderly and fair securities market."

The CFA then considered the question of proportionality, which in this case concerned whether the imposition of the reverse persuasive onus under s. 295(7) of Cap. 571 was no more than necessary to achieve the legitimate social aim. The Court distinguished the judgment of *Lee To Nei v HKSAR* and held that the proportionality test was satisfied in the case of s. 295(7) of Cap. 571. The Court said at 556 – 557:

"94. In *Lee To Nei*, this Court found that there was a qualitative difference between the United Kingdom defence and the Hong Kong legislation which was 'crucial' … The difference was that the Hong Kong defence required the defendant to satisfy the court that he could not with reasonable diligence have ascertained the falsity. This condition applied a standard of care independent of an accused person's state of mind. It imported an objective test. The difference was held to have 'a major impact on the proportionality inquiry' (Mr Justice Ribeiro PJ at [40]). The requirement of proportionality was found not to have been satisfied.

95. In the case of s. 295 of the SFO, the nature of the important and complex issue of securities market legislation addressed by the legislature has been considered above. The matter which has been identified as an answer to the otherwise unqualified prohibition of wash sales and matched orders in transactions conducted on the market is the purpose of the defendant in entering into the transaction. This is a matter of the defendant's state of mind, and is likely to be peculiarly within the defendant's knowledge. The legislature was entitled to take the view that it would be inadequate simply to impose on the defendant an evidential burden, leaving the prosecution with the legal burden of proving that the appellant had the proscribed purpose. The aim of the legislation was to stop short of imposing an absolute ban on wash sales or matched orders in market transactions, but to require a defendant to show an innocent explanation. In many, perhaps

most cases, the capacity of the authorities to investigate and establish the purpose of trading is likely to be limited, and the defendant will have the capacity to raise, by argument or expert evidence, a realistic possibility of an innocent purpose sufficient to enliven the issue.

96. The proportionality test is satisfied. The appellants, on the issue raised by s. 295(7), carried the persuasive burden of proof. …"

Inglory Ltd v Director of Food and Environmental Hygiene

[2012] 3 HKLRD 603

Background

Inglory Limited ("applicant") sought to judicially review the decision of the Director of Food and Environmental Hygiene ("Director") not to cancel the licence of an operator of a newspaper stall ("Stall"), arguing that the Director had failed to consider the option of cancellation under s. 125(1)(b) of the Public Health and Municipal Services Ordinance (Cap. 132). The Stall was on a pedestrian pavement in front of a building of which the ownership was acquired by the applicant. The applicant was upset that the Stall's operator frequently occupied areas of the pavement beyond the limits permitted by the operator's hawker licence and believed that such activities had caused financial loss to it in terms of loss of rental income. The applicant had complained to the Director many times regarding the Stall, and despite enforcement actions by the Director, there were still occasions when the Stall was found to be operating beyond its permitted area. On 18 July 2011, the Director replied to the letter from solicitors for the applicant which demanded cancellation of the licence. It was stated that the then departmental policies "do not provide for the cancellation of Fixed-pitch (Newspaper) Hawker Licences due to conviction of offences relating to obstruction".

The applicant argued that, amongst others, the decision of the Director on 18 July 2011 was illegal in that the Director had failed to discharge his constitutional duty under BL 64.

Basic Law provisions in dispute

The Basic Law provision in dispute was BL 64.

What the Court held

The CFI held that the Director did not rule out cancellation as an option in his armouries of stringent enforcement actions. The non-exercise of a statutory power (even if prolonged) did not necessarily mean the decision-maker had effectively renounced the existence of that power. The constitutional challenge based on BL 64 failed.

What the Court said

At 614 – 616, the CFI held that the Director's non-exercise of power of cancellation in the case was not contrary to BL 64:

"35. It should be noted that though the power of cancellation is available for the furtherance of the objects of the Ordinance, there is nothing in the Ordinance which says that this is the only mode of enforcement to further the objects of the Ordinance in cases of repeated contraventions. Therefore it is wrong to suggest that the Director did not exercise his constitutional duty to enforce the Ordinance simply because he did not deem fit to exercise this power by way of enforcement for repeated contraventions. Actually, the evidence shows that the Director did exercise his power of cancellation in other specific situations (as provided in the Departmental Policy) and those instances can also be regarded as an exercise of power in furtherance of the objects of the Ordinance. The evidence also shows that the Director did take other enforcement actions in respect of the Stall. These immediately cast doubt on the validity of Mr Pun's challenge based on art.64."

Wong Hin Wai v Secretary for Justice [2012] 4 HKLRD 70

Background

The applicants were on bail pending their appeals against convictions and sentences of 14 days to two months' imprisonment. Both applicants

were disqualified from standing for election under s. 39(1)(b)(i) of the Legislative Council Ordinance (Cap. 542) for not having served their sentences despite their appeals before the expiration of the nomination period. S. 39(1)(d) of Cap. 542 prevented a person who was serving a sentence of imprisonment on the date of nomination or of the election from standing for LegCo election. The applicants challenged the constitutionality of s. 39(1)(b)(i) and 39(1)(d) of Cap. 542.

Basic Law provisions in dispute

The main provision in dispute was BL 26.

What the Court held

The CFI held that s. 39(1)(b) of Cap. 542 was inconsistent with BL 26, BL 39 and BoR 21. The CFI held that there was no rational connection between the application of s. 39(1)(b)(i) of Cap. 542 to persons on bail pending appeal and the maintenance of public confidence in the LegCo and the electoral process and the ensuring of the proper operation of the LegCo, which were legitimate aims. S. 39(1)(b)(i) was more likely to catch an intended candidate on bail than an escaped convict. Even if hard cases could be caught, the drawing of a bright line could not be justified.

In relation to the constitutional challenge of s. 39(1)(d) of Cap. 542, the CFI held that since both applicants were given bail and were not subject to the restriction of s. 39(1)(d) of Cap. 542, it would leave the constitutionality of s. 39(1)(d) to be considered in the future.

What the Court said

The CFI also elaborated on the right to stand for election and the nature of restrictions which might be imposed on such right at 100 – 103:

"66. Like the right to vote, the right to stand for election is a fundamental right. This is expressly recognized under art.26 of the Basic Law. These rights are crucial to establishing and maintaining the foundations of an effective and meaningful democracy, … But they are not absolute.

73. Drawing from these authorities, I can make the following observations

which are relevant for present purposes:

(a) The permissible restrictions can go beyond mere procedural regulations of the nomination process and disqualification criteria based on certain attributes of a candidate may be permissible;

(b) The restrictions have to be justified. They must be reasonable, not excessive and non-discriminatory in addition to being prescribed by law;

(c) Justification has to be considered against the historical and political developments of the state or region in question."

The CFI considered the legitimate aims of maintaining public confidence in LegCo and the election process and ensuring proper operation of LegCo at 105 – 106:

"85. I accept the maintenance of public confidence in LegCo and the election process and the ensuring of proper operation of LegCo as legitimate aims. In the discussion relating to these two objectives in the affidavit of the Secretary, he referred to the uncertainties that might be engendered and the confusion that might be caused to the electorate if convicts on bail pending appeal were allowed to run as candidates.

86. With respect, given that we are only talking about those subject to a sentence of three months or less, not much uncertainty can be caused by allowing such candidates to run. As submitted by Mr Dykes SC, in the present day Hong Kong situation it is unlikely that a conviction and liability to serve prison sentence of a candidate of LegCo election is not revealed to the voters even if he or she is on bail pending appeal. There would not be any confusion. I have no doubt that the voters in Hong Kong are intelligent enough to take into account the potential contingency of imprisonment of such candidate in deciding whether to cast their votes in favour of him or her.

87. Whilst there might be uncertainty in terms of the outcome of the appeal and thus the need to serve the prison sentence, at the highest it would only be three months out of a total four-year term [footnote omitted] of office of the candidate (if elected). As observed in the course of hearing, there is no certainty in life and legislators, like all of us, are subject to various contingencies in life like illness or other mishaps which might prevent a legislator from performing the duties in the LegCo during part of his or her term of office."

The CFI held at 107 – 108 that s. 39(1)(b) was not a proportionate

measure to pursue the legitimate aims:

"95. On the whole, I do not see the rational connection between the application of s. 39(1)(b) to persons on bail pending appeal and the maintenance of public confidence in the LegCo and the electoral process. I have not overlooked that s. 39(1)(b) also applies to escaped convicts or fugitives. However, I do not think the measure can be justified as the drawing of a bright line which catch some hard cases … With respect, it is actually difficult to envisage an escaped convict standing for election, at least not one who is being convicted by a court in Hong Kong or a jurisdiction with which we have extradition arrangement. Section 39(1)(b) is more likely to catch an intended candidate on bail than an escaped convict. As it happened, three persons (including the applicants) who fall into the former category were recently caught by the dilemma occasioned by s. 39(1)(b). I do not think their predicaments can simply be dismissed as hard cases.

96. It also follows from the above analysis that I do not regard s. 39(1)(b) as a proportionate measure to pursue the aims of preserving public confidence in the LegCo or the electoral process and ensuring the proper operation of LegCo."

In rejecting the argument that respect for the law and enhancement of civic responsibility was a legitimate aim of s. 39(1)(b)(i) of Cap. 542, the CFI said at 108 – 109:

"100. I do not agree with the Secretary that the last objective, respect for the law and enhancement of civic responsibility, can on its own be regarded as a legitimate aim for the restriction on the right to stand for election. Insofar as a criminal conviction with prison sentence may reflect upon the suitability of a candidate (whether in terms of his respect for the law or his sense of civic responsibility), this has been considered in the preceding discussion. …

101. In substance the argument is that s. 39(1)(b) can serve as a special deterrent to those aspired in running for LegCo office in addition to the usual sanction under our criminal law. In my judgment, with respect, this conflated the proper function of electoral restriction under our election law with the function of our criminal law. LegCo members, like other citizens in Hong Kong, are subject to the same set of laws and the same treatment under our criminal justice system. Of course, LegCo members would also be politically accountable to the voters. But political accountability should not be confused with additional restrictions on the right to stand for election.

102. Further, s. 39(1)(b) extends to a prison sentence imposed in places other than Hong Kong for offences not known here and it can even be applied in respect of a sentence imposed by a jurisdiction which has no extradition arrangement with Hong Kong. That has little bearing on the respect for our law and civic responsibility as a Hong Kong citizen."

Chim Sui Ping v Hong Kong Housing Authority & Another (unreported, 17 September 2012, HCAL 139 of 2009)

Background

Chim Sui Ping ("applicant") was a tenant of a flat ("Flat") in a public housing estate under a tenancy agreement ("Tenancy Agreement") dated 9 July 2008 with the 1st respondent, the Hong Kong Housing Authority ("HA") as the landlord. Under the Tenancy Agreement, the tenancy commenced on 22 July 2008 where the applicant was the principal tenant and her son was included as a family member. Under the Tenancy Agreement, the applicant and her son were required to take up the tenancy within 1 month from 22 July 2008 and thereafter retain regular and continuous residence therein. During HA's random check for possible tenancy abuse, HA's officers visited the Flat for 18 times between 10 March and 15 May 2009 and nobody answered the door on each visit. The applicant was eventually found staying at her parents' flat in Mei Foo Sun Chuen ("Mei Foo Flat") and the applicant and her son only moved in the Flat on 18 June 2009.

The HA made a decision on 31 July 2009 to serve a Notice to Quit ("NTQ") on the applicant to terminate the Tenancy Agreement and required her to vacate the Flat ("HA's Decision"). The applicant lodged an appeal to the 2nd respondent, the Appeal Tribunal ("Appeal Tribunal") against the NTQ and the Appeal Tribunal made the decision on 22 September 2009 dismissing the appeal and upholding the NTQ ("the Appeal Decision"). The applicant applied for judicial review of (1) the HA's Decision; and (2) the Appeal Decision. The applicant argued, *inter alia*, that the HA's Decision and the Appeal Decision had failed to take

into account the right to home of the applicant and her son under BL 29 and BoR 14; and alternatively, it was a disproportionate interference with their right to home.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 29.

What the Court held

In balancing all the factors of the present case against the precious and very stringent public rental housing resources in Hong Kong, the CFI held that in the circumstances of the present case, a decision to terminate the Tenancy Agreement and evict the applicant was proportional to achieving the legitimate aim of a fair and efficient distribution and management of public housing resources for those in genuine need in Hong Kong and of preventing tenancy abuses. The CFI therefore rejected the applicant's argument that the HA and the Appeal Tribunal had failed to take into account the right to home of the applicant and her son under BL 29 and BoR 14 as well as the applicant's submissions on proportionality.

What the Court said

Au J (as he then was) held that the decision to terminate the Tenancy Agreement was proportional. He said at paragraphs 47 – 48 that:

"47. From these observations, one could distil the following guidelines in assessing proportionality in judicial review against public housing authority's eviction decisions:

(1) The question to be asked under the issue of proportionality is whether the eviction is a proportionate means of achieving a legitimate aim.

(2) The burden to show that the eviction is proportional is on the authority.

(3) However, in situations where the occupant has no right under private law to remain in the property, it would be regarded as a strong case in support of proportionality. In these cases, the proportionality of the eviction decision is generally strongly supported by (a) the vindication of the authority's unencumbered ownership rights, and (b) the fact that it would enable the

authority to comply with its duties in distributing and managing public housing resources for a fair allocation of its housing for the needy people. This is particularly so as it is both the right and obligation of the authority, in discharge of its duties, to decide who should occupy its property.

(4) Further, in this regard, unless the contrary is shown, the authority is generally assumed to be acting in accordance with its duties in dealing with the property in making an eviction decision when the authority is entitled under private law to possession per se.

(5) Thus, in most cases, where the authority is entitled to possession as a matter of private law, there will be a very strong case that the eviction decision is proportionate, unless there are clear and strong factors showing otherwise. Such factors may include circumstances of a particularly vulnerable occupant (such as one who is suffering from mental or physical illness) where the eviction together without the arrangement of an alternative accommodation may cause exceptional hardship on the occupant. But each case must be assessed on its own facts.

48. Applying these guidelines to the present case, it is clear to me that a decision to terminate the Tenancy Agreement is proportional in all the circumstances."

Au J also said that the proportionality of the NTQ was strongly supported by the following reasons at paragraphs 49 – 50:

"49. First, the proportionality of the NTQ is strongly supported by two facts:

(1) There is no dispute that the applicant was in breach of clause II(20) of the Tenancy Agreement. The HA was entitled to terminate the tenancy, and the applicant has no right under the Tenancy Agreement (or the HO) to remain in possession of the Flat. Thus, the NTQ would serve to vindicate the HA's ownership rights.

(2) The NTQ enabled the HA to comply with and discharge its duties in relation to the distribution and management of public housing resources in Hong Kong.

50. Secondly, in carrying out such duties and obligation, it is for the HA to balance between the applicant and her son's right to the Flat on the one hand, and the right of the public at large to public rental housing on the other. The HA's said right and obligation to decide who should occupy public rental housing should not generally be subject to 'second-guess' by the court."

Au J then considered the applicant's submissions of factors relevant to the proportionality issue and said at paragraph 54 that:

"54. … in my view, all these factors whether looked at alone or jointly, do not constitute any special circumstances to negate the strong case of proportionality of a decision to evict the applicant:

(1) The factors set out at paragraph 53(1), (2), (5) above apply to most tenancy abuses cases, and thus do not constitute any further strong grounds to show that the eviction is disproportional.

(2) Insofar as paragraph 53(3) is concerned, the Appeal Tribunal has taken that into account, but do not find the explanations to justify not terminating the tenancy. I do not find this conclusion to be unreasonable or irrational. Further and in any event, the breach in my view cannot be described as a minor one in light of the following evidence before me:

(a) By way of her signed Declaration dated 9 July 2008, the applicant confirmed to the HA of her understanding of the provisions of the Tenancy Agreement, which included the obligations to promptly move into, and thereafter maintain continuous residence, of the Flat. Notwithstanding this, she still breached the provisions. …

(b) Her explanation based on financial difficulty could only apply to the breach before January 2009. Since then, she was given sufficient money by the parents to enable her to promptly and quickly refurbish the Flat and move into it. This she did not do. … It was only after she had been interviewed by the HA officers in May for tenancy abuse that she reacted more promptly to furnish the Flat and decided to move into it in June 2009.

(c) The Flat was the applicant's fifth choice of public housing estate (in different locations and of varying ages) in two years' time (from 5 June 2006 to 24 June 2008). Finally after being given her choice, she however still misused it by not observing her obligations under the Tenancy Agreement.

(3) In relation to paragraph 53(4) above, although there is no dispute that she suffers from a form of mental illness, there is no evidence at all before me to show what adverse impact or effect, if any, it would have on her relating to the mental illness if she has to vacate the Flat. As such, I cannot see how this factor alone would make a strong case of vulnerability … In any event, in the present case, the evidence shows that the applicant could apply for interim housing when she vacates the Flat under the NTQ. This she has indicated that she would not need any such interim housing. … She has also revealed that her maiden family had already reserved a room for her

and her son at the Mei Foo Flat if she is to be evicted from the Flat. In these circumstances, I cannot see how it can be suggested that the NTQ would cause so much extra hardship on the applicant to the extent of rendering disproportionate a decision to evict her."

Au J therefore concluded that the decision to evict the applicant was proportional at paragraphs 55 – 56:

"55. In the premises, in balancing all these factors together against the precious and very stringent public rental housing resources in Hong Kong, I am clearly of the view that, in the circumstances of the present case, a decision to evict the applicant is proportional to achieving the legitimate aim of a fair and efficient distribution and management of public rental housing resources for those in genuine need in Hong Kong and of preventing tenancy abuses.

56. … I conclude that a decision to terminate the Tenancy Agreement and evict her in light of her breaches of the Tenancy Agreement is a proportional one."

Koon Wing Yee v Financial Secretary [2013] 1 HKLRD 76

Background

The Insider Dealing Tribunal ("IDT") found that Mr Koon Wing Yee, the appellant, had engaged in insider dealing under the Securities (Insider Dealing) Ordinance (Cap. 395) and the IDT imposed various orders. In the appeal to the CA, the constitutional issues included whether the IDT proceedings constituted an unconstitutional exercise by the IDT of judicial power of the HKSAR or whether the registration of the orders was an unconstitutional exercise of such power.

The appellant contended that BL 80 and BL 19 granted exclusively to the courts of the HKSAR all the judicial power of the HKSAR with the consequence that judicial power could not constitutionally be exercised by anybody which was not a court within the meaning of the Basic Law. He argued that two of the three members of the IDT were appointed by the Financial Secretary and not in accordance with BL 88. He further contended that those two members were not chosen on the basis of their

judicial qualities as required by BL 92. He also contended that Cap. 395 did not require the Chairman of the IDT to be a judge of the HKSAR so that, insofar as judicial power was purportedly vested in the Chairman of the IDT, that purported vesting was unconstitutional and of no legal effect. In support of his arguments, the appellant relied upon Australian authorities as to the meaning of the exercise of judicial power.

Basic Law provisions in dispute

The Basic Law provisions in dispute were BL 19, BL 80, BL 83, BL 88 and BL 92.

What the Court held

The CA held that the IDT proceedings did not constitute the exercise of judicial power of the HKSAR and were therefore not in breach of the Basic Law articles relied upon. The CA held that neither the IDT's decision-making nor the registration of the orders was an unconstitutional exercise of judicial power of the HKSAR.

The CA held that the powers of the legislature, the executive and the judiciary were separate under the Basic Law. The CA further held that the Basic Law incorporated a separation of powers principle, but it would not follow that the Basic Law necessarily mandated a model of separation of powers that conformed either to the United States or Australian model. It was unsafe to simply borrow and apply the Australian jurisprudence on the meaning of judicial power without regard to the difference between the strict Australian constitutional approach to separation of powers based on the United States federal model and the constitutional order in Hong Kong enshrined in the Basic Law. There should be a flexible and realistic approach to the doctrine of separation of powers, and a purposive and contextualized interpretation of the scope and meaning of "judicial power" in the Basic Law.

The CA held that it was necessary, when construing the relevant provisions of the Basic Law, to have regard to the important theme of continuity provided for between the pre-existing and present courts and judicial systems. Both at the time the Basic Law was promulgated (4

April 1990) and when it came into effect (1 July 1997), administrative bodies and tribunals had become prevalent and they performed or discharged numerous functions that had superficial resemblance to the judicial process. Given the theme of continuity, it would be very surprising if the effect of the Basic Law, upon its proper interpretation, would be to outlaw the administrative tribunals and bodies for ousting the jurisdiction or usurping the judicial functions of the courts of the HKSAR. The CA further held that it would be a very surprising suggestion if the IDT, which had been established before 1997 to deal with a particular type of evil affecting the financial markets, had suddenly become a usurper of judicial authority after the coming into force of the Basic Law.

What the Court said

At 92, the CA held that the powers of the legislature, the executive and the judiciary were separate under the Basic Law:

"47. [Counsel for the appellant] relied on the observation of Hartmann J (as he then was) in *Yau Kwong Man v Secretary for Security* (unrep., HCAL 1595, 1596/2001, [2002] HKEC 1142), [38] that:

It has not been disputed that the Basic Law is founded on what is commonly called the Westminster model. As such, the powers of the legislature, the executive and the judiciary are separate. In terms of Art.80, judicial power is vested in those appointed to hold judicial office. That being so, what the legislature cannot do, consistent with the separation of powers, is to place judicial power in the hands of the executive.

48. I do not regard that observation as controversial …"

At 92 – 94, the CA held that the IDT proceedings did not constitute the exercise of judicial power of the HKSAR and that it was necessary to apply a considerable degree of caution regarding the Australian authorities on the meaning of the exercise of judicial power:

"49. … did the IDT proceedings constitute the exercise of judicial power of the HKSAR?

50. In my judgment … the IDT proceedings did not constitute the exercise of such power and were therefore not unconstitutional by reason of inconsistency with the various Basic Law articles relied upon.

51. Considerable assistance in the appropriate analysis by which to address the question posed is provided in *Luk Ka Cheung v Market Misconduct Tribunal* [[2009] 1 HKLRD 114], a decision of the CFI consisting of Hartmann JA and Andrew Cheung J (as the Chief Judge then was) in which the Court considered whether the Market Misconduct Tribunal was exercising judicial power of the HKSAR. The Court held that it was not. Although not binding on us, I consider that the reasoning in the judgment in that case is highly persuasive in the present context.

52. In his judgment, with which Hartmann JA agreed, Andrew Cheung J stressed (at [29]–[30]) the importance of context in interpreting the Basic Law and observed (at [31]) that it was unsafe to simply borrow and apply Australian jurisprudence on the separation of powers in general, and on judicial power in particular, without first recognizing the rationale behind the Australian approach, which was a strict one based on its federal system.

54. … it is necessary to apply a considerable degree of caution before importing the *dicta* in the Australian authorities relied upon by the appellant as to the meaning of the exercise of judicial power. A similar sentiment was more recently expressed by Johnson Lam J (as he then was) in *Lee Yee Shing Jacky v Inland Revenue Board of Review* [2011] 6 HKC 307, [86]:

… for the reasons given by A Cheung J at paras.29 to 36 of his judgment in ***Luk Ka Cheung****, it is unsafe to simply borrow and apply the Australian jurisprudence on the meaning of judicial power without regard to the difference between the strict Australian constitutional approach to separation of power based on the United States federal model and the constitutional order in Hong Kong enshrined in the Basic Law. For this reason, it is more pertinent for our purposes to have regard to the purpose of the relevant articles in the Basic Law dealing with access to the courts as explained by Ribeiro PJ in [****Stock Exchange of Hong Kong Ltd v New World Development Co Ltd (2006) 9 HKCFAR 234****]. His Lordship pinpointed continuity with the previous legal system practised in Hong Kong as one of the objectives.*"

At 94 – 95, the CA held that, when construing the Basic Law provisions, it was necessary to have regard to the important theme of continuity:

"55. In terms of the context, it is important to note that, both at the time the Basic Law was promulgated (4 April 1990) and when it came into effect (1 July 1997), *'administrative bodies and tribunals had become prevalent and they performed or discharged numerous functions that had superficial*

resemblance to the judicial process': per Andrew Cheung J in *Luk Ka Cheung v Market Misconduct Tribunal*, [34].

56. Hence, at [36], Andrew Cheung J said (and I respectfully agree):

It is plain that in a modern society like Hong Kong, administrative tribunals and bodies have an important role to play. This is not a new phenomenon. It was already the case before the Basic Law was promulgated. Given the theme of continuity, it would be very surprising if the effect of the Basic Law, upon its proper interpretation, were to outlaw these administrative tribunals and bodies for ousting the jurisdiction or usurping the judicial functions of the courts of judicature of the HKSAR. Or put another way, the Basic Law should be interpreted in such a way as to enable, so far as violence is not done to the principle of separation of powers as understood in the tradition of English common law, the continued existence and development of administrative tribunals and bodies. This calls for a flexible and realistic, as opposed to an idealistic, approach to the doctrine of separation of powers, and a purposive and contextualized interpretation of the scope and meaning of 'judicial power' in the Basic Law, rather than following indiscriminately the strict interpretation adopted by the Australian courts towards their own Constitution, which was written under very different circumstances in order to serve its own unique purposes.

…

58. Next, in addition to context, it is necessary, when construing the relevant provisions of the Basic Law to have regard to the important theme of continuity provided for between the pre-existing and present courts and judicial systems, i.e. 'continuity with what went before': see *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd*, [43] and [45]. As Andrew Cheung J noted in *Luk Ka Cheung v Market Misconduct Tribunal* (at [37]), the IDT, which was the predecessor of the Market Misconduct Tribunal, was already in existence for some years before 1997.

59. In this regard, I find myself in complete agreement with the observations of Andrew Cheung J in *Luk Ka Cheung v Market Misconduct Tribunal* where he said:

[40] … the (pertinent) philosophy behind the Basic Law is one of continuity, and it would be a very surprising suggestion indeed if anybody were to suggest that the Insider Dealing Tribunal, which had been established before 1997 to deal with a particular type of evil affecting the financial markets that had been identified by the Executive/Legislature, had suddenly become

a usurper of judicial authority after the coming into force of the Basic Law.

[41] This is a highly relevant background fact, in the sense that how, historically, the subject matter under discussion has been dealt with and how the present regime came into being are material to determining whether the judicial power of the State is involved …"

At 95 – 97, the CA concluded that the IDT was not exercising the judicial power of the HKSAR:

"60. … it is pertinent that the subject matter of insider dealing, an 'insidious mischief' and 'very serious misconduct' … is not one which has traditionally or historically been the subject of adjudication by the courts of judicature. Instead, insider dealing is novel to the common law and is not a common law offence: see *Luk Ka Cheung v Market Misconduct Tribunal*, [42]–[43]. It is not a subject matter which has been removed from the jurisdiction of the courts and given to a statutory tribunal to be dealt with.

61. A further factor identified by Andrew Cheung J in *Luk Ka Cheung v Market Misconduct Tribunal* as an indicator that the Market Misconduct Tribunal is not exercising judicial power is the fact that, notwithstanding the creation of civil liability for market misconduct by s. 281 of the Securities and Futures Ordinance (Cap.571), that tribunal does not decide civil liability (see [48]–[49]). The same point can be made in respect of the IDT, which likewise does not decide civil liability. Indeed, evidence given in proceedings before the IDT, whilst admissible for the purposes of [Cap. 395], *'shall not be admissible against that person in any civil or criminal proceedings in a court of law by or against him'* (save for perjury): see [Cap. 395] s. 19.

…

63. The conclusion of Andrew Cheung J in respect of the Market Misconduct Tribunal in *Luk Ka Cheung v Market Misconduct Tribunal* was:

[54] In my view, to a substantial extent the Tribunal is performing a function comparable to that performed by a regulating body or disciplinary tribunal established to self-regulate a particular type of activity amongst a specific class of people in society. Of course, like solicitors disciplinary proceedings, the public at large has a stake in the matter in the sense that solicitors are here to provide legal services to the public and it is in the interest of the public that professional misconduct of solicitors be investigated into and dealt with accordingly. Likewise, the Tribunal is there to regulate the conduct of those involved in the financial markets in Hong Kong. The investing public and the reputation of Hong Kong as a serious financial centre all have a

stake in it. But it is very different in nature from, say, the determination of a criminal offence by a criminal court, or the adjudication of civil disputes before a civil court. The functions performed by the courts in those cases are qualitatively different from that performed by the Tribunal. Maybe this is just another way of putting the distinction between exercising the judicial power and exercising a judicial power of the State.

64. In my judgment, the same analysis applies to the IDT and I reach the same conclusion in respect of the IDT, namely that it is not exercising the judicial power of the HKSAR."

HKSAR v Lee Kwok Wah Francis [2013] 2 HKLRD 1009

Background

Under s. 153P of the Crimes Ordinance (Cap. 200), a person who commits any act outside Hong Kong against a child that would have constituted an offence specified in Schedule 2 of Cap. 200 had it been committed in Hong Kong, commits an offence if either: he is a Hong Kong permanent resident or ordinarily resides in Hong Kong (s. 153P(1)); or the victim is a Hong Kong permanent resident or ordinarily resides in Hong Kong (s. 153P(2)). The defendant, a permanent resident of Hong Kong, was indicted on seven counts of sexual offences under various provisions of Cap. 200, including s. 153P. The defendant was found guilty of five counts and sentenced to eight years' imprisonment. The five counts took place in the Mainland, with one being committed via online video chat.

The defendant applied to the CA for leave to appeal against the convictions and sentence. The defendant argued, *inter alia*, that: (1) the extra-territorial effect of s. 153P of Cap. 200 discriminated against him on the ground of his Hong Kong permanent resident status in breach of BL 25, BoR 1 and BoR 22; and (2) his right to a fair trial under BL 87 and BoR 10 had been encroached upon due to the massive coverage given by the media before and during the trial.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 25 and BL 87. The CA also referred to BL 24 and BL 41.

What the Court held

The CA held that s. 153P(1) of Cap. 200 did not discriminate against a Hong Kong permanent resident or a person who ordinary resided in Hong Kong and did not violate BL 25, or, BoR 1(1) and BoR 22. Under the United Nations Convention on the Rights of the Child, Hong Kong was required to protect children from sexual exploitation including child sex tourism. S. 153 of Cap. 200 targeted at sexual abuse of children outside Hong Kong and pursued the legitimate aim of preventing paedophiles who committed such acts from getting away unpunished by returning to the territory. Further, given the conditions in s. 153P(1) and (2) of Cap. 200 restricting the scope of the extra-territorial jurisdiction of Hong Kong, the distinction with reference to the status of persons provided for in Cap. 200 was rationally connected to the legitimate aim. The differential treatment was also no more than necessary to accomplish the legitimate aim. This is because a non-Hong Kong resident could be punished under laws of the place where he sexually abused children or the laws of his own country, but even if there were no similar provisions in the laws of his own country, it did not follow that a Hong Kong permanent resident or a person who ordinarily resided in Hong Kong suffered any discrimination.

As for widespread media coverage of his case, the CA found that the defendant had not been deprived of the right to a fair trial under BL 87 and BoR 10. The CA held that the foundation of the jury system was that jurors were required to follow directions given to them by the judge, able to try the case fairly on the evidence and to put aside extraneous prejudice before trial. The Court could make its decision on the basis that the jury had done so unless there was contrary evidence.

What the Court said

The CA set out the legal principles on equality before the law expounded

by the Court of Final Appeal in the case of *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 at 1030:

"26. … the Court of Final Appeal pointed out that equality before the law is a fundamental human right and is in essence the right not to be discriminated against (see para.1 of the judgment). The Court of Final Appeal expounded the legal principle that all persons are equal before the law without discrimination as follows:

(1) In general, the law should accord identical treatment to comparable situations.

(2) However, the guarantee of equality before the law does not invariably require exact equality. Differences in treatment under the law may be justified for good reason. To satisfy the justification test, it must be shown that:

(a) The difference in treatment pursues a legitimate aim; in other words, a genuine need for such difference must be established;

(b) The difference in treatment is rationally connected to the legitimate aim; and

(c) The difference in treatment is no more than is necessary to accomplish the legitimate aim.

(3) Requirement (a) cannot be established from the mere act of legislative enactment. …

(4) Where the difference in treatment satisfies the justification test, the correct approach is to regard the difference in treatment as not constituting discrimination. Unlike some other constitutional rights, such as the right of peaceful assembly, it is not a question of an infringement of the right which may be constitutionally justified. …"

The CA held at 1031 – 1032 that s. 153P (1) of Cap. 200 pursued a legitimate aim:

"28. Section 153P(1) clearly draws a distinction between permanent residents and non-permanent residents, but the Court of Final Appeal had held that the giving of different treatment to different people might be justified for good reason. According to the criteria set by the Court of Final Appeal, the respondent was required to show that the difference in treatment pursues a legitimate aim.

29. In our judgment, it is patently obvious that s. 153P (1) pursues a legitimate aim. Even though the Optional Protocol is still not applicable

to Hong Kong, in order to implement what is required under art.34 of the United Nations Convention on the Rights of the Child, Hong Kong has an unshirkable duty to enact laws to protect children from sexual abuse. In Hong Kong there is no shortage of laws for combating activities involving sexual abuse of children within our territory, but such activities do not take place just within Hong Kong, they also take place outside Hong Kong. It is common knowledge that there are adults who travel from their home countries to other places, in particular developing countries or less-developed places, to engage in sexual activities involving children. It is therefore necessary to stipulate in the law that committing acts of sexual abuse of children outside Hong Kong is a criminal offence …

30. We consider that the applicant's argument is a one-sided view. The use of the word 'jurisdiction' in art.2 [of the Convention on the Rights of the Child] does not mean that the duty of a State Party is limited to protecting children within its territory; on the contrary, the scope of its duty covers child abuse cases which happen outside its territory. Section 153P(1) is targeted at paedophiles who sexually abuse children outside Hong Kong. Its purpose is to prevent them from getting away unpunished by just returning to Hong Kong. This point was clearly brought out in the documents submitted to the Legislative Council and referred to above. In other words, there was a genuine need for enacting s. 153P. In Canada, legislation similar to s. 153P was enacted in accordance with the Convention on the Rights of the Child (See *R v Klassen* (2008) 240 CCC (3d) 328)."

The CA further held that s. 153P of Cap. 200 met the requirement of rational connection. The Court said at 1032:

"31. One of the criteria for satisfying the test is that the difference in treatment must be rationally connected to the legitimate aim. We consider that the Ordinance also meets the requirement of rational connection. A law which extends the jurisdiction to places outside Hong Kong must be subject to limitations; otherwise, the Hong Kong authorities would prosecute any person who sexually abused any children outside Hong Kong. Such kind of authority will be too wide.

32. The limitations are set out in s. 153P(1). A person will be prosecuted only if one of the following two conditions is fulfilled:

(1) He is a Hong Kong permanent resident or he ordinarily resides in Hong Kong (s. 153P(1)); or

(2) The victim is a child who is a Hong Kong permanent resident or who

ordinarily resides in Hong Kong (s. 153P(2)).

33. These two conditions restrict the scope of the extra-territorial jurisdiction of Hong Kong, therefore the distinction with reference to the status of persons provided for in the Ordinance is rationally connected to the legitimate aim."

The CA considered that s. 153P of Cap. 200 was no more than was necessary to accomplish the legitimate aim at 1032 – 1033:

"34. If a person who is not a Hong Kong permanent resident or who does not ordinarily reside in Hong Kong sexually abuses children in any place outside Hong Kong, he can be punished under the laws of that place; or if the laws of his own country contain provisions similar to s. 153P, he may also be punished under the laws of his own country after he returned home. However, even if there are no similar provisions in the laws of this person's country, it does not follow that a Hong Kong permanent resident or a person who ordinarily resides in Hong Kong suffers any discrimination. On the basis of the above reason, such differential treatment is no more than is necessary to accomplish the legitimate aim. We do not think that s. 153P is in any sense discriminatory against a Hong Kong permanent resident or a person who ordinarily resides in Hong Kong."

With regard to the defendant's argument on the encroachment of the right of a fair trial conferred on him by BL 87 and BoR 10, the CA considered the legal principles in the cases of *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR and *Montgomery v HM Advocate (PC)* [2003] 1 AC 641 on the effects of media reports on a trial and said at 1035 – 1037:

"42. In *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133, the Court of Final Appeal made the following comments about the legal principles applicable to questions about the effects of media reports on a trial:

(1) In a society where the press is free it is inevitable that the reporting of crime will, in some sections of the media, be lurid and sensationalist, sometimes even at the risk of punishment for contempt. The more heinous or shocking a particular crime, the more it is likely to be given notoriety and to receive potentially prejudicial reporting. Jurors will therefore almost certainly have been exposed to some degree to such media coverage, prejudicial to the accused.

(2) Reliance on the integrity of the jury and its ability to try the case fairly on the evidence, to put aside extraneous prejudice and to follow the directions

of the judge is fundamental to the jury system itself.

(3) There is good sense in regarding a jury, properly directed, as able to overcome prejudicial publicity in the vast majority of cases. First, with the passage of time, any recollection that a juror may have of adverse publicity can be expected to fade, lessening its prejudicial effect.

(4) Secondly, the jury may sensibly be credited with the ability to overcome any pre-trial prejudice because of the nature and atmosphere of the trial process itself. Whatever impression of the case members of the jury may have gained beforehand, at the trial, they are given direct, first-hand access to the actual evidence in the case, presented systematically and in detail, with live witnesses tested by cross-examination and exhibits tendered for inspection. They are addressed as to the significance of such evidence by counsel on both sides and guided by the impartial summing-up of the judge. Many jurors will already harbour a healthy scepticism about certain kinds of press reporting. They can be credited with the intelligence to realize that whatever may have been reported, they are far better placed at the trial to make up their own minds on the evidence, with the help of the judge's direction.

See pp.189–192B of the judgment of that case.

43. The Privy Council held the same views in *Montgomery v HM Advocate (PC)* [2003] 1 AC 641 at 673F–674G …

44. The issue in that case was the defendants' complaint that the extent of the media reports was such that it would be impossible for them to have a fair trial as required by art.6(1) of the European Convention [sic] on Human Rights. The Privy Council considered that it was only by having regard to all the circumstances that a decision on this issue could be made, and that the circumstances included the following three matters:

(1) the length of time since publication of the reports;

(2) the focusing effect of listening to evidence over a prolonged period; and

(3) the likely effect of the directions by the trial judge."

The CA held that the defendant was not deprived of the right to a fair trial and said at 1037:

"46. … The foundation of the jury system is that the jurors are required to follow instructions given to them by the judge. Unless there is actual evidence that the jurors have not done what is required of them, the Court must make its decision on the basis that they have done so. The applicant's

allegation that the jurors might have searched for information in disregard of Pang J's direction is groundless. We reject his submission in this connection.

47. … When Pang J's directions are considered in their entire context, what he meant was that the jury should disregard those reports which had nothing to do with the case and had not been tested by counsel in court. We do not agree that the applicant was deprived of the right to a fair trial."

Ubamaka v Secretary for Security (2012) 15 HKCFAR 743

Background

The appellant was subjected to a deportation order, pursuant to which he would be deported to Nigeria. If so deported, he would face the risk of prosecution and punishment under the Nigerian law for the same conduct, i.e. drug trafficking, which had led to his conviction and incarceration for 16 years in Hong Kong. The appellant contended that the execution of the deportation order would violate his constitutionally protected rights not to be subjected to double jeopardy and not to be subjected to cruel, inhuman or degrading treatment or punishment ("CIDTP").

This appeal also raised important issues concerning the constitutional validity, scope and effect of the reservation concerning immigration legislation contained in s. 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383), which provides that: "As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation." The appeal raised issues regarding whether the appellant could invoke the protection against double jeopardy and against CIDTP.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 39.

What the Court held

The CFA dismissed the appellant's appeal and held that s. 11 of Cap. 383 was consistent with BL 39 and hence constitutional.

The CFA also held that the right not to be subjected to CIDTP under BoR 3 was non-derogable, meaning that there could be no derogation from it even in times of public emergency which would threaten the life of the nation. As the right not to be subjected to CIDTP was absolute, a breach could not be justified on any grounds.

As BoR 3 rights were absolute and non-derogable, the immigration reservation contained in s. 11 of Cap. 383 should not be understood to exclude the application of Cap. 383 and the BoR in relation to the exercise of powers and the enforcement of duties under immigration legislation regarding persons not having the right to enter and remain in Hong Kong insofar as the rights under BoR 3 were engaged.

Accordingly, if the risk of being subjected to CIDTP was duly established, the proposed deportee could not be exposed by the HKSARG to such a risk, however objectionable might be his conduct or character supplying the ground for his proposed expulsion.

On the facts of the present case, the appellant could not establish that he would face the risk of CIDTP. The CFA was not satisfied that the ill-treatment he would face if expelled attained a "minimum level of severity"; or that he faced a genuine and substantial risk of being subjected to such mistreatment.

The appellant's challenge based on the double jeopardy ground also failed, as the CFA held that the immigration reservation contained in s. 11 of Cap. 383 precluded reliance on the right against double jeopardy, which was neither non-derogable nor absolute. Further, the right would only apply within the territorial limits of the HKSAR.

What the Court said

The CFA held at 775 – 776 that s. 11 of Cap. 382 was valid as a matter of Hong Kong law:

"89. As a matter of Hong Kong law, the Hong Kong courts have invariably

viewed section 11 (without qualifying it by any narrow construction) as consistent with the immigration reservation and with Article 39. …

90. Prior to 1st July 1997, the question arose in *Wong King-lung v Director of Immigration*, as to whether the immigration reservation, taken to be reflected in the terms of section 11, was valid. Having noted that the ICCPR could be modified by a reservation provided it was not incompatible with the objects and purpose of the Covenant, Jones J held that section 11 was consistent with those aims.

91. In *In re Hai Ho-tak v Attorney General*, the Court of Appeal held that section 11 precluded reliance on BOR Art 14 (prohibiting unlawful interference with family life). Mortimer JA commented that:

Section 11 is an essential limitation on the general provisions of the international covenant brought about by the reality of Hong Kong's geographical position and economic success. It follows the United Kingdom's reservation to the international covenant's application to Hong Kong.

92. … in preparation for the 1997 transition, acting pursuant to Article 160 of the Basic Law, the Standing Committee of the National People's Congress by its Decision of 23 February 1997, disallowed certain presently immaterial provisions of [Cap. 382], but otherwise confirmed adoption of the rest of the Ordinance, including section 11, as part of the laws of the HKSAR at least prima facie consistent with the Basic Law.

93. Since 1st July 1997, section 11 has been discussed on a number of occasions in this Court without anyone detecting any inconsistency between that provision and either the original immigration reservation or Article 39 of the Basic Law. …

94. In *Tam Nga Yin v Director of Immigration*, the Court was concerned with the question whether BOR Art 19(1) was displaced by section 11. The majority recognized that:

The effect of the reservation and s 11 is that the ICCPR and the Bill of Rights do not apply to and do not affect immigration legislation regarding persons not having the right to enter and remain in Hong Kong …"

The CFA concluded at 777 that s. 11 was consistent with BL 39:

"96. … I therefore conclude that section 11 is consistent with Article 39 and constitutionally valid. I turn then to a consideration of the reach or scope of section 11 on its proper construction."

The CFA held that, construed purposively, s. 11 of Cap. 382 would be

qualified by s. 5. The CFA held at 783 – 784 that:

"114. In my judgment, the clear words of section 5 establish the non-derogable character of the right not to be subjected to torture or CIDTP protected by BOR Art 3. It is also clear from the highly persuasive jurisprudence of the Strasbourg Court and the House of Lords in relation to the closely analogous provisions of the ECHR that BOR Art 3 rights are not only non-derogable but also absolute. Such jurisprudence shows that the absolute character of the protection against torture and CIDTP is an internationally accepted standard or, as Lord Steyn puts it 'a universal minimum standard'.

115. Accordingly, any apparent conflict between section 5 and section 11 or any ambiguity as to the statutory purposes of those provisions should be resolved by giving precedence to section 5, according decisive weight to the non-derogable and absolute character of the rights protected by BOR Art 3. Therefore, construed purposively, section 11 must be read as qualified by section 5. Section 11 must be understood to exclude the application of HKBORO and BOR in relation to the exercise of powers and the enforcement of duties under immigration legislation regarding persons not having the right to enter and remain in Hong Kong except insofar as the non-derogable and absolute rights protected by BOR Art 3 are engaged."

The CFA rejected the appellant's challenge based on double jeopardy. The CFA held at 795 that:

"162. The appellant's challenge to the deportation order founded on BOR art.11(6) must fail. Section 11 precludes reliance on that provision. The right which it protects, namely, the right not to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong is neither non-derogable (not being mentioned in s. 5) nor absolute.

…

164. I respectfully agree both with Reyes J and the Court of Appeal that an additional ground for concluding that BOR art.11(6) does not avail the appellant is that it only applies within the territorial limits of the HKSAR. As noted … above, Covenant rights generally operate within such limits, an exception having been made in respect of BOR art.3 because of the absolute character and non-derogable character of the prohibition of CIDTP and the severe and irreparable harm it entails. There are no grounds for making such an exception in relation to BOR art.11(6)."

Re Hui Kee Chun (unreported, 1 February 2013, CACV 4 of 2012)

Background

The applicant was a former lecturer of the Hong Kong Institute of Vocational Education of the Vocational Training Council. In October 2005, the applicant met with his department head ("Mr Tam") for lunch and they discussed the applicant's work performance. The applicant secretly recorded their conversations without Mr Tam's knowledge. In November 2005, the applicant provided to the media the download links to the lunch conversation, and subsequently posted an article on two websites in which reference was made to the conversations. Messages showing hyperlinks to the articles were also posted on internet forums. Mr Tam made a complaint to the Privacy Commissioner for Personal Data ("Commissioner") and the Commissioner found that the applicant had contravened Data Protection Principle 3. Pursuant to s. 50 of the Personal Data (Privacy) Ordinance (Cap. 486), the Commissioner served on the applicant an enforcement notice ("Enforcement Notice"), directing him to take actions including removing the recorded conversation from the websites and forums. The applicant lodged an appeal to the Administrative Appeals Board ("Board") against the findings of the Commissioner and the Enforcement Notice, which was dismissed by the Board. The applicant did not comply with the Enforcement Notice and as a result, he was convicted and fined in Tuen Mun Magistrate Court in 2008.

In 2006, the applicant issued a writ in the High Court against the Commissioner. The claim was struck out by a Master of the High Court and the decision was affirmed by a Judge on appeal. The applicant's appeals to the CA and the CFA were both dismissed. The applicant then applied for leave to apply for judicial review against: (1) the Enforcement Notice; (2) the decision of the Board; and (3) the conviction and sentence. The CFI refused to grant him leave to apply for judicial review and the applicant appealed to the CA. The applicant argued, among other things, that the refusal of leave to apply for judicial review violated his right of access to court under BL 35 and BoR 10.

Basic Law provisions in dispute

The major provision in dispute was BL 35.

What the Court held

The CA held that the refusal of leave to apply for judicial review did not violate the applicant's right of access under BL 35 and BoR 10.

The CA held that under s. 21K(3) of the High Court Ordinance (Cap. 4) and Order 53, rule 3(1) of the Rules of High Court (Cap. 4A), the leave of the court was required to bring judicial review. Such leave would only be granted for cases with realistic prospects of success. The refusal of leave to apply for judicial review by itself would not amount to a violation of BL 35 or BoR 10.

What the Court said

The CA considered that the refusal of leave to apply for judicial review *per se* would not amount to a violation of the right of access to court and said at paragraphs 31 – 32:

"31. Under section 21K (3) of the High Court Ordinance, Cap. 4 and Order 53 rule 3(1) of the Rules of the High Court, Cap. 4A, leave of the court is required to bring judicial review. Leave to proceed will only be granted where the case enjoys realistic prospects of success: *Po Fun Chan v. Winnie Cheung* (2007) 10 HKCFAR 676. The Court of Final Appeal had also held that the granting of leave is discretionary and leave can also be refused on other grounds, including delay or where the proceedings are academic or that there exists an adequate alternative remedy: at paragraphs 18 and 52.

32. In the light of the statutory requirement for leave, it is untenable that the refusal of leave to apply for judicial review *per se* amounts to a violation of the right of access to court under the Basic Law or the HKBORO. As the Court of Final Appeal pointed out, the leave requirement is an important filter to prevent public authorities from being unduly vexed with unarguable challenges. Further, the filtering out of unarguable cases is conducive to according expedition to those arguable cases in particular need of being dealt with expeditiously: at paragraphs 14 and 19. Since the Judge came to the conclusion that the application for judicial review was unarguable, he was duty bound to refuse leave. The only issue is whether the Judge was

correct in concluding that the applicant's intended application for judicial review has no realistic prospect of success."

HKSAR v Minney (2013) 16 HKCFAR 26

Background

The appellant pleaded guilty to two offences of possession of dangerous drugs. Cocaine was found in five plastic bags, four of which contained small quantities of cocaine, and the appellant had taken three with him to a bar at Lamma Island. In view of the "latent risk", i.e. risk that some of the cocaine might fall into the hands of others, the Deputy District Judge increased the starting points of imprisonment from 6 months and 12 months for the two offences to 9 months and 15 months respectively.

The appellant argued on appeal that the latent risk sentencing principle contravened the presumption of innocence protected in BL 87 and BoR 11(1) since it imputed to a person convicted of a possession offence an unproven intent, predilection or propensity to commit the more serious offence of trafficking contrary to s. 41(1)(a) and (3) of the Dangerous Drugs Ordinance (Cap. 134). In other words, the appellant argued that it was impermissible to have regard to the risk of dissemination, not because the risk was unreal, but because to do so, one would be punishing the possessor for his "present conditional intention" to traffic in dangerous drugs, which was tantamount to punishing him for an offence (of trafficking in dangerous drugs) which he had not been charged. The CA dismissed the appellant's appeal and he appealed to the CFA.

Basic Law provisions in dispute

The major provision in dispute was BL 87.

What the Court held

The CFA held that a sentencing court could take into account the risk

that the drug would fall into the hands of others but the possessor must not be sentenced as if he had been convicted of trafficking. This did not mean that the Court attributed to a defendant an intention to traffic in the drugs, but simply reflected the fact that the quantity and circumstances of their possession were such as to pose a risk to society. The assessment of the risk of dissemination depended on the drawing of the correct inference from the circumstances of the possession as established on the evidence. Before any such inference was drawn, the sentencing court must be sure that in all the circumstances of the particular case, the risk of dissemination was real. The sentencing judge was best placed to decide whether there was such a real risk. Often times, it was just a matter of common sense.

Accordingly, the CFA held that the assessment of the risk of dissemination and the latent risk sentencing principle did not contravene the presumption of innocence protected in BL 87 and BoR 11(1). It was not a question of punishing a person for a crime he had not committed and it was not a question of punishing him for a crime he might commit. It was a question of punishing him for the crime which he had committed taking into account the circumstances of its commission and the dangers to society which those circumstances created.

What the Court said

In considering the latent risk sentencing principle, the CFA considered the cases of *R v Chiu Hung Wong* [1994] 1 HKCLR 184, *R v Lee Siu Lung* [1995] 2 HKCLR 247, *HKSAR v Mok Cho Tik* [2001] 1 HKC 261, *HKSAR v Wan Sheung Sum* [2000] 1 HKLRD 405 and held at 32 that:

"14. These authorities show clearly an awareness that whilst a sentencing court may take into account the risk that the drug will fall into the hands of others, the possessor must not be sentenced as if he had been convicted of trafficking."

The CFA also agreed with the judgment of Fok JA (as he then was) at the CA. At 32 – 33, the CFA said:

"15. Here, Fok JA said:

[28] … there can be no objection to a sentencing court taking into account the relevant circumstances of the case in determining whether the

possession of the drugs leading to the conviction are such as to give rise to a real risk that some of those drugs might end up being redistributed and finding their way into the hands of others apart from the offender's. That is not to say that the court then attributes to the defendant an intention to traffic in the drugs but simply reflects the fact that the quantity and circumstances of their possession are such as to pose a risk to society.

16. With respect, I agree. The assessment of the risk of dissemination depends on the drawing of the correct inference from the circumstances of the possession as established on the evidence. Before any such inference is drawn, the sentencing court must be sure that in all the circumstances of the particular case, the risk of dissemination is real. The sentencing judge is best placed to decide whether there is such a real risk. Often times, it is just a matter of common sense.

17. The sentencing judge must also bear in mind Fok JA's reminder that:

[31] …

(1) if a judge is minded to enhance sentence on the basis of risk of dissemination, he must forewarn counsel for the accused, to enable the accused to challenge the issue, if necessary by the giving of evidence;

(2) a judge is not to sentence for unproved trafficking, namely an unproved actual intention to traffic."

At 33, the CFA held that the court's approach did not contravene the presumption of innocence:

"18. The authorities discussed above show that the court's approach to latent risk does not in anyway contravene the presumption of innocence. As Fok JA explained:

[29] … It is not a question of punishing a person for a crime he has not committed. It is not a question of punishing him for a crime he may commit. It is a question of punishing him for the crime which he has committed taking into account the circumstances of its commission and the dangers to society which those circumstances create."

Lee Bing Cheung (李炳章) v Secretary for Justice [2013] 3 HKC 511

Background

The plaintiff rented house units in 1949 and later bought the house units in 1952. The house units stood on a piece of unleased government land ("Government Land") adjoining a leased lot. On 29 January 2010, the HKSARG evicted the plaintiff's tenant from a house unit standing on the Government Land and took possession of the Government Land. The plaintiff claimed against the Secretary for Justice ("defendant") for declaratory reliefs and damages in respect of the Government Land on, *inter alia*, the ground of adverse possession. The defendant claimed that the Government was entitled to recover possession of the Government Land.

The defendant's case was that the resumption of sovereignty over Hong Kong by the PRC on 1 July 1997 constituted a break to the plaintiff's possession of the Government Land for the purpose of determining whether the relevant limitation period had expired, as the HKSARG's right to sue for possession only accrued as from 1 July 1997 when it came into existence. The defendant claimed that the HKSARG's right of action was independent of any such right by the British Hong Kong Government ("BHKG") in right of the British Crown.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 7 and the CFI also deliberated on the Preamble of the Basic Law ("BL Preamble").

What the Court held

The CFI rejected the defendant's argument that under the Basic Law, the PRC was entitled to all land in Hong Kong, which land was and had always been State property, and what happened on 1 July 1997 had been a resumption of sovereignty over land that had always belonged to the PRC ("Ownership Argument").

The CFI held that the language of BL 7 did not support the contention

that, as a matter of local municipal law, all land in Hong Kong was and had always been the property of the PRC. There was no express reference in BL 7 to land ownership in Hong Kong before 1 July 1997, and there was no ambiguity that the provision only concerned land in Hong Kong on and after 1 July 1997.

The CFI did not agree that, insofar as Hong Kong municipal law was concerned, the BL Preamble must mean that all land in Hong Kong had always been the property of the PRC. The Court held that the BL Preamble recognized Hong Kong's history and realities including its occupation by Britain after the Opium War in 1840. Insofar as the broad terms of the enactment background set out in the BL Preamble concerned acts of State that led to the resumption of sovereignty, they were not matters that were justiciable in municipal courts.

The CFI further held that under Hong Kong municipal law, it was by virtue of the enactment of the Basic Law (especially BL 7), and not as a result of ancient rights, that all land and natural resources in the HKSAR became State property on and after 1 July 1997.

The CFI also rejected the defendant's suggestion that the position of the PRC was analogous to that of a reversioner who could not sue for possession during the pendency of the lease, such that time would not run against the HKSARG before 1 July 1997 as the HKSARG could only have sued for possession as from that date ("Reversioner Analogy").

The CFI held that under Hong Kong municipal law, the transition of land tenure being part of Hong Kong's transition from a British Colony to a SAR was achieved by the enactment of the Basic Law and the Hong Kong Reunification Ordinance. The system of land tenure had not changed after 1 July 1997 save that all land in Hong Kong had become State property and was managed, used, developed and leased by the HKSARG. This meant that all rights of "ownership" held by the BHKG in right of the British Crown in respect of land in Hong Kong prior to 1 July 1997 were the same rights held by the PRC and/or the HKSARG in right of the PRC on or after 1 July 1997.

Although the plaintiff had not been in possession of the Government

Land for 60 years by 1 July 1997, the CFI found that he had acquired "inchoate rights" as an encroacher or adverse possessor against the BHKG in right of the British Crown, or, in other words, the Limitation Ordinance (Cap. 347) to some extent had already started to operate in his favour on 30 June 1997.

The CFI held that the plaintiff had been in possession of the Government Land for more than 60 years, and his claim for encroachment of the Government Land for the benefit of the Government *qua* landlord must succeed.

What the Court said

The CFI held that the Basic Law did not have retrospective effect. The CFI said at 551A – E that:

"146. Likewise, in *Harvest Good Development Ltd v Secretary for Justice & Ors* [2007] 4 HKC 1, 19-20, Hartmann J (as he then was) held there is a presumption that legislative instruments shall not be construed as having retrospective effect (and such presumption was not rebutted in respect of articles 6 and 105 of the BL). He said as follows at p 20:

'66. As to retrospectivity, I start by saying that, reading the [BL] in the context of its purpose, I can find no provision to the effect that, concerning rights of private property, the [BL] shall operate retrospectively. There is certainly no clear language that it shall have such effect. Nor, in my view, on a reading of the [BL] or relevant extraneous materials, does such a construction arise by necessary implication.

67. The [BL], it appears to me, while it recognizes history, seeks to set up a new order, one to take effect on the resumption of sovereignty on 1 July 1997. It is therefore a forward-looking document, not one that seeks to reach back in order to influence or alter what came before. In this regard, the third paragraph to the [BL Preamble] reads:

'In accordance with the Constitution of the [PRC], the National People's Congress hereby enacts the [BL] of the [HKSAR] of the [PRC], prescribing the systems ***to be*** *practised in the [HKSAR], in order to ensure the implementation of the basic policies of the [PRC] regarding Hong Kong.' [my emphasis]"*

The CFI also said that international obligations had no effect in

municipal law and the courts were bound to apply municipal law at 551G – 552A:

"147. … International obligations have no effect in municipal law, and the courts are bound to apply municipal law. It was held in *Tang Ping-hoi v Attorney General* [1987] HKLR 324, 326-328 and *The Home Restaurant Ltd v Attorney General* [1987] HKLR 237, 245-246 that the JD being an international treaty is not justiciable in the municipal courts. The municipal courts cannot undertake any exercise that involves construction of the JD or adjudication of transactions of sovereign states."

At 552F – H, the CFI explained the role of the BL Preamble on interpretation of the Basic Law:

"151. … where appropriate, the courts may utilize the BL Preamble as an internal aid to throw light on the operative part of the BL.

152. To start, one should not read Article 7 in isolation but should consider the purpose and context of such operative part of the enactment (including any aids that may illuminate the text of such provision and make clear its intended meaning) in order to decide whether or not any real doubt exist as to its meaning. If such study of the enacting words in their context and purpose shows they are plain and clear, then the BL Preamble cannot influence the meaning otherwise ascribable to Article 7 even if the latter falls short of the indications that may be gathered from the former. It is only when the BL Preamble conveys a clear meaning as compared to the ambiguous or indefinite enacting words of Article 7 that the BL Preamble (especially if it goes further) may prevail."

The CFI then held that BL 7 did not support the contention that all land in Hong Kong was and had always been the property of the PRC. The CFI said at 552I – 553H:

"153. In my view, the language of the text of Article 7 does not support the contention that as a matter of local municipal law all land in Hong Kong is and has always been the property of the Chinese State, and it is not correct to say that Article 7 draws no distinction as to time. In fact, Article 7 states that the land and natural resources 'within the Hong Kong Special Administrative Region' shall be State property (香港特別行政區境內的土地和自然資源屬於國家所有). Since the HKSAR only came into existence on 1 July 1997, there is plainly no express reference in the text of Article 7 to land ownership in Hong Kong before that date, and no ambiguity that the provision only concerns land in Hong Kong *on and after* 1 July 1997."

The CFI said at 553H – 554A that:

"155. I therefore do not agree that, insofar as Hong Kong municipal law is concerned, the BL Preamble's own meaning must be that all land in Hong Kong has always been the property of the Chinese State. In fact, the BL Preamble recognizes Hong Kong's history and realities including its occupation by Britain after the Opium War in 1840. In coming to this view, I am fortified by the presumption against retrospectivity which Mr Man [counsel for the defendant] does not seek to rebut. But I must make clear that such conclusion only concerns the municipal law and not acts of State between the British and Chinese Governments. Insofar as the broad terms of the enactment background set out in the BL Preamble concern acts of State that led to the resumption of sovereignty, they are not matters that are justiciable in the municipal courts."

With regard to the question of land ownership in Hong Kong prior to 1 July 1997, the CFI said at 554D – G that:

"157. As a matter of the 'history and realities' referred in the BL Preamble, Hong Kong was occupied by Britain after the Opium War in 1840. The Letters Patent (The Hong Kong Charter) of 5 April 1843 established Hong Kong Island as the 'Colony of Hong Kong' and laid down general principles for setting up the BHKG. So all land on Hong Kong Island became owned by the British Crown and were managed/administered by the BHKG in right of the British Crown. The then newly established Legislative Council enacted the Supreme Court Ordinance 1844 which by s 3 provides *inter alia* that '… in all matters and questions touching the right or title to any real property [in the Colony of Hong Kong], the law of England shall prevail. …' Therefore, under Hong Kong municipal law, the British Crown was the owner over all land on Hong Kong Island. …"

The CFI further held that it was by virtue of the enactment of the Basic Law (especially BL 7) that all land and natural resources in the HKSAR became property of the PRC after 1 July 1997 and rejected the defendant's Ownership Argument. The CFI said at 555E – G that:

"160. … 'the then prevailing Hong Kong law' recognizes one owner of the land at any one time but not any 'vacuum' or abeyance of ownership. Since the maximum duration of leasehold estates granted by the BHKG in right of the British Crown was fixed in time, before 1 July 1997 'ownership' of land in Hong Kong (or at least on Hong Kong Island) in the fullest sense necessarily remained with the British Crown and/or with the BHKG exercising British

Crown ownership, which gave rise to the BHKG's right to sue for possession of the Government Land. I do not accept there was any abeyance or hiatus in the Chinese State's 'ownership' over land in Hong Kong before 1 July 1997 under the then prevailing municipal law. I hold that under Hong Kong municipal law it is by virtue of the enactment of the BL (especially Article 7) and not as a result of ancient rights that all land and natural resources in the HKSAR became State property on and after 1 July 1997. I reject the Ownership Argument."

The CFI also rejected the defendant's argument that the PRC was a reversioner. The CFI said at 556F – 557B that:

"163. Quite plainly, even on the defendant's own case, the Chinese State is not a reversioner or in a position analogous to a reversioner. Mr Man does not suggest that the Chinese State has disposed of a lesser estate in respect of all land in Hong Kong to the British Crown by way of a grant. In such circumstances and given my rejection of the Ownership Argument, the Chinese State's entitlement to such land after 1 July 1997 cannot be the 'remnant of an estate which has never been passed away from the grantor'. Consequently, the Reversioner Analogy falls away, and the SARG's right to sue for possession of the Government Land does not turn on any 'reversionary' interest falling into possession or on any derivation of title.

164. In my view, under Hong Kong municipal law, the transition of land tenure being part of Hong Kong's transition from a British Colony to a Special Administrative Region of the PRC under the principle of 'one country, two systems' upon the resumption of sovereignty by the Chinese State on 1 July 1997 is achieved by the enactment of the BL and the Hong Kong Reunification Ordinance (HKRO) …"

The CFI held that the system of land tenure had not changed after 1 July 1997 save that all land in Hong Kong had become State property. The CFI said at 557B – 559A that:

"164. … The system of land tenure has not changed after 1 July 1997 save that all land in Hong Kong has become State property and is managed, used, developed and leased by the SARG (see articles 120-123 in s 2 of Chapter V of the BL). This means that all rights of 'ownership' held by the British Crown and/or the BHKG in right of the British Crown in respect of land in Hong Kong prior to 1 July 1997 are the same rights held by the Chinese State and/or the SARG in right of the Chinese State on or after 1 July 1997.

…

169. … I have rejected the Ownership Argument. Under Hong Kong municipal law and consistent with the meaning of the BL, s 30(1) of the HKRO vests and transfers all property, rights and liabilities belonging to the British Crown and/or the BHKG in right of the British Crown to the SARG on 1 July 1997. Hence, the land rights held by the SARG over all land in Hong Kong are the same rights as those previously held by the British Crown and/or the BHKG in right of the British Crown."

Vallejos v Commissioner of Registration (2013) 16 HKCFAR 45

Background

The two appellants were Philippine nationals who had entered Hong Kong for employment as foreign domestic helpers ("FDHs") and had lived in Hong Kong for over 20 years. However, s. 2(4)(a)(vi) of the Immigration Ordinance (Cap. 115) provides that a person employed as a FDH who is from outside Hong Kong is not to be treated as "ordinarily resident" in Hong Kong and so could not become a Hong Kong permanent resident.

The appellants argued that they had "ordinarily resided" in Hong Kong for a continuous period of more than 7 years for the purpose of BL 24(2)(4) and the restriction in s. 2(4)(a)(vi) of Cap. 115 was inconsistent with BL 24(2)(4) and unconstitutional. The respondent submitted, *inter alia*, that insofar as might be necessary, the CFA should make a reference under BL 158(3) and seek the NPCSC's interpretation of the meaning of "interpretation" in BL 158(1).

The CFI accepted the appellants' argument but the CA reversed the decision in favour of the respondent. The CFA dismissed the appellants' appeal.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 24(2)(4) and BL

158(3).

What the Court held

The CFA held that in interpreting the meaning of "ordinarily resident" in BL 24(2)(4), a contextual approach should be adopted, taking into consideration the position of the person claiming to be ordinarily resident to see whether there were any special features affecting the nature and quality of the residence. The CFA held that the residence of FDHs, as a class, in Hong Kong did not come within the meaning of ordinarily resident in BL 24(2)(4), and accordingly, FDHs were not eligible for right of abode in Hong Kong under the provision. The CFA identified the special features of the FDH scheme in Hong Kong since the mid-1970s. Such special features included the standard-form two years employment contract, the two-week rule, mandatory return to place of origin for home leave before commencing new contract, general prohibition to change employer if the contract was terminated prematurely and general prohibition to bring in dependants. An FDH admitted to Hong Kong under the FDH scheme could only engage in domestic work and had to work and reside in the employer's residence designated in the contract. He or she could not work elsewhere or for another employer. In view of the above special features, the CFA held that FDHs' residence in Hong Kong was qualitatively far-removed from what would traditionally be recognized as "ordinary residence". S. 2(4)(a)(vi) of Cap. 115 was not inconsistent with BL 24(2)(4).

The CFA held that it was not necessary for it to seek an interpretation of BL 158 from the NPCSC. The Court explained that in deciding whether or not to make a reference to the NPCSC, the Court must be satisfied that the classification and necessity conditions, and the arguability requirement, were fulfilled. If the above conditions were satisfied, the CFA had a duty to make a reference. The CFA held that the classification condition was satisfied here since BL 158 was a provision which concerned the relationship between the Central Authorities and HKSAR. However, in light of the conclusion made by the CFA on the true construction of BL 24(2)(4), it would not be necessary to interpret BL 158 in the appeal, and the necessity condition was not satisfied. Hence,

it would not be necessary for the Court to make a reference under BL 158(3).

What the Court said

The CFA held at 76 – 77 that the proper approach to constitutional interpretation was to consider the context and purpose of the provision:
"80. … it is clear that the 'natural and ordinary meaning' attributed by Mr Fordham [counsel for the appellants] to the words 'ordinarily resident' in art 24(2)(4) may serve as a starting-point but cannot be decisive. To be able to say of a person or class of persons that they live in Hong Kong 'lawfully, voluntarily and for a settled purpose, as part of the regular order of life for the time being' may often justify the conclusion that they are ordinarily resident here, but that will not always be the case.

81. It is always necessary to examine the factual position of the person claiming to be ordinarily resident to see whether there are any special features affecting the nature and quality of his or her residence. If such features exist, one asks whether they result in that person's residence being qualitatively so far-removed from what would traditionally be recognized as 'ordinary residence' as to justify concluding that he or she is not 'ordinarily resident'. This is necessarily a question of fact and degree and the outer boundaries of 'ordinary residence' are incapable of precise definition. But the exercise is necessary since the meaning of 'ordinary residence' in Article 24(2)(4) can only be considered in the factual context presented by the person claiming to come within the meaning of that concept.

82. In the present case, the Court must take as the factual context, the scheme whereby FDHs are allowed to enter and reside in Hong Kong subject to the highly restrictive conditions described in Section B above. Those are the facts that mark out FDHs as a class and characterize the nature and quality of their residence in Hong Kong while employed as such. Those facts must necessarily be at the centre of the Court's deliberations when it considers whether it is congruent with the concept of 'ordinary residence' as employed in Article 24(2)(4) to treat FDHs as a class as not ordinarily resident."

The CFA held at 77 – 78 that the distinguishing features of the FDHs' residence in Hong Kong made their residence far-removed from ordinary residence:

"88. … By way of summary, each time a FDH is given permission to enter, such permission is tied to employment solely as a domestic helper with a specific employer (in whose home the FDH is obliged to reside), under a specified contract and for the duration of that contract. The FDH is obliged to return to the country of origin at the end of the contract and is told from the outset that admission is not for the purposes of settlement and that dependents cannot be brought to reside in Hong Kong.

89. It is clear, in our view, that these distinguishing features result in the residence of FDHs in Hong Kong being qualitatively so far-removed from what would traditionally be recognized as 'ordinary residence' as to justify concluding that they do not, as a class, come within the meaning of 'ordinarily resident' as used in art 24(2)(4). It follows that in providing that they should not be treated as ordinarily resident, s. 2(4)(a)(vi) is consistent with art 24(2)(4) and constitutionally valid. We accordingly dismiss the appeals."

The CFA held at 85 that it must make a reference under BL 158(3) if the conditions of classification, necessity and arguability were met:

"105. The seeking of an interpretation by the Court of Final Appeal (or, in common parlance, making a reference to the Standing Committee) is therefore a precisely defined duty under Article 158(3). It is mandatory in character: it is specifically limited in its application to the excluded provisions of the Basic Law and it applies only in the particular circumstances contemplated by that provision, that is, the conditions of classification, necessity and arguability. Then and only then the Court of Final Appeal must make a reference to the Standing Committee."

The CFA held at 86 that it was not necessary to make a reference in the appeal:

"110. The classification condition is satisfied in the present case. Article 158 of the Basic Law is a provision that does concern the relationship between the Central Authorities and the HKSAR. There was no real dispute about this.

111. The necessity condition, however, is not. In the light of the conclusion this Court has reached on the issue of the true construction of art. 24(2)(4), a reference to the Standing Committee is simply unnecessary. …

112. The necessity condition not being satisfied, it is not necessary to deal with the arguability factor either. Accordingly, the request for a reference must be rejected."

W v Registrar of Marriages (2013) 16 HKCFAR 112

Background

The appellant suffered from gender identity disorder and had undergone "sex change operations". She was now a post-operative male to female transsexual person, with a new identity card and passport stating her sex as female. She wished to marry her male partner, but the Registrar of Marriages ("respondent") refused on the basis that she did not qualify as a "woman" under s. 40 of the Marriage Ordinance (Cap. 181), or under s. 20(1)(d) of the Matrimonial Causes Ordinance (Cap. 179). The appellant brought judicial proceedings to challenge the respondent's decision. The challenge failed at first instance and in the CA. She appealed to the CFA.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 37.

What the Court held

The CFA (by majority) held that the Basic Law and the ICCPR, as given constitutional effect by the Hong Kong Bill of Rights Ordinance (Cap. 383) and BL 39, were living instruments intended to meet changing needs and circumstances. In present day Hong Kong, there had been significant changes such that procreation was no longer (if it ever was) regarded as essential to marriage. Thus there was no justification for regarding the ability to engage in procreative sexual intercourse as a *sine qua non* of marriage, and thus as a premise for deducing purely biological criteria existing at the time of birth ascertaining a person's sex for marriage purposes. In any event, such criteria which ignored the psychological and social elements of a person's sexual identity and any reassignment treatment, could not be justified in light of medical advancements and change of social attitudes.

Hence, the majority held that the criteria laid down in *Corbett v Corbett* [1971] P 83 on the definition of "woman" was too restrictive, and s. 20(1)(d) of Cap. 179 and s. 40 of Cap. 181, which precluded the

appellant from marrying a man, had impaired the very essence of the appellant's right to marry. Those provisions were unconstitutional. In light of her irreversible surgery and implacable rejection of her male sexual identity there was no question of her enjoying in any meaningful sense the right by being able to marry a woman, so the provisions in effect prevented her from marrying at all. The majority further held that the absence of a majority consensus as a reason for rejecting a minority's claim was inimical in principle to fundamental rights.

The majority held that a remedial interpretation should be adopted to the impugned provisions. S. 20(1)(d) of Cap. 179 and s. 40 of Cap. 181 must be read and given effect so as to include in the words "woman" and "female" a post-operative male-to-female transsexual whose gender had been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery. As such, the appellant was in law entitled to be included as a "woman" within the meaning of those provisions.

Chan PJ (dissenting) held that recognition of transsexual marriages was a radical change of the traditional concept of marriage. Marriage, as an important social institution, had its basis in the social attitudes of the community. Legislative changes in overseas jurisdictions allowing transsexuals to marry in their post-operative sex had been informed by social consultation which indicated changes in social attitudes towards marriage. There was no similar evidence in Hong Kong. Chan PJ held that the court should not invoke its power of constitutional interpretation to recognize transsexual marriages in the absence of such evidence. To do so would amount to making a new policy on a social issue which had far-reaching ramifications and this was not the business of the Court.

What the Court said

The majority held at 158 that the *Corbett* criteria underlying the construction of Cap. 179 and Cap. 181 should no longer be accepted:

"103. … in our view, the *Corbett* criteria which underlie the construction of [Cap. 179] s. 20(1)(d) and [Cap. 181] s. 40 must be regarded as too restrictive and should no longer be accepted. In addressing the question whether an individual like W qualifies as 'a woman' so as to be entitled to marry a man,

the Court ought in principle to consider all the circumstances — biological, psychological and social — relevant to assessing that individual's sexual identity at the time of the proposed marriage. We can see no good reason for the Court to adopt criteria which are fixed at the time of the relevant person's birth and regarded as immutable. That is to adopt a blinkered view, looking only at circumstances existing at a time when the psychological element — which is so important to the sexual identity of transsexuals — was not manifest, and when the surgical and social transformation of the individual had not yet taken place. It is contrary to principle that the Court, in making the important determination of whether a transsexual person has in law the right to marry, should be prevented from taking account of all the available evidence."

At 160 – 161, the CFA held that the adoption of the *Corbett* criteria would impair the very essence of the transsexuals' right to marry:

"108. As indicated above, while the right to marry is necessarily subject to legal rules regulating its exercise, such rules must be consistent with, and must not operate to impair the very essence of, the constitutional right.

