THE JUDGE OVER YOUR SHOULDER

A GUIDE TO JUDICIAL REVIEW FOR ADMINISTRATORS
THIRD EDITION
The Judge Over Your Shoulder
A Guide To Judicial Review For Administrators
(Third Edition)

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Foreword

With a greater awareness of rights and liberty among the public, Government decisions and actions are subject to more vigilant judicial scrutiny. The proper use of judicial review serves to buttress the rule of law and provides an essential foundation to good governance of administrators. Judicial review enables individuals to seek redress from the Court against public bodies to ensure that the exercise of public functions is in accordance with the law and is subject to necessary checks and balances. Judicial review is an integral part of the regime for upholding the rule of law in Hong Kong and the Hong Kong Special Administrative Region Government fully respects individuals' right to apply for judicial review.

Thus, the increasing number of judicial review applications made to the Court of First Instance in recent years should be viewed in a positive light and that it is also a reflection of community's confidence in our independent judicial system and in turn, the rule of law in Hong Kong.

Judicial review remains an established and vital feature of our legal system to ensure that governmental decisions and actions meet the legal requirements on lawfulness, rationality, procedural fairness and compatibility with safeguards on fundamental rights, and provide suitable legal redress where appropriate. It should however be appreciated that judicial review serves to determine the legality of actions of the public authorities as opposed to the merits of policies involving political, economic, social arguments or the like, which the Court is not concerned with and are for the Government to resolve.

It is therefore of particular importance that administrators are well-versed with the fundamentals of judicial review and remain vigilant in observing the relevant legal principles when discharging their duties and responsibilities. To this end, it gives me great pleasure to introduce the third edition of "The Judge Over Your Shoulder – A Guide to Judicial Review for Administrators".

In line with the Government's commitment to openness and transparency, this third edition of the Guide will be made accessible to not just Government officials, but the general public for the first time. It will be uploaded to the website of the Department of Justice so as to facilitate better understanding of the principles relating to good governance and administration. It is hoped that the Guide will serve as a useful general reference for not just Government officials, but anyone who wishes to have a better understanding of judicial review, which is undeniably an important part of the Hong Kong legal system.
Foreword

With a greater awareness of rights and liberty among the public, Government decisions and actions are subject to more vigilant judicial scrutiny. The proper use of judicial review serves to buttress the rule of law and provides an essential foundation to good governance of administrators. Judicial review enables individuals to seek redress from the Court against public bodies to ensure that the exercise of public functions is in accordance with the law and is subject to necessary checks and balances. Judicial review is an integral part of the regime for upholding the rule of law in Hong Kong and the Hong Kong Special Administrative Region Government fully respects individuals’ right to apply for judicial review.

Thus, the increasing number of judicial review applications made to the Court of First Instance in recent years should be viewed in a positive light and that it is also a reflection of community’s confidence in our independent judicial system and in turn, the rule of law in Hong Kong.

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It is therefore of particular importance that administrators are well-versed with the fundamentals of judicial review and remain vigilant in observing the relevant legal principles when discharging their duties and responsibilities. To this end, it gives me great pleasure to introduce the third edition of “The Judge Over Your Shoulder – A Guide to Judicial Review for Administrators”.

In line with the Government’s commitment to openness and transparency, this third edition of the Guide will be made accessible to not just Government officials, but the general public for the first time. It will be uploaded to the website of the Department of Justice so as to facilitate better understanding of the principles relating to good governance and administration. It is hoped that the Guide will serve as a useful general reference for not just Government officials, but anyone who wishes to have a better understanding of judicial review, which is undeniably an important part of the Hong Kong legal system.
As with the previous two editions, the third edition of this Guide mainly serves to assist Government officials who are responsible for making decisions affecting the public in understanding the basics of judicial review. It provides an update to the rapid development of the law on judicial review in recent years. In particular, a new chapter “Is judicial review available” is added and a flowchart illustrating the process of judicial review is included in one of the Annexes to facilitate a better understanding of the practical procedures involved in an application for judicial review.