109. The existing statutory provisions, construed as aforesaid, preclude W from marrying a man. In the light of the irreversible surgery which she has undergone to eliminate the original male genital and gonadal organs; and in the light of her implacable rejection of her male sexual identity, there is no question of her enjoying in any meaningful sense the right to marry by being able to marry a woman. The applicant in *Goodwin v UK* was in the same position and, as we have noted, the Grand Chamber decided that she had been denied the essence of the right to marry. It held:

… that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.

110. As the New Zealand Court in *A-G v Otahuhu Family Court*, pointed out, *'Once a transsexual has undergone surgery, he or she is no longer able to operate in his or her original sex.'* And as the Australian Court recognized, after surgery rendering *'the patient's psychic association with the female sex … strongly supported by anatomical changes',* it is *'impossible to go back'.*

111. All this applies to W and we conclude that [Cap. 179] s. 20(1)(d) and [Cap. 181] s. 40, construed as endorsing the *Corbett* criteria, operate to prevent W from marrying at all. They are therefore provisions which unconstitutionally impair the very essence of the right to marry guaranteed by art.37 and art.19(2)."

The majority held at 162 – 163 that the absence of majority consensus was not a reason for rejecting a minority's claim:

"116. Reliance on the absence of a majority consensus as a reason for rejecting a minority's claim is inimical in principle to fundamental rights. The Chief Justice of Ireland, Murray CJ, made the point extra-judicially in the following terms:

… The use of consensus as an interpretive tool is inherently problematic, not only because of any perceived inconsistency in the application of the doctrine by the [European Court of Human Rights], but fundamentally because the very application of a doctrine of consensus by a court required to adjudicate on fundamental rights begs important questions of legitimacy. How can resort to the will of the majority dictate the decisions of a court whose role is to interpret universal and indivisible human rights, especially minority rights?"

The majority held at 164 – 165 that a remedial interpretation should be adopted:

"121. It is well-established that where the Court concludes that a piece of legislation is unconstitutional, it has a duty either to declare it invalid or … to provide a remedial interpretation rendering the provision consistent with the constitution. …

123. … we hold that it is necessary in principle that a remedial interpretation should be given to [Cap. 179] section 20(1)(d) and [Cap. 181] section 40. It is a remedial interpretation which requires the references to 'woman' and 'female' to be read as capable of accommodating post-operative male-to-female transsexual persons for marriage purposes and as allowing account to be taken of the full range of criteria for assessing sexual identity, viewed at the date of the marriage or proposed marriage.

124. On that basis, we hold that a transsexual in W's situation, that is, one who has gone through full SRS, should in principle be granted a declaration that, consistently with Article 37 of the Basic Law and Article 19(2) of the Bill of Rights, she is in law entitled to be included as 'a woman' within the meaning of [Cap. 181] section 40 and [Cap. 179] section 20(1)(d) and

therefore eligible to marry a man. …"

Secretary for Justice v Chung Kam Ho [2013] 5 HKLRD 203

Background

The defendant became the Crown lessee of two lots in the New Territories by way of assignments executed by his father. Both the defendant and his father were indigenous villagers of the New Territories. The plaintiff, on behalf of the Commissioner of Rating and Valuation ("Commissioner"), claimed against the defendant for recovery of Government rent and surcharge for late payment in respect of the two lots, pursuant to the Government Rent (Assessment and Collection) Ordinance (Cap. 515). The defendant's grounds of defence were that, amongst others: (a) he, as an indigenous villager of the New Territories, was entitled to exemption from payment of Government rent by virtue of BL 40 and BL 122; and (b) the relevant provisions of Cap. 515 were invalid for contravening BL 40 and BL 122.

Basic Law provisions in dispute

The major provisions in dispute were BL 40 and BL 122. The CFI also referred to BL 8, BL 11, BL 121 and BL 158.

What the Court held

The CFI rejected the defendant's grounds of defence.

The CFI held that pursuant to BL 158(2), Hong Kong courts were authorized by the NPCSC to interpret of their own accord, in adjudicating cases, the provisions of the Basic Law which were within the limits of the autonomy of Hong Kong. The CFI held that the levying of Government rent fell within the limits of the autonomy of Hong Kong, and BL 122 was precisely this type of provision which could be interpreted by Hong Kong courts of their own accord.

The CFI held that the relevant provisions of Cap. 515 were not inconsistent with the Basic Law. Following the earlier decision of the CA in *Lai Hay On v Commissioner of Rating and Valuation* [2010] 3 HKLRD 286, the CFI held that "lawful successors" in BL 122 referred to a succession on the death of the relevant ancestor and did not include an *inter vivos* transfer, and that nothing in BL 40 required a different interpretation.

What the Court said

At 208 – 209, the CFI followed the earlier decision of the CA in *Lai Hay On v Commissioner of Rating and Valuation* [2010] 3 HKLRD 286, which held that lawful succession did not cover *inter vivos* gifts :

"8. The defendant … submits that the issue in *Lai Hay On* concerned the interpretation of domestic law, the determination of which was within the power of the Court of Appeal; on the other hand, he emphasizes that the issue in the present case concerns the interpretation of the Basic Law, and the power to interpret the Basic Law rests with the Standing Committee of the National People's Congress (hereinafter 'NPCSC'), not the Court of Appeal. Therefore, he submits that the present case is not bound by *Lai Hay On*.

9. I do not agree with his submission. The issue in *Lai Hay On v Commissioner of Rating and Valuation* was no different from that in the present case, which concerns the interpretation of ss. 3 and 6 of [Cap. 515] and arts.40, 121 and 122 of the Basic Law. In *Lai Hay On*, Tang V-P (as he then was) said at [8] of his judgment that:

The critical issue in this appeal is whether the appellant held Lot 790A as his father's 'lawful successor' as a result of the inter vivos gift.

This issue of course concerns the interpretation of domestic law… the present case is identical to *Lai Hay On* … I am bound to follow the interpretation given by the Court of Appeal in that case on the relevant provisions in [Cap. 515] and the Basic Law."

The CFI further rejected the defendant's argument that Hong Kong courts did not have the power to interpret the Basic Law at 209 – 210:

"10. The defendant … submits that Hong Kong courts do not have the power to interpret the Basic Law; that the Commissioner is not entitled to levy Government rent against him unless, having interpreted the relevant

provisions, the NPCSC has decided that he is not entitled to exemption from Government rent … His submission is plainly unreasonable and sophistry.

11. … According to para.2 of art.158, Hong Kong courts are authorized by the NPCSC to interpret of their own accord, in adjudicating cases, the provisions of the Basic Law which are within the limits of the autonomy of Hong Kong. Furthermore, para.3 of art.158 extensively authorizes Hong Kong courts to interpret other provisions, the only restriction being that, where a provision in the Basic Law concerns affairs which are the responsibility of the Central People's Government or concerns the relationship between the Central Authorities and the Hong Kong Special Administrative Region, the Court of Final Appeal is required, before making their final judgments, to seek an interpretation of that provision from the NPCSC. In other words, the courts of all levels below the Court of Final Appeal may interpret all provisions in the Basic Law, and any party dissatisfied with an interpretation may appeal to the higher court and all the way up to the Court of Final Appeal. Nevertheless, before making its final judgments on the interpretation of the two types of provisions specified above, the Court of Final Appeal is required to seek an interpretation of those provisions from the NPCSC. Therefore, in adjudicating cases, save and except those two types of provisions, the Court of Final Appeal is empowered to make final interpretations on the provisions in the Basic Law.

12. Pursuant to the mechanism set out in the Basic Law regarding interpretation of the Basic Law, the Court of Appeal in *Lai Hay On v Commissioner of Rating and Valuation* had the power to interpret arts.40 and 122 of the Basic Law. Obviously, the levying of Government rent falls within the limits of the autonomy of Hong Kong, and art.122 is precisely this type of provision which can be interpreted by Hong Kong courts of their own accord …"

The CFI held that the relevant provisions of Cap. 515 were not inconsistent with the Basic Law at 213 – 218:

"19. The defence submits that ss. 3(a), 6(1), 6(3)(a) and 15(4) of [Cap. 515] are inconsistent with arts.40 and 122 of the Basic Law and hence invalid pursuant to art.11 of the Basic Law … The defendant's allegations are based on a misinterpretation of the term 'lawful successor' in the Basic Law and [Cap. 515].

…

21. In *Lai Hay On v Commissioner of Rating and Valuation*, Tang V-P held

that s. 4 of [Cap. 515] was not inconsistent with arts.40 and 122 of the Basic Law. He said … in the judgment:

…

[74] I believe 'lawful successors' in Article 122 refers to a person who has become such by lawful succession. Article 122 does not permit or require lawful succession to have a more extensive meaning than as recognized by the law in Hong Kong. That is consistent with Article 8 …

[83] … For the reasons I have given above I believe 'lawful successors' in Article 122 refer to a succession on the death of the relevant ancestor and do not include an inter vivos transfer. There is nothing in Article 40 which requires a different interpretation …

The above judgment concerns the question of whether s. 4 of [Cap. 515] is inconsistent with the Basic Law. However, similar to that question, the issue of whether ss. 3(a), 6(1), 6(3)(a) and 15(4) are inconsistent with the Basic Law involves the interpretation of 'succession' and 'lawful successor'. The above judgment should therefore equally apply to the issues raised by the defendant in these actions. I agree with - and indeed am also bound to follow - the legal principles and interpretations laid down in *Lai Hay On*. Accordingly, I find that ss. 3(a), 4, 6(1), 6(3)(a) and 15(4) of [Cap. 515] are not inconsistent with the Basic Law."

Leung Chun Ying v Ho Chun Yan Albert (2013) 16 HKCFAR 735

Background

In the CE election held on 25 March 2012, Mr Leung Chun Ying ("Mr Leung") was the retuned candidate and he was publicly declared and gazetted as such by the returning officer on 25 March 2012. On 4 July 2012, Mr Ho Chun Yan ("Mr Ho"), a candidate of the CE election, lodged an election petition under s. 32 of the Chief Executive Election Ordinance (Cap. 569), followed the next day by a notice of application for leave to apply for judicial review under s. 39 of Cap. 569, putting an issue whether Mr Leung was duly elected. It was alleged in both proceedings that Mr Leung had engaged in illegal conduct within the

meaning of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554).

On 5 July 2012, a notice of application for leave to apply for judicial review was also issued by another person who was not a candidate in the CE election ("non-candidate"). The non-candidate challenged Mr Leung's election as CE on substantially the same grounds as Mr Ho's challenge.

The CFI refused leave for judicial review to Mr Ho on the basis that it was an abuse for him to have commenced both judicial review and election petition proceedings and, in the case of both Mr Ho and the non-candidate, on the basis that the grounds set out in s. 32(1)(a) of Cap. 569 were not available in judicial review proceedings. The CFI also held that the seven-day limit in s. 34(1) of Cap. 569 was unconstitutional as it had denied Mr Ho access to courts, a right under BL 35. The CFI, however, agreed that a remedial interpretation, which provided the court discretion to extend the time, should be adopted. All parties appealed to the CFA.

Basic Law provisions in dispute

The major provision in dispute was BL 35.

What the Court held

The CFA held that an election petition was not the only means of challenging an election. The wording of s. 39 of Cap. 569 presupposed the availability of judicial review and other proceedings. Further, s. 32(1)(a) and (b) of Cap. 569 set out the grounds to question an election under the election petition proceedings. Nothing was said about the grounds which might be available in judicial review or other proceedings envisaged under s. 39 of Cap. 569.

However, the word "only" in s. 32(1) of Cap. 569 made clear that where an election was questioned by persons eligible under s. 33 of Cap. 569 ("s. 33 Persons") on the grounds set out in s. 32(1)(a) or (b) of Cap. 569, this could only be done by an election petition. Judicial review or other proceedings were not open to Mr Ho or other s. 33 Persons if the same

grounds as set out in s. 32(1)(a) of Cap. 569 were used. It made pointless the elaborate and speedy procedure for election petitions carefully and extensively set out in Cap. 569 if they could do so. However, s. 33 Persons could bring judicial review proceedings if they did not rely on the grounds set out in s. 32(1)(a) or (b) of Cap. 569.

As for non-s. 33 Persons, such as the non-candidate, nothing in Cap. 569 excluded the right of non-s. 33 Persons from relying on the grounds set out in s. 32(1)(a) or (b) of Cap. 569. The availability of judicial review as a fallback procedure to deal with those situations where election petition proceedings were not instituted, provided an additional guarantee to enable CE elections to have integrity and to be genuine, open, honest and fair.

The CFA further held that the seven-day limit under s. 34(1) of Cap. 569 was not disproportionately short and hence did not violate the right of access to courts under BL 35. The CFA held that s. 33 Persons were expected to have been intimately involved in the election and therefore should be able to lodge a petition in time.

What the Court said

The CFA held at 757 – 758 that s. 33 Persons were prohibited from instituting judicial review proceedings relying on grounds under s. 32(1) of Cap. 569:

"22. In my view, the Judge was right in his conclusion that judicial review (or other proceedings) were not open to Mr Ho — and therefore also unavailable to all s. 33 persons — if the same grounds as set out in s. 32(1)(a) were used …

(4) … In return for this right to institute election petition proceedings as of right, the s. 33 persons are, as I have said, bound by a strict time limit and also must be left with this form of proceedings as the only means of questioning an election if any of the grounds set out in ss. 32(1)(a) and (b) are relied on. It makes no sense for the judicial review procedure also to be available to s. 33 persons on the same grounds. It makes pointless the elaborate procedure for election petitions carefully and extensively set out in the Ordinance. The object and purpose of these provisions relating to election petitions, being the need for matters to be resolved quickly, would

be defeated …"

The CFA held at 759 – 760 that non-s. 33 Persons were not excluded from bringing judicial review proceedings even if they relied on the same grounds under s. 32(1):

"26. For my part, I would respectfully disagree with the Judge's views on the relationship between election petition proceedings and judicial review proceedings. I have concluded earlier that the effect of ss. 32 and 33 of [Cap. 569] is that where s. 33 persons wish to question an election on any of the grounds set out in s. 32(1)(a) or (b), they can only do so by an election petition and no other proceedings are available to them if such grounds are relied on. It does not follow from this construction of those two provisions, however, that persons other than s. 33 persons are somehow automatically excluded from claiming that an elected person should not be permitted lawfully to assume the office of Chief Executive on the basis that he or she was not properly elected by reason of one or more of the grounds set out in s. 32(1)(a) or (b). Nothing in [Cap. 569] automatically excludes the right of non-s. 33 persons from so relying on the grounds set out in s. 32(1)(a) or (b) …

28. … I have not ignored the argument to the effect that to allow the judicial review procedure to be made available to non s 33 persons in this way might undermine the election petition procedure set out in [Cap. 569] and thus potentially result in duplication and prolonging of proceedings concerning elections. … In my view, it is important to highlight the following points in this context:-

(1) It should be borne in mind that the primary and most speedy form of proceedings to question an election is the election petition. This is likely in practice to be the most usual form of proceedings to challenge an election result.

(2) However, the election petition procedure cannot be the only form of proceedings available to question an election. The content of those provisions in the Ordinance discussed earlier make this point. Judicial review is available, although the time for instituting such proceedings is reduced to 30 days from the usual three months.

(3) The availability of judicial review as a fallback procedure to deal with those situations where, for whatever reason, election petition proceedings are not instituted, constitutes an additional guarantee to enable elections for the Chief Executive to have integrity and to be genuine, open, honest and fair. The availability of judicial review should not be cut down unless this

is clearly stated and justified.

(4) It does not follow judicial review proceedings will necessarily prolong the challenges that may be made regarding elections. While the time limited for the lodging of election petitions may be shorter, those proceedings can be instituted and pursued as of right (subject of course to any striking out applications). Judicial review proceedings, on the other hand, require leave before they can be properly instituted."

The CFA held at 766 – 767 that the seven-day limit was not disproportionate to the right of access to courts protected under BL 35:

"41. I have earlier referred to the essence of the right of access to the courts contained in Article 35 and the buttress it provides to the integrity of elections. There is no doubt that s 34 of [Cap. 569] can be regarded as placing restrictions on that right. But whether such restrictions amount to an infringement of that constitutional right depends on whether on analysis the essence of the right has been impaired. In the context of the right of access to court, the European Court of Human Rights has said that the right is not an absolute one and any restrictions placed on it must be examined to see whether the essence of the right has been impaired. …

42. The question of whether s 34(1), if absolute in preventing an election petition being lodged beyond the seven day limit, impairs the essence of the right of access to the courts, must be seen in context. The context of that provision is that it is but part of a whole scheme regarding election petitions. This scheme is an elaborate one as we have seen, restricting the class of persons entitled to use that procedure to the s. 33 persons but it has the important feature of allowing election petitions to be lodged as of right without the need for leave to be obtained.

43. I have also earlier mentioned the need for any proceedings questioning an election to be dealt with speedily. This is obviously the purpose of s. 34(1) and on this basis, in the context of the scheme as a whole, it does not seem to me disproportionate to impose a seven-day limit. Although a tight one, given that the class of persons entitled to lodge election petitions proceedings are those who can be expected to have been intimately involved in an election right from the start and who can therefore be expected to pay close attention not only to their own election activities but also the activities of their opponents, the limit is not unduly short …

44. … It is by no means unusual for time limits for the institution of proceedings questioning an election to be non-extendable, just as in the

case of s. 34(1). For the same reasons as indicated earlier, I do not regard as objectionable this feature of s. 34(1)."

Yu Chi Shing Paul v Or Sin Yi Windy [2013] 5 HKLRD 326

Background

Yu Chi Shing Paul ("petitioner") was an unsuccessful candidate in the 2011 District Council election. He challenged the election result by an election petition but the petition was dismissed by the CFI. The petitioner sought to appeal to the CA. However, according to s. 22(1)(c)(v) of the Court of Final Appeal Ordinance (Cap. 484), a party to an election petition should lodge an appeal to the CFA against the determination of the election petition by the CFI.

The petitioner argued, *inter alia*, that the "leap-frog" mechanism which took away the right to appeal to the CA was inconsistent with his constitutional right protected under BL 35, and no justification had been advanced to justify the restriction on his right.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 35.

What the Court held

The CA held that the petitioner's appeal was incompetent for want of jurisdiction.

The right of access to the courts under BL 35 was not engaged. The Basic Law did not state in terms that a constitutional right of appeal existed against decisions of the courts. The CA distinguished the right of access to the courts (which is guaranteed in BL 35) from a right of appeal against decisions of the courts.

What the Court said

Cheung CJHC (as he then was) held that BL 35 did not assist the petitioner's argument. He said at 333 – 334:

"26. … In *Mok Charles v Tam Wai Ho*, the petitioner/appellant also relied on art.35 as an additional ground to challenge the finality provision there. The CJ pointed out in his judgment that art.35 did not add much to the appellant's arguments, as the case actually turned on art. 82 of the Basic Law:

…

[36] For his part, Mr Michael Thomas SC (who appeared for the intervener) is correct when he observes that nothing in the Basic Law states in terms that a right of appeal exists against decisions of the courts. Article 83 of the Basic Law states that the structure, powers and functions of the courts in Hong Kong shall be prescribed by law. Mr Thomas is also correct to point out that there is no inherent jurisdiction in any particular court to hear appeals; the appellate jurisdiction of any particular court is the creation of statute …

27. In short, the Basic Law does not state that there is a constitutional right of appeal against decisions of the court as such. The right of access to the courts is different from a right of appeal against decisions of the courts. In the present case, art.35 is simply not engaged."

Regarding the applicability of *Secretary for Justice v Wong Sau Fong* [1998] 2 HKLRD 254, Cheung CJHC said at 335:

"30. The case is wholly distinguishable. Article 11(4) of the Hong Kong Bill of Rights provides that 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'. Given that guaranteed right, the Court in *Secretary for Justice v Wong Sau Fong* was seized of the question of whether a right of appeal from the Court of Appeal to the Court of Final Appeal is good enough to satisfy the right of appeal guaranteed under art.11(4), which, in a usual case, is satisfied by the right of appeal from the District Court to the Court of Appeal.

31. However, the issue here is whether there is such a guaranteed right of appeal in a case of the present type, given that art.11(4) of the Hong Kong Bill of Rights obviously has no application to an election petition. As said, the Court of Final Appeal has already explained that the Basic Law, including art.35, does not state in terms that there is such a right of appeal.

Nor, for that matter, does the Hong Kong Bill of Rights so far as civil matters are concerned. There is, therefore, no question of any need to compare between the right of appeal as of right from the Court of First Instance to the Court of Appeal and the discretionary right of leap-frog appeal to the Court of Final Appeal."

HKSAR v Chow Nok Hang (2013) 16 HKCFAR 837

Background

In a prize-giving ceremony organized by the Mass Transit Railway (MTR), Chow Nok Hang and another ("defendants") demonstrated against fare increases on the MTR. The first defendant rushed onto the stage and scattered devil money in the air. The second defendant dashed onto the podium, lunged towards the speaker and seized the microphone from the speaker shouting his protest slogans. They were convicted of offences under s. 17B(1) and 17B(2) of the Public Order Ordinance (Cap. 245) for behaving in a disorderly manner in a public place. The defendants appealed to the CFA against the conviction. At issue was how the defendants' conduct should be judged in light of the fundamental rights of peaceful assembly and freedom of demonstration.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 27.

What the Court held

The CFA held that both BL 27 and BoR 17 protected the right of peaceful assembly. As there was no substantive difference between the right of peaceful assembly guaranteed by BL 27 and BoR 17, the Court shall accordingly refer to the rights interchangeably and focus in this judgment on the text of BoR as setting out the scope and limits of the right.

The CFA allowed the appeal. S. 17B(1) of Cap. 245 did not apply because the defendants' purpose did not involve more than a brief

interruption of the prize-giving ceremony. S. 17B(2) of Cap. 245 did not apply either because the defendants' behaviour was not intended or likely to cause of breach of the peace by someone else.

On the other hand, the law imposed bounds on the constitutionally protected activity of peaceful assembly. The CFA was of the view that the second defendant's conduct crossed the line separating constitutionally protected peaceful demonstration from unlawful activities which was subject to legal sanctions and constraints. The second defendant's actions might very well have constituted common assault, although he was not charged with common assault.

What the Court said

The CFA held that the rights protected by BL 27 were not absolute at 854 – 857:

"33. Demonstrators are therefore free to assemble and to convey views which may be found to be disagreeable, unpopular, distasteful or even offensive to others and which may be critical of persons in authority. Tolerance of such views and their expression is a hallmark of a pluralistic society. At the same time, it must be recognized that those freedoms are not absolute and demonstrators must ensure that their conduct does not go beyond the constitutional limits of those rights.

34. Such limits are set by the combined effect of the constitutional provisions themselves and compatible laws enacted by the legislature and developed at common law. Basing itself on the text of art.17, the Court held in *Leung Kwok Hung* that:

The exercise of the right of peaceful assembly, whether under the Basic Law or under BORO, may be subject to restrictions provided two requirements are satisfied:

(1) The restriction must be prescribed by law (the 'prescribed by law' requirement).

(2) The restriction must be necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others (the necessity requirement).

No issue arises in the present case in relation to the 'prescribed by law requirement'.

35. It is established that the 'necessity requirement' involves the application of the proportionality test which enables a proper balance to be struck between the interests of society on the one hand and the individual's right of peaceful assembly on the other. Accordingly, limits may be set to the right of demonstration by validly promulgated laws provided that the restrictions they impose are for a legitimate purpose; are rationally connected with the pursuit of such legitimate purpose; and are no more restrictive than necessary to achieve that legitimate purpose.

36. In relation to the right of peaceful assembly, the Court has held that art.17, reflecting art.21 of the ICCPR, exhaustively lists the only legitimate purposes for which restrictions on that right may be imposed. Thus, restrictive laws may legitimately have as their purpose the safeguarding of national security, public safety, or public order (*ordre public*); the protection of public health or morals; or the protection of the rights and freedoms of others. Such laws are valid if they pass the proportionality test.

…

38. Article 17 allows a line to be drawn between peaceful demonstrations (where, as noted above, full rein is given to freedom of expression) and conduct which disrupts or threatens to disrupt public order, as well as conduct which infringes the rights and freedoms of others. In *Leung Kwok Hung*, having recognized that the interests of public order (*ordre public*) are listed by art.17 as a legitimate purpose, the Court held that there is no doubt that such concept 'includes public order in the law and order sense, that is, the maintenance of public order and the prevention of public disorder'. It concluded that a statutory scheme giving the Commissioner of Police discretion to regulate public processions with a view to maintaining public order was constitutionally valid after severance of certain objectionably vague words.

39. Once a demonstrator becomes involved in violence or the threat of violence – somewhat archaically referred to as a 'breach of the peace' – that demonstrator crosses the line separating constitutionally protected peaceful demonstration from unlawful activity which is subject to legal sanctions and constraints. The same applies where the demonstrator crosses the line by unlawfully interfering with the rights and freedoms of others.

40. The law therefore imposes bounds on the constitutionally protected activity of peaceful assembly. The need for such limits is sometimes dramatically illustrated in situations involving demonstrations and counter-demonstrations. It is not uncommon for one group, demonstrating in

favour of a particular cause, to find itself confronted by another group demonstrating against that cause. The situation may be potentially explosive and the police will generally try to keep them apart. Obviously, if both remain within their lawful bounds, all will be well. But often, conflict and public disorder may result. Sometimes, both sides will have broken the law. But in some cases, the disruption of public order is caused only by one side. The task of the law enforcement agencies and the courts is then to identify the source of such disruption by identifying the demonstrators who have crossed the line into unlawful activity. They thereby avoid curtailing or punishing the constitutionally protected activities of the innocent group.

…

42. Lines also have to be drawn where a demonstrator's conduct impinges unacceptably upon the rights of others (which may or may not be constitutionally protected rights). Such a line had to be drawn, for instance, in *Yeung May Wan*, where the Court had to decide whether the offence of obstructing a public place was properly applied so as to curtail a static, peaceful demonstration by a small group of Falun Gong protesters which obstructed only part of the pavement, on the basis that they were interfering with the rights of other users of the public highway. To take another example, the Court of First Instance recently had to decide whether the right to demonstrate entitled protesters to take their demonstration into a private residential development without the consent of the owners, or whether that right was constrained by the need to respect the private property rights of the residents.

43. In practice, restrictions on the right to demonstrate are likely to be tested where a demonstrator is subjected to some form of restraining action by a law enforcement agency possibly, but not necessarily, leading to a criminal charge on account of the demonstrator's conduct. The law relied on to justify the action taken against the demonstrator may then require examination. In some cases, its constitutionality may have to be examined: Does it pursue one of the listed legitimate aims? If so, does it pass the proportionality test? If the law is constitutionally valid, the question becomes whether the demonstrator's conduct falls within the restriction imposed by the law, bearing it in mind that the restriction is narrowly construed while the constitutional right receives a generous interpretation."

The CFA upheld the constitutionality of s. 17B(1) and (2) of Cap. 245 at 860:

"54. Restricting the right of peaceful assembly by setting the boundaries established by these two sections (and, indeed, by other offences which prohibit violence or the threat of violence) involves in my view, the rational and proportionate furthering of the aforesaid legitimate purposes. They set a proper balance between the interests of demonstrators exercising their right of peaceful assembly on the one hand, and the interests of public order and the rights and freedoms of persons affected by that exercise on the other. It should not ordinarily be necessary in future for a magistrate or judge to dwell on the constitutionality of these offences."

Kong Yunming v Director of Social Welfare (2013) 16 HKCFAR 950

Background

The appellant, Madam Kong, was a Mainland resident. She married Mr Chan Wing ("Mr Chan"), a Hong Kong permanent resident in October 2003. Mr Chan was not a man of means and his health was not good and he had been a recipient of social welfare since 1985. The appellant was granted a one-way permit and she decided to come and settle in Hong Kong. She arrived in Hong Kong on 21 December 2005. The appellant was aged 56 then and she was granted permission to remain for seven years. However, Mr Chan died on 22 December 2005, one day after the appellant's arrival in Hong Kong. As a result, the appellant found herself homeless, since the Housing Authority repossessed Mr Chan's public housing unit. On 20 March 2006, the appellant applied for Comprehensive Social Security Assistance ("CSSA") but was unsuccessful. The CSSA scheme was a non-statutory scheme administered by the Social Welfare Department. It was a non-contributory and means-tested social security scheme aiming to provide a safety net to ensure that those with limited or no other sources of income could meet their basic needs.

The appellant's application was refused because the policy of HKSARG had, since 1 January 2004, been that persons who had resided in Hong Kong for less than seven years did not qualify for CSSA ("seven-year

requirement"). The appellant's case was not considered appropriate for the respondent to exercise a discretion in her favour. The appellant failed in her appeal to the Social Security Appeal Board. She instituted judicial review proceedings to challenge the refusal of her CSSA application. The CFI dismissed her application, and the CA dismissed her appeal. The appellant appealed to the CFA.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 36 and BL 145.

What the Court held

The CFA held that the welfare benefit of the CSSA scheme was clearly "social welfare" for the purpose of BL 36 because it aimed to provide welfare benefit addressing basic "safety net" needs, which was a fundamental function of any social security system. Reading BL 36 together with BL 145, the intention of the Basic Law must be taken to be that the administrative scheme of the CSSA was to be treated as a system providing "social welfare in accordance with law" within the meaning of BL 36.

Social welfare rights protected by BL 36 were subject to modification in accordance with BL 145, which did not preclude the elimination or reduction of particular welfare benefits if that proved necessary to develop, improve or maintain the sustainability of the welfare system as a whole. However, any restriction on such rights was subject to constitutional review. The court would ask whether the restriction was rationally connected with the accomplishment of a legitimate social aim and whether the means employed were proportionate. As the right to social welfare was a right which intrinsically involved the HKSARG setting rules determining eligibility and benefit levels, the seven-year requirement would only be held to be disproportionate if it was manifestly without reasonable foundation.

The CFA held that seven-year requirement could not satisfy the proportionality test. As for the legitimate social aim, the HKSARG claimed that it was adopted to ensure the sustainability of the social

security system. However, none of the three factors, i.e. (i) the policy of accepting immigrants from the Mainland under the OWP scheme; (ii) Hong Kong's ageing population; (iii) the rise in expenditure on CSSA, said to contribute to the sustainability problem could justify the seven-year requirement. Other matters identified as objectives promoted by the seven-year requirement lacked legitimacy as societal aims. The HKSARG could not abdicate its constitutional responsibility for social welfare to private charities. The discretion to waive the seven-year requirement was available only in exceptional cases and only played a small part in dealing with applicants.

The CFA allowed the appeal and concluded that the seven-year requirement was in breach of BL 36.

What the Court said

The CFA held at 967 – 968 that BL 36 operated as a framework provision:

"33. … True it is that art.36 does not — and obviously cannot — descend into particulars as to specific welfare benefits or their eligibility and other conditions. But that is because, like many other constitutional provisions, art.36 is intended to operate as a framework provision. Read together with art.145, it provides the framework for identifying a constitutionally protected right to social welfare: Once it is clear that an administrative scheme such as the CSSA scheme has crystallized a set of accessible and predictable eligibility rules, those rules may properly be regarded as embodying a right existing 'in accordance with law', qualifying for art.36 protection.

34. Article 145 supports this view. It adopts the previous social welfare system as the basis for the Administration's formulation of policies after 1 July 1997 to develop and improve that previous system in the light of economic conditions and social needs. Article 145 therefore endorses the rules and policies established under the previous system and, as discussed … it implicitly regards them as rules established 'in accordance with law' and thus capable of constituting particular rights protected by Article 36.

…

37. … But art.145 does not address, let alone freeze, the eligibility conditions or the level of any particular benefits. What it does is to make

it clear that the Government may formulate policies 'on the development and improvement of [the previous] system'. Lord Pannick rightly submitted that art.145 does not preclude the elimination or reduction of particular welfare benefits if that proves necessary to develop, improve or maintain the sustainability of the welfare system as a whole."

The CFA held at 976 – 977 that the OWP scheme could not provide support to the seven-year requirement:

"61. It is evident from the foregoing that no support for the CSSA seven-year requirement can rationally be derived from any aspect of the OWP scheme. The humane and laudable purpose of that scheme is the promotion of family reunion, respecting the right of abode of children of Hong Kong permanent residents under the Basic Law …

62. Where such a reunited family is poor, having means-tested income which does not cover the basic needs of its members, one would expect the social security scheme to operate in harmony with the OWP scheme and so make CSSA benefits available. While it may be that the one-year residence requirement has to be accepted as the basic right to social welfare historically defined, it would be wholly irrational, when viewed from the perspective of the OWP scheme, to raise it to a seven-year requirement. Although the Task Force Report contains considerable discussion of the OWP scheme, it provides no rational basis for adopting the seven-year rule. On the contrary, its logic demands the disapplication of that rule in relation to OWP arrivals.

…

66. It is clear, to say the least, that the OWP scheme provides no support whatsoever for the Government's alleged legitimate aim of ensuring the welfare system's sustainability and no support for the existence of any rational connection between that aim and the impugned seven-year requirement. The policies underlying the OWP scheme militate against that restriction."

The CFA considered at 979 whether the problem of an ageing population could support the seven-year requirement:

"73. As has already been pointed out, the Government has only partially acted on that logic, exempting those under 18 from the seven-year residence eligibility criterion for CSSA, but applying the restriction to parents who arrive to be reunited with and to care for such children. To that extent, far from the seven-year requirement being a rational measure to

mitigate the ageing population problem (and thereby contributing to the sustainability of our social security system), it is a counter-productive and irrational measure."

The CFA held at 986 that there was no evidence as to the savings achievable by the seven-year requirement:

"97. In fact, the Government has acknowledged the immateriality of the savings achievable by the seven-year requirement. In its information paper dated 2 January 2004, the day after the new rule took effect, the Government informed the Welfare Panel's Subcommittee that 'Of the amount paid to the new arrivals in 2002–03, $963 million were made to those aged 18 or above and $1,068 [million] to those aged below 18' …"

The CFA concluded at 997 – 998 that the seven-year requirement was in breach of BL 36:

"137. I have reached the conclusion that the seven-year residence requirement is an unjustifiable contravention of the right to social welfare in accordance with law, conferred by Article 36.

138. In seeking to address basic, 'safety net' needs pursuant to an accessible and predictable set of administrative rules, the CSSA scheme clearly comes within the Article 36 concept of a 'social welfare' scheme established 'in accordance with law'. It receives Article 36 protection, and while the Government has a wide margin of discretion, both in defining the conditions and level of the benefit in the first place, and in making any changes pursuant to policies developed in accordance with Article 145, such changes are subject to constitutional review.

139. Restrictions on rights protected by Article 36 must pursue a legitimate societal aim and must be rationally connected with the achievement of that end, employing measures that do not make excessive inroads into the protected right. If the restriction is not rationally connected to the avowed legitimate purpose or if the inroads it makes into the protected right are manifestly without reasonable foundation, the Court may declare the measure unconstitutional.

140. In the present case, the Government has claimed that the seven-year residence requirement pursues the legitimate purpose of curbing expenditure so as to ensure the sustainability of the social security system. In my view that claim is not made out. The seven-year restriction conflicts with two important social policies which are simultaneously embraced by the Government, namely the OWP family reunion policy and the

population policy aimed at rejuvenating our ageing population. There is no evidence as to the level of savings actually achieved and achievable as a result of adopting the seven-year rule. On the contrary, everything points to the actual savings being modest and of an order that cannot sensibly be described as designed to safeguard the system's sustainability. The Government has indeed admitted that the new residence requirement is not driven by the need to reduce CSSA expenditure on new arrivals.

…

143. I do not doubt that the Government adopted policies genuinely with the legitimate aim of curbing expenditure on CSSA with a view to ensuring the financial sustainability of the social security system. I readily accept that it did take rational measures towards that end by reducing standard payments in 1999 in relation to larger households and reducing standard payments across-the-board in 2003 and 2004. But in my view, the Director has not made good the proposition that the seven-year residence requirement was rationally connected to the aforesaid legitimate aim. 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."

GA v Director of Immigration (2014) 17 HKCFAR 60

Background

The 1st to 3rd appellants and the 4th appellant had been in Hong Kong for 10 to 13 years as mandated refugees and a screened-in torture claimant respectively. They applied for judicial review to challenge the refusal of the Director of Immigration ("Director") to grant permission to work to them.

The appellants contended that they had the right to work in Hong Kong under BoR 14, Article 6 of the ICESCR, BL 33 and common law. They also alleged that not permitting them to work constituted inhuman or degrading treatment under BoR 3.

The appeal was academic since three of the appellants were granted permission to work by the Director since the commencement of judicial

review. The other appellant was not in a position to work. Nevertheless, the CFA considered the issues since it was of the view that important issues were involved and should be dealt with in the public interest.

Basic Law provisions in dispute

The Basic Law provisions in dispute were BL 33 and BL 39. The CFA also referred to BL 24(2)(4) and BL 154(2).

What the Court held

The CFA rejected the appellants' argument based on BoR 14, the CFA disagreed with the appellants' interpretation of s. 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383). The CFA held that the appellants failed to accord sufficient weight to the context and purpose of s. 11 of Cap. 383. The purpose of that provision was to enable the HKSARG to impose immigration control on the entry into, stay in and departure from Hong Kong, as reflected in BL 154(2). Before 1 July 1997, the United Kingdom Government had entered into a Reservation on the ratification of the ICCPR which evidenced its intention that the ICCPR was to apply subject to the Reservation. The Reservation reserved the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom and its dependent territories. After the resumption of sovereignty on 1 July 1997, BL 39(1) made it clear that the ICCPR was effective only "as applied" to Hong Kong. Hence, the ICCPR, incorporated into Hong Kong's domestic law by Cap. 383, only applied in Hong Kong subject to the Reservation as reflected by s. 11 of Cap. 383.

The CFA held that the words "stay in … Hong Kong" in s. 11 of Cap. 383 covered the activities which a person in Hong Kong might be permitted to carry out and whether a person should be permitted to work. Whether a person was allowed to work during his or her stay was a matter of immigration control. The CFA held that the appellants could not rely on BoR 14 to establish their right to work.

Applying the case of *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743, the CFA held that the right not to be subjected to torture

or to cruel, inhuman or degrading treatment or punishment under BoR 3 was absolute. S. 11 of Cap. 383 did not except the applicability of BoR 3 to immigration legislation.

The CFA declined to make a determination as to whether the refusal of the Director to grant permission to work constituted inhuman or degrading treatment in the present case but it was of the view that the position of the appellants could conceivably constitute inhuman or degrading treatment if they were not given permission to work, especially when all the appellants had been in Hong Kong for a long time since they became protected persons (ranging from six to twelve years).

The CFA held that ICESCR was not incorporated into the domestic law of Hong Kong through any legislation. The statutory provisions advanced by the appellants did not incorporate the general, unrestricted right to work of persons in the position of the appellants, they at most only made allowance for persons in their position to be permitted to work.

The CFA ruled that BL 33 did not confer a general right to work, but only a narrower freedom of choice of occupation. The purpose of BL 33 was to protect against conscription to particular fields of occupation.

The CFA held that the cases cited by the appellants in support for a common law right to work were not relevant to the present context.

What the Court said

The CFA held at 82 – 84 that s. 11 of Cap. 383 is intended to except immigration legislation that deals with each stage of a person's stay in Hong Kong:

"29. The following points, in my view, provide a reasonably clear picture of the context and purpose of s 11:-

(1) It is clear from the provision itself that it is dealing with immigration control on entry into, stay in and departure from Hong Kong, as reflected in Article 154(2) of the Basic Law:-

The Government of the Hong Kong Special Administrative Region may apply immigration controls on entry into, stay in and departure from the Region by

persons from foreign states and regions.

Section 11 is in the same terms in adopting the words 'entry into, stay in and departure from Hong Kong'.

(2) The intention of s 11 is to except the applicability of the BOR to the aforesaid aspects of immigration control. Here, it is also useful to make reference to the Reservation that was entered by the United Kingdom Government on the ratification of the ICCPR on 20 May 1976. The Reservation was in the following terms:-

The Government of the United Kingdom reserve the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time and, accordingly, their acceptance of article 12 (4) and of the other provisions of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom. The United Kingdom also reserves a similar right in regard to each of its dependent territories.

… When in 1976, the United Kingdom Government acceded to the terms of the ICCPR, it also did so for its then dependent territories, including Hong Kong. Thus, as far as Hong Kong was concerned, the ICCPR could only ever apply subject to the Reservation. … as far as Hong Kong was concerned, the significance of the Reservation was to enable the Hong Kong Government to deal with immigration matters, specifically to have in place legislation 'which the Government may deem necessary to enact to govern entry into, stay in and departure by persons who do not have the right to enter and remain in Hong Kong'. It was against this background that the HKBORO was enacted. After the resumption of the exercise of sovereignty on 1 July 1997, when the Basic Law came into effect, Article 39(1) made it clear that the ICCPR was effective only 'as applied' to Hong Kong. The ICCPR therefore only applies in Hong Kong subject to the Reservation. Section 11 reflects this proviso. Indeed, the wording of s 11 tracks the Reservation; the relevant phrase in both is 'entry into, stay in and departure from Hong Kong'. …

(3) The intention of Article 154(2) of the Basic Law and the Reservation, both of which are couched in general terms, must have been, one would have thought, for the purpose for enabling effective immigration control to be exercised. …

30. Given this context and purpose, one then looks at the words used in

s. 11 to ascertain the ambit of the immigration legislation which is intended to be excepted from the BOR by this provision. It is clear in my view that, subject to s 5 of the same Ordinance, the provision is intended to except immigration legislation that deals with each stage of a person's stay in Hong Kong, as stated earlier, from entry through his or her stay in Hong Kong, to departure. This includes of course whether permission should be given to be in Hong Kong in the first place, the purpose for which that permission is to be granted to enter Hong Kong and the duration of the stay. It must also, from an immigration control point of view, generally cover the activities which a person in Hong Kong may be permitted to carry out and in my view must cover the aspect of whether a person should be permitted to work. Whether a person who, not having the right to enter and remain in Hong Kong, is permitted to work during his or her stay is, one would clearly have thought, eminently a matter of immigration control. Particularly in a place like Hong Kong, which has considerable economic attractions to many people, the need to control immigration and to control the number or type of people who may wish to work here, can easily be seen. …"

The CFA held at 97 that the dualist principle is applicable in Hong Kong:

"58. The provisions of the international covenants and conventions referred to in art.39(1) of the Basic Law are not directly enforceable in Hong Kong by any individual unless implemented by domestic or municipal law. … This is sometimes called the common law dualist principle and the wording of art.39(1) of the Basic Law, both in English and in Chinese, is declaratory of this. One clear example is the incorporation into domestic law of the ICCPR. It is well recognized that the HKBORO is the domestic embodiment of the ICCPR as applied to Hong Kong. One of the consequences of the principle is where an international obligation has not been made part of domestic law, then, whatever the international position may be, an individual cannot rely on the content of that international obligation …"

The CFA held at 103 that ICESCR has not been incorporated in Hong Kong and it is also subject to a Reservation:

"61. Accordingly, whatever the effect or ambit of Article 6 of the ICESCR, even if it provides for the general and unrestricted right to work which the Applicants advance as its effect, this Article does not enure to their benefit. It has not been incorporated into Hong Kong domestic legislation.

…

66. … Just as in the case of the Reservation entered by the United Kingdom Government to the ICCPR, art.39(1) of the Basic Law has the effect in any event of enabling the ICESCR to remain in force only 'applied to Hong Kong', in other words, that Convention applies in Hong Kong subject to the Reservation."

As to the scope of the right guaranteed under BL 33, the CFA held at 105:

"71. Article 33 does not refer to the right to work in general. It is much narrower than that, dealing only with the freedom of choice of occupation. If it was intended that a wider right was to exist, the article would simply have said so or it would have been made much clearer, rather than to adopt a somewhat elliptical technique."

Ghulam Rbani v Secretary for Justice (2014) 17 HKCFAR 138

Background

The plaintiff was a Pakistani national and had been convicted repeatedly for overstaying in Hong Kong. Upon release in 2005, the Director of Immigration placed him under administrative detention pursuant to s. 32(2A)(a) of the Immigration Ordinance (Cap. 115). A removal order issued against the plaintiff was revoked later on 15 September 2005 because he lodged a claim under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") against refoulement. The administrative detention was further extended for 21 days on 16 September 2005. The CAT assessment process started on 21 September 2005 and the plaintiff's release was also under consideration. On 26 September 2005, the plaintiff was asked to nominate a guarantor for his release. On 7 October 2005, the plaintiff was released on recognizance.

The plaintiff claimed against the Director for damages for false imprisonment that he was unlawfully detained once it was clear that his intended removal from Hong Kong could not be achieved within the

time limits for detention under s. 32 of Cap. 115 and that the Director failed to publish any statement of policy identifying criteria justifying detention under s. 32 of Cap. 115. The plaintiff also relied on BoR 5(1), BL 28 and BL 41 on freedom of the person of non-Hong Kong residents. The lower Courts dismissed the plaintiff's claim and he appealed to the CFA.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 28 and BL 41.

What the Court held

Allowing the appeal, the CFA held that the power to detain must be exercised reasonably and in a manner which was not arbitrary. *Hardial Singh* principles are applicable to detention pending a removal order decision under s. 32(2A) of Cap. 115. The Director must intend to deport the person and could only use the power to detain for the purpose. The detention period must be reasonable in all the circumstances. If, before the expiry of the reasonable period, it became apparent that the Director would not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention. The Director should act with reasonable diligence and expedition to effect removal.

The Director's initial decision to detain the plaintiff was lawful because the plaintiff repeatedly overstayed and presented a real risk of absconding. However, the actual period of detention was excessive. Once the plaintiff lodged claim under CAT, the removal order should be revoked as the CAT claim should be considered first. The CAT assessment and the release procedures should have been taken with far greater urgency. Thus, the plaintiff's detention was 10 days more than what was justifiable in all the circumstances and he was entitled to damages for false imprisonment for 10 days.

BoR 5(1) was no different from the common law right discussed above. However, the plaintiff could not bring himself within BoR 5(1) as s. 11 of Cap. 383 stated that BoR did not affect any immigration legislation. The detention powers of the Director under s. 32 of Cap. 115 were part

of the statutory machinery designed to regulate a person's stay in Hong Kong and to ensure his enforced departure where a decision to remove was taken.

What the Court said

The CFA explained at 170 – 171 that s. 11 of Cap. 382 prevented reliance on BoR 5(1):

"81. The content of the BOR art.5(1) right is therefore, as previously pointed out, no different from the content of the common law right and the appellant's position is not improved by bringing himself within its terms. If one were faced with the argument that the common law freedom from arbitrary detention had in some way been curtailed by statute, it would be important to determine whether a constitutional challenge to such a statute could be mounted on the basis of BOR art.5(1) or BL art.28. However, there is no suggestion that the relevant IO provisions have such an effect.

82. In any event, it is clear that by reason of s. 11 the appellant cannot bring himself within BOR art.5(1). Section 11 provides:

As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.

83. The words 'this Ordinance' in s. 11 refer of course to the Hong Kong Bill of Rights Ordinance … BOR art.5(1) is a provision of that Ordinance.

84. It is not disputed that the appellant is a person who does not have 'the right to enter and remain in Hong Kong' It follows that if, in exercising the detention powers contained in s. 32 of the IO, the Director is 'applying legislation governing entry into, stay in and departure from Hong Kong', s. 11 precludes reliance by the appellant on BOR art.5(1)."

The Court held that s. 11 precluded reliance on BL 28 and BL 41 at 172 – 175:

"89. The appellant is not a Hong Kong resident. He can therefore only bring himself within BL art.28 if he can rely on BL art.41. The question which arose was whether BL art.41 operates to permit such reliance. In particular, the question was whether the words 'in accordance with law' in BL art.41 bring s. 11 to bear in a manner which precludes persons who, like the appellant, do not have 'the right to enter and remain in Hong Kong', from relying on BL

art.41.

…

92. I respectfully agree that in the present case, the effect of s. 11 is to preclude reliance by the appellant on BL art.28. However, it is important to be clear why that is so.

93. One should at once dispel any notion that the words 'in accordance with law' in BL art.41 mean that it is open to the legislature, simply by passing legislation, to deprive persons other than Hong Kong residents who are present in the HKSAR of Chapter III rights. That would plainly be a wrong reading of BL art.41. If that had been the Basic Law's intention, BL art.41 would not have been included at all. The object of BL art.41 is to extend the Chapter III constitutional guarantees to persons in Hong Kong who are not residents. Such guarantees take effect at the level of the constitution and are in principle not merely in the legislature's gift, to be permitted or excluded at any stage if it sees fit.

94. The reason why s. 11 results in excluding the appellant's reliance on BL art.41 is that, by virtue of BL art.39, s. 11 operates at the constitutional level and qualifies the scope and effect of BL art.41. BL art.39 states:

The provisions of the International Covenant on Civil and Political Rights … as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

95. It is well established that the ICCPR is implemented through the Hong Kong Bill of Rights Ordinance and that such implementation includes the immigration exception contained in s. 11. …

97. In other words, in giving constitutional status to the Hong Kong Bill of Rights Ordinance including s. 11, BL art.39 gives constitutional status to a specific exception to relevant provisions of the Hong Kong Bill of Rights in relation to persons not having the right to enter and remain in Hong Kong and in respect of immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of such legislation. For the reasons discussed above, that exception precludes resort to the right to liberty and security of person under BOR art.5(1) by the aforesaid class of persons in relation to the application of the specified categories of immigration legislation. Giving effect to the words 'in accordance with

law' in BL art.41, it is necessary to read BL art.28, which is concerned with freedom of the person in general, as subject to that specific exception provided for by s. 11, given constitutional status by BL art.39.

98. As we have seen, s. 11 does not preclude persons who come within its terms from relying on the common law right to personal freedom and to protection against arbitrary arrest or detention. Nor does s. 11 preclude such persons from relying on Chapter III and Bill of Rights guarantees in respect of legislation other than 'immigration legislation governing entry into, stay in and departure from Hong Kong'."

Ho Man Kong v Superintendent of Lai Chi Kok Reception Centre (2014) 17 HKCFAR 179

Background

This was an appeal against a committal order made under s. 10(6)(b) of the Fugitive Offenders Ordinance (Cap. 503). Australia sought the extradition of the defendant on drug trafficking charges on the basis of evidence acquired through telephone intercepts lawfully carried out in Australia. The issue was whether BL 30 rendered telecommunications intercepts obtained lawfully in a foreign jurisdiction inadmissible as evidence in extradition proceedings in Hong Kong Courts.

Basic Law provisions in dispute

The major provision in dispute was BL 30.

What the Court held

Dismissing the appeal, the CFA held that issues of use and admissibility of evidence were not the concern of BL 30. The Court was also of the view that since no fair trial issues arose, there was no basis for any discretionary exclusion of the intercept evidence.

The defendant's counsel asked the Court to interpret BL 30 by reference to s. 61(1) of the Interception of Communications and Surveillance

Ordinance (Cap. 589). He submitted that BL 30, like s. 61(1) of Cap. 589, prevented the use of evidence derived from the Australian intercepts in court proceedings. The CFA found such argument ungrounded and held that the legislature did not share the defendant's counsel's view about the effect of BL 30.

The Court did not agree with the defendant's counsel's submission that the second sentence of BL 30 had provided the only exceptions to the protection of privacy of communication. The Court held that the second sentence had nothing to do with the admission of relevant evidence and the purpose of the sentence was to control surveillance and not to change the common law position that evidence obtained illegally was admissible if relevant, subject to the discretion to exclude such evidence if necessary to secure a fair trial for the accused.

What the Court said

At 183, the CFA explained the essence of BL 30:

"7. … Article 30 is self-evidently concerned with protecting the privacy of communications. It creates an exception allowing officials to inspect communications for the purpose of protecting public security or investigating crime, in a manner prescribed by law. As the exception shows, the right is infringed by some third person gaining access to the content of the communication so that it loses its quality of privacy. Where a law enforcement agency seeks authority to breach such privacy the court's role is to balance the right to privacy of communications against the public interest in protecting public security and in investigating crime. [Cap. 589] provides the machinery and framework for striking that balance.

8. The question whether certain evidence - including evidence obtained in breach of a constitutionally protected right - is admissible in court proceedings involves a different balance founded on a different right, namely, the right of the defendant to a fair trial. The well-established balance here is between the public interest in the Court having access to relevant and probative evidence on the one hand, and the exclusion of evidence with a prejudicial effect which is out of proportion with its probative value on the other. The Court might also be asked to consider whether the conduct of the prosecution in securing such evidence constitutes an abuse of the process on a stay application. It determining

the admissibility of evidence or a stay application, the Court carries out its judicial function in the light of the defendant's constitutionally protected right to a fair trial.

9. The suggestion of inadmissibility of evidence obtained in breach of a constitutional right was authoritatively rejected by the Court in *HKSAR v Muhammad Riaz Khan* and no basis exists for accepting Mr McCoy's invitation to re-visit the correctness of that decision."

The Court rejected the defendant's submission on BL 30 at 187:

"24. Mr McCoy also submitted that we should deconstruct Article 30 and give meaning to the first sentence in Article 30 by contrast-effects with the second sentence. Thus read, he said we should conclude that the only exception to the protection of the freedom and privacy of communication are the limited exceptions in the second sentence. He further submitted that the expression 'department or individual' in the second sentence cover the courts. I do not agree. The clear purpose of the second sentence was to make clear that no 'department or individual' other than 'relevant authorities may inspect communication' and then, only 'in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.' It has nothing to do with the admission of relevant evidence.

25. In the interpretation of the Basic Law, 'a purposive approach is to be applied' and 'as to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context.' *Ng Ka Ling and Others v Director of Immigration* (1999) 2 HKCFAR 4 at 28. The purpose of the second sentence is clear. Bokhary PJ explained in *Koo Sze Yiu and Another v Chief Executive of the HKSAR* (2006) 9 HKCFAR441 at 449, it was to control covert surveillance. It was not to change the common law position about the admissibility of relevant evidence. Neither the language nor the purpose of Article 30 supports Mr McCoy's submission. On the contrary, it runs counter to the general theme of continuity reflected in the Basic Law."

As to the discretion to receive evidence, the Court made reference to the test laid down in *HKSAR v Muhammad Riaz Khan* (2012) 15 HKCFAR 232 and quoted from the judgment of that case at 188:

"29. The test laid down in *HKSAR v Muhammad Riaz Khan*, which is to be found at [20] of the report, is this:

Evidence obtained in breach of a defendant's constitutional rights can

nevertheless be received if, upon a careful examination of the circumstances, its reception (i) is conducive to a fair trial, (ii) is reconcilable with the respect due to the right or rights concerned (iii) appears unlikely to encourage any future breaches of that, those or other rights. The risk-assessment called for under the third element will always be made by the courts, vigilantly of course, in the light of their up-to-date experience. Thus is achieved, consistently with the constitution, a proper balance between the interests of individual defendants and those of society as a whole. It cannot have been the framers' intention - and is not the constitution's effect - to stand in the way of such of balance being struck. Just as rationality and proportionality can justify an impact on a non-absolute constitutional right, so can they justify a discretion to receive evidence obtained in breach of a constitutional right. Under the test stated above, the discretion concerned is rational and proportionate. The factors to be taken into account in applying this test and the weight to be accorded to each such factor will depend on the circumstances of each case.

As can be seen, there is no question of any discretion to receive evidence the reception of which is not reconcilable with the respect due to any right or freedom concerned. The discretion is the well-established one to exclude otherwise admissible evidence if its reception would be unfair in the circumstances."

T v Commissioner of Police (2014) 17 HKCFAR 593

Background

T participated in an event which raised awareness of the lesbian, gay, bisexual, transgender and intersex community. The event took place in an area designated as a pedestrian street. A temporary stage had been set up by the organizers of the event on which there was dancing performance.

The dance stopped after the police told the organizers that the latter had committed an offence as they did not have a temporary licence under the Places of Public Entertainment Ordinance (Cap. 172).

T applied for judicial review of the respondent's intervention. The

CFI held that the event in question required a licence while the CA disagreed. The respondent appealed.

The issues before the CFA were:

(1) whether the organizers were required to obtain a licence, and this turned on the interpretation of "public entertainment" and "place of public entertainment" in Cap. 172 ("the construction issue"); and

(2) the constitutionality of the licensing regime under Cap. 172 ("the constitutionality issue").

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 27.

What the Court held

The CFA (by majority) dismissed the appeal. The CFA held that the requirement that the public be admitted to the place was integral to the definition of "place of public entertainment".

The requirement of admission required some forms of control over the admission of persons to the public entertainment and the place where it was being presented, and a right of exclusion from that place. The word "admitted" suggested an active sense of giving permission to enter and letting a person in.

As a licence requirement on the keeping or use of a place of public entertainment constituted an interference with the constitutionally protected freedoms of assembly and expression, clear words were required to effect any such restriction, and doubts would be resolved in favour of a construction which did not amount to a restriction of the rights.

Without a lawful basis for exercising control over admission of the public to a public street, the licensing regime under Cap. 172 could not apply to entertainments taken place on public streets.

What the Court said

The majority held at 675 that the licensing regime under Cap. 172 could not apply to entertainments in a public street:

"266. … the ability to control admission is a necessary pre-condition to the making of an application for a licence. Since the public has a right of way over a public street, it is difficult to see how control over admission of members of the public could lawfully be exercised. Absent some other basis for exercising control over admission by members of the public to a public street, the [Cap. 172] licence regime cannot apply to an entertainment presented or carried on in a public street."

As the majority ruled in favour of T on the construction issue, it is not necessary for them to make a ruling on the constitutionality issue. Nevertheless, Ribeiro PJ (with whom Ma CJ and Lord Neuberger NPJ agreed) made the following observations on the constitutionality issue at 641 – 644:

"136. On the basis that [Cap. 172] applies to the IDAHO event, the respondent argues that sections 2 and 4 are unconstitutional because they are inconsistent with Articles 27 and 39 of the Basic Law and/or Articles 16(2) and 17 of the Hong Kong Bill of Rights. The contention is that the licensing regime of [Cap. 172] infringes the constitutionally guaranteed freedoms of expression and assembly, as demonstrated by the interference with the [International Day Against Homophobia] dance performance.

137. Those freedoms are of course of great importance, but they are not absolute and laws which impinge on them are valid if they pass the proportionality test which has often been applied in this jurisdiction. In the present case, the licensing requirement clearly has a legitimate aim being a precautionary scheme for the effective protection of public safety and good order in places of public entertainment. Plainly, the licensing regime which has been described is rationally connected with achieving that end. Neither of these points is in dispute.

…

143. Such constraints on the freedoms of expression and assembly as flow from operation of [Cap. 172] generally do not involve prohibiting the event. The Ordinance therefore usually involves minimal interference with the freedoms in question. In the rare case where the location is so unsuitable or the entertainment so dangerous that the risk cannot be

acceptably mitigated by imposing suitable conditions, refusal of a licence is a proportionate constraint. It is unthinkable that we should fail to learn the tragic lessons of the Lan Kwai Fong disaster of 1 January 1993. But even in cases involving such dangers, the organizers may be able to find a safe alternative venue or suitably to modify the entertainment so as to obtain a licence subject to tailor-made conditions. In my view, the requirements imposed by [Cap. 172] are no more than necessary to secure public safety and good order in places of public entertainment. It is a legitimate, rational and proportionate measure which is compatible with the constitutional guarantees."

Chau Tsun Kiu v Secretary for Justice [2014] 5 HKLRD 414

Background

The applicant was an unsuccessful candidate in the 2012 LegCo election for a certain geographical constituency. He applied for judicial review to challenge the constitutionality of s. 43(4A), (4B) and (4D) of the Legislative Council Ordinance (Cap. 542) ("the impugned provisions") under which candidates, in sending out free of postage ("f.o.p.") letter, might include materials of other candidates of the same constituency. The applicant argued that the impugned provisions constituted unequal treatment between affiliated and non-affiliated candidates on grounds of their political views. This was because only candidates with political affiliation could effectively benefit from the expanded exposure to electors through cross-referencing.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 25 and BL 26.

What the Court held

The impugned provisions did not constitute direct unequal treatment between candidates or different groups of candidates on the grounds

of political views or status. The rights conferred on candidates were to send f.o.p. letters to the electors and include in them information of other candidates. The rights were conferred across the board and without distinction on candidates. No restriction was imposed on which candidate was entitled to those rights.

There was also no relevant indirect unequal treatment. The applicant's alleged unequal treatment did not have any real and effective causation with the impugned provisions. To benefit from the impugned provisions, it was for the other candidates to include the applicant's information in their f.o.p. letters. However, they might decide not to do so for different reasons. The applicant's political views might be the reason but there might be other reasons such as they simply did not want to include the others' information. It did not necessarily follow that the f.o.p. arrangements had in practice constituted a disproportionate unequal treatment by reason of political views or status. The relevant and effective cause for the applicant's inability to benefit from the impugned provisions was the other candidate's decision not to include applicant's information in their letters, but not the reasons behind those decisions.

Thus, the impugned provisions were not in breach of BL 25, BL 26, BoR 21(b) and BoR 22.

What the Court said

The Court stated the principle of equality before the law at 423:

"25. It has been now firmly established by the Court of Final Appeal that:

i. The constitutional right to equality is in essence the right not be discriminated against. The right is guaranteed and protected in Hong Kong under the Basic Law and the BOR, incorporating the ICCPR.

ii. The law should generally and usually accord identical treatment to comparable situations, in the sense that like cases should be treated alike, and unlike cases should not be treated alike.

iii. However, equality before the law does not invariably require exact equality. Differences in legal treatment may sometimes be justified under the justification test, which is in nature similar to the now well-known proportionality test.

iv. When difference in treatment has been shown by an applicant, it is for

the Government to satisfy the court that the justification test is met: that is that (a) the unequal treatment is to pursue a legitimate aim, (b) there is rational connection between the legitimate aim and the difference in treatment, and (c) the difference in treatment is a proportionate one, in the sense that it is no more than necessary to accomplish the legitimate aim.

v. Given the doctrine of separation of powers, in assessing whether the justification test is so met, the court will generally give an appropriate degree of margin of appreciation to the legislature or the administrative authority in setting the arrangement in question, and will not interfere unless the arrangement is manifestly beyond reasonable foundation.

vi. The degree of the margin of appreciation to be given however is dependent on the context of the types of right said to be infringed by the arrangement in question. When the unequal treatment is based on grounds of core matters such as race, sex or say freedom of expression, the court would rarely find it acceptable and will scrutinize with intensity to see whether the differential treatment is justified in accordance with the proportionality test. Where characteristics or status other than these core societal values are involved, the court would accord greater leeway to the legislature, executive or relevant authorities.

vii. Finally, if it can be shown that the unequal treatment is so justified, the concerned treatment does not constitute discrimination and thus is not unconstitutional."

At 425, the Court held there was no direct unequal treatment:

"32. I therefore agree that the impugned provisions *by themselves* do not treat one class of candidates, or any candidate, more or less favourably than another on the ground of status, be it political view or affiliation. They therefore do not give any *direct* differential treatment to different candidates or different groups of candidates."

At 432 – 433, the Court held there was no indirect unequal treatment:

"52. There may be many reasons why the other candidates decide not to include candidate A's information in their f.o.p. letters. True it may be that some candidates may decide not to include A's information in their f.o.p. letters because of A's political views or A being not a member of these other candidates' parties. But it is also true that there may well be other reasons behind some candidates' decisions not to do so, such as that simply they do not want to include anyone else's information in their letters, or they do not know A well enough.

53. Therefore, the mere fact that *even if* A can show that in some specified occasions, there were those DC2 candidates who decided not to include his information in their f.o.p. letters because of his political views or status of non-association, this does not necessarily follow that the subject f.o.p. arrangements result in practice disproportionate unequal treatment by reason of political views or status. As explained above, similar results of non-inclusion in the f.o.p. letters would also occur for reasons other than status or political views in other occasions.

54. Thus, the relevant and effective cause for A's inability to benefit from the impugned provisions is the other candidates' decision not to include A's information in their letters, but not the reasons behind those decisions."

Gutierrez v Commissioner of Registration (2014) 17 HKCFAR 518

Background

This appeal arose in connection with an unsuccessful application made on behalf of the appellant, aged 10, by his mother for verification of his eligibility for a Hong Kong Permanent Identity Card ("Permanent ID Card") with a view to establishing that he enjoyed the status of Hong Kong permanent resident and right of abode. The appellant was born in Hong Kong and his mother was a Philippine national employed as a foreign domestic helper in Hong Kong. At the material time, the appellant was allowed to stay in Hong Kong as a visitor with three occasions of absence for periods of 17, 9 and 16 days respectively.

The appellant's application was first refused by the Immigration Department, and later by the Commissioner of Registration ("Commissioner"). The appellant appealed to the Registration of Persons Tribunal and his appeal was dismissed. That led to an application for leave to apply for judicial review. Leave was granted but the substantive application was dismissed. His appeal to the CA was dismissed and he appealed further to the CFA.

The questions before the CFA were:

(1) For the purpose of qualifying as a HKSAR permanent resident under BL 24(2)(4), what must a child or young adult applicant who is a non-Chinese national born in Hong Kong and whose application is made before he or she reaches the age of 21 establish, either on his own or by a parent or legal guardian on his or her behalf, to satisfy the requirement under BL 24(2)(4) of "having taken Hong Kong as [his or her] place of permanent residence"? ("The first question")

(2) For the purposes of BL 24 and BL 31, whether and under what circumstances a person exempted from the requirement of registration under the laws of the HKSAR and given permission to remain in Hong Kong as a visitor may become or be recognized as a non-permanent resident of the HKSAR to enjoy the freedom to travel and to enter and leave the HKSAR. ("The second question")

Basic Law provisions in dispute

The provisions in dispute were BL 24 (in particular BL 24(2)(4)) and BL 31.

What the Court held

The CFA dismissed the appeal. The CFA held that BL 24(2)(4) required persons to "have taken Hong Kong as their place of permanent residence" (the permanence requirement) to be an element additional to the requirement that those persons "have ordinarily resided in Hong Kong for a continuous period of not less than seven years" (the seven-year requirement).

The CFA held that the test in *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26 was applicable. The CFA held that the permanence requirement imported both subjective and objective requirements: the applicant must show that he subjectively intended to establish his permanent home in HKSAR and that he objectively had taken action to achieve that, taking into account his individual circumstances, including any action taken or arrangements made by himself or by a parent or legal guardian on his behalf or for his benefit which tended to show that such child or young adult had taken Hong

Kong as his place of permanent residence.

What the Court said

Addressing the first question, the CFA held at 533 that the Basic Law did not distinguish between adults and children for the purpose of BL 24(2)(4):

"29. … It is unfortunate for him that the Basic Law does not distinguish between adults and children for art.24(2)(4) purposes. In art.24(2)(5), the Basic Law specifically addresses the position of non-Chinese children born in Hong Kong, granting them permanent resident status if they are under the age of 21 and if they were born of non-Chinese residents who qualify for permanent residence under art.24(2)(4). But a child like the appellant, not of Chinese nationality, born in Hong Kong but not a resident within art.24(2)(4), cannot rely on art.24(2)(5). He can only qualify for permanent resident status if he comes within art.24(2)(4), meeting the requirements explained in *Prem Singh v Director of Immigration*. The submission in the appellant's printed case that children and young adults stand in a different class, requiring a different test to be devised therefore cannot be accepted."

The CFA held at 534 that BL 24(2)(4) included both the seven-year requirement and the permanence requirement:

"31. … as pointed out in *Prem Singh v Director of Immigration*, art.24(2)(4) makes it clear that more than ordinary residence is required. It specifies the permanence requirement as an element additional to the seven-year requirement. It is therefore not enough merely to show ordinary residence and an intention to continue to be ordinarily resident. Secondly, the words 'have taken Hong Kong as their place of permanent residence' are properly construed as importing both subjective and objective requirements. The element of permanence connotes a subjective commitment to maintaining a residence in Hong Kong, while the need to 'have taken Hong Kong (etc.)' denotes the existence of objective facts constituting such 'taking'… Given the content of art.24(2)(4), it is not plausible to suggest that the drafters of the Basic Law intended that ordinary residence accompanied by a mere declaration of intent without the support of concrete, objective evidence, would suffice to meet the permanence requirement.

32. That more than ordinary residence is required under Article 24(2)(4) is reinforced by comparing that Article with Article 24(2)(2) which, in relation

to Chinese citizens, only requires ordinary residence in Hong Kong for a continuous period of not less than seven years, making no mention of having taken Hong Kong as the applicant's place of permanent residence."

As regards the "concrete steps" to be taken for the purpose of the permanence requirement, the CFA held at 535 – 536:

"36. The reference to 'concrete steps' occurs at [64] [of *Prem Singh v Director of Immigration*] in the statement that:

The permanence requirement makes it necessary for the applicant to satisfy the Director both that he intends to establish his permanent home in Hong Kong and that he has taken concrete steps to do so. This means that the applicant must show that his residence here is intended to be more than ordinary residence and that he intends and has taken action to make Hong Kong, and Hong Kong alone, his place of permanent residence.

37. As the context shows, those words were used to emphasize that there are both subjective and objective elements in the permanence requirement: the applicant must show that he subjectively intends to establish his permanent home in Hong Kong and that he objectively has taken action to achieve that. They are words which emphasize that intention alone is not enough and that it is necessary for there to be some objective evidence of having taken Hong Kong as the applicant's permanent home.

…

40. … Plainly, the Court was pointing to the need to refer concretely to objective facts and not just a statement of intent. But while clearly holding that evidence of such objective facts is needed, the judgment cannot properly be read as confining such evidence or such facts to any particular category. Thus, the facts and circumstances which surround any conduct relied on for the purpose of satisfying the permanence requirement may be just as relevant as the conduct itself. Indeed, conduct which may be described as involving an omission rather than positive steps, if tending to show that the permanence requirement is met, would plainly be relevant …"

The CFA pointed out that the permanence requirement did not oblige an applicant to sever links with other countries. At 537, the CFA said:

"44. We are not aware of any judgment where the alleged error complained of has been made. *Prem Singh v Director of Immigration* certainly does not suggest that the permanence requirement obliges an applicant to sever links with other countries …

45. Plainly, an applicant who provides evidence of intent and conduct to show that he has taken Hong Kong alone as the place where he plans to live permanently or indefinitely is not excluded from acquiring permanent residence because he owns property abroad, has close relatives residing in another country or maintains other kinds of foreign links."

The CFA agreed that all relevant circumstances should be considered to determine whether the permanence requirement had been satisfied. The CFA said at 538:

"50. Looked at individually, the centrally important feature of the appellant's case is obviously that he was 10 years old when he made his claim for permanent residence. We agree … that one would not in general expect a child aged 10 independently to form the intention or to possess the means to establish his own place of permanent residence. As the Court of Appeal acknowledged, there may be rare occasions where that may occur, but in the great majority of cases, the child will be living with and dependent upon the support of his parents or guardian so that the child's position will for practical purposes follow that of his parents or guardian … one would take into account all relevant circumstances, asking whether there is evidence of conduct or arrangements made on his behalf or for his benefit, by his parents, guardian or otherwise (including by himself in the rare case whether that is possible), showing that he has taken Hong Kong as his place of permanent residence."

The CFA concluded at 539:

"53. On the available evidence, there was no basis for suggesting that the appellant had taken Hong Kong as his place of permanent residence through any conduct of, or arrangements made on his behalf or for his benefit by, his mother or by any other person. The question which the Court of Appeal posed as to what would become of the appellant if his mother were to lose her employment was, in the circumstances of this case, a perfectly proper question, given the appellant's lack of ability independently to establish Hong Kong as his place of permanent residence."

Addressing the second question, the CFA said at 534:

"63. The difference between the Commissioner and the appellant on the second question hinges on whether the proviso to regulation 25, by enabling exempted persons to apply for an identity card, means that they ought in law to be treated as 'persons who are qualified to obtain Hong Kong identity

cards in accordance with the laws of the Region' within Article 24(4) and are therefore non-permanent residents.

64. We agree with Lord Pannick's submission that the answer is 'No' because the proviso to regulation 25 merely qualifies exempted persons to apply and not to obtain an identity card. This is so because the proviso makes it clear that an identity card will only be issued 'if the Commissioner allows' that to happen. Plainly, if an application is refused, the applicant cannot claim to be a person qualified to obtain an identity card.

…

66. Our answer to the second question is therefore that a person exempted from the requirement of registration and given permission to remain in Hong Kong as a visitor does not, without more, qualify to enjoy the freedom to travel and to enter and leave the HKSAR as a non-permanent resident. …"

Good Faith Properties Ltd v Cibean Development Co Ltd

[2014] 5 HKLRD 534

Background

In May 2013, the Lands Tribunal ("Tribunal") made an order pursuant to the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545) for the sale of the remaining portion of Inland Lot No. 1486 ("the Land"). At that time, there was a composite building on the Land and there was a shop unit in the building. The respondent was the owner of that unit and a minority owner of the Land. The respondent opposed the application for sale but failed. In awarding certain costs against the respondent, the Tribunal rejected the compensation approach and adopted a modified form of "costs follow the event" approach. The respondent appealed against the costs decision of the Tribunal.

Basic Law provisions in dispute

The major provision in dispute was BL 105.

What the Court held

The CA held that Cap. 545 was a statutory compromise balancing the competing interests of the majority owner in utilizing the land for redevelopment and the minority owner's interests in the disposal of his property. It provided safeguard to ensure that the minority owner's right of private ownership of property was not overridden without the Tribunal being satisfied in the statutory process that there was sufficient justification to meet the statutory criteria for a compulsory sale.

In compulsory acquisition of land made by the Government, a successful claimant was entitled under the compensation approach to the reasonable and necessary expenses of determining the amount of the disputed compensation. In view of BL 105 which protected private property, the CA held that this must be correct as a matter of principle. An owner whose land was taken would not be able to get the real value of the property if there would be a substantial depletion of the compensation by costs of the process. The CA held that there was no valid reason why the compensation approach should not equally apply to proceedings under Cap. 545. The CA allowed the appeal, set aside the costs order and remitted the matter back to the Tribunal for a proper determination of the question of costs in accordance with the compensation approach.

What the Court said

At 540 – 542, the CA held that Cap. 545 balanced the competing interests of the co-owners by a statutory process:

"11. We must recognize that [Cap. 545] is a statutory compromise balancing the competing interests of the co-owners: the majority owner's interest in utilizing his property by releasing the land for redevelopment versus the minority owner's proprietary interest in the disposal of his own property. The right of private ownership protected under Article 6 of the Basic Law … should not be overridden without justification. Even if the right of private ownership of the minority owner were to be overridden when there is proper justification, there must be fair and reasonable compensation. …

13. [Cap. 545] gives the majority owner(s) a means to override the will of the minority owner not because the minority owner has done something wrong: there is no legal wrong committed by the minority owner against

the legal interests of the majority owner(s). It merely gives the majority owner(s) an opportunity to establish the justification for doing so to the satisfaction of the Tribunal. And it is only upon the Tribunal deciding that the statutory criteria have been met that the minority owner becomes obliged to sell.

14. Therefore, the making of the application is a necessary step if the majority owner(s) wish to take advantage of [Cap. 545] and the costs incurred by him in making the application is the price he has to pay in order to bring him to the point where a minority owner can be compelled by an order to sell through no fault on the part of the latter.

15. Further, [Cap. 545] also gives a right to the minority owner to have his objections heard by the Tribunal. Objections can be raised in several respects. Under s 4(1)(a), the minority owner can dispute the value of the property. Under s 4(2), objections can be raised as to whether the applicant has met the statutory criteria in s 4(2)(a) and (b).

16. Though the Tribunal will only come to the question of reserve price under Schedule 2 para 2 pursuant to s 5(1)(a) after it concludes that the statutory criteria under s 4(2) are met, the minority owner is also entitled to be heard on the setting of the reserve price because it would have a bearing on the quantum of the sale proceeds in which he has an interest. …"

Citing the CFA's decision in *Sin Ho Yuen v Fineway Property Ltd*, the CA agreed that one objective of Cap. 545 was to ensure that the minority owner could receive fair and reasonable compensation. The Court said at 543:

"19. Turning next to … the fair and reasonable compensation to the minority owner if an order for sale is to be made against his will. In the context of the present appeal, the following observations by Bokhary PJ in *Sin Ho Yuen v Fineway Properties Ltd* (2011) 24 HKCFAR 497, at [7] are pertinent:

… One of the objectives of [Cap. 545] is, as Mr Justice Ribeiro PJ said in ***Capital Well Ltd v Bond Star Development Ltd*** *at para 21, 'to ensure that the minority owner receive fair and reasonable compensation for his interests in the lot'. That objective would be defeated if such compensation is swallowed up or materially eroded by the costs which the minority owner has to pay to his own or the other side's lawyers. …*

20. To the same effect is what was said by Litton NPJ at [25]:

In order that the entrenched right of private ownership of property in Articles 6 and 105 of the Basic Law be not infringed, the protection of minority

interest under the Ordinance becomes therefore a key factor. In turn, it behoves the tribunal, in carrying out the scheme of the Ordinance, to ensure that such protection be not diminished … And there would be diminution if, for instance, the minority owner bore, at the end of the day, an inordinate burden of costs, so that what he got by way of his share of the proceeds of sale was largely taken away by the costs incurred in the legal process."

The CA held at 545 – 549 that the compensation approach was applicable:

"27. In compulsory acquisition cases (where land is acquired by the government or public authorities), the general approach on costs is that it should not be dealt with in the same manner as ordinary hostile litigation. Bearing in mind the special context (the process being one for the determination of the proper compensation for the taking of the land compulsorily), the expenses of such determination are regarded as the part of the reasonable and necessary expense attributable to the acquisition process as a whole. The starting point is that such costs should be paid by the acquiring authority …

30. As a matter of principle, this must be the correct approach for land resumption cases in view of Article 105 of the Basic Law. A substantial depletion of compensation by costs of the process (which cannot be regarded as unreasonably incurred) will not give the owner whose land was taken the real value of the property.

…

33. … it must be recognized that in common with compulsory acquisition by the government or other public authorities, a sale ordered by the Tribunal under [Cap. 545] is the compulsory deprivation of the minority owner's private ownership of property. Though there could be debate as to the applicability of Article 105 of the Basic Law in light of the expression '徵用' in the Chinese version, there is no doubt that Article 6 of the Basic Law is engaged. As observed by Litton NPJ in *Sin Ho Yuen v Fineway Properties Ltd*, supra, the deprivation of private ownership without fair and reasonable compensation is an infringement of the constitutional right of the minority owner. …

34. Like the case of a landowner in the context of compulsory acquisition, the minority owner in [Cap. 545] proceedings does not wish to dispose of his private property. The whole process, including the proceedings in the Lands Tribunal, is instigated by the majority owner. To the extent that the

exercise of the discretion should be informed by the principle that he who caused the litigation should pay for it, the consideration in proceedings under [Cap. 545] and resumption cases is the same. …"

The CA concluded at 550:
"37. In principle, we do not see any valid reason why the compensation approach on costs should not be equally applicable to proceedings under [Cap. 545]."

Leung Kwok Hung v President of the Legislative Council (No. 1) (2014) 17 HKCFAR 689

Background

The President of the LegCo ("President") made a decision to terminate a lengthy debate dealing with numerous amendments proposed by two members of the LegCo (the appellant being one of them). The avowed intention of the two members for the introduction of the amendments was to filibuster the matter being discussed. The President considered that the debate was not serving its proper objective and should come to an end. He eventually made a decision to end the debate pursuant to Rule 92 of the Rules of Procedure of the LegCo ("Rules"). The appellant sought leave to apply for judicial review of the President's decision. Leave was refused by the CFI whose decision was affirmed by the CA.

Rule 92 of the Rules provides that "in any matter not provided for" in the Rules, the practice and procedure to be followed in the LegCo "shall be such as may be decided by the President". The Rules (including Rule 92) were made by the LegCo pursuant to BL 75(2), which stated that the rules of procedure of the LegCo "shall be made by the Council on its own, provided that they do not contravene this Law." As regards the role of the President, BL 72(1) provided for his power and function to preside over meetings.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 72 (BL 72(1) in particular), BL 73 (BL 73(1) in particular) and BL 75 (BL 75(2) in particular). The CFA also referred to BL 74.

What the Court held

The CFA held that the President had power to set limits and to terminate a debate when presiding over meetings under BL 72(1).

The CFA held that the purpose of BL 73 was to confer certain powers and functions on LegCo as a law-making body and was not directed to individual members. This contrasted with BL 74 which conferred powers on members in their individual capacities. This conclusion was supported by BL 75(2) which provided the LegCo exclusive power to make its rules of procedure and by the extensive powers conferred by BL 72 on the President to exercise his power to "preside over meetings" so as to ensure the orderly, efficient and fair disposition of LegCo's business.

The CFA applied the principle of non-intervention and recognized the exclusive authority of the legislature in managing its own internal processes in the conduct of its business, in particular the legislative process.

Nonetheless, the CFA held that there was one important qualification, namely, that the courts would exercise jurisdiction to determine the existence of a power, privilege or immunity of the President, but it was not for the CFA to consider whether or not the power had been properly exercised on any occasion.

What the Court said

The CFA rejected the appellant's argument that BL 73(1) conferred a right on individual members to participate in the legislative process. The Court held at 699 – 700:

"21. … The purpose of [art.73], as is apparent from its language, is to confer certain powers and functions on LegCo as a law-making body, that is, as an

institution. The article is not directed to the powers, let alone the rights, of individual members of LegCo. There is no reference in art.73, as there is in art.74, to members in their individual capacities.

22. That the purpose of art.73 is not to confer rights on individual members of LegCo to participate in its processes is supported by art.75 which authorizes LegCo to make its rules of procedure 'on its own' and by the extensive powers conferred on the President by art.72. The two articles indicate that LegCo is to have exclusive authority in determining its procedure and that the President is to exercise his power to 'preside over meetings' under art.72 so as to ensure the orderly, efficient and fair disposition of LegCo's business."

The CFA further elaborated the reasons for rejecting the appellant's argument at 700:

"23. The consequences of the interpretation of art.73(1) advanced on behalf of the appellant are so daunting as to invite, if not demand, its rejection. The appellant's interpretation would open the door to the courts so that any member of LegCo who was dissatisfied with the way in which the Rules were applied to him, or with rulings of the President, could seek relief from the courts by way of judicial review, not only post-enactment, but more importantly, pre-enactment. This prospect would be extremely damaging to the orderly, efficient and fair deliberations and working of LegCo. Its proceedings would be liable to disruption, delays and uncertainties occasioned by applications for judicial review, judgments and appeals."

The CFA held at 702 that BL 73(1) should be interpreted in light of the relevant common law principles and policy consideration including the LegCo's law-making function:

"28. In construing and applying the provisions of the BL, it is necessary not only to apply common law principles of interpretation but also principles, doctrines, concepts and understandings which are embedded in the common law. They include the doctrine of the separation of powers and, within it, the established relationship between the legislature and the courts. This relationship includes the principle that the courts will recognize the exclusive authority of the legislature in managing its own internal processes in the conduct of its business, in particular its legislative processes. The corollary is the proposition that the courts will not intervene to rule on the regularity or irregularity of the internal processes of the legislature but will leave it to determine exclusively for itself matters of this

kind (the non-intervention principle).

…

30. The important responsibilities of LegCo, notably its law-making function, require, as with other legislatures, that it should be left to manage and resolve its own internal affairs, free from intervention by the courts and from the possible disruption, delays and uncertainties which could result from such intervention. Freedom from these problems is both desirable and necessary in the interests of the orderly, efficient and fair disposition of LegCo's business.

31. The adoption of the principle of non-intervention by the courts will reduce, if not eliminate, the prospect of pre-enactment challenge to proceedings in LegCo. It will also reduce, if not eliminate, post-enactment challenges to the validity of laws made by LegCo based on irregularity in its proceedings, unless such an irregularity amounts to non-compliance with a requirement on which the validity of a law depends.

32. In this respect it is important to recognize that the principle of non-intervention is necessarily subject to constitutional requirements. The provisions of a written constitution may make the validity of a law depend upon any fact, event or circumstance they identify, and if one so identified is a proceeding in, or compliance with, a procedure in the legislature the courts must take it under its cognizance in order to determine whether the supposed law is a valid law. …

33. Although the principle of non-intervention is directed to pre-enactment judicial intervention in the legislative processes, the grounds on which the principle is based have generated a strong related principle of interpretation or presumption. That principle or presumption is that the courts will lean against an interpretation of a constitutional provision that makes compliance with procedural regularity in the law-making processes of a legislature a condition of the validity of an enacted law."

The CFA held at 706 – 707 that the courts would exercise jurisdiction to determine whether the President had a power, privilege or immunity:

"43. Accordingly, our conclusion on this point was that, although art.73(1) does not make compliance with the Rules essential to the validity of the enactment of a law by LegCo and that it is for LegCo itself to determine its own procedures and how they will be applied, the courts will exercise jurisdiction to determine the existence of a power, privilege or immunity of LegCo. We also arrived at the conclusion that the courts will exercise

jurisdiction to determine the existence of a power, privilege or immunity of the President of LegCo. We arrived at this conclusion in the light, not only of art.73(1), but also of the provisions of art.72 of the BL and the important powers and functions which it confers on the President, particularly the power to 'preside over meetings'. The courts, however, will not exercise jurisdiction to determine the occasion or the manner of exercise of any such powers, privileges or immunities either by LegCo or the President."

The CFA considered at 707 the power of the President under BL 72(1):
"46. … it is clear that the President has power to set limits to and terminate a debate. The existence of the power is inherent in, or incidental to, the power granted by art.72(1) to the President to preside over meetings, quite apart from r.92. The rules of procedure for which provision is made by art.75, as far as they relate to the President and his powers and functions, are necessarily subject to the provisions of art.72 setting out his powers and functions. It is not for this Court to consider whether or not the power was properly exercised. Nor is it for us to determine whether the President's decision constituted an unauthorized making of a rule of procedure …"

HKSAR v Hon Ming Kong (2014) 17 HKCFAR 727

Background

The appellants were convicted of conspiracy and sought leave to appeal against their convictions to the CFA. The crux of the proposed appeal related to the refusal by the District Court and the CA of their application to stay the criminal proceedings against them as an abuse of process. The appellants argued that it would be unjust and unfair for the trial to proceed because they were unable to secure the evidence from witnesses residing in the Mainland ("Mainland witnesses") and those witnesses could give evidence favourable to them.

Basic Law provisions in dispute

The Basic Law provisions in dispute were BL 87 and BL 95.

What the Court held

The Appeal Committee of the CFA unanimously dismissed the applicants' application for leave to appeal. The Appeal Committee held that there was no point of law of great and general importance involved. The Appeal Committee agreed with the CA's conclusion of facts and was of the view that the appellants failed to lay a sufficient foundation for a stay of proceedings. Therefore, the appellants' argument that it would be unjust and unfair for the trial to proceed because they were unable to secure the evidence of the Mainland witnesses for their criminal trial could not be sustained.

The Appeal Committee ruled that BL 95 plainly did not impose a duty to put in place a scheme for mutual legal assistance between the HKSAR and the Mainland in criminal matters. Moreover, the question of whether the PRC was in breach of its obligations under the ICCPR was not a matter justiciable before the courts of the HKSAR.

What the Court said

At 732, the Appeal Committee held that the appellants' constitutional arguments were wholly misconceived:

"7. Insofar as the points of law relied upon seek to raise arguments of constitutional law and procedure regarding mutual legal assistance in criminal proceedings, we are satisfied that these arguments are wholly misconceived and do not begin to raise arguable grounds of appeal. The permissive terms of Article 95 of the Basic Law, even if read together with Article 87 of the Basic Law, plainly do not impose a duty to put in place a scheme for mutual legal assistance in criminal matters. Similarly, the argument, based on the absence of a compulsory mechanism in the PRC to ensure that the evidence of the Mainland witnesses was taken pursuant to the letters of request issued by the court in Hong Kong, that the PRC was in breach of its obligations under the International Covenant on Civil and Political Rights is not a matter justiciable before the courts of the HKSAR."

Secretary for Justice v Florence Tsang Chiu Wing (2014) 17 HKCFAR 739

Background

In ancillary relief proceedings, the husband ("H") and his father ("F") claimed that most assets in question belonged to F. On the other hand, the wife ("W") claimed that a fraudulent transaction had taken place between H and F to defeat her claim for financial provision. W obtained discovery of certain documents against H and F. H objected arguing that some documents were protected by legal professional privilege ("LPP"). The Judge, however, held that LPP could not be claimed where the documents fell within the exceptions for "crime" or "fraud". The Judge directed the Registrar to forward a copy of the judgment to the Director of Public Prosecutions ("DPP"). The Secretary for Justice ("SJ") applied for the DPP to be given access to the relevant documents in aid of a criminal investigation. Another Judge granted SJ's application and released W from her implied undertaking in relation to the relevant documents for the purpose of disclosing the same to the SJ and the police.

On appeal, the CA set aside the order granting SJ access to the relevant documents. The issue of LPP was remitted to the CFI but the order releasing W from her implied undertaking was upheld. H and F appealed to the CFA against the CA's order.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 35.

What the Court held

The CFA allowed the appeal. The Court held that LPP was a fundamental right which the courts would jealously protect. As between the SJ and H and F, the issue of whether the relevant documents were protected by LPP had not yet been determined. It would be wrong to release W from her implied undertaking. The DPP should not be permitted to make derivative use of the relevant documents which were

protected by LPP in his hands, the privilege being absolute. Whether the relevant documents could be released for use of a criminal investigation should depend on the DPP establishing his entitlements to such use and not on relieving W from her implied undertaking.

What the Court said

The CFA held at 751 that LPP was a fundamental right:

"27. It has repeatedly been stressed that LPP is a fundamental right which the courts will jealously protect. As Lord Hoffmann reiterated in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*:

… LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice. …

28. In Hong Kong, LPP is constitutionally guaranteed by the confidential legal advice clause in Article 35 of the Basic Law, as this Court noted in *Akai Holdings Ltd v Ernst & Young (a Hong Kong firm)*.

29. While an exercise of balancing competing interests is required in deciding whether someone should be released from the implied undertaking, it is well established that 'LPP does not involve such a balancing of interests. It is absolute and is based not merely upon the general right to privacy but also upon the right of access to justice'."

The CFA disagreed that W could be released from her implied undertaking. At 752, the Court said:

"31. In our view, it would be wrong in principle to release W from her implied undertaking with the consequence of enabling her to provide to the SJ and DPP, documents for which LPP is claimed and not yet ruled upon by the Court. But it is not simply a question of directing W to await the final outcome of the SJ's application for access to the disputed documents. Of course, if the SJ were to succeed in obtaining access to the same documents as W obtained, no practical difficulty would arise. However, it is plainly possible that the outcome of his pending application might involve the DPP failing to obtain access at all or obtaining a narrower range of documents than those obtained by W. In such a case, it would be highly incongruous for W to be released from her undertaking and thus permitted to provide to

the DPP documents which the Court has held were protected as against him by LPP. To allow the Court's ruling to be side-stepped in this way would be to undermine the Court's decision and to bring the administration of justice into disrepute."

The CFA reiterated at 752 – 753 that LPP was absolute:

"33. In our view, it would not be proper for the DPP to gain access to any documents denied him by the Court by the simple expedient of receiving them from W. There can be no question of releasing W from her implied undertaking to enable her to achieve that purpose. Nor is there any question of the DPP being permitted to make derivative use of documents which are protected by LPP in his hands, the privilege being absolute.

34. In our view, no cogent argument has been advanced for releasing W from her undertaking at all. Holding W to her undertaking in the present case does not mean that the reporting of an alleged crime will be stifled. The Judge has made such a report by passing a copy of the Main Judgment to the DPP. If and to the extent that the DPP succeeds in bringing the documents concerned within the *R v Cox* rule, there would be no impediment to him using those documents in the criminal investigation. He could discuss them with W without her having to be released from her undertaking. It is appropriate that the availability of such documents for use in a criminal investigation should depend on the DPP establishing his entitlement to such use and not on W being relieved of her implied undertaking, regardless of the outcome of the DPP's application."

Leung Lai Kwok Yvonne v The Chief Secretary for Administration & Others (unreported, 5 June 2015, HCAL 31 of 2015)

Background

In July 2014, after consultation, the CE made a report to the NPCSC suggesting that amendment should be made to the method of selecting the CE to attain the aim of universal suffrage. The NPCSC made a decision setting out the framework for political reform in Hong Kong in the election for CE in 2017 ("the 831 Decision"). On 7 January

2015, a task force led by the putative respondents commenced public consultation ("the 2nd consultation") in the form of the consultation document ("the Consultation Document"). On 22 April 2015, the Secretary for Constitutional and Mainland Affairs, the 3rd putative respondent, published the Consultation Report and Proposals on the "Method for Selecting the Chief Executive by Universal Suffrage" ("the Consultation Report and Proposals"). Both the Consultation Document and the Consultation Report and Proposals were proceeded on the basis that the entire 831 Decision set out a legally binding framework on the constitutional reform for selecting the CE. In the Consultation Report and Proposals, it was also expressly stated that the HKSARG would not further process any suggestions that were considered not consistent with or not in conformity with the 831 Decision. The applicant applied for judicial review of the decisions of the putative respondents (i) to commence the 2nd consultation in the form of Consultation Document; (ii) in issuing the Consultation Document itself; and (iii) in issuing the Consultation Report and Proposals.

The applicant sought, *inter alia*, the following relief:

(1) declarations to the effect that the Consultation Document and the Consultation Report and Proposals were issued under a mistaken or false legal basis that the entirety of the 831 Decision had legal effect and was legally binding in Hong Kong under the Basic Law.

(2) A declaration that the proposals in the Consultation Report and Proposals were unconstitutional and/or unlawful as they constituted disproportionate interference with the right to vote and the right to stand for election in contravention of BL 26 and BoR 21.

Basic Law provisions in dispute

The major provisions in dispute were BL 26, BL 45, Article 7 of Annex I to the Basic Law and the interpretation of Article 7 of Annex I and Article III of Annex II made by NPCSC on 6 April 2004 ("the 2004 Interpretation"). BL 158 was also mentioned.

What the Court held

The 2004 Interpretation and Article 7 of Annex I to the Basic Law prescribed that the NPCSC had the ultimate authority to approve any proposed electoral reform amendments to be made to Annex I. It was held that the 831 Decision, being a decision of the NPCSC, was not subject to judicial review by the court in Hong Kong, as the court had no jurisdiction to do so. The applicant could not challenge the 831 Decision itself by way of the intended judicial review.

Any potential options which could be regarded as outside the scope of the 831 Decision could only amount to non-viable options for the purpose of formulating the proposals in amending the selection method of the CE which required the NPCSC's final approval, as any such options would be eventually rejected by the NPCSC. As a matter of law, there was no duty on the authority to consult non-viable options. In the premises, the 2nd consultation would not have been rendered defective or unfair even if it had excluded those options which were non-viable options. The court would not quash any decision relating to that consultation.

It was premature to entertain the challenge based on the alleged error of law and infringement of BL 26 and BL 45. The Court should only look at the question when the relevant motion had been properly debated in and endorsed by the LegCo and should avoid interfering in the legislative process and entertaining a pre-enactment challenge. This was particularly so as it was simply unclear whether the objected provision would become law.

What the Court said

At paragraphs 30 – 31, the Court affirmed the view that the 831 Decision was not subject to review by the court in Hong Kong:

"30. First, it must be noted that the applicant has at least impliedly accepted (and I think rightly so) that the 831 Decision, being a decision of the NPCSC, is not subject to review by the court in Hong Kong, as the court simply has no jurisdiction to do so. She has also accepted that the 2004 Interpretation and Article 7 of Annex I prescribe that the NPCSC has the *ultimate* authority to approve or not approve at step 5 any proposed electoral reform

amendments to be made to Annex I.

31. In the premises, there is no question that the applicant can challenge the 831 Decision itself by way of the intended judicial review. As such, the applicant's substantive attack under these grounds can only be that the 2nd consultation was tainted by the alleged error of law, and as such, the consultation itself and the subsequent Consultation Report and Proposals are also similarly tainted and thus should be quashed."

In holding that there was no duty on the authority to consult non-viable options, the Court said at paragraph 33:

"33. … As submitted by Mr Yu [counsel for the respondents], even if there is (although Mr Yu contends there is not) the mistake of law as contended by the applicant, any views or options which can be regarded as outside the scope of the Further Statement can only amount to non-viable options for the purpose of formulating the proposals in amending the method for selecting the CE. This is so as (leaving aside the question as to whether the entire 831 Decision is legally binding in Hong Kong) the NPCSC has in any event through the Further Statement stated expressly the framework within which any proposed amendments to the method may be accepted by it. Since (as accepted by the applicant) the NPCSC has the ultimate authority to disapprove any amendments (even if endorsed by the LegCo and consented to by the CE) at step 5, any such potential views and options would therefore not be viable ones for the purpose of formulating the proposal for amending methods for the final approval by the NPCSC, as any proposed amendments incorporating them would be eventually rejected by the NPCSC at the last step. In this respect, as a matter of law, there is no duty on the authority or decision maker to consult non-viable options … In the premises, the consultation would not have been rendered defective or unfair even if the 2nd consultation, by reason of the alleged error of law, had excluded these views and options (which are non-viable options). The court would not quash any decisions relating to or resulting from that consultation."

At paragraphs 39 – 44, the Court held that it was premature to entertain the challenge based on the alleged error of law and infringement of BL 26 and BL 45:

"39. As mentioned above, the legislature process for incorporating the proposals has already begun. The Draft Motion for the amendments has already been submitted to the Subcommittee formed under the House

Committee of the LegCo for scrutiny. The motion itself would most likely be debated and voted in the LegCo later in June. It is only if the LegCo endorses the motion by two-thirds majority that the five step process will move on to the next stage. At present, it is not known at all whether the LegCo will endorse the motion.

40. In this respect, the law is clear that, to underline the concept of separation of power and the distinct and different role of the legislature and the judiciary, the court should, in general and as far as possible, avoid interfering in the legislative process and entertaining a pre-enactment challenge. This is particularly so as it is simply unclear whether the objected provision would become law: *Leung Kwok Hung v President of the Legislative Council (No. 2)* [2015] 1 HKC 195, paragraphs 27 – 29 …

43. The strict approach is not limited to situations where there is already a bill tabled before the legislature; it also applies to the case of pre enactment consultation which may or may not result in an enactment …"

The Court held at paragraph 57:

"57. Moreover, I would add that there is a further reason as to why the court should not entertain a challenge based on Grounds 3 and 4 at this pre-enactment stage. The question of whether the Proposals in not adopting the ['none of the above option'] amount to unjustified or disproportionate restriction of the Relevant Rights (even if they are applicable in this context) is one concerning election. As said by Ma CJ in *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735, at paragraph 45, this is a context which also involves political and policy considerations and it is in these areas that the legislature is involved. Thus, in determining a question of whether certain legislative restriction is an appropriate or justified one vis-à-vis an alleged constitutional right concerning election, the court (in recognizing the principle of separation of power) would accord a due margin of appreciation to the legislature."

Ho Chee Sing James v Secretary for Justice [2015] 4 HKLRD 311

Background

The plaintiff held the rank of a Chief Officer in the Correctional Services Department in 2004. In 2007, he was interdicted and part of his monthly salary was withheld pursuant to an order made by the Commissioner of the Correctional Services ("Commissioner"). After his retirement in 2012, the plaintiff commenced proceedings in which he sought the withheld emolument and damages. He pleaded that there had been breach of contract of employment, breach of a duty imposed by s. 20(4) of the Prisons Ordinance (Cap. 234), by the Commissioner in refusing to pay the withheld emoluments, breach of statutory duty under BoR 10 and breach of constitutional rights under BL 35, BL 39 and/or BoR 10.

The Secretary for Justice argued that part of the plaintiff's claim fell within the exclusive jurisdiction of the Labour Tribunal ("the Tribunal") and sought to strike out his amended statement of claim ("ASOC") except in so far as the ASOC related to the claim for withheld emolument pursuant to s. 20(4) of Cap. 234, and a stay of the proceedings until the matter was resolved by the Tribunal. The plaintiff argued that (a) the Tribunal had no jurisdiction over a dispute arising from the relationship between a civil servant and the Government, (b) the exclusive jurisdiction of the Tribunal under s. 7 of the Labour Tribunal Ordinance (Cap. 25) was inconsistent with BoR 10 and BL 35 and unconstitutional, and (c) the plaintiff's claim fell outside the Tribunal's exclusive jurisdiction as the claim involved both a breach of constitutional rights and a breach of statutory duty.

Basic Law provisions in dispute

The major provision in dispute was BL 35.

What the Court held

The CFI held that the exclusive jurisdiction provisions under Cap. 25 were not unconstitutional or inconsistent with BL 35 and BoR 10. The

Tribunal was plainly a court designed to deal with employment disputes, namely for a sum of money arising from an employment contract expeditiously. However, where the substantive claim was based on tort or the relief claimed was outside the jurisdiction of the Tribunal, the claim could be commenced in or transferred to other courts.

The legislative intent of the Hong Kong Bill of Rights Ordinance (Cap. 383) was not to protect a limited class but to protect the citizens of Hong Kong at large. The effect of s. 6 of Cap. 383 was that a breach of the Hong Kong Bill of Rights did not give rise to an independent private law cause of action. Therefore, there was no separate right to damages for breach of BoR 10.

What the Court said

The CFI discussed the exclusive jurisdiction of the Tribunal under Cap. 25 at 322 – 323:

"27. It is agreed between the parties, plainly correctly, that the effect of section 7(1) and (2) of the LTO is that the Tribunal will have exclusive jurisdiction to determine the claims as specified in the Schedule to the LTO. Those claims include a claim for a sum of money which arises from the breach of term, whether express or implied of a contract of employment for performance in Hong Kong.

28. The contract under which Mr Ho was employed, being a contract of employment within the scope of the LTO, the starting point must be that the Tribunal has exclusive jurisdiction in respect of a dispute involving a claim for a sum of money which arises from a breach of a term in relation to that contract …"

In considering the constitutionality of the exclusive jurisdiction clause of the Tribunal, the CFI laid down its approach at 327 – 328:

"46. [Counsel for the plaintiff] argued that the exclusive jurisdiction clause of the Tribunal was inconsistent with Mr Ho's right of access to the courts under Article 10 of the Hong Kong Bill of Rights, and Article 35 of the Basic Law. He said that the exclusive jurisdiction clause excludes the jurisdiction of all other courts over a claim arising from a contract of employment, irrespective of the complexity of the issues, irrespective of the amount claimed, and irrespective of any inequality of arms by excluding any legal representation to the employee, and yet allowing the government to be

represented, albeit in the capacity of a public officer.

…

48. It is abundantly plain that the purpose of the exclusive jurisdiction clause is to provide a quick, simple, cheap and informal means to resolve employment disputes between employers and employees. I accept that the LTO is not designed to deal with complex claims.

49. But the argument that Mr Ho's rights of access to the courts is restricted must fail.

50. First, the Tribunal is plainly a court. It is established by s. 3 of the LTO, which provides:

3 Establishment of Tribunal

(1) There is hereby established a Tribunal to be known as the Labour Tribunal which shall be a court of record of such jurisdiction and powers as are conferred on it by this and any other Ordinance.

51. As a court of record, the proceedings of the Tribunal are preserved in its archives, called records, and are conclusive evidence of that which is recorded therein. Under s. 42 a presiding officer may punish behavior amounting to contempt summarily. The right to appeal in cases of contempt of court in s. 50 of the High Court Ordinance (Cap. 4) is preserved. For the purposes of enforcing the payment of any fine imposed or giving effect to any sentence of imprisonment, a presiding officer shall have the powers of a judge: see s. 45A of the LTO. These powers are all entirely consistent with the powers of a court of record.

52. It matters not that it is styled a 'Tribunal'. Article 10 of the Bill of Rights preserves the right of access to 'courts and tribunals'.

53. Plainly, having regard to the terms of the legislation, any complex claim involving damages claims beyond a mere money dispute arising from the contract of employment will be removed by the presiding officer to the appropriate court. The starting point is a court. The finishing point is a court. They may not be the same, but the legislation ensures that the appropriate court will ultimately deal with the matter.

54. It cannot be said that this arrangement does not meet a test of proportionality, if the matter should get to the stage of requiring the test of proportionality. It is entirely right that a simple claim arising out of a contract of employment should go to the appropriate court to start and for that court to act as a filter to determine whether or not the claims are appropriate for a different venue. Such 'filters' are entirely normal in our

judicial system. It cannot be suggested that a filter such as the requirement to obtain leave to appeal, a common requirement, in any way restricts a citizen's access to the courts. The 'filter' requirement provided by s. 7 and the Schedule to the LTO is a perfectly lawful procedure, designed to ensure that employment disputes are dealt with expeditiously.

55. … When faced with a case that is beyond its competence or design the Tribunal will transfer that case to the appropriate court. If application is made by the dissatisfied employee for transfer, and transfer refused, rights of appeal of judicial review arise to protect his rights."

The CFI held at 335 that Cap. 383 did not give rise to a private cause of action:

"80. The BoRO provides a remedy for its breach in section 6, and the words of Article 1 make it clear that it is not the Legislative intention to protect a limited class but to protect the citizens of Hong Kong at large. … I am satisfied that a breach of BoRO does not give rise to a private law cause of action."

China International Fund Ltd v Dennis Lau & Ng Chun Man Architects & Engineers (HK) Ltd [2015] 4 HKLRD 609

Background

The CFI dismissed the applicant's application to set aside an arbitration award, and subsequently refused leave to appeal. The applicant applied to the CA for leave to appeal. The respondent contended, amongst others, that the CA had no jurisdiction to grant leave because under s. 81(4) of the Arbitration Ordinance (Cap. 609), a refusal of leave by the CFI would bring finality to the matter. The applicant contended that s. 81(4) of Cap. 609 was unconstitutional in that it disproportionately restricted the CFA's power of final adjudication under BL 82.

Basic Law provisions in dispute

The provision in dispute was BL 82.

What the Court held

Although s. 81(4) of Cap. 609 imposed finality in respect of the CFI's decision on whether leave to appeal should be granted, the CA held that this was subject to the limited supervisory residual jurisdiction of the CA. The CA held that s. 14(3)(ea)(iv) and (v) of the High Court Ordinance (Cap. 4) had to be read down in light of BL 82 to carve out from the exclusions in those provisions the residual jurisdiction of the CA. Such jurisdiction was a jurisdiction to provide redress in the extreme situation where the refusal of leave by the lower court could not be properly regarded as a "judicial" decision, or where a decision was reached not by any intellectual process, but through bias, chance, whimsy or personal interest.

In terms of potential engagement of the CA in respect of applications for leave to appeal in cases of challenge to an award on ground of serious irregularity, a party could take the alternative scheme by stipulating in his arbitration agreement that s. 4 of Schedule 2 to Cap. 609 should apply in order to retain an option to come to the CA to seek leave. In light of the above and taking into account the CA's residual jurisdiction, the CA held that the limitation of s. 81 of Cap. 609 did not constitute an absolute exclusion. If things had gone badly wrong in the arbitration process, there were other ways for a party to come to the CA.

The CA considered that it was not dealing with an absolute power of final adjudication in the present case. In defining the point at which a court's determination should be final, there was room for recognizing that it was consistent with BL 82 for the legislature to adopt one scheme out of a range of reasonable options. The CA held that the limitation in s. 81(4) of Cap. 609 was not more than what was necessary to achieve the legitimate aims. It fell within the reasonable range of options for achieving the legitimate aims.

What the Court said

At 624 – 625, the CA elaborated on the nature of its residual jurisdiction:
"44. Lord Pannick [counsel for the applicant] submitted that the recognition of the residual jurisdiction undermines the absolute prohibition against applying to this Court for leave.

45. We cannot accept this submission. As explained above, the residual jurisdiction is different in character and purpose from a right to apply to this Court for leave to appeal. Such difference is important in the context of the structural integrity of our judicial system. It is obvious that this Court must provide a means of redress in the rare case where the decision to refuse leave in the court below cannot be regarded as a judicial decision. The same cannot be said where a judge has refused leave after giving the matter a fair and proper consideration. The rarity of occasions where it would be proper to invoke the residual jurisdiction and the very high threshold that an applicant must meet have repeatedly been emphasized … The number of occasions where the residual jurisdiction would be invoked is likely to be much less than those where leave applications are renewed in this Court."

The CA held at 626 – 627 that the limitation in s. 81(4) was not more than what is necessary to achieve the legitimate aims:
"52. … The underlying subject matter is an arbitral award. … by the time when the court's intervention is sought to set aside an award, the parties have gone through the adjudicative process by a tribunal of their choice whose decision they have agreed to be final and not to be subject to an appeal on the merit. We respectfully agree with the observation of Waller LJ in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (Leave to Appeal)* [2001] QB 388 at p.396 that limitation on the rights of appeal is consistent with the philosophy underpinning arbitration and that philosophy does not cease to apply when the matter has come to court by way of a challenge to the arbitral award. We also agree … that to allow multiple rounds of leave application would undermine the legitimate aim of finality and speed and reduction of costs of dispute resolution by arbitration.

53. Against such context, it is a matter of policy considerations in deciding who should be the gatekeeper having regard to the importance one placed on party autonomy in arbitration, the promotion of speed and reduction of costs in those cases and the interest of bringing a challenge to an award to courts of the higher level. … we are not dealing with an absolute power of

final adjudication. As in *Leung Chun Ying v Ho Chun Yan Albert*, in defining the point at which a determination by the court should be final, there is room for recognizing that it is consistent with art.82 for the legislature to adopt one scheme out of a range of reasonable options.

54. … we are satisfied that the limitation in section 81(4) is not more than what is necessary to achieve the legitimate aims. It falls within the reasonable range of options for achieving the same. We do not find it objectionable that the judge has to decide whether leave should be granted for an appeal against his own decision. … it is also trite that the judge would be more familiar with the case and the arguments of the parties and he or she could usually reach a decision on the leave application promptly. In this connection, we do not find a comparison with other types of cases to be meaningful. The arbitration context is different and the legitimate aims in issue are different."

Television Broadcasts Ltd v Communications Authority

[2016] 2 HKLRD 41

Background

The applicant was one of the two main television broadcasters in Hong Kong. On 19 September 2013, the Communications Authority (the "Authority") issued a decision (the "Decision") in finding that the applicant adopted a number of anti-competitive practices that had the effect of restricting competition in the television broadcasting market in Hong Kong in breach of ss.13(1) and 14(1) of the Broadcasting Ordinance (Cap. 562). The Authority directed the applicant to cease the infringement and to undertake a number of remedial actions and imposed on it a fine.

The applicant applied for judicial review of the Decision on various grounds. Under Ground 2, the applicant argued that the statutory process behind the Decision failed to comply with BoR 10 and 11. By virtue of BoR 10, all persons shall be equal before the courts and tribunals and in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair

and public hearing by a competent, independent and impartial tribunal established by law. BoR 11 provides that everyone convicted of a crime shall have the right to his conviction and sentence reviewed by a higher tribunal according to law.

Basic Law provisions in dispute

This case concerned BoR issues but the Court referred to BL 54 and the role of ExCo in its decision.

What the Court held

The CFI held that BoR 10 was infringed and quashed the Decision. The Court, however, held that BoR 11 was not engaged as the case did not involve any determination of criminal charge.

The Court held that BoR 10 was fundamentally important to the constitutional set-up of Hong Kong and the rule of law. The applicant's civil rights and obligations should be made subject to sufficient control of a judicial body. The Court held that the Authority was not an independent and impartial tribunal. The test of independence and impartiality was whether a fair-minded and informed observer, with knowledge of the relevant facts, would conclude there was a reasonable apprehension of bias. The Authority, as a policy advisory body on the broadcasting market, was required to form views that had significant potential overlap with the considerations it needed to make in the determination of the applicant's liability under ss. 13(1) and 14(1) of Cap. 562. As such, a fair-minded and informed observer might find there was legitimate doubt whether the Authority's decision on those provisions was one uninfluenced by its view in the performance of its other functions.

The Authority's lack of independence and impartiality would also not be remedied by the availability of appeal to the CE in C and judicial review.

What the Court said

The Court considered at 91 – 92 that the ExCo was a policy organ and the CE in C could take into account policy considerations:

"130. TVB also submitted that the [CE in C] lacks objective impartiality for the same reasons that affect the Authority, namely, its role in the formulation of policy in relation to the broadcasting sector (in relation to which the [CE in C], through the Secretary for Commerce and Economic Development, is advised by the Authority). In particular, whereas the Authority advises the Secretary on policies in the broadcasting sector, the [CE in C] is the body that sets the policies. It is also the [CE in C] who grants FTA domestic television licences upon the recommendation of the Authority. This should be seen together with the fact that the Executive Council is first and foremost a policy organ. Art. 54 of the Basic Law states that it is an organ for assisting the Chief Executive in policy-making. The [CE in C] is the executive of Hong Kong. In dealing with an appeal he is required to act in an administrative or executive capacity. He cannot be criticized for taking into account policy considerations for under s. 64(4) he is entitled to take into consideration any material or advice in his absolute discretion."

MS & Others v Director of Social Welfare (unreported, 15 February 2016, HCAL 57 of 2015)

Background

The applicants were asylum seekers entering Hong Kong intending to make non-refoulement claims. It was their case that they had run out of their own money while still staying in Hong Kong as visitors waiting for the expiry of the permission to stay so as to lodge their non-refoulement claims. They could hardly afford food and accommodation to maintain a proper and humane living condition. They said they were in a desperate and destitute state. They sought welfare assistance from the Director of Social Welfare ("Director") to provide them with basic financial and accommodation needs. The Director declined these requests.

The applicants said the Director had a policy ("Policy") that he would not normally provide any financial assistance to visitors in Hong

Kong, although he would consider granting by way of exception such assistance depending on the circumstances of each case. They further said that, under the Policy, putative asylum seekers ("Putative Asylum Seekers") who had entered Hong Kong initially as visitors but were (or were in an imminent situation of) facing destitution while waiting for the expiry of their visitor's visas before they could formally lodge a non-refoulement claim would not receive any humanitarian assistance.

The applicants argued that, pursuant to BoR 3, the Director was under a legal duty to provide emergency humanitarian assistance to persons like the applicants so as to avoid destitution or infliction of degrading treatment. They also argued that, pursuant to BL 36, BL 145, the Convention on the Rights of the Child ("CRC") and the ICESCR, the Director had a constitutional obligation to provide basic accommodation, clothing and food for Putative Asylum Seekers who could prove that they had exhausted all other means of providing emergency shelter and food.

Basic Law provisions in dispute

The provisions in dispute were BL 36, BL 39 and BL 145.

What the Court held

The CFI held that the Policy was not in breach of any legal obligations to provide humanitarian assistance to persons facing destitution. The CFI did not agree that there was a duty on the Director to set out the general criteria as to what would amount to inhuman or degrading circumstances so as to justify the grant of humanitarian support to Putative Asylum Seekers. The CFI held that no purported rights under the CRC and the ICESCR were engaged.

The CFI rejected the applicants' argument based on BL 36 and BL 145. The CFI held that non-Hong Kong residents such as the applicants and Putative Asylum Seekers could not rely on BL 36. The CFI further held that BL 145 endorsed the rules and policies established under the previous social welfare system and in existence as at 1 July 1997, that those constituted the particular rights protected by BL 36 and that the

previous social welfare system did not provide for non-refoulement claimants or visitors.

What the Court said

At paragraph 28, the CFI held that the Policy was not in breach of any legal obligations to provide humanitarian assistance to persons facing destitution:

"28. … even assuming that … the Director has a duty in the appropriate circumstances to provide humanitarian assistance to persons (including Putative Asylum Seekers) facing destitution … there could not be any arguable case that the Policy is in breach of any such legal obligations. This is so as the Policy properly construed is not saying that the Director would not provide humanitarian assistance to the Putative Asylum Seekers even if they can prove and show that they are in destitution or are in an imminent position of becoming so."

The CFI rejected the argument based on BL 39, the CRC and the ICESCR at paragraph 37:

"37. … it is well established the CRC and the ICESCR being undomesticated international conventions have no force of law in Hong Kong. Article 39(1) of the BL cannot assist the applicants. No purported rights under these conventions are therefore engaged …"

The CFI also rejected the argument based on BL 36 and BL 145 at paragraph 38:

"38. … insofar as Articles 36 and 145 of the BL are concerned … as held by Ribeiro PJ at paragraph 23 of *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950, Article 36 confers a constitutional right on Hong Kong residents to social welfare in accordance with law. Furthermore, Bokhary PJ held at paragraph 163 that Article 36 of the BL does not extend to non-residents in Hong Kong. Therefore, as non-Hong Kong residents, the applicants and Putative Asylum Seekers plainly cannot rely on Article 36. Neither can Article 145 of the BL assist them. As held in *Kong Yunming, supra,* at paragraph 33, Article 36 read with Article 145 provides the framework for identifying a constitutionally protected right to social welfare. At paragraph 34, it was held that Article 145 endorses the rules and policies established under the previous social welfare system and in existence as at 1 July 1997, and those constitute the particular rights protected by Article

36. In the present case, the previous social welfare system did not provide for non-refoulement claimants or visitors. Therefore the applicants cannot draw on Article 145 to argue that there is a constitutionally protected social welfare system which had provided for the class of persons the applicants once represented, ie, Putative Asylum Seekers, and must continue to provide for them."

HKSAR v Chan Huandai [2016] 2 HKLRD 384

Background

The applicant was convicted of trafficking in dangerous drugs after a retrial. Three days before sentence, the Judge's clerk was informed by one of the jurors that, after commencement of the trial and before verdict, he and some other jurors did not comply with the Judge's express direction after empanelment and had searched the Internet where they learnt that the case was a retrial. The applicant applied for leave to appeal against conviction on the ground that he was not given a fair trial. The CA conducted an investigation by questionnaire sent to the jurors. According to the answers provided, six jurors knew that the case was a retrial.

Basic Law provisions in dispute

The provisions in dispute were BL 86 and BL 87.

What the Court held

The CA granted the appeal, treated the hearing as the appeal and ordered a retrial. The CA found that evidence about jury deliberations was admissible in this case since extraneous non-evidential material had been introduced into the decision-making process and held that the CA must assume responsibility for investigating the truth of any irregularity in a public inquiry if an allegation was only raised on appeal.

Given that neither the parties nor the Judge knew of the irregularity before the verdict, nothing could have been done to remedy it. The

Court was thus of the view that the retrial was unfair and prejudicial to the applicant and the verdict was unsafe.

What the Court said

At 388, the CA held that the jury system was an entrenched institution in common law:

"10. Deeply rooted in our common law tradition, the trial by jury of criminal cases in the Court of First Instance is an integral and indispensable feature of the criminal justice system. It has since 1997 been entrenched in art.86 of the Basic Law constitutionally:

The principle of trial by jury previously practised in Hong Kong shall be maintained."

The CA mentioned the judicial attributes conducive to upholding the integrity of the whole system at 389:

"15. As a judicial tribunal, a jury must conform to judicial standards. Fundamental to such judicial standards is to act independently, fairly and impartially. These judicial attributes required of a jury ensure the full compliance with art.10 of the Hong Kong Bill of Rights and art.87 of the Basic Law which guarantee a person's constitutional right to a fair trial.

16. In practical terms, when discharging their function with the requisite judicial attributes, the jurors must keep to the oath that they took when they assumed duty. They must act in good faith. And most pertinently for present purposes, they must follow the directions of the trial judge and base their deliberations and return their verdict on the evidence and the evidence alone. They must not introduce any extraneous materials into their deliberations. They must put aside any extraneous prejudice. Acting in conformity with the trial judge's instructions and returning a verdict in accordance with the evidence only underpin the integrity of the entire system of trial by jury …".

Concerning complaints on jury irregularity, the Court said that the appropriate approach was to conduct all necessary inquiry within the limited scope permitted by the confidentiality rule, it further quoted from Stuart-Moore V-P in *HKSAR v Mohammed Saleem* [2009] 1 HKLRD 369, 376-378 at [25] at 391 in summarizing the confidentiality rule:

"22. (1) The general rule is that the court will not investigate, or receive

evidence about, anything said in the course of the jury's deliberations while they are considering their verdict in their retiring room: see *Ellis v Deheer* [1922] 2 KB 113 at pp.117-118, *per* Bankes LJ; *R v Miah* [1997] 2 Cr App R 12, p.18, *per* Kennedy LJ; *R v Mirza* at p.1156 [95], *per* Lord Hope.

(2) An exception to the above rule may exist if an allegation is made which tends to show that the jury as a whole declined to deliberate at all, but decided the case by other means such as drawing lots or tossing a coin. Such conduct would be a negation of the function of a jury and a trial whose result was determined in such a manner would not be a trial at all: see *R v Mirza* at pp.1164-1165 [123], *per* Lord Hope.

(3) There is a firm rule that after the verdict has been delivered evidence directed to matters intrinsic to the deliberations of jurors is inadmissible. The House so held in *R v Mirza*, affirming a line of cases going back to *Ellis v Deheer* and *R v Thompson* [1962] 1 All ER 65.

(4) The common law has recognized exceptions to the rule, confined to situations where the jury is alleged to have been affected by what are termed extraneous influences, e.g. contact with other persons who may have passed on information which should not have been before the jury: see such cases as *R v Blackwell* [1995] 2 Cr App R 625 and *R v Oke* [1997] Crim LR 898.

(5) When complaints have been made during the course of trials of improper behaviour or bias on the part of jurors, judges have on occasion given further instructions to the jury and/or asked them if they feel able to continue with the case and give verdicts in the proper manner. This course should only be taken with the whole jury present and it is an irregularity to question individual jurors in the absence of the others about their ability to bring in a true verdict according to the evidence: *R v Orgles* [1994] 1 WLR 108."

The CA made reference to *R v Thompson (Benjamin)* [2011] 2 All ER 83 and set out two exceptions of the rule of admissibility at 393:

"28. …

[4] … The first arises if it emerges that there may have been a complete repudiation of the oath taken by the jurors to try the case according to the evidence; examples include a decision arrived at by the casting of lots or the toss of a coin, or the well-known case of the use, or rather misuse, of a Ouija board. If there are serious grounds for believing that such a repudiation may have taken place, this court will inquire into it, and may hear, de bene esse,

evidence, including the evidence of jurors themselves, in order to decide whether it has happened. If it has, the verdict will inevitably be unsafe, and any resulting conviction will be quashed.

[5] The second exception arises in cases where extraneous material has been introduced into the jury deliberations. The verdict must be reached, according to the jury oath, in accordance with the evidence. For this purpose each juror brings to the decision-making process, his or her own experience of life and general knowledge of the way things work in the real world; that is part of the stock-in-trade of the jury process, and the combination of the experience of a randomly selected group of 12 individuals, exercising their civic responsibility as a collective body, provides an essential strength of the system. However, the introduction of extraneous material, that is non-evidential material, constitutes an irregularity. Examples are provided by earlier decisions of this court. They include telephone calls into or out of the jury room, papers mistakenly included in the jury bundle, discussions between jurors and relatives or friends about the case, and in recent years, information derived by one or more jurors from the internet. All this is familiar territory, and no citation of authority is needed. Where the complaint is made that the jury has considered non-evidential material, the court is entitled to examine the evidence (possibly after investigation by the Criminal Cases Review Commission) to ascertain the facts. If extraneous material has been introduced into the decision-making process, the conviction may be quashed."

Turning to the responsibility of the judge in case of jury irregularity, the Court opined that a public inquiry was needed at 396:

"34. A public inquiry by the Court of Appeal to ascertain the truth of the alleged jury irregularity is inevitable, however cumbersome or difficult it might be. Its importance transcends the need of the individual case where the result of the inquiry will help the Court dispose of the appeal. By conducting the inquiry, the Court is telling the community at large that a complaint based on jury irregularity will always be taken most seriously by the Court lest the integrity of the jury system might be easily jeopardized by a disgruntled defendant who, without any justification, raised or caused the complaint to be raised with a view to luring the Court to overturn the conviction, or even by a discontented juror who is displeased with the verdict."

Regarding the use of internet by the Jury, the CA suggested that the trial

judges may follow the suggested directions contained in the *Judicial Institute Bulletin* (Nov 2015) and warned future jurors of the serious consequence of breach at 401:

"49. Trial judges may adopt the suggested directions, with necessary modifications, in their opening speech to the jury after empanelment. They may also wish to stress again the importance of not doing Internet research about the case in the summing-up. In giving the directions against Internet search, judges should also warn the jury that if they do not abide by the directions and carry out internet search, the consequences would be very serious. They may be prosecuted for contempt of court and if convicted, may be sentenced to imprisonment."

Hui Sin Hang v Chief Executive in Council (unreported, 15 March 2016, HCAL 99 of 2015)

Background

Hong Kong International Airport ("HKIA") was operated and maintained by the Airport Authority Hong Kong ("AAHK"), a statutory body whose functions, powers and duties were governed by the Airport Authority Ordinance (Cap. 483). On 29 December 2011, after receiving feedback from public consultation, AAHK recommended HKSARG to pursue the construction of a third runway ("3RS") which was one of the options in Master Plan 2030. On 17 March 2015, the CE in C made the decision, amongst others, that AAHK should be invited to actively explore, in consultation with HKSARG, ways to facilitate the early implementation of the 3RS. In September 2015, AAHK proposed a revised Airport Construction Fee ("ACF") regime pursuant to HKSARG's suggestion that AAHK should explore options for lowering the ACF with a view to minimizing the burden on passengers. In a statement made by the Civil Aviation Department ("CAD") to media reports on the PRD airspace dated 10 March 2015, it was stated that under the PRD Region Air Traffic Management Planning and Implementation Plan (Version 2.0) ("PRD Airspace Plan"), the use of airspace resources in PRD region was to be optimized, amongst others,

through shared use of airspace.

The applicant sought leave for judicial review challenging (a) the alleged decision of the CE in C made on 17 March 2015 to approve the 3RS and the financing scheme of AAHK in relation to the 3RS, (b) the financing arrangement for developing the 3RS proposed by AAHK including the introduction of the ACF on 29 September 2015 and (c) the PRD Airspace Plan. The applicant alleged, *inter alia*, that the imposition of ACF contravened BL 73(3) and the principle of shared use of airspace pursuant to the PRD Airspace Plan would be inconsistent with BL 130.

Basic Law provisions in dispute

The Basic Law provisions in dispute were BL 64, BL 73(3) and BL 130.

What the Court held

With regard to the financing arrangement for developing the 3RS, the applicant argued that AAHK had no power to impose the ACF which was a form of taxation and had not been approved by the LegCo as it violated the "no levy without authority" principle and/or BL 73(3). The CFI rejected his argument since the legislature had expressly empowered AAHK to charge the ACF pursuant to Cap. 483.

In light of the PRD Airspace Plan, the applicant argued that under the principle of shared use of airspace, the Civil Aviation Administration of China ("CAAC") would be responsible for the provision of air traffic service in a small portion of the airspace within the flight information region of the HKSAR. The applicant contended that this would be contrary to BL 130 which provided, amongst others, that HKSAR shall be responsible on its own for the provision of air traffic services within the flight information region of the HKSAR. The CFI concluded that the ownership of the concerned airspace still belonged to the original civil aviation authority, so the arrangement was not a complete relinquishment of control or responsibility and there was no breach of BL 130.

The CFI also held that the cost of construction of the 3RS was not a "public expenditure" so it did not have to be authorized by the LegCo

under BL 64. The application for leave to apply for judicial review was refused.

What the Court said

At paragraphs 22 – 30, the CFI rejected the applicant's submission that the imposition of ACF violated the "no levy without authority" principle and/or BL 73(3):

"22. The 'no levy without authority' principle is well established, and is to the effect that the Government (or a public body) has no power to impose any charge upon the subject unless the power to charge has been given by the legislature by express words or by *necessary* implication …

23. In my view, the simple answer to Hui's complaint of violation of the 'no levy without authority' principle is that the legislature has expressly empowered AAHK to charge the ACF …

…

28. It is, in my view, clear from the above provisions of the Ordinance and on the facts of the present case that:-

(1) a principal or substantive function of AAHK is to 'develop' HKIA;

(2) the construction of the 3RS falls within AAHK's function to develop HKIA;

(3) AAHK has the power to do anything which is requisite or expedient for the performance of its functions, including the determination of the amount of charges and fees; and

(4) the imposition of the ACF is requisite or expedient for the performance by AAHK of its function to develop HKIA, and also falls squarely within AAHK's power under section 7(2)(i) of the Ordinance.

29. … the present case concerns the imposition of a charge to enable or facilitate AAHK to develop HKIA which, as earlier mentioned, is a principal function of AAHK.

30. The above conclusion that AAHK has express power under the Ordinance to impose the ACF also answers Hui's complaint of violation of Article 73(3) of the Basic Law, even if the ACF can be regarded as a form of tax."

As for the applicant's complaint that the PRD Airspace Plan would breach BL 130, the CFI rejected it by holding at paragraphs 36, 38 and 39 that the arrangement did not indicate a complete relinquishment of

control or responsibility by the original civil aviation authority over the "delegated" airspace concerned:

"36. As I understand from the public statement made by the CAD dated 10 March 2015, under the principle of shared use of airspace, the CAD would permit the CAAC to make use of a small portion of the HKSAR's airspace to facilitate their air traffic control, and vice versa. The use by the CAAC, pursuant to permission granted by the CAD, of a small portion of the HKSAR's airspace does not mean, in my view, that the HKSAR is no longer responsible on its own to manage the provision of air traffic services within the flight information region of the HKSAR. As mentioned in that statement, the ownership of the concerned airspace still belongs to the original civil aviation authority.

…

38. The use of the word 'delegate' (or different forms of that word) in the Chapter 2 of Annex 11 to the Chicago Convention, and also in Mr Cheng's affidavit, does not denote, to my understanding, a complete relinquishment of control or responsibility by the original civil aviation authority over the 'delegated' airspace concerned.

39. In all, the complaint that implementation of the principle of shared use of airspace under PRD Airspace Plan would breach Article 130 of the Basic Law is, in my view, not reasonably arguable."

At paragraph 50, the CFI rejected the submission in relation to BL 64:

"50. … it is plainly incorrect to suggest that the Government intends to waive, nor not to receive, dividends from AAHK for over 10 years. Whether to declare any dividend is a decision to be made by the board of AAHK, not the Government. Although the Financial Secretary may, in specified circumstances, direct AAHK to declare and pay dividend under section 26 of the Ordinance, it is not suggested that the Financial Secretary has exercised such power. In any event, I am unable to see how AAHK's proposal not to distribute any dividends to the Government from 2014/15 until the full commissioning of the 3RS in 2023/24 can turn the cost of construction of the 3RS into a 'public expenditure' such that it has to be authorized by the Legislative Council under Article 64 of the Basic Law."

Hong Kong Television Network Ltd v Chief Executive in Council [2016] 2 HKLRD 1005

Background

The applicant was one of three applicants applying for free television licence under the Broadcasting Ordinance (Cap. 562). On 15 October 2013, the CE in C refused the applicant's application and set out eleven factors in the annex to the letter of rejection but did not explain in detail the reasons for refusing the application. The applicant applied for judicial review. In the court below, the Judge quashed the decision of CE in C mainly on the two grounds, legitimate expectation of the applicant, and that the CE in C had misinterpreted the Government's own broadcasting policy by imposing a limit on the number of licensees in the field. The Judge, however, rejected the applicant's ground, among others, that the CE in C's decision had failed to meet the "prescribed by law" requirement and had infringed the applicant's freedom of speech guaranteed in BL 27 and BoR 16 (ICCPR 19). The CE in C appealed to the CA.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 27.

What the Court held

The CA held the Government's broadcasting policy including the point that "no artificial limits should be set for the number of players in the field", did not prevent the CE in C from adopting a gradual and orderly approach as it had. The CE in C had not misinterpreted the policy. The applicant's "legitimate expectation" argument, which was based on the proposition that the adoption of a graduate and orderly approach had frustrated the applicant's legitimate expectation, was rejected.

In respect of the "prescribed by law" issue, the CA focused on whether public interest as an important consideration was legally certain enough to meet the "prescribed by law" requirement for the CE in C to take into account in exercising the discretion under s. 10(1) of Cap. 562. The

Court held that public interest was a wholly appropriate consideration for the exercise of that discretion in the context of the regulation of domestic free television programme services.

The CE in C was entitled to adopt a cautious approach. The applicant was not forever barred from applying for a licence since the refusal only applied to the present application. The applicant's "proportionality" argument also failed.

The refusal was not vitiated by not consulting the Broadcasting Authority ("BA") further. This was because the CE in C could not be said not to have had all the information necessary to make an informed decision without going back to the Authority.

The CA further held that there was no procedural unfairness. All comments which the applicant had wanted to make about the gradual and orderly approach had been made in the applicant's detailed representation made in its response to the CE in C at the latter's invitation.

What the Court said

The CA held at 1036 – 1038 that the CE in C did not depart from the general policy statements by adopting "the graduate and orderly approach":

"74. With respect to the learned judge, he has placed too much emphasis on the wording used … and adopted an unduly narrow approach to the reading of the broad policy statements involved in the present case.

75. Indeed, taking the present discussion a step further, I take the view that, if the true interpretation of the policy statements were indeed as that contended by the applicant or decided by the Judge, the policy statements would, to that extent, be unlawful as being contrary to the requirement that the CE in Council shall take into account relevant public interest considerations in exercising his discretion under s. 10(1) on a true and proper construction of Cap.562.

76. This being my view, it must follow that by adopting the gradual and orderly approach, the CE in Council was not departing from the general policy statements. He was simply adopting a particular mode or manner in which to implement the policy statements and achieve the policy objectives

concerned. In other words, instead of choosing (as he was perfectly entitled to) to open up the domestic free television market in one go, the CE in Council decided, for good reasons of his own, to do it step by step, that is, to adopt an incremental approach. I can see no mutual inconsistency between a policy of no pre-set or artificial limit on the number of licences to be granted and granting such licences in a gradual and orderly manner over a period of time (whether short or long). The latter simply does not contradict the former. Rather, it is one way, although there can be other ways, to achieve the opening up of the market. There is neither a misunderstanding of the relevant policy statements nor a departure from them.

…

79. As for legitimate expectation, for the reasons explained, this ground for judicial review stands or falls together with the first ground based on misapprehension of or departure from government policy. I take the view that if there was any expectation on the part of the applicant as contended, it was due to its own misinterpretation of the government policy."

The Court held at 1046 – 1047 that a holistic approach should be adopted in assessing whether the "prescribed by law" requirement could be met:

"96. In my view, in determining whether a concept such as public interest is legally certain enough, one should adopt a holistic approach and bear in mind all relevant requirements and characteristics of the common law, which, as explained, includes the requirement of fairness. Whether fairness would require the CE in Council to allow a licence applicant to modify or amend his application, without needing to submit a fresh one, is a totally separate question. What is important, for the purpose of the present discussion, is that this requirement of fairness has to be fully taken into account as part of our common law system when evaluating, in accordance with the Convention requirement of prescribed by law which is applicable both to a common law jurisdiction as well as a civil law jurisdiction, whether the concept of public interest in the present context is sufficiently legally certain."

The CA further rejected the applicant's argument on proportionality at 1049 – 1051:

"109. … the overriding reason of the CE in Council in granting only two licences out of the three applications was his concern about market sustainability. That is a policy matter which cannot be challenged and is

not challenged. Given Fantastic TV's obvious superiority over the applicant and HKTVE, the comparison was really between the latter two. It is true that the applicant was superior to HKTVE in all aspects except one, that is, programming strategy and capability. But that precisely was a criterion on which the CE in Council decided to give more weight, a matter that cannot be challenged or questioned in legal proceedings no matter what test or standard of review one employs. Nor can there be any challenge regarding what weight the CE in Council chose to give to the four criteria in question respectively. The court is not asked to substitute its own opinion for that of the CE in Council. The Ordinance has entrusted the CE in Council, not the court, with the power and responsibility to decide who should be granted a domestic free television licence. Ranking the licence applicants is not the function of judicial review. That being the case, the decision to rank the applicant third cannot be challenged either.

113. … The CE in Council was entitled to adopt a cautious approach …"

Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise [2016] 2 HKLRD 1372

Background

In June 2011, in a joint operation with the Mainland Customs, the Customs and Excise Department ("C&E") conducted an investigation into a suspected case of smuggling involving Keen Lloyd Holdings Ltd and its subsidiaries. During the period from September 2011 to January 2012, C&E obtained sixteen search warrants, eight of them were issued by a District judge under the Organized and Serious Crime Ordinance (Cap. 455) and the other eight by a magistrate under Import and Export Ordinance (Cap. 60). Thirteen of the search warrants were executed in January 2012 and C&E seized huge amount of documents and materials and provided copies of some documents to the Mainland Customs.

One of the issues before the CA was whether s. 21(1)(a) of Cap. 60 (which allowed entry into non-domestic premises without a warrant) was constitutional in that the restriction of the rights contained in BL 29 and BoR 14 was not proportionate to the legitimate aim of crime

prevention and detection.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 29.

What the Court held

The CA held that the protection of the right to privacy under BL 29 and BoR 14 was against arbitrary of unlawful interference, search or intrusion. The broad concept of arbitrariness in the context of Basic Law formed the juridical basis for the applicability of proportionality test, which must be applied cautiously so that only statutory provisions which were manifestly disproportionate would be struck down as arbitrary.

The CA held that s. 21(1)(a) of Cap. 60 permitted warrantless search for non-domestic premises regardless of the practicality in obtaining a warrant. The CA acknowledged that there could be justifications for not subjecting a search to the requirement of prior authorization, but the court had to examine whether the justification could be cogent enough and whether other safeguards were in place to protect a citizen from abuse or excess of executive action in the name of investigation.

The CA held s. 21(1)(a) of Cap. 60 to be manifestly disproportionate in restricting the right to privacy. The CA held that a blanket warrantless power of search was more than necessary to achieve the legitimate purpose of providing for the effective investigation of offences under Cap. 60. Nevertheless, the CA exercised the power of remedial interpretation to make s. 21(1)(a) constitutional by expanding its application to "premises or place" so that the requirement for a search warrant would apply across the board to all premises and places, irrespective of whether they were domestic or non-domestic.

What the Court said

The CA considered *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 in which the CFA held that Basic Law rights expressed in absolute terms were capable of restriction provided that the restriction could satisfy the

proportionality test. At 1392 – 1393, the CA pointed out that the right of privacy under BL 29 and BoR 14 was not expressed in absolute terms and considered the meaning of "arbitrary" and "unlawful" in the context of BL 29 and BoR 14:

"57. … as we have seen, the right of privacy is not expressed in absolute terms in art.29 of the Basic Law and art.14 of the HKBOR. The protection in these provisions is against 'arbitrary or unlawful' interference, search and intrusion. In other words, if the interference, search or intrusion is not arbitrary or unlawful, the rights under these provisions would not be infringed. There is no need for any implied derogation.

58. One must therefore concentrate on the meaning of 'arbitrary or unlawful' in the context of these provisions … in *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415 … in the joint judgment of Li CJ and Ribeiro PJ, their Lordships discussed the concept of 'arbitrary or unlawful' in the context of art.28 of the Basic Law. The following propositions can be derived from that discussion:

(a) Something lawful may nonetheless be arbitrary ([42]);

(b) Arbitrariness is to be construed broadly to include elements of inappropriateness, injustice and lack of predictability ([43]);

(c) The concept of arbitrariness has developed to embrace within it the concept of manifest or gross disproportion in addition to its traditional meaning of 'capricious, unreasoned or without reasonable cause'. A statutory provision can also be challenged as arbitrary if it is manifestly disproportionate ([46], [110]-[112]); and

(d) A high threshold must be crossed before a statutory provision can be struck down as arbitrary by reason of it being manifestly disproportionate.

59. In our judgment, the broad concept of arbitrariness in the context of the Basic Law forms the juridical basis for the applicability of the proportionality test in relation to art.29 of the Basic Law and art.14 of the HKBOR, provided that the test must be applied cautiously so that only a statutory provision which is manifestly disproportionate would be struck down as arbitrary."

While the CA considered that it would not be right to directly transplant the reasoning in cases decided in Canada and the United States to the present context, the CA found the following *dicta* of Dickson J in *Hunter v Southam Inc* (1984) 14 CCC (3d) 97, to be "enlightening" in the application of the proportionality test. The CA recited the relevant paragraph at 1394 – 1395:

"64. [The purpose of the constitutional protection under s8] … is to protect individuals from unjustified State intrusions upon their privacy. That purpose requires a means of *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of *prior authorization*, not one of subsequent validation."

Having considered the authorities, the CA examined the judicial gatekeeping role of judicial warrant and said at 1396:

"71. … The vetting of an application for a warrant by a judicial officer provides important safeguards against arbitrary interference with the right of privacy guaranteed by art.14 of the HKBOR and art.29 of the Basic Law."

The CA reiterated at 1398 the importance of prior scrutiny of an application by a judicial officer:

"73. These observations highlight the importance of careful scrutiny of an application by a judicial officer, the need to approach the application judicially with an independent mind balancing the conflicting interests and the duty on the part of an applicant to place all material information before the judicial officer. In respect of the latter, we wish to add that the duty is not confined to the likelihood of the information sought being privileged. As the facts of the present case illustrated, information such as the anticipated time frame for the execution of the warrant and the possibility of disseminating the information obtained to some other law enforcement agencies or persons outside the jurisdiction are also material. As decided by the Court of Appeal in *Philip KH Wong v Commissioner of ICAC (No. 2)* … a judicial officer has implied power to impose conditions when he issues a warrant. Such information is relevant for considering whether any special conditions should be imposed in the warrant."

Even though the CA appreciated that there might be justifications for not subjecting a search to the requirement of prior judicial authorization, the CA held at 1399:

"75. … we appreciate there could be justifications for not subjecting a search to the requirement of prior judicial authorization. However, in the overall assessment of proportionality, the court must examine whether the justification is cogent enough and whether other safeguards are in place to protect a citizen from abuse or excess of executive action in the name of investigation. An obvious case for exception is a situation where it would

not be reasonably practicable to obtain a warrant in light of the risk of destruction or loss of the relevant evidence or materials. However, s 21(1)(a) of IEO permits warrantless search regardless of the practicality in obtaining a warrant. We should therefore examine whether there is other justification to support the proportionality of such a wide power."

The CA held at 1402 – 1403 that s. 21(1)(a) of Cap. 60 was manifestly disproportionate:

"90. … To recap, the proportionality test requires the court to consider if the means used to impair the right is no more than was necessary to accomplish the legitimate purpose in question. The legitimate purpose (which is not disputed by counsel, as identified by the judge at [82] of the 1st judgment) is to provide for the effective investigation of IEO offences. As discussed above, in assessing whether the statutory power is no more than was necessary to achieve the legitimate purpose, the court has to consider the need to protect against executive abuse. Though sometimes such need could be outweighed by cogent justification for having a warrantless power of search as in the cases where there is a serious risk of destruction or loss of the relevant evidence or materials occasioned by the need to obtain a warrant, we have to ask what is the justification for overriding such protection when this is not the case.

91. … Apart from cases where it would not be practicable to obtain a warrant from a magistrate before a search is conducted, we cannot see any valid justification in the content of s. 21 for sidestepping the requirement of a judicial warrant or similar form of impartial protection against executive excesses. … In short, though the context is not exactly the same, we share the view of the late Jerome Chan J in *R v Yu Yem Kin …* that a blanket warrantless power of search is more than is necessary to achieve such legitimate purpose. As it stands, s. 21(1)(a) is, in our judgment, manifestly disproportionate."

As regards the general principles of remedial interpretation, the CA said at 1404 – 1405:

"95. … the court should consider whether the legislative provision in question can become Basic Law compliant by remedial interpretation before holding that it is constitutionally invalid.

97. For present purposes, the following propositions derived from *Ghaidan v Godin-Mendoza* … are germane:

(a) Subject to the limitations in (c) and (d) below, the court can exercise the

power of remedial interpretation to depart from the unambiguous meaning of the legislative provision in order to give a Basic Law compliant effect to the same;

(b) In adopting a remedial interpretation, the court can interpret language in a statutory provision restrictively or expansively. It can also read in words which change the meaning of the provision;

(c) However, the court cannot adopt a meaning inconsistent with a fundamental feature of the legislative scheme or its essential principles. Whether an element in the statutory provision constitutes a fundamental feature or essential principle must be determined with regard to its place in the overall scheme of the legislation;

(d) Remedial interpretation does not empower the courts to make decisions for which they are not equipped such as choosing between various options which requires legislative deliberation or adopting a meaning which has important practical repercussions which the court is in no position to evaluate."

Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li

[2016] 3 HKLRD 303

Background

The defendant was a PRC national residing in the Mainland of China. A writ of summons was issued against him in this action. Pursuant to an order for substituted service ("Substituted Service Order"), service of the concurrent writ on him was effected by, amongst others, delivering by hand the court documents to the Hong Kong office of a firm of solicitors, Messrs Reed Smith Richards Butler ("RB"), who were at the time the solicitors on record for him in another action in Hong Kong. He sought to, amongst others, set aside the Substituted Service Order.

The defendant argued that the Substituted Service Order contravened the Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts ("Arrangement") and Order 11 rule 5A of the Rules of the High Court (Cap. 4A) ("O. 11 r. 5A"). He argued that O. 11 r. 5A should

be construed against the matrix of the Basic Law which enshrined the principle of "one country, two systems" and that the Hong Kong courts were not permitted to direct service of process on a Mainland resident in a manner that would interfere with the sovereignty of the PRC. He also argued that insofar as Order 11 r. 5(1) of Cap. 4A authorized substituted service of a writ on a person to be served in the Mainland of China, it was in contravention of the Basic Law and was beyond the jurisdiction of the court.

Basic Law provisions in dispute

The CA referred to BL 95.

What the Court held

The CA held that the Substituted Service Order was not in contravention of the Arrangement or O. 11 r. 5A because the service was effected in Hong Kong.

The CA further held that to order substituted service to be effected in Hong Kong would not interfere with the sovereignty of the Mainland courts or contravene the Basic Law. The CA observed that litigation between the residents of the Mainland and Hong Kong had become a routine incident of our commercial life, and service on a person in the Mainland should be regarded as a pragmatic decision in the interests of the efficient conduct of litigation in an appropriate forum. The CA held that Hong Kong's rules on methods of service had the legitimate sensibilities of the Mainland jurisdiction in mind, in that nothing in our rules or any court order made by virtue of the rules authorized or required the doing of anything contrary to the laws of the Mainland.

What the Court said

At 310 – 312, Kwan JA recognized that BL 95 was the legal basis of the Arrangement:

"25. Before the reunification, between 1991 and 1997, service of judicial documents between the Mainland and Hong Kong was governed by the Hague Convention. The Convention continues to apply to Hong Kong as part

of the PRC after 30 June 1997 but being an international agreement, the Convention no longer applies for the service of judicial documents between the Mainland and Hong Kong after the reunification.

26. Article 95 of the Basic Law provides that the HKSAR may, through consultations and in accordance with law, maintain juridical relations with judicial organs in other parts of China, and they may render assistance to each other. Pursuant to this article, on 14 January 1999, the Chief Judge of the High Court signed a memorandum for the Arrangement with the Supreme People's Court. This was to re-establish reciprocal arrangement for the service of judicial documents generally along the lines of the arrangement prior to the reunification, and which reflected the principles of the Convention. The Arrangement came into effect in the Mainland and Hong Kong on 30 March 1999.

…

28. Order 11 r.5A was added to the Rules of the High Court to implement the Arrangement …

29. Amendments were also made to O.11 r.5 …"

At 326 – 327, Kwan JA rejected the argument that the Substituted Service Order would interfere with the sovereignty of the Mainland courts:

"76. … Hong Kong has always adopted the doctrine of *forum non conveniens*. The Arrangement, which reflected the principles of the Hague Convention, re-established the reciprocal arrangement for the service of judicial documents generally along the lines as before. So taking a realistic view of the situation, it is correct to say that in the great majority of cases where service on a person in the Mainland of China is authorized, there will have been either a contractual submission to the jurisdiction of the Hong Kong court or else a substantial connection between the dispute and Hong Kong. Similarly, litigation between the residents of the Mainland and Hong Kong has become a routine incident of our commercial life … service on a person in the Mainland should be regarded as a pragmatic decision in the interests of the efficient conduct of litigation in an appropriate forum … our rules on methods of service have the legitimate sensibilities of the Mainland jurisdiction in mind, in that nothing in our rules or any court order made by virtue of the rules authorizes or requires the doing of anything contrary to the laws of the Mainland.

77. For the above reasons, I reject [the] arguments that to order substituted

service to be effected in Hong Kong would be to interfere with the sovereignty of the Mainland courts and would thereby contravene the Basic Law."

At 306 – 307, Lam V-P held that there was no question of Hong Kong court interfering with the sovereignty of the Mainland authority:

"2. I acknowledge that it is important for the One Country Two Systems principle that our courts should not exercise our jurisdiction to order service *in the Mainland* in a way that would contravene Mainland sovereignty. However, the crucial question in this appeal is the place at which service was effected in the present case.

3. As analysed by Kwan JA, the service at the office of RB was effected in Hong Kong. So understood, there was no contravention of O.11 r.5(2) and r.5A of the Rules of the High Court (Cap.4A, Sub.Leg.) or any law for service in the Mainland. It is similar to service effected in Hong Kong pursuant to O.10 r.2 (on local agent of overseas principal) or r.3 (contractual provision for service specifying a local address for service) in respect of a defendant who resides in the Mainland. As such, there is no question of Hong Kong court interfering with the sovereignty of the Mainland authority."

HKSAR v Wu Wing Kit (No. 1) [2016] 3 HKLRD 386

Background

During the hearing of appeals by the defendants against convictions for dealing with property known or believed to represent the proceeds of an indictable offence ("the Appeals"), the prosecution applied for an order directing the media not to publish the proceedings until the conclusion of an ongoing criminal trial before a jury which had several factual issues similar to the Appeals ("the Trial"). The Court only ordered the issue of a general written warning against the publication of any material that might prejudice the fairness of ongoing trial. Counsel for the defendants submitted that the warning was insufficient and that a non-publication order was necessary.

Basic Law provisions in dispute

The major provision in dispute was BL 87.