Last but not least, I must express my warmest gratitude to Professor Christopher Forsyth, Emeritus Sir David Williams Professor of Public Law, University of Cambridge, and a long-time friend of this department. His helpful review of the contents and the very constructive comments he has given guided us to complete this edition. I am also most grateful for the hard work and dedication of our in-house editorial team in contributing to this edition.

Ms Teresa Cheng, GBS, SC, JP
Secretary for Justice
May 2019
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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>BL / Basic Law</td>
<td>The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China</td>
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<tr>
<td>BL 8</td>
<td>Article 8 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China</td>
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<tr>
<td>CAT</td>
<td>The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>CFA</td>
<td>The Court of Final Appeal of the Hong Kong Special Administrative Region of the People’s Republic of China</td>
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<tr>
<td>HKBOR</td>
<td>The Hong Kong Bill of Rights as contained in section 8 of the Hong Kong Bill of Rights Ordinance, Cap. 383</td>
</tr>
<tr>
<td>HKBOR 5</td>
<td>Article 5 of the HKBOR</td>
</tr>
<tr>
<td>HKBORO</td>
<td>The Hong Kong Bill of Rights Ordinance, Cap. 383</td>
</tr>
<tr>
<td>HKSAR / Hong Kong</td>
<td>The Hong Kong Special Administrative Region of the People’s Republic of China</td>
</tr>
<tr>
<td>ICCPR</td>
<td>The International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>LegCo</td>
<td>The Legislative Council of the Hong Kong Special Administrative Region of the People’s Republic of China</td>
</tr>
<tr>
<td>PRC</td>
<td>People’s Republic of China</td>
</tr>
<tr>
<td>SCNPC</td>
<td>The Standing Committee of the National People’s Congress of the People’s Republic of China</td>
</tr>
<tr>
<td>UNHCR</td>
<td>The United Nations High Commissioner for Refugees</td>
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1. INTRODUCTION

This Guide is intended to assist Government officials responsible for making decisions affecting the public. It highlights the main areas where decisions are susceptible to challenge in courts by way of the procedure known as the "application for judicial review". It examines in broad terms the process of judicial review. This Guide is not intended to be a substitute for seeking legal advice but it should assist in making lawful decisions. Apart from judicial review, there are other remedies available for challenging or seeking redress in relation to an administrative decision. These are not the focus of this Guide, but an overview is available in Chapter 10.

1.1 THE NATURE OF JUDICIAL REVIEW

1.1.1 Judicial review is the review by a judge of the Court of First Instance of any exercise, or any refusal to exercise, any public decision-making powers. Its purpose is to determine whether that decision is lawful and valid. It is thus a means by which the courts can supervise how Government officials or other public officers exercise their powers or carry out their duties. It plays an important part in the process of good administration, providing an effective means of ensuring that any improper exercise of power can be remedied and safeguarding individual interests against any administrative action which is illegal, irrational or taken without following proper procedures.

1.1.2 Although most administrative actions are based on the exercise of powers derived from legislation, judicial review may also cover other administrative actions that do not have a statutory basis, for example, deciding whether to make an ex gratia compensation or the Comprehensive Social Security Allowance.

1.1.3 Government officials and other public authorities (such as the Housing Authority and the Hospital Authority) performing public functions are the most common bodies whose decisions are challenged by judicial review. But any person exercising public power (including any statutory board or disciplinary panel of a professional body) may also be subject to judicial review.

Application for Leave to Apply for Judicial Review*

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Applications</th>
<th>Leave granted</th>
<th>Leave refused</th>
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<tr>
<td>2008</td>
<td>147</td>
<td>67</td>
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<tr>
<td>2009</td>
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<tr>
<td>2016</td>
<td>228</td>
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<tr>
<td>2017</td>
<td>1146**</td>
<td>16</td>
<td>228</td>
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*Statistics for 2008 to 2017 are provided by the Judiciary as quoted by the Government in a written reply to a member of the LegCo dated 28.2.2018. The statistics on the outcome of leave applications represent the position as at 3.1.2018 and may vary with time. According to the Judiciary's written reply to a member of the LegCo in respect of a meeting on 8.4.2019, 3014 leave applications were filed in 2018, of which 2851 cases were in respect of non-refoulement claims.