What the Court held

The CA made an order prohibiting temporarily the publications of any report of the proceedings. The Court held that it had power, arising from the Basic Law and the Hong Kong Bill of Rights, to protect the right to a fair trial of defendants in other proceedings, to make an order prohibiting temporarily the publication of any report of the Court's proceedings pending the conclusion of the f

Where open administration of justice in a case would frustrate the ultimate aim of doing justice, it was a most important if not decisive consideration to take into account when balancing the relevant interests, rights and freedoms involved, to decide whether open justice should be restricted, and if so, by what means and to what extent.

What the Court said

At 392, the Court discussed the court's power to order the suspension of publication of the proceedings:

"8. In *R v Mohamed Hashin Shamsudin*, Roberts CJ, sitting as a single judge, refused an application made by the Attorney General for the imposition of restrictions on the reporting by the press of the proceedings … Having noted that the authorities to which he had been referred, on the issue of the power of the court to make an order that the publication of proceedings be postponed, were 'sparse', in determining that '… a power at common law to postpone reporting a part of proceedings seems to exist'. Roberts CJ said that he relied on the judgment of Lord Denning in *R v Horsham Justices, ex p Farquharson*. There, Lord Denning had relied on a finding to that effect in *R v Clement* in stating:

It has long been settled that courts have the power to make an order postponing publication (but not prohibiting) if the postponement is necessary for the furtherance of justice in proceedings which are pending or imminent. …"

The Court agreed at 409 that it had power to prohibit publication of

court proceedings temporarily under the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383):

"63. Whether or not the common law as developed in Hong Kong provides for an inherent power of the court to make an order for the temporary prohibition of publication of court proceedings is moot. As noted earlier, Roberts CJ, sitting as a single judge, determined the power to exist. Soon afterwards the report of the Law Reform Commission, of which both the then Chief Justice and Attorney General were members, recommended that the power of the court, 'be confirmed' by legislation. Clearly, it was assumed that the power did exist. …

64. In the event, given that the parties are agreed, correctly in our judgment, that the Basic Law and the Bill of Rights Ordinance provide the Court with a power to make the order sought, it is not necessary for this Court to decide, notwithstanding the judgment of the Privy Council in *Independent Publishers*, whether or not that power exists in the common law of Hong Kong."

Wong Chi Fung v Secretary for Justice [2016] 3 HKLRD 835

Background

S. 37(1)(a) of the Legislative Council Ordinance (Cap. 542) provides that a person is eligible to stand as a candidate at a Legislative Council election if he or she is at least 21 years old ("the minimum candidature age requirement"). The applicant, who was 19 years old, sought leave to apply for judicial review, challenging the constitutionality of s. 37(1)(a) of Cap. 542 on ground that it infringed his right to stand for election under BL 26. The applicant further argued that the Court should adopt a remedial interpretation to interpret the minimum candidature age under s. 37(1)(a) of Cap. 542 to be the same as the eligible age for registration as an elector under s. 29 of Cap. 542, i.e. 18 years old ("the Age Declaration").

Basic Law provisions in dispute

The major provision in dispute was BL 26.

What the Court held

The CFI refused to grant leave. The Court held that the minimum candidature age requirement which restricted the right to stand for election under BL 26 had satisfied the proportionality test. The requirement pursued a legitimate aim to ensure a degree of maturity amongst candidates. The requirement was rationally connected to that aim, and was no more than necessary to achieve such aim.

The Court opined that even if it had found s. 37(1)(a) of Cap. 542 to be unconstitutional, the Age Declaration would not be granted because the choice of the minimum age of candidature was a matter of political judgment for the legislature, but not one for the Court to make in the name of remedial interpretation.

What the Court said

The Court held that the right to vote and the right to stand for election under BL 26 and BoR 21 were not absolute rights at 839:

"13. It is common ground (as it is well established) that these rights are not absolute and can be subject to restrictions permissible under the laws. However, a restriction would only be regarded as permissible by the law if it satisfies the proportionality test, in that:

(1) the restriction is imposed to achieve a legitimate aim;

(2) the restriction is rationally connected to that legitimate aim; and

(3) the restriction as a measure is no more than necessary to accomplish that aim."

At 849 – 850, the Court considered that it was wrong to say that the Government could only discharge its burden under the proportionality test by way of evidence:

"56. If Mr Wong is seeking to say that these cases support a general proposition that a putative respondent can only discharge his burden under the proportionality test by way of what can be properly described as evidence, that in my view also cannot be right. These observations cannot

be intended by the courts to lay down a general proposition or principle that in every case where a proportionality challenge is made, the Government can *only* discharge that burden by the use of evidence.

57. There is no question that, when the Government or decision-maker is met with a proportionality challenge, the burden *is* on the Government or the decision-maker to justify the challenged decision or restriction on the basis of proportionality. However, as a matter of general principle, what may amount to sufficient information, materials or evidence to satisfy the court that a proportionality challenge is met must be case specific, depending on the specific issues involved and the way the arguments and submissions are advanced. The court in appropriate circumstances must also apply a degree of common sense in assessing what amounts to sufficient materials or evidence. There cannot be any hard and fast rules."

In addressing the applicant's argument that the right to stand for election should not be subject to a higher age requirement than that of the right to vote, the Court held at 844:

"40. The two rights are obviously different in nature, and there is a fundamental difference between the right to stand for election and the right to vote. As rightly pointed out by Mr Yu, voters are not occupying any public office that comes with its responsibilities that need to be discharged in the public interest. However, a candidate, if elected, does. The two rights therefore carry important and significantly different public interest responsibilities, which would by themselves justify the imposition of different restrictions in the exercise of the rights."

The Court held that the minimum candidature age requirement had satisfied the proportionality test at 842:

"28. First, as said above, the imposition of the minimum candidature age requirement is obviously to achieve the legitimate aim of ensuring a degree of maturity for the person to carry out the functions and duties of a legislator. There is nothing objectively to show that that cannot be the aim.

…

29. Second, that measure (i.e. to impose a minimum age requirement) is also obviously rationally connected to the aim of ensuring a degree of maturity of the candidate who may be elected. …

30. Third, as the Secretary has shown, there are many other jurisdictions that have set the minimum age of candidature for elections at 21 or even

higher. Moreover, as stated in the 'Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report' (adopted by the Venice Commission at its 52nd Plenary Session on 18-19 October 2002) at p.14, para. 6a, the age limitation for the right to stand for election should generally be not more than 25 (save where there are specific qualifying ages for certain offices such as senator or head of state).

31. The age of 21 therefore lies clearly within a range of reasonable alternatives that is open to the LegCo to adopt in enacting the Impugned Provision [i.e. s. 37(1)(a) of Cap. 542] to impose the minimum candidature age requirement. The choice of the age is predominantly a discretionary political judgment for the elected members of the LegCo to make. In giving a broad margin of appreciation to the LegCo's discretionary judgment, the court clearly would not regard the decision to adopt 21 years old as the minimum candidature age as disproportionate."

The Court discussed the tool of remedial interpretation at 852 – 853:

"70. It is correct that the court has the implied power to adopt remedial interpretation for the purpose of making a statutory provision BL or BOR compliant. Striking down a legislative provision for being not constitutional is appropriate only where a remedial interpretation is impossible. The rationale is that the court interferes less with the exercise of legislative power than it would if it cannot engage in a remedial interpretation.

71. On the other hand, although it is a matter of judicial duty to adopt a remedial interpretation of an infringing provision, it could only do so as far as it is possible …

72. In this respect, the court should not make decisions for which they are not equipped such as where their choice amongst several ways of making a provision BL or BOR compliant may involve issues that should be deliberated by the legislature … Further, it is not permissible for the court to reach an interpretation in the name of remedial interpretation the result of which is wholly different from what the parliament has intended.

73. The tool of remedial interpretation therefore has its limits at least to the extent that the court should not make decisions on matters that should be deliberated and determined by the legislature, in particular where … there is a number of ways to make the infringing provision constitutional."

University of Hong Kong v Hong Kong Commercial Broadcasting Co Ltd (No. 2) [2016] 4 HKLRD 113

Background

At a meeting of the Council of the University of Hong Kong ("Council") on 29 September 2015 ("Meeting"), the appointment of the Vice-President and the Pro-Vice Chancellor came up for a final decision ("the Appointment Issue"). After the Meeting, one of the members of the Council held a press conference summarizing some of the discussion of the Meeting. The act of that member was condemned as a serious breach of confidentiality. Subsequent to the Meeting, partial audio recordings of the Meeting made by an unknown person was broadcast on a radio channel operated by Hong Kong Commercial Broadcasting Co Ltd ("1st defendant") and was accessible on the 1st defendant's website.

The University of Hong Kong ("plaintiff") obtained *ex parte* interim injunction against the 1st defendant and persons unknown who had appropriated, obtained and/or offered or intended to offer for sale, publication of confidential information in respect of the meetings of the Council ("2nd defendants"), restraining further publication or disclosure of audio recordings, agenda, supporting papers and minutes relating to meetings of the Council. The injunction against the 1st defendant was subsequently discharged and the action against the 1st defendant was discontinued. At the hearing of the continuation of injunction against the 2nd defendants, the CFI continued the interlocutory injunction until trial and granted leave for the Hong Kong Journalists Association to make submissions at trial.

Basic Law provisions in dispute

The Basic Law provision in dispute was BL 27.

What the Court held

The CFI held that the injunction to restrain relevant persons from the publication or disclosure of audio recordings, agenda, supporting papers and minutes relating to meetings of the Council was proportionate and

necessary for the protection of the plaintiff's right to confidentiality. The duty of confidentiality arose from the provisions of the Guide and Code of Practice for Members of the Council, the express notice of confidentiality given to the members of the Council and their acceptance (including signed written undertakings) of such confidentiality, and the surreptitious way in which the audio recordings of the Council meetings were made. However, the Court also emphasized that the duty of confidence might be overridden by countervailing public interest which would warrant disclosure.

Freedom of speech was a constitutional right under BL 27 and BoR 16. However, such freedom was not absolute and might be subject to restrictions including the right to confidentiality as necessary and appropriate. While there might be countervailing public interest which would justify disclosure, there was a strong general public interest in upholding the duty of confidence.

What the Court said

At 125, the CFI discussed the importance of the duty of confidentiality:
"33. The recognition by the law of confidentiality in the context of meetings of the Council generally serves to protect the organisational and commercial secrets of the University, the privilege attaching to legal advice and the confidentiality of other professional advice received by the University, the reputation and privacy of individuals who are the subject of discussions, as well as the integrity of the decision-making structure and process adopted by the University, which operates on the twin principles of confidentiality and collective responsibility. The absence of protection of confidentiality would, it is feared, create a 'chilling effect' on free expression within the Council, and deter persons from serving as its members in future."

The Court considered the "public interest defence" at 126 – 128:
"39. … There are different views as to the precise juridical basis of the 'defence' and as to whether it is an issue that defines the scope of the obligation at its inception rather than operates as a defence as such, but it is unnecessary to go into these questions. Having reviewed the authorities again I would state the principles by which I propose to be guided in the determination of this action as follows:

(1) There is a constitutionally guaranteed freedom of expression (art.16 of the Bill of Rights; Art.27 of the Basic Law), but the freedom is not absolute. It is qualified by, *inter alia*, the need to respect the right of others to confidentiality. There is a public interest that confidences should be preserved and protected by the law, but that public interest may in turn be outweighed by some other countervailing public interest which favours disclosure: *Attorney General v Guardian Newspapers Ltd (No. 2)*, 282E.

(2) The test is not whether the matters disclosed would interest the public or be of interest to the public or even 'newsworthy', but whether it is in the public interest that disclosure should be made and the confidence breached …

(3) Nor is the test merely whether it is in the particular judge's view *desirable* for the information to be made public. The disclosure, to the proposed extent, in the proposed manner and to the proposed recipient, must be shown to be required in the public interest.

(4) Where there is justification to disclose, the disclosure should be to one who has a proper interest in receiving the information …

(5) The defence has to be kept within limits, lest it becomes '… not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an*ad hoc*basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence' … a risk recognized also by the English Court of Appeal in *R v Department of Health ex p Source Informatics Ltd* [2001] QB 424 at [52].

(6) It is well established that there is no confidence in iniquity … but the University has not so contended and, as at present advised, I am not prepared to limit the public interest defence to situations involving 'the existence of an iniquity in the sense of a crime, a civil wrong or serious misdeed of public importance' … The defence may well extend to disclosure of activities that are 'seriously contrary to the public interest' … or disclosure necessary to prevent a 'serious risk of public harm'… I doubt if these categories can be regarded as closed. The freedom of speech and the associated right of the public to receive information are in this kind of case always a central consideration.

(7) In such cases whether disclosure should be permitted may depend on the nature of the confidential information, the degree of confidentiality, the seriousness and probability of harm to public as well as the extent to which disclosure would redress that harm. On the other hand, it is not only

necessary to take into account the prejudice that would be caused to the plaintiff and other specific parties by the disclosure of the information in the particular case, but also the risk of harm generally resulting from the confidentiality being undermined by disclosure. An example is given in *Toulson & Phipps*, at para. 6-075: if the law too readily permits a doctor to disclose information about a patient, it may impair a patient's willingness to confide in the doctor and receive treatment."

Hysan Development Co Ltd v Town Planning Board (2016) 19 HKCFAR 372

Background

Hysan (a group of companies owning properties in Causeway Bay and Wanchai) took out an application for judicial review challenging a series of planning restrictions imposed by the Town Planning Board ("the Board") on their properties. Among other grounds, they argued that such restrictions infringed their property rights under BL 6 (which provides that, "[t]he Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law") and BL 105 (which provides, among other things, that "[t]he Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property").

Reversing the judgment of the court below, the CA allowed Hyson's appeal on various administrative law grounds and quashed the Board's decisions. Nevertheless, The CA was not satisfied that the planning restrictions represented a disproportionate and therefore unconstitutional infringement of Hysan's property rights in contravention of BL 6 and BL 105. Hysan therefore appealed to the CFA on the constitutional issues with a view to ensuring that, when the Board reconsidered its decisions regarding the planning restrictions, it would have the guidance of the judgment of the CFA as to the relevance and application of BL 6 and BL 105.

Basic Law provisions in dispute

The major provisions in dispute were BL 6 and BL 105.

What the Court held

The CFA held that BL 6 and BL 105 were engaged when it was factually established that planning restrictions imposed by the Board encroached upon a landowner's property rights. Further, a proportionality analysis of the planning restrictions was required in order to determine the permissible extent of those restrictions, as the guaranteed right was not absolute.

While Hong Kong courts had previously applied a three-step proportionality test, the CFA held that a four-step analysis should now be adopted for the proportionality analysis. The Court ruled that town planning restrictions were in general only susceptible to constitutional review if the Court were satisfied that they were manifestly without reasonable foundation.

The CFA ordered the Board to reconsider its decisions in relation to planning restrictions in light of its judgment.

What the Court said

Ribeiro PJ (with whom the other Judges agreed) held at 424 – 425:

"132. Articles 6 and 105 are engaged in cases where it is factually established that planning restrictions imposed by the TPB encroach upon a landowner's property rights.

133. Where such encroachment on the right is established, the extent, if any, of the encroaching measure's validity is determined by a proportionality analysis.

134. In Hong Kong, such a proportionality assessment has been viewed as involving a three-step process of asking (i) whether the intrusive measure pursues a legitimate aim; (ii) if so, whether it is rationally connected with advancing that aim; and (iii) whether the measure is no more than necessary for that purpose.

135. A fourth step should be added. In line with a substantial body of authority, where an encroaching measure has passed the three-step test,

the analysis should incorporate a fourth step asking whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

136. At the third stage, assessing the permissible extent of the incursion into the protected right, two main standards have been applied. The first is the test of whether the intruding measure is 'no more than necessary' to achieve the legitimate aim in question. This must be understood to be a test of reasonable necessity. If the Court is satisfied that a significantly less intrusive and equally effective measure is available, the impugned measure may be disallowed.

137. An alternative standard which may be applied at the third stage is one which asks whether the encroaching measure is 'manifestly without reasonable foundation', being a standard closely related to the concept of 'margin of appreciation' in[the European Court of Human Rights] jurisprudence.

138. At the supra-national level of the [European Court of Human Rights], the margin of appreciation doctrine involves the recognition that on certain issues, the Court should allow Member State latitude to decide on the legitimacy of their societal aims and the means to achieve them since they are better placed to make the assessment. Similar considerations have led the Court at a domestic level to allow the legislative and executive authorities latitude or a 'margin of discretion' to do the same, applying the 'manifestly without reasonable foundation' standard in such cases.

139. The 'manifest' standard has been used in cases where the Court recognizes that the originator of the impugned measure is better placed to assess the appropriate means to advance the legitimate aim espoused. This has occurred in cases involving implementation of the legislature's or executive's political, social or economic policies but the principle is not confined to such cases.

140. The location of the standard in the spectrum of reasonableness depends on many factors relating principally to the significance and degree of interference with the right; the identity of the decision-maker; and the nature and features of the encroaching measure relevant to setting the margin of discretion.

141. The difference between the two standards is one of degree, with the

Court in both cases, scrutinizing the circumstances of the case and the factual bases claimed for the incursion.

142. No extant planning restrictions fall to be considered since the Board is to reconsider its decisions. In general terms, where the Board reaches decisions which are not flawed on traditional judicially reviewable grounds, any imposed restrictions which encroach upon a landowner's property rights should be subject to constitutional review applying the 'manifestly without reasonable foundation' standard. It is considered to be highly unlikely that Board decisions imposing planning restrictions arrived at lawfully and in conformity with the principles of traditional judicial review, would be susceptible to constitutional review unless the measures are exceptionally unreasonable."

Yu Hung Hsua Julie v Chinese University of Hong Kong

[2016] 5 HKLRD 393

Background

The applicant was a retired associate professor of the Chinese University of Hong Kong ("University"). Several of her students appealed against their academic grades given by the applicant. Based on those grades, the students would fail to satisfy the minimum requirements of the MBA programme in the academic year of 2013-2014. The examination panel ("Panel") received and considered such appeals. The Panel decided to re-grade the students and they met the academic requirements of the programme. The MBA degrees were conferred upon them in 2015. The applicant, amongst others, appealed against the CFI's refusal to grant leave to her to apply for judicial review of the Panel's decisions.

Basic Law provisions in dispute

The Basic Law provision in dispute was BL 137.

What the Court held

The CA held that BL 137 was not engaged since there was no external

interference with the University's institutional freedom to decide how to assess its students in the case which involved a difference in opinion as to the procedural fairness of the grading assessment.

What the Court said

The CA, at 398, explained that BL 137 was not engaged:

"13. … we do not agree that art.137 of the Basic Law is engaged. That article protects the autonomy and academic freedom of educational institutions. In particular, it provides that such institutions may continue to recruit staff and use teaching materials from outside Hong Kong. Thus, the autonomy of the University and the collective academic freedom of the institution are the primary subject matters of protection.

14. … the freedom in question under art.137 is the institutional freedom of the university.

…

16. In our judgment, there cannot be any suggestion that there was any external interference with the institutional freedom of the University in deciding how its students are to be assessed. What is in issue is the dispute between the applicant and the examination panel as to whether the latter acted within the proper scope of intervention provided by the Code of Practice of the University. We do not see how art.137 is engaged in such circumstances."

Leung Sze Ho Albert v Bar Council of Hong Kong Bar Association [2016] 5 HKLRD 542

Background

The applicant was a practising barrister. His application for permission to engage in neuro-beautology as a supplementary occupation under paragraph 23 of the Code of Conduct of the Bar ("Code") was refused by the Hong Kong Bar Council ("Bar Council") because it considered such supplementary occupation to be incompatible with his practice as a barrister. The applicant applied for judicial review on the ground that

paragraph 23 of the Code was inconsistent with the freedom of choice of occupation under BL 33 as it prevented a barrister from engaging in supplementary occupation without the Bar Council's prior permission and succeeded at CFI. The Bar Council appealed the CFI decision.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 33.

What the Court held

The CA held that BL 33 was not engaged by the restriction in paragraph 23 of the Code. BL 33 only protected against conscription to particular fields of occupation and conferred no constitutional right to work in general. The right to work in general under Article 6 of the ICESCR had no domestic force. In this regard, the CA considered that the lower courts were bound by the CFA judgment in *GA v Director of Immigration* (2014) 17 HKCFAR 60 ("*GA*").

The CA also held that BL 33 was a passive or negative right of freedom to choose an occupation and did not imply a right to take up available employment in the first place, nor did the article confer an unqualified right to obtain employment, which was necessarily subject to market forces and legal constraints, such as visa and qualification requirements.

The CA rejected the applicant's argument that a right to work always existed under common law and this right was elevated to constitutional status by virtue of BL 33. The CA refused to depart from the CFA's interpretation of BL 33 in *GA* as the applicant had not shown significant societal changes warranting such a departure.

What the Court said

In his concurring judgment, Cheung CJHC (as he then was) held at 545 that the origin and drafting history of BL 33 were relevant to the interpretation of the provision:

"2. Article 33 states that 'Hong Kong residents shall have freedom of choice of occupation'. It is found in chapter III of the Basic Law which sets out the

fundamental rights and duties of the residents of the Hong Kong Special Administrative Region. Article 33, like other provisions in chapter III, should therefore be given 'a generous interpretation' in order to give to Hong Kong residents 'the full measure' of the right and freedom so constitutionally guaranteed: *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 29A–B. It does not follow, however, that the origin and drafting history of art.33 should be ignored. Rather, the proper interpretation of art.33 should be informed by its context and purpose. As Fok JA (now Fok PJ) pointed out in the Court of Appeal in *MA v Director of Immigration* (unrep., CACV 44, 45, 46, 47 & 48/2011, [2012] HKEC 1624, 27 November 2012), [139], art.33 has its genesis in art.3(5) (JD ref 17) of the Joint Declaration and annex I section XIII (JD ref 151) to the Joint Declaration, both of which refer to various rights and freedoms including that 'of choice of occupation'. No wider right to work is expressly referred to. In the same paragraph, Fok JA went on the point out in his judgment (with which both Stock V-P and Kwan JA agreed):

… At the time of the Joint Declaration, the significance of a freedom of choice of occupation was the practice in the PRC's planned economy of assigning students joining universities to specific fields of studies and occupations after graduation: see Chan and Lim (General Editors): ***Law of the Hong Kong Constitution*** (Sweet & Maxwell, 2011) at para.24.004."

In the leading judgment, Poon JA (as he then was) summarized the *ratio decidendi* in *GA* at 652:

"51. Two propositions can be distilled from the judgment of the Court of Final Appeal in *GA v Director of Immigration*:

(1) Under the common law, a general right to work does not exist.

(2) BL 33, on a proper construction, only protects against conscription to particular fields of occupation. It does not confer a right to work in general."

Poon JA held at 563 – 564 that BL 33 did not confer a general right to work:

"59. First, Mr Dykes submitted that the Basic Law is not a freeze-frame. It is a living instrument intended to meet changing needs and circumstances. In construing it, the court must take into account the evolving social context. Thus while the context in the 1980s must be looked at, including the way in which socialist labour conscription policies were practised in the Mainland at that time, that is far from a complete account of the enquiry that must be undertaken in correctly construing BL 33. Mr Dykes seemed to be suggesting that given the present social context, BL 33 must now be construed to

include a general right to work.

60. It is well established that a constitution such as the Basic Law is capable of growth and development over time to meet new social, political and historical realties since the time of its enactment … Thus in construing the Basic Law, the court gives due regard to its historical context but is not unduly constricted by it. The court always treats the Basic Law as a living norm, rooted in the past but intended to be responsive to contemporaneous needs and circumstances, and gives it an interpretation that truly reflects firmly held modern views in the current social and legal landscape.

61. When in a particular case the court is asked to depart from a long-held position in interpreting the Basic Law, such as the concept of marriage in *W v Registrar of Marriages* (2013) 16 HKCFAR 112, the court will approach the matter with extreme caution to ensure that such departure is truly warranted so as to reflect the underpinning societal changes and realities. Otherwise, the court will act beyond its constitutional role by writing new, or rewriting existing, social policy in the guise of constitutional interpretation. Introducing changes to social policy is the exclusive function of the executive branch of the government or the legislature which the court cannot usurp.

62. Here, the Court of Final Appeal handed down its judgment in *GA v Director of Immigration* on 18 February 2014, some 32 months ago. And in unequivocal terms, the Court of Final Appeal held that BL 33 confers no general right to work. If Mr Dykes really wanted us to depart from such a position now by giving BL 33 the interpretation that he contended for, he would have to demonstrate to us that there had been significant societal changes since February 2014. But he simply has not done so. Indeed, on the materials before us we can see no societal changes since February 2014 that would warrant such a departure. There is accordingly no basis for this Court to interpret BL 33 in such a way as to confer a general right to work."

Re BJB Career Education Co Ltd [2017] 1 HKLRD 113

Background

BJB was a company incorporated in the Cayman Islands. It provided vocational technology education in the PRC. On 3 July 2016, it was put into liquidation by order of the Grand Court of the Cayman Islands

("Grand Court"). Two members of PricewaterhouseCoopers were appointed joint provisional liquidators ("PL"). On 14 March 2016, the Grand Court issued a letter of request, seeking the High Court's assistance by exercising its common law powers to order Xu, the former chairman and director of BJB, to attend for oral examination by PL, answer interrogatories, and produce documents belonging to BJB.

In Hong Kong, PL issued an originating summons seeking recognition of their appointment and of the Grand Court's orders. Xu did not object to the orders sought. The High Court was prepared to make a recognition order but adjourned the matter for submissions on, *inter alia*, whether the order for the oral examination of an officer of a foreign company would infringe BL 96.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 96. The Court also considered BL 8.

What the Court held

The CFI held that the common law power of assistance extended to ordering an oral examination if such a power existed in the jurisdiction of liquidation and that was the jurisdiction of incorporation and in the assisting jurisdiction. Accordingly, in the exercise of its common law power, the Companies Court of Hong Kong could order the oral examination of a director of a Cayman company in liquidation in the Cayman Islands if satisfied that it was necessary and it would not infringe the established limitations on the exercise of the power conferred by the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).

Reciprocity was not a necessary component of assistance to be given to foreign liquidators. The power to provide assistance was founded firmly in the common law. The common law power of recognition and assistance was part of the laws in force in Hong Kong prior to 1997. There was no reason to suggest that such power contravened BL 96.

What the Court said

The CFI said at 118 that it was necessary to consider the judicial basis of assistance to determine if BL 96 was engaged:

"9. The question is whether the granting of an order of recognition and assistance in response to a letter of request is caught by art. 96. This requires a consideration of the juridical basis upon which the assisting court is providing assistance. …"

The Court said at 119 – 120 that reciprocity was not a component in private international law:

"11. In the context of personal bankruptcy the English courts have recognized since the mid-18th century the effect of personal bankruptcies declared under the law of the domicile of the bankrupt: see *Solomons v Ross* and the authorities discussed by Lord Collins in [12] and [13] of *Rubin v Eurofinance*. Reciprocity is not a component of the principle that allows the court to recognize the effect of a foreign bankruptcy order. Similarly, reciprocity is not a component of the established principles of private international law that the existence and dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognized in England and Hong Kong and that the authority of the liquidator appointed under the law of the place of incorporation is recognized in England. In [29] to [34] of *Rubin v Eurofinance* Lord Collins considers in detail the common law power to recognize and grant assistance to foreign insolvency proceedings. There is nothing to suggest in this analysis that it is based on notions of reciprocity, although his Lordship acknowledges in [28] that the introduction of regulations in respect of enforcement of judgments involves some degree of reciprocity as illustrated by the lengthy negotiation and consultation of the EC Insolvency Regulations and the Model Law."

The Court considered that BL 8 was relevant in maintaining the common law power of assistance. The Court said at 121:

"14. Once it is recognized that the power to provide judicial assistance is founded firmly in the common law (and as I explain in paragraph 5 the Privy Council in *Singularis* rejected the suggestion that the power of examination arises by utilizing statutory powers by analogy) Article 8 becomes relevant:

The laws previously in force in Hong Kong, that is, the common law … shall be maintained, except for any that contravenes this Law and subject to any amendment by the legislature of the Hong Kong Special Administrative

Region.

15. Prior to 1997 the Hong Kong courts had in a number of cases used the common law power of assistance to aid foreign liquidators: *Re Russo-Asiatic Bank, Modern Terminals (Berth 5) Ltd v States Steamship Co* and; *BCCI (Overseas) Ltd v BCCI (Overseas) Ltd – Macau Branch*. The common law power of recognition and assistance was clearly part of the laws in force in Hong Kong prior to 1997 and given their character in my view there is no reason to suggest that they contravene the Basic Law."

Chief Executive of HKSAR v President of the Legislative Council [2017] 1 HKLRD 460

Background

Leung and Yau were two newly elected members of the LegCo. They purported to take the LegCo oath as prescribed in s. 16(d) and Sch. 2, Part IV of the Oaths and Declarations Ordinance (Cap. 11) but departed substantially from the oath under Cap. 11. The LegCo President gave a ruling that their oaths were invalid but allowed them to retake the oath. The CE and the SJ commenced urgent proceedings and sought a declaration that their oaths were invalid and applied for judicial review of the President's decision allowing the two to retake the oath. Subsequent to the hearing of the case by the CFI but before the Court handed down its decision, the NPCSC made an interpretation of BL 104 pursuant to Article 67(4) of the Constitution and BL 158(1) on 7 November 2016 ("the Interpretation"). The Judge found that (a) Yau and Leung's conduct did amount to their wilfully omitting to take the oath and they evinced an intention not to be bound by it; (b) the principle of non-intervention did not apply; and (c) Leung and Yau had vacated their office automatically under s. 21 of Cap. 11. Leung and Yau appealed.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 104. The CA also discussed BL 48(2), BL 77 and BL 79(1).

What the Court held

The CA rejected the appeal. The Court held that BL 104 laid down a constitutional requirement on oath taking by LegCo members. The scope of the constitutional requirement extended to the consequence of its non-compliance which was laid down in BL 104 itself as interpreted by the NPCSC in the Interpretation, as well as s. 21 of Cap. 11. Compliance with the constitutional requirement under BL 104 was not an internal business of the LegCo, hence the principle of non-intervention had no application.

Under BL 104 (as interpreted) and s. 21(a) of Cap. 11, vacation of office was automatic by operation of law. The CE had a constitutional responsibility to implement the Basic Law pursuant to BL 48(2). The CE might do so by means of judicial review. The immunity granted under BL 77 to LegCo members did not extend to cover the taking of a LegCo Oath when assuming office.

The Interpretation set out the true and proper meaning of BL 104 from 1 July 1997 and was binding on the courts in Hong Kong. The court did not have jurisdiction under the Basic Law to review the Interpretation.

What the Court said

The CA held at 471 that the common law principle of non-intervention must be subject to the Basic Law:

"24. However, in a jurisdiction like Hong Kong where a written constitution (that is, the Basic Law), rather than the legislature, is supreme, where the rule of law reigns and where the courts are given under the constitution the independent power of adjudication, this principle of non-intervention has its own inherent limit.

25. First and foremost, the supremacy of the Basic Law means that no one – the legislature included – is above the Basic Law. In other words, where a constitutional requirement under the Basic Law is in issue, even the legislature cannot act contrary to that requirement under the Basic Law. Secondly, given that the courts are given under the constitution the independent power of adjudication of the Special Administrative Region, the question of whether that constitutional requirement has been complied with or breached is a matter which it is both the power and responsibility of

the courts to decide. As the Court of Final Appeal importantly pointed out in *Leung Kwok Hung*, paragraph 32:

In this respect it is important to recognize that the principle of non-intervention is necessarily subject to constitutional requirements."

The CA held at 472 that BL 104 was a constitutional requirement:
"27. … When taking an oath, no less a promissory oath such as the LegCo Oath, both the form and the substance matter greatly. The requirement under article 104 is plainly designed to secure the genuine, solemn and sincere declaration and pledge by the holders of the important offices mentioned in that article to do their utmost, in accordance with the Basic Law, to discharge the high responsibilities entrusted to them in running the Special Administrative Region in their respective roles assigned under the Basic Law. Article 104 clearly lays down a constitutional requirement that an oath must be taken in accordance with what is required under that article. Moreover, it says 'when assuming office', the oath must be taken. It must mean that taking the oath is a prerequisite and precondition to the assumption of office."

The CA held at 472 – 473 that the Interpretation set out the consequence of non-compliance with the oath taking requirement:
"29. The Interpretation gives the true meaning of article 104. Paragraph 2(3) of the Interpretation specifically sets out the consequence of an oath taker's declining to take the relevant oath – automatic disqualification, as part of the true meaning of article 104. It conclusively defeats Mr Pun's argument that the consequence of a failure to take the relevant oath as required by article 104 does not form part of the constitutional requirement, so that the principle of non-intervention applies.

30. Furthermore, article 104 says the oath must be taken 'in accordance with law'. The relevant provisions in the Ordinance actually predated the drafting of the Basic Law. When article 104 refers to law, the drafters must have in mind the provisions in the Ordinance. Section 21(a) of the Ordinance says that if an office holder declines or neglects to take the relevant oath, he shall vacate his office. That is perfectly consistent with article 104. Since article 104 specifically refers to the implementing law, it provides another reason for rejecting Mr Pun's argument that article 104 is not engaged but only section 21(a) of the Ordinance is – and therefore the principle of non-intervention still applies. It is neither right nor realistic to look at article 104 without looking at its implementing law (in the present

case, the relevant provisions in the Ordinance) together, or to look at the statutory provisions without looking at article 104 at the same time, in deciding whether the constitutional requirement under article 104 has been satisfied."

The CA discussed paragraph 2(4) of the Interpretation at 474 – 475:

"36. It is clear from the Chinese version, particularly the use of the words '應確定' (which is better rendered as 'should confirm/affirm'), that paragraph 2(4) seeks to emphasize the important administrative duty of the oath administrator to ensure that the oath taker has taken the relevant oath properly and validly in full accordance with the Interpretation and the law, and that when the office holder declines to take the oath (paragraph 2(3)), the oath administrator must resolutely say so and refuse to make any administrative arrangement for the retaking of the oath. What it plainly does *not* say is it gives the oath administrator any judicial power of the Special Administrative Region to determine whether the oath taken is in accordance with the requirements of the Basic Law and the Ordinance. Still less does it take away the courts' judicial power of the Special Administrative Region, granted under the Basic Law, to adjudicate on a dispute.

37. Neither does the Interpretation give the oath administrator any fact-finding role in any judicial sense. In other words, it does not give the oath administrator a judicial power of the Special Administrative Region to make any finding of fact. Nor does it constitute the oath administrator as a sort of administrative tribunal of fact (subjecting him thereby to all that standard administrative law requires of such a tribunal of fact to observe by way of procedural fairness etc.). Still less does it exclude the courts' judicial power, conferred under the Basic Law, to make the relevant findings of fact.

38. If anything, paragraph 4 highlights the absolute importance of full compliance with the oath taking requirements under article 104 and the implementing law. …"

The CA held at 475 that Leung and Yau had declined respectively to take the LegCo Oath and they had vacated their office automatically:

"42. As a matter of law and fact, Leung and Yau have failed the constitutional requirement. They are caught by paragraph 2(3) of the Interpretation as well as section 21 of the Ordinance which gives effect to the constitutional requirement. Under the former, they were automatically disqualified forthwith from assuming their offices. Under the latter, they 'shall … vacate [their respective offices].' There is therefore no question of allowing them to

retake the LegCo Oath."

The CA ruled at 476 that BL 79(1) was not relevant to the oath taking case:

"45. I reject the further argument based on article 79(1) of the Basic Law. With respect, one only needs to read the Chinese text of article 79(1) to see that it plainly does not apply to the present type of situation. Disqualification under section 21 is miles away from '無力履行職務' ('loses the ability to discharge his or her duties') in article 79(1)."

The CA further held at 477 that the CE could bring legal proceedings to implement the Basic Law:

"49. All I wish to say is this. I accept that proceedings under section 73 may only be brought by the Secretary for Justice or an elector, but not the Chief Executive in his official capacity as such. However, I do not agree that apart from section 73, no proceedings can be brought by the Chief Executive. Given the Chief Executive's constitutional role under article 48(2) of the Basic Law (to be responsible for the implementation of the Basic Law and other laws), any attempted restriction on the Chief Executive's right to take steps, including the commencement of court proceedings, to implement the Basic Law must be incompatible with article 48(2) and therefore invalid. Plainly, section 21J of the High Court Ordinance (Cap 4) entitles the Chief Executive to sue. On its proper construction, section 73(7) does not prevent the Chief Executive from doing so."

The CA held at 478 that BL 77 had no application:

"51. Immunity from suit enjoyed by legislators under article 77 of the Basic Law has no relevance in the present dispute. The article gives members of the LegCo immunity from legal action in respect of their statements at meetings of the Council. It is neither necessary nor desirable to define the scope of immunity conferred by that article in these appeals. One thing is clear. The Basic Law must be read as a whole. Article 77 must be read together with article 104. Given the importance of article 104 as explained above, it is simply unarguable that the drafters of the Basic Law intended to permit members of the LegCo – yet not anyone else as article 77 only applies to them – to get round the constitutional requirement on oath taking laid down in article 104 via the backdoor of article 77. It would make a mockery of article 104 and serve no discernible, meaningful purpose. …"

The CA ruled at 478 that the Interpretation declared what the law has

always been from 1 July 1997:

"53. First, the Interpretation, by definition, sets out the true and proper meaning of article 104 from day one. The question of whether it applies 'retrospectively' to any given set of facts whether pending before the court or not therefore cannot and does not arise, save for the situation specifically provided in article 158(3) of the Basic Law, which is not the case here. As the Court of Final Appeal explained *in Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, 326D:

The Interpretation, being an interpretation of the relevant provisions, dates from 1 July 1997 when the Basic Law came into effect. It declared what the law has always been."

Finally, the CA held at 479 – 480 that the court had no jurisdiction to question the validity of an NPCSC interpretation:

"58. But more importantly, this present argument raises an *a priori* question of whether under the Basic Law, the courts of the Hong Kong Special Administrative Region have ever been vested with the jurisdiction to determine whether an interpretation officially promulgated as such by the NPCSC in accordance with article 67(4) of the Constitution and article 158 of the Basic Law and the procedure therein is invalid on the ground under discussion. Apart from citing to the court a passage in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 26A-B which must be read together with *Ng Ka Ling (No. 2)* (1999) 2 HKCFAR 141, where the Court of Final Appeal clarified in no uncertain terms that the courts in Hong Kong cannot question 'the authority of the National People's Congress or the Standing Committee to do any act which is in accordance with the provisions of the Basic Law and the procedure therein' (p 142E), Mr Pun has simply made no submission on this fundamental question of jurisdiction.

59. In my view, the court has no jurisdiction to deal with the issue raised."

Re Leung Lai Fun [2018] 1 HKLRD 523

Background

Ms Leung Lai Fun ("applicant") claimed that a person (Mr Ng) had without her authorization applied for a "Certificate of Registration of Death" and a "Cremation Permit" for her deceased mother, and another

person (Ms Yu) had used those documents to reserve a time slot for the cremation of her deceased mother but then transferred that time slot to another person. The applicant alleged that the signature on an authorization letter for the application of a "Cremation Permit" was not hers. She believed that someone had committed the offences of "making a false instrument" and "using a false instrument".

After investigation, the applicant was advised by the officers of the Independent Commission Against Commission that none of the persons involved in the case would be prosecuted. The Director of Public Prosecutions ("DPP") also reached the conclusion that it would be inappropriate to institute a prosecution since there was no reasonable prospect of Ms Yu being convicted. In his view, administering a caution to Mr Ng was an appropriate way to deal with the matter.

The applicant's application for leave to apply for judicial review of a decision by the DPP not to prosecute Ms Yu and Mr Ng was rejected by the CFI and she appealed to the CA.

Basic Law provisions in dispute

The Basic Law provision in dispute was BL 63.

What the Court held

The CA held that under BL 63, only in extremely rare circumstances, including where evidence proved that the Department of Justice had acted on political instruction or in bad faith such that the prosecutorial decision was unconstitutional, would the court have jurisdiction to review the decision concerned. On the evidence, that was not the case and the appeal was dismissed.

What the Court said

In respect of BL 63, the CA said at 526 – 527:

"10. Article 63 of the Basic Law provides that 'The Department of Justice shall control criminal prosecutions, free from any interference'. As Hartmann J had pointed out in *RV v Director of Immigration* [2008] 4 HKLRD 529, this provision includes the protection of the independence of the Department

of Justice's control of criminal prosecutions from judicial encroachment. It is only if the case belongs to those extremely rare situations, such as where there is evidence proving that the Department of Justice has acted in obedience to political instruction when making the decision, or is acting in bad faith, such as to cause the Court to find that the prosecutorial decision is unconstitutional, that the Court will have jurisdiction to review the decision concerned. Otherwise the Court should not encroach on the right of the Department of Justice to control prosecutions. This is the major premise which is founded on principle.

…

12. In the present case, the documents and evidence submitted by Ms Leung did not show that the DPP had acted in obedience to political instruction when making the decision, or in bad faith. According to the legal principle discussed above, the Court should not grant her application."

Zhi Charles v Lim Hosok [2017] 2 HKLRD 35

Background

Zhi Charles ("the plaintiff") was a shareholder of SMG, a listed company in Hong Kong. Stock trading of SMG's shares was suspended in April 2013. In July 2014, the Stock Exchange of Hong Kong Limited ("SEHK") conditionally permitted stock trading to be resumed; one of such conditions required SMG to assess the quantity of coal reserves of one of its coal mines in order to ascertain the validity of the insurance of certain financial instruments. According to SMG's announcement on 22 April 2015 ("the SMG Announcement"), an investigation was carried out about the coal reserve. Dissatisfied with the SMG Announcement, the plaintiff commenced legal action alleging SMG used misleading technical terms to confuse the public and SEHK did not adequately protect the investing public.

Six applications were heard before the CFI where four of the applications were taken out by the plaintiff, one by SEHK, and one by a staff of the listing department of SEHK. The plaintiff sought a declaration that s. 22 of the Securities and Futures Ordinance (Cap.

571) was in breach of BL 35 and was unconstitutional. He argued that the immunity enjoyed by SEHK and persons acting on behalf of SEHK under s. 22 of Cap. 571 was in breach of BL 35.

Basic Law provisions in dispute

The major provision in dispute was BL 35.

What the Court held

The CFI held that BL 35 was not engaged and s. 22 of Cap. 571 was not unconstitutional. BL 35 was only concerned with a citizen's procedural right of access to court rather than the content or substance of his claim. Even if BL 35 was engaged, the restrictions under s. 22 of Cap. 571 pursued a legitimate aim and was proportional to that aim, and did not impair the essence of the right to access to the courts.

What the Court said

The Court held that BL 35 was not engaged at 39 – 40:

"10. … I agree that:

(a) Art 35, Basic Law is not engaged. … Art 35, Basic Law is only concerned with a citizen's procedural right of access to court, and not with the contents or substance of his claim;

(b) even if Art 35, Basic Law is engaged, its restrictions are concerned with a legitimate aim, are proportional to that aim and do not impair the very essence of the right to access the court: *Ng Yat Chi v Max Share Ltd & Another* (2005) 8 HKCFAR 1 (para 73).

11. … s. 22 of the Securities and Futures Ordinance does not limit or exclude Mr Zhi's procedural right of access to court, but is a limitation of civil liabilities on the part of SEHK and Ms Chan. This concerns substantive law.

12. … the role of SEHK in the stock market is mainly regulatory in nature. Conferring certain degree of immunity from legal suit serves a legitimate aim. There is at least potentially a tension between the interests of those seeking listing (so as to attract public funding) and those of the investors. SEHK should be able to act firmly and without fear of liabilities. To remove

that immunity would bring about hesitations in decision making or even non-action, and uncertainty. Recourse is still available to the public because the Securities and Futures Commission may still impose sanctions against SEHK (s. 28 of the Securities and Futures Ordinance). The immunity conferred is not absolute; acts done in bad faith will still attract civil liabilities.

13. Civil liabilities other than for bad faith (such as one grounded on common causes of action like tort and contract) fall within s. 22 of the Securities and Futures Ordinance. The factors which favour the restrictions against such liabilities are the fact that SEHK (and its personnel) has to regularly tackle potentially complicated investment instruments and corporate matters, make decision relying on information provided by third parties such as corporate directors or officers and professional advisers, and often may have to do so within relatively short time frames."

Choi King Fung & Another v Hong Kong Housing Authority (unreported, 17 March 2017, HCAL 191 of 2015)

Background

As a measure to manage the substantial rise in demand for public rental housing ("PRH"), the Hong Kong Housing Authority ("HKHA") adopted the Quota and Points System ("QPS") in 2005 to set an annual quota for non-elderly one-person applicants and establish a points system to accord priority to QPS applicants of higher age. The applicants sought judicial review of the HKHA's decision to refine the QPS in 2014 ("the Refined QPS"), which, in effect, enhanced the priority of the elderly applicants in the allocation of PRH. The applicants argued that the refined QPS deprived QPS applicants under the age of 49 of access to PRH, and infringed their right to social welfare under BL 36 and BL 145 and the guarantee of equality under BL 25 and BoR 22.

Basic Law provisions in dispute

The major provisions in dispute were BL 25, BL 36 and BL 145.

What the Court held

The CFI held that the applicants failed to properly identify the precise right under BL 36 that had been infringed by the refined QPS. In any event, the refined QPS, which interfered with the priority rather than the right to social welfare under BL 36, satisfied the proportionality test as it pursued legitimate social aims, was rationally connected to such aims, was not manifestly without reasonable foundation and did not inflict an unacceptably harsh burden on QPS applicants.

Regarding the guarantee of equality under BL 25, the applicants wrongly adopted QPS applicants under 49 as the subject group and in referring to families and elderly persons they chose the wrong comparators. In any event, the refined QPS, in so far as it drew a distinction between applicants under 45 and others, passed the justification test.

What the Court said

The CFI made the following observations on the right to social welfare at paragraphs 39, 40 and 41:

"39. The first sentence of Art 36 of the Basic Law states that Hong Kong residents 'shall have the right to social welfare in accordance with law'. It is not in dispute that PRH is a form of social welfare. As is obvious, however, it cannot sensibly be contended that every resident of Hong Kong is entitled to be provided with a PRH flat. It is necessary to see precisely what relevant right exists on the part of the Applicants that is afforded protection by the Basic Law.

40. The stipulation in Art 36 is expressed in general and abstract language. As Ribeiro PJ stated in *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950 at [33]:

… like many other constitutional provisions, Article 36 is intended to operate as a framework provision. Read together with Article 145, it provides the framework for identifying a constitutionally protected right to social welfare

…

41. Art 145 refers to the 'previous social welfare system', i.e. the system before the Basic Law came into effect in 1997. On the basis of this system, the Government is mandated to formulate policies on its development and improvement in the light of the economic conditions and social needs."

At paragraph 43, the Court explained the approach to social welfare rights:

"43. This approach requires one to identify the relevant features of the pre-existing system, recognize that a right may exist as crystallized under that system that attracts constitutional protection of Art 36, and then analyse whether that right has been infringed or restricted by a new law, policy or administrative arrangement and, if so, whether the interference with that right is permissible."

The Court held at paragraphs 44 – 45 and 47 that the present case was different from *Kong Yunming*:

"44. In this context, the present case is different from *Kong Yunming* in two respects. First, whereas the measure attacked in *Kong Yunming* concerned eligibility for a monetary form of benefit, the QPS and its refined version affect not the *eligibility* of applicants for PRH but their *priority* (both among QPS applicants *inter se* and relative to other applicants) in being allocated PRH units, a finite public resource that is 'increasingly scarce relative to demand'.

45. Further, as mentioned above, there has been no application for judicial review, instituted by the present Applicants or otherwise, to challenge the HKHA's decision in 2005 to implement the QPS. The only challenge launched is against the Refined QPS. …

47. Contrary to the approach in *Kong Yunming*, neither the Applicants' Form 86 nor their counsel's submissions, despite my enquiry, identified the precise right which is said to be protected under Art 36 and infringed by the Revised QPS. Instead there were repeated incantations simply of their 'right to social welfare'. The central submission of Mr Pun SC for the Applicants was that looking at the overall effect of the Refined QPS as a whole, there is *de facto* deprivation of access to PRH to QPS applicants under the age of 49, and the Refined QPS therefore infringes their 'right to social welfare'."

The CFI concluded at paragraph 50:

"50. Applying the correct approach, it may be that one can recognize the Applicants as having a relevant right under Art 36 prior to the decisions

challenged, in the form of the right to be provided with PRH under the rules of the original QPS with the priority defined by those rules. The Applicants have not, however, framed their case on this basis. In my view their application fails at the very first hurdle for failing to identify properly a constitutionally protected right. …"

The CFI also rejected the applicants' case on the right to equality. The Court said at paragraphs 100 – 101 and 104:

"100. The Applicants contend that there is no obvious, relevant difference between non-elderly one-person applicants under the age of 49 and the other applicants on the Waiting List to justify the *de facto* exclusion of the former from access to PRH. …

101. With respect, the Applicants' case is fundamentally flawed. As explained above, there is no separate and different treatment of those under the age of 49. The number of 49 is not a fixed feature of the Refined QPS but an observed phenomenon at a particular time flowing from changing parameters.

…

104. Accordingly it is in my view not open to the Applicants, on their present Form 86, to contend that they were discriminated against in comparison with family and elderly applicants."

Lai Man Lok v Director of Home Affairs [2017] 3 HKLRD 338

Background

On 1 October 2013, the applicant and Joshua Wong ("Wong") staged a demonstration during the annual National Day flag-raising ceremony at the seafront promenade of the Hong Kong Convention and Exhibition Centre ("HKCEC"). He and Wong entered into a restricted area and ignored the instructions of the staff of the Home Affairs Department ("HAD") and the security personnel of the HKCEC to return to the public viewing area. The HAD staff and security personnel tried to remove the applicant from the restricted area by dragging and hauling

with force. The applicant challenged the decision of the Director of Home Affairs ("respondent") to direct or permit the use of force to remove him from the restricted area on various grounds including that their rights to freedom of expression, assembly and demonstration, and their rights to freedom of the person were violated.

Basic Law provisions in dispute

The major provisions in dispute were BL 27, BL 28 and BL 39(2).

What the Court held

The CFI held that the respondent was entitled under common law to exercise "self-help" and use no more force than was reasonably necessary to remove the applicant. Accordingly, BL 28 was not engaged as it did not confer on Hong Kong residents an entitlement to absolute freedom but rather prohibited arbitrary and unlawful restriction of the person.

Under the circumstances, the CFI found that the applicant had no permission and knew he had no permission to remain in the restricted area. As such, the respondent's staff were carrying out their lawful duty to remove the applicant and in doing so were using no more than reasonable force. There was no restriction on the applicant's freedom of person under BL 28 and even if there was, it was neither arbitrary nor unlawful.

On the question of BL 27 and BoR 16 and 17, the CFI held that they had not been violated. The Court held that the freedom of expression, assembly and demonstration did not entail a freedom of forum for the exercise of such rights. At the material times, the respondent had the exclusive right to the use and control of the restricted area and was entitled to permit or deny entry to the area by any particular person.

With regard to the "prescribed by law" requirement under BL 39(2), the CFI held that the common law principle of "self-help" was both "certain" and "accessible".

What the Court said

At 348, the CFI considered the limitations of BL 28:

"31. It cannot, in my view, seriously be argued that the right to freedom of the person as guaranteed by BL 28 permits or allows (i) a person who otherwise has no right or permission to enter or remain in a property to do so despite the owner's objection, or to be immune from action taken to remove him from the property which does not go beyond the use of reasonable force necessary to effect the removal, or (ii) a person to resist or obstruct the due execution of lawful duties by public officers.

32. In this case, the applicant had no lawful right to remain in the Community Groups Viewing Area. I do not consider that there was 'restriction of the freedom' of the applicant when all that the HAD staff and security personnel sought to do was simply to remove him from that area using no more than reasonable force.

33. In any event, what is prohibited by BL 28 is 'arbitrary' or 'unlawful' restriction of the freedom of the person. BL 28 does not confer on Hong Kong residents a right to *absolute* freedom of the person. …"

The CFI discussed the application of BL 39(2) at 350:

"37. Insofar as BL 39(2) is concerned, as earlier mentioned, it provides that: '[t]he rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law …'. The meaning of the 'prescribed by law' requirement is well settled - the relevant law, covering both statute and unwritten law (including common law), must be certain and accessible (see *Hong Kong Television Network Ltd v Chief Executive in Council* [2016] 2 HKLRD 1005 at [84]-[88], *per* Cheung CJHC). Questions concerning the requisite level of certainty of the relevant law for the purpose of the 'prescribed by law' requirement do not arise in the present case, and I do not propose to examine the authorities mentioned by the Chief Judge of the High Court in those paragraphs which discussed this issue. It is, in my view, clear that the common law principle of 'self-help', which permits no more than reasonable force to be used to remove a trespasser and to prevent unlawful obstruction of the due execution of duties, is both 'certain' and 'accessible'."

At 354, the CFI considered BL 27 and BoR 16 and 17:

"43. … BL 27 and BORs 16 and 17 can, and should, be read as conferring on the applicant rights to express, assemble and demonstrate lawfully. They

cannot, and should not, be read as authorizing the applicant to exercise those rights in an unlawful manner or by unlawful means."

The CFI held at 354 – 355:

"46. … even if the applicant's rights to freedom of expression, assembly and demonstration were engaged and restricted by the Decision, it is trite that those rights were not absolute. BORs 16 and 17 expressly provide for restriction of the relevant rights, while the rights under BL 27, although not subject to any express qualification, may be impinged by laws if they pass the proportionality test …"

Incorporated Owners of Po Hang Building v Sam Woo Marine Works Ltd (2017) 20 HKCFAR 240

Background

The appellant was the owner of a shop on the ground floor of Po Hang Building, of which the respondent was the owners' corporation of the building. The respondent brought proceedings against the appellant in the District Court alleging breach of the Deed of Mutual Covenant. The appellant failed to file a defence in time and the respondent applied for judgment in default. The District Court refused the appellant's leave to file its pleadings out of time and entered judgment in favour of the respondent.

The appellant's application to the District Court for a stay of execution and for leave to appeal to the CA was dismissed. The appellant then applied to the CA for leave to appeal against the District Court's decision refusing leave to file pleadings out of time and entering judgment in the respondent's favour. After the CA refused leave, the appellant proceeded to seek the CA's leave to appeal to the CFA against the CA's refusal to grant leave to appeal to itself against the District Court's decision, contending that s. 63B of the District Court Ordinance (Cap. 336) (which provided that no appeal lay from the CA's decision to refuse or grant leave) was inconsistent with BL 82 (regarding the vesting of the power of final adjudication in the CFA) and thus unconstitutional.

The CA upheld the constitutionality of s. 63B of Cap. 336 and dismissed the application. The appellant appealed to the CFA.

Basic Law provisions in dispute

The major provisions in dispute were BL 82 and BL 83.

What the Court held

The CFA held that BL 82 operated to vest the power of final adjudication in the CFA. However, the Basic Law did not intend to give every party to every dispute a right to have a dispute resolved by the final adjudication by the CFA, and the CFA's power of final adjudication vested by BL 82 required regulation. BL 83 reflected the above and provided that the structure, powers and functions of the courts of HKSAR shall be prescribed by law.

The CFA found that the two broad aims of the scheme of excluding appeals to the CFA against a refusal by the CA to grant leave to appeal from a decision of a District Court created by ss. 63(1), 63A(2) and 63B of Cap. 336 were: (i) promoting the proper and efficient use of judicial resources and the avoidance of oppressive and unproductive appeals, and enabling the CFA to play its proper role, by having the CA screened out cases which had no reasonable prospects of success on appeal; and (ii) maintaining reasonable proportionality between litigation costs and the amounts at stake by restricting the available tiers of appeal. The CFA held that these aims were legitimate aims and the restriction of rights of appeal by ss. 63(1), 63A(2) and 63B of Cap. 336 was rationally connected to their achievement. The CFA further held that the restrictions in question did not go beyond what was reasonably necessary for the achievement of the legitimate aims and were proportionate, and hence constitutionally valid.

What the Court said

The CA explained the effect of BL 82 at 251 – 252:

"12. In most cases, constitutional challenges are founded on an applicant's claim that his or her constitutional rights have been violated. Thus, the

analysis usually begins by identifying the constitutional rights engaged. However, this approach is inapplicable in the present case. This is because art.82 of the Basic Law operates to vest the power of final adjudication in the Court of Final Appeal. It does not confer on parties to litigation any constitutional right of appeal to the final court. As Li CJ pointed out:

… it is obvious that the intent of the Basic Law was not to give every party to every dispute a right to have the dispute resolved by final adjudication by the Court. By its very nature, the Court's power of final adjudication vested by art.82 calls for and indeed requires regulation, which may include limitation. Such limitation is permitted by implication, having regard to the nature of the power. It may be dealt with by the enactment of statutes by the legislature or it may be dealt with by rules of court made by the rules committee exercising subordinate legislative powers.

13. Article 83 reflects this by providing that 'the structure, powers and functions of the courts of the Hong Kong Special Administrative Region at all levels shall be prescribed by law'.

14. However, any restrictions on rights of appeal (eg, by finality provisions confining appeals to intermediate courts) have a limiting effect upon the Court's constitutional power of final adjudication and cannot be arbitrarily imposed. As was held in *Solicitor v Law Society*:

… The limitation imposed must pursue a legitimate purpose and there must be reasonable proportionality between the limitation and the purpose sought to be achieved … it is the duty of the courts to review any legislation enacted which seeks to impose any limitation on the power of final adjudication vested in the Court by art.82 and to consider whether the limitation satisfies the proportionality test."

At 257 – 263, the CFA held that restriction on the CFA's exercise of the power of final adjudication under BL 82 passed the proportionality analysis:

"33. A finality provision which prevents a class of cases from reaching the Court of Final Appeal limits the Court's exercise of the power of final adjudication vested in it by art.82 of the Basic Law. The combined effect of DCO ss. 63(1), 63A(2) and 63B is to create such a limitation. It is a constraint which has to be justified on a proportionality analysis …

D.1 Steps (i) and (ii): Legitimate aims and rational connection

35. In identifying the aim of the restriction with a view to considering its legitimacy and the rationality of the measures adopted to achieve it,

section 63B should not be viewed in isolation. The statutory purpose emerges from the scheme created by sections 63(1), 63A(2) and 63B in the context of other relevant provisions of the DCO.

36. The scheme has two broad aims. First, … by having the Court of Appeal screen out cases which have no reasonable prospects of success on appeal, it promotes the proper and efficient use of judicial resources and the avoidance of oppressive and unproductive appeals. It avoids the squandering of resources by the Court of Appeal or this Court on hearing appeals which cannot be expected materially to benefit either party, merely causing delays to others in the queue waiting for suitable appeals to be dealt with …

37. Secondly, in the context of a court of limited jurisdiction, the statutory scheme aims to maintain reasonable proportionality between litigation costs and the amounts at stake by restricting the available tiers of appeal.

38. The aim of economic proportionality in litigation is generally recognized.

…

41. It is plain that the two broad aims discussed above are legitimate aims and that the restriction of rights of appeal by sections 63(1), 63A(2) and 63B is rationally connected to their achievement.

D.2 Step (iii): No more than necessary

42. Two main arguments have been advanced on the appellant's behalf to contend that the finality provision in the present case goes disproportionately beyond what is necessary.

43. The first is the suggestion that section 63B imposes an absolute ban so that, … it ought to be held to fail the proportionality test. That argument must be rejected.

…

48. In the present case, the DCO provisions limiting the right of appeal plainly do *not* erect a total ban on appeals. The Court of Appeal is entrusted with vetting the prospects of a potential appeal and enjoined to refuse leave unless the criteria specified in section 63A(2) are met. Conversely, if the application relates to an appeal which does have a reasonable prospect of success or in respect of which there is some other reason in the interests of justice for hearing the appeal, the Court of Appeal may be expected to grant leave. If leave is granted and the appeal is determined, the parties could, if so advised, apply for leave to appeal to this Court. If the section 22(1)(b) criteria are satisfied, leave could be expected to be granted

and the final appeal duly heard by the Court in the exercise of its power of final adjudication.

49. The appellant's second argument takes objection to the fact that it is the Court of Appeal rather than the Court of Final Appeal itself which decides what cases should be excluded as having no reasonable prospects of appeal. It argues that this Court has its own filtering rules comprising [section 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484)] and rule 7 of its Rules which the Court ought itself to operate in the exercise of its power of final adjudication. The contention is that allocating the screening process to the Court of Appeal in itself constitutes an unnecessary and disproportionate restraint on the Court's power of final adjudication.

50. Mr Martin Lee SC (counsel for the appellant) went so far as to argue that any rule which permits any case (save for decisions of a purely interlocutory nature) to be screened out as unfit for appeal by an intermediate court would constitute a disproportionate derogation from the Court's power of final adjudication. He did not shrink from the logic of this argument and made the extravagant submission that the Court of Final Appeal, by its Appeal Committee, was bound to vet for itself every application for leave to appeal, including applications originating in decisions of tribunals like the Small Claims Tribunal.

51. That argument involves a complete departure from the proportionality analysis. The DCO's restriction of the Court's power of final adjudication by assigning the filtering process to the Court of Appeal is the starting-point in the proportionality analysis, raising questions as to the aims, rationality and proportionality of that measure. It is not, as Mr Lee SC submitted, the end of the inquiry, in itself justifying a conclusion of unconstitutionality.

52. The appellant's argument thus ignores or loses sight of the legitimate aims identified above as the first step of the analysis, namely, the aims of promoting the proper use of judicial resources, the proper role of the Court of Final Appeal and economic proportionality in litigation. And in extending the argument to cover applications for leave to appeal from all judicial tribunals, it ignores other important legitimate aims. For example, rules which limit rights of appeal from tribunals like the Small Claims and Labour Tribunals are aimed in part at fostering an equality of arms between parties such as well-resourced employers or businesses on the one hand and employees and consumers with modest means on the other. Such rules seek to provide a cheap and quick means of resolving small claims. Access to justice afforded by such tribunals would be wholly undermined if

a well-resourced litigant were able to drag poorer opponents up successive appellate levels all the way to this Court's Appeal Committee, requiring unaffordable costs to be incurred and greatly delaying resolution of their claims.

53. Mr Lee SC's argument fails to address the crucial question at step (iii), that is, whether the relevant statutory measures go beyond what is reasonably necessary to accomplish the legitimate aims identified. It fails in particular to examine that question with regard to the legitimate aim of preventing the apex Court from being unduly burdened with appeals so as to enable it to concentrate on appeals of importance to the entire legal system. The appellant's contention that all applications for leave to appeal should be allowed to proceed unrestricted from the courts or tribunals below to be adjudicated upon by this Court necessitates abandonment of that aim. The appellant's objection to the appellate process being halted at the level of the Court of Appeal is thus not an argument about the proportionality of the statutory measures designed to achieve the aforesaid aim but an argument which disavows that legitimate aim itself. It misapprehends the issue at the core of the proportionality analysis.

D.3 Step (iv) the overall balance

54. The fourth step in the proportionality analysis is not of direct significance in the present case. No individual constitutional rights are infringed. The filtering mechanism, while a restriction on the Court's power of final adjudication, is beneficial since it screens out unfit applications for leave to appeal, helping to ensure that the Court of Final Appeal is able to exercise that power effectively. It is in the general interest to avoid the waste of judicial resources and to promote economy in litigation. It is beneficial both to the parties and to the courts that appeals which have no reasonable prospects of success should not be allowed to proceed."

Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs (2017) 20 HKCFAR 353

Background

This case concerned the Legislative Council (Amendment) Bill 2012, which was passed, and a new s. 39(2A) of the Legislative Council

Ordinance (Cap. 542) was enacted accordingly. S. 39(2A) of Cap. 542 aimed to prevent the LegCo members from resigning in order to trigger by-elections. It provided that members who had resigned within six months of the date of the by-election were disqualified from nomination. The appellant challenged the constitutionality of s. 39(2A) of Cap. 542 under BL 26 by way of judicial review.

Basic Law provisions in dispute

The major provision in dispute was BL 26. The Court also referred to BL 30, BL 68, BL 69, BL 73, BL 74, BL 79(2) and Annex II to the Basic Law.

What the Court held

The CFA held that the determination of constitutionality was a question of law for the courts to decide. A right guaranteed under the constitution which was not absolute may be validly limited by restrictions created by law. The courts would determine the permissible extent of those restrictions by way of a proportionality analysis.

In cases involving socio-economic policies, defence and foreign policy and areas reflecting political judgments, the courts would afford a wide margin of appreciation, according wide area of discretion to a decision-maker or to the legislature. It reflected the separate constitutional and institutional responsibilities of the judiciary and other organs of government.

The right to stand for election under BL 26 and BoR 21 was not an absolute right and any restrictions must be subject to the proportionality test. The CFA held that s. 39(2A) of Cap. 542 was in pursuit of a legitimate aim and was rationally connected with its aim. Since the legislation concerned matters of political judgment, a wide margin of appreciation ought to be accorded with the appropriate test being whether the section was "manifestly without reasonable foundation". Applying this standard, the CFA then came to a conclusion that s. 39(2A) of Cap. 542 fulfilled the proportionality test and was therefore constitutional.

What the Court said

The CFA explained the scope of protection offered by BL 26 at 367 – 368:

"22. … Notwithstanding the absence of express qualifications to the right set out in art.26 of the Basic Law, it is clear that this article must be read together with art.21 of the Hong Kong Bill of Rights which does contain qualifications. It is accepted that the right to stand for election is not an absolute right. It is also accepted that the words 'without unreasonable restrictions' in art.21 of the Hong Kong Bill of Rights require the application of the proportionality test. This was the way Andrew Cheung J (Cheung CJHC as he then was) analyzed the words in *Chan Kin Sum v Secretary for Justice* and this is consistent with textbook authority. "

According to the CFA at 370, the proportionality analysis arose when three prior steps were satisfied:

"30. The proportionality analysis referred to in this passage of course does not arise unless three prior steps are satisfied by the person asserting unconstitutionality: the identification of a constitutionally guaranteed right, the identification of the relevant legislation or measure said to infringe such constitutional right and the infringement itself.

31. Once these three initial steps are satisfied, the next step in the analysis is to look at the constitutional right itself to see whether there are any built-in qualifications. Where the right is contained in the Basic Law, there may be some qualifications that are expressly stipulated. Qualifications to rights also appear in the Hong Kong Bill of Rights.

32. In the present case, the relevant right is the right to stand for election and this right has been infringed by the restriction contained in s. 39(2A) of [Cap. 542]. The relevant constitutional right is contained in art.26 of the Basic Law and art.21 of the Hong Kong Bill of Rights. The former provision contains no express qualification, while the latter does. In any event, the proper analysis to be adopted is the proportionality test."

The CFA then outlined the proportionality test at 371:

"35. The proportionality analysis involves four steps for the Court to determine. These were set out in *Hysan Development Co Ltd v Town Planning Board* as follows:

[134] In Hong Kong, such a proportionality assessment has been viewed as involving a three-step process of asking: (i) whether the intrusive measure

pursues a legitimate aim; (ii) if so, whether it is rationally connected with advancing that aim; and (iii) whether the measure is no more than necessary for that purpose.

[135] A fourth step should be added. In line with a substantial body of authority, where an encroaching measure has passed the three-step test, the analysis should incorporate a fourth step asking whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether the pursuit of the societal interest results in an unacceptably harsh burden on the individual."

Regarding the first step of legitimate aim, the CFA at 379 agreed with Lord Pannick QC (counsel for the respondent) that:

"51. … The Court does not have to be convinced that the aims, and in particular where the aims are political ones, are politically correct or even that it agrees with these aims from a political standpoint. The responsibility of the Court is to be satisfied from a legal point of view that the aim is first, identifiable and secondly, legitimate in the sense that it lies within constitutional limits."

Regarding the third step of "no more than necessary", the CFA elaborated on the correct approach in the present case at 380:

"55. The background facts and their significance were all matters that were before the Legislative Council in determining what measures were appropriate to deal with the perceived problem. No doubt a number of options were available for consideration and the facts set out above refer to a number of options on which the public were consulted. In my view, in these circumstances, a wide margin of appreciation ought to be accorded. The consequence of a wide margin of appreciation given to the Legislative Council means that in the present context, the appropriate test regarding the legislative choice made (that is, s. 39(2A)) should be the manifestly without reasonable foundation test. Where, as in the present case, there are involved matters of political judgment or prediction, some leeway should be permitted to the Legislature to determine what would be an appropriate way of dealing with the perceived mischief. It is not appropriate to adopt a strict 'no more than necessary' test in the present case. The Court is not in a position nor is it equipped to apply this test in the circumstances of the present case, involving as it does matters of political judgment and assessment."

As to the fourth step of the proportionality test, the CFA held at 382 – 383:

"61. The fourth step requires a court to take an overall view in the proportionality exercise to ensure that any encroachment on a constitutional right is fully justified. In the present case, however, this fourth step is satisfied by the respondent:

(1) The first three steps of the proportionality exercise are satisfied and in most cases, this will point towards the fourth step being satisfied as well.

(2) The encroachment on the constitutional right to stand for election is a relatively small one. It only applies to by-elections and the bar is solely against the resigning member. As far as he or she is concerned, s. 39(2A) cannot be said to bear harshly on the resigning member since, having been elected on a four-year mandate and perfectly entitled to stay in office as a legislator, he or she has chosen voluntarily to resign with full knowledge of the consequences. Even then, the bar is only for six months.

(3) As far as voters in the relevant constituency are concerned, the by-election is held in any event and their choice of candidate is unrestricted (except for the resigning member)."

Yau Wai Ching v Chief Executive of HKSAR (2017) 20 HKCFAR 390

Background

Leung and Yau were respectively elected to be members of the LegCo in the general election held in September 2016. When requested to take the LegCo oath, Leung and Yau made a number of material alterations to the oath and accompanied their words with different actions. The President of LegCo ("President") decided that the oaths taken by Leung and Yau were invalid but permitted Leung and Yau to retake the oaths at the next meeting.

Before they were able to do so, proceedings were commenced by the CE and the Secretary for Justice on the question whether, in the circumstances, Leung and Yau were entitled to retake their oaths and the consequences of non-compliance with the constitutional

requirement under BL 104. On 7 November 2016, the NPCSC issued an interpretation on the meaning of BL 104 ("Interpretation").

The CFI granted declaratory and injunctive relief against Leung and Yau whereby neither of them would be allowed to enter on the office of LegCo member. The decision was affirmed on appeal in CA. Leung and Yau applied for leave to appeal to the CFA.

Basic Law provisions in dispute

The major provisions in dispute were BL 104 and BL 158(1).

What the Court held

The Appeal Committee of the CFA held that the principle of non-intervention was necessarily subject to constitutional requirements, and it could not apply in respect of the court's duty to rule on the question of compliance with the constitutional requirement of BL 104. In the exercise of their judicial power conferred by the Basic Law, it was the duty of the courts, as a matter of obligation and not discretion, to enforce and interpret that law. BL 104 imposed a constitutional requirement on a member of LegCo to take the oath validly. Hence the question of whether that had been done, when properly raised, was a matter the courts were duty bound to inquire into. Thus, none of the questions sought to be raised by Leung and Yau in respect of the non-intervention principle were reasonably arguable.

The Appeal Committee held that the Basic Law was a national law of the PRC. The NPCSC's power to interpret the Basic Law was derived from Article 67(4) of the Constitution and was provided for expressly in BL 158(1) in general and unqualified terms. The exercise of interpretation of the Basic Law under PRC law was one conducted under a different system of law to the common law system in force in the HKSAR and included legislative interpretation which could clarify or supplement laws. An interpretation of the Basic Law issued by the NPCSC was binding on the HKSAR courts. It declared what the law was and had always been since the coming into effect of the Basic Law on 1 July 1997. The Interpretation was clear in its scope and effect, and

it was binding on the HKSAR courts as regards the true construction of BL 104 when Leung and Yau purported to take their oaths.

What the Court said

The Appeal Committee first set out the principle of non-intervention as laid down in *Leung Kwok Hung v President of the Legislative Council (No. 1)* (2014) 17 HKCFAR 689 at 404:

"17. In *Leung Kwok Hung v President of the Legislative Council (No. 1),* the Court of Final Appeal acknowledged, as a common law doctrine, the doctrine of the separation of powers and, within it, the established relationship between the legislature and the courts, including the principle that the courts will recognize the exclusive authority of the legislature in managing its own internal processes in the conduct of its business, in particular its legislative processes. The Court also acknowledged, as a corollary to this, the proposition that the courts will not intervene to rule on the regularity or irregularity of the internal processes of the legislature but will leave it to determine exclusively for itself matters of this kind: this is the non-intervention principle."

The Appeal Committee continued to elaborate on the principle of non-intervention as applied in the present context. The Appeal Committee said at 406:

"21. In the present context, the principle of non-intervention cannot apply in respect of the court's duty to rule on the question of compliance with the constitutional requirements of BL 104. In the exercise of their judicial power conferred by the Basic Law, it is the duty of the courts of the Hong Kong Special Administrative Region, as a matter of obligation and not discretion, to enforce and interpret that law … BL 104 gives rise to a constitutional duty on members of LegCo to take an oath to swear to uphold the Basic Law and to swear allegiance to the Hong Kong Special Administrative Region. This is clear from the terms of BL 104 itself but is reinforced by para.2 of the Interpretation. Although the precise terms of the oath to be taken are not expressly set out in BL 104, the provision imposes a duty to swear 'in accordance with law'. That law is the [Oaths and Declarations Ordinance (Cap. 11)] , ss. 16, 19 and Sch. 2 of which stipulate the form of the LegCo oath that members are required to take and also provides, by s. 21, that certain consequences will attach to a person who declines or neglects to take that oath when duly requested to do so.

22. In the circumstances, by reason of the constitutional requirement in BL 104, the courts are plainly duty bound to consider the question of whether Leung and Yau did each duly take the LegCo oath on 12 October 2016 and, if not, with what consequences, and the non-intervention principle does not preclude such judicial inquiry. This conclusion is reinforced by the fact that it has not been contended by either Leung or Yau that any of ss. 16, 19 or 21 of [Cap. 11] are generally unconstitutional. Furthermore, the Interpretation provides explicitly that the taking of the LegCo oath is a legal prerequisite to taking up office and that a person who declines to take the oath is disqualified from assuming office."

In relation to the Interpretation issued by the NPCSC, the Appeal Committee said at 411 – 412:

"34. In approaching questions raised in respect of the Interpretation, it must be borne in mind that the Court has previously considered the scope of BL 158(1), the power of the NPCSC to interpret provisions of the Basic Law and the effect of such interpretations on a number of occasions, among them in the Court's decisions in *Ng Ka Ling v Director of Immigration*, *Ng Ka Ling v Director of Immigration (No. 2)*, *Lau Kong Yung v Director of Immigration, Director of Immigration v Chong Fung Yuen* and, most recently, *Vallejos v Commissioner of Registration*.

35. Thus, certain basic propositions are authoritatively established. Under the constitutional framework of the Hong Kong Special Administrative Region, the Basic Law is a national law of the PRC, having been enacted by the National People's Congress pursuant to art.31 of the Constitution of the PRC. The NPCSC's power to interpret the Basic Law derives from art.67(4) of the Constitution of the PRC and is provided for expressly in the Basic Law itself in BL 158(1) and is in general and unqualified terms. The exercise of interpretation of the Basic Law under PRC law is one conducted under a different system of law to the common law system in force in the Hong Kong Special Administrative Region, and includes legislative interpretation which can clarify or supplement laws. An interpretation of the Basic Law issued by the NPCSC is binding on the courts of the Hong Kong Special Administrative Region. It declares what the law is and has always been since the coming into effect of the Basic Law on 1 July 1997.

36. In these circumstances, unless this Court were to revisit these fundamental propositions of law, it is apparent that many of the questions sought to be raised by Leung and Yau as to the Interpretation have already

been authoritatively determined by the Court. In our view, there is no warrant for revisiting those propositions and Leung and Yau's contentions questioning their correctness are not reasonably arguable. In short, we are satisfied that the Interpretation is clear in its scope and effect, that disqualification of Leung and Yau is the automatic consequence of their declining or neglecting to take the LegCo oath, and that it is binding on the courts of the Hong Kong Special Administrative Region as regards the true construction of BL 104 at the material time when Leung and Yau purported to take their oaths."

HKSAR v Fong Kwok Shan Christine (2017) 20 HKCFAR 425

Background

The appellant, who was a member of the Sai Kung District Council, was admitted to the public gallery above a conference room in the LegCo complex on two occasions where the sub-committee of the LegCo held meetings to discuss a landfill extension project. On the first occasion, she wore a T-shirt with characters and handed to her assistant a paper poster which he displayed by holding it against the glass panel. This caused commotion. On the second occasion, she and others chanted slogans opposing the landfill extension and ignored warnings to stop. On both occasions, the meetings had to be adjourned.

The appellant was convicted by the Magistrate of contravening ss. 11 and 12(1) of the Administrative Instructions for Regulating Admittance and Conduct of Persons (Cap. 382A) contrary to s. 20(b) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382). The appellant's appeal was dismissed by CFI. She then appealed to the CFA arguing ss. 11 and 12(1) of Cap. 382A to be unconstitutional.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 27.

What the Court held

The CFA unanimously dismissed the appeal.

The respondent argued, *inter alia*, that members of the public did not have a right to exercise freedom of expression in the public gallery of LegCo and on government premises to which the general public had not been given free access (the "right not applicable" Argument). The CFA rejected the "hard line" version of the "right not applicable" Argument which excluded the right to freedom of expression on all government-owned properties and its intermediate version which would only exclude such right on some of the properties. The CFA rejected such argument as it would subjugate fundamental constitutional rights to property interests and such argument failed to recognize that the proposed location of a demonstration was an intrinsic dimension of the right so that exclusion from that location was properly analyzed as a restriction of the right which required to be justified on orthodox proportionality principles.

The appellant argued that s. 11 of Cap. 382A was invalid as it did not constitute a restriction "prescribed by law" as BL 27 and BoR 16 required any purported limitation of the right of freedom of expression to be sufficiently legally certain. The CFA found that in light of the context and purpose of s. 11 of Cap. 382A, anyone reading the section with appropriate advice if necessary would know that creating a disturbance by demonstrating in the public gallery while a LegCo subcommittee was sitting constituted a contravention, and hence, held that s. 11 of Cap. 382A did not lack legal certainty as it only penalized persons who entered or were within the precinct of LegCo and failed to behave in an orderly manner.

The appellant further argued that the total and blanket prohibition imposed by s. 12(1) of Cap. 382A on the display of any sign, message or banner in a press or public gallery in the LegCo failed to satisfy the proportionality test as the section was unjustifiably wide. Therefore it was inconsistent with BL 27 and BoR 16 and was unconstitutional. The CFA held that, properly construed, s. 12 of Cap. 382A did not lay down a blanket prohibition, and the prohibitions were aimed at displays which entailed the risk of disorder in public galleries and which might disturb

LegCo sittings and the rights of others observing the proceedings. The restrictions were clearly proportionate, valid and could be justified as necessary for respect of rights of others and for the protection or public order and were no more than reasonably necessary for accomplishing this aim.

What the Court said

The CFA explained the effect of BL 27, BL 39, BoR 16 and BoR 17 at 437:

"15. This Court has held that there is no difference between the right of peaceful assembly guaranteed by BL 27 and that provided for in BOR 17. The same applies to freedom of speech under BL 27 and freedom of expression under BOR 16. The Court has also noted that the rights to freedom of expression, of public assembly and of procession and demonstration are closely related, making the case law on these associated freedoms collectively relevant.

16. Accordingly, by the combined effect of BL 39 and BOR 16, if any purported restriction on the right of free expression is to be valid, it must have sufficient legal certainty to qualify as a restriction 'prescribed by law' and must be 'necessary for respect of the rights or reputations of others; or for the protection of national security or of public order (*ordre public*), or of public health or morals.' It is established that the requirement of necessity involves the application of a proportionality test and that the objectives listed in BOR 16 are exhaustive of purposes qualifying as legitimate aims to justify a purported restriction of the guaranteed right."

The CFA rejected the "hard line" version of the "right not applicable" Argument and said at 440 – 441:

"29. The argument takes as its premise the existence of an entitlement on the part of the Government (or LegCo in this case) as property owner to exclude the public. It reasons from that premise to the conclusion that the guaranteed right of freedom of expression is excluded. It therefore subjugates a fundamental constitutional right to property interests, leaving the applicability or otherwise of that right to the unfettered choice of a Government agency regarding the grant of access.

30. Such an argument is, in my view, wrong in principle. As BL 8 makes clear, an existing statutory or common law rule which comes into conflict

with a constitutional requirement must give way. The 'rights not applicable' argument inverts this principle."

Ribeiro PJ also rejected the intermediate doctrine of the "right not applicable" Argument and said at 442 – 443:

"36. With respect, I do not think [whether the claimant could establish that the expression in question (including its time, place and manner) promote one of the purposes underling the guarantee of free expression] is a test that could or should be adopted in Hong Kong. BL 27 and BOR 16 guarantee the right to freedom of expression subject only to the specified permitted restrictions. It would not be appropriate for our courts to place hurdles in the way of a person claiming those rights where such rights are factually engaged, by requiring such person to show that the content, manner and form of the proposed expression promote the matters identified as the underlying purposes of free expression. As indicated in the discussion which follows, rather than imposing a burden on the claimant to prove that the proposed expression qualifies for constitutional protection, the burden is rightfully placed on the government to prove that its limitation of the guaranteed right is justified.

37. It also seems to me that an official trying to decide whether access to a venue should be granted or denied will find it hard to know beforehand whether the intended demonstration will meet the somewhat amorphous criteria articulated. Moreover, the criteria themselves appear debatable. It is well established that, subject to permissible limitations, freedom of expression extends to views which may be 'disagreeable, unpopular, distasteful or even offensive to others'. It is unclear whether the suggested criteria accommodate the expression of such views."

Ribeiro PJ set out the proper approach in dealing with fundamental rights at 443:

"39. In my view, the correct starting point and the proper focus throughout is on the guaranteed right, adopting the assumption that it is universally applicable, subject to any constitutionally valid restriction. Thus, where the right to freedom of expression is invoked, one asks whether factually, that right is engaged. If so, the question becomes whether any restriction which purports to limit its exercise is valid, that is, whether it pursues a legitimate aim which falls within one of the permitted categories listed in BOR 16; and if so, whether it is rationally connected with accomplishing that aim; whether the restriction is no more than reasonably necessary for

accomplishing that purpose; and whether a reasonable balance has been struck between the societal benefits of the encroaching measure on the one hand and the inroads made into the guaranteed right on the other."

Ribeiro PJ, after taking into account of the relevant provisions of Cap. 382 and other sections of Cap. 382A, construed the scope of s. 11 of Cap. 382A at 456:

"91. Taking into account the [long title, s. 2, s. 3, s. 5(b), s. 6(1), s. 8, s. 17(c), s. 20(b) of Cap. 382, and s. 2 of Cap. 382A], there is nothing uncertain about [s. 11 of Cap. 382A]. In the light of the context and purpose illuminated by those provisions, anyone reading the section, with appropriate advice if necessary, would know that creating a disturbance by demonstrating in the public gallery while a LegCo subcommittee was sitting constitutes a contravention. Indeed, that is a conclusion any layman would have no difficulty reaching, exercising common sense."

Ribeiro PJ held that s. 12 of Cap. 382A created a valid restriction on the right of freedom of expression which was necessary for accomplishing one of the purposes in BoR 16 at 462:

"111. … The question is whether, in limiting the right to freedom of expression by prohibiting such demonstrations, [s. 12 of Cap. 382A] imposes a constitutionally valid restriction.

112. This involves first examining whether the section operates as a restriction which is necessary for accomplishing one of the purposes listed in BOR 16. In my view, it clearly does. If not prohibited, demonstrations and interjections by persons in public galleries would inevitably interfere with debates and other proceedings on the floor of LegCo. A demonstration on a controversial issue is likely to be met with a counter-demonstration and a confrontation between the two camps in a public gallery would pose an obvious risk of conflict and public disorder. It would also interfere with the rights of persons who simply wish to observe the debate or other proceedings.

113. Given such prospects, the [s. 12 of Cap. 382A] restrictions can be justified as necessary for respect of the rights of others and for the protection of public order or *ordre public*. The applicability of the categories of respect for the rights of others and the protection of public order is self-evident. …"

Ribeiro PJ then held that the restriction under s. 12 of Cap. 382A was

rationally connected with the purpose at 463:

"115. The next question is whether the restrictions are rationally connected with accomplishing the [aim of respecting the rights of others and of the protection of public order or *ordre public*], the answer to which is obviously 'Yes'. They directly operate to restrict intrusive or disruptive conduct in the legislative Chamber."

Ribeiro PJ then held that the restriction under s. 12 of Cap. 382A did no more than reasonably necessary for accomplishing the purpose at 463:

"116. Does the restriction do no more than reasonably necessary for accomplishing that purpose? In my view, it clearly does pass this test. [S. 12 of Cap. 382A] has a limited scope, applying only to persons who are in a press or public gallery. It targets intrusive behaviour to protect good order during a LegCo meeting. The Appellant was not prohibited from exercising her freedom of expression in opposition to the proposed landfill extension in other venues, including in designated areas of the LegCo complex. She was free to canvass support from fellow residents and to lobby elected legislative councilors who were members of the subcommittee concerned. She was free to campaign for public support using social media and other forms of public communication. What she was prohibited from doing was confined to her mounting a disruptive demonstration in the public gallery during the subcommittee's sessions.

117. A reasonable balance has plainly been struck between the benefit to society of enabling LegCo properly to carry out its constitutional functions on the one hand and the limited restriction on the guaranteed right of freedom of expression on the other. [S. 12 of Cap. 382A] in my view is clearly a proportionate and valid restriction on the right."

HKSAR v Leung Hiu Yeung (梁曉陽) (2018) 21 HKCFAR 20

Background

In June 2014, protestors rushed to the entrances of the LegCo building attempting to gain entry when the Finance Committee of LegCo was in session. The President of LegCo sought assistance from the police who

entered the lobby to stand by at his request. The appellant vigorously shoved the police officers forming the line when the police attempted to disperse the protestors and was convicted of, amongst others, obstructing an officer of the Council while in the execution of his duty contrary to s. 19(b) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382).

The appellant appealed against his conviction, arguing first that the police officer was not an "officer of the Council" within the meaning of s. 19(b) of Cap. 382. The appellant sought support for his argument from BL 78, which gave members of LegCo immunity from arrest when attending or on their way to a meeting of the LegCo, on the basis that this must include a power to refuse entry to persons, including police officers, who sought entry to LegCo premises to arrest a member and the power to eject if the police officers were already inside. Secondly, the appellant also argued that even if the police officer was such an officer, he was not acting in the execution of his duty when obstructed by the appellant.

Basic Law provisions in dispute

The major provision in dispute was BL 78.

What the Court held

The CFA unanimously dismissed the appellant's appeal and held that BL 78 did not create immunity to persons who were not members of the LegCo and the immunity created did not restrict the criminal liability even of members in respect of ordinary criminal offence whose enforcement had no adverse impact on the core business of LegCo.

The CFA further held that a lawful restriction on access to LegCo was plainly in place and the police officers were assisting security staff to enforce such restriction in the execution of their duty when obstructed by the appellant. The police officers were acting lawfully in the execution of their duty (as police officers and officers of the Council).

What the Court said

The CFA rejected the appellant's argument based on BL 78 and provided a detailed explanation on the application of BL 78 at 28 – 29:

"20. Article 78 therefore immunizes members of LegCo from arrest when going about the core business of the legislature – attending meetings of the Council. It has no relevance to persons who are not members, charged with offences such as those of which the appellant was convicted.

21. Provisions with a purpose similar to that of art.78 can be found in [Cap. 382], including those safeguarding freedom of speech and debate in the Council; immunizing LegCo members against civil or criminal proceedings for things said in, or reported in writing to, the Council; protecting members from arrest for any criminal offence whist attending a sitting of the Council or a committee; and so forth. The object of such provisions is to ensure freedom of speech and debate essential to the legislative process. They provide no basis for suggesting that the presence of police officers in LegCo's precincts, performing their ordinary duties, or preserving public order and enforcing the general criminal law, is somehow inconsistent with such constitutional and statutory safeguards.

22. Far from conferring any form of protection for persons in the appellant's position, the immunities created by art.78 and the abovementioned [Cap. 382] provisions do not restrict the criminal liability even of members of the legislature in respect of ordinary criminal offences whose enforcement has no adverse impact on the core business of LegCo. This is in line with the position at common law as explained by the UK Supreme Court in *R v Chaytor*, in connection with parliamentary privilege. The enforcement of the ordinary criminal law within the precincts of LegCo does not involve any infringement of the separation of powers principle.

23. Constitutional issues and questions regarding contempt of the legislature might arise if the police were to insist on entering the LegCo Chamber contrary to the wishes of the President and the Council, for instance to effect certain arrests. However, no such issues arise in the present case."

Secretary for Justice v Wong Chi Fung (黃之鋒) (2018) 21 HKCFAR 35

Background

The 1st appellant, Joshua Wong Chi Fung and 3rd appellant, Alex Chow Yong Kang, were found guilty by the Magistrate for participating in an unlawful assembly contrary to s. 18 of the Public Order Ordinance (Cap. 245). The 2nd appellant, Nathan Law Kwun Chung, was convicted of inciting others to take part in an unlawful assembly. The Magistrate sentenced the 1st appellant and the 2nd appellant to 80 hours and 120 hours of community service respectively whereas the 3rd appellant was sentenced to 3 weeks' imprisonment suspended for one year. On the Secretary for Justice's application for review of sentence pursuant to s. 81A of the Criminal Procedure Ordinance (Cap. 221), the CA held that the Magistrate erred in principle, the sentences imposed were manifestly inadequate and sentenced the 1st to 3rd appellants to 6 months, 8 months and 7 months' terms of imprisonment respectively. The appellant were granted leave to appeal to the CFA.

Four issues concerning sentencing principles and approach arose. The first issue concerned the CA's power to review facts on a review of sentencing. The second issue concerned the extent of considering the motives of the appellants in committing offences, particularly where it involved acts of civil disobedience or in exercise of a constitutional right. The third issue concerned the effect of the CA's issuance of guidance for future cases in the current case. The fourth issue concerned the CA's duty under s. 109A of Cap. 221 to consider appropriate sentencing on youth offenders.

Basic Law provisions in dispute

The major provision in dispute was BL 27.

What the Court held

The CFA allowed the appeals of all three appellants, quashed the sentences of imprisonment imposed by the CA and reinstated those

imposed by the Magistrate.

The CFA considered that the exercise of constitutional rights to freedom of expression and freedom of assembly under BL 27, BoR 16 and BoR 17 was relevant to the background and context of the offending. However, once violence or the threat of violence was involved, the demonstrator crossed the line separating the lawful exercise of constitutional rights from unlawful activity. Hence, the contention of merely exercising constitutional rights as a mitigation of the offence of unlawful assembly was of little merit, because by definition the constitutional rights were not being exercised.

Similarly, the CFA considered that, civil disobedience was "a public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government". Hence, when violence was involved, the act was not civil disobedience.

The CFA also held that BoR 12(1) provided protection against retroactive criminal penalties. Hence, an offender was to be sentenced on the existing or prevailing guideline or tariff of sentence existing at the time of the commission of the offence. While the CA was entitled to provide a new guideline for future cases, it was not appropriate to apply the new guidance to the appellants.

What the Court said

On the consideration of mitigation placed on offence relevant to an exercise of constitutional rights under BL 27, BoR 16 and BoR 17, the CFA held at 72 – 75:

"67. Although [the constitutional rights under BL 27, BoR 16 and BoR 17] are not absolute rights and lawful restrictions may be placed on their exercise in the interest of public order and for the protection of the rights and freedoms of others, the importance of these rights has been repeatedly recognized in previous decisions of this Court. It follows that the fact that an offence arose out of an occasion when constitutional rights to assemble and protest were being exercised was relevant to the background and context of the offending, particularly when those rights had been exercised peacefully and in accordance within the law up to the point when the offence was

committed. But once a demonstrator became involved in violence, or the threat of violence, that demonstrator crossed the line separating constitutionally protected peaceful demonstration from unlawful activity.

68. However, as Ribeiro PJ stated in *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at [39]:

Once a demonstrator becomes involved in violence or the threat of violence—somewhat archaically referred to as a 'breach of the peace' — that demonstrator crosses the line separating constitutionally protected peaceful demonstration from unlawful activity which is subject to legal sanctions and constraints. The same applies where the demonstrator crosses the line by unlawfully interfering with the rights and freedoms of others.

69. For this simple reason, a submission in mitigation of the offence of unlawful assembly (and certainly in the case of incitement) that the act was committed in the exercise of constitutional rights was unlikely to carry any significant weight. The fact of a conviction of the offence will necessarily mean that the offender has crossed the line separating the lawful exercise of his constitutional rights from unlawful activity subject to sanctions and constraints. In such a case, there is little merit in a plea for leniency on the basis that the offender was merely exercising constitutional rights since, by definition, he was not doing so at the time when the offence was committed. This is all the more so when the facts of the offending involve violence, in particular on the part of the offender himself, since there is no constitutional justification for violent unlawful behaviour.

…

74. Where, therefore, in furtherance of an ostensibly peaceful demonstration, a protester commits an act infringing the criminal law which involves violence and is therefore not peaceful and non-violent, a plea for leniency at the stage of sentencing on the ground of civil disobedience will carry little (if any) weight since by definition that act is not one of civil disobedience.

75. Even where an act of protest may properly be characterized as one of civil disobedience, … the court will not enter into an evaluation of the worthiness of the cause espoused. … It is not, however, the task of the courts to take sides on issues that are political or to prefer one set of social or other values over another."

Regarding the principle of legal certainty in following existing sentencing guidelines and tariffs, and to avoid the imposition of

retrospective application of guidelines, the CFA said at 75:

"77. As a reflection of the principle of legal certainty, it is settled law that the sentence for an offence should be in accordance with the practice prevailing at the time of the commission of the offence …

78. The principle that an offender is to be sentenced on the existing or prevailing guideline or tariff of sentence existing at the time of the commission of the offence reflects the protection against retroactive criminal penalties conferred by art.12(1) of the Hong Kong Bill of Rights which relevantly provides:

… Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."

Chan Ho Tin v Lo Ying Ki Alan [2018] 2 HKLRD 7

Background

The petitioner was the convenor of the Hong Kong National Party, which advocated, among others, the independence of the HKSAR from the PRC and nullification of the Basic Law. On 18 July 2016, the petitioner submitted his nomination form as a candidate to stand for election to be a member of the LegCo in the New Territories West Geographical Constituency. In compliance with s. 40(1)(b)(i) of the Legislative Council Ordinance (Cap. 542), his nomination form included a declaration (the "Declaration") that he "will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region." The petitioner did not sign a confirmation form (the "Confirmation Form"), which required nominated candidates to confirm that they made the Declaration on the basis that they understood that to uphold the Basic Law included upholding BL 1, BL 12 and BL 159(4) therein.

After receiving the petitioner's nomination form, the respondent asked if the petitioner "still continue to advocate and push for the independence of the [HKSAR]" (the "Question"). The petitioner did not answer the Question and replied that he had already signed the Declaration.

After the nomination period ended, the petitioner's nomination was held invalid by the respondent who by a written decision ("Decision") informed the petitioner that given his stance in advocating the HKSAR's independence from the PRC and the abolition of the Basic Law, the respondent was satisfied that the petitioner "does not in fact uphold or intend to uphold the Basic Law." The respondent concluded that the petitioner did not in fact make the Declaration in law notwithstanding he had signed it.

The petitioner filed an election petition to challenge the lawfulness of the Decision on the grounds that, *inter alia*: (1) the Declaration requirement under s. 40(1)(b)(i) was only a formality requirement which was complied with by the mere signature of the nominee on the nomination form; and (2) his rights under BL 25, 26, 27, 32, 39 and 79(7), and BoR 1, 15, 16, 18, 21 and 22 were infringed by the Decision.

Basic Law provisions in dispute

The major provisions in dispute were BL 26 and BL 104.

What the Court held

The CFI found against the petitioner. The CFI applied a purposive construction to the Declaration requirement under s. 40(1)(b)(i) of Cap. 542 and held that the upholding of the Basic Law and the pledging of allegiance to the HKSAR were legal requirements and preconditions applicable to candidates and members of the Legislative Council. The Declaration requirement under s. 40(1)(b)(i) was a substantive requirement. It was only satisfied if the nominee made the Declaration genuinely and truthfully.

The Court also held that viewing the substantive requirement of s. 40(1)(b)(i) against the fundamental right to stand for election as well as the tight statutory timetable of the election process, the submission of a signed Declaration should constitute strong *prima facie* objective proof of a candidate's genuine intention to uphold the Basic Law and pledge allegiance to the HKSAR. This should and could only be displaced in a plain case where, albeit on a balance of probabilities, there were cogent,

clear and compelling materials which would demonstrate to an objective reasonable person that the candidate plainly could not have that intention at the time of the nomination.

The Court found that the materials considered by the respondent, coupled with the petitioner's refusal to sign the Confirmation Form and to reply to the Question, clearly and unequivocally showed that the petitioner advocated the HKSAR's independence and the abolition of the Basic Law notwithstanding the signing of the Declaration. The Court held that a pronounced unequivocal intention to advocate the HKSAR's independence and the abolition of the Basic Law was obviously inconsistent with the intention to "uphold" the Basic Law.

The Court also rejected the petitioner's constitutional challenge of the Decision. The Court held that the Declaration requirement served the legitimate aims of protecting the constitutional principles which underpinned the HKSAR's constitutional order, maintaining public confidence in the election process and the LegCo, ensuring the proper operation of the LegCo, and protecting public order. The Declaration requirement also bore a rational connection between the legitimate aims and the restrictions of rights as it only denied candidacy to those who advocated the negating of the constitutional order. The Declaration requirement was a proportionate measure to achieve the legitimate aims as persons taking up the high responsibility of the office of the LegCo Members would do their utmost to uphold the Basic Law and reinforce national unity and territorial integrity.

What the Court said

The Court held at 29 – 30 that BL 104 was relevant to the interpretation of s. 40(1)(b)(i) of Cap. 542:

"42. … BL 104 mandates all high office holders of the HKSAR, including LegCo Members, when assuming their respective offices, to take an oath to uphold the Basic Law and pledge allegiance to the HKSAR of the PRC. These are the same obligations enshrined in the Declaration. Moreover, taking the oath is not merely a procedural requirement but a substantive one where the oath-taker must genuinely and truly commit to the obligation to uphold the Basic Law and pledge allegiance to the HKSAR of the PRC. …

43. … the underlying purpose of s. 40(1)(b)(i) is related to BL 104. It is to avoid the circumstances where a candidate who is elected to be a LegCo Member has no intention of or is not capable of complying with the BL 104 requirement to take the oath substantively.

44. Once understood in this context … it must be the objective legislative intent of s. 40(1)(b)(i) to require the person making the Declaration to be genuine and truthful in its content. If … the requirement under s. 40(1)(b)(i) is complied with by the nominee who has merely signed the Declaration even though he or she does not intend to uphold the Basic Law and to pledge allegiance to the HKSAR, how could that achieve the intended purpose of avoiding the circumstances that the elected person has no intention or is not able of complying with BL 104.

45. In other words, simply by looking at the plain words of BL 104, it is obvious that s. 40(1)(b)(i) is a *substantive* (as opposed to merely a formality) requirement where the person making the Declaration is someone who genuinely and truthfully intends to uphold the Basic Law and pledge allegiance to the HKSAR."

The Court considered at 30 – 31 the impact of the Interpretation of BL 104 issued by the NPCSC on 7 November 2016:

"48. Relevantly for the present purposes, para.1 of the Interpretation provides:

1. 'To uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China' and to bear 'allegiance to the Hong Kong Special Administrative Region of the People's Republic of China' as stipulated in Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, are not only the legal content which must be included in the oath prescribed by the Article, ***but also the legal requirements and preconditions for standing for election in respect of or taking up the public office specified in the Article.*** *(Emphasis added.)*

49. Thus, under BL104 (read with the Interpretation), the requirements under BL 104 are also the necessary 'legal requirements and preconditions for standing for election' in respect of the office of LegCo members. … it is implicit in the requirements that LegCo candidates and members must genuinely and truly uphold the Basic Law and swear allegiance to the HKSAR of the PRC."

The Court held at 69 that the Declaration requirement imposed under

s. 40(1)(b)(i) was constitutional:

"151. Second, given that the Interpretation has now provided that it is a *constitutional* prerequisite and precondition under BL 104 for a candidate seeking to stand for election to faithfully and truly uphold the Basic Law and pledge allegiance to the HKSAR, it is unarguable that the Declaration requirement in implementing this constitutional requirement would be unconstitutional in infringing the Relevant Constitutional Provisions. The better view must be that, as a matter of proper construction, the Relevant Protected Rights as provided under the Relevant Constitutional Provisions should be construed together and read subject to the constitutional requirements under BL 104."

The Court held at 74 – 78 that the Declaration requirement served legitimate aims:

"172. Mr Yu [counsel for the respondent] has identified three legitimate aims (the Legitimate Aims) to be served by the substantive Declaration requirement.

173. First, Mr Yu says it is to protect the constitutional principles which underpin the HKSAR's constitutional order:

(1) The requirement that a candidate truthfully declare that he will uphold the Basic Law and pledge allegiance to the HKSAR is to require him to confirm that he recognizes the Basic Law as the supreme law of the HKSAR and PRC's sovereignty over the HKSAR under the 'one country, two systems' principle and arrangement.

(2) Under the rubric 'for respect of the rights or reputation of others' (see *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, 457A), the requirement of the Declaration (and in turn the LegCo Oath) can reasonably be viewed as an affirmation of loyalty to the new and underpinning constitutional order and principles, including upholding the Basic Law as the constitution of the HKSAR of the PRC and pledging allegiance to the HKSAR as an inalienable part of the PRC.

174. … I accept that this must be regarded as a legitimate aim of the Declaration requirement.

176. … I agree that maintaining public confidence in the election process to return a member who could formally assume office in the LegCo must also be a legitimate aim.

177. Finally, Mr Yu submits the requirement is for the protection of public order (*ordre public*):

(1) In *Ng Kung Siu*, the Court of Final Appeal held that the concept of public order (*ordre public*) includes the legitimate interests in the protection of the national and regional flags (at 457E–460E).

(2) Li CJ held that (a) the boundary of the concept cannot be precisely defined; (b) the concept includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole; and (c) the concept must remain a function of time, place and circumstances (at 459I–460E).

(3) In the context of protection of flags, Li CJ emphasized that, on 1 July 1997, the PRC resumed the exercise of sovereignty over Hong Kong being an inalienable part of the PRC and established the HKSAR under the principle of 'one country, two systems' and, in these circumstances, the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests which are within the concept of public order (*ordre public*) (at 460B–E).

(4) If the protection of the national and regional flags as unique symbols of one country and the HKSAR as an inalienable part of the PRC can be justified, then by analogy, or indeed a *fortiori*, the *substantive* requirement that a LegCo candidate should uphold the Basic Law and pledge allegiance to the HKSAR of the PRC must be justifiable under the concept of public order (*ordre public*), because it does not merely act as a symbol, but also as an embodiment of the legal requirements and preconditions and an affirmation of loyalty to the new constitutional order under the Basic Law and the status of the HKSAR as an inalienable part of China. In other words, in the Hong Kong context, the safeguarding of the fundamental constitutional order under the Basic Law is an essential component of public order.

…

180. We are here concerned with the preconditions and legal requirements for nomination in the LegCo. The focus is on the *constitutional* requirement for candidates contending a LegCo seat to *uphold the Basic Law and pledge allegiance to the HKSAR* (and the use or threat of force is quite beside the point). The Declaration in s. 40(1)(b)(i) dovetails with this constitutional requirement. In any event, it cannot be right to suggest that such constitutional requirement can be fulfilled simply by a person not resorting to the use or threat of force, even though he does not genuinely and truthfully intend to uphold the Basic Law and pledge allegiance to the HKSAR (or, even worse in Mr Chan's case, by seeking to nullify the Basic Law

and put an end to the HKSAR by 'secession' from the PRC).

…

182. HKSAR as a society is founded on the core or fundamental principle of 'one country, two systems'. Hence, to protect and preserve this fundamental principle by the Declaration requirement falls within the justified purpose of maintaining 'public order *(order public*)' even if one is to apply the Siracusa Principles.

183. In the premises, I … accept that this is a legitimate aim for the Declaration requirement."

The Court held at 78 – 79 the Declaration requirement did not constitute disproportionate restriction of the fundamental rights including BL 26:-

…

"186. Once the court has accepted that there is a legitimate aim in ensuring that candidates for the LegCo at least recognize and support the legitimacy and existence of the Basic Law and the premise of national unity and territorial integrity under the 'one country, two systems' principle, it is difficult to imagine what other alternatives can be available in achieving such aim. As emphasized in para.1 of the Interpretation, the contents of the Declaration embody the legal requirements and preconditions to candidacy of the LegCo. As such, it cannot be said to be disproportionate for the legislature to empower the Returning Officer to inquire into the truthful intention of the nominee making the Declaration *in a clear or obvious case*.

…

188. In the specific political and historical context of Hong Kong, the Basic Law underpins the constitutional order of the HKSAR and with it the 'one country, two systems' political model, the autonomy enjoyed by the HKSAR, safeguards for the stability and prosperity of the HKSAR and the constitutional guarantee of fundamental rights and freedoms, including BL 26. At the same time, national unity and territorial integrity of the PRC with the HKSAR being part of it, is another fundamental principle on which the constitutional order is founded, as enshrined in BL 1 and BL 12. It is thus consistent with the constitutional framework under the Basic Law, including the right to stand for election in BL 26, for s. 40(1)(b)(i) to give effect to a candidature requirement which protects the constitutional order.

189. It is a fundamental constitutionally important context that the HKSAR was established under the 'one country two systems' constitutional order in

which the HKSAR is an inalienable part of the PRC.

190. As held by Li CJ in *Ng Kung Siu* at 461D–E, the implementation of the principle of 'one country, two systems' is a matter of fundamental importance, as is the reinforcement of national unity and territorial integrity. In that case, it was held that the protection of the national and regional flags, having regard to their unique symbolism, will play an important part in the attainment of these goals. In the present case, the *substantive* requirement of the Declaration would not only have unique symbolism, but would also ensure that persons taking up the high responsibility of the office of LegCo Members would do their utmost to uphold the Basic Law and reinforce national unity and territorial integrity (or, at the very least, refrain from jeopardizing the same). The requirement is thus necessary for the protection of others and for the protection of public order (*ordre public*).

…

192. In the premises, giving due margin of discretion to the legislature, the substantive Declaration requirement in my view clearly serves as a proportionate measure to achieve the Legitimate Aims. …"

Lubiano Nancy Almorin v Director of Immigration [2018] 1 HKLRD 1141

Background

This application for judicial review concerned a systemic challenge to the "Live-In Requirement" applicable to foreign domestic helpers ("FDHs") who worked in Hong Kong. Four grounds were advanced by the applicant in support of her application, namely: (1) the Director of Immigration ("the Director") did not have lawful authority to impose the Live-In Requirement on FDHs; (2) the implementation of the Live-In Requirement heightened the risk of a breach of engaged fundamental rights in a manner that was disproportional and therefore unconstitutional; (3) the implementation of the Live-In Requirement was discriminatory against FDHs by reason of their status as domestic helper or migrant worker contrary to BL 25; and (4) applying the anxious scrutiny approach, the implementation of the Live-In Requirement

without any, or any general, exception was irrational in the public law sense, and/or amounted to an unlawful fetter on the Director's exercise of his discretion.

Basic Law provisions in dispute

The provision in dispute was BL 25, though the Court also referred to BL 13, BL 24(2)(4), BL 39(1) in the judgment.

What the Court held

The Live-In Requirement was one of the key features of the arrangement under which FDHs were admitted to work and reside in Hong Kong which led to CFA's earlier conclusion that their residence in Hong Kong could not be regarded as "ordinary residence" and therefore they could not acquire the right of abode in Hong Kong under BL 24(2)(4). Thus a determination that the Live-In Requirement was unconstitutional or illegal might lead to a re-opening of the debate on whether FDHs might acquire the right of abode in Hong Kong. However, if the Live-In Requirement was, as a matter of law, unconstitutional or illegal, the court was duty-bound to declare that it was so.

Insofar as the alleged international customary rule prohibiting forced labour was concerned, it was a controversial issue as to whether it was competent for the Hong Kong Court to declare and enforce international customary law, because such ruling could potentially raise issues pertaining to "foreign affairs" which are the responsibility of the CPG under BL 13. However, it was not necessary for the Court to resolve the issue since the applicant had, in any event, failed to adduce sufficient evidence of the international customary rule prohibiting forced labour.

Both ICESCR and Migration for Employment Convention 1949 ("MEC") were applicable to Hong Kong as a matter of international law and came within the scope of BL 39(1). However, they were not directly enforceable in Hong Kong unless implemented by domestic law. Meanwhile, the Employment Ordinance (Cap. 57) did not domesticate article 7(b) and (d) of ICESCR.

In any event, the applicant was precluded from invoking BoR 4(2) or

(3)(a) to challenge the Live-in Requirement due to s. 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383).

While BL 25 provided that all Hong Kong residents shall be equal before the law, there was enough of a relevant difference between FDHs and imported workers admitted under the Supplementary Labour Scheme ("SL Scheme") to justify the differential treatment. The two groups were plainly not in comparable positions insofar as the Live-In Requirement was concerned.

What the Court said

The CFI explained at 1159 the approach to the Live-In Requirement:
"42. In this regard, it will be recalled that the Live-In Requirement for FDHs was one of the key features of the arrangement under which FDHs were admitted to work and reside in Hong Kong which led to the Court of Final Appeal's conclusion that their residence in Hong Kong could not be regarded as 'ordinary residence' and therefore they could not acquire the right of abode in Hong Kong under art.24(2)(4) of the Basic Law (see *Vallejos and Domingo v Commissioner of Registration* [2013] 2 HKLRD 533 at [12], [82], [88]–[89] *per* Ma CJ). A determination that the Live-In Requirement is unconstitutional or illegal may lead to a re-opening of the debate on whether FDHs may acquire the right of abode in Hong Kong. It is well-recognized that the court should act cautiously when being asked to adjudicate on a constitutional issue which may give rise to substantial or unexpected social, economic or political consequences or implications which the executive and/or legislative branches of the Government, rather than the judiciary, are much better placed to address or consider. This having been said, if the Live-In Requirement is, as a matter of law, unconstitutional or illegal, the court is duty-bound to declare that it is so."

The Court said at 1167 that it was a controversial issue as to whether it was competent for the Hong Kong court to declare and enforce international customary law:
"63. In so far as the alleged international customary rule prohibiting forced labour is concerned, it is a controversial issue as to whether it is competent for the Hong Kong court to declare and enforce international customary law, because such ruling could potentially raise issues pertaining to 'foreign affairs' which are the responsibility of the Central People's Government

under art.13 of the Basic Law. This is a matter of some significance here, because China has not ratified either the Forced Labour Convention, 1930 (No. 29) (FLC) or the Abolition of Forced Labour Convention, 1957 (No. 105) (AFLC). It is not necessary for me to resolve this issue in the present case because I consider it to be clear that the applicant has, in any event, failed to adduce sufficient evidence of the alleged international customary rule prohibiting forced labour."

The Court further said at 1173 that both ICESCR and MEC were not directly enforceable in Hong Kong by any individual unless implemented by domestic law:

"76. It is not in dispute that the above provisions are applicable to Hong Kong as a matter of international law, and come within the scope of art.39(1) of the Basic Law. However, whether they can be enforced or relied upon in the domestic court is another matter… The provisions of the international covenants and conventions referred to in art.39(1) of the Basic Law are not directly enforceable in Hong Kong by any individual unless implemented by domestic or municipal law. Under the common law dualist principle, international treaties are not self-executing and, unless and until they are made part of our domestic law by legislation, they do not give rise to any rights or obligations enforceable in the domestic court …"

The Court held at 1184 that there was enough of a relevant difference between FDHs and imported workers admitted under the SL Scheme to justify the differential treatment:

"103. It is, in my view, clear that there is enough of a relevant difference between FDHs admitted under the FDH Scheme and imported workers admitted under the SL Scheme to justify the differential treatment. The two groups are plainly not in comparable or analogous positions in so far as the Live-In Requirement is concerned. In view of the fact that FDHs are admitted to Hong Kong for the purpose of provision of live-in domestic service, it cannot sensibly be argued that a requirement that they should live-in their employers' residences is discriminatory of them when compared to other workers who are not admitted for such purpose.

104. In *Demebele, Salifou v Director of Immigration* (HCAL 44/2014, [2016] HKEC 922, 22 April 2016), the applicants challenged the financial sufficiency requirement under the Director's dependant policy on the ground that it was discriminatory against Hong Kong residents marrying foreign nationals as the requirement did not similarly apply to spouses coming from Mainland

China on a One-Way Permit (OWP). In rejecting this challenge, Au J stated as follows:

[62] In relation to the applicants' specific reference to the comparison based on the OWP scheme to support the claim of discrimination, as I have also said above, the Dependant Policy which is premised on the showing and proving of dependency is an entirely separate and different scheme from the OWP scheme.

[63] The Dependant Policy and the OWP schemes are thus simply two different schemes with different nature and objective, and are to serve different and distinct purposes. There are no meaningful and relevant comparisons that can be made to support any contentions of discrimination by reason of differential treatment.

105. The above reasoning applies, *a fortiori*, to the present attempt to argue that FDHs admitted under the FDH Scheme and imported workers admitted under the SL Scheme are in comparable or analogous positions in so far as the Live-In Requirement is concerned."

HKSAR v Lew Mon Hung (劉夢熊) [2019] 2 HKLRD 1004

Background

The Independent Commission Against Corruption ("ICAC") conducted an investigation on the applicant and others, for suspicion of conspiracy to commit corruption ("Investigation"). The applicant sent emails and letters to the CE and the Commissioner of the ICAC ("Commissioner") protesting his innocence and asking them to urgently stop the persecution against him otherwise "a political bomb would be detonated". In his letters, the applicant also threatened if the ICAC did not terminate the Investigation, "all will perish together". The applicant was subsequently arrested and charged with "doing acts tending and intended to pervert the course of public justice" ("Offence").

The applicant was convicted of the Offence in the District Court. He applied to the CA for leave to appeal against conviction. The applicant argued, among others, that the applicant's conduct had no prospect of success in stopping the Investigation since the CE and the Commissioner

had no legal power to stop an ongoing ICAC investigation and they were subject to monitoring of the Operations Review Committee ("ORC"). It was argued that the trial judge had wrongly held that the applicant's acts, i.e. the threats and intimidations expressed in his emails and letters, had the necessary tendency to pervert the course of justice.

Basic Law provisions in dispute

The Court considered and cited BL 48, BL 57, BL 73(9) and BL 160.

What the Court held

The CA held that after the handover, the existence, establishment and function of the ICAC were protected by the Basic Law and the Independent Commission Against Corruption Ordinance (Cap. 204). Under BL 48, the CE was responsible for the implementation of all laws which applied in Hong Kong, while Cap. 204 (which was maintained as laws of the HKSAR after the handover pursuant to BL 160) provided that the Commissioner was authorized to discharge the various statutory duties listed in s. 12 thereof, including the investigation of any alleged or suspected offence/conspiracy to commit an offence under the Prevention of Bribery Ordinance (Cap. 201), on behalf of the CE. BL 57 provided that the ICAC, including the Commissioner, shall function independently and be only accountable to the CE. S. 5 of Cap. 204 reiterated the principles laid down by the Basic Law that the Commissioner shall perform his duty to direct and administer the ICAC independently on behalf of the CE, and only subject to the orders and control of the CE.

The CA agreed that the Commissioner was subject to the instructions and control of the CE in exercising the power of investigation under Cap. 204, and the CE shall be entitled to give orders or instructions to the Commissioner concerning the exercise of the power. However, if the CE abused his power and issued an improper or unlawful order or instruction to the Commissioner, then the CE's conduct would have violated the objects of BL 57 and Cap. 204. The CE's conduct would have no effect in law and the CE might face investigation and

impeachment under BL 73(9).

In response to the applicant's argument about the monitoring function of the ORC, the CA held that although the ORC was responsible for overseeing the ICAC's investigative work, the law did not provide the ORC with any power to terminate the Commissioner's investigations, not to mention exercising control over the Commissioner or issuing any directions or orders to the Commissioner, since it would be in breach of BL 57. The power to make the ultimate decision to terminate an investigation was reserved to the CE and the Commissioner.

The CA refused to grant leave to appeal.

What the Court said

Poon JA (as he then was) said at 1047 – 1048 and 1049 – 1050 that the requirement of the Commissioner to be accountable to the CE had been provided for by BL 57:

"104. After the handover, it is stated clearly in art.57 of the Basic Law that a Commission Against Corruption shall be established in the Hong Kong Special Administrative Region. It shall function independently and be accountable to the Chief Executive. At the same time, the Independent Commission Against Corruption Ordinance is maintained as laws of the Hong Kong Special Administrative Region. As such, after the handover, the legal provisions which establish the statutory regime of the ICAC are affirmed by art.57 of the Basic Law and the Independent Commission Against Corruption Ordinance. …

106. Article 57 of the Basic Law assures that the ICAC, including the Commissioner, the head of the ICAC, shall function independently and only be accountable to the Chief Executive. Since art.57 of the Basic Law is a constitutional provision in general terms, it does not specify in detail as to how the Commission maintains its independence. Neither does it lay down the detailed arrangement as to how it should operate in order to be accountable to the Chief Executive. These matters are dealt with in sections 5, 12 and 14 to 17 of the Independent Commission Against Corruption Ordinance.

…

113. … The opening sentence of s. 12 clearly states 'It shall be the duty of

the Commissioner, on behalf of the Chief Executive,' to perform the various statutory duties as set out in the section. The wording carries two layers of meaning.

114. Firstly, the duties in s. 12 are first of all conferred on the Chief Executive. This is in conformity with the provisions in art.48 of the Basic Law … According to art.48 of the Basic Law, the Chief Executive is required to be responsible for the implementation of the laws, which certainly include the Independent Commission Against Corruption Ordinance as well as the other laws as stated in s. 12(b) of the Independent Commission Against Corruption Ordinance.

115. Secondly, since it is impossible for the Chief Executive to personally implement the Independent Commission Against Corruption Ordinance including the duties prescribed in s. 12, s. 12 authorizes the Commissioner to discharge the various statutory duties listed out in the section on behalf of the Chief Executive. When the Commissioner, on behalf of the Chief Executive, performs the statutory duties (including investigation) of s. 12, he of course has to be accountable to the Chief Executive as required by art.57 of the Basic Law and s. 5 of the Independent Commission Against Corruption Ordinance. In other words, the Commissioner is subject to the instructions and control of the Chief Executive in performing the s. 12 duties (including investigation). Accordingly, the Chief Executive shall be entitled to give orders or instructions to the Commissioner concerning the performance of the s. 12 duties (including investigation)."

Poon JA pointed out at 1050 – 1051 that the CE and the Commissioner were subject to the constraint of the law:

"116. As previously pointed out, the Commissioner is only accountable to the Chief Executive. The law, nevertheless, provides various checks and balances on the way the Chief Executive conducts himself in this regard to ensure that he does not abuse his power:

(1) If the Chief Executive abuses his power and issues an improper or unlawful order or instruction to the Commissioner, or interferes in any way that is improper or even unlawful, his conduct is in violation of the objects of art.57 of the Basic Law and the Independent Commission Against Corruption Ordinance, exceeds the authority vested in him by art.57 of the Basic Law and the relevant provisions in the Independent Commission Against Corruption Ordinance. His act is *ultra vires*, and has no effect in law …

(2) …

(3) In extreme circumstances, the conduct of the Chief Executive might amount to a serious breach of the law or dereliction of duty. He might face investigation and impeachment procedures pursuant to art.73(9) of the Basic Law, and might even be removed from office by the Central People's Government upon impeachment by the LegCo.

117. These restraints in law stringently regulate and restrict the acts of the Chief Executive under art.57 of the Basic Law and the Independent Commission Against Corruption Ordinance, especially on matters related to investigations, barring him from improperly or even unlawfully interfering with the Commissioner."

HKSAR v Choi Wai Lun (蔡偉麟) (2018) 21 HKCFAR 167

Background

In August 2014, the appellant, a young man of 22, visited an adult website on which a girl ("PW1") had posted an advertisement, describing herself as aged 17 and offering sexual services at listed prices. PW1 was in fact under the age of 16. The appellant asked for, and received from her, a half-length photo of herself. They arranged to meet and went to a guest house where they showered together and the appellant ran his hands over her body. PW1 then performed oral sex on him. The appellant testified that he thought that her photo was consistent with her being aged 17 and that he believed that this was borne out when they met, PW1 appearing to him to be relatively tall, with well-developed bodily features, and speaking in a mature manner.

The appellant was prosecuted for indecent assault contrary to ss. 122(1) and (2) of the Crimes Ordinance (Cap. 200). S. 122(2) deemed a person under the age of 16 incapable of giving consent to the assault concerned. The appellant said that he did not suspect that she was under 16. PW1 gave evidence that she would dress more maturely when meeting clients. The Deputy Magistrate held that there was actual consent, an honest belief on the appellant's part that PW1 was aged 16 or more and ordered an acquittal. The Magistrate's ruling was reversed by the CFI. The

CFI held that the legislative intent was that indecent assault should be an offence of absolute liability. The appellant's honest and reasonable belief as to the girl's age was no defence. The appellant appealed to the CFA.

Basic Law provisions in dispute

The major provision in dispute was BL 87.

What the Court held

The CFA held that in deciding whether an offence was one of absolute liability, the starting point was that a statutory offence was presumed to require proof of *mens rea* unless the statute expressly or by necessary implication made the presumption inapplicable.

To accommodate more serious criminal offences such as the one in *Kulemesin v HKSAR* (2013) 16 HKCFAR 195 and to cater for *mens rea* as to the consequences of the prohibited act, the CFA reformulated the five possible alternatives in *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 and referred to them as "the *Kulemesin* alternatives":

(i) The *mens rea* presumption persists and the prosecution must prove knowledge, intention or recklessness as to every element of the offence ("the first alternative");

(ii) The prosecution need not set out to prove *mens rea*, but if there is evidence capable of raising a reasonable doubt that the defendant may have acted or omitted to act in the honest and reasonable belief that the circumstances or likely consequences of his conduct were such that, if true, liability would not attach, he must be acquitted unless the prosecution proves beyond reasonable doubt the absence of such exculpatory belief or that there were no reasonable grounds for such belief ("the second alternative");

(iii) The presumption has been displaced so that the prosecution need not prove *mens rea* but that the accused has a good defence if he can prove on the balance of probabilities that he acted or omitted to act in the honest and reasonable belief that the circumstances or likely

consequences of his conduct were such that, if true, he would not be guilty of the offence ("the third alternative");

(iv) The presumption has been displaced and that the accused is confined to relying on the statutory defences expressly provided for, the existence of such defences being inconsistent with the second and third alternatives mentioned above ("the fourth alternative"); and

(v) The presumption is displaced and the offence is one of absolute liability so that the prosecution succeeds if the prohibited act or omission is proved against the accused, regardless of his state of mind regarding the relevant elements of the offence in question ("the fifth alternative").

The CFA held that the third *Kulemesin* alternative should be adopted in construing s. 122(2), hence the appellant should bear the burden to prove on the balance of probabilities that he honestly and reasonably believed that PW1 was aged 16 or more.

A reverse onus, i.e. imposing a burden to prove on the balance of probabilities on the appellant, derogated from the right to be presumed innocent as guaranteed by BL 87 and BoR 11(1). For such a derogation to be justified, it must pass the rationality and proportionality tests. The Court must be satisfied that the reverse onus had a rational connection with the pursuit of a legitimate aim and that it was no more than necessary for the achievement of that aim. The Court must also be satisfied overall that adoption of a reverse onus struck a reasonable balance between the societal benefits promoted and the inroads made into the constitutionally protected presumption of innocence and that it did not place an unacceptably harsh burden on the individual. Applying the above principles, the CFA concluded that the CFI was wrong to hold that s. 122(2) had imposed absolute liability. The CFA unanimously allowed the appeal and restored the appellant's acquittal.

What the Court said

The third *Kulemesin* alternative was elaborated at 177:

"18. … the five possible alternatives may be stated as follows …

(c) third, that the presumption has been displaced so that the prosecution need not prove *mens rea* but that the accused has a good defence if he can

prove on the balance of probabilities that he acted or omitted to act in the honest and reasonable belief that the circumstances or likely consequences of his conduct were such that, if true, he would not be guilty of the offence (*the third alternative*); …"

The CFA discussed the presumption and indecent assaults on persons under the age of 16 at 180:

"30. In cases where the accused asserts that there was actual consent, he will naturally also be asserting that he honestly believed that the other person was consenting. If such a belief were capable of negativing the *mens rea* of the offence, the protective purpose of the age-related restriction on capacity to consent would be defeated. Section 122(2) thus necessarily implies that it does not avail the accused to establish that he honestly (and correctly) believed that the underaged person was freely consenting to the acts in question. The effect of s. 122(2) is, in other words, to eliminate consent as an ingredient from both the *actus reus* and *mens rea* of indecent assault. The presumption of *mens rea* therefore does not concern any element of consent in cases involving persons under the age of 16.

31. … While in cases involving persons aged 16 or over, the victim's age is not relevant, the fact that the victim is under 16 is an essential ingredient of the offence as modified by s. 122(2). Indecent assault becomes an offence which the defendant commits by doing an indecent act towards the victim, *being a person under 16*, with or without that person's consent. The age of the victim therefore forms part of the *actus reus* of the offence as modified by s. 122(2) and thus engages the presumption of *mens rea.*"

The CFA discussed the Court's previous decision on absolute liability at 185:

"48. If [*So Wai Lun v HKSAR* [2005] 1 HKLRD 443] had been decided today, the Court would have proceeded to consider whether the statutory purpose of the offence could be sufficiently met by construing s. 124 as laying down an intermediate mental requirement in place of full *mens rea*. It seems entirely possible that a different conclusion would have been reached since the Court was much troubled by its having to decide in favour of absolute liability."

The CFA held that the third *Kulemesin* alternative better reflected the statutory purpose of s.122 at 191:

"67. The third alternative better reflects the statutory purpose. A man who

says: 'I honestly and reasonably believed the girl was old enough to consent' ought to be required to persuade the court or jury that he probably did in fact so believe, a matter which he is best placed to explain. It is a suitably demanding standard designed to encourage men to steer clear of indecent conduct with young girls who may fall within the protected class, placing them otherwise at peril of being unable to discharge the persuasive burden."

The CFA discussed the constitutional basis of BL 87 and BoR 11(1) in the context of a reverse onus at 191 – 192:

"68. A reverse onus derogates from the constitutional right to be presumed innocent. For such a derogation to be justified, it must pass the rationality and proportionality tests: the Court must be satisfied that the reverse onus has a rational connection with the pursuit of a legitimate aim and it is no more than necessary for the achievement of that aim. If those tests are met, the Court must be satisfied overall that adoption of a reverse onus strikes a reasonable balance between the societal benefits promoted and the inroads made into the constitutionally protected presumption of innocence and that it does not place an unacceptably harsh burden on the individual.

69. In my view, construing s. 122(2) as imposing a burden on the accused to prove on the balance of probabilities that he honestly and reasonably believed that the girl in question was aged 16 or more passes those tests. It is rationally connected with the legitimate aim of giving heightened protection to vulnerable under-aged girls and is no more than necessary to achieve such a level of protection. The inroad it makes into the presumption of innocence as the price of promoting necessary protection of a vulnerable class strikes a reasonable balance in the context of a fair trial for the accused.

70. … I conclude that the Judge was wrong to hold that section 122(2) imposes absolute liability where the victim is in fact under the age of 16. On its proper construction, the presumption has been displaced so that the prosecution does not need to prove *mens rea* as to the girl's age, but the accused has a good defence if he can prove on the balance of probabilities that he honestly and reasonably believed that the girl was 16 or over."

MTR Corp Ltd v Tsang Kin Shing [2019] 3 HKLRD 285

Background

The appellant was convicted of posting stickers at the concourse of an MTR Station without the written authority of the MTR Corporation Ltd ("the MTR") contrary to By-laws 32(a) and 43 of the Mass Transit Railway By-laws (Cap. 556B). The appellant appealed against conviction, arguing that, among others, that the Magistrate erred in her judgment that By-law 32(a) ("By-law") was constitutional. Given that the By-law constituted a total ban on posting in MTR premises in the absence of written authority, it infringed the appellant's right to freedom of speech and expression disproportionately.

Basic Law provisions in dispute

The major provisions in dispute were BL 27 and BL 39.

What the Court held

The CFI held that MTR was a public authority, and therefore, pursuant to s. 7 of the Hong Kong Bill of Rights Ordinance (Cap. 383), the Hong Kong Bill of Rights was binding on it. Also, the Court held that the Basic Law bound the MTR.

The Court held that freedom of expression as enshrined in BL 27 was not absolute and was subject to certain restrictions under BoR 16, BoR 17 and BL 39. The By-law only regulated one mode of expression by the appellant, thus the By-law was not a total restriction of the appellant's right to freedom of expression.

The Court further held that the property interests of the MTR had to be given very substantial weight in the balancing exercise owing to the constitutional protections of property right and the By-law had satisfied the proportionality test.

What the Court said

The CFI held that the MTR is a public authority bound by Cap. 383 and

it was also bound by the Basic Law. The Court said at 296 – 297:

"39. Section 7 of the Hong Kong Bill of Rights Ordinance states clearly that the Ordinance binds public authorities. It is beyond question that MTR is a public authority, therefore the Bill of Rights is binding on it.

42. … It is clear that freedom of speech is guaranteed by the Bill of Rights and the Basic Law. Although there is no provision similar to s. 7 of the Hong Kong Bill of Rights Ordinance in the Basic Law, the Basic Law shall have a binding effect on the MTR …"

The Court held at 297 that the rights and freedoms were not unlimited but could be subject to restriction:

"43. … the right to freedom of expression is not unlimited. Apart from the above restrictions set out in arts.16 and 17 of the Bill of Rights, art.39 of the Basic Law also provides that the rights and freedoms enjoyed by Hong Kong residents are subject to restrictions as prescribed by law:

Article 39

… The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

The Court referred to the CFA's judgments in *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 and *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at 297 – 298:

"44. In *Ng Kung Siu* … Chief Justice Li pointed out that:

Freedom of expression is not an absolute. The Preamble to the ICCPR recognizes that the individual has duties to other individuals and to the community to which he belongs. Article 19(3) itself recognizes that the exercise of the right to freedom of expression carries with it special duties and responsibilities and it may therefore be subject to certain restrictions. But these restrictions shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

45. In *Chow Nok Hing*, Mr Justice Ribeiro PJ pointed out that:

[33] Demonstrators are therefore free to assemble and to convey views which may be found to be disagreeable, unpopular, distasteful or even

offensive to others and which may be critical of persons in authority. Tolerance of such views and their expression is a hallmark of a pluralistic society. At the same time, it must be recognized that those freedoms are not absolute and demonstrators must ensure that their conduct does not go beyond the constitutional limits of those rights."

The Court held that the conduct of sticking or writing without the consent of the property owner (i.e. the appellant's conduct) contravened the owner's property rights. The Court said at 301 – 302:

"57. It is obvious that the By-law in question concerns sticking or writing on the property (such as a wall) of the railway premises of MTR. The conduct of sticking or writing without the consent of the property owner is a contravention of the owner's property rights. I disagree with Mr Kwok who submits that posting of stickers itself is not illegal.

58. There are many ways to express one's opinions. Forbidding the appellant from posting stickers without the written authority of the MTR is only limiting one mode of expression by the appellant but not a total restriction of the appellant's right to freedom of expression.

63. … By-law 32(a) only regulates one mode of expression by the appellant, and the regulation and restriction are limited. The appellant can still express his views in other ways." (Original emphasis)

The Court considered the case *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425 at 300 – 301:

"54. … I have also considered that in the case of *Fong Kwok Shan Christine*, the Court of Final Appeal rejected the argument that the 'right to freedom of expression did not apply if sought to be exercised on government premises to which the general public had not been given free access' …

(2) … to focus on the guaranteed right, adopting the assumption that it was universally applicable, subject to any constitutionally valid restriction. The right to free expression encompassed as one of its dimensions, the location of its exercise. If access to that place was denied, such denial was properly viewed as a restriction imposed on the exercise of the right so that the legitimacy, rationality and proportionality of that restriction fell to be considered. A rule presumptively excluding free expression at certain types of venues was too blunt an instrument. A proportionality analysis enabled the court to take into account the dimensions of any particular exercise of such rights and the exigencies of the intended venue …"

55. I also stress in particular the *obiter dictum* of the Court of Final Appeal … :

(3) (Obiter) Where the exercise of free expression was engaged on private property, justification of the restriction as a measure necessary for the protection of the rights of others had to be given very substantial weight in the proportionality analysis due to the constitutional protections of private property and privacy. Such weight was further enhanced where the property involved a resident's home (or their curtilages or common areas). These weighed heavily in favour of validating restricted access although this might be subject to rare possible exceptions …"

The Court held at 302 that the By-law satisfied the "proportionality analysis":

"64. I have already pointed out that save where the MTR can be regarded as a public place for the purpose of the Public Order Ordinance, railway premises are not public places, they are the MTR's property instead. I am of the view that justification of the restriction under the By-law concerned for the protection of the property interests of MTR has to be given very substantial weight. Upon balancing both sides: (1) to guarantee the appellant's right to freedom of expression, and (2) to protect the 'property interests' of the MTR and its duty to ensure the rights and freedoms of other MTR users are not affected, I am of the view that the By-law concerned satisfies the 'proportionality' test and it is not unconstitutional."

Chung Chiu v Secretary for Justice [2018] 3 HKLRD 323

Background

The applicant was excluded as an elector at a village representative election in Cheung Chau, a "Market Town" under Schedule 3A of the Rural Representative Election Ordinance (Cap. 576). Under s. 15(5A) of Cap. 576, a person is not eligible to be registered as an elector for a Market Town unless he: "(b) has been a resident of the Market Town for the three years immediately before" applying for registration and "(d) is a Hong Kong permanent resident." The applicant was born in Cheung Chau but moved away in 1999, thus not satisfying s. 15(5A)(b) of Cap. 576. He challenged the constitutionality of the said s. 15(5A)(b) and

(d) of Cap. 576 ("Impugned Provisions") on equality ground since they did not apply to a person seeking to be registered as an elector for an Indigenous or a Composite Village under s. 15(5) of Cap. 576.

Basic Law provisions in dispute

The Basic Law provision in dispute was BL 25.

What the Court held

The CFI held that in considering the question of eligibility for registration as an elector, residents of a Market Town (such as Cheung Chau in the present case) and residents of an Indigenous or a Composite Village were not in comparable situations because their respective elections were different in nature and form historically and traditionally.

The Court also held that since historically "residency" of Cheung Chau had always been a requirement for eligibility for both electors and candidates in the "kaifong" elections, s. 15(5A) of Cap. 576 was simply reflecting and incorporating the traditional and historical arrangements in the respective elections and was not discriminatory in law and thus was not contrary to BL 25 and BoR 22.

What the Court said

The CFI held at 327 – 329 that the "justification test" laid down in *Secretary for Justice v Yau Yuk Lung* was applicable:

"9. The court's approach when considering whether there is infringement to the right to equality has been explained by Li CJ in *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335, at [19]-[22] as follows:

[19] In general, the law should usually accord identical treatment to comparable situations*. As Lord Nicholls observed in* ***Ghaidan v Godin-Mendoza*** *[2004] 2 AC 557 at p.566C:*

Like cases should be treated alike, unlike cases should not be treated alike.

[20] However, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment may be justified for good reason. In order for differential treatment to be justified, it must be shown that:

(1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.

(2) The difference in treatment must be rationally connected to the legitimate aim.

(3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim.

The above test will be referred to as 'the justification test'. …

10. Hence, the law does not treat differential treatment between two groups of person as discrimination if there is sufficient relevant difference between them to warrant the differential treatment. If the two groups of person are *not* in comparable situations, no question of discrimination arises as the law does not require them to be treated identically. However, if they can be regarded as to be in comparable situations, there would be *prima facie* discrimination unless the differential treatment can be justified under the proportionality test. The burden is on the respondent to show that the differential treatment satisfies the proportionality test." (Original emphasis)

The Court further emphasized at 332:

"29. The question of whether a complainant of a discriminatory differential treatment is in a comparable situation as the comparator must be looked at and answered with reference to the proper context."

At 335, the Court found that there had never been any village or village indigenous representative elections held in Cheung Chau before 1999:

"35. On the other hand, there is also clear evidence showing that before 1999 there had never been any village or village indigenous representative elections held in Cheung Chau. There have been only the 'kaifong leaders or representatives' elections held historically and traditionally in Cheung Chau to return them as members of the [Cheung Chau Rural Committee]. …"

The Court concluded that the Impugned Provisions did not infringe BL 25 at 339:

"44. Based on the above undisputed and objective evidence, I accept that there was no election held in Cheung Chau throughout the years to return either 'village representatives' or 'indigeneous village representatives', where the eligibility of both electors and candidates in its elections is based on *'lineal descendancy'* from indigenous inhabitants. In nature and in form, the elections in Cheung Chau were held to return 'kaifong representatives' (where the eligibility of the electors and candidates is *not* based on such

'*lineal descendancy*') and not village representatives.

45. Once understood as such, I also conclude that residents of a Market Town (such as Cheung Chau) and residents of an Indigenous/Composite Village are *not* in comparable situations in the context of considering their eligibility to be registered as an elector, since the respective elections to elect their respective representatives are simply different in nature and form historically and traditionally. No question of discrimination therefore arises since they are not comparable.

46. The Impugned Provisions in simply reflecting and incorporating these traditional and historical arrangements in the respective elections that have been held in Indigenous/Composite Villages and Market Towns are hence not discriminatory in law as, for the above reasons, no question of discrimination arises."

QT v Director of Immigration (2018) 21 HKCFAR 324

Background

QT, a British national, entered into a same-sex civil partnership in England with SS. SS was offered employment in Hong Kong and was granted an employment visa. The Director of Immigration ("Director") refused to grant a dependent visa to QT since the existing policy only admitted a spouse as a dependant if he or she was party to a monogamous marriage consisting of one male and one female ("Policy"). Same-sex couples like QT and SS fell outside the Policy.

QT challenged the Policy by judicial review proceedings, on the ground that, among others, the Policy was discriminatory on the basis of sexual orientation, and it was unjustified. The CFI ruled in favour of the Director but the CA overruled the CFI's decision. The Director appealed the CA's decision.

Basic Law provisions in dispute

The major provisions in dispute were BL 25 and BL 154.

What the Court held

The CFA dismissed the Director's appeal unanimously. The CFA held that the Director's powers of immigration control was subject to the principle of equality and the differential treatment required justification. The CFA held that the Policy was not rationally connected with the legitimate aim of ensuring that Hong Kong continued to attract people with the right talent and skills. Foreign workers with desirable talent or skills, who were encouraged to join Hong Kong's workforce by being permitted to bring their dependants to live with them in Hong Kong, could be heterosexual or homosexual.

Further, the Policy was not rationally connected with the legitimate aim of strict immigration control. In terms of quantity of entrants, each foreign worker was only entitled to apply to bring one spouse to join him or her in Hong Kong. Whether the spouse was same sex or different sex was irrelevant. In terms of quality of entrants, whether the spouse was heterosexual or homosexual was also irrelevant.

The CFA also held that the differential treatment to QT and SS on the basis of administrative convenience was irrational, since QT and SS could as conveniently produce their civil partnership certificate as any heterosexual married couples.

What the Court said

Regarding the powers of immigration control being exercised subject to the principle of equality, the CFA said at 343 – 344:

"18. Article 154 of the Basic Law vests the HKSAR Government with the power of immigration control over the Region. This is given statutory effect by the Immigration Ordinance under which a person who does not enjoy the right of abode or have the right to land may not enter without the Director's permission. …

19. Although his powers are expressed in very wide terms, the Director accepts that in implementing the Policy, he is constrained to exercise them in accordance with what has been referred to as 'the principle of equality'. He is right to do so.

20. It is a cardinal principle of administrative law that broad statutory powers are to be construed with the implied limitation that they are to be

exercised only for the purposes for which they are given. …

21. In order to be within the scope of the statutory grant, it is presumed that such powers must be exercised fairly and rationally, reflecting the rule of law. …

22. The principle of equality is an important aspect of such rationality. …"

On the issue of discrimination, the CFA said at 346:

"31. An inquiry into whether an individual or group has suffered unlawful discrimination generally begins with a claim that the complainant has been subjected to some unfairly adverse treatment. It is usually recognized that such treatment may broadly occur in three forms. The first two are succinctly conveyed by the statement: 'Like cases should be treated alike, unlike cases should not be treated alike.' The third involves indirect discrimination where the measure complained of appears neutral on its face but is significantly prejudicial to the complainant in its effect."

The CFA rejected the Director's argument that marriage was different from civil partnership and the differential treatment needed not be justified. The CFA said at 350 – 353:

"42. The first unsatisfactory aspect of the Director's first argument is its circularity. It puts forward the challenged differentiating criterion as its own justification. It is hardly satisfactory to answer the question: 'Why am I treated less favourably than a married person?' by saying: 'Because that person is married and you are not'.

…

44. The second major objection to the Director's first argument is that the identification of comparators does not of itself permit a proper conclusion to be reached as to whether a given difference in treatment is or is not discriminatory. As Lord Walker pointed out in *R (Carson) v Secretary of State for Work and Pensions*, the real issue in the case at hand was:

…

'… why the complainant had been treated as she had been treated. Until that question was answered, it was impossible to focus properly on the question of comparators'.

46. Indeed, when one considers in general terms the inter-personal relationships between two civil partners on the one hand and between a married couple on the other, each being a status recognized under UK law, it is hard to see any basis for the Director concluding that they are obviously

different comparators. In *Ghaidan v Godin-Mendoza*, a case concerning discrimination in rules which excluded the survivor of a long-term cohabiting homosexual couple from succession to a statutory tenancy, Lord Nicholls stated:

'A homosexual couple, as much as a heterosexual couple, share each other's life and make their home together. They have an equivalent relationship. There is no rational or fair ground for distinguishing the one couple from the other in this context …'

…

53. The Director cites a number of cases for the proposition that marriage creates a special status which fittingly provides an exclusive criterion for bestowing on the married couple particular benefits denied to others.

54. It is no doubt true that in some cases, it may be appropriate to confine certain benefits to married persons but this would generally be on the basis that the difference in treatment can be justified on fact-specific grounds, such as in connection with parental rights where the best interests of a child are involved or where certain biological issues arise. But the authorities cited do not support an approach which eschews the need for justification simply on the basis of an asserted difference in status."

On the correct approach to examine whether there was discrimination, the CFA said at 361:

"83. Indeed, in our view, the correct approach is to examine every alleged case of discrimination to see if the difference in treatment can be justified. …"

On the "talent" aim (and the lack of rational connection of the differential treatment to it), the CFA said at 364:

"90. It is at this point that the Director encounters major difficulties justifying the Policy. In cases like the present, the sponsor has been granted an employment visa presumably because he or she has the talent or skills deemed needed or desirable. Such a person could be straight or gay. The Policy is, as the Director has stated, aimed at encouraging such persons to join our workforce 'by giving them the choice of bringing in their dependants to live with them in Hong Kong'. As is evident from the attempted intervention of the Banks and Law Firms, the ability to bring in dependants is an important issue for persons deciding whether to move to Hong Kong. But, as Ms Rose QC submitted, it runs wholly counter to the

Director's stated aim to say: 'You can bring in your partner provided that he or she is straight and would be viewed as married validly under Hong Kong law'. Such a policy is counterproductive and plainly not rationally connected to advancing the 'talent' aim."

On the objective of strict immigration control (and the lack of rational connection of the differential treatment to it), the CFA said at 364 – 365:

"91. It is similarly hard to see how the Policy's exclusion of persons who are bona fide same-sex dependants of sponsors granted employment visas promotes the legitimate aim of strict immigration control. As Cheung CJHC put it in the Court of Appeal:

Maintaining a strict, stringent immigration policy means, in the present context, controlling both the quantity and quality of the entrants to Hong Kong. In terms of quantity, under the policy, each foreign worker is only entitled to apply to bring one spouse to join him or her in Hong Kong. Whether that spouse is of the same sex or different sex is neither here nor there. In terms of quality, whether the spouse is heterosexual or gay cannot possibly be relevant. Thus analyzed, the restriction to heterosexual spouses does not advance the aim of maintaining a strict or stringent immigration policy …"

In response to the Director's argument that the differential treatment had laid down clear or bright lines to determine which categories of persons can be allowed into Hong Kong, the CFA held at 365 – 366:

"96. … In putting forward the 'bright line' aim, the Director has in mind the convenience of drawing a demarcating line based on production of a marriage certificate. But the line is not quite so bright or simple since the conditions of eligibility include 'reasonable proof of a genuine relationship between the applicant and the sponsor', bogus marriages being a practical concern, and require evidence that 'the sponsor is able to support the dependant's living at a standard well above the subsistence level and provide him/her with suitable accommodation in the HKSAR.'

97. But even purely at the level of convenience, QT and SS are just as conveniently able to produce their civil partnership certificate. Excluding them on the basis of administrative convenience is irrational.

98. More substantively, the rationality in question is not about the convenience of drawing of bright lines but about the rationality of the demarcation. …

99. Given that the Policy cannot be justified as a measure rationally connected to the avowed 'talent' and 'immigration control' objectives, it is not saved by the 'bright line' aim."

Navarro Luigi Recasa v Commissioner of Correctional Services [2018] 4 HKLRD 38

Background

The applicant was a Filipino born biologically male. Her passport also showed that her gender was male. The applicant suffered from gender dysphoria and identified herself as a female. She was a pre-operative male-to-female ("MtF") transgender person ("TG") with an outward female appearance but she retained all her male genitalia. On 5 June 2014, she was arrested and was later convicted of trafficking in a dangerous drug and sentenced to 20 months' imprisonment. The applicant was detained by the police between 5 and 7 June 2014, and was later handed over to the Correctional Services Department ("CSD"). She was transferred to Pik Uk Correctional Institution, a male institution. The latter had been notified that the applicant was a suspected MtF TG. She was transferred to Siu Lam Psychiatric Centre on 9 June 2014. The applicant remained there until her release on 15 July 2015. She had been subjected to various strip or cavity searches conducted by male police officers or male CSD officers since her arrest. The applicant challenged the various decisions of the Commissioner of Correctional Services ("CCS") to put her in male correctional facilities and to subject her to detention conditions which kept her effectively in a single cell and disallowing her from mingling with other female inmates (collectively "the detention decisions"); and to conduct body searches on her by male officers. The applicant contended that these decisions infringed her fundamental rights under the Basic Law and the Hong Kong Bill of Rights.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 25 and BL 28.

What the Court held

The CFI held that the principle of equality under BL 25 and BoR 22 did not require identical treatment of the applicant as a person in custody ("PIC") with either a non-transsexual female or male PIC for custodial purposes. The applicant was in materially different circumstances compared with either non-transsexual female or male PICs. The relevant statutory provisions relating to the custody and custodial discipline of PICs in correctional institutions anticipated and imposed segregation by sex between men and women. Given that the applicant retained all male genitalia and her female physique and transsexualism, the decisions to put her in male custodial facilities and to subject her to detention conditions of keeping her in a single cell and keeping her from other female inmates were to prevent the potential risk posed by the applicant to other female inmates and the risk that she might be subject to sexual harassment by male inmates. Accordingly, the Court rejected the applicant's argument based on right to equality protected under BL 25, BoR 1 and BoR 22.

The Court also held that the detention decisions did not infringe the applicant's rights under BL 28 and BoR 3, BoR 5(1), BoR 6(1) and BoR 14. For cruel, inhuman or degrading treatment to arise from conditions of detention in a penal establishment, the suffering and humiliation involved must go beyond the unavoidable level of suffering inherent in detention. The detention conditions imposed on the applicant were to maintain custodial discipline and security and to ensure the security of the applicant as well as other female PICs. The applicant's right to privacy was not unjustifiably infringed.

The Court held that when a person who suffered from gender dysphoria and identified herself as a female was stripped or cavity searched by a male officer, it *prima facie* interfered with rights to privacy and to dignity. However, the applicant failed to establish that the search conducted at the police station was arbitrary and infringed her rights to

privacy and dignity given that there was the serious factual dispute over the precise manner in which the search was conducted and the nature of such dispute, and there were clearly legitimate reasons for a custody search to be conducted as a general rule.

The Court also held that the searches conducted at Pik Uk Correctional Institution and Siu Lam Psychiatric Centre were not arbitrary and did not infringe the applicant's right to privacy or dignity because they were proportionally justified for the purpose of maintaining security in prison setting. There were always serious security considerations in a prison context. The CCS should be allowed significant latitude in terms of the exercise of his discretionary judgment.

What the Court said

The Court held at 67 – 71 that the applicant was in a materially different circumstances compared with either non-transsexual female PICs or male PICs:

"87. When these considerations are looked at together, I agree … that R was in a materially different circumstances compared with either non-transsexual female PICs or male PICs:

(1) The presence of male genitalia on R's body put her in a position that was materially different from that of a non-transsexual female PIC, which justified the non-allocation of R to a female prison.

(2) The presence of some feminine features on R put her in a position that was also materially different from that of a non-transsexual male PIC, which called for the protective measures that had been put in place for R in male prison.

…

91. It must be noted that R in her own evidence has expressed her fear for and made allegations of actual harassments by male PICs (which allegations are disputed by the CCS). In the premises, it must be justified for the CCS to consider that there was *a substantial risk* that she might be subject to such harassment and hence treating her differently for the purpose of custody.