** Out of these, 1006 cases were in respect of non-refoulement claims.
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** Out of these, 1006 cases were in respect of non-refoulement claims.
1.2 THE FOUNDATIONS OF JUDICIAL REVIEW

1.2.1 In most cases the foundation or justification of judicial review is to be found in the basic proposition that a public official must not act beyond his legal powers (“ultra vires”), i.e. a decision is challenged on the ground that it is in excess of the authority conferred by law, and therefore invalid.

1.2.2 The “ultra vires doctrine” covers the validity of subsidiary or delegated legislation as well as the decisions of administrative boards or tribunals and the decisions of administrative bodies (such as those taken by public officers and public authorities). A decision-maker acts beyond his powers both when he goes beyond the powers expressly granted by the legislation but also when he ignores the limits laid down impliedly by the legislation. Thus even if the legislation does not expressly say that powers must be exercised in a procedurally fair manner, this is “taken as read” and a decision-maker who adopts an unfair procedure will be found to have exceeded his powers.

1.2.3 Where there is no legislation involved (see para 1.1.2), the justification of judicial review is found in the “common law theory”. Judicial review is justified by the inherent power of the courts to develop the common law. It is a judicial creation intended to apply the substantive values of fairness and justice inherent in the rule of law to the decisions of administrative authorities.

1.3 REVIEW AND APPEAL

1.3.1 Judicial review is fundamentally different from an appeal. When hearing an appeal, the Court is concerned with the merits of a decision. Was it a wise or an unwise decision? But when subjecting some administrative act or order to judicial review, the Court is only concerned with its legality. On appeal the question is “right or wrong?”. On review the question is “lawful or unlawful?”. Rights of appeal are always statutory. Judicial review is inherent in the common law.

<table>
<thead>
<tr>
<th>Year</th>
<th>Favourable to Government</th>
<th>Against Government</th>
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<tbody>
<tr>
<td>2008</td>
<td>73%</td>
<td>27%</td>
</tr>
<tr>
<td>2009</td>
<td>72%</td>
<td>28%</td>
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<tr>
<td>2010</td>
<td>82%</td>
<td>18%</td>
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<tr>
<td>2011</td>
<td>71%</td>
<td>29%</td>
</tr>
<tr>
<td>2012</td>
<td>78%</td>
<td>22%</td>
</tr>
<tr>
<td>2013</td>
<td>68%</td>
<td>32%</td>
</tr>
<tr>
<td>2014</td>
<td>64%</td>
<td>36%</td>
</tr>
<tr>
<td>2015</td>
<td>56%</td>
<td>44%</td>
</tr>
<tr>
<td>2016</td>
<td>88%</td>
<td>12%</td>
</tr>
<tr>
<td>2017</td>
<td>85%</td>
<td>15%</td>
</tr>
<tr>
<td>2018</td>
<td>93%</td>
<td>7%</td>
</tr>
</tbody>
</table>
1.4 JUDICIAL REVIEW AND GOOD GOVERNANCE

1.4.1 With the increasing number of applications and wide range of areas covered, it is inevitable that judicial review will create pressure on the Administration. These challenges, however, help develop a culture on the part of the Government and public authorities in which they exercise their powers and formulate their legislative proposals and policies in compliance with the law. This is part and parcel of the Government’s role in vigilantly upholding the rule of law and maintaining good administration. It is with such conviction that (as the figures given in para 1.1.3 show) the Government succeeds more than it fails in judicial review proceedings.

1.4.2 Of course it is often inconvenient for the Government to lose a judicial review (especially when established procedures have to be changed as a result) and to have its conduct described as illegal by the courts. But this only underlines the importance of public officers making decisions in accordance with the principles set out in this Guide, so that those decisions are less likely to be vulnerable to challenge in the courts.