92. Further, given her male genitalia, as a matter of common sense, it cannot be said to be unreasonable for the CCS to also consider that there was at least *a risk* that non transsexual female PICs might be subjected to

R's harassment. It must be remembered that the CCS also has a duty to consider and protect the female PICs' safety.

…

96. It can be seen that the [Canadian Human Rights Tribunal] concluded [in *Synthia Kavanagh v Canada (Attorney General)* 41 CHRR 119] that the evidence supported that placing a pre-operative MtF TG inmate in a female prison would reasonably result in fear for, and increased risk of, harassment amongst the female inmates. It must be noted that the evidence the Tribunal referred to was related to expert evidence concerning the general aspects of pre-operative MtF TG, and had nothing to do with the particular history of violence concerning Kavanagh (being convicted of murder) specifically.

97. I am of course aware of the fact that there is no similar medical expert evidence adduced in the present case. But this part of the Tribunal's judgment shows that it cannot be said that the CCS's consideration in this respect is devoid of common sense and not reasonably justified.

98. I therefore do not accept Mr Deng's contention that, since R did not have a history of violence, there was no basis for the CCS to form the view that there might at least be a risk of harassment to the other non-transsexual female PICs if R was put to contact with them.

99. For these reasons, I also reject this complaint based on right to equality protected under BL 25 and HKBOR 1 and 22."

The Court considered at 79 that the applicant had not established "cruel, inhuman or degrading" treatment for the purpose of BoR 3:

"142. The question is thus whether R can bring herself within the terms of this article on the facts, and she must establish to 'a very high threshold' that the treatment he had received was so 'cruel, inhuman or degrading' that it attained 'a minimum level of severity', which 'generally involves actual bodily injury or intense physical or mental suffering'. Whether that is met is 'ultimately a matter of judgment', depending on 'all the circumstances of the case such as the nature and context of the treatment or punishment that is in issue'. See *Ubamaka* at [171]–[173].

143. For [cruel, inhuman or degrading treatment] to arise from conditions of detention in a penal establishment, the suffering and humiliation involved must go beyond the unavoidable level of suffering inherent in detention. …

144. In particular, the prohibition of contact with other prisoners for security

or protective reasons does not itself amount to inhuman treatment or punishment. …"

The Court also considered the segregation was justified at 80:

"146. In the present case, one must also not lose sight of the context that:

(1) We are concerned with custodial detention for which there are serious security considerations. …

(2) Good order and discipline is very important in ensuring the safe and orderly running of prisons, and the [Prison Rules] vest a large measure of discretion in the CCS to determine how best that can be secured. …"

In relation to the right to privacy and right to dignity, the Court held at 93:

"215. As submitted by R, the authorities do support that a right to privacy does include respect for the person's private life, and private life as protected includes someone's own choice of gender identity and the person's interaction with others … Hence, when a person who suffers from gender dysphoria and identifies herself as a female is stripped or cavity searched by a male officer (someone of a gender opposite to the person's own identification), it does *prima facie* interfere her privacy. The right is therefore engaged.

216. For the same reason, a lawfully detained person's right to dignity is similarly engaged, as it must be obvious that that detained pre-operative MtF TG (who identifies her as female) would feel subjected to embarrassment and humiliation to be stripped or cavity searched by an officer of a gender opposite to her self-identified gender.

217. However, these rights are not absolute and can be proportionally and justifiably limited in law. In considering whether the limitation is so justified, it must be considered in the proper context and purpose."

The Court held at 96 that the relevant Police General Order ("PGO") was only a general rule and the police officers should take into account the need to protect the detained person's circumstances and the person's fundamental human rights in applying the PGO:

"222. Thus, even though I agree that PGO 49-04, para.9 should be construed to be consistent with the right to privacy and right to dignity for transgender PICs, it must be construed in the context of the above considerations. When these are all considered together, I accept Ms Wong's fall back construction that, properly construed to be consistent with the constitutional

protection of privacy and dignity (read together with HKBOR 3) of PICs, the requirement of a search being conducted upon a detained person by officers of 'the same sex' under PGO 49-04, para.9 is only intended to be a general rule, leaving a discretion to be exercised by the police officers as to how a custody search is to be properly and lawfully conducted in the light of all the relevant circumstances, having regard to, among others, the individual circumstances of the detained person, the need to protect the detained person's fundamental human rights to respect to dignity and privacy, and the appropriateness of the gender of the officers conducting and witnessing the search.

223. In other words, when PGO 49-04, para.9 provides that 'Custody search shall be conducted by police officers follows', it is only to mean that the searches should generally be conducted in accordance with the requirements provided in the subparagraphs. The police officers retain a discretion to decide how a custody search is to be conducted properly and lawfully in a transgender circumstance."

Re Leung Kwan Tsan Kelvin (a bankrupt) [2019] 1 HKLRD 1051

Background

The applicant was employed as a teacher at an aided school between 1990 and 2015. Under the Subsidized Schools Provident Fund Rules (Cap. 279D), the applicant was required to make contributions to the provident fund. A bankruptcy order was made against him on 19 September 2002. He was discharged from bankruptcy on 19 September 2006. The applicant challenged that the withholding of provident fund payment from him would violate his rights to equality and retirement security, as it would involve treating persons in his position less favourably than the general members of the workforce and aided school teachers adjudicated bankrupt after the commencement of ss. 85(4) and (5) of the Education Ordinance (Cap. 279) on 28 June 2013. Ss. 85(4) and (5) of Cap. 279 excluded entitlement of an aided school teacher under the subsidized schools provident fund from the property of that

teacher for the purpose of the Bankruptcy Ordinance (Cap. 6).

Basic Law provisions in dispute

The major provisions in dispute were BL 25 and BL 36. The Court also referred to BL 145 and BL 147.

What the Court held

The Court held that ss. 85(4) and (5) of Cap. 279 did not engage BL 25. Cap. 279 did not make the position of aided school teachers adjudicated bankrupt after the commencement of ss. 85(4) and 85(5) more favourable than that of those adjudicated bankrupt prior to the commencement of those provisions. Cap. 279 being a legislation conferring benefits could be made prospective only. The situations of the two groups of teachers were not relevantly similar and the differentiation was justified according to the legitimate aim and proportionality.

The Court also held that s. 85(4) of Cap. 279 did not engage BoR 1(1) and BoR 22. The differential treatment was based on the date of bankruptcy, which did not trigger any of the relevant status under the Bill of Rights.

The Court further held that by reading BL 36 together with BL 145, s. 85(4) of Cap. 279 did not deprive anyone of retirement security. Thus, BL 36 was not engaged.

What the Court said

The CFI rejected the applicant's argument that s. 85(5) of Cap. 279 had infringed the principle of equality by not having retrospective effect. The Court held at 1071 – 1074 that:

"43. I must say that this submission struck me as completely devoid of merits. The legislative amendments were effected so as to confer new rights and/or benefits upon those teachers who were adjudicated bankrupt after the Effective Date. A line has to be drawn somewhere. Testing Mr Wong's submission by pushing it to its logical conclusion, it would mean that whenever the Government, by public policy, confers new or additional benefits upon citizens of Hong Kong, it has to do so both prospectively and

retrospectively, otherwise such public policy and the relevant legislation would have infringed the principle of equality. With respect, this cannot be right.

…

46. I am of the firm view that equality and fairness must be assessed or looked at without ignoring the interests of creditors. It must be fundamental and basic that one is obliged, both legally and morally, to repay one's debt. It matters not that the repayment is to come from one's savings, whether reserved for retirement or not, or other sources of income. That must be the starting point. When legislation intervened so as to confer a special privilege or protection to any person's pension benefits so that creditors' rights of repayment is curtailed, that inevitably was a political or social policy choice of both the Government and the Legislature."

The Court agreed that the disputed differential treatments were not based on any relevant status. At 1079 and 1083, the Court respectively said:

"57. … The relevant comparator here, namely, the date of bankruptcy, clearly has got nothing to do with race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth … Hence, the only issue is whether date of bankruptcy would constitute 'other status'. I am of the view that the answer is no.

…

69. … The differential treatments are based on the date of bankruptcy. Such comparator:

(1) is not a personal characteristic by which persons or groups of persons are distinguished from each other;

(2) is not an innate characteristic that applies from birth and does not relate to a core or personal belief or choice; and

(3) has never been recognized as a personal characteristic that could loosely be described as impacting on personal circumstances."

The Court held at 1083 – 1085:

"71. I am of the view that the same reasoning applies to rights under art.25 of the Basic Law …

74. The right to equality under art.25 of the Basic Law is not engaged if the complainant is not comparable to the persons alleged to have been treated more favourably by the Administration or the Legislature. In

deciding whether the applicant is comparable to the other groups, the Court shall also consider the arguments advanced in justifying the differential treatment. …

75. Adopting the above approach, I am of the view that teachers who were adjudicated bankrupt before and after the Effective Date are not in relevantly similar situations …"

The Court held at 1089 that s. 85(5) of Cap. 279 satisfied the proportionality test:

"85. For the reasons stated above, I have no doubt that s. 85(5) of the Education Ordinance satisfies the 4-step proportionality test:

(1) It pursues legitimate aims: to avoid retrospective operation of the law and to maintain the bankruptcy regime's stability;

(2) The wordings of s. 85(5) of the Education Ordinance are rationally connected to the said legitimate aims;

(3) To achieve the said legitimate aims, s. 85(5) of the Education Ordinance is not manifestly without reasonable foundation. The Executive and the Legislature should be given a wide margin of discretion.

(4) Based on the evidence, a reasonable and fair balance has been struck between the societal benefits of s. 85(5) of the Education Ordinance and its impact on the rights of the applicant."

The Court held that BL 36 was not engaged. The Court said at 1089 – 1091:

"87. Mr Liu submitted that the first limb of art.36 of the Basic Law has to be read together with art.145 of the Basic Law which reads:

On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs.

88. Ribeiro PJ in *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950 at [33] said:

… like many other constitutional provisions, art. 36 is intended to operate as a framework provision. Read together with art. 145, it provides the framework ***for identifying a constitutionally protected right to social welfare*** *… (Emphasis added.)*

89. Godfrey Lam J in *Choi King Fung v Hong Kong Housing Authority* (HCAL

191/2015, [2017] HKEC 549, 17 March 2017) at [41]–[43] said:

[41] Art 145 refers to the 'previous social welfare system', i.e. the system before the Basic Law came into effect in 1997. On the basis of this system, the Government is mandated to formulate policies on its development and improvement in the light of the economic conditions and social needs.

[42] In allowing the appeal in ***Kong Yunming****, the Court of Final Appeal rejected the notion that the protected right to social welfare could be regarded as defined by or subject to the conditions inherent in the legal or administrative arrangements devised from time to time for the provision of the welfare, for that would be to deny any meaningful effect to Art 36. In that case the Court of Final Appeal held that the scheme of comprehensive social security assistance existing prior to 1 July 1997, incorporating an eligibility requirement of one-year's residence in Hong Kong, which had been applicable since 1970, represented a set of accessible and predictable rules embodying a right to social security benefit in accordance with law, which was as such protected by Art 36. The Government's policy, implemented since 2004, to increase that requirement to 7 years' residence infringed the entrenched right and therefore needed to be justified under the proportionality test.*

[43] ***This approach requires one to identify the relevant features of the pre-existing system, recognize that a right may exist as crystallized under that system that attracts constitutional protection of Art 36, and then analyze whether that right has been infringed or restricted by a new law, policy or administrative arrangement and, if so, whether the interference with that right is permissible.*** *(Emphasis added.)*

90. On the facts of the present case, s. 85(3) of the Education Ordinance has taken effect before 1 July 1997 and, on the assumption that pension benefits fall within the meaning of 'social welfare' under art.36 of the Basic Law, it shall form part of the 'previous social welfare system' under art.145 of the Basic Law. The new s. 85(4) and 85(5) enacted in 2013 sought to relax, not restrict, rights under s. 85(3) of the Education Ordinance.

91. I am of the view that there is no deprivation of prior rights of the applicant by reason of the amendments to the Education Ordinance in 2013. There is simply no basis for the applicant to argue that he has a constitutionally protected right to social welfare which protects his pension benefits from being vested in the trustee-in-bankruptcy. I am of the view that this is the end of the applicant's argument on art.36 of the Basic Law."

The Court agreed at 1091 that the formulation of labour laws and policies under BL 147 needed not be based on the previous system:

"93. Mr Liu submitted that as public funds are limited, workers' entitlement to welfare benefits and retirement security under art.36 cannot be absolute. In contrast with art.145, the formulation of labour laws and policies under art.147 of the Basic Law need not be based on the previous system. The courts may require the Executive to meet the proportionality test if a worker's entitlement to retirement security is restricted. Since matters relating to the labour force and their retirement security belong to the area of macro-economic policies and the use of public funds, it was submitted that the Executive has a wide margin of discretion in the formulation of labour laws and policies. I agree."

Interush Ltd v Commissioner of Police [2019] 1 HKLRD 892

Background

In November 2013, the Commercial Crime Bureau of Police investigated X1, a company, for promoting an alleged pyramid scheme. Bank of East Asia ("BEA") had investigated X1's account and suspected that the account had been used for illegal activities. The account was suspended by BEA for breach of the parties' merchant agreements. Hang Seng Bank ("HSB") also investigated X1 and a related company X2. It filed a "Suspicious Transaction Report" concerning their accounts with the Joint Financial Intelligence Unit ("JFIU"). The JFIU issued a letter of "no consent" ("Letter") to HSB regarding the latter's dealing with Xs (i.e. the applicants)' accounts under Chapter 27-19 of the Force Procedures Manual ("Manual"). The Manual was an internal document of the police to implement the consent regime. HSB then suspended X1's account. Senior officers of the applicants were arrested for promoting a pyramid scheme. In July 2014, BEA terminated the merchant agreements with X1, withheld the balance of X1's account and made a report to the police. The applicants brought civil proceedings against HSB and BEA. The applicants applied for judicial review, challenging, *inter alia*, the

constitutionality of the consent regime on the principal ground that s. 25 and s. 25A of Organized and Serious Crimes Ordinance (Cap. 455) were inconsistent with their property rights under BL 6 and BL 105 as the provisions failed to provide an express time limit for the expiry of a "no consent" decision. The Judge dismissed the application. The applicants appealed to the CA.

Basic Law provisions in dispute

The major provisions in dispute were BL 6 and BL 105.

What the Court held

The CA rejected the appeal.

The CA held that the consent regime under s. 25A of Cap. 455 did engage the applicants' property rights. In assessing whether constitutional rights were engaged, the Court was concerned with substance and not form. The Letter did not by itself freeze the applicants' accounts but this affected the applicants' use of their money in the bank accounts. Although the "temporary freezing" of the applicants' accounts did not constitute a deprivation of their property, the applicants' use of their property in the nature of debt which had an economic value was affected.

The CA also rejected the argument that the procedures in connection with the Manual were so uncertain that they fell foul of the proportionality requirement. Where the statute imposed an obligation on a public body to take a particular step, it was normally not required to take that step within a particular time and the general rule was that delay was controlled by the application of established public law principles (including the *Wednesbury* test) and not by the court reading in time limits. There was also an implied duty on all persons exercising public power such as the police to act reasonably. Further, the time and the method taken by the police to investigate must depend on the complexity of the case and the way in which the suspect responded to police enquiries.

The applicants argued that in assessing the proportionality of the

consent scheme, the availability of a restraint order, among others, was relevant. In response, the CA found that the availability of the restraint order regime at a later stage did not point towards a consent regime at an earlier stage being disproportionate, when investigations were ongoing. It further recognized that this was an area where the legislative and executive authorities must be accorded with a margin of discretion as to why they had chosen to adopt the measures in such manner.

Applying the standard of "manifestly without reasonable foundation", the CA held that the consent regime was no more than necessary for the legitimate purpose and societal benefit of anti-money laundering. A reasonable balance had been struck between the societal benefits of the consent regime and constitutionally protected rights of the individual. A comparison with the anti-money laundering provisions in other countries was not appropriate. Further, this was where the margin of appreciation came into play, particularly where the court recognized the legislative and executive branches who were the originators of the impugned measure as better placed to assess the appropriate means to advance the legitimate aim espoused.

The CA also held that the access to court right was not engaged because of the judicial remedies available to the applicants by way of judicial review and civil claim against the banks.

What the Court said

The CA held at 923 – 924 that when assessing whether the right under BL 105 was engaged, the courts should look at the substance, not the form of impugned measures:

"6.18 The wording of art.1 of Protocol No 1 of the [European Convention on Human Rights] is different from our art.105, but the overall intention is the same, namely, the protection of an individual in the use of his property. Deprivation of the property must be subject to law. In Hong Kong, a property owner has the right to compensation for unlawful deprivation of his property. … I accept that the 'Letter of No Consent' does not by itself freeze the accounts of the applicants but this letter has affected the use by the applicants of their money in the bank accounts. Although the 'temporary freezing' of the applicants' accounts does not constitute a deprivation of

their property, the *use* by the applicants of their property in the nature of the debt which has an economic value is affected.

6.20 In assessing whether constitutional rights are engaged, the Court is concerned with substance and not form. In line with this principle, the practical impact of the criminal law on the banks affects the right of the applicants to make use of their money deposited with the banks in the form of a chose in action."

The CA adopted the approach as laid down in the CFA case *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 and rejected the argument that property rights were not engaged because of the assumption of risks by the applicants when they entered into a commercial transaction with their banks at 925 – 926:

"6.24 This view was roundly rejected by the Court of Final Appeal. Ribeiro PJ held the focus of the argument is on the phrase 'in accordance with law':

[30] Articles 6 and 105 stipulate that the obligation is to be discharged by providing such protection 'in accordance with law'. That phrase and similar phrases such as 'prescribed by law' *and 'according to law', appear in numerous Articles of the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383).* ***It is well-established that they mandate the principle of legal certainty, requiring the subject matter of the Article to be regulated by laws which are accessible and precisely defined. It follows that the phrase introduces another aspect of protection: Property rights are to be guaranteed by clear and accessible laws, and not, for instance, left to uncharted administrative discretion.***

…

[32] ***I can therefore see no basis for reading the words 'in accordance with law' as qualifying or limiting the protection conferred by Arts.6 and 105. Such an interpretation of the Articles in effect involves the unwarranted insertion of the word 'only' before the phrase in question. Far from diminishing the protection of those Articles, the phrase confers the added protection of legal certainty.*** *(Emphasis added.)"*

6.25 Applying the rationale in *Hysan*, I reject the assumption of risk argument advanced by the respondents as being contrary to the express provisions of arts.6 and 105. They are for the protection of individuals and are not intended to qualify the protection by treating the individuals as having assumed a 'qualified' protection."

The CA held at 929 that the proportionality test laid down by the CFA in *Hysan Development Co Ltd v Town Planning Board*, above, applied to the present case:

"6.33 … The four-step approach is as follows:

(1) whether the intrusive measure pursues a legitimate aim;

(2) if so, whether it is rationally connected with advancing that aim;

(3) whether the measure is no more than necessary for that purpose; and

(4) where an encroaching measure had passed the three-step test, the analysis should incorporate a fourth step asking whether a reasonable balance had been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest resulted in an unacceptably harsh burden on the individual."

The applicants accepted that the consent regime could satisfy the first and second stages of the proportionality analysis. The main contest between the parties was whether the procedures set out in the Manual were so vague as to fall foul of the proportionality requirement. The CA said at 932 – 934:

"6.41 In my view, the absence of 'temporal limit' and lack of guideline arguments by the applicants must be rejected for the following reasons … :

(a) The starting point is that there is an implied duty of all persons exercising public power such as the Police to act reasonably. Mr McCoy [counsel for the respondent] correctly submitted that reasonable suspicion activates the right to arrest or to investigate and such an assessment can only be challenged on the basis that it is *Wednesbury* unreasonable, namely perverse. …

(b) In Hong Kong criminal law, there is no time frame imposed for the investigation of any criminal offence. Section 26 of the Magistrates Ordinance, Cap. 227, of course, requires all summary offences to be charged or summonses to be laid, within six months of the date of the offence having occurred. However, that default provision is itself extended in a number of ordinances in relation to mere summary offences, where the underlying investigatory issues can be more complicated or involve international or Mainland elements, e.g. section 389(1) of the Securities and Futures Ordinance (Cap. 571), extends the time limit for prosecution (and therefore for potential investigation) for three years (after the commission

of the offence). …

(c) There is no time limit at common law for the prosecution of any indictable offence subject, of course, to the power of the Court to stay proceedings by reason that a fair trial could not take place because of delay.

(d) Section 70 of the Interpretation and General Clauses Ordinance (Cap. 1) provides:

'Where no time is prescribed or allowed within which any thing shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.'

The decision making process under the Manual must be subject to this express legislative provision.

(e) The time and the method taken by the Police to investigate must necessarily depend on the complexity of the case (the present case being an example) and the way in which the person under investigation responds to the enquiries by the Police.

(f) The level of precision required of a law 'must depend on the subject matter of the law in question'. …

(g) There are long established authorities that where the statute imposes an obligation on a public body to take a particular step, that does not normally import any requirement to take that step within a particular time and the general rule is that delay is controlled by the application of established public law principles (which include the *Wednesbury* test) and not by the Court reading in time limits …

6.42 For these reasons, I reject the argument that the procedural steps in the Manual are so uncertain that they fall foul of the proportionality requirement."

On the appropriate standard of review, the CA held at 938 – 939:

"6.50 … this being a constitutional challenge, the standard of assessment is whether it is 'manifestly without reasonable foundation'. Applying this standard, my view is that the measure is no more than necessary for the legitimate purpose and societal benefit of anti-money laundering. The consent regime is part and parcel of the measures used to combat organized crime in money laundering. In my view, a reasonable balance has been struck between the societal benefits of the consent scheme and constitutionally protected rights of the individual. It cannot be said that the pursuit of the societal interest results in an unacceptably harsh burden on

the individual.

…

6.52 More importantly again in my view this is where the margin of discretion comes into play, particularly where the Court recognizes the legislative and executive branches who were the originators of the impugned measure as better placed to assess the appropriate means to advance the legitimate aim espoused. I, therefore, reject the applicants' argument that the encroachment on the property rights was disproportionate."

HKSAR v Yu Lik Wai William (余力維) [2019] 1 HKLRD 1149

Background

The two applicants were convicted of joint offences of conspiracy for an agent to solicit an advantage, and dealing with property known or believed to represent the proceeds of an indictable offence.

The prosecution evidence in the case relied heavily on the audio recordings of five meetings that were covertly recorded by the undercover ICAC officers pursuant to three executive authorizations issued by a senior officer of a law enforcement agency on the basis of statements in writing (also known as Type 2 surveillance) and two judge's authorizations issued by a judge on the basis of affidavits (also known as Type 1 surveillance) under the Interception of Communications and Surveillance Ordinance (Cap. 589). The supporting unsworn statements and affidavits used to obtain both types of the authorizations were disclosed to the applicants but with certain parts redacted to conceal the fact that telephone interception had taken place. The applicants had applied for disclosure of the redacted parts and to hold an *ex parte* hearing under s. 61(4) of Cap. 589 to inspect the redacted parts. The applications were refused by the District Court.

The applicants applied for leave to appeal against their convictions, arguing, *inter alia*, that they did not receive a fair trial on the grounds that (i) the disclosure regime under s. 61 of Cap. 589 was unconstitutional; and (ii) the power to issue executive authorization

for Type 2 surveillance by someone who was not a judicial officer or someone who was not capable of acting judicially under s.15(1)(a) of Cap. 589 was unconstitutional.

Basic Law provisions in dispute

The major Basic Law provisions in dispute were BL 30 and BL 87.

What the Court held

The CA held that the disclosure test under s. 61(4) of Cap.589 balanced the need to maintain secrecy with the need to protect the fairness of the trial and did not undermine the twin goals of open justice and a fair trial.

The constitutional right engaged by the measures contained in s. 61 of Cap. 589 was the right to a fair trial under BL 87, BoR 10 and BoR 11(2). This was because s. 61(4) of Cap. 589 significantly altered the common law disclosure regime, and disclosure was a crucial element of a fair hearing. The Court also held that the right to a fair trial was an absolute right. As such, no derogation from it was permitted, although components or elements of a fair trial could be interfered with as long as such interference did not prevent a fair trial from taking place.

The Court held that the *ex parte* procedure under s. 61(4) of Cap. 589 and constraints on the powers of the judge did not lead to an unfair procedure provided the prosecutor conscientiously performed the role of a minister of justice and at all times remained vigilant in protecting the fairness of the trial. Moreover, if the constraints on the judge under s. 61 of Cap. 589 prevented a fair trial, the judge could order a stay of proceedings.

The Court in applying the reasonable necessity test held that the transferal of the disclosure duty from the prosecution to the investigator under s. 61(4) of Cap. 589 was more than necessary, and s. 61(4) was unconstitutional. Notwithstanding the CA's ruling that s. 61(4) was unconstitutional, the CA dismissed the appeal because the prosecution had, independent of the ICAC, concluded that none of the redacted parts was covered by the disclosure test.

In relation to the constitutionality of power to issue executive authorization for Type 2 surveillance under s. 15(1)(a) of Cap. 589, the right to privacy under BL 30 was engaged. The Court held that executive authorizations amounted to an interference with the right to privacy, but since privacy was not an absolute right, it was lawful for the government to make legislations which interfered with the right. The Court held that the use of executive authorizations and unsworn statements in writing were justified given the fluid nature of undercover operations.

The Court took into account the operational efficiency of departments responsible for public safety and security and held that the "manifestly without reasonable foundation" standard should be adopted. The Court further allowed a sufficiently wide margin of discretion to the government on the operational efficiency aspect. Further, as the executive authorization only permitted low levels of intrusiveness into privacy rights, the Court held that the measure of executive authorization was not manifestly without reasonable foundation. The CA concluded that the use of executive authorizations for Type 2 surveillance was constitutional.

What the Court said

The CA held at 1205 that s. 61 of Cap. 589 engaged the right to fair trial: "177. … the right that is engaged by the measures contained in s. 61 is the right to a fair trial under art.87 of the Basic Law and s. 8 arts.10 and 11(2) of the [Hong Kong Bill of Rights Ordinance, Cap. 383] These fair trial articles are engaged because s. 61(4) alters in a significant way the disclosure regime under the common law and, as we have seen, disclosure and openness are integral components of a fair hearing. The s. 61(4) regime alters these components by:

(i) restricting the openness of the hearing;

(ii) limiting what the Judge can do to ensure the fairness of the trial;

(iii) replacing the much wider common law test of disclosure with a narrower statutory test; and

(iv) transferring the duty of disclosure, in relation to the application of the new disclosure test, from the prosecutor to the investigator."

The Court held that the right to a fair trial was an absolute right at 1206:
"179. The right to a fair trial is an absolute right and so no derogation from it is permitted. However, components or elements of a fair trial may be interfered with as long as any such interference does not prevent a fair trial from taking place. An obvious example, around which much case law has developed, is the interference with the presumption of innocence by the creation of reverse burden offences. Another, more relevant, example are the procedures, developed at common law, for resolving claims of public interest immunity in respect of otherwise disclosable material."

The Court held that the *ex parte* procedure in s. 61(4) did not create unfairness at 1209 – 1210:
"192. We shall firstly address the question of whether the *ex parte* procedure in s. 61(4) is a fair procedure since it excludes the defendant from having any role in it, or even from knowing of its existence.

193. We are not persuaded that it does create unfairness simply by virtue of its one-sidedness. The Judge can still look to the interests of a defendant and ensure that they are protected just as he does in the third class of public interest immunity case that was described in described by the English Court of Appeal in *R v Davis*. This is the class of case relating to material where the public interest would be injured even by disclosure that an *ex parte* application is to be made. The Court of Appeal described such cases as highly exceptional because they were contrary to the general principle of open justice in criminal trials."

The Court found that the role of the prosecutor was crucial in ensuring fair trial in the context of disclosure at 1211:
"197. The important contribution that the prosecutor makes to the fairness of the trial in the context of disclosure was the subject of comment by Lord Rodger of Earlsferry in *McDonald (John) v HM Advocate*. He said:

The success of our adversarial system of trial depends on both sides duly performing their respective roles. Of course, a prosecutor must always act as a 'minister of justice' and this means that, when carrying out his duty of prosecuting, the prosecutor must do his best to ensure that the accused receives a fair trial. So the prosecutor must be alert to examine and re-examine the Crown case in the light of known and emerging lines of defence and must disclose any disclosable material of which he is aware or becomes aware while carrying out that duty. Disclosure is simply one aspect of the overall duty to prosecute the case fairly.

198. We are satisfied that so long as the prosecutor conscientiously performs the role of a minister of justice and at all times remains vigilant in protecting the fairness of the trial, the *ex parte* procedure and the constraints on the powers of the Judge should not, by themselves alone, lead to an unfair procedure."

The Court held at 1221 that transferring the disclosure duty from the prosecution to the investigator was more than necessary:

"231. In deciding what is necessary we do not see that there is any particular margin of discretion relevant to this issue. We appreciate the concern of the respondent and we understand its argument that anything less than the regime created will undermine and imperil the legitimate aim that s. 61 seeks to achieve. But we are not persuaded by this argument. We apply the reasonable necessity test and in doing so we conclude that the intruding measure of transferring the disclosure duty from the prosecution to the investigator is more than is necessary. We are satisfied that retaining the common law position whereby the duty is imposed upon the prosecution is 'a significantly less intrusive and equally effective measure' in achieving the legitimate aim of maintaining secrecy of telephone interception."

Taking into account the nature of undercover operations, the Court held at 1235 – 1236 that the use of executive authorizations under s. 15(1)(a) of Cap. 589 was justified:

"268. We have not been provided with any material elaborating on the justification of operational efficiency but, in our view, that is largely a matter of common sense.

269. Participant monitoring is very much the covert surveillance tool of undercover operations. Undercover operations are themselves very fluid in their nature and not always readily controlled, no matter how much planning may go into them. Their, at times, opportunistic nature can be inconsistent with the delay involved in obtaining a judge's authorization. The need for a more speedy avenue for obtaining an authorization is no doubt also the reason why the statement in writing is an unsworn document."

The Court held at 1239 that the "manifestly without reasonable foundation" standard was applicable:

"284. Given that this proportionality analysis involves taking into account the operational efficiency of departments who are responsible for public safety and security we are of the view that we should employ the 'manifestly

without reasonable foundation' standard. In doing so we allow a sufficiently wide margin of discretion to the government on the operational efficiency aspect of its justification for the impugned measure. However, this is not done just to cater to the needs of our law enforcement agencies. We bear in mind the words of Lord Steyn in the *Attorney General's Reference (No. 3 of 1999)* case quoted earlier in this judgment. Where he said that 'the purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property'. There is, consequently, a much broader interest at stake; an interest which is a truly public interest as it involves the whole of Hong Kong."

The Court held at 1239 that the use of executive authorization for Type 2 surveillance was consistent with the privacy right:

"286. When the justification for the measure is taken together with the after-the-event judicial supervision safeguards that are in place and regard is also had to the fact that the executive authorization only permits low levels of intrusiveness into the privacy rights of others, we are of the view that the measure of executive authorization is one that cannot be said to be manifestly without reasonable foundation. The use of executive authorizations for Type 2 surveillance is, therefore, constitutional."

HKSAR v Godson Ugochukwu Okoro [2019] 2 HKLRD 451

Background

The appellant was convicted of trafficking in a dangerous drug contrary to s. 4(1)(a) and (3) of the Dangerous Drugs Ordinance (Cap. 134) and was sentenced to 6 years and 4 months' imprisonment. His role in the drug trafficking was a courier. He appealed against the sentence arguing, *inter alia*, that the sentencing guidelines for drug trafficking unduly restricted the court's discretion in varying sentences for the role and circumstances of individual defendants, and in the case of drug couriers such as the appellant, imposed mandatory minimum sentences which were manifestly disproportionate to the criminality involved, and thus were arbitrary and in violation of BL 28 and BoR 5(1).

Basic Law provisions in dispute

The major provision in dispute was BL 28.

What the Court held

The CA held that the sentencing guidelines did not unduly restrict the Court's discretion in varying sentences for the role and circumstances of individual offenders who were couriers. The sentencing guidelines, which provided important principles and guidance to the Court, were not fixed or compulsory and the Court had the flexibility to depart from the sentencing guidelines when there were "special circumstances" or "good reasons" warranting it.

The Court further held that the sentencing guidelines for couriers were not disproportionate to the criminality involved. The sentencing guidelines were specifically formulated to address the range of sentences that should be imposed on a courier or a storekeeper.

For the foregoing reasons, the Court held that the sentencing guidelines for drug trafficking were not arbitrary and did not violate BL 28 or BoR 5(1).

What the Court said

The CA examined the scope of the protection under BL 28 and BoR 5(1) at 466:

"54. The Court of Final Appeal in *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415 examined the scope of the protection afforded by BL 28 and BOR 5(1). In the joint judgment of Li CJ and Ribeiro PJ, with whom the other judges agreed, they noted that the terms between the two articles differed and that BL 28 expressly provides a constitutional guarantee against arbitrary 'imprisonment' and not just against arbitrary 'arrest or detention', as in the case of BOR 5(1). They further noted that 'imprisonment' covers incarceration pursuant to a sentence lawfully imposed by a court after a criminal conviction. They explained that BL 28 extends its protection to offenders lawfully in prison after conviction by a court, and as it prohibits 'arbitrary or unlawful' imprisonment, it envisages that a term of imprisonment lawfully ordered may nonetheless be 'arbitrary'. It followed, therefore, that such arbitrariness may reside in the substantive rules of criminal liability whose breach led to the imprisonment ordered.

55. They noted that this conclusion was consistent with interpretations of the equivalent article under the International Covenant on Civil and Political Rights to that of BOR 5(1), prohibiting 'arbitrary arrest or detention', where it was held that arbitrariness is not excluded merely because detention is pursuant to lawful procedures, and that it was not to be equated with 'against the law', but rather should be interpreted more broadly to include elements of 'inappropriateness, injustice and lack of predictability'."

As to the test of arbitrariness, the Court held at 468:
"59. In summary, whether an arrest or detention was 'arbitrary' turned on the nature and extent of any departure from the substantive and procedural standards involved. It would be arbitrary if it was 'capricious, unreasoned, or without reasonable cause', that is, if it was made without reference to an adequate determining principle or without following proper procedures, and if the laws imposed sentences of imprisonment that were manifestly disproportionate."

The Court explained at 473 that the formulation of sentencing guidelines was done by the CA in the exercise of its judicial power:
"81. Sentencing guidelines are formulated and evolved by the Court of Appeal as part of its supervisory role to ensure equal and consistent justice in the treatment and punishment of offenders for particular offences. This is done by the Court in the exercise of its judicial power when adjudicating cases. See Ch.IV, s. 4 of the Basic Law. Sentencing guidelines therefore form an essential part of the common law and provide a lawful means by which an offender is sentenced. See BL 8 and BL 18 which recognize that the common law is part of the laws in force in the Hong Kong Special Administrative Region.

82. Sentences passed by a court in accordance with the sentencing guidelines for drug trafficking are lawfully imposed and therefore the issue is whether such sentences are arbitrary because they infringe BL 28."

The Court held at 476 that the sentencing guidelines were not arbitrary and were consistent with BL 28 and BoR 5(1):
"96. This proposition is largely based on the premise that the sentencing guidelines cannot take into account the role of an offender, such as that of a courier, and therefore sentences imposed on couriers under the sentencing guidelines are manifestly disproportionate to the criminality involved. However, as already noted, the sentencing guidelines were specifically

formulated to address the range of sentences that should be imposed on a courier or a storekeeper. It, therefore, cannot be argued that it is arbitrary because of this factor. The complaint is really not one of arbitrariness, but of the application of the sentencing guidelines to couriers, but that has been confirmed to be the case in *Kilima*. The fact that a defendant may have played a more significant role in the trafficking of drugs would and should be visited with an upward adjustment of the sentencing guidelines. It cannot be said that the sentencing guidelines, as they apply to drug couriers, are 'capricious, unreasoned or without reasonable cause.'

97. In summary, this Court has reconfirmed in *Kilima* that the sentencing guidelines of *Lau Tak Ming* and A*bdallah* apply to drug couriers. They provide important principles and guidance to sentencing courts, which still retain the flexibility to depart from them where there is a good reason to do so, and impose an appropriate sentence in the circumstances of the offence and the offender. They are not arbitrary and do not violate BOR 5(1) or BL 28."

Comilang Milagros Tecson v Director of Immigration (2019) 22 HKCFAR 59

Background

The appellants were (i) mothers ("mothers") who were foreign nationals with no right to enter or remain in Hong Kong; and (ii) their minor children ("children") who were either Hong Kong resident or permanent resident.

The mothers applied for a further extension of permission to remain in Hong Kong to take care of the children. Their applications were refused by the Director of Immigration ("Director") for the reason that they did not fall within any of the categories recognized under the immigration policy and that no exceptional circumstances existed to justify an extension on humanitarian or compassionate grounds.

The appellants challenged the Director's refusal by judicial review, arguing that he failed to take into account and give effect to, *inter alia*: the right of abode in BL 24; the right to raise a family freely in BL

37; article 10 of the ICESCR; and article 3 of the CRC (collectively, "Rights").

Both the CFI and the CA ruled against the appellants and held that the Rights were not engaged due to the immigration reservation in s. 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383), which provided that "[a]s regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation."

Basic Law provisions in dispute

The major provisions in dispute were BL 24, BL 37, BL 39, BL 41 and BL 154(2).

What the Court held

The CFA dismissed the appeals and held that the Director was not duty bound to take into account the Rights when exercising his discretion to refuse permission to stay to the mothers since such rights were disengaged by s. 11 of Cap. 383.

The CFA held that s. 11 of Cap. 383 operated at the constitutional level and the intention of s. 11 was to give effect to the stipulation in BL 39 that the content of the ICCPR "as applied to Hong Kong", i.e. subject to the immigration reservation, was to be incorporated. S. 11 of Cap. 383 excluded immigration legislation governing entry into, stay in and departure from Hong Kong, and the application of such legislation, from the scope of the Hong Kong Bill of Rights. Also, the Basic Law must be interpreted as a coherent whole, consistently with s. 11. S. 11 was therefore not confined to rights in the Hong Kong Bill of Rights but extended by necessary implication to cognate rights in the Basic Law in the specified immigration context.

Accordingly, the CFA held that s. 11 of Cap. 383 excluded reliance on the rights under the Hong Kong Bill of Rights asserted by the mothers. Also, since the mothers were not Hong Kong residents but only had visitor status, the rights claimed by them under BL 37 through BL 41

were constitutionally subject to s. 11.

The CFA held that s. 11 of Cap. 383 also barred the children's reliance on rights under the Hong Kong Bill of Rights. The exception under s. 11 did not focus on who had the fundamental rights but rather on the content of the decision itself and to whom the decision specifically related. It would frustrate the evident purpose of s. 11 and BL 39 if a person who had no right to enter and remain was able to circumvent the immigration exception by relying on someone else's right. The need for a coherent approach was especially cogent given the recognized necessity for strict and effective immigration control that had long been the policy adopted in Hong Kong.

The CFA also held that the children could not rely on the cognate rights in the Basic Law whether they were invoked directly or in connection with the enjoyment of another right. S. 11 of Cap 383 was clearly linked to BL 154(2) as both were for the purpose of enabling effective immigration control. This demonstrated that the drafters of the Basic Law thought it appropriate to exclude all other rights, be they in the Hong Kong Bill of Rights or the Basic Law, in the context of an immigration decision. The family rights under BL 37 were no greater than the rights conferred under the Hong Kong Bill of Rights. Given the constitutional status of s. 11 through BL 39, it was untenable to contend that BL 37 was not subject to immigration reservation when viewed as part of a coherent scheme of rights.

The CFA further held that the rights conferred to the children by BL 24 did not enable a permanent resident to require the Director to permit another person to enter the HKSAR.

The CFA also held that the appellants' reliance on the ICESCR and CRC was untenable. These were international treaties and, unless made part of Hong Kong domestic law by legislation, their provisions did not confer any rights or obligations on individual citizens. Even if it was accepted that provisions of the ICESCR and CRC had been incorporated into domestic legislation by the Basic Law and the Hong Kong Bill of Rights, those rights were subject to the immigration reservation in s. 11 of Cap. 383.

What the Court said

The CFA explained the relationship between s. 11 and BL 39 at 80 – 81:

"24. Against this background, our courts have consistently held that by enacting HKBORO, the fundamental rights guaranteed by the BOR set out in Pt. II of the Ordinance, have not merely been incorporated domestically but, by virtue of BL 39, incorporated as part of the Basic Law and given constitutional effect. This is the consequence of BL 39(2) which protects the rights and freedoms of Hong Kong residents against restrictions which 'contravene the provisions of the preceding paragraph of this Article', such provisions being for present purposes the ICCPR as applied to Hong Kong and incorporated via HKBORO.

…

26. By tracking the wording of the immigration reservation, the intention of s. 11 is plainly to give effect to BL 39's stipulation that the content of the ICCPR 'as applied to Hong Kong' — in other words, as applied subject to the immigration reservation — is to be incorporated. …

27. In giving effect to the immigration reservation as part of the implementation process mandated by BL 39, s. 11 lays down a specific exception limiting the scope of the BOR rights incorporated in the Basic Law. As Ma CJ points out in *GA v Director of Immigration*:

The intention of s. 11 is to except the applicability of the BOR to the aforesaid aspects of immigration control [i.e. entry into, stay in and departure from Hong Kong].

…

… the provision is intended to except immigration legislation that deals with each stage of a person's stay in Hong Kong, as stated earlier, from entry through his or her stay in Hong Kong, to departure.

28. Section 11 therefore operates at the constitutional level. It excludes from the scope of the provisions of the BOR given constitutional effect by BL 39, immigration legislation governing entry into, stay in and departure from Hong Kong and the application of such legislation."

The CFA explained at 81 – 83 that the scheme of constitutional rights under the Basic Law must be interpreted as a coherent whole, consistently with s. 11 of Cap. 383:

"30. While the limitation created by s. 11 expressly addresses the scope of HKBORO, this Court has held that the scheme of constitutional rights laid

down by the Basic Law, both in its Chapter III and in the BOR incorporated via BL 39, must be interpreted as a coherent whole, consistently with s. 11.

…

33. Stressing that s. 11 operates at the constitutional level, the Court held that the rights conferred on non-residents by BL 41 'in accordance with law' are to be understood as constitutional rights operating as a coherent scheme consistently with the immigration reservation. It would not be coherent for s. 11, given constitutional force by BL 39, to exclude non-residents from relying on BOR 5(1) (as it clearly does) while construing BL 41 to permit such non-residents to rely on similar rights under BL 28 in the same excepted immigration context.

…

35. It was therefore held that the exception created by the immigration reservation, given constitutional force by BL 39, is not confined in its operation to rights in the BOR but extends by necessary implication to cognate rights in the Basic Law, requiring them to be interpreted consistently with s. 11 as laying down a coherent scheme in the specified immigration context."

The CFA considered the scope of the Basic Law rights enjoyed by the mothers at 84:

"41. Regardless of that, since the appellant mothers are not Hong Kong residents but only have visitor status here, their rights under Chapter III of the Basic Law are rights enjoyed pursuant to BL 41 and the scope and effect of those rights is qualified by s. 11 which … operates at the constitutional level.

42. Thus, the rights claimed by the appellant mothers under BL 37 through BL 41 are constitutionally subject, via BL 39, to the s. 11 exception. The appellants were therefore forced to argue that *Ghulam Rbani v Secretary for Justice* was wrongly decided in this respect. We reject that submission. … it would be incoherent to hold that s. 11, given constitutional effect by BL 39, excludes reliance on the relevant rights in the BOR (BOR 14, 19 and 20) while permitting reliance on cognate rights under BL 37 via BL 41. There is no indication that the drafters of the Basic Law were intending to give greater rights to challenge immigration decisions than were available under the provisions of the BOR prior to the Basic Law coming into effect on 1 July 1997."

At 87 – 88, the CFA accepted the Director's submission that it would frustrate the evident purpose of BL 39 if a person who had no right to enter and remain was able to circumvent the s. 11 exception by relying on someone else's right:

"57. As a matter of purpose, we accept the Director's submission that it would frustrate the evident purpose of s. 11 and BL 39 if a person who has no right to enter and remain is able to circumvent that position by saying: 'I'm relying on someone else's rights'. An interpretation of the children's rights to such effect would lead to incoherence in the constitutional scheme. The need for a coherent approach is especially cogent given the recognized necessity for strict and effective immigration control that has long been the policy adopted in Hong Kong. …"

The CFA rejected the children's argument based on BL 37 at 88 – 90:

"58. Even if they are excluded from relying on rights under the BOR, the children appellants' case proceeds on the basis that they can nevertheless rely on independent family rights arising under the Basic Law. These Basic Law rights are not, they contend, subject to the s. 11 exception and so are rights which the Director is duty bound to take into account when exercising any discretion under the Immigration Ordinance in respect of the mothers which may have an effect on the children's enjoyment of those family rights.

59. The correctness of this contention depends on the interpretation of the Basic Law and the particular rights relied upon. … For the following reasons, we would reject the appellants' contention so far as it was based on BL 37.

60. First, the approach to interpretation of the Basic Law is now well established. … Provisions of the Basic Law are to be construed in the light of their context and purpose. The context of a provision of the Basic Law includes other provisions of the Basic Law and the provisions of the ICCPR as applied to Hong Kong. Context and purpose are to be considered in the first instance and not merely in the case of ambiguity.

61. Applying those settled principles, the Basic Law rights relied upon must be construed as a coherent whole together with BL 39 and s. 11 which, for the reasons explained above, is given constitutional status. Although s. 11 in terms only applies textually to the rights set out in HKBORO, by necessary implication it limits the application of cognate rights in the BL whether they are invoked directly or in connection with the enjoyment of another right. …

62. Secondly, there is a clear link between s. 11 and BL 154(2) as reflected in the constitutional jurisprudence of this Court. …

63. Contrary to the appellants' submission that the geographical circumstances of Hong Kong are only relevant and to be considered at the stage of conducting a proportionality exercise to determine if an infringement of a constitutional right is justified, the linkage between BL 154(2) and s. 11 demonstrates that, save for non-derogable rights, the drafters of the Basic Law thought it appropriate to exclude all other rights, be they in the BOR or the Basic Law, in the context of a decision relating to entry into, stay in or departure from Hong Kong by someone without the right to enter and remain.

64. Thirdly, the appellants' argument entails accepting that the coming into effect of the Basic Law effected a radical change to the BOR. From 1991, when HKBORO was enacted, until 1 July 1997, the rights under the BOR did not apply in the immigration context falling within s. 11 and the law before 1 July 1997 was reflected in *Hai Ho Tak v Director of Immigration*. There is no discernible basis for concluding that the intention of the drafters of the Basic Law was, through the coming into effect of the Basic Law, to impose new and stricter limits on the discretion of the Director of Immigration in making immigration decisions. Such a conclusion would fly in the face of the clear theme of continuity reflected in the Basic Law. …

65. Even on the appellants' case, the family rights under BL 37 are no greater than the rights conferred under the BOR 14, 19 and 20. That being the case, given the constitutional status of s. 11 through BL 39, it is untenable to contend that BL 37, viewed as part of a coherent scheme of rights, is not subject to the immigration reservation. …"

The CFA rejected the children's argument which was based on BL 24 at 90 – 91:

"66. Faced with these difficulties in respect of reliance on Basic Law rights which reflect similar rights to those protected under the BOR, the appellants submitted that their reliance on BL 24 was different in that there is no parallel between the rights conferred by BL 24 and those conferred in the BOR.

…

69. This novel argument in respect of BL 24 cannot be accepted. The rights conferred by BL 24 do not enable a permanent resident to require the Director to permit any other person to enter Hong Kong. As pointed out above, the decision being challenged is the Director's decision refusing an extension of stay to the non-resident mothers, whether viewed from the

perspective of the children or their mothers. While cast as an argument based on BL 24, the appellants' case depends in reality on an asserted family unity right necessarily incidental to the enjoyment of the right of abode. The challenge both by the mothers and their children is to the Director's exercise of his powers of immigration control covered by s. 11 on the footing that they have a right (under BOR 14, 19 or 20 and BL 37) not to have their family relationship disrupted, the practical consequence of which is said to be the endangering of their children's BL 24 right to permanent residence. As indicated above, by necessary implication, s. 11 limits the application of rights in the BOR and cognate rights in the Basic Law (here the family unity rights) whether they are invoked directly or in connection with the enjoyment of another right (here BL 24). The appellants' attempt to hermetically seal BL 24 from the BOR and the rest of the Basic Law, including BL 37, BL 39 and BL 154(2) must fail."

Win More Shipping Ltd v Director of Marine (unreported, 2 May 2019, HCAL 1520 of 2018)

Background

The applicant was the registered owner of a motor tanker ("Vessel"). The Vessel flied the Hong Kong flag, being the regional flag of the HKSAR directly below the national flag of the PRC. The Vessel called at Yeosu Port, South Korea. The Yeosu Regional Office, Ministry of Oceans and Fisheries, Republic of Korea carried out an investigation into the Vessel's suspected involvement in illicit ship-to-ship transfers of petroleum products to a North Korean vessel in breach of certain resolutions of the United Nations Security Council ("Security Council") Resolution, and thus the Vessel remained impounded at the Yeosu Port.

The applicant submitted to the Director of Marine ("Director") certain proposed preventive measures to be adopted in respect of the Vessel ("Proposed Measures") and asked the Director to make a request to the United Nations Security Council Sanctions Committee ("Committee") for the release of the Vessel ("Proposed Request"). After further correspondence, the applicant put forward certain revisions to the

Proposed Measures ("Final Proposed Measures"). The Director, through the Office of the Commissioner of the Ministry of Foreign Affairs, submitted to the CPG, amongst others, the applicant's Proposed Measures and Final Proposed Measures together with comments ("Comments") of the Marine Department ("MD") thereon for consideration by the CPG. The Comments stated, amongst others, that "MD finds it hard to be convinced that adequate arrangements can be made by the Ship Owner with these proposed measures to prevent the Tanker from contributing to future violations of the resolutions concerned."

Pursuant to paragraph 11 of Resolution 2375 (2017) ("Resolution 2375") adopted by the Security Council, it was decided that "all Member States shall prohibit their nationals, persons subject to their jurisdiction, entities incorporated in their territory or subject to their jurisdiction, and vessels flying their flag, from facilitating or engaging in ship-to-ship transfers to or from [Democratic People's Republic of Korea ("DPRK")]-flagged vessels of any goods or items that are being supplied, sold or transferred to or from the DPRK."

Furthermore, pursuant to paragraph 9 of Resolution 2397 (2017) ("Resolution 2397") adopted by the Security Council, it was decided, amongst others, that "Members States shall seize, inspect, and freeze (impound) any vessel in their ports, and may seize, inspect, and freeze (impound) any vessel subject to its jurisdiction in its territorial waters, if the Member State has reasonable grounds to believe that the vessel was involved in activities, or the transport of items, prohibited by resolutions … and … after six months from the date such vessels were frozen (impounded), this provision shall not apply if the Committee decides, on a case-by-case basis and upon request of a flag State, that adequate arrangements have been made to prevent the vessel from contributing to future violations of these resolutions".

By this application for judicial review, the applicant sought to challenge, amongst others, the failure or refusal or delay of the Director to make a request to the Committee for the release of the Vessel from detention pursuant to paragraph 9 of Resolution 2397.

Basic Law provisions in dispute

The major provisions in dispute were BL 13, BL 105, BL 124 and BL 125.

What the Court held

The CFI dismissed the application for leave to apply for judicial review.

The CFI held that the HKSAR was not a "State" or the "flag State" of the Vessel, and had no standing or locus to make any relevant request pursuant to paragraph 9 of Resolution 2397. The CFI further held that the making of a request to the Committee pursuant to paragraph 9 of Resolution 2397 was a matter of "foreign affairs" relating to the HKSAR and, pursuant to BL 13, was therefore a matter for which responsibility lied with the CPG to the exclusion of the HKSAR unless it was something which the CPG authorized the HKSAR to conduct on its own in accordance with the Basic Law.

The CFI held that BL 124 and BL 125 did not enable the HKSAR to make a relevant request to the Committee pursuant to paragraph 9 of Resolution 2397. The CFI held that in deciding whether to make a request to the Committee pursuant to paragraph 9 of Resolution 2397, one would reasonably expect the CPG to take into account the views of the Director, being the official in Hong Kong responsible for shipping management and regulations generally.

The CFI also held that the Director had not done anything which could be described as depriving the applicant of its right to use the Vessel in contravention of BL 105. The CFI held that the applicant's loss of its right to use the Vessel arose from the fact that its charterer had, or was suspected to have, used the vessel in a manner in breach of Resolution 2375.

What the Court said

The CFI summarized the premise of the applicant's case at paragraph 41:

"41. It is apparent that the Applicant's case … is based on the premise that

the Director has a 'statutory' duty under Article 94 of the United Nations Convention on the Law of the Sea ('the Convention') to make a request to the Committee for the release of the Vessel pursuant to paragraph 9 of Resolution 2397. On this basis, the Applicant seeks an order of mandamus to compel the Director to make a request to the Committee for the release of the Vessel."

The CFI then rejected the applicant's complaint for several reasons. At paragraphs 46 – 48, the CFI held that the making of a request to the Committee pursuant to Resolution 2397 was a matter of "foreign affairs" relating to the HKSAR and, under BL 13, was a matter for which responsibility lied with the CPG:

"46. … paragraph 9 of Resolution 2397 contemplates that a request would be made by a 'flag State'. The HKSAR is not a 'State', or the 'flag State' of the Vessel, and has no standing or locus to make any relevant request pursuant to that paragraph. Such request can properly be made only by the Central People's Government.

47. … the making of a request to the Committee pursuant to paragraph 9 of Resolution 2397 is, in my view, a matter of 'foreign affairs' relating to the HKSAR and is therefore a matter for which responsibility lies with the Central People's Government to the exclusion of the HKSAR under Article 13(1) of the Basic Law, unless it is something which the Central People's Government authorizes the HKSAR to conduct on its own in accordance with the Basic Law under Article 13(4).

48. Under Article 124 of the Basic Law, the HKSAR shall maintain Hong Kong's previous system of shipping management and shipping regulation, including the system for regulating conditions of seamen (sub-paragraph (1)), and shall, on its own, define its specific functions and responsibilities in respect of shipping (sub-paragraph (2)). Further, under Article 125 of the Basic Law, the HKSAR is authorized by the Central People's Government to continue to maintain a shipping register and issue related certificates under its legislation, using the name 'Hong Kong, China'. None of these powers enables the HKSAR to make a relevant request to the Committee pursuant to paragraph 9 of Resolution 2397. Article 13(4) of the Basic Law has no application to the present case."

At paragraph 49, the CFI held that the Director was not the applicant's "mouthpiece" in submitting the applicant's request to the Committee via

the CPG:

"49. … [Counsel for the applicant] advanced a different argument on behalf of the Applicant … namely, that the Director should transmit the Applicant's request to the Committee via the Central People's Government 'without comment and accompanied with only factual information about the measures taken in Hong Kong to implement the requirements of R2397', or in a 'neutral way', and furthermore the Director 'should not invite the CPG to express its views on the request' … I do not consider that it can seriously or sensibly be argued that the Director's role, when forwarding the Applicant's request to the Central People's Government with a view to it being submitted to the Committee, is confined to acting effectively as the Applicant's 'mouthpiece' only. It is, in my view, entirely a matter for the Central People's Government to decide whether to make a request to the Committee pursuant to Paragraph 9 of Resolution 2397. In deciding whether to make such a request, a relevant consideration by the Central People's Government would obviously be whether the request stands any chance of being approved by the Committee. That depends, in turn, on whether adequate arrangements have been made to prevent the Vessel from contributing to future violations of the relevant resolutions. In order to form a view on this issue, one would reasonably expect the Central People's Government to take into account the views of the Director, being the official in Hong Kong responsible for shipping management and regulations generally, who should be in a good position to comment on the adequacy or effectiveness of the Final Proposed Measures to prevent the Vessel from contributing to future violations of the relevant resolutions of the Security Council. It also stands to reason that the Central People's Government would expect the Director to have conducted a detailed assessment of the Applicant's Final Proposed Measures and forward her assessment of those measures to the Central People's Government for its consideration. If the Applicant considers the Director's assessment to be mistaken or incorrect, it is at liberty to put forward its counter arguments to the Central People's Government. As a matter of fact, the Applicant did write directly to the Department of Treaty and Law of the Ministry of Foreign Affairs of the PRC on 6 March 2019 making detailed submissions (in a 13-page letter) on the Director's Comments. I do not consider the procedure adopted by the Director to be unlawful, irrational, or unfair in the circumstances of the present case."

At paragraph 50, the CFI further held that the Director had not done

anything which could be described as depriving the applicant of its right to use the Vessel:

"50. Lastly, it seems to me to be clear that that Director has not done anything which can be described as depriving the Applicant of its right to use the Vessel in contravention of Article 105 of the Basic Law. The Applicant's loss of its right to use the Vessel arises from the fact that its charterer had, or is suspected to have, used the vessel in a manner in breach of Resolution 2375 …"

Yeung Chu Wing v Secretary for Justice [2019] 3 HKLRD 238

Background

The applicant brought judicial review proceedings seeking a declaration that ss. 118C, 118G, 118H, 118I, 118J(1), 118K and 141(c) of the Crimes Ordinance (Cap. 200) were unconstitutional on the grounds that they were discriminatory against male homosexuals and thus be inconsistent with the right to equality before the law under BL 25 and the right to equal protection of law under BoR 22.

The respondent accepted that ss. 118G, 118H, 118J(1) and 118K of Cap. 200 (the "Uncontested Provisions") were inconsistent with BL 25 and BoR 22. The respondent also accepted that ss. 118C, 118I and 141(c) of Cap. 200 (the "Contested Provisions") read as they were would amount to *prima facie* differential treatment of male homosexuals and thus inconsistent with BL 25 and BoR 22, and submitted that the Court could apply a remedial interpretation of the Contested Provisions to render them constitutional.

Basic Law provisions in dispute

The major provision in dispute was BL 25.

What the Court held

The Court held that the Uncontested Provisions were inconsistent with BL 25 and BoR 22, and therefore discriminatory and should be struck down for the following reasons: (i) all of the Uncontested Provisions were concerned with illegal sexual activities between homosexual men only and amounted to differential treatment between male homosexuals and heterosexuals or female homosexuals; (ii) s. 118H further treated a homosexual boy under the age of 16 less favourably since an under 16 participant would not be criminally liable for the same or similar act between heterosexuals; (iii) s. 118J(1) mirrored s. 118F(1) of Cap. 200 which had been struck down by the CFA and the scenarios pertinent to s. 118J(1) could be covered by the common law offence of outraging public decency or s. 148 of Cap. 200; and (iv) there was not any justification for any of the Uncontested Provisions.

The Court adopted a remedial interpretation of the Contested Provisions so that they could comply with BL 25 and BoR 22. The applicant's challenge against the Contested Provisions was dismissed.

What the Court said

The Court held at 249 – 250 that the Uncontested Provisions were unconstitutional:

"16. In the present case, the Uncontested Provisions are all concerned with illegal sexual activities between homosexual men *only*. … the Uncontested Provisions amount to differential treatment which target only male homosexuals (but not heterosexuals or female homosexuals):

(1) Both sections 118G and 118K target only male homosexuals but no comparable offences exist for heterosexuals or female homosexuals. Applying the reasoning in *Yau Yuk Lung* where the Court of Final Appeal held at paragraphs 23-30 that section 118F(1) (concerning the offence of homosexual buggery otherwise than in private) was discriminatory in targeting male homosexuals, in the absence of any justification, these two provisions are discriminatory and should be declared unconstitutional.

(2) Section 118H also targets male homosexuals but no comparable offences exist for heterosexuals or female homosexuals. The provision further treats a homosexual boy under the age of 16 less favourably in that for the same

or similar act between heterosexuals (eg, under sections 118D, 122, 123, and 124), the under 16 participant would not be held criminally liable. This amounts to direct discrimination. Given there exists a similar offence under section 146(1) (indecent conduct towards a child under 16) with a heavier penalty which could deal with the same mischief, section 118H is discriminatory in nature unless there are other justifications for it.

(3) Section 118J(1) only targets male homosexuals but no comparable offences exist for heterosexuals. Given that section 118J(1) mirrors section 118F(1) which has been struck down in *Yau Yuk Lung* and the fact that the scenarios pertinent to section 118J(1) can be covered by the common law offence of outraging public decency or section 148, section 118J(1) should be declared unconstitutional in the absence of any justification.

17. The SJ has not provided any justification for any of the Uncontested Provisions. In the premises, these provisions are inconsistent with the right to equality protected under BL 25 and BOR 22 and discriminatory in nature. They are unconstitutional and should be struck down.

In adopting remedial interpretation to the Contested Provisions, the Court held at 250 – 251:

"19. It is now firmly established that the court has the implied power to adopt a remedial interpretation for the purpose of making a statutory provision Basic Law or BOR compliant. Striking down a legislative provision for being not constitutional is appropriate only where a remedial interpretation is impossible. The rationale is that the court interferes less with the exercise of legislative power than it would if it cannot engage in a remedial interpretation. …

20. The court in adopting a remedial interpretation may make use of the well-known techniques of severance, reading in, reading down and striking out …

21. It is indeed a matter of judicial *duty* to adopt a remedial interpretation of an infringing provision, although it could only do so as far as it is possible …

22. In this respect, the court should not make decisions for which they are not equipped such as where their choice amongst several ways of making a provision Basic Law or BOR compliant may involve issues that should be deliberated on by the legislature … Further, it is not permissible for the court to reach an interpretation in the name of remedial interpretation the result of which is wholly different from what the parliament has intended.

23. The tool of remedial interpretation therefore has its limits at least to the extent that the court should not make decisions on matters that should be deliberated on and determined by the legislature, in particular where … there are a number of ways to make the infringing provision constitutional.

24. The court must and can only exercise that power in accordance with established principles."

The Court held at 252 that it could not adopt a remedial interpretation which would in effect create a new offence:

"30. In my view, properly considered, the question of 'new offences' are effectively part of the limitations as summarized by the Court of Appeal in *Keen Lloyd*, in that the court cannot adopt remedial interpretations which (a) will go beyond or are inconsistent with a fundamental feature of the legislative scheme or its essential principles; and (b) amount to the courts making decisions for which they are not equipped, such as choosing between various options which requires legislative deliberation or adopting a meaning which has important practical repercussions which the court is in no position to evaluate."

Leung Chun Kwong v Secretary for Civil Service (2019) 22 HKCFAR 127

Background

The appellant was an immigration officer. He was married to A, his same-sex partner, in New Zealand under New Zealand law in 2014. A was denied access to spousal medical and dental benefits under the Civil Service Regulations and the appellant was unable to include A in the joint tax assessment of salaries tax under the Inland Revenue Ordinance (Cap. 112) since same-sex marriage was not recognized as marriage under Hong Kong law ("the two decisions"). The appellant challenged the two decisions by judicial review proceedings, arguing that he had been unlawfully discriminated on the ground of his sexual orientation. The CFI allowed the appellant's challenge with regard to the civil service spousal benefits but dismissed his case against the joint tax assessment. The Secretary for the Civil Service ("Secretary") appealed

and the appellant cross-appealed to the CA. The Secretary's appeal was allowed and the appellant's cross-appeal was dismissed at the CA. The appellant appealed to the CFA.

Basic Law provisions in dispute

The major provision in dispute was BL 25.

What the Court held

The CFA held that in discrimination cases, the correct approach was, first, to determine whether there was differential treatment on a prohibited ground and, only if this could be demonstrated, then, to examine whether it could be justified applying the justification test.

The CFA accepted that the protection of the institution of marriage in Hong Kong, being the voluntary union for life of one man and one woman to the exclusion of all others, was a legitimate aim.

The CFA ruled that the denial of the appellant's employment and tax benefits was not rationally connected to the said aim of protecting the institution of marriage in Hong Kong for the following reasons: (i) it could not logically be argued that any person was encouraged to enter into an opposite-sex marriage in Hong Kong because a same-sex spouse would be denied those benefits; (ii) it was circular to argue that the benefits should be restricted to opposite-sex married couples simply because it was the only form of marriage recognized in Hong Kong law; (iii) the lack of any rational connection was further evidenced by the HKSARG's published policy as an equal opportunities employer, and the fact that Cap. 112 did not serve the purpose of promoting marriage as defined under Hong Kong law; and (iv) there was no administrative necessity as the appellant could demonstrate without any difficulty that he and A were parties to a same-sex marriage having the characteristics of publicity and exclusivity of a heterosexual marriage.

The CFA concluded that the two decisions could not be justified because of the lack of any rational connection, hence it was not necessary to consider the proportionality issue.

What the Court said

The CFA explained the nature of discrimination at 139 – 140:

"16. It is a cardinal principle of a system governed by the rule of law that all persons are equal before the law and that principle is enshrined in the Basic Law of the Hong Kong Special Administrative Region and the Hong Kong Bill of Rights …

17. … unlawful discrimination is 'fundamentally unacceptable' … However, the law has to draw distinctions between different situations or types of conduct, to which different legal consequences may attach. Principles have therefore been established 'for determining when distinctions drawn by legal or administrative measures are rational and fair and when such distinctions constitute unlawful discrimination' …

18. It is now acknowledged that there are three forms of differential treatment, which may be described as discriminatory. In summary, these are: (i) direct discrimination where like cases are not treated alike; (ii) direct discrimination where unlike cases are treated in the same way; and (iii) indirect discrimination where an ostensibly neutral criterion is applied which operates to the significant prejudice of a particular group …"

The CFA discussed at 140 – 141 the correct approach in discrimination cases:

"19. In every alleged case of discrimination, the correct approach is, first, to determine whether there is differential treatment on a prohibited ground and, only if this can be demonstrated, then, to examine whether it can be justified. Differential treatment which is justified does not constitute unlawful discrimination. However, where differential treatment is not justified it is unlawful discrimination …

20. The initial step of determining whether there is differential treatment on a prohibited ground essentially involves a comparison exercise. …

Accordingly, the initial step must be for the complainant to demonstrate that he or she has been treated differently to a person in a comparable position and that the reason for this difference in treatment can be identified as a prohibited ground, such as race, religion or sexual orientation. Only after this is demonstrated does it then become necessary to consider whether such differential treatment is lawful. If the treatment is held to be unlawful, then the complainant will be entitled to remedies.

21. In order to determine whether differential treatment is unlawful,

the courts apply the same test used to determine if incursions into constitutionally protected rights are lawful … When applied in the context of an analysis of constitutionality, that test is usually referred to as the 'proportionality' test. When applied in the context of determining whether differential treatment is unlawful, that test is usually referred to as the 'justification' test.

22. The justification test consists of four steps or elements: (i) does the differential treatment pursue a legitimate aim; (ii) is the differential treatment rationally connected to that legitimate aim; (iii) is the differential treatment no more than necessary to accomplish the legitimate aim; and (iv) has a reasonable balance been struck between the societal benefits arising from the application of differential treatment and the interference with the individual's equality rights …"

On the characteristics of publicity and exclusivity of the same-sex marriage, the CFA held at 145 – 148 that:

"38. The question of whether treatment is relevantly different such as to require justification is always a matter that is context dependent. The Court observed in *QT*:

[44] The second major objection to the Director's first argument is that the identification of comparators does not of itself permit a proper conclusion to be reached as to whether a given difference in treatment is or is not discriminatory. As Lord Walker pointed out in ***R (Carson) v Secretary of State for Work and Pensions****, the real issue in the case at hand was:*

'… why the complainant had been treated as she had been treated. Until that question was answered, it was impossible to focus properly on the question of comparators.'

…

40. The present case is concerned with the conferment of financial benefits on spouses in the contexts of employment and taxation. Those benefits are conferred on the basis of marriage. The nature of the relationship between the appellant and [A] is one of same-sex marriage valid under the law of the place where it was entered into. It is a relationship which has the same characteristics of publicity and exclusivity which distinguish a heterosexual marriage.

41. The characteristic of publicity is established by the formality of the marriage entered into by the couple under the laws of New Zealand and by the New Zealand Marriage Certificate issued to them under the Births,

Deaths, Marriages, and Relationships Registration Act 1995. …

42. Similarly, in Hong Kong, there are detailed provisions for publicity of a marriage prescribed in the Marriage Ordinance. …

43. The characteristic of exclusivity of the appellant's and [A]'s same-sex marriage is constituted by the consequence of their marriage under New Zealand law …

44. Exclusivity is also an essential characteristic of a marriage under Hong Kong law. …

45. … the material fact that the marriage certificate establishes is that the appellant and [A] are in a valid same-sex marriage under the laws of New Zealand, where such marriages are lawfully recognized. It is not just the relationship between the appellant and [A] that is important for the purposes of determining if there is differential treatment in respect of the Benefits Decision and the Tax Decision. A mere relationship (whether opposite-sex or same-sex) will not have the same readily identifiable characteristics of publicity and exclusivity described above that positively identify a same-sex married couple as being in materially the same position as an opposite-sex married couple. …

46. For these reasons, the respondents' concession of differential treatment requiring justification was properly made. In the context of the present case, concerned with financial spousal benefits, a same-sex married couple and an opposite-sex married couple are relevantly analogous and the appellant was treated differently to a heterosexual married man in respect of the two challenged decisions on the ground of his sexual orientation."

The CFA held that "prevailing views of the community on marriage" were not relevant to a consideration of the justification exercise at 150 – 151:

"55. The other argument that can be shortly disposed of is the suggestion that prevailing views of the community on marriage are relevant to identifying a legitimate aim and justification of differential treatment. In the Court of Appeal, Poon JA said 'protecting and not undermining the status of marriage in light of the prevailing views of the community on marriage … is plainly a legitimate aim.' …

56. … in *W v Registrar of Marriages*, Ma CJ and Ribeiro PJ rejected the absence of a majority consensus as a reason for rejecting a minority's claim as being inimical in principle to fundamental rights. They quoted with approval the extra-judicial comments of the Chief Justice of Ireland, Murray

CJ, in the following terms:

… The use of consensus as an interpretive tool is inherently problematic, not only because of any perceived inconsistency in the application of the doctrine by the [European Court of Human Rights] but fundamentally because the very application of a doctrine of consensus by a court required to adjudicate on fundamental rights begs important questions of legitimacy. How can resort to the will of the majority dictate the decisions of a court whose role is to interpret universal and indivisible human rights, especially minority rights?

…

57. It follows therefore that the 'prevailing views of the community on marriage' as identified by Poon JA, even if this can confidently be gauged in the first place, are simply not relevant to a consideration of the justification exercise. …"

The CFA held that the protection of the institution of marriage was a legitimate aim at 152:

"61. There can be no doubt, therefore, that the protection of the institution of marriage in Hong Kong, being the voluntary union for life of one man and one woman to the exclusion of all others, is a legitimate aim and that differential treatment directed to that aim may be justified if the other elements of the justification test are satisfied. To this extent, … the protection of the institution of marriage as defined under, and in its context within, the laws of Hong Kong is part of 'the local legal landscape and societal circumstances' for the purposes of the issue of proportionality and/or justification.

62. The real contest between the parties in this appeal was the question of whether the differential treatment of the appellant was rationally connected to that legitimate aim of the protection of the traditional family in the circumstances of the present case and it is that to which we now turn."

The CFA held that there was no rational connection between the differential treatment and the legitimate aim at 152 – 157:

"65. … the relevant context is the conferment of financial benefits on spouses in the contexts of employment and taxation. Traditionally, those benefits were not conferred in order to protect the institution of marriage or even to encourage people to marry one another. Instead, they were provided to acknowledge the economic reality of the family

unit with one member of a couple, usually the male, being the principal breadwinner for the family and, in the case of employment within the civil service, to encourage the recruitment and retention of staff. Medical and dental benefits were therefore extended to a civil servant's spouse and dependent children as a perquisite of employment. Joint tax assessment helped to lessen the overall tax burden on a couple living together and meeting expenses traditionally from one source of earned income. It was (and is) no part of the Secretary's or Commissioner's functions that they were responsible for protecting (much less promoting) the institution of marriage. The Secretary's principal responsibility was (and is) the efficient administration of government and that of the Commissioner was (and is) the raising of revenue through the taxation system.

66. In these circumstances … one looks to see how denying the appellant spousal employment benefits (the Benefits Decision) and the right to elect for joint assessment (the Tax Decision) is rationally connected to the legitimate aim of protecting or not undermining the institution of marriage in Hong Kong.

67. It is here that the respondents' case faces great difficulty. How is it said that allowing [A] medical and dental benefits weakens the institution of marriage in Hong Kong? Similarly, how does permitting the appellant to elect for joint assessment of his income tax liability under [Cap. 112] impinge on the institution of marriage in Hong Kong? It cannot logically be argued that any person is encouraged to enter into an opposite-sex marriage in Hong Kong because a same-sex spouse is denied those benefits or to joint assessment to taxation.

…

71. … Restricting these financial benefits to opposite-sex married couples on the ground that heterosexual marriage is the only form of marriage recognized in Hong Kong law is circular and therefore proceeds on the fallacious basis rejected by the Court in *QT* … It amounts to the application of a self-justifying reasoning process and denies equality to persons of different sexual orientation who are accepted to be in a relevantly analogous position. Ultimately, a line is merely drawn without any further attempt to justify it.

72. In any event, we are unable to accept the proposition that heterosexual marriage would be undermined by the extension of the employment and tax benefits to same-sex married couples. …

73. The suggested rational connection between the differential treatment and the legitimate aim is all the more illogical in respect of the Benefits Decision when one takes into account the Government's published policy as an equal opportunities employer …

74. It is difficult to see how the Secretary can adhere to the published employment policies dedicated to the elimination of discrimination on the ground of sexual orientation by denying to a married same-sex couple the same employment benefits that are available to a married opposite-sex couple.

75. The contention that there is a rational connection between the Tax Decision and the legitimate aim of protecting the institution of marriage as understood under Hong Kong law (i.e. heterosexual and monogamous) is, similarly, further undermined by the fact that s. 2(1) of [Cap. 112] recognizes a polygamous marriage in that it extends the definition of 'marriage' to that between a man and his principal wife. [Cap. 112] simply does not serve the purpose of promoting traditional heterosexual monogamous marriage.

76. Nor is it necessary to restrict the spousal employment and tax benefits to those in an opposite-sex marriage as recognized under Hong Kong law in order to draw a 'bright line' in order to achieve administrative workability. … the appellant in this case can demonstrate without any difficulty that he and [A] are parties to a same-sex marriage having the characteristics of publicity as a formal marriage and exclusivity that distinguish it from a mere relationship. There is therefore no administrative difficulty posed by the appellant's case and the 'bright line' argument provides no rational justification for upholding the Benefits Decision or the Tax Decision.

77. For these reasons, we conclude that the respondents are unable to justify the differential treatment in the present case in respect of the Benefits Decision and the Tax Decision."

HKSAR v Lew Mon Hung (劉夢熊) (2019) 22 HKCFAR 159

Background

The appellant was convicted of attempting to pervert the course of

justice. In 2013, the appellant was suspected for having conspired with others to commit an offence contrary to the Prevention of Bribery Ordinance (Cap. 201). He was arrested and interviewed by the Independent Commission Against Corruption ("ICAC") ("Investigation"). The appellant sent emails and letters to the CE and the Commissioner of the ICAC ("Commissioner") in which he protested his innocence and asked them to stop the Investigation "or else a political bomb will be detonated". The appellant was subsequently charged with one count of "attempting to pervert the course of justice" ("Charge").

The appellant was convicted of the Charge in the District Court and the conviction was upheld in the CA, which subsequently certified three questions of law of great and general importance on whether the CE and the Commissioner had the legal power to stop an ongoing ICAC investigation. The Appeal Committee granted leave to appeal on the basis of an additional question, which it regarded as a prior question to the other questions. This prior question was:

"Where an accused seeks to cause a person to stop or otherwise interfere with a criminal investigation, is it incumbent on the prosecution, on a charge of attempting to pervert the course of justice, to establish that the person approached by the accused could, by the lawful exercise of a legal power he possesses, stop or interfere with the criminal investigation in order to prove that the accused's act had a tendency to pervert the course of justice?" ("First Question")

Basic Law provisions in dispute

The CFA considered BL 43(1), BL 48 and BL 57.

What the Court held

The CFA held that whether a defendant's act had the tendency to pervert the course of justice, which was one of the general principles in proving the *actus reus* of the offence of attempting to pervert the course of justice, was a question of fact in each case. On this issue, the CFA ruled that the appellant's act plainly had the necessary tendency to pervert

the course of justice since the Commissioner was directly and most relevantly connected with the Investigation by virtue of his position and the CE, being the head of the HKSAR under BL 43(1) and the person to whom the Commissioner was accountable under BL 57, was also a relevant person connected with the Investigation. The CFA held that whether the CE and the Commissioner had the legal power to terminate the Investigation was not important on the facts of this case given the reality of the situation and the influence they had on the handling or disposal of the Investigation due to their respective positions.

The First Question was answered in the negative and therefore the other questions did not arise.

What the Court said

At 171 – 172, the CFA held that the appellant's acts of threatening and intimidating the CE and the Commissioner plainly involved a tendency to pervert the court of justice:

"31. … The Chief Executive and the Commissioner are, respectively, the head of the HKSAR[24] and the head of the ICAC.[25] Moreover, the Chief Executive is the very person to whom the Commissioner is accountable in respect of his work.[26] In my view, writing to them asking them to stop an ongoing ICAC investigation, with the threat that otherwise a huge political bomb would be detonated, plainly involves a tendency to pervert the course of justice …

33. Secondly, by virtue of his position, the Commissioner was directly and most relevantly connected with the ICAC investigation. So far as the Chief Executive is concerned, he is the person to whom the Commissioner is accountable. Moreover, he is the head of the HKSAR. He is plainly a relevant person connected with the ICAC investigation.

34. To suggest, as the appellant did, that in order for the approaches to them to have a tendency to pervert the course of justice, the Chief Executive and the Commissioner must have the legal power to stop the investigation, is to overlook the reality of the situation (regardless of whether, as a matter of law, they do or do not have the legal power to terminate the

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24 Article 43(1) of the Basic Law.

25 Section 5(1) of the ICAC Ordinance.

26 Article 57 of the Basic Law; s. 5(1) and (2) of the ICAC Ordinance.

investigation). Given the unique constitutional and legal position of the Chief Executive, he is undoubtedly in a position to influence or otherwise affect the Commissioner's and, through the Commissioner, his officers' handling of the investigation, if not effectively to stop it altogether. For instance, he may seek to persuade the Commissioner, or to put pressure on him, to take steps or adopt courses that are favourable to the appellant. That the Chief Executive may or may not be successful in what he seeks to do is not the point. In my view, what he can do (if he wants to or is forced to) would be quite sufficient to constitute a tendency to pervert the course of justice, particularly when one remembers that the attempt to pervert the course of justice need not be successful …"

Chong Yu On v Kwan SH Susan [2020] 2 HKLRD 407

Background

The applicant lodged claims against three judges of the High Court (the respondents) under the Disability Discrimination Ordinance (Cap. 487) in the District Court, alleging that they had discriminated against him on the ground of his disability in the adjudication of a case to which he was a party. The respondents successfully applied to strike out the applicant's claim on the basis that they were protected by judicial immunity under BL 85 and that the claims, which did not disclose any reasonable cause of action and had incurable defects, could not be saved by an amendment to the pleadings. The District Court also decided that the applicant could not make the claims by applying to join the Judiciary as a respondent. The applicant subsequently applied to the CA for leave to appeal.

Basic Law provisions in dispute

The major provision in dispute was BL 85.

What the Court held

The CA held that the applicant had failed to explain why the respondents

were not to be protected by BL 85. The CA also held that protection conferred by BL 85 on members of the Judiciary could not be avoided by commencing actions against the Judiciary. The CA further held that the phrase "the performance of their judicial functions" in BL 85 would cover also the hearings and decisions made on procedural matters by members of the judiciary.

What the Court said

The CA held at 410 – 413 that:

"9. On 12 July 2002, the court stated in *Ma Kwai Chun v Queeny K Y Au-Yeung*, HCA 771/2002 the following on the immunity of members of the judiciary:

[13] The entire provision of Article 85 of the Basic Law reads as follows: 'The courts of the Hong Kong Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.' Generally speaking, Article 85 is a constitutional guarantee of the Hong Kong's judicial independence, and the inclusion of judicial immunity for the members of the judiciary in this provision is not incidental …

[17] As regards the definition of the phrase 'the performance of their judicial functions', I am of the view that it should be given a liberal interpretation. In the English translation, the sentence is: 'members of the judiciary shall be immune from legal action in the performance of their judicial functions.' Judicial functions are not limited to deciding cases. In view of society's demands and expectations of the judicial system, most of the time, judges and other judicial officers have to conduct hearings on case management and to make decisions on related arrangements, so as to ensure the fair disposal of cases quickly and effectively. The hearings and decisions made on procedural matters by members of the judiciary are actually part of the process of the court in the enforcement of judgments which are inseparable. Therefore, I am of the view that these acts can be included in the performance of judicial functions …

11. We also agreed with the analysis in *T v The Judiciary* [2018] HKDC 650 that the claimant could not avoid the protection conferred by art.85 of the Basic Law on members of the judiciary by way of commencing actions against the Judiciary, otherwise the judge might be plagued by the losing litigant with claims against the Judiciary, and this would render the

protection otiose."

Chow Ting v Teng Yu Yan Anne (Returning Officer) [2019] 4 HKLRD 459

Background

The petitioner intended to run for the LegCo by-election for the Hong Kong Island Geographical Constituency ("By-election"). In January 2018, she submitted a duly completed nomination form ("Nomination Form") to the respondent, the Returning Officer for the By-election, in which she made a declaration to uphold the Basic Law and pledge allegiance to the HKSAR ("Declaration") as required by s. 40(1)(b)(i) of the Legislative Council Ordinance (Cap. 542). The petitioner also submitted a signed confirmation form, in which she declared and confirmed that she had made the Declaration in the Nomination Form and that she understood the contents of that Declaration and the legal consequences of making a false declaration. Apart from a request for documentary proof of the petitioner's renouncement of her UK citizenship, the respondent raised no further inquiries with the petitioner regarding the validity of the Nomination Form or her nomination as a candidate. Thereafter, by a "Notice of Decision as to Validity of Nomination" dated 27 January 2018 ("Decision"), the respondent informed the petitioner that she had declared the petitioner's nomination as a candidate invalid on the ground that the respondent was not satisfied that the petitioner had duly complied with s. 40(1)(b)(i) of Cap. 542. The respondent relied on the petitioner's affiliation with Demosistō (香港眾志) and adherence to the doctrine of "democratic self-determination" (民主自決), which she considered to be inconsistent with the principle of "one country, two systems" under the Basic Law.

The petitioner lodged an election petition challenging the Decision. Three principal questions arose for determination, namely (1) whether it was a substantive requirement that a person, to be validly nominated as a candidate in a LegCo election for a geographical constituency,

should genuinely intend to uphold the Basic Law and pledge allegiance to the HKSAR in addition to having signed a declaration to that effect; (2) whether a returning officer for a geographical constituency should, before he or she decided that a nomination of a candidate was invalid, give the candidate a reasonable opportunity to respond to the materials intended to be relied upon by the returning officer for the decision that the nomination was invalid; and (3) in the event the court held that the respondent ought to have given the petitioner such reasonable opportunity but failed to do so, whether (a) the irregularity should be regarded as a "material" irregularity; and (b) if "yes", whether the court should nevertheless dismiss the election petition on the ground that giving the petitioner an opportunity to present her case would have made no difference to the outcome.

Basic Law provisions in dispute

The major provisions in dispute were BL 1, BL 26, BL 104. The CFI also considered BL 12 and BL 159(4).

What the Court held

The CFI held that the requirement of a candidate in a LegCo election to uphold the Basic Law and pledge allegiance to the HKSAR under s. 40(1)(b)(i) of Cap. 542 was not a mere "formal" requirement to be satisfied by the candidate by simply signing a declaration in the Nomination Form. This issue was conclusively settled by paragraph 1 of the interpretation of BL 104 issued by the NPCSC on 7 November 2016 ("BL 104 Interpretation"), which was binding on the Court.

The CFI also held that the respondent's failure to give the petitioner a reasonable opportunity to respond was contrary to her right to be heard under BoR 10.

The CFI considered that the nature of the Decision related to the right of a Hong Kong permanent resident to stand as a candidate in a LegCo election as protected under BL 26 and BoR 21 which was not absolute and could be restricted by law. The CFI held that the respondent's failure to give the petitioner a reasonable opportunity to put forward her

case before making the Decision was a "material" irregularity in the By-election. In any event, matters including, amongst others, whether the petitioner genuinely and truthfully intended to uphold the Basic Law and pledged allegiance to the HKSAR ought to be considered by the respondent after hearing the petitioner's representations and prior to making the Decision, and not retrospectively after the event.

For the foregoing reasons, the CFI allowed the election petition.

What the Court said

At 470, the CFI held that the issue of whether the requirement under s. 40(1)(b)(i) of Cap. 542 was a "formal" or "substantive" requirement was conclusively settled by paragraph 1 of the BL 104 Interpretation:

"22. … In any event, I consider this issue to be conclusively settled by paragraph 1 of the BL 104 Interpretation. That interpretation is binding on this court. Mr Shieh submits that the BL 104 Interpretation only concerns the oath taken upon assuming the office of a member of the Legislative Council, but does not touch on *candidacy for election*. This submission seems to me to be contrary to the express statement in paragraph 1 of the BL 104 Interpretation, *viz* '… also the legal requirements and precondition for standing for election in respect of or taking up the public office specified in the Article'. Mr Shieh further argues that if the BL 104 Interpretation purports to impose substantive requirements on candidacy for election, it would go beyond the permissible powers of the NPCPC. Leaving aside the question of the court's competence to determine this issue, there is, in any event, no expert evidence on PRC law on the scope or width of the interpretative powers of the NPCSC. In the absence of such evidence, I do not see how Mr Shieh's argument can even get off the ground.

23. In all, I reject the contention that the requirement of a candidate in a Legislative Council election to uphold the Basic Law and pledge allegiance to the HKSAR under s. 40(1)(b)(i) of the Ordinance is a mere 'formal' requirement which is satisfied by the candidate by simply signing a declaration to that effect in the nomination form."

At 474 – 477, considering that the nature of the Decision related to the right under BL 26 and BoR 21, the CFI held that the respondent's failure to give a reasonable opportunity to the petitioner was a "material" irregularity:

"32. In my view, the principle of natural justice is an important principle which ought generally to be observed in administrative decisions. Moreover, one has to bear in mind the nature of the decision under consideration. It relates to the right of a Hong Kong permanent resident to stand as a candidate in a Legislative Council election, which is a right protected by Article 26 of the Basic Law and Article 21 of the Hong Kong Bill of Rights. While the right is not absolute and can be restricted by law, the deprivation of such right is a serious matter. I consider that the Returning officer's failure to give Ms Chow a reasonable opportunity to put forward her case before she made the Decision is a 'material' irregularity in the By-election.

…

39. Had the Returning Officer afforded Ms Chow an opportunity to put forward her case and elicited a response from Ms Chow along the lines of [Ms Chow's] Explanation, it might well be the case that the Returning Officer would still have rejected it as being incompatible with the principle of 'one country two systems', and concluded that Ms Chow did not genuinely and truthfully intend to uphold the Basic Law and pledge allegiance to the HKSAR. However, that is a matter for the Returning Officer to decide, at least in the first instance. In this regard, I note that even with the Explanation now proffered by Ms Chow, the Returning Officer has not expressed a view on whether it is incompatible with the principle of 'one country two systems' or the principle that the HKSAR is an inalienable part of the People's Republic of China. Neither has the Returning Officer stated that she would have come to the same conclusion even if she had received and considered Ms Chow's Explanation before making the Decision. In any event, these matters ought to be considered by the Returning Officer after hearing Ms Chow's representations and prior to making the Decision, and not retrospectively after the event."

At 476, the CFI also held that the legal fact that the HKSAR was an inalienable part of the PRC as stated in BL 1 had to be accepted by anyone who wished to assume the public office of a LegCo member and the concept of referendum had no basis under the legal system in Hong Kong:

"36. … The starting point must be the fundamental principle that the HKSAR is an inalienable part of the People's Republic of China. This is stated in art.1 of the Basic Law. Regardless of whether the Basic Law will apply for only 50 years as from 1 July 1997, or whether it may continue to apply (with or

without modification) after 30 June 2047, this starting point is a legal fact which underlines the establishment of the HKSAR under the Basic Law and has to be accepted by anyone who wishes to assume the public office of a member of the Legislative Council. Any person who advocates for the independence of Hong Kong, or for a process of 'self-determination' by Hong Kong People (in the ordinary sense in which that expression is used), whether before or after 30 June 2047, cannot genuinely and truthfully intend to uphold the Basic Law and pledge allegiance to the HKSAR.

37. It is also important to bear in mind that Hong Kong law does not provide for important issues to be determined by 'referendum'. The concept of referendum has no basis under our legal system. In any event, to advocate the determination of Hong Kong's future by a constitutionally effective, or binding, referendum by Hong Kong people could potentially lead to the secession or independence of Hong Kong and would therefore be incompatible with the fundamental principle that the HKSAR is an inalienable part of the People's Republic of China."

MK v Government of HKSAR [2019] 5 HKLRD 259

Background

The applicant, who was a female Hong Kong permanent resident and a lesbian, and her same-sex partner wished to marry in Hong Kong, or enter into a form of legally recognized civil union or registered partnership should such framework be available in Hong Kong. The applicant applied for judicial review on the ground that the Marriage Ordinance (Cap. 181) and the Matrimonial Causes Ordinance (Cap. 179) were unconstitutional for inconsistency with BL 25, BL 32, BL 37 and/or BL 39 and/or BoR 1, BoR 14, BoR 15, BoR 19 and/or BoR 22 to the extent that they denied same-sex couples the right to marry; and HKSARG's failure to provide a legal framework for the recognition of same-sex relationships under Cap. 181 and Cap. 179 constituted a violation of those articles of the Basic Law and the BoR.

Basic Law provisions in dispute

The major provision in dispute was BL 37.

What the Court held

Having regard to the legislative context of Basic Law both at the time of promulgation and at the time of coming into effect, and reading with the Hong Kong Bill of Rights as a whole, the CFI held that the word "marriage" under BL 37 should be understood in the traditional sense of being a union between a man and a woman.

The Court held that since same-sex couples did not qualify to enjoy the marriage right specifically dealt with under BL 37, applying the maxim of *generalia specialisbus non derogant*, they could not derive any further marriage-related rights from other general and non-specific articles under the Basic Law.

The CFI further held that the right enshrined in BoR 14 was negative in nature and the Government bore no positive legal obligation in establishing a legal framework for recognition of same-sex relationships. Whether there should be such a legal framework was a matter for the legislators and the CFI was reluctant to exercise powers outside its judicial functions.

What the Court said

At 269 – 274, the CFI held that BL 37 protected heterosexual marriage only:

"14. BL 37 states generally that the freedom of 'marriage' of Hong Kong residents shall be protected by law, without specifying whether the concept of marriage in that article refers to heterosexual marriage only or includes same-sex marriage. Nevertheless, it is, in my view, clear that the expression 'marriage' in BL 37 is a reference to heterosexual marriage only, for the following reasons:

(1) The state of the domestic legislation at the time of the adoption of the Basic Law is an important aid to its proper interpretation, because it provides the context for a proper understanding of the Basic Law and because of the important theme of continuity of the Basic Law. At the

time of the promulgation of the Basic Law on 4 April 1990 and at the time that the Basic Law came into effect on 1 July 1997, Hong Kong law did not provide for or recognize same-sex marriage.

(2) At the time of the promulgation of the Basic Law and at the time that the Basic Law came into effect, no country in the world provided for or recognized same-sex marriage. Netherlands was the first country in the world to provide for same-sex marriage in 2001. It would be unreal to attribute to the draftsman of the Basic Law an intention that the word 'marriage' in BL 37 would include a same-sex marriage …

15. … Although BL 37 refers to the freedom of marriage of 'Hong Kong residents', instead of 'men and women', as being protected by law, I do not consider this choice of words in BL 37 could lead to the conclusion that the article also protects the freedom (or right) of same-sex couples to marry, in view of the fact that 'marriage' was, at the time of the promulgation of the Basic Law, clearly understood in the traditional sense of being a union between a man and a woman.

…

21. … I am unable to see anything in either the context or the purpose of BL 37 which would support a reading of that article as extending the right of marriage to same-sex couples. BL 37 is found in Chapter III of the Basic Law titled the 'fundamental rights and duties of the residents' of Hong Kong. Apart from BL 24(1) and (2) (which define the 'permanent residents' and 'non-permanent residents' of the HKSAR), each article in that Chapter of the Basic Law sets out certain constitutionally protected right(s) of Hong Kong residents. The scope of the right(s) as protected by any article is defined by the language of that article. BL 37 refers to two different, but related, rights, namely (i) the 'freedom of marriage' (婚姻自由) and (ii) the 'right to raise a family' (自願生育的權利). The latter right, as expressed in the authentic Chinese text, plainly has no application to same-sex couples. In *Gurung Deu Kumari v Director of Immigration* [2010] 5 HKLRD 219 at [54]–[58], A Cheung J (as he then was) interpreted Hong Kong residents' right to raise a family in BL 37 as exempting them from 'the one child policy' practised on the Mainland under art.49 of the Constitution of the People's Republic of China. In *Li Nim Han v Director of Immigration* [2012] 2 HKC 299, Lam J (as he then was) agreed with A Cheung J's construction of BL 37. This interpretation of the second limb of BL 37 was affirmed by the Court of Appeal in *Comilang v Director of Immigration* [2018] 2 HKLRD 534 at [61]–[70]. In my view, the context and purpose of BL 37 is against the interpretation … that the article

protects the right of same-sex couples to marry. ”

At 274 – 277, the CFI considered if an “updated interpretation” of BL 37 to include same-sex couples was justified:

“22. … I accept as correct in principle that legislation, including the Basic Law, may, in appropriate circumstances, be given an ‘updated interpretation’ …

23. … although an updated interpretation of legislation may be made to meet the changing or contemporary needs and circumstances of the society and relevant international developments:

(1) there must be shown strong and compelling local reasons for the court to depart from what has been generally understood to be the law on a matter as fundamental as the marriage institution which has its basis in the social attitudes of the community;

(2) the court should not use the technique of updating interpretation to introduce or make a new policy on a social issue;

(3) the court should exercise the power of updating interpretation with great caution where the new interpretation has far reaching consequences or ramifications; and

(4) the court should not make an updated interpretation if the language of the legislation is not capable of bearing the new meaning sought to be given.

24. … The evidence before the Court is not, in my view, sufficiently strong or compelling to demonstrate that the changing or contemporary social needs and circumstances in Hong Kong are such as would require the word ‘marriage’ in BL 37 to be read as including a marriage between two persons of the same sex. On the other hand, it is obvious that were the Court to ‘update’ the meaning of ‘marriage’ to include a same-sex marriage, it would be introducing a new social policy on a fundamental issue with far reaching legal, social and economic consequences and ramifications. It is, I consider, beyond the proper scope of the functions or powers of the Court, in the name of interpretation, to seek to effect a change of social policy on such a fundamental issue. In all, I am not convinced that an updated interpretation of the word ‘marriage’ in BL 37 to include a same-sex marriage is justified.”

At 279 – 285, the CFI held that same-sex couples could not derive such right from other articles of the Basic Law or BoR which concerned other rights if they did not enjoy any right of marriage under BL 37:

"32. If, as I consider it to be the case, MK does not enjoy any right of marriage under BL 37, being the article in the Basic Law which deals specifically with the marriage right of Hong Kong residents, she cannot derive such right from other articles of the Basic Law or Hong Kong Bill of Rights which concern other rights such as the right to equality under BL 25/BOR 1/BOR 22, the right of privacy, family and home under BOR 14, or the freedom of thought, conscience and religion under BL 32/BOR 15. *Generalia specialisbus non derogant* is a maxim which is applicable to the interpretation of constitutions. Accordingly, if a specific marriage protection clause *(lex specialis)* in a constitution or human rights instrument does not confer the right of marriage on same-sex couples, other general articles in that constitution or human rights instrument providing for other rights cannot give rise to such right.

…

43. … In so far as BL 37 and BOR 19 are concerned, I consider it to be clear that they protect only the right of opposite-sex couples to marry, and those articles constitute the relevant *lex specialis* precluding the right to marriage from being accorded to same-sex couples under other articles of the Basic Law and/or the Hong Kong Bill of Rights …"

Chee Fei Ming v Director of Food and Environmental Hygiene [2020] 1 HKLRD 373

Background

The applicants were Falun Gong ("FLG") practitioners who had held a number of "static demonstrations" at 26 public locations which fell within the Director of Food and Environmental Hygiene ("Director")'s purview under s. 104A(1)(b) of the Public Health and Municipal Services Ordinance (Cap. 132). Displaying publicity materials on the 26 public locations without first obtaining the Director's written permission was an offence under s. 104A(2) of Cap. 132. The Director delegated power under s. 104A(1)(b) to the Lands Department which processed applications in accordance with a published Management Scheme. The 26 public locations were not spots designated under the Management

Scheme. The evidence was that had there been an application in relation to the undesignated spots, the application would be considered by the Director with reference to the object of the statutory control and the Management Scheme on a case-by-case basis. No application for permission had ever been made by the applicants. In April 2013, the Food and Environmental and Hygiene Department ("FEHD") commenced enforcement action and removed the publicity materials from the 26 public locations. The applicants commenced judicial review proceedings arguing, *inter alia*, that the enforcement action did not satisfy the "prescribed by law" requirement and s. 104A(1)(b) constituted unlawful restriction of their right to freedom of expression and demonstration protected by BL 27, BoR 16 and BoR 17.

The CFI ruled in favour of the applicants and held that s. 104A of Cap. 132 did not satisfy the "prescribed by law" requirement. The CFI, however, did not make any ruling on the proportionality issue. The respondent appealed on the "prescribed by law" issue; and the applicants sought a declaration that s. 104A(1)(b) of Cap. 132 did not satisfy the proportionality test.

Basic Law provisions in dispute

The major provisions in dispute were BL 27 and BL 39.

What the Court held

The CA rejected the CFI's holding that s. 104A of Cap. 132 had failed the "prescribed by law" requirement under BL 39. Pursuant to the "prescribed by law" requirement, the law must be adequately accessible and formulated with sufficient precision to enable the citizen to regulate his conduct and to foresee to a reasonable degree the consequences of a particular course of action.

The CA found that the statutory scheme under s. 104A of Cap. 132 conferred a discretion on the Director to grant written permission, but did not *per se* infringe the "prescribed by law" requirement as long as the law indicated with sufficient clarity the scope of such discretion and the manner of its exercise and provided adequate and effective

safeguards against arbitrary interference.

The CA found that upon reading s. 104A to s. 104C of Cap. 132, a citizen could reasonably foresee the legal consequences of displaying publicity materials without written permission of the Director. In assessing whether the foreseeability requirement was satisfied, the CA held that the law must be examined with a holistic approach, taking into account not only the statutory provisions, but also the common law together with the published materials setting out the boundaries of an administrative discretion, and examining how the law was administered, including the effectiveness of judicial supervision through judicial review.

The CA found that given the nature of the power under s. 104A(1)(b) of Cap. 132, which was applicable to a wide range of public spaces, a large variety of potential users, and purposes for which posters and bills might be displayed, it was inevitable that the statutory provision had to be worded in a general manner. The CA held that the statutory objects stated in the relevant scheme, namely, protecting the cityscape, balancing the use of public space by different segments of the citizenry, preventing chaos and conflicts in the competition for such space and promoting road safety, had provided sufficient guidance for proper exercise of the discretion by the court to prevent arbitrary interference with the display of banners or posters, including display for a static demonstration.

The CA held that while the Management Scheme was the primary mode of control exercised by the Director under s. 104A(1)(b) of Cap. 132, the Director must have a residual discretion, having regard to policy considerations embodied in the Management Scheme, to grant permission for applications to display publicity materials on spots not designated by the Management Scheme. The CA held that the Management Scheme provided relevant guidance to an applicant in relation to spots outside the Management Scheme, and with guidance from the Management Scheme, the exercise of the residual discretion by the Director on a case-by-case basis was not arbitrary.

The CA also rejected the applicants' proportionality argument as there was no effective proportionality challenge by reference to the content-

based screening criteria in the Management Scheme.[1]

What the Court said

The CA set out the principle of the "prescribed by law" requirement at 389:

"23. The law on this requirement, which stems from art. 39 of the Basic Law and arts. 16 and 17 of the HKBOR, is not in serious dispute. In *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245 at [49], the European Court of Human Rights set out the two requirements flowing from the concept 'prescribed by law':

… First, the law must be adequately accessible: the citizen must be able to have an indication that it is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Against, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

The CA held at 390 that the CFA's guidance on "foreseeability" in *Leung Kwok Hung v HKSAR* should be followed:

"27. In *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at [29], the majority of the Court of Final Appeal had this to say:

A law which confers discretionary powers on public officials, the exercise of which may interfere with fundamental rights, must give an adequate indication of the scope of the discretion. The degree of precision required of the law in this connection will depend upon the particular subject matter of the discretion.

28. … this Court adverted to an important facet of this requirement being

1 The Appeal Committee of the CFA dismissed the applicants' applications for leave to appeal the CA's decision in FAMV Nos. 42 and 43 of 2016, and FAMV Nos. 213 and 214 of 2020 handed down on 18 May 2021.

that 'a norm must be formulated with sufficient precision to enable a citizen to regulate his conduct so that he is able, with legal advice if necessary, to foresee the consequences which a course of action will entail'."

The CA held at 391 – 392 that discretionary power did not infringe the "prescribed by law" requirement:

"34. The statutory scheme confers a discretion on the Director to grant written permission. The provision for discretionary power by itself does not infringe the 'prescribed by law' requirement provided that the law indicate with sufficient clarity the scope of any such discretion and the manner of its exercise and provides adequate and effective safeguards against abuse. Such safeguards may include procedures for effective scrutiny by the courts.

35. By the very nature of a discretionary power, it may not always be predictable with certainty whether an application for written permission would be successful. However, if a citizen consults a lawyer and such lawyer is able to tell him that the discretionary power can be exercised within a certain scope and in a particular manner and there are safeguards against abuse, in our view the requirement of foreseeability is satisfied."

The CA held at 394 – 396 that a holistic approach should be adopted:

"39. The proposition that law includes unwritten law can hardly be disputed. Common law is recognized to be a source of law in Hong Kong and there are ample authorities for taking common law into account in assessing in a particular case whether the foreseeability requirement under 'prescribed by law' is satisfied …

40. More recently, the foreseeability requirement was considered in the context of television broadcasting licensing in *Hong Kong Television Network Ltd v Chief Executive in Council* [2016] 2 HKLRD 1005. …

41. In that case, the statutory provisions conferred a wide discretion on the Chief Executive in Council to grant a licence. After reviewing the relevant principles in respect of the foreseeability requirement at [121] of the first instance judgment, Au J took account of various matters in reaching the conclusion that the court can interpret the very widely worded statutory provisions for the purpose of determining whether the exercise of power by the Chief Executive in Council is within or outwith the scope conferred by them. In consequence, a reasonably competent lawyer would be able to advise an applicant on the scope of and the manner in which the discretion would have to be exercised. These matters included reading the ordinance together with a non-statutory Guidance Note promulgated by the

Communication Authority (whose recommendations are not binding on the Chief Executive in Council though they were obliged to take account of it in the absence of cogent reasons for not doing so) setting out criteria for the assessment of licence applications, identifying the statutory objectives by reference to a LegCo brief, as the underlying context of the ordinance (public interest), and the other provisions in the same statute. Au J also referred to the amenability of the decision of the Chief Executive in Council to judicial review and the requirement of fairness in our public law safeguard.

42. As mentioned, this approach was endorsed by the Court of Appeal. In the judgment of the then Chief Judge, it was described as a holistic approach which takes into account all relevant requirements and characteristics of the common law.

…

44. Further, the holistic approach also examined how the law is actually administered, including the effectiveness of judicial supervision through judicial review. …

45. As held by Lord Hope and Lord Scott in *R (Munjaz) v Mersey Care NHS Trust*, the law includes the common law and the availability of judicial review to safeguard against any arbitrary interference in the context of a generally worded discretion. So long as there is sufficient guidance in the published rules or policies setting out the boundaries of an administrative discretion, it would provide an adequate basis for working out the precise outcome in a particular case by way of judicial review.

…

47. The holistic approach is consistent with European jurisprudence. In one of the earlier cases on the 'prescribed by law' requirement, the Strasbourg Court acknowledged in *Silver v United Kingdom* (1983) 5 EHRR 347 at [88] that many laws were inevitably couched in vague terms the interpretation and application of which were questions of practice. On the facts of the case, the Orders and Instructions issued by the Home Secretary established a practice and the Court held that they could be taken into account in assessing whether the requirement of foreseeability was satisfied. At [90], the Court further acknowledged that the safeguards against the arbitrary interference with fundamental rights by way of discretionary power need not be enshrined in the very text which imposed the restrictions.

…

50. Insofar as Mr Harris [counsel of Chee Fei Ming] was making a general

submission that all statutory discretions must contain explicit limitations on the same in order to satisfy the 'prescribed by law' requirement, we must respectfully reject the same. Such proposition is directly contradictory to the Court of Appeal's decision in *Hong Kong Television Network Ltd v Chief Executive in Council*. It is also against the holistic approach adopted in the cases discussed above."

On the degree of precision required, the CA said at 397:

"53. As regards the degree of precision, Ribeiro PJ said in *Winnie Lo v HKSAR*, [75]:

The central requirement is therefore that the offence must have a sufficiently clearly formulated core to enable a person, with advice if necessary, to regulate his or her conduct so as to avoid liability for that offence. At the same time, the principles recognize the need for both flexibility and development.

54. The same principle applies in respect of the extent of precision for discretion in licensing context. *…"*

On the issue of certainty, the CA held at 401:

"65. With great respect, we differ from the Judge on his conclusion that the statutory objects do not provide sufficient guidance for the purpose of the 'prescribed by law' requirement. As discussed earlier, by the nature of this particular power under s. 104A(1)(b), the discretion has to be framed widely and generally. Testing the issue by asking if these statutory objects provide sufficient framework or boundary for meaningful legal debate on its proper scope, we are of the view that the statutory objects do set sufficient guide for proper control of the exercise of discretion by the court to prevent arbitrary interference with the display of banners or posters including such display for a static demonstration of habitual regularity or permanence."

The CA held at 401 – 402 that s. 104A's interference with the right of demonstration was limited:

"66. In this connection, it should be borne in mind that the interference with the right of demonstration is limited. In the assessment of the constitutional compliance of a legal restriction on the exercise of fundamental human rights, the extent of restriction can be relevant, see *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907, 921. The discretion would not affect the use of banners or posters in a mobile demonstration. … [the applicants] could not pinpoint the significance of the regular use of a

particular site for the FLG demonstrations. This is not a case where the static demonstration at a regular location or site carries with it symbolic meaning in the exercise of the right of demonstration.

67. Granted that the exercise of this power may entail prohibition against the display of defamatory messages or lurid pictures, we do not think the power is unlimited. Such content-screening can only be permitted insofar as it is necessary for the furtherance of the statutory objectives. So understood, the width of the power could not be a reason for holding that the discretion is not prescribed by law though one may still challenge its proportionality."

The CA further held at 403 that the Management Scheme could provide guidance on the Director's exercise of residual discretion under s. 104A(1)(b):

"74. … we agree … that G Lam J erred in holding that the Management Scheme could not provide relevant guidance to an applicant in a case falling outside the scope of that scheme. With such guidance, the exercise of the residual discretion by the Authority on a case by case basis is not arbitrary."

The CA held at 404 that there was sufficient guidance to meet the "prescribed by law" requirement:

"81. On the whole, we are of the view that there is sufficient guidance in the publicly available materials including the Management Scheme to guide the courts in resolving a dispute if an application for permission should be granted. We respectfully disagree with the judgment of G Lam J on the 'prescribed by law' challenge."

The CA rejected the applicants' proportionality argument at 408:

"99. … there is no effective proportionality challenge by reference to the content-based screening criteria set out in the Management Scheme (which we held to apply equally for the exercise of residual discretion). Based on the limited materials available, we are satisfied that the criteria do not entail political censorship. In addition to the evidence that the Authority would not screen out applications simply because the applicant is a FLG member, the court can take judicial notice that political messages have frequently been disseminated by LegCo and District Council members using placards or posters displayed under the Management Scheme.

100. For these reasons, we would also reject the proportionality challenge."

Cheung Tak Wing v Director of Administration [2020] 1 HKLRD 906

Background

The Director of Administration ("Director") implemented a scheme where members of the public could apply to the Director for permission to hold public meetings or processions in the East Wing Forecourt ("Forecourt") of the Central Government Offices ("CGO") on Sundays or public holidays between 10:00 a.m. and 6:30 p.m. ("Permission Scheme").

The applicant's application for using the Forecourt was refused on the sole basis that the intended public meeting was to take place on weekday ("Decision"). The applicant applied for judicial review to challenge the Permission Scheme and the Decision.

The CFI found that the restriction of the Permission Scheme was unconstitutional for being inconsistent with the rights to freedom of expression and assembly under BoR 16 and BoR 17. The Director appealed to the CA.

Basic Law provisions in dispute

The major provisions in dispute were BL 6, BL 27, BL 29, BL 39 and BL 105.

What the Court held

The CA allowed the appeal. The Court held that the Permission Scheme was prescribed by law. The restriction was imposed with proper legal authority as the Permission Scheme was implemented by the Director in the exercise of the HKSARG's common law right and duty as landowner of the CGO. The Permission Scheme was accessible to the public and was also formulated with sufficient precision to enable a citizen to regulate his conduct. Under the Guidance Notes accompanying the application form, there was no scope for the Director to disallow an application on grounds other than public order, public safety and the orderly and effective operation of the CGO. Such criteria

were acceptable and objectively assessable.

The CA held that the Permission Scheme was not unlawful. There was no basis for the applicant to suggest that the Director had erred in fact in terms of the HKSARG's ownership of the land. Nor was it an error of law for the Director to set conditions for permitting members of the public to enter into the CGO and the Forecourt. As manager of the CGO on behalf of the HKSARG, the Director obviously had a duty to ensure activities in the Forecourt would not hamper the ordinary business of the CGO and the safety of those visiting or working there.

On the issue of proportionality, the CA held that the present case was not one in which competing rights were engaged. Neither BL 6, BL 105 nor privacy rights under BL 29 were truly engaged in competition with the rights under BoR 16 and BoR 17. The CA also held that the standard of scrutiny in conducting the proportionality analysis should be "no more than necessary" rather than "manifestly without reasonable foundation". The CA found that the aims identified by the Director were legitimate aims within the specified purposes provided for in BoR 16 and BoR 17. The CA also held that the Permission Scheme was rationally connected with the legitimate aims and the restriction under the Permission Scheme was no more than necessary to achieve the legitimate aims. In light of other effective means available at or in the vicinity of the CGO for the applicant to exercise his rights to freedom of expression and freedom of assembly, the Permission Scheme only imposed limited restriction on his BoR 16 and BoR 17 rights and was not disproportionate.

What the Court said

The CA set out the criteria in assessing whether a restriction is "prescribed by law" at 929:

"47. In essence, a restriction is prescribed by law if it satisfies the following criteria:

(a) the restriction is imposed with proper legal authority;

(b) the restriction is accessible to those affected by it;

(c) the restriction is formulated with sufficient precision to enable the citizen to regulate his conduct."

The CA held at 931 that all three criteria were satisfied:

"52. In our judgment, the proprietary right of the Government in respect of the Forecourt and its duty as occupier provided proper authority in law for the implementation of the Permission Scheme. Like other landowners, the Government does not need to rely on any statutory provision in the exercise of its power to lawfully manage its own buildings. There is no need to have further statutory backing for the Permission Scheme. The first criterion in [47] above is satisfied.

53. There is no dispute that the Permission Scheme is accessible to the public. The second criterion in [47] is also satisfied.

54. As regards the third criterion, the Guidance Notes set out at para.5 how an application would be processed. It provides for the Director to seek advice from the Police as to potential threat to public order and public safety in respect of a request for use of the Forecourt for expression of opinions or conduct public activities. Further, under para.2, the purpose of the Scheme was stated to be the striking of a balance between the maintenance of orderly and effective operation of the CGO and the need to facilitate public expression of opinions. Paragraph 7 of the Conditions of Use provides that the Director may refuse access to the Forecourt by any person if the person failed to comply with the conditions of use, or behaves in a disorderly, offensive or immoral manner, or commits an offence. Hence, the only criteria in assessing if an application which is made in accordance with the Scheme should be granted are public order and public safety and the orderly and effective operation of the CGO.

55. In such circumstances, there is no scope for the Director to disallow an application on other grounds. On the evidence, applications were processed on first come first served basis.

56. Public order and public safety and orderly and effective operation of the CGO are acceptable and objectively assessable criteria. If necessary, the court can provide redress by way of judicial review in cases where the Director rejects an application on improper ground. Viewed thus, there are sufficient safeguards against arbitrary interference with the exercise of right of peaceful assembly or the freedom of expression.

57. We therefore reject the challenge of [the applicant] based on the prescribed by law requirement. We hold that the Permission Scheme is prescribed by law."

The CA held at 938 – 940 that this case did not involve competing

rights:

"84. BL 6 refers specifically to the right of private ownership of property. BL 105 refers to the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property. Both articles require the Government to protect such rights in accordance with law. Read in context, as held by the Court of Final Appeal, those articles are not engaged in respect of Government properties.

85. Since the present case is concerned with the Forecourt at the CGO, there is no dispute that it is Government property. BL 6 and 105 are not engaged.

86. But this does not mean that the Government does not have proprietary rights in respect of its properties. As explained in Section F above, as a matter of general law, the Government can exercise its power (and indeed has a duty to) manage its properties. In the management of such properties, there is however a public law obligation on the Government to pay due regard to the rights protected under arts.16 and 17 of the HKBOR. It does not mean that there cannot be any restrictions imposed upon access. The rights of the Government and the rights of other users of the properties can come under the rubric of 'rights of the others' in the permissible restrictions. In *Fong Kwok Shan Christine* itself, the Court of Final Appeal upheld the conditions imposed by the LegCo. But such restrictions have to satisfy the proportionality test.

87. The right under BL 29 applies not only to the homes of Hong Kong residents but also to 'other premises'… Since the CGO is the workplace of the civil servants and Government ministers working there, their rights under BL 29 are engaged.

…

92. However, private office is distinct from the forecourt of the building in which one's office is situated. Applying the test of reasonable expectation of privacy espoused in *HKSAR v Chan Kau Tai*, we cannot accept that the rights of the civil servants working at the CGO under BL 29 were engaged in respect of the Forecourt of the CGO.

93. In light of the above analysis, the present case is not a case in which competing constitutional rights are engaged. Neither property rights under BL 6, 105 nor privacy rights under BL 29 are truly engaged in competition with the rights of a demonstrator under arts.16 and 17 of the HKBOR."

The CA held at 941 that the "no more than necessary" standard was applicable to the proportionality analysis:

"100. Whilst we accept that the Director would have more experience than the court in assessing these matters, it is also the duty of the Director to provide the court with the relevant information on such matters in assisting us to conduct the necessary assessment. Armed with such information as set out in the evidence, we do not accept that the court is so institutionally disadvantaged that the less stringent test of manifestly without reasonable foundation standard should be adopted.

101. We hold that Au J was correct in applying the standard of no more than reasonably necessary in conducting the proportionality analysis."

The CA held at 941 that the aims identified by the Director were legitimate:

"109. … The Government, as owner of CGO has the right to use the land where the Forecourt is situated and designed for its safe and effective use in furtherance of the operation of the CGO and as passageway for its workers and visitors … it has to be borne in mind that the function of the Forecourt as designed by the Government (as owner of the property) is not a place for demonstration or protest. The Director, as manager of the CGO and the Forecourt, has a duty to take precautions so that the designated functions of the Forecourt are not compromised by other activities permitted to be carried on at the Forecourt. The Director was perfectly entitled to take account of the needs of those working at the CGO in the attempt to strike the right balance with the public law duty on the Government to facilitate expression of public opinion to Government officials. As we said above, in these respects, the Government owes a duty of care as to the safety and well-being of those working at and visiting the CGO. These are all relevant considerations in the context of the proportionality analysis. In these respects, the Forecourt is different from a public road or highway even though it can be said that the general public do have access to the Forecourt during its opening hours.

110. Further … it is a misnomer to call the Forecourt the Civic Square. It is therefore wrong to perpetuate the self-improved but mistaken characterisation of the primary function of the Forecourt by attributing symbolic significance to it as a special place for mass public protest under such misnomer as suggested by [the applicant]. The Government had never allowed the Forecourt to be used as a place of mass protest and demonstration to the detriment of the normal operation of the CGO. It was therefore perfectly lawful for the Director to decide that security measure

had to be tightened up after POEs causing serious disruptions to the ordinary business carried on at the CGO.

111. … We accept that the aims identified by the Director are legitimate aims within the specified purposes provided for in arts.16 and 17 of the HKBOR."

The CA also held that the Permission Scheme was rationally connected with the legitimate aims at 944:

"115. Given the nature of meetings and processions, they would attract public attention and the presence of reporters. The likelihood of other people interested in or opposed to the same public issue or topic joining in cannot be underestimated. Such activities could cause disruptions to the ordinary and peaceful use of the Forecourt as passageway. If such activities spilled over to the vehicular access, there could be obstructions to the normal vehicular access to the CGO and danger to those present at the passageway. Thus, there is an obvious need to have some control as to the meetings and processions to be allowed at the Forecourt. We are satisfied that the Permission Scheme is rationally connected with the legitimate aims. Au J did not hold otherwise."

The CA held at 945 – 946 that the availability of alternative means was a relevant consideration:

"119. … Although the Government is obliged to justify the restrictions imposed under the Permission Scheme, it is quite clear from the authorities that the availability of alternative means is a relevant consideration under the proportionality test in terms of assessment if a restriction is no more than necessary in the circumstances of the case …

…

124. In our judgment, the Permission Scheme should not be assessed in isolation from other measures adopted by the Government for receiving views from members of the public in or at the vicinity of the CGO. To recap, the alternative measures include:

(a) The designation of the [designated public activity area] just outside the Forecourt for demonstration and public meetings;

(b) The arrangements for receiving petitions by Government officials."

The CA held that the restriction under the Permission Scheme was no more than necessary to achieve the legitimate aims at 949:

"137. As a matter of common experience, there are many places in public or government buildings where admittance is limited to restricted personnel or subject to conditions. Many of those rules do not provide for exceptions in relation to the exercise of rights of demonstration or freedom of expression. It would be surprising if such rules, no matter how cogent or sensible they are, can now be said to be invalid due to the lack of reference to a residual discretion to cater for really exceptional circumstances.

138. For the reasons given above, in respect of restrictions on the arts.16 and 17 rights, the Permission Scheme should be considered together with the other avenues for demonstrations and petitions at or in the vicinity of the CGO. Having assessed the extent of restriction and balanced the same against the potential risks of disruption to the operation of the CGO during working days, we are of the view that the Permission Scheme is no more than necessary to achieve the legitimate aims discussed above."

The CA held at 950 that the incursion occasioned by the Permission Scheme on the right to freedom of expression and demonstration was limited:

"140. We have already explained above the limited extent of the incursion occasioned by the Permission Scheme to the right of freedom of expression and demonstration in general in light of the substantial equivalence of other effective means available at or in the vicinity of the CGO. On the facts of the application of this applicant, we cannot discern any exceptional circumstances causing oppressive unfairness to him to require the Director to depart from the policy set out in the Permission Scheme. The applicant could exercise his freedom of expression and assembly in a manner and form which is equally effective as the holding of such event at the Forecourt.

141. In our view, the Permission Scheme also satisfies the requirement under the fourth step."

Infinger v Hong Kong Housing Authority [2020] 1 HKLRD 1188

Background

The applicant and X, his same-sex partner, married overseas. The

applicant applied to the Hong Kong Housing Authority ("HA") for Public Rental Housing ("PRH"). The application was submitted as an "ordinary family" application under the "general application" category, in which X was described as his only family member and was accompanied by, *inter alia*, a copy of their certificate of marriage. To be eligible to apply as an "ordinary family", the relationship between the applicant and family members must fall within certain relationships in the HA's "Application Guide for PRH". The relationship between the applicant and X was not "husband and wife" and "family members" under the Application Guide. The HA decided that the applicant was not eligible to apply for PRH as an ordinary family and also decided not to accept his PRH application for registration as an ordinary family application ("Decisions").

The applicant applied for judicial review against the Decisions and the HA's policy embodied in the Application Guide which excluded same-sex couples from applying as ordinary families ("Spousal Policy"). He argued, amongst others, that they were illegal and/or unconstitutional (i) since they constituted unjustified discrimination against the applicant and his partner on the ground of sexual orientation and therefore violated BL 25 and/or BoR 22, and (ii) further or alternatively, as an unjustified restriction of the applicant's right, and that of his partner, to respect for their private and family life without distinction as to sexual orientation under BoR 14 in conjunction with BoR 1(1).

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 25. The CFI also referred to BL 36 and BL 145.

What the Court held

The CFI held that the Spousal Policy, which treated heterosexual and homosexual couples differently for the purpose of determining eligibility to apply for PRH as "ordinary families", was a differential treatment based on sexual orientation contrary to BL 25 and BoR 22. It was unlawful unless it could pass the 4-step justification test.

Applying the justification test, the CFI held that the family aim of the Spousal Policy to support traditional family formations constituted by heterosexual marriage with regard to their housing needs ("Family Aim") was a legitimate aim. The CFI also accepted that the differential treatment was rationally connected to the Family Aim. The Court, however, held that the differential treatment was not a proportionate means to achieve the Family Aim and it was also not satisfied that a reasonable balance had been struck between the societal benefits of the differential treatment and the interference with the applicant's rights.

The CFI concluded that the HA was unable to justify the differential treatment under the Spousal Policy and allowed the judicial review.

As regards BL 36 and BL 145, the CFI was of the view that entitlement to social welfare was not absolute. This was however *obiter* since the case was not about whether the applicant had any absolute right to social welfare.

What the Court said

At 1198, the CFI discussed the appropriate approach of determining whether an alleged discrimination was unlawful or unconstitutional contrary to BL 25 and BoR 22:

"25. The first stage requires the complainant to demonstrate that 'he or she has been treated differently to a person in a comparable position and that the reason for this difference in treatment can be identified as a prohibited ground, such as race, religion or sexual orientation'.

26. After this has been demonstrated, in order to determine whether the differential treatment is lawful or unlawful, the Court applies the 4-step justification test, namely:

(i) does the differential treatment pursue a legitimate aim; (ii) is the differential treatment rationally connected to that legitimate aim; (iii) is the differential treatment no more than necessary to accomplish the legitimate aim; and (iv) has a reasonable balance been struck between the societal benefits arising from the application of differential treatment and the interference with the individual's equality rights."

In discussing the factor to be taken into account when deciding whether the right to equality under BL 25 was infringed, the CFI held at 1207

that:

"42. … Mr Chan has … repeatedly emphasized the fact that competition for PRH is a zero-sum contest: the allocation of a PRH unit to a person necessarily reduces the number of PRH units available, and correspondingly deprives another potentially eligible person of the same benefit. It is undoubtedly the case that PRH resources are highly limited, and it is a factor which may properly entitle the body who has been entrusted with the function and responsibility of distribution or allocation of such limited resources to have a wider margin of discretion in the performance of its function and responsibility. This factor should not, however, be overly emphasized. In the nature of things, most public resources are limited, and the zero-sum argument can be made in most cases involving the conferment of benefits amongst different groups of persons. If a group of persons is excluded from being eligible to apply for the benefits in question, the resources available to the remaining, competing, groups would naturally be enlarged or increased. Ultimately, the court must still consider whether the exclusion of the benefits from any particular group infringes the core right to equality, with the scarcity of the public resources involved being taken into account in the overall assessment of whether the impugned measure is a proportional means to achieve a legitimate aim."

On the appropriate standard of review of the case concerning differential treatment, the CFI held at 1209 that:

"44. … the allocation of highly scarce public resources such as PRH, which raises particularly acute socio-economic considerations which the Government is undoubtedly in a much better position that the court to assess … the yardstick of reasonable necessity is not a strict, bright line, but occupies a continuous spectrum which should be viewed as a 'sliding scale' in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference … The concept of reasonable necessity is inherently elastic, so is the intensity of review applied by the court in any given case. It is not, in my view, helpful to focus excessively on the label of the standard that should be applied. Instead, the court should take into account both the fact that this case concerns differential treatment based on sexual orientation as well as the factual context in which the issue arises in its assessment of the proportionality of the differential treatment under the Spousal Policy …

In the circumstances of this case, I consider that the appropriate standard for assessing proportionality should be somewhere in the middle of the

continuous spectrum of reasonableness, and the intensity of review should be set accordingly."

At 1211, the CFI observed the following on indirect discrimination and differential treatment based on sexual orientation:

"46. …

(1) … In any event, I do not accept, as a matter of principle, that less weighty justification, or a lower standard or intensity of review, should be applied in a case of indirect discrimination. Most discrimination cases that have found their way to this court involve indirect, as opposed to positive or direct, discrimination. The vice is, however, the same. There was also no suggestion in the judgment of the Court of Final Appeal in either *QT* or *Leung Chun Kwong* that the standard or intensity of review should vary depending on whether the discrimination was direct or indirect.

(2) In choosing the appropriate standard of review and the application of the appropriate standard in this case, two counterveiling considerations come into play: the differential treatment here is based on sexual orientation, but the policy choice is made in the context of allocation of highly scarce public resources. … both considerations should be given proper weight and taken into account when deciding whether the relevant policy is justified."

At 1212, the CFI held, in *obiter*, in relation to BL 36 and BL 145:

"48. … Mr Chan prays in aid BL 145, which imposes an obligation, and prerogative, upon the Government to 'formulate policies on the development and improvement of [the social welfare system] in light of the economic conditions and social needs'. The ability of the Government to formulate policies in respect of the social welfare system is respected, but it cannot seriously be argued that this article of the Basic Law authorizes the Government to pursue an unlawful or discriminatory policy.

49. … It is undoubtedly true that entitlement to social welfare is not absolute under our system. However, this case is not about whether the applicant has any absolute right to social welfare. This case is about whether the Housing Authority, having established a scheme for PRH, has introduced a policy for determining eligibility thereunder which is discriminatory and thus unlawful."

Sham Wing Kan (岑永根) v Commissioner of Police [2020] 2 HKLRD 529

Background

The applicant participated in a march on 1 July 2014 and was responsible for driving the head vehicle leading the march. The police arrested the applicant a few days later. Upon arrest, the police searched the applicant and seized five mobile phones from him. After briefly inspecting each of the mobile phones, the arresting officer took possession of them on the ground that they were suspected to be related to the offence for which the applicant was arrested.

In the judicial review proceedings, the applicant sought, amongst others, a declaration that s. 50(6) of the Police Force Ordinance (Cap. 232) did not authorize police officers to search without warrant the contents of mobile phones seized on arrest, or alternatively, if such search power was so authorized, s. 50(6) was unconstitutional under BL 30 and BoR 14.

Basic Law provisions in dispute

The major provision in dispute was BL 30.

What the Court held

The CA recognized both the privacy interest involved in a search of the contents of an arrestee's mobile phone and the legitimate need for law enforcement officers to search mobile phones used as instruments of crime. The CA held that while the right of privacy did not operate to shield incriminating evidence from legitimate criminal investigation process, an arrested person's privacy interest in the digital data stored on his phone outside the proper and legitimate scope of search must remain intact.

The CA held that the power to conduct a mobile phone search upon arrest could be exercised if, amongst others: (a) a warrant was obtained under s. 50(7) of Cap. 232; or (b) when it was not reasonably practicable to obtain such warrant before a search was conducted, the police officer must have a reasonable basis for having to conduct the

search immediately as being necessary (i) for the investigation of the offence(s); or (ii) for the protection of the safety of persons including the victim(s) of the crime, etc.

The CA held that the power of a police officer to conduct a search of the digital contents of a mobile phone found on an arrested person in accordance with the conditions set out by the CA was compatible with BL 30 and BoR 14.

What the Court said

The CA summarized the central issue in question at 557:

"101. The central issue arising from facts similar to the present case is thus: how is a search of the digital contents of a mobile phone or similar device found on or seized from an arrested person incidental to arrest to be conducted in a manner that is compatible with BOR 14 and BL 30? More specifically, is a judicial warrant always required before such a search can be carried out? If yes, s. 50(6) is of no avail. If, however, a judicial warrant is not always required, how is the warrantless search to be conducted, be it under s. 50(6) or the common law, in order to make it compatible with BOR 14 and BL 30?"

The CA recognized the privacy interest involved in a search of the contents of an arrestee's mobile phone. The CA said at 559 – 560:

"113. We no longer use mobile phones simply as telephones. We regularly use them to conduct many aspects of our daily life. We use them as instantaneous communication tools, cameras, voice or video recorders and players, calendars, diaries, albums, televisions, maps or newspapers. We use them for emails, social media, the internet, millions of apps covering all aspects of our life. We even use them to conduct our bank or financial affairs … mobile phones are now such a pervasive and insistent part of daily life that 'the proverbial visitor from Mars might conclude they were an important feature of human anatomy'.

114. In terms of privacy interest, three important characteristics arising from the use of a mobile phone distinguish it from other objects that might be kept on an arrestee's person: (1) the vast amount and unique nature of the personal information stored in it; (2) storage of such information on 'cloud' accessible by the mobile phone; (3) the portability and accessibility of such information.

…

116. In short, a mobile phone is capable of providing a very detailed and accurate profile of its user. The privacy interest involved in a search of the contents of an arrestee's mobile phone would necessarily go beyond the ordinary level of privacy that would be intruded upon in a traditional search of things found on his person on arrest."

However, the CA also recognized the legitimate need for law enforcement officers to search mobile phones used as instruments of crime. The CA said at 564:

"131. The advent of information technology and the popular use of mobile phones also present new modes for criminal activities to be conducted … in the modern world drugs traffickers use mobile phones to conduct their illicit trade. Since the illicit communications are often conducted electronically, the digital data stored in the mobile phones of such criminals are of high probative value in the proof of their involvement in those crimes.

…

133. The law should recognize the new challenges presented by the use of mobile phones as instruments of crime and the legitimate need for law enforcement officers to search such phones in appropriate circumstances with appropriate safeguards. The digital world should not become a haven for criminals where a black-hole is created so that crucial evidence for the proof of their unlawful activities could become out of reach for law enforcement officers."

The CA held at 580 that there must be adequate safeguards to protect the arrested person's privacy right:

"195. In our judgment, the privacy interest of an arrested person (who is subject to lawful custody and detention by police upon arrest) must necessarily be subject to a lawful search which is truly incidental to the arrest as an incidence of his arrest and the investigation of the offence for which he was arrested. The right of privacy does not operate to shield incriminating evidence from legitimate criminal investigation process.

196. At the same time, his privacy interest in the digital data stored on his phone outside the proper and legitimate scope of such search must remain intact. The law must therefore protect him against the disproportionate intrusion into his privacy interest in such other data.

197. In the context of a search of the digital contents of mobile phone … the

problem does not lie in the lack of legitimate law enforcement objectives for such a search … It is also plain that a search of the mobile phone for the relevant data and information is rationally connected with the advancement of such interests …

198. Rather, the real problem stems from the potentially large amount of private and possibly sensitive data (which does not fall within the legitimate scope of search) stored in the phone alongside the information and data which fall within the legitimate scope of such search. Thus, there must be adequate safeguards to protect the arrested person against arbitrary and unlawful interference."

At 584 – 585, the CA set out the conditions in accordance with which a police officer could conduct a search of the digital contents of a mobile phone found on an arrested person:

"218. In summary, we hold that the power to conduct a mobile phone search upon arrest can be exercised if:

(a) a warrant is obtained under s. 50(7); or

(b) when it is not reasonably practicable to obtain such warrant before a search is conducted, the police officer must also have a reasonable basis for having to conduct the search immediately as being necessary (i) for the investigation of the offence(s) for which the person was suspected to be involved, including the procurement and preservation of information or evidence connected with such offences; or (ii) for the protection of the safety of persons (including the victim(s) of the crime, members of the public in the vicinity, the arrested person and the police officers at the scene);

(c) for a warrantless search conducted under (b) above, other than a cursory examination for filtering purpose, the scope of the detail examination of the digital contents of a phone should be limited to items relevant to objectives set out in sub-paragraph (b);

(d) in addition, a police officer should make an adequate written record of the purpose and scope of the warrantless search as soon as reasonably practicable after the performance of the search and a copy of the written record should be supplied forthwith to the arrested person unless doing so would jeopardise the ongoing process of criminal investigation.

219. Whilst the exercise of such power would interfere with the interest of an arrested person under BL 30 and BOR 14, we also hold that the conferment of such power to the police is proportionate …

…

220. For the above reasons, we would … grant instead a declaration that a police officer can conduct a search of the digital contents of a mobile phone found on an arrested person in accordance with the conditions set out at [218] above and the power is compatible with BL 30 and BOR 14."

Junior Police Officers' Association of Hong Kong Police Force v Electoral Affairs Commission (No. 2) [2020] 3 HKLRD 39

Background

Pursuant to s. 20(3) of the Electoral Affairs Commission (Registration of Electors) (Legislative Council Geographical Constituencies) (District Council Constituencies) Regulation (Cap. 541A), principal residential addresses of registered electors must be shown together with their names ("Linked Information") in electoral registers open to public inspection, and pursuant to s. 38(1) of the Electoral Affairs Commission (Electoral Procedure) (District Councils) Regulation (Cap. 541F), extracts of the published register could be supplied by the Electoral Registration Officer to election candidates on request, to be used for election-related purposes (collectively referred to as "Impugned Provisions").

The applicants, applied for judicial review against the requirement that the Linked Information must be made available for public inspection or provided to candidates ("Impugned Measures"). The CFI found that the Impugned Measures engaged the registered voters' rights to privacy under BoR 14 and their right to vote under BL 26, but held the Impugned Measures to be lawful and proportionate and dismissed the application. The applicants appealed to the CA, primarily challenging the absence of any discretion to restrict general public inspection even on occasions of real risk to personal or family safety of a particular elector ("Constitutional Challenge").

Basic Law provisions in dispute

The major provision in dispute was BL 26.

What the Court held

The CA held that a person's right to determine the extent of dissemination of his residential address formed the essence of the right of privacy under BoR 14. By virtue of the Impugned Measures, the right of a registered elector to control the dissemination of his residential address was taken away.

The right to vote under BL 26 was also engaged, albeit indirectly, in light of the deterrent effect on an individual in the effective exercise of his voting right if he had to disclose to the public his principal residential address even when such disclosure could put his or his family's life and safety at risk. In the absence of discretion to restrict general public inspection even on occasions of real risk to personal or family safety of a particular elector, the CA held that a real risk of harm was demonstrated and was sufficient to support the Constitutional Challenge. The CA also acknowledged that in the aspects concerning electoral registers, the court should accord a margin of discretion to the electoral authorities and the legislature.

Applying the proportionality test, the CA held that the disclosure of Linked Information to the public in general under the Impugned Provisions served two legitimate aims (ensuring a highly transparent mechanism for the public to inspect, and make claims and objections in respect of, the electoral registers, and to detect vote-rigging and/or other corrupt/illegal electoral conduct, thereby contributing to the preservation of the integrity of the electoral system ("Transparent Election Aim"); and facilitating electioneering activities by candidates, in particular enabling them to send their election materials or conduct personal visits to particular electors or groups of electors at their places of residence ("Electioneering Aim")) and was rationally connected with those aims. The CA also agreed with the CFI that the disclosure under s. 38(1) of Cap. 541F was proportionate but s. 20(3) of Cap. 541A interfered with the BL 26 and BoR 14 rights of those registered electors who had

safety concerns over the unrestricted public inspection of their Linked Information in a manner which was more than reasonably necessary to achieve the Transparent Election Aim. The existing scheme under s. 20(3) of Cap. 541A failed to strike a fair balance between the rights of the individual electors concerned and the societal benefit to be derived from the same in terms of the furtherance of the Transparent Election Aim and hence the appeal was allowed to that limited extent.

What the Court said

At 54 – 56, the CA held that the right to vote under BL 26 was engaged:
"38. … In most cases, a person can decide whether to provide his residential address for a particular purpose to a particular recipient or institution after making his own assessment as to the balance between the utility of the transaction requiring the disclosure of address and the safeguards (both legal as well as practical safeguards) in place provided by such recipient or institution against the misuse of the information. But there is no such choice if he or she wishes to exercise the right to vote which is a constitutionally entrenched right … a registered elector is obliged to disclose his residential address and the information will then be available for public inspection, failing which he forfeits his right to vote.

…

47. The right to vote under BL 26 is also engaged, albeit indirectly. This stems from the deterrent effect on an individual in the effective exercise of his voting right if he has to disclose to the public his principal residential address even when such disclosure could put his or his family's life and safety in danger …"

At 57 – 58, the CA gave non-exhaustive examples on cases where a person's right to privacy and right to vote might be encroached:
"51. In our judgment, it is not difficult to envisage cases where a person's right to privacy and right to vote may be severely encroached upon by the unrestricted publication of the electoral registers outside the context of doxxing. Take, for example, a person who is a victim of domestic violence. Such a person could have changed residential address to hide from a violent partner and could have justifiable concern over the unrestricted public disclosure of the new address. If the person wishes to vote, he or she has to inform the electoral authorities of the new address, which would then

become publicly available in the published registers in the form of the Linked Information. Assuming that the partner has a general idea as to the district in which the victim is residing, it would not be difficult for the partner to track down the victim with the Linked Information through public inspection of the register. In the absence of any opt-out mechanism, the victim would be forced to choose between risking personal safety and giving up the right to vote. A similar dilemma may arise for someone who tries to escape from the threatening acts of a stalker. These examples are not exhaustive."

Horsfield Leslie Grant & Others v Chief Executive of the HKSAR & Others (unreported, 22 May 2020, HCAL 952 of 2020)

Background

In February 2020, the applicants, a family of five and their domestic helper, travelled from Hong Kong to South Africa and were stranded there for about 7 weeks as the country was in lock-down due to the COVID-19 pandemic.

The applicants returned to Hong Kong on 14 May 2020. Upon arrival at the Hong Kong International Airport, the applicants were each served with a compulsory quarantine order ("the Order") issued under the Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation (Cap. 599E), which required them to quarantine at a designated quarantine centre for 14 days until 27 May 2020.

By way of an application for a writ of *habeas corpus*, the applicants challenged the Order on various grounds, including that the decision to quarantine the applicants at the designated quarantine centre was arbitrary, and violated BL 28, BoR 5 and the common law right to liberty.

Basic Law provisions in dispute

The major provision in dispute was BL 28.

What the Court held

The CFI dismissed the *habeas corpus* application. It held that the decision to require the applicants to quarantine at the designated quarantine centre satisfied the 4-step proportionality test and did not amount to arbitrary detention.

What the Court said

In paragraph 36, the Court set out the 4-step proportionality test and held that the Order passed the test:

"36. Finally, in so far as the Applicants rely on the rights to liberty and security of the person under BL 28, BOR 5 and at common law, including the right not to be subjected to arbitrary detention (which are not absolute rights), I am of the view that the decision to require the Applicants to quarantine at the Centre satisfies the 4-step proportionality test, in that:

(1) The impugned measure serves the legitimate aim of protection of public health.

(2) The impugned measure is rationally connected with the advancement of that aim.

(3) The appropriate standard of review is that of 'manifestly without reasonable foundation' instead of the more stringent standard of 'no more than reasonably necessary'. I do not consider the impugned measure to be manifestly without reasonable foundation in the light of the evidence given by Mr Au in his affirmation. I should add that I would reach the same conclusion even if the standard of review should be the higher one of 'no more than reasonably necessary'.

(4) Lastly, the impugned measure strikes a reasonable balance between (i) the societal benefits of the encroachment, namely, protection of public health in Hong Kong, which I consider to be a matter of paramount importance in the current COVID-19 pandemic, and (ii) the restriction of the Applicants' liberty. Having regard to the very serious social (including public health) and economic consequences which may result from a general or widespread outbreak of COVID-19 in the community, I am not persuaded that the pursuit of the societal interest results in an unacceptably harsh burden on the Applicants."

Wong Ho Ming (黃浩銘) v Secretary for Justice [2020] 3 HKLRD 419

Background

From 2015 to 2019, the applicant, a Hong Kong permanent resident, was convicted and sentenced to imprisonment exceeding 3 months on a number of occasions for offences relating to unlawful assemblies, criminal contempt, etc.

Under s. 39(1)(e)(i) of the Legislative Council Ordinance (Cap. 542), s. 21(1)(e)(i) of the District Councils Ordinance (Cap. 547), and s. 23(1)(e)(i) of the Rural Representative Election Ordinance (Cap. 576), a person convicted of a criminal offence in Hong Kong would be disqualified from being nominated as a candidate at an election and from being elected as (i) a member of the Legislative Council, (ii) a member of a District Council, and (iii) a Rural Representative for a Rural Area if:

(i) his sentence for that offence is a term of imprisonment exceeding 3 months; and

(ii) the election is held within 5 years after the date of his conviction.

The effect of these provisions ("the Impugned Measure") was that the applicant could not be nominated as a candidate or elected as a member of the Legislative Council or a District Council or as a Rural Representative up to 8 April 2024.

By way of judicial review, the applicant challenged the Impugned Measure arguing that such measures were inconsistent with his right to stand for election under BL 26 and BoR 21.

Basic Law provisions in dispute

The provision in dispute was BL 26.

What the Court held

The Court upheld the Impugned Measure's constitutionality and dismissed the judicial review application.

What the Court said

The Court held at 427 – 428 that the 4-step proportionality test was applicable:

"14. It is not in dispute that the rights protected by BL 26 and BOR 21 are engaged in the present case. It is also not in dispute that those rights are not absolute rights. Accordingly, the question for determination is whether the restriction on those rights imposed by the Impugned Provisions, i.e. the Impugned Measure, is proportional, applying the well-established 4-step proportionality test, namely:

(1) whether the Impugned Measure pursues a legitimate aim;

(2) if so, whether it is rationally connected with advancing that aim;

(3) whether it is no more than necessary for that purpose; and

(4) whether a reasonable balance has been struck between the societal benefits of the restriction and the inroads made into the constitutionally protected rights of the individual, asking in particular whether the pursuit of the societal interest results in an unacceptably harsh burden on the individual."

The Court held at 435 that the Impugned Measure served a legitimate aim:

"42. It is the Government's case that the Impugned Measure advances the legitimate aim of maintaining public trust and confidence in (i) the offices of the Legislative Council, District Council and Rural Representative, (ii) the character, honesty and personal integrity of persons elected to those offices, and (iii) the related electoral processes (collectively, 'the Public Confidence Aim'). This aim is, in my view, plainly a legitimate one which may be pursued by the Government."

The Court identified a rational connection between the Impugned Measure and the legitimate aim. The Court said at 442:

"57. It is clear that the Impugned Measure, which disqualifies persons who are or may be unsuitable to occupy the offices of the Legislative Council, District Council and Rural Representative from being elected to such offices, is rationally connected with advancing the Public Confidence Aim, in the sense that it would logically be expected to contribute towards the achievement of that aim."

The Court held that the "manifestly without reasonable foundation"

standard was applicable. The Court said at 445 – 446:

"66. I accept that the rights to vote and stand for election and to participate in public life protected by BL 26 and BOR 21 are important rights … I also bear in mind the fact that the disqualification imposed by the Impugned Measure lasts for a period of 5 years from the date of the relevant conviction, which means that a person may be disqualified for 2 terms of office of the Legislative Council, District Council or Rural Representative. Nevertheless, I am of the view that the appropriate standard of review to be adopted in the present case should be towards the lower end of the continuous spectrum of reasonable necessity (i.e. the 'manifestly without reasonable foundation' standard) for the following reasons:

(1) This case concerns the validity of an aspect of the electoral laws relating to the qualification criteria for a candidate which are inevitably much affected by political or policy considerations and, as can be seen from the above discussion concerning the legislative history of the Impugned Provisions, have been the subject of active political debate. Plainly, the Legislature is better placed than the Judiciary to assess who may be suitable or unsuitable to fill the offices of Legislative Council or District Council or Rural Representative, and the appropriate means to advance the Public Confidence Aim (see *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353, at [42] and [45] …).

(2) BL 68, read together with paragraph 2 of Part I of Annex II to the Basic Law, expressly provides that the method for forming the Legislative Council, including the 'election methods', shall be specified by an electoral law introduced by the Government and passed by the Legislative Council.

(3) The restriction on a person standing for election is imposed only after he has been duly convicted of an offence of a degree of seriousness reflected by a prison sentence for a term exceeding 3 months. In the present case, the court is concerned with convictions in Hong Kong where persons charged with criminal offence are protected by BOR 10 and 11 and common law principles, including the right to a fair and public hearing, the presumption of innocence, the requirement that guilt must be proved beyond reasonable doubt, the right to be tried in his presence and to defend himself through legal assistance of his own choosing, the right not to be compelled to testify against himself or to confess guilt, etc.

(4) The maintenance of public trust and confidence in the public offices of the Legislative Council, District Council and Rural Representative is itself a matter of considerable public importance."

The Court applied the "manifestly without reasonable foundation" standard and held at 448 – 449 that the legislature's judgment should be respected:

"72. It is, in my view, plainly open to the Legislature to prescribe that a person who has been convicted of a criminal offence and sentenced to imprisonment for a term exceeding a specified period should not be permitted to be nominated as a candidate at an election, or to be elected as a member of the Legislative Council or a District Council or as a Rural Representative for a certain period of time after the relevant conviction. The question is whether the Sentence Threshold of 3 months and the Disqualification Period of 5 years are justified. The drawing of bright lines regarding the Sentence Threshold and Disqualification Period is not, as earlier mentioned, objectionable. These are not matters of exact science, but are primarily matters of value judgment. Unless the lines as drawn are plainly unreasonable, the court should respect of the judgment of the legislature which is better placed than the court to assess where the lines should be drawn."

The Court concluded at 450 that the Impugned Measure could pass step 4 of the proportionality test:

"76. Whether the Impugned Measure can pass step 4 requires the court to make, ultimately, a 'value judgment' as to whether it operates on the Applicant and others in a similar situation 'with such oppressive unfairness that it cannot be regarded as a proportionate means of achieving the legitimate aim in question' … Taking into account the matters mentioned in [66(3)] and [66(4)] above (and, in relation to the Applicant specifically, the seriousness of the offences for which he was convicted as recited in various judgments, I am not persuaded that the pursuit of the societal interest by the Impugned Measure can be said to result in an unacceptably harsh burden on them, notwithstanding the importance of the rights being restricted."

Kwok Wing Hang v Chief Executive in Council (2020) 23 HKCFAR 518

Background

In October 2019, the CE in C made the Prohibition on Face Covering Regulation ("PFCR") pursuant to the Emergency Regulations Ordinance (Cap. 241) on the basis that Hong Kong was in a state of public danger. Kwok Wing Hang and other LegCo members ("appellants") challenged the constitutionality of Cap. 241 and the proportionality of the PFCR by judicial review proceedings on the ground that they were inconsistent with the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383). The appellants partially succeeded at CFI and CA. Both the Government and the appellants appealed to the CFA.

Basic Law provisions in dispute

The major provisions in dispute were BL 27, BL 39, BL 62(5), BL 66 and BL 73(1).

What the Court held

The CFA held that Cap. 241 was constitutional and dismissed the appellants' appeal. Under the Basic Law, the legislative power of the HKSAR was vested in LegCo only and its power to make primary legislation could not be delegated. LegCo could, however, delegate its power to make subordinate legislation to another person or body, including the CE in C. Cap. 241 merely authorized the CE in C to make subordinate legislation in emergency or public danger. The power to make regulations under Cap. 241 and any regulations so made were further controlled by the courts, by LegCo and by the Basic Law. By virtue of BL 39, any regulations made under Cap. 241 that purported to restrict fundamental rights must satisfy the requirements of "prescribed by law" and proportionality.

The CFA also rejected the appellants' argument that the "prescribed by law" requirement was applicable to Cap. 241. The "prescribed by law" requirement was not directed at empowering legislation.

The CFA held that the prohibitions of the use of facial covering at certain types of public gatherings in the PFCR were proportionate restrictions of the rights protected under BL 27, BoR 14, BoR 16 and BoR 17.

What the Court said

At 541, the CFA held that the LegCo could delegate power to CE in C to make subsidiary legislation:

"34. … Chapter IV of the Basic Law clearly sets out the political structure of the HKSAR. Sections 1 to 4 under Chapter IV deal with, respectively, the Chief Executive, the Executive Authorities, the Legislature and the Judiciary. They all have different roles to play, powers to exercise and functions to perform. So far as legislative power is concerned, the legislative power which the NPC authorizes the HKSAR to exercise, pursuant to Article 2 of the Basic Law, is exercisable by LegCo, which is made the legislature of the HKSAR under Article 66. Article 73(1) specifically says that LegCo shall exercise the power and function 'to enact, amend or repeal laws in accordance with the provisions of [the Basic Law] and legal procedures.'

35. However, this does not mean that the Chief Executive and the Executive Government have no role to play in terms of legislating for the HKSAR. So far as the Government is concerned, article 62(5) provides that the Government has the power and function 'to draft and introduce bills, motions and subordinate legislation'. As for the Chief Executive, who is both the head of the HKSAR and head of the executive authorities of the HKSAR, i.e. the Government, article 56(2) states:

Except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council.