“Proper responsibility and accountability in the public sphere is called good governance, good governance is another term for an adherence to the requirements of the law and to its spirit. In other words, it embodies the concept of the rule of law. This is the essence of that type of case known as judicial review and, most often, this type of case involves the Government…. In judicial reviews, the public interest is always engaged… A decision of the court in public law litigation will often serve as a guide to good governance, whether looking at events in the past or perhaps more important, the future. Although there may occasionally be inconveniences, judicial review overall serves the public interest and facilitates the well-being of our society. This status should properly be recognised”. (per Chief Justice Ma at the Ceremonial Opening of the Legal Year 2016)

“It is important to recognise that judicial review is an established and vital feature of our legal system. This is not by any means unique to Hong Kong. On the contrary, the growth of judicial review in our jurisdiction in recent years is consistent with what has happened in many common law jurisdictions.”
“It would not be right for judicial review to be viewed negatively as a hindrance to Government. On the contrary, it should be seen as providing an essential foundation for good governance under the rule of law.”  

(per former Chief Justice Li at the Ceremonial Opening of the Legal Year 2007)

1.5 ROLE OF THE COURT

1.5.1 The Court has repeatedly emphasised that its role is solely to determine legal issues in accordance with the law and its spirit although judicial review proceedings may involve matters of considerable political, economic or social consequences.

1.5.2 Generally, the Court is slow to review Government policies which are legitimately formulated. Judicial review is concerned with the question of legality and is not intended to deprive authorities of their policy-making functions or to substitute the Court’s decisions for those of policy-making bodies.

“The society in which we all live and work is a complex one. The complexities are reflected in the nature of the legal disputes that go before the courts for resolution. Some of these disputes I have referred to as high profile and may involve important political, economic or social consequences. This should, I reiterate, be seen in proper light. The courts deal with these types of case in precisely the same way as any other case: strictly in accordance with the law and legal principle.”  

(per Chief Justice Ma at the Ceremonial Opening of the Legal Year 2017)

Case Example

• See Chu Yee Wah v Director of Environmental Protection [2011] 3 HKC 227; HCAL 9/2010 (18.4.2011). The applicant sought, inter alia, to have the Director of Environmental Protection apply a more stringent policy of air quality objectives (“AQOs”). The Court held that although there was a strong case for adopting more stringent AQOs, it was not for the Court to impose a new policy in this regard. “To do so would be to trespass on the balancing process which is the exclusive domain of the Executive.”  

(per Fok JA (as he then was) sitting as a first instance judge at para 172)  This part of the judgment was approved by the Court of Appeal. See Chu Yee Wah v Director of Environmental Protection [2012] 1 HKC 35; CACV 84/2011 (27.9.2011). “It is not for the court to decide matters of policy.”  

(per Tang VP (as he then was) at para 116)

1.6 GROUNDS FOR JUDICIAL REVIEW: AN OVERVIEW

1.6.1 The three main grounds for judicial review are:

(a) Illegality;
(b) Irrationality; and
(c) Procedural Impropriety.

Case Example

- In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (22.11.1984) Lord Diplock said in words that have become very well known: “Judicial review has I think developed to a stage today when ... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The *first* ground I would call ‘illegality’, the *second* ‘irrationality’ and the *third* ‘procedural impropriety’. That is not to say that further development on a case by case basis may not in the course of time add further grounds ...

By ‘*illegality*’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it ...

By ‘*irrationality*’ I mean what can now be succinctly referred to as ‘*Wednesbury unreasonableness*’ (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ...

I have described the third head as ‘*procedural impropriety*’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instruments by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.” (per Lord Diplock at 410, 411) (emphasis added)

1.6.2 A more detailed analysis of the above three main grounds for judicial review will be provided in the chapters that follow.
2. IS JUDICIAL REVIEW AVAILABLE

In considering a potential case of judicial review, the first question is often this: is judicial review available? This chapter provides an overview of relevant key principles in considering this question. In addition, there are two flowcharts at Annex I which graphically summarise the key issues. You may wish to refer to the flowcharts after reading this Guide.

2.1 PROCEDURAL EXCLUSIVITY

2.1.1 An applicant for judicial review is in a different situation from a plaintiff who starts a private civil law action. A judicial review applicant needs to first obtain the leave of the Court, by satisfying the Court of the various matters set out in this chapter, and that the grounds of the proposed judicial review are reasonably arguable (see Chapters 7.1 and 7.2). In order to prevent public law issues being the subject of adjudication in private law proceedings where such hurdles do not exist, there is a rule requiring persons seeking to obtain public law remedies (see Chapter 7.7) to proceed by way of judicial review and not otherwise. It would as a general rule be an abuse of process for an applicant to seek redress for a public law wrong by means of a private civil law action for private law remedy (for example, to take out a private civil law action applying for a declaration that a public authority’s decision is unlawful). The rule is enforced by the Court striking out proceedings that should have been commenced as a judicial review. In suitable cases, the Court may order that judicial review proceedings continue as a private law action.

High Court Ordinance, Cap. 4

21K. Application for judicial review

(1) An application to the Court of First Instance for one or more of the following forms of relief—
   (a) an order of mandamus, prohibition or certiorari;
   (b) an injunction under section 21J restraining a person not entitled to do so from acting in an office to which that section applies,

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.

Rules of the High Court, Cap. 4A

O.53, r.1 Cases appropriate for application for judicial review

(1) An application for judicial review must be made if the applicant is seeking—
   (a) an order for mandamus, prohibition or certiorari; or
   (b) an injunction under section 21J of the Ordinance restraining a person from acting in any office in which he is not entitled to act.

Case Example

• In O’Reilly v Mackman [1983] 2 AC 237 (25.11.1982), the plaintiffs, four inmates
of Hull prison, commenced proceedings by private civil action disputing the validity of punishments awarded by the Board of Visitors of Hull Prison on the ground that such disciplinary awards were in breach of the prison rules and contravened the principles of natural justice. The House of Lords held that the proceedings should be struck out as an abuse of process of the Court; and that since the case was a matter of public law the only available procedure was judicial review.

2.1.2 There are various exceptions to the rule. One is where the public law issues are collateral to the main issues in a private law claim. For example, a defendant in a private civil law action may defend himself by raising a public law issue. Similarly, defendants in criminal proceedings may, under some circumstances, be entitled to raise a defence in public law.

2.2 TIMING

2.2.1 Generally, an application for leave to apply for judicial review must be made promptly and, in any event, within 3 months from when the grounds for judicial review first arose, unless time is extended by the Court upon good reasons given. Leave may be refused if an application for leave is delayed or premature.

Case Example

- In Commissioner for Television and Entertainment Licensing v Amusement Game Centres Appeal Board [2004] 1 HKLRD 765; CACV 185/2003 (2.3.2004), it was held that the time began to run from the date when the grounds for the application first arose, hence from the date of tribunal’s decision being impugned rather than when the reasons therefor were later given.

(a) Delay

2.2.2 Delay in making the application could result in refusal of leave or, if leave is granted, denial of the discretionary relief after the substantive hearing even if the ground of challenge was made out.

Case Example

- In Town Planning Board v Society for the Protection of the Harbour Ltd (2004) 7 HKCFAR 1; FACV 14/2003 (9.1.2004), the former Chief Justice Li stressed that it was of obvious importance and in the interests of good public administration that all concerned should know where they stood as soon as possible so that the earliest opportunity for any challenge should be promptly taken. If not, the courts have the discretion to refuse relief.
(b) Prematurity

2.2.3 If an application for judicial review is premature, leave may be refused. Issue of prematurity may arise if, at the time when the application is made, the relevant legal or factual events to which the application relates have not yet occurred or if the application concerns an “intermediate” or “procedural” decision which does not give rise to any substantive consequence. Moreover, it is generally not part of a Court’s function to restrain the legislature from making unconstitutional laws, as distinct from declaring such laws invalid after enactment. In spite of that, an application for judicial review may, in exceptional circumstances, be entertained even where it may otherwise be regarded as being premature.

Case Example

• In *Leung Lai Kwok Yvonne v Chief Secretary for Administration, unreported, HCAL 31/2015* (5.6.2015), the applicant challenged the decisions made by the Government in relation to the “Consultation Document” and a “Consultation Report and Proposals” as regards the method of selecting the Chief Executive of the HKSAR. Following the said documents, a Draft Motion was submitted to the LegCo and it remained to be seen whether the LegCo would endorse the motion. The Court held, among other things, that the intended judicial review application was premature in that the impugned decisions were not final decisions as the same might not be endorsed by the LegCo.

2.3 SUBJECT MATTER OF CHALLENGE

2.3.1 The nature of the decision in question will determine the extent to which it can be reviewed by the Court. Where the impugned decision is non-justiciable (i.e. not capable of being adjudicated upon by a Court), the Court will not review the decision. Also, the Court may exercise judicial restraint and avoid adjudicating on matters pertaining to policy solutions to complex social problems.

(a) Private vs public

2.3.2 The application for judicial review is confined to reviewing matters of a public nature as opposed to those of a purely private character. In exercising a purely commercial function, a public authority performs a “private” function governed by private and not public law. If the duty imposed on a body was a public duty and the body was exercising public law functions, that body’s decision may be within the reach of judicial review. Courts usually regard the function being exercised by the public body, rather than the formal source of its power, as the touchstone for amenability to review.
Rules of the High Court, Cap. 4A

O. 53, r.1A  Interpretation

*application for judicial review* (司法覆核申請) includes an application in accordance with this Order for a review of the lawfulness of –
(a) an enactment; or
(b) a decision, action or failure to act in relation to the exercise of a public function.

**Case Example**

- In *Regina v Panel on Take-overs and Mergers, ex parte Datafin plc and another [1987] 1 Q.B. 815* (5.12.1986), the Panel on Takeovers and Mergers monitored a code of rules, promulgated by itself, governing company takeovers and mergers. The scheme had neither statutory nor contractual underpinning. The Court of Appeal found that the decisions of the Panel were amenable to judicial review as the Panel was performing a public duty, having considered factors such as the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and mergers and to use the Panel as the centrepiece of his regulation of that market; and the fact that the rights of citizens were indirectly affected by the Panel’s decisions. Lloyd LJ at 847 opined that “...it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may ... be sufficient to bring the body within the reach of judicial review.”

- In *Wan Yung Sang v Housing Authority, unreported, HCAL 135/2009* (6.7.2011), a tenant of public housing estate challenged by way of an application for judicial review the Housing Authority’s decisions in serving him a notice to quit and in confirming the same. The Court of First Instance held that the Housing Authority was not acting purely or predominantly as a private landlord but there were clearly sufficient public elements in managing the public housing estates via the tenancy agreements to render the Housing Authority’s actions subject to judicial review.

**(b) Prerogative powers**

2.3.3  These comprise the wide range of non-statutory discretionary powers exercised by the Government. Examples include the grant of honours, the grant of mercy, the appointment of ministers and the making of treaties. These prerogative powers were previously said to confer discretion which no Court could question. Today, those prerogatives do not as such confer unreviewable discretion, but many of those powers are considered to be of a kind with which the Court will not concern themselves (i.e. not justiciable). Depending on the subject matter, the lawfulness of the decision making process may be subject to judicial review, while the merits of the decision will not be questioned.
Case Example

- See *Ch’ng Poh v Chief Executive of HKSAR*, unreported, HCAL 182/2002 (3.12.2003). The applicant for judicial review was convicted of fraud related offences. Following unsuccessful criminal appeals, the applicant petitioned to the then Chief Executive seeking the exercise of his prerogative for mercy under BL 48(12). On the issue of amenability to judicial review, it was held that “while the merits of any decision made by the Chief Executive pursuant to Article 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.” (per Hartmann J (as he then was) at para 38)

(c) Constitutional limits on judicial review

2.3.4 BL 19(2) provides for the maintenance of restrictions on Hong Kong courts’ jurisdiction imposed by the legal system and the principles previously in force in Hong Kong. Further, under BL 19(3), the HKSAR courts shall have no jurisdiction over acts of state such as defence and foreign affairs. BL 63 provides that the Department of Justice shall control criminal prosecutions free from interference.

**BL 19(2) & (3)**

“The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.” (BL 19(2))

“The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs ...” (BL 19(3))

**BL 63**

“The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.”

Case Example

- See *Re C (A Bankrupt) [2006]* 4 HKC 582; CACV 405/2004 (28.9.2006). “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.” (per Stock JA (as he then was) at 591)

FG Hemisphere Associates LLC commenced proceedings in the HKSAR to enforce two arbitral awards obtained in Paris and Zurich against the Democratic Republic of the Congo. The Democratic Republic of the Congo raised the ground that the courts of the HKSAR did not have jurisdiction over it as it enjoyed state immunity as a foreign sovereign state. By a majority, the CFA reached a provisional conclusion, *inter alia*, that the determination by the Central People’s Government (“CPG”) to adopt a policy of absolute immunity was an “act of state such as defence and foreign affairs” within the meaning of BL 19(3). As such, the determination to adopt the policy of absolute immunity for state immunity was a matter over which the Hong Kong courts had no jurisdiction and the courts were bound to respect and act in conformity with that determination. The SCNPC, in reply to a judicial reference made by the CFA, stated that the words “acts of state such as defence and foreign affairs” in BL 19(3) were interpreted to include the determination by the CPG as to rules or policies on state immunity. The CFA considered that the provisional judgment made by the majority Court regarding BL 19(3) was consistent with the interpretation given by the SCNPC and declared the judgment final accordingly.

### 2.4 ALTERNATIVE REMEDY

2.4.1 Judicial review is a remedy of last resort and is always in the discretion of the Court. It is a well-established general principle that an applicant should exhaust all appeal procedures or other alternative remedies before resorting to judicial review.

2.4.2 Where alternative remedies have not been exhausted, the Court may refuse to grant leave to apply for judicial review. In some special or exceptional circumstances, the Court may permit judicial review even if the applicant did not exhaust all appeal procedures or other alternative remedies. The test is whether the interests of justice require the Court to intervene in the dispute at that particular stage.

#### Case Example

- See *Fok Siu Wing v Secretary for Justice*, unreported, CACV 105/2013 (13.1.2014). In holding that leave should not be granted to the applicant (who had been convicted by the magistrate) to apply for judicial review whilst he could have challenged the conviction by way of appeal under the statute, the Court of Appeal affirmed, at para 10, that “the supervisory jurisdiction of the court should only be exercised in exceptional circumstances notwithstanding the availability of alternative remedy”.

- See *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735; FACV 24, 25 & 27/2012, 1/2013 (11.7.2013). Mr Leung Chun Ying was declared the returned candidate in the election for the Chief Executive held on 25.3.2012. The applicant (Mr Ho Chun Yan Albert) challenged Mr Leung’s election by way of election petition under s.32 of the Chief Executive Election Ordinance, Cap. 569 (“the Ordinance”) and judicial review. The CFA held that where an election was
questioned by persons eligible to lodge an election petition under s.33 of the Ordinance, such challenge must be made by way of an election petition but not by way of judicial review.

2.5 OUSTER CLAUSE

2.5.1 There may be statutory provisions in various forms which seem to remove the Court’s jurisdiction in judicial review. Here are some examples.

Housing Ordinance, Cap. 283

19. Termination of lease
(3) No Court shall have jurisdiction to hear any application for relief by or on behalf of a person whose lease has been terminated under subsection (1) in connection with such termination. (Subsection (1) provides for certain situations in which the Housing Authority may terminate a lease.)

Protection of Wages on Insolvency Ordinance, Cap. 380

20. Decisions under this Part not to be challenged
No decision of the Commissioner or the Board made in exercise of any discretion under this Part shall be challenged in any Court.

2.5.2 Ouster clauses are construed very strictly. There is a strong presumption against any restriction of the supervisory powers of the Court. In general, ouster clauses may only protect a valid decision; where a decision is a nullity (and most decisions where there has been a legal error made will be nullities), it may not be caught by the ouster clause and the decision may be amenable to judicial review.

Case Example

- In Anisminic v Foreign Compensation Commission [1969] 2 AC 147 (17.12.1968), the appellants’ challenge to a determination of the Foreign Compensation Commission seemed to be prevented by the ouster clause in s.4(4) of the Foreign Compensation Act 1950, which stated that no “determination of the commission ... shall ... be called into question in any court of law”. The House of Lords nevertheless granted a declaration that the determination was ultra vires and a nullity. On the effectiveness of the ouster clause, the House of Lords held that it did not protect a nullity. Lord Reid, at 170, said, “statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry even as to whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a
determination shall not be called in question in any court of law.”

• In Gurung Bhakta Bahadur v Director of Immigration [2001] 3 HKLRD 225; HCAL 1579/2000 (2.2.2001), the applicant applied for judicial review of the decisions made by the Director of Immigration and the Chief Executive-in-Council respectively in refusing to grant him permission to remain in Hong Kong. On the question of whether s.64(3) of the Interpretation and General Clauses Ordinance, Cap. 1 (which provides that “no proceedings [for judicial review remedies]” shall be taken against the Chief Executive-in-Council in these circumstances) precluded judicial review of the decision of the Chief Executive-in-Council, Hartmann J (as he then was), at 238, 241, said, “In my judgment, therefore, it is now settled law, applicable in the courts of Hong Kong, that in respect of what I will call “complete ouster” provisions, such as the one appearing in s.64(3), the Anisminic Ltd v Foreign Compensation Commission (No. 2) [1969] 1 All ER 208 principles will be applied … I am further satisfied that s. 64(3) of the Interpretation Ordinance does not prevent the applicant from seeking to judicially review the decision of the Chief Executive in Council if it can be shown that the Chief Executive in Council ‘has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity’.”

2.6  STANDING OF APPLICANT

2.6.1 The Court shall not grant leave to apply for judicial review if the applicant does not have a sufficient interest in the matter to which the application relates. Someone who is not directly affected by the decision sought to be impugned may have no sufficient interest. Standing goes to jurisdiction and it has to be considered in the legal and factual context of the whole case. Apart from merits, the Court may take into account the following factors: the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who have a greater interest in the matter, and the nature of the breach of duty against which relief is sought.

Case Example

• In Ng Wing Hung v Hong Kong Examinations and Assessment Authority, unreported, HCAL 79/2010 (22.9.2010), the applicant challenged certain decisions announced by the Authority relating to examinations offered and held by it. In refusing leave to apply for judicial review, the Court held as one of the supporting reasons that the applicant did not have a prima facie case of sufficient interest as the evidence was that it was improbable for him to take part in the relevant examinations.

• In Re Wong Chi Kin, unreported, CACV 80/2014 (26.9.2014), the applicant, a former employee of the Marine Department, sought leave to challenge various parts of the Report of the Commission of Inquiry into the Collision of Vessels near Lamma Island on 1.10.2012 which, in his view, were erroneous and misleading. The Court of Appeal only granted leave for the applicant to challenge the parts of the report which concerned him personally. As regards
3. ILLEGALITY

An administrative decision may be set aside by way of judicial review because of its illegality. The starting point is that the decision-maker must understand correctly the law that regulates his decision-making power and give effect to it.

3.1 STATUTORY INTERPRETATION

3.1.1 Where the decision-making power is sourced from legislation, its exercise depends on the proper construction of the statute concerned. The modern approach to statutory interpretation is commonly referred to as the "purposive approach". The task is to ascertain the intention of the legislature as expressed in the language of the statute and adopt a purposive interpretation having regard to the context and purpose of the statute. The ascertainment of the intention of the legislature as expressed in the language of a statute is an objective exercise. Section 19 of the Interpretation and General Clauses Ordinance, Cap. 1, has been recognised by the courts as giving statutory recognition of the purposive approach.

Interpretation and General Clauses Ordinance, Cap. 1

19. General principles of interpretation

An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.

3.1.2 The context of a statutory provision must be taken in its widest sense. Among other matters, the object or purpose of a statute may be ascertained from the long title to the original bill and by reference to "legislative materials", such as the Explanatory Memorandum attached to the bill and the statements made by Government officials in the course of proceedings in the legislature. However, legislative materials are only admissible for identifying the purpose of the statutory provision, not for construing its words.

Case Example

 See T v Commissioner of Police (2014) 17 HKCFAR 593; FACV 3/2014 (10.9.2014). "The starting point in any exercise of statutory interpretation is to look at the context and purpose of the relevant provisions. As has been stated and reiterated in numerous recent decisions of this Court, it is to context and purpose that one looks first in examining the words under scrutiny. One does not begin by looking at what might be termed 'the