36. This being the relevant constitutional set-up, three points can immediately be made. First, the legislative power of the HKSAR is vested in LegCo only. Subject to one exception, the Basic Law does not provide for any power on the part of LegCo to delegate its general legislative power to any other body. Secondly, it follows that LegCo cannot delegate its power to make primary legislation to anybody, including the CEIC. Thirdly, the above does not, however, mean that LegCo cannot give another person or body

power to make subordinate legislation. Article 62(5) specifically refers to the Government's role in drafting and introducing subordinate legislation to LegCo. Moreover, Article 56(2) expressly provides that the CEIC may make subordinate legislation – if the power to do so has been delegated by LegCo. …"

The CFA rejected the appellants' argument that Cap. 241 constituted an impermissible attempt to delegate legislative power. The Court said at 547:

"49. We find these criticisms of the Ordinance to be more apparent than real. The power of the CEIC to make emergency regulations, as well as any regulations so made, are controlled and restrained by the internal requirements of the Ordinance, by the courts, by LegCo and by the Basic Law."

The CFA held at 551 – 552 that the power of the CE in C to make regulations under Cap. 241 and the regulations so made were subject to the Basic Law:

"67. Not only are the power to make regulations under [Cap. 241] and the regulations so made subject to legislative and judicial control, they are also subject to the Basic Law …

68. The points we now make are in relation to the protection of fundamental rights under the Basic Law. First, art. 39 gives a constitutional guarantee of the provisions of the ICCPR as applied to Hong Kong and implemented by the HKBORO. Accordingly, any regulations made under [Cap. 241] that seek to restrict fundamental rights protected under the ICCPR and HKBORO are (as the Government accepts) subject to the constitutional control of the courts in terms of the dual requirements of 'prescribed by law' and proportionality.

69. In other words, despite the apparently wide powers given to the CEIC under s. 2(1) and (2) of [Cap. 241] to make regulations on a variety of matters, there can be no restriction of fundamental rights protected under the ICCPR and the HKBORO as guaranteed under art. 39 of the Basic Law unless the regulations satisfy the prescribed by law requirement and proportionality analysis.

70. Secondly, s. 5 of the HKBORO, which is based on art. 4 of the ICCPR, provides for the derogation from the fundamental rights in the BOR (ICCPR) in times of public emergency subject to specified conditions. Given the constitutional guarantee of the ICCPR as implemented by the HKBORO

under art. 39, there is no question of construing [Cap. 241] to mean that LegCo has given the CEIC any power to make any regulations that are inconsistent with s. 5 of the HKBORO, and indeed s. 2A(1) of IGCO operates to mandate the adoption of a contrary construction.

71. Thirdly, nothing in any regulations made under [Cap. 241] can restrict the rights guaranteed under the Basic Law itself, including the right of access to the courts, unless the restriction can be justified."

At 554, the CFA ruled that the "prescribed by law" requirement did not apply to Cap. 241:

"80. … There is no dispute that any regulations made under [Cap. 241] which purport to restrict fundamental rights must pass the prescribed by law test as required by Article 39(2) of the Basic Law. However, the applicants argued that the prescribed by law requirement is applicable not only to the regulations, but also to [Cap. 241], it being a law which empowers the making of regulations that may restrict fundamental rights.

81. Both the CFI and the Court of Appeal were right in rejecting this argument on the ground that the prescribed by law requirement is not engaged. Article 39(2) of the Basic Law provides that the rights and freedoms enjoyed by Hong Kong residents 'shall not be restricted unless as prescribed by law'. The requirement is directed at actual restrictions on the rights and freedoms enjoyed by Hong Kong residents. It is not directed at empowering legislation such as [Cap. 241] which merely authorizes the making of subsidiary legislation which, if and when made, may seek to restrict fundamental rights. Of course, we do not necessarily exclude the possibility of a situation arising where the empowering Ordinance and the subsidiary legislation made thereunder are so intertwined that it is unrealistic or artificial to separate the two. However, we are not faced with such a situation here. We also consider that the protection intended to be afforded by the prescribed by law requirement under art. 39(2) is fully achievable by subjecting any regulations made under [Cap. 241] that seek to restrict fundamental rights to that requirement."

The CFA upheld the constitutionality of the PFCR. The CFA said at 576 – 577:

"146. … the PFCR was made to address an ongoing situation of violence and unlawfulness that had existed over a period of months and had led to the CEIC to conclude that there was an occasion of public danger under [Cap. 241]. The situation on the streets and in other public places in Hong

Kong had become dire. Members of the public were fearful of going out to certain places and significant inconvenience was caused to the public at large by the blockage of roads and closure of public transport facilities. There is a clear societal benefit in the PFCR when weighed against the limited extent of the encroachment on the protected rights in question. As Mr Benjamin Yu SC [counsel for the respondent] submitted, the PFCR affects a range of different people in Hong Kong. Although some people might wish to demonstrate in public but with a facial covering as a form of expression or for reasons of privacy, there were others who might wish to demonstrate peacefully but who were deterred from doing so because of the ongoing violence. The interests of that latter category should be given due weight in the balance. Similarly, due weight must be given to those persons who had sustained personal injury or property damage as a result of the actions of the violent protesters. And finally, the interests of Hong Kong as a whole should be taken into account since the rule of law itself was being undermined by the actions of masked lawbreakers who, with their identities concealed, were seemingly free to act with impunity."

Kwok Cheuk Kin v Director of Lands [2021] 1 HKLRD 737

Background

The Small House Policy ("SHP") was approved by the then ExCo in November 1972 and has been implemented since December of the same year. The SHP allowed 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: (a) a Free Building Licence ("FBL") on land owned by the NTII himself at nil premium; (b) a Private Treaty Grant ("PTG") of Government land at concessionary premium set at approximately two-thirds of the full market value; or (c) a Land Exchange ("LE") at nil premium for the private land portion and concessionary premium for the Government land portion. The applicants challenged, by way of judicial review proceedings, the decisions of the Director of Lands on grounds including that the SHP was in breach of the equality protection under BL 25 and BL 39, and/or BoR 22.

The applicants argued that the SHP and the benefits conferred on NTIIs

under the SHP did not fall within BL 40 which protected the lawful traditional rights and interests of the NTIIs. The CFI partially allowed the application and found that FBL was constitutional whereas PTG and LE were not. All parties appealed.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 40 though the CA also referred to BL 25, BL 39, BL 120 and BL 122.

What the Court held

The CA held that "lawful traditional rights and interests" in BL 40 meant those which were, as a matter of historical fact, recognized to be the NTIIs' lawful traditional rights and interests in the Hong Kong legal system at the time of the promulgation of the Basic Law on 4 April 1990. Applying the theme of continuity, BL 40 continued and elevated the recognition and protection to a constitutional level for such lawful traditional rights and interests of NTIIs after 1 July 1997. On the "traditional" aspect, the CA disagreed with the CFI that "traditional rights and interests" protected by BL 40 were those "traceable" to before 1898. The CA held that BL 40 did not entail a tracing exercise.

The rights of a NTII to apply for permission of a small house grant under SHP ("Ding Rights") were recognized as traditional in that they originated from and retained the essence of the NTIIs' pre-1898 customs to build a house for their own occupation on their own land despite the change of the land holding system after 1898.

On the "lawful" aspect, the Ding Rights were recognized as lawful in that they were recognized by legislation and consolidated in the form of a government policy, giving rise to legal consequences enforceable in court.

The CA agreed that the Basic Law must be read as a coherent whole (including BL 25, BL 39, BL 40, BL 120 and BL 122). When construing BL 40 together with BL 120 and BL 122, small house grants under SHP would continue to be recognized and protected under the law of the HKSAR irrespective of the form and whether they were made before or

on 30 June 1997.

When read with the reservations under the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") which excluded a discrimination challenge of SHP based on sex, the CA found that BL 40 must be construed to exclude a discrimination challenge based on other grounds, such as sex, birth or social origin, available in the Basic Law or the BoR. Accordingly, the CA held that Ding Rights were, on a proper construction of BL 40, within the NTII's lawful and traditional rights interests covered by BL 40 and were entitled to constitutional protection in full, despite their inherently discriminatory nature.

What the Court said

The CA affirmed that a contextual approach must be adopted in construing BL 40. At 774, the CA said:

"87. In ascertaining the purpose and objective of BL 40, its specific historical context is instructive. In *Vallejos,* Ma CJ at [82] said that the court must take as the factual context, the scheme whereby foreign domestic helpers were allowed to enter and reside in Hong Kong subject to the highly restrictive conditions. Those were the facts that marked out foreign domestic helpers as a class and characterize the nature and quality of their residence in Hong Kong while employed as such. Those facts must necessarily be at the centre of the court's deliberations when it considered whether it was congruent with the concept of 'ordinary residence' as employed in article 24(2)(4) of the Basic Law to treat them as a class not ordinarily resident. Likewise, the historical factual matrix outlined in Part D1 above shows that the NTIIs are treated as a class of their own when it comes to their traditional rights and interests and the protection that they enjoy. Those facts must lie at the centre of our deliberations on the purpose and objective of BL 40.

88. As already pointed out, NTIIs as a status to distinguish them from the rest of Hong Kong's population had its origin in 1898 when the New Territories Lease came into force. By adopting the term 'NTIIs', the drafters must have 1898 in mind. At that time, the NTIIs already enjoyed certain rights and interests, derived from the customs and usages practiced in the New Territories in the pre-Colonial era, which were unique to them because of their status and the assurances given to them on behalf of the Colonial

Administration. Subject to and if necessary as modified by laws in terms of their recognition, their form and the manner in which they were exercised and enjoyed, when such rights and interests were passed down from the first generation to their descendants, they became the NTIIs' lawful traditional rights and interests as recognized in the legal system."

The CA held that "traditional" in BL 40 did not entail a tracing exercise. The Court said at 775:

"90. On the 'traditional' aspect, the drafters clearly did not intend to protect some rights and interests which might have been traditional but had already become extinct at the time or which might be asserted to be traditional sometime in the future. Whether a right or interest is traditional for the purpose of BL 40 is to be determined by reference to the state of affairs in April 1990. So BL 40 does not entail the tracing exercise advocated by the respondents and accepted by the Judge for the purpose of determining if an asserted right or interest is a traditional right or interest of the NTIIs entitling its protection. The Judge at [55] of the Judgment cited *Tse Kwan Sang*, and *Koon Ping Leung* in support of the tracing exercise. However, it should be noted that most of the historical and drafting materials pertaining to the construction of BL 40 were not presented before the courts, as is here in these appeals. Thus the two cases should not be regarded as authoritative on the 'traditional' aspect of BL 40.

91. Further, human experience shows that traditional rights and interests might evolve when they were passed down from one generation to another without however losing its essential features. Or that there might be occasional gaps and disruptions here and there without however really breaking their continuity or rendering them extinct. The drafters must have clearly intended to protect a traditional right and interest of the NTIIs although it might not be enjoyed in exactly the same manner in its pre-1898 form provided it retains its essential or core features. Such intention accords with the cardinal principle that a constitutional provision must be interpreted to protect the essence of the right in question from impairment: see *W v Registrar of Marriages* (2013) 16 HKCFAR 112 at [65]-[67]. The drafters must have also intended to protect a traditional right or interest despite some occasional gaps or disruptions which did not break its continuity or render it extinct."

At 775 – 776, the CA highlighted the importance of the continuity theme in construing BL 40:

"92. On the 'lawful' aspect, as said, the drafters intended to protect existing traditional rights and interests which were recognized as lawful in the legal system at the time. Contrary to the applicants' argument, the drafters did not intend to leave open the question of lawfulness to be determined by the courts after the Basic Law came into effect by reference to the Qing law, or the law before 1 July 1997 or thereafter. For it would result in much uncertainty and render the promise to give constitutional protection to the NTIIs' lawful traditional rights and interests already included in BL 40 as early as April 1990 inefficacious, which clearly is not what the drafters intended.

93. In our view, 'lawful traditional rights and interests of the NTII' in BL 40 mean those which are, as a matter of historical fact, recognized to be the NTIIs' lawful traditional rights and interests in the Hong Kong legal system at the time of the promulgation of the Basic Law on 4 April 1990. Applying the theme of continuity, BL 40 continues and elevates the recognition and protection to a constitutional level for such lawful traditional rights and interests of NTIIs after 1 July 1997."

The CA held at 776 – 777 that Ding rights were lawful traditional rights:

"94. As shown in the historical survey in Part D1, it is beyond doubt that the Ding Rights were as a matter of fact recognized in the Hong Kong legal system as lawful traditional rights and interests of the NTIIs during the drafting stage despite the heated debates about their discriminatory nature. They were recognized as traditional in that they originated from and retained the essence of the NTIIs' pre-1898 customs to build a house for their own occupation on their own land despite the change of the land holding system after 1898 and the disruptions caused by World War II. They were recognized as lawful in that they were embedded in legislation and in the form of a government policy, giving rise to legal consequences enforceable in court. They were not made unlawful by any statute, nor were they subject to any legal challenge or court decision denouncing them to be unlawful. They had all along been recognized and accepted to be lawful.

95. The Ding Rights continued to be recognized in the legal system as the NTIIs' lawful traditional rights and interests when the Basic Law was promulgated in April 1990. It therefore falls within the ambit of BL 40 and merits the constitutional protection in full despite its inherently discriminatory nature. Since the protection has been elevated to the constitutional level, BL 40 shields them from any challenge against their

legality based on discrimination or other constitutional grounds including the equality provisions such as BL 25, BL 39 and BOR 22. If such challenge were allowed, it would defeat the whole purpose of BL 40.

96. We have already pointed out at [92] above that generally speaking, the question of lawfulness of the NTIIs' rights and interests in BL 40 does not involve a determination by reference to the law before July 1997. In respect of the Ding Rights, we would add this. The Small House Policy was never subject to any legal challenge since 1972, not even after the BOR came into force in 1991. Since the respondents and the interested party accepted that the Small House Policy is inherently discriminatory, one might be tempted to argue that it must have fallen foul of the BOR before July 1997 had a challenge been mounted. In fact, this would appear to be the applicants' argument when they contended that lawfulness of the Ding Rights must be determined by the law before 1 July 1997, which includes the BOR. However, we do not find such an argument convincing. As will be seen below, because of the CEDAW reservations, a weighty factor in construing the relevant articles in the BOR, the Small House Policy might well have survived a discrimination challenge based on sex, or social origin and birth. Further, it is not entirely clear if the agreement reached by the UK Government and the PRC Government on small house grants as evidenced in Annex III of the Joint Declaration would impact on the challenge and if so how. In short, it is doubtful such a notional challenge based on the BOR if made prior to 1 July 1997 would succeed. This speculative exercise does not add anything to the analysis at hand."

The CA held that BL 40 must be read with BL 120 and BL 122. The Court said at 777 – 778:

"99. First, the coherence principle mandates that BL 40 must be read together with BL 120 and BL 122. It is because an article of the Basic Law should be read with and in light of other articles, especially those addressing the same or similar subject matter, to produce a harmonious and congruous instead of a discordant meaning …

102. Reading BL 120 and BL 122 together, insofar as small house grants made pursuant to the Small House Policy are concerned, irrespective of the form and whether they are made before or on 30 June 1997, they will continue to be recognized and protected under the law of the HKSAR. When BL 40 is construed together with BL 120 and BL 122, the Ding Rights must fall within the scope of NTIIs' lawful traditional rights and interests.

Any contrary construction would render BL 120 and BL 122, insofar as small house grants are concerned, quite meaningless."

The CA ruled that BL 25, BL 39 and BoR 22 must be read as consistent with the reservations under the CEDAW. The Court said at 780:
"110. While the CEDAW reservations render a discrimination challenge against the Ding Rights based on sex impermissible, it must also inform the construction of BL 40 in the context of a discrimination challenge based on other grounds, such as birth or social origin. The reason is again coherence.

…

112. Consistent with the CEDAW reservations excluding a discrimination challenge based on sex, BL 40 must be construed to also exclude a discrimination challenge based on other grounds, such as birth or social origin, available in the Basic Law or the BOR. Such construction ensures that a coherent constitutional scheme is laid down in BL 40 to protect the Ding Rights as the NTIIs' lawful traditional rights and interests."

The CA concluded at 781 that Ding Rights fell within BL 40:
"116. For the above reasons, we hold that on a proper construction of BL 40, the Ding Rights fall within the NTIIs' lawful traditional rights and interests entitling them to the constitutional protection in full, despite their inherently discriminatory nature. The Small House Policy is constitutional in its entirety."

HKSAR v Lai Chee Ying (黎智英) (2021) 24 HKCFAR 33

Background

On 12 December 2020, the respondent was charged with one count of "collusion with a foreign country or with external elements to endanger national security" under Article 29(4) of the National Security Law (the "NSL"). The Chief Magistrate refused bail and remanded the respondent in custody. On 23 December 2020, on the respondent's application, the CFI granted him bail pursuant to s. 9J of the Criminal Procedure Ordinance (Cap. 221) subject to certain undertakings offered by the respondent. The prosecution sought leave to appeal to the CFA and leave was granted on the question which sought the CFA's ruling on the

correct interpretation of Article 42(2) of the NSL ("NSL 42(2)") which provided:

No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.

Basic Law provisions in dispute

The CFA discussed BL 18 and BL 23.

What the Court held

The CFA allowed the prosecution's appeal and the respondent was remanded in custody. The Court held that the interpretation of NSL 42(2) required the provision to be examined in the light of the context and purpose of the NSL as a whole, taking into account the constitutional basis upon which the NSL was applied in the HKSAR.

The NSL was promulgated as a law of the HKSAR by the NPC and NPCSC in accordance with BL 18(2) and (3) on the footing that safeguarding national security was a matter outside the limits of the HKSAR's autonomy and within the purview of the Central Authorities. The CFA held that the legislative acts of the NPC and the NPCSC leading to the promulgation of the NSL as a law of the HKSAR, done in accordance with the provisions of the Basic Law, were not subject to review on the basis of any alleged incompatibility as between the NSL and the Basic Law or the provisions of the ICCPR as applied to Hong Kong.

The CFA held that NSL 42(2) excluded the presumption in favour of bail. The starting point was significantly different in that no bail shall be granted unless the judge had sufficient grounds for believing that the accused "will not continue to commit acts endangering national security". The CFA acknowledged that NSL 42(2) introduced a considerably more stringent threshold requirement: it is "no bail unless there are sufficient grounds to believe violation will not occur".

The CFA held that bail conditions could be considered by the court under NSL 42(2). The bail application was a matter for assessment by the court. The court might decide that in all the circumstances, and having duly considered possible bail conditions, it did not have sufficient grounds for believing that the accused would not continue to commit acts endangering national security and thus refuse bail.

The CFA held that no burden of proof was engaged under both NSL 42(2) and Part IA of Cap. 221. The grant or refusal of bail under the laws did not involve the application of a burden of proof, so that there was no burden resting on either party, and no burden to be imposed on the prosecution.

In applying NSL 42(2), the CFA held that the court must first decide whether it "has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security". If, having taken into account all relevant materials, the court concluded that it did not have sufficient grounds for believing that the accused would not continue to commit acts endangering national security, bail must be refused.

What the Court said

The Court explained the HKSAR's obligation to enact a national security law at 42 – 46:

"9. Since the PRC's resumption of the exercise of sovereignty over Hong Kong on 1 July 1997, the HKSAR has been constitutionally obliged to enact a National Security Law. Article 23 of the Basic Law ('BL 23') provides:

The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

10. Although a draft law was prepared after widespread consultation by the HKSAR Government in 2003, it was withdrawn in the face of political opposition and no such law has been locally enacted despite the passage of some 23 years. In the wake of serious and prolonged disturbances to public

order and challenges to the authority of the HKSAR and PRC governments in recent months, the Central Authorities considered the absence of national security legislation unacceptable and decided to take such legislation into their own hands. As NSL 1 states, the NSL:

… is enacted, in accordance with the Constitution of the People's Republic of China, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, and the Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for Safeguarding National Security in the Hong Kong Special Administrative Region …

11. The reference to the abovementioned Decision of the National People's Congress ('NPC') is to its Decision dated 28 May 2020 (which has been referred to as 'the 5.28 Decision') forming part of the process of formulating and applying the NSL to the HKSAR. Given the special status of the NSL as a national law applied under Article 18 of the Basic Law (as will be discussed) and given the express reference in NSL 1 to that process, regard may properly be had to the Explanations and Decisions made in proceedings of the NPC and the NPC Standing Committee ('NPCSC') regarding promulgation of the NSL as a law of the HKSAR as extrinsic materials relevant to consideration of the context and purpose of the NSL.

12. The process started with the Explanation of a Draft Decision (which was subsequently to become the '5.28 Decision') presented to the NPC on 22 May 2020. The Explanation began by identifying the concerns of the Central Authorities in the light of recent events in Hong Kong …

13. The Explanation went on to note that the HKSAR's failure to enact BL 23 legislation gave rise to the proposal that steps be taken at the national level to 'establish and improve the legal system and enforcement mechanisms for the HKSAR to safeguard national security, and to change its long-term 'defenceless' condition in the field of national security'. It identified five basic principles underlying the proposals which may be summarized as follows:

(a) First, 'resolutely safeguarding national security';

(b) Secondly, 'upholding and enhancing the 'One Country, Two Systems regime';

(c) Thirdly, adhering to 'administering Hong Kong in accordance with the law' and resolutely upholding 'the constitutional order in the HKSAR as established by the Constitution and the Hong Kong Basic Law';

(d) Fourthly, resolutely opposing external interference; and

(e) Fifthly, 'fully safeguarding the legitimate rights and interests of Hong Kong residents'.

…

15. The aforesaid Explanation was adopted by the NPC in making its 5.28 Decision. Having noted the national security risks, unlawful activities and foreign interference referred to, the NPC made its Decision entrusting the NPCSC:

… to formulate relevant laws on establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security, in order to effectively prevent, stop and punish acts and activities to split the country, subvert state power, organize and carry out terrorist activities and other behaviours that seriously endanger national security, as well as activities of foreign or external forces interfering in the affairs of the HKSAR.

…

16. It was left to the NPCSC to decide to include the relevant laws in Annex III of the Basic Law of the HKSAR of the PRC 'to be promulgated and implemented by the HKSAR locally'.

17. The Basic Law provisions in question are BL 18(2) and (3) which provide:

(2) National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

(3) The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.

18. The next step in the process was preparation of the Draft NSL and an Explanation of that Draft which was presented to the NPCSC on 18 June 2020. The five basic principles mentioned above were reiterated and the main contents of the Draft Law were elucidated. Certain 'working principles' adopted in the Draft were identified. … Notably, the fifth working principle was stated to be:

… accommodating the differences between Mainland China and the HKSAR,

and striving to address the convergence, compatibility and complementarity between this Law, and the relevant national laws and local laws of the HKSAR.

19. The NPCSC having decided to adopt the Draft NSL, there followed an Explanation of a Draft Decision of the NPCSC to add it to the list of laws in Annex III of the Basic Law. Having referred to BL 18 regarding the categories of national laws that may be locally applied by that constitutional route, the Explanation noted that:

… Safeguarding national security is a matter within the purview of the Central Authorities. The Central People's Government has an overarching responsibility for national security affairs relating to the HKSAR. …

It accordingly declared that:

… The National Security Law formulated by the NPC Standing Committee in accordance with the Decision falls within the scope of laws which should be listed in Annex III to the Hong Kong Basic Law. …

20. On 30 June 2020, the NPCSC duly decided to add the NSL to the list of laws in Annex III of the Basic Law to be applied locally by way of promulgation by the HKSAR. It was accordingly promulgated by the Chief Executive of the HKSAR who gave notice that the NSL as scheduled to the Promulgation applies as from 11 p.m. on 30 June 2020."

The CFA held that the courts of the HKSAR had no jurisdiction to review provisions of the NSL. The Court said at 49 – 50:

"32. As we have seen, promulgation of the NSL as a law of the HKSAR was the product of the NPC's 5.28 Decision and the NPCSC's formulation and listing of the NSL in Annex III of the Basic Law. This was done in accordance with BL 18(2) and (3) on the footing that safeguarding national security is a matter outside the limits of the HKSAR's autonomy and within the purview of the Central Authorities, the CPG having an overarching responsibility for national security affairs relating to the HKSAR. Mr Stewart Wong SC [counsel for the respondent] does not suggest the contrary. It follows … that there is no room for holding that the NSL or any of its provisions are unconstitutional or incompatible with the Basic Law or with the ICCPR as applied to Hong Kong as that would amount to a challenge to legislative acts of the NPC and NPCSC done in accordance with the provisions of the Basic Law and the procedure therein.

…

37. In our view, in the light of *Ng Ka Ling v Director of Immigration (No. 2)*, the legislative acts of the NPC and NPCSC leading to the promulgation of the NSL as a law of the HKSAR, done in accordance with the provisions of the Basic Law and the procedure therein, are not subject to review on the basis of any alleged incompatibility as between the NSL and the Basic Law or the ICCPR as applied to Hong Kong."

Kwok Cheuk Kin v President of Legislative Council [2021] 1 HKLRD 1247

Background

On 15 December 2017, the LegCo passed a resolution ("the Resolution") amending Rule 17 of the Rules of Procedure of the LegCo ("the Rules of Procedure") with the effect that the quorum for a meeting of a committee of the whole Council ("COWC") was reduced from not less than half of all the members of the LegCo (including the chairman) to 20 members (including the chairman). The Resolution did not otherwise alter the quorum of the LegCo. The Resolution was published in the Gazette on 22 December 2017 and took effect upon such publication.

The legislative authority in Hong Kong was conferred on the LegCo by BL 66 and BL 73(1). Subject to BL 75(1) on quorum for the meeting of the LegCo, BL 75(2) left it to the LegCo to make its own rules of procedure provided that such rules could not contravene the Basic Law.

The deliberation of bills in the three-reading legislative process was set out in the Rules of Procedure. When a motion for the second reading of a bill had been agreed to, the bill shall stand committed to the COWC. The function of the COWC was to consider the details (rather than the fundamental direction or underlying principles) of a bill and amendments could be made to a bill. The COWC and all other committees, including the House Committee, the Bills Committee and Select Committee, were creatures of the Rules of Procedure with their respective compositions, functions, powers and procedures being

provided for in the Rules of Procedure.

The applicant appealed to the CA against the dismissal of his application for judicial review by the CFI, contending that the Resolution was inconsistent with BL 75.

Basic Law provisions in dispute

The major provision in dispute was BL 75.

What the Court held

The CA dismissed the appeal. The Court held that BL 75 only governed the quorum of the LegCo, not the quorum of the COWC.

The Court held that from the angle of continuity, at all times prior to 1997, the quorum of the COWC was governed by the Standing Order of the LegCo, rules adopted by the Council, whereas the quorum of the Council itself was governed by Royal Instructions, a constitutional document in the colonial political regime.

The Court held that changes in the quorum of the COWC prior to 1997 had always been effected by the amendments to the Standing Orders adopted by the LegCo, not the Royal Instructions emanating from the British Government. It highlighted that the LegCo had the authority to effect such changes on its own. Since different changes of quorum were effected for the COWC and the LegCo prior to 1971, it highlighted that the LegCo was not regarded as the same entity as the COWC.

The Court held that the context and purpose of BL 75(1) supported the view that the true legislative intent was that the quorum requirement prescribed by BL 75(1) should apply only to meetings of the body tasked with important constitutional powers and functions as enumerated in BL 73, namely the LegCo itself, but not that of a mere committee of the LegCo as the COWC.

The Court held that there was no ground for drawing a distinction between the COWC and the other committees engaged in the legislative process in terms of construing BL 75 as to quorum requirement for the meeting of the LegCo.

What the Court said

The CA held at 1263 that at all times prior to 1997, the quorum of the COWC had never been governed by a constitutional instrument:

"45. Starting with the concept of continuity, [prior to 1997] the quorum of COWC was governed by the Standing Order of the Legislative Council whereas the quorum of the Council itself was governed by Royal Instructions. The authority of the Legislative Council came from the Royal Instructions, which was a document of constitutional order in the colonial political regime. On the other hand, the COWC derived its authority from the Standing Orders, which were rules adopted by the Council itself. In other words, at all times prior to 1997, the quorum of the COWC had never been prescribed by a constitutional instrument."

The CA held at 1263 – 1264 that the different changes of quorum effected for the LegCo and the COWC highlighted that the Council was not regarded as the same entity as the COWC:

"46. Prior to 1971, the quorum requirements of the COWC and the [LegCo] were actually different. The details were set out by the Judge at [33] of [the CFI judgment]:

(1) Prior to 9 October 1968, the quorum of the Council under the Royal Instructions was at least five Members including the Governor or the Presiding Member. There was no express provision concerning the quorum of a committee of the whole Council in the Standing Orders.

(2) During the period from 9 October 1968 (when the revised Standing Orders came into force) to 17 February 1969, the quorum of the Council under the Royal Instructions was at least five Members including the Governor or the Presiding Member, while the quorum of the Council and a committee of the whole Council under the Standing Orders was ten members excluding the President or Chairman.

(3) During the period from 17 February 1969 to 1 December 1971, the quorum of the Council under the Royal Instructions was at least ten Members including the Governor or the Presiding Member, while the quorum of the Council and a committee of the whole Council under the Standing Orders was ten members excluding the President or Chairman.

…

47. … the changes in the quorum of the COWC [prior to 1997] had always been effected by the amendments to the Standing Orders adopted by the

Council, not the Royal Instructions emanating from the British Government. This highlighted the fact that the Council had the authority to effect the changes. There was no need for approval by the British Government.

48. … since different changes of quorum were effected for the COWC and the Council prior to 1971, it also highlighted that the Council was not regarded as the same entity as the COWC. Otherwise, the requirement in the Royal Instructions applied and there was no need to have separate provision governing the quorum of COWC in the Standing Orders."

The CA held at 1264 – 1265 that BL 75(1) shall not apply to such internal committee as the COWC, which was not tasked with important constitutional powers and functions:

"49. Bearing in mind the functions and works of the COWC as an internal committee of the [LegCo], it is not surprising that the rule as to its quorum was governed by Standing Orders issued by the Council as opposed to being prescribed by a constitutional document such as the Royal Instructions.

50. Hence, from the angle of continuity, it is difficult to see the logic of the adoption of a construction of BL 75 governing not only the quorum of the Council but also the quorum of COWC. That would be a change from the practice in the past when the Council could amend the quorum requirement on its own. Mr Tam [counsel for the applicant] had not pinpointed any contextual material which can remotely suggest that the National People's Congress had the intention to make that change by the Basic Law. The functions and works of the COWC remain substantially the same after 1997 and we cannot see any reason why the drafters of the Basic Law would wish to make provision for the quorum of an internal committee in BL 75(1) instead of leaving it to the Council to decide under BL 75(2).

51. In this connection, we agree with the Judge's analysis at [49] of [the CFI judgment]:

The context and purpose of BL 75(1) as described above strongly support the view that the true legislative intent is that the quorum requirement prescribed by that article should apply only to meetings of the body tasked with the important constitutional powers and functions as enumerated in BL 73, i.e. the [LegCo] itself, but not that of a mere committee of the Council. The Basic Law is a constitutional instrument which sets out broad general principles for the governance of the HKSAR. A committee of the whole Council is essentially a working committee to fine tune the details of a bill after its general merits and principles have been considered by a Bills

Committee and accepted by the Council at the second reading of the bill. While it can readily be understood why the Basic Law would prescribe the quorum of the Council which must be satisfied before it can validly meet and transact its business, it is difficult to see why the Basic Law would be concerned with the quorum requirement for meetings of a committee of the Council."

The Court held at 1265 – 1266 that there was no distinction between the COWC and the other committees engaged in the legislative process:
"55. As we have seen, there are other committees (e.g. the House Committee, the Bills Committee, Select Committee) engaged in the legislative process and we do not see any ground for drawing a distinction between those committees and the COWC in terms of construing BL 75 as to quorum requirement for the meeting of the [LegCo]."

K v Commissioner of Police [2021] 2 HKLRD 645

Background

On 11 August 2019, K ("appellant") was found in Nathan Road having suffered injuries to her right eye. According to her, she was "hit by a suspected bean bag round shot by anti-riot police". She was then admitted to Queen Elizabeth Hospital ("Hospital") for treatment.

The police obtained personal details and medical records of the appellant from the Hospital pursuant to two search warrants ("Warrants"). The appellant asked the respondent to provide her a copy of the Warrants but her request was refused. The appellant commenced judicial review proceeding against the respondent arguing, *inter alia*, that the failure of the respondent to provide her with copies of the Warrants ("non-production of the Warrants") infringed her right of access to the courts protected by BL 35. The CFI dismissed the appellant's application for judicial review. The appellant appealed to the CA.

Basic Law provisions in dispute

The major provision in dispute was BL 35.

What the Court held

The CA dismissed the appellant's appeal, affirming the CFI's holding that there was no free-standing right for the appellant, a data subject not being an occupier or owner of premises, to have the Warrants produced to her on demand. There was no impediment in fact or in law to the appellant's intended legal challenge to the Warrants. The non-production of the Warrants did not obstruct her right of access to court under BL 35 to seek a remedy against any infringement of her privacy rights. The CA held that the challenge based on BL 35 had no merit.

What the Court said

At 665 – 666, the CA affirmed the CFI's holding that the appellant did not have a free-standing right to have the Warrants produced to her:

"78. None of the authorities cited by Mr Harris [counsel for the appellant] addressed the question of a free-standing right of a person other than the occupier or owner of the premises to obtain a copy of the warrant on account of his privacy interest. There are obvious differences between an occupier or owner of a premises to which a law enforcement officer seeks to gain access by a warrant and the data subject of information which the officer would obtain pursuant to a warrant. To start with, the information contained in a document could cover more than one (and sometimes many) data subjects. Further, the tactical need to maintain secrecy is necessarily compromised *vis-a-vis* an occupier on whom a warrant is served. But this would not be so for a data subject. Thirdly, the impact of such free-standing rights being conferred on a data subject on the integrity of a criminal investigation is much greater as illustrated the absurdity of such general right highlighted by the Judge at [42] of the judgment.

…

81. But it does not follow from the engagement of the right of privacy that the subject of investigation or the data subject of a piece of information obtained by the police in an investigation should be informed of such investigation and be entitled to copies of warrants for the search of his or her personal data. In every case where a law enforcement agency obtains documents or information by a search warrant, the privacy of the data subject of the documents or information is intruded. As acknowledged by the Supreme Court in *R (Naralambous) v Crown Court at St Albans*, at [27],

in many cases it would be inimical to the public interest to require the police to disclose information concerning an ongoing criminal investigation.

82. The safeguards are usually provided by the judicial gate-keeping in the issue of warrants. The right of a person affected to apply for the setting aside of warrants is part and parcel of these safeguards. As we shall see, there is no impediment to K in that regard had she chosen to do so in the present case.

83. We are prepared to accept (as the Judge did) that a person like K had the standing to apply to the magistrate to set aside the Warrants or apply to the High Court for judicial review of the Warrants. But the existence of such right does not give rise to a free-standing right to have copies of the Warrants on demand."

At 668 – 669, the CA found that there was no impairment to the essence of the right of access to court under BL 35:

"93. … the so-called practical difficulties cannot constitute impairment to the essence of the right of access to court. Given that K was aware that her medical reports were the subject matter of the Warrants and how the disclosure of such reports would impact on her privacy, we are not impressed … that K could not effectively bring an application to the magistrate to set aside the Warrants or alternatively bring an application for judicial review to challenge the issue of the Warrants on the ground of intrusion of her right of privacy.

…

96. Though it may be said that without sight of the Warrants it is unsatisfactory to mount a challenge directed against the scope of the disclosure, in the present case this is more apparent than real. It was known to K (and the police did not dispute) that the subject matter of the Warrants were the medical reports (and there is no suggestion that apart from the medical reports and the personal particulars the police obtained other information concerning K from the Hospital Authority) and she intended to challenge the Warrants by reason of her interest in privacy over the medical reports. Further, if the eventual discovery of the Warrants provides other grounds for challenging the same, additional grounds could be added to the application to set aside or judicial review."

The CA concluded at 669:

"97. We agree with the Judge's conclusions that there was no impediment

in fact or in law to K's intended legal challenge to the Warrants. Her right of access to court had not been obstructed by the non-production of the Warrants.

98. … If there is no obstruction of access, the right under BL 35 is not engaged.

99. Thus, the challenge based on BL 35 has no merit and the Judge was correct in dismissing the same."

曹敏儀 v Carrie Lam Cheng Yuet-ngor, Chief Executive of HKSAR (unreported, 20 May 2021, HCAL 2405 of 2020)

Background

The applicant intended to apply for judicial review of the "Lantau Tomorrow Vision" project announced by the Chief Executive in the 2018 Policy Address. This was a government project that proposed to study the development of an artificial island and related infrastructural projects near Kau Yi Chau to provide a larger piece of land for area required for various social needs so as to meet the development needs of Hong Kong in various aspects. The applicant argued that the Government did not need to incur infrastructure costs on reclamation to implement the "Lantau Tomorrow Vision" project and that the Government had violated the principle of "keeping expenditure within the limits of revenues" under BL 107.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 107.

What the Court held

The CFI dismissed the applicant's application for leave to apply for judicial review. The CFI pointed out that the principle of "keeping expenditure within the limits of revenues" was not a static principle that the HKSARG must adhere to in every financial year. The balance

of revenues and expenditures referred to in BL 107 meant that total revenues were roughly the same as total expenditures, rather than requiring that total revenues and total expenditures to be exactly the same in any given financial year. It may take some time for the Government to break even, so it may record surpluses or deficits in individual years during that period.

On the question as to whether the "Lantau Tomorrow Vision" project was worthy of implementation, the CFI pointed out that it was for the HKSARG and/or the Legislature to consider and it was not for the Court to make a judgment. The CFI dismissed the applicant's application for leave to apply for judicial review.

What the Court said

In relation to the applicant's allegation that the "Lantau Tomorrow Vision" project violated BL 107, the CFI stated in paragraphs 6 – 7 that:

"6. BL 107 only sets out some broad and general principles, namely that the HKSARG shall strive to achieve a fiscal balance and avoid deficits. The principle of 'keeping expenditure within the limits of revenues' is not a static principle that the HKSARG must adhere to in every financial year. The Basic Law does not require the HKSARG to achieve a fiscal balance and avoid deficits in every financial year. In addition, the balance of revenues and expenditures referred to in BL 107 means that total revenues are roughly the same as total expenditures, rather than requiring that total revenues and total expenditures to be exactly the same in any given financial year. It may take some time for the Government to break even, so it may record surpluses or deficits in individual years during that period.

7. Large-scale projects such as the 'Vision' cannot be completed in a single fiscal year, and the revenues and benefits from these projects cannot be fully counted in a single financial year. Therefore, when considering whether the principle of 'keeping expenditure within the limits of revenues' has been observed, a long-term and holistic focus should be adopted. The Court finds that the applicant has failed to present any substantial evidence to support the contention that the Government did not adhere to the principle of 'keeping expenditure within the limits of revenues' in deciding to implement the 'Vision' project."

As to whether Hong Kong should implement the "Lantau Tomorrow Vision" project, the CFI stated in paragraph 9 that it was for the HKSARG and/or the Legislature to consider how to proceed, not for the Judiciary to decide.

"9. … As regards the political, social and economic issues arising from the question whether Hong Kong should implement the 'Vision' project, it is for the HKSARG and/or the Legislature to consider, and not for the Judiciary to decide (see *Fok Chun Wa v Hospital Authority* [2012] 2 HKC 413 at para. 64). BL 84 provides that the function of the Judiciary is to try specific cases of legal claims in accordance with the laws applicable to the HKSAR. The Judiciary has no authority to make or enforce a public policy. In accordance with BL 62(1), the relevant matters are within the competence of the Executive Authorities."

Kwok Cheuk Kin v Secretary for Justice [2021] 3 HKLRD 140

Background

The principal issue which arose for determination in these appeals was whether the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Cap. 632) was inconsistent with the Basic Law.

The HKSARG and Mainland authorities agreed in around July 2017 on the framework for implementing co-location arrangement at West Kowloon Station as they considered that efficient and time-saving clearance procedures were essential to realizing the full potential of the Express Rail Link ("XRL"). Co-location Arrangement meant conducting clearance procedures of two different jurisdictions successively at West Kowloon Station.

On 18 November 2017, the CE and the Governor of Guangdong Province signed the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location

Arrangement ("Co-operation Arrangement").

On 27 December 2017, the NPCSC approved the Co-operation Arrangement by adopting, at the Thirty-first Session of the Standing Committee of the Twelfth NPC, the Decision of the NPCSC on Approving the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement ("the NPCSC Decision").

The NPCSC Decision expressly confirmed that (i) the Co-operation Arrangement was consistent with the Constitution and the Basic Law, and (ii) the implementation of the Co-location Arrangement at West Kowloon Station was consistent with the fundamental purposes of the "one country, two systems" principle and of the Basic Law.

In June 2018, Cap. 632 was enacted. The Ordinance established the Mainland Port Area in West Kowloon Station for the purpose of conducting clearance and inspection on high-speed rail passengers and their luggage. S. 6(1) provided that: "[e]xcept for reserved matters, the Mainland Port Area is to be regarded as an area lying outside Hong Kong but lying within the Mainland for the purposes of - (a) the application of the laws of the Mainland, and of the laws of Hong Kong, in the Mainland Port Area; and (b) the delineation of jurisdiction … over the Mainland Port Area".

The applicant and others ("the applicants") sought leave to apply for judicial review, contending that Cap. 632 was inconsistent with the Basic Law. The applications were dismissed by the CFI which found Cap. 632 to be consistent with the Basic Law. The applicants' appeals were dismissed by the CA.

Basic Law provisions in dispute

The major provisions in dispute were BL 18 and BL 19.

What the Court held

The CA held that the courts must approach the Basic Law as a living instrument in determining the constitutionality of Cap. 632, which was a novel matter not envisaged when the Basic Law was promulgated. In doing so, the courts were still guided and bound by the purpose of the Basic Law and the relevant articles, and its language in light of its context.

The CA held that the NPCSC Decision on a subject matter lying at the interface of the two systems was highly persuasive in the HKSAR court's construction of the Basic Law, the courts would strive for a construction of the Basic Law that was consistent with the NPCSC Decision.

The CA held that in terms of constitutional purpose and context, given its specific purpose, its unique characteristics, and its limited applicability in terms of geographical location and classes of individuals, in deeming the Mainland Port Area as an area lying outside the HKSAR and lying within the Mainland for the purpose of applying the Mainland law and jurisdiction except for reserved matters, Cap. 632 did not contravene BL 18 and BL 19. It did not diminish the high degree of autonomy enjoyed by the HKSAR as authorized by the NPC. It did not impermissibly allow the Mainland system to pass the demarcation line between the two systems jealously guarded by the Basic Law.

What the Court said

The CA discussed the purposive approach and the "living instrument" concept as well as the limit of the concept. The CA said at 165 – 166:

"40. … As a facet of purposive construction, that concept arises from the unique characteristics of a constitutional document. As a constitutional document, one of the principal purposes of the Basic Law is to prescribe the systems to be practised in the HKSAR in order to ensure that the implementation of the basic policies of the PRC regarding Hong Kong, including the principle of 'one country, two systems', will remain unchanged for 50 years … The Basic Law is accordingly drafted with an eye to the future. Its function is to provide a continuing constitutional framework for the Hong Kong system as prescribed to operate as long as Hong Kong remains a

Special Administrative Region. Maintaining the Hong Kong system under the 'one country, two systems' principle, however, does not mean stagnation. On the contrary, the Hong Kong system is expected to and indeed should continue to develop within the confines of the Basic Law to suit the contemporaneous needs and circumstances of our society, some of which may even be beyond the drafters' contemplation. Keeping in line with these objectives, the Basic Law adopts a language in ample and general terms to express statements of policies, principles and values without condescending to particularity or definition of terms. This enables the Basic Law to grow and develop at the same time as our society progresses so as to meet current social and political realities, including those which are not envisaged by its drafters. These considerations require the court to approach the Basic Law as a living instrument, so that it will not be deprived of its vitality and adaptability to serve succeeding generations in the HKSAR.

41. … The concept does not release the courts from the task of interpreting the language used in the Basic Law and does not enable them to give free rein to whatever they consider should have been the views of the drafters. … It is impermissible for the courts to give a meaning that the language cannot bear. …

42. Thus understood, the courts are entitled to and must approach the Basic Law as a living instrument in determining the constitutionality of [Cap. 632], which is a novel matter not envisaged when the Basic Law was promulgated. In doing so, the courts are still guided and bound by the purpose of the Basic Law and the relevant articles, and its language in light of its context."

The CA pointed out at 169 – 170 that the Co-operation Arrangement lied squarely at the interface between the Mainland system and the Hong Kong system:

"59. One crucial general point which informs the construction of BL 18 and BL 19 may be drawn from the outline above. The executive, legislative and independent judicial power, as authorized by the NPC … is to be exercised by the HKSAR for two primary purposes. Firstly, it is for the furtherance of the high degree of autonomy that the HKSAR enjoys. Secondly, it is for the maintenance of the Hong Kong system, including the executive, legislative and judicial systems as prescribed … Needless to say, such power must be exercised within the bounds of the high degree of autonomy set in the Basic Law."

At 170, the CA discussed the interfaces between the two systems:

"60. The 'one country, two systems' principle is underpinned by the imperative that the Mainland system and the Hong Kong system, though kept separate and distinct under the Basic Law, are within one country and one national constitutional order. There are interfaces where the two systems meet and interact within the constitutional framework set by the Constitution and the Basic Law. Accordingly, there are mechanisms in the Constitution and the Basic Law to regulate their interactions and to ensure that any subject matter lying at the interface conforms with both systems. …"

The CA highlighted four mechanisms which dealt with the interfaces between the two systems, i.e. a decision by the NPCSC, the reporting and return mechanism under BL 17(3), application of national laws under Annex III to the Basic Law, and an interpretation by the NPCSC.

The CA considered the first mechanism, i.e. the NPCSC Decision, in light of the evidence of Professor Wang Lei, the respondent's PRC law expert. The CA said at 172:

"66. Adopting the same reasoning and based on Professor Wang's evidence, one may reasonably argue thus. Save and expect that the socialist system and policies shall not be practised in Hong Kong, the Constitution on the whole must apply to the HKSAR as an inalienable part of the People's Republic of China. Under both the Constitution and the Basic Law, the Standing Committee has the ultimate authority and power to decide if a subject matter lying at the interface of the two system confirms with the Constitution and the Basic Law. The authority of the Standing Committee to make such decision must be fully acknowledged and respected in the HKSAR. As both the Mainland and Hong Kong systems are within one country and one national constitutional order, such Standing Committee's decision made in conformity with the Constitution and the Basic Law under the Mainland system is binding in Hong Kong.

67. That argument, if correct, would be determinative of these appeals and indeed issues similar to those arising here. But we will have to await another occasion to examine it further in light of the submission before us."

The CA held at 173 – 174 that the NPCSC Decision was highly persuasive in the court's construction of the Basic Law:

"69. … it is axiomatic that a subject matter lying at the interface must conform with the Basic Law under each of the Mainland and Hong Kong systems. And on the question of conformity, the two systems must operate

coherently. The two systems being within one country and one national constitutional order requires it to be so. When the Standing Committee has by way of a decision confirmed that an arrangement conforms with the Basic Law, its decision as a matter of the Mainland law is final. This is a crucial fact that the courts in Hong Kong must fully acknowledge and accept when approaching a constitutional challenge that the subject matter contravenes the Basic Law under Hong Kong law. The Standing Committee's authoritative view expressed in the NPCSC Decision must therefore carry a highly persuasive weight in the courts' construction of the Basic Law.

…

72. … It means that the courts must give due regard to it as a highly persuasive interpretative factor in the overall constitutional context and, in doing so, will strive for a construction of the Basic Law that is consistent with it."

The CA considered the mechanism under BL 17(3). The CA said at 174 – 175 that:

"76. … If the Standing Committee decided to return [Cap. 632] under BL 17(3), its decision that it did not conform with the BL could not be challenged in Hong Kong courts. … By not returning the Ordinance under the mechanism in BL 17(3), the Standing Committee must have confirmed that the Ordinance conformed with the Basic Law. Its confirmation, likewise, could not be reviewed by Hong Kong courts. … we did not hear the parties further on the implications of the Standing Committee's act of not returning the Ordinance under BL 17(3). We would leave the point for another occasion".

The CA rejected the applicants' suggestion that the Co-operation Arrangement should be implemented by way of the mechanism under Annex III to the Basic Law. The Court said at 176:

"80. … We disagree because the national law introduced through the Annex III mechanism applies across the board to the entire HKSAR. It cannot be invoked for introducing the Co-operation Arrangement, which is limited to a confined area and restricted classes of individuals."

The CA held that it was incorrect to conflate a decision of the NPCSC with an interpretation. The CA said at 176:

"82. … Moreover, treating the NPCSC Decision as an interpretation in substance is unnecessary when, as demonstrated, it *per se* must have a

highly persuasive weight."

The CA went on to deal with the core issue and pointed out at 178 that:
"92. As a starting point, subject to the constitutionality issue, the HKSAR, in exercising the high degree of autonomy bestowed on it by the Basic Law, plainly has ample powers to establish the Mainland Port Area within the West Kowloon Station. … The HKSAR Government may exercise its own immigration controls on the entry to and exit from the Region as part of the executive power that it enjoys pursuant to the authorization by the NPC. Establishing the Mainland Port Area at the West Kowloon Station for the purpose of immigration control and related matters is well within the executive power of the Government of HKSAR. Enacting [Cap. 632] to give statutory backing to its establishment likewise falls within the legislative power of the Legislative Council.

93. The genesis of the Co-operation Arrangement, and the 'Three-step process' that it went through, cumulating in the enactment of [Cap. 632] clearly demonstrate the Ordinance does not offend the 'one country-two systems' principle, diminish the HKSAR's high degree of autonomy or encroach upon the Hong Kong systems as complained. …"

The CA rejected the applicants' argument that it was impermissible to deem the Mainland Port Area as an area lying outside Hong Kong but within the Mainland for the purpose of applying the Mainland law and in terms of jurisdiction. The CA held at 180:
"96. First, the deeming provision proceeds on the well-established legal notion that in the context of modern transport and communication, a distinction may be drawn between territorial boundary and legal jurisdiction, which, depending on the actual needs and circumstances, are not necessarily co-extensive … Deeming the Mainland Port Area as an area lying outside Hong Kong and within the Mainland in terms of legal jurisdiction does not alter the boundary of the HKSAR, as section 6(2) makes plain. It certainly does not have the effect of *'surrendering'* a part of the HKSAR back to the Mainland, contrary to the applicants' emotive suggestion. It meets the special needs and circumstances arising from the Co-operation Arrangement, and no more. …

97. Second, the intention of a deeming provision, in laying down a hypothesis, or an assumed state of affairs, is that the hypothesis should be carried as far as necessary to achieve the legislative purpose, but no further. … Here, the purpose of [Cap. 632] is to establish a port in the West

Kowloon Station where immigration controls and related measures are to be implemented to facilitate passengers who choose to travel between Hong Kong and the Mainland by using the XRL with the associated convenience and advantages provided by the co-location arrangement. The deeming provision in the Ordinance gives effect to this purpose, and no more.

98. Third, we give full weight to the NPCSC Decision confirming that the Ordinance, including the deeming provision, conforms with the Basic Law."

The CA concluded at 181:

"100. Our conclusion is further supported by the coherence principle, under which the Basic Law must be read in a harmonious and congruous way. … The legislative and judicial power under BL 18 and BL 19 is to be exercised for furthering the HKSAR's high degree of autonomy and for maintaining the Hong Kong systems. BL 18 and BL 19 cannot be construed to take away the HKSAR's powers to establish the Mainland Port Area by [Cap. 632], especially the deeming provision, which neither diminishes the Region's high degree of autonomy nor impairs the Hong Kong system. …

102. To sum up, in terms of constitutional purpose and context, given its specific purpose, its unique characteristics, and its limited applicability in terms of geographical location and classes of individuals, in deeming the Mainland Port Area as an area lying outside the HKSAR and lying within the Mainland for the purpose of applying the Mainland law and jurisdiction except for reserved matters, [Cap. 632] does not contravene BL 18 and BL 19. It does not diminish the high degree of autonomy enjoyed by the HKSAR as authorized by the NPC. It does not impermissibly allow the Mainland system to pass the demarcation line between the two systems jealously guarded by the Basic Law and encroach upon the Hong Kong system."

Tong Ying Kit v Secretary for Justice [2021] 3 HKLRD 350

Background

This case concerned the construction of Article 46(1) ("NSL 46(1)") of the Law of the People's Republic of China on Safeguarding National Security in the HKSAR ("NSL"), and whether a decision by the Secretary for Justice ("SJ") to issue a certificate under NSL 46(1), directing that the proceedings in the CFI be tried without a jury ("the

Certificate"), was amenable to conventional judicial review challenge such as the principle of legality and procedural safeguards.

The applicant, a defendant facing trial in the CFI for offences under the NSL etc. applied before the Judge for leave to judicial review of the SJ's decision to issue the Certificate on the ground that the Certificate engaged the principle of legality and procedural safeguards which the SJ had failed to observe. The Judge refused to grant leave to the applicant to apply for judicial review after a rolled up hearing. The applicant's appeal to the CA was dismissed.

Basic Law provisions in dispute

The major provisions in dispute were BL 63, BL 86 and BL 87.

What the Court held

Applying a purposive construction, the CA held that NSL 46(1) sought to give full effect to the primary purpose of the NSL, which had a special constitutional status focusing specifically on safeguarding national security and preventing and suppressing acts endangering national security in the Region. However, NSL 46(1) had to be read together with NSL 4 and NSL 5, and BL 87 and BoR 10 and BoR 11, to ensure that the defendant's constitutional right to a fair trial was not compromised. The prosecution also had a legitimate interest in maintaining the fairness of the trial.

The third of the stated grounds for issuing a non-jury trial certificate in NSL 46(1), which concerned the protection of personal safety of jurors and their family members, served the prosecution's legitimate interest in maintaining a fair trial and safeguarded the accused's constitutional right to a fair trial. Though jury trial was the conventional mode of trial in the CFI, it was not the only means of achieving fairness in the criminal process. Neither BL 87 nor BoR 10 specified trial by jury as an indispensable element of a fair trial in the determination of a criminal charge. When there was a real risk that the goal of a fair trial by jury would be put in peril by reason of the personal safety of jurors and their family members, the only assured means for achieving a fair trial was a

non-jury trial, one conducted by a panel of three judges as mandated by NSL 46(1).

The CA held that, on a proper construction, NSL 46(1) did not admit of a conventional judicial review as contended by the applicant. The decision of the SJ to issue the Certificate was a prosecutorial decision protected by BL 63. As such, it was only amenable to judicial review on the limited grounds of dishonesty, bad faith and exceptional circumstances. It was not open to challenge on conventional judicial review grounds based on the principle of legality and procedural safeguards.

The direction to law enforcement and judicial authorities of the Region for timely disposal of NSL cases in NSL 42(1) strongly militated against the contention that the decision by the SJ to issue the Certificate was amenable to conventional judicial review challenge, because such a challenge would definitely breed elaborate and protracted satellite proceedings, by delaying the criminal process, contrary to the directive of NSL 42(1).

The CA further held that, under the common law, a prosecutorial decision was reviewable only on limited grounds under the rubric of dishonesty, bad faith or other exceptional circumstances. The applicant did not allege dishonesty or bad faith. He only relied on his asserted constitutional right to a jury trial in the CFI. However, that alone did not amount to exceptional circumstances for challenging the SJ's prosecutorial decision of issuing the Certificate.

What the Court said

The CA set out the applicant's real complaint at 361:

"30. Properly understood, the applicant's complaint boils down to his assertion that he has a constitutional right to a jury trial under BL 86 and that when the SJ issued the Certificate, her decision had the effect of depriving him such a right, therefore engaging the principle of legality and procedural safeguards. …"

The CA held at 366 that there can be no inconsistency between the NSL and the Basic Law:

"45. NSL 1 states that the NSL is enacted in accordance with the Constitution and the Basic Law. Thus, there can be no inconsistency or incompatibility between the NSL and the Basic Law. It follows that there can be no inconsistency or incompatibility between NSL 46(1) with BL 63 or BL 86. This requires the court to read NSL 46(1), BL 63 and BL 86 as a coherent whole."

At 365, the CA discussed fair trial and how it was ensured by NSL 46(1):

"43. The third of the stated grounds for issuing a non-jury trial certificate in NSL 46(1) concerns the protection of personal safety of jurors and their family members. When the personal safety of jurors or their family members is under threat, it will seriously undermine the integrity of the criminal process. This is where the paramount importance of a fair trial comes into play. Granted jury trial is the conventional mode of trial in the Court of First Instance, it should not be assumed that it is the only means of achieving fairness in the criminal process. Neither BL 87 nor BOR 10 specifies trial by jury as an indispensable element of a fair trial in the determination of a criminal charge. When there is a real risk that the goal of a fair trial by jury will be put in peril by reason of the circumstances mentioned in the third ground, the only assured means for achieving a fair trial is a non-jury trial, one conducted by a panel of three judges as mandated by NSL 46(1). Such a mode of trial serves the prosecution's legitimate interest in maintaining a fair trial and safeguards the accused's constitutional right to a fair trial."

In relation to the applicant's contention that there was a right to jury trial in the CFI, the CA said at 368:

"54. … Mr Dykes' contention that there is a right to jury trial in the CFI does not sit well with the modern local appellate authorities on the subject. However, as said, it is not necessary for me to come to a definitive view on the matter. The reason is this. Even assuming that BL 86 has entrenched a right to jury trial in the CFI, it does not encompass the principle of legality or procedural safeguards as contended. It is because … a decision made by the SJ which results in a non-jury trial under the relevant enactment is a prosecutorial decision protected by BL 63."

At 368 – 369, the CA came to the conclusion that the decision of the SJ to issue the Certificate was a prosecutorial decision and was shielded from any conventional judicial review challenge by applying the Appeal

Committee's judgment in *Chiang Lily v Secretary for Justice* (2010) 13 HKCFAR 208:

"56. It follows from the Appeal Committee's judgment in *Chiang Lily* that the SJ's decision on venue, which results in a non-jury trial by the operation of a statutory provision, is a prosecutorial decision protected under BL 63 and is not reviewable on conventional judicial review ground. Likewise, issuing a certificate under NSL 46(1) is undeniably a prosecutorial decision made by the SJ in the criminal process. NSL 46(1) then mandates a non-jury trial. Applying *Chiang Lily*, BL 63 shields the decision to issue a NSL 46(1) certificate from any conventional judicial review challenge."

The CA also derived support from the English authorities in coming to the conclusion that the decision of the SJ to issue a NSL 46(1) certificate was a prosecutorial decision. After discussing three such cases, the CA said at 371 – 372:

"64. Plainly, when one considers the context and process in which a decision to issue a non-jury trial certificate under NSL 46(1) is made, the same considerations and evaluative assessment undertaken by the Attorney General as described in the English authorities are involved. The decision-making process undertaken by the Secretary for Justice under NSL 46(1) may involve classified information such as State secrets, confidential intelligence concerning involvement of foreign factors, sensitive materials on risks of personal safety of jurors or their family members or threats to due administration of justice. The information or materials are ordinarily of such a nature that it would not be in the public interest to disclose. Or for the Secretary for Justice to reveal to or discuss with the accused before trial. The Secretary for Justice has to take into account all the relevant circumstances in assessing all the materials available to her, some of which may not be admissible in evidence, and make a judgment call. It is usually, as aptly described by Lord Kerr, of the impressionistic and instinctual variety. And NSL 46(1) entrusts the Secretary for Justice alone with this enormous task. The reasons articulated in the English authorities as to why the Attorney General's decision or certificate is a prosecutorial decision not amenable to conventional judicial review challenge are equally apposite to the decision by the Secretary for Justice to issue a certificate under NSL 46(1)."

Secretary for Justice v Leung Kwok Hung (27 September 2021, FACC 3 of 2021)

Background

During a LegCo panel meeting held in November 2016, Leung Kwok Hung ("appellant"), then a LegCo member, snatched away a folder from a Government official and then passed it to another LegCo member, ignoring the chairperson's repeated demands for him to return to his seat and to return the folder to the Government official.

Subsequently prosecuted for the offence of contempt under s. 17(c) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382), the appellant challenged the ambit and constitutionality of s. 17(c) of Cap. 382. The appellant succeeded before the Magistrate. The Secretary for Justice appealed and succeeded at the CA, the latter held, *inter alia*, that s. 17(c) was constitutional. The appellant appealed to the CFA and argued that he enjoyed immunity from prosecution for the s. 17(c) offence because of, *inter alia*, the absolute freedom of speech and debate in LegCo under ss. 3 and 4 of Cap. 382 or BL 77, and the application of the non-intervention principle.

Basic Law provisions in dispute

The provision in dispute was BL 77.

What the Court held

The CFA dismissed the appellant's appeal. While s. 3 of Cap. 382 conferred an absolute privilege, whether any particular conduct fell within the protected freedom of speech and debate in LegCo depended on a proper construction of the relevant provisions of Cap. 382 as a whole. Cap. 382 was to provide a statutory footing for, *inter alia*, LegCo's powers and privileges. Although Cap. 382 was enacted before the drafting of the Basic Law, there was no suggestion that the Basic Law had intended to depart from or extend the powers and privileges of LegCo in Cap. 382. By reference to the purpose of the privilege of free speech and debate in LegCo, the appellant's argument that he had

absolute immunity for his actions merely because of his presence and participation in a LegCo meeting was rejected. The appellant's conduct did not fall within the protection of free speech and debate under ss. 3 and 4 of Cap. 382 or BL 77 as he was plainly not engaged in speech and debate in LegCo when he acted in the alleged way.

Accordingly, the CFA held that the freedom of speech and debate under ss. 3 and 4 of Cap. 382 or BL 77 did not provide the appellant with the immunity from prosecution for the s. 17(c) offence. The CFA further held that the non-intervention principle had no application in this case.

What the Court said

At paragraphs 24 – 25, the CFA held that the question of whether any particular conduct fell within the protected freedom of speech and debate in LegCo depended on a proper construction of the relevant provisions of Cap. 382:

"24. Adopting the well-established principles of statutory construction of examining the language of the relevant provisions by reference to their context and purpose, … In [Cap. 382], the privilege or immunity applies to 'speech and debate' (section 3) and 'words spoken … or written' (section 4) in LegCo, and is reflected in the immunity for 'statements' in BL 77. This Court has, of course, previously acknowledged that freedom of expression embraces, as one of its dimensions, the manner in which an individual wishes to express their views and is therefore not limited to spoken or written words. At the same time, however, section 17(c) provides a criminal offence of contempt for interruptive disturbances … and so the question of whether any particular conduct falls within the protected freedom of speech and debate or not must depend on a proper construction of the relevant provisions of [Cap. 382] as a whole.

25. The statutory purpose is the starting point of any such construction. [Cap. 382] was enacted in 1985 in anticipation of the resumption of the exercise of sovereignty over Hong Kong by the People's Republic of China. It was recognized that the powers and privileges of the former colonial legislature would cease to have effect after 30 June 1997 and so the then Hong Kong Government proposed the Bill which became [Cap. 382] in order to provide a statutory footing for LegCo's management of its own affairs, effective investigatory powers and its powers and privileges. That legislative

scheme included the creation of offences and penalties, over which jurisdiction was conferred on the courts. This statutory purpose is reflected in the debates in LegCo second reading and committee stage of the Bill, including in particular the speeches of the Chief Secretary moving its second reading. The enactment of [Cap. 382] in July 1985, included sections 3, 4 and 17(c), as well as other provisions, and preceded the drafting of the Basic Law. There is no suggestion that the Basic Law was intended either to depart from, or extend, the powers and privileges of LegCo in [Cap. 382] (as noted above, BL 77 only immunizes 'statements at meetings of the Council')."

The CFA ruled at paragraphs 28 – 29 that the appellant did not have absolute immunity for his actions merely because of his presence and participation in a LegCo meeting:

"28. The protection of freedom of speech and debate in LegCo is self-evidently an important right. It enables members of LegCo to advocate opinions freely and robustly and without inhibition due to the fear of legal proceedings for such speech and debate. It would be a significant inroad into that freedom if a member of LegCo were subject to legal proceedings for things said by him in the course of sometimes heated political debate. Equally, as the passage quoted in the preceding paragraph demonstrates, the provisions regulating admission and creating offences are designed to achieve the statutory purpose of creating a secure and dignified environment conducive to the legislature carrying out its constitutional functions at its sittings without disruption or disturbance.

29. Accepting the appellant's broad argument in the present case that, merely because he was present at, and had been participating in, a committee meeting of LegCo, he had absolute immunity for his actions however and whenever occurring and even if they amounted to a disruption caught by section 17(c), would be to extend the privilege of free speech and debate beyond the purpose for which it is granted."

At paragraphs 30 – 31, the CFA held that the appellant's conduct did not fall within the protection of free speech and debate under ss. 3 and 4 of Cap. 382 or BL 77:

"30. In the present case, in my view, his conduct did not fall within the speech and debate protected by sections 3 or 4 of [Cap. 382] or BL 77. At the meeting in question, if the prosecution's case is established, the appellant created a disturbance by the act of crossing the floor of the chamber during

a debate and snatching property belonging to someone else which he passed to a third party over the owner's objections. … By his actions, the appellant created a disturbance which interfered with the ability of other members of LegCo to carry out their proper functions. In doing so, he was not making a speech, nor was he participating in debating any business that was before the meeting.

31. … As noted above, the Court has acknowledged that freedom of expression embraces the manner in which an individual expresses their views. In conveying information and ideas an individual member might well conduct themselves in a manner which falls within the freedom of speech and debate conferred. On the other hand, whilst the limits of the freedom are widely drawn and properly described as absolute, conduct which does not form part of any speech or debate in LegCo falls outside the section 3 privilege. Such conduct which creates a disturbance constituting an interruption to proceedings interfering with the proper functioning of LegCo or its committees, and in particular where it interferes with the rights of others, may attract liability under section 17(c). There may be cases where it is more difficult to see the division between conduct which falls within the protection of speech and debate and that which does not. This is not such a case. Here, it is plain that the appellant was not engaged in speech and debate in LegCo when he conducted himself in the manner alleged to have created a disturbance. It follows that his conduct, *prima facie* contrary to section 17(c), is not protected by the privilege conferred by sections 3 and 4 or BL 77."

The CFA distinguished this case from that of *Leung Kwok Hung v President of the Legislative Council (No. 1)* (2014) 17 HKCFAR 689. The CFA held at paragraph 35:

"35. That case [*Leung Kwok Hung v President of the Legislative Council (No. 1)* (2014) 17 HKCFAR 689] concerned the question of whether the court should exercise its powers of judicial review regarding the regularity or otherwise of the President of LegCo's decision to curtail the time for debate and to bring a long filibuster to an end. This was clearly a matter involving the internal processes of the legislature. The present case is entirely different. In exercising jurisdiction in respect of the appellant's prosecution under section 17(c), the court is carrying out its judicial function of applying primary legislation enacted by LegCo itself. There is no issue of separation of powers. LegCo has carried out its constitutionally allotted legislative function of enacting the offence provision conferring jurisdiction on the

courts and the courts carry out their constitutionally allotted adjudicative function in trying prosecutions for the offence so enacted. Contrary to the appellant's arguments, the non-intervention principle has no application."

Kwok Cheuk Kin v Director of Lands (5 November 2021, FACV 2, 3 & 4 of 2021)

Background

Formalized by the ExCo in 1972, the Small House Policy ("SHP") is a non-statutory administrative policy which authorizes grants of land and building licences to eligible male indigenous inhabitants of the New Territories on more favourable terms than those available generally. Kwok Cheuk Kin ("appellant") challenged the constitutionality of the SHP by judicial review proceedings. The appellant argued, *inter alia*, that the SHP was discriminatory on the grounds of sex and social origin or birth, in breach of BL 25, BL 39 and BoR 22. The Government ("respondents") and Heung Yee Kuk ("interested party") contended that the SHP was constitutional under BL 40. The appellant partially succeeded at the CFI. All parties appealed to the CA and the latter allowed the respondents' and the interested party's appeal. The appellant subsequently appealed to the CFA.

Basic Law provisions in dispute

The major Basic Law provision in dispute was BL 40 though the CFA also referred to BL 8, BL 25, BL 39 and BL 122.

What the Court held

The CFA upheld the constitutionality of the SHP and dismissed the appellant's appeal. The nature of the right or interest of an applicant under the SHP was defined by the CFA as a right to have his application dealt with in accordance with the criteria laid down in the government's statements of the current SHP, subject to the lawfully exercised

discretion of the Lands Department ("LD"). Such a right created by the SHP was a "right" within the meaning of BL 40.

On the construction of the word "lawful" under BL 40, the CFA overruled the CA and held that "lawful" went to the lawfulness of the way in which the discretion of the LD was exercised as a matter of public law. "Lawful" was not intended to refer to the absence of discriminatory features forbidden by BL 25 or BL 39 as BL 40 excluded their application in the context of indigenous rights.

The CFA agreed with the CA that "traditional" rights under BL 40 were those recognized as traditional in April 1990 when the Basic Law was promulgated. The issue of whether the exclusion of the SHP from the Sex Discrimination Ordinance was constitutional did not stand as BL 40 took the SHP out of the ambit of BL 25 and BL 39.

What the Court said

The CFA held at paragraphs 39 – 40 that the relevant right or interest of an applicant under the SHP was a "right" within the meaning of BL 40:

"39. The starting point is to identify the nature of the 'right' or 'interest' which an applicant under the Small House Policy may be said to have. The existence of the Policy is implicitly acknowledged in a number of Ordinances, as well as the Basic Law itself. … But the Policy itself has never had a statutory basis. It is applied as a matter of administrative discretion. In those circumstances, it cannot give rise to a legal right in the ordinary sense of the word. The actual grant of a building licence or a lease gives rise to a right which is good against the world, but an application for such a right or interest does not. The relevant right is founded entirely on public law. We would define it 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. That discretion is not unlimited. It is governed by law. … This is therefore an inherently imperfect right. It depends on the availability of judicial review, a jurisdiction with highly flexible remedies. Moreover, unless BL 40 makes the Small House Policy immutable (a question which we do not decide), it may change. But while the Policy remains in force in its current terms, it creates something which is clearly a 'right' in the sense meant by BL 40. Otherwise BL 40 applies to very little.

40. In those circumstances the concept of an 'interest' does not call for separate consideration, but it is clearly at least as broad as the concept of a 'right'."

The CFA found at paragraph 44 that BL 40 qualified and limited the application of the anti-discrimination provisions, BL 25, BL 39 and BoR 22:

"44. In our judgment, the [respondents' and the interested party's case that BL 40 qualifies and limits the application of the anti-discrimination provisions, BL 25, BL 39 and BoR 22] is correct, for the following reasons:

(1) The Basic Law is founded on the principle of continuity, with specific exceptions where this was inconsistent with the PRC's basic policies for Hong Kong. Indeed, Article 5 of the Basic Law stated that 'the previous capitalist system and way of life shall remain unchanged for 50 years.' One starts, therefore, with the expectation that a significant element in what paragraph 3(5) of the Joint Declaration calls 'current social and economic systems' will remain unchanged. On the face of it, BL 40 is a saving provision seeking to give effect to that principle by protecting an existing entitlement of a particular class of persons.

(2) It is a principle of statutory construction that the specific prevails over the general. This is simply one aspect of the more general principle that legislative instruments must be read as a coherent whole …

The same principle applies to constitutional interpretation. BL 25 and BL 39 and BOR 22 are general provisions. BL 40 is a specific provision dealing with the special position of the indigenous inhabitants of the New Territories.

(3) Absent BL 40, all the various advantages enjoyed by the indigenous inhabitants of the New Territories would be inherently discriminatory unless they can be objectively justified as being necessary in pursuit of a legitimate aim: see *Secretary for Justice v Yau Yuk Lung*. If consistency with the anti-discrimination provisions is treated as a condition of their being protected by BL 40 (as the Appellant proposes), then either (i) the discrimination is justified, in which case BL 40 is unnecessary; or (ii) it is unjustified, in which case BL 40 applies to nothing. Yet BL 40 was plainly intended to have some effect.

(4) BL 122, which deals with the level of rent payable on 'old schedule lots, village lots, small houses and similar rural holdings', assumes that grants will continue to be made under the Small House Policy to descendants in the male line of pre-1898 village residents, notwithstanding the discriminatory

features of the Policy which are specifically referred to in that Article. It is fair to say that the assumptions of the legislator are not necessarily the same as his enactments. But this assumption casts a good deal of light on what the drafters of the Basic Law must have believed that they had provided for in BL 40."

At paragraph 45, the CFA ruled that the word "lawful" under BL 40 referred to the lawfulness of the way that the discretion of the LD was exercised as a matter of public law:

"45. Both courts below described the word 'lawful' as 'descriptive'. Mr Lee [counsel for the appellant] fairly submits that on that footing it is redundant and without legal effect. In our judgment, the word is neither purely descriptive nor redundant. It goes to the lawfulness of the way that the discretion is exercised as a matter of public law. We have defined the relevant right or interest of an applicant under the Small House Policy as a right to have his application dealt with in accordance with the criteria laid down in the government's public statements of the current Policy, subject to a lawfully exercised administrative discretion of the Lands Department. That right or interest is lawful if the discretion to make a grant under the Policy is lawfully exercised as a matter of public law. It would not be lawful if, for example, the discretion was exercised in a manner contrary to some enforceable legitimate expectation of the applicant or was vitiated by corruption or bias. 'Lawful' is not intended to refer to the absence of discriminatory features forbidden by BL 25 or BL 39, whose application in the special context of indigenous rights is addressed by BL 40 and excluded."

The CFA held that "traditional" rights under BL 40 were those recognized as traditional in April 1990 and BL 40 did not require a protected right or interest to be traceable to the period before 1898. At paragraphs 47 and 50, the Court said:

"47. There is nothing in BL 40 which requires a protected right or interest to be traceable to the period before 1898. BL 40 does not say so in terms. Is there any ground on which such a principle might be implied? In our opinion there is not. The principle of traceability is not implicit in the concept of tradition as a matter of language. It is not necessary for the efficacy of BL 40. And it is not consistent with the purpose of BL 40. In view of the importance which has always been attached to purposive construction in interpreting the Basic Law, this last point calls for some expansion.

…

50. … The Basic Law was addressed to the problem of continuity between the colonial regime and the system which would follow it. The problem of continuity between the *Qing* dynasty and the colonial regime was of no subsisting relevance by 1990. There was therefore no rational reason why the PRC, whose basic policies regarding Hong Kong were embodied in the Basic Law, should wish to make the preservation of indigenous rights which they would inherit from the colonial regime dependant on their similarity to rights which had existed before 1898. The fact that only descendants of pre-1898 villagers were eligible for small house grants and that the Small House Policy had been devised for an earlier transfer of power was part of the description of the system which the SAR inherited and which BL 40 protected. But it was not an indication that between 1997 and 2047 the survival of those rights should depend on disputable antiquarian research into land rights which had been extinguished nearly a century before."

Extended Reading

Deng Xiaoping (1993). *Deng Xiaoping: On the Question of Hong Kong*. Hong Kong: Joint Publishing (H.K.) Co. Ltd.

Lee Hoey, Simon (2012). *Overview of the Drafting Process of the Basic Law of Hong Kong*. Hong Kong: Joint Publishing (H.K.) Co. Ltd.

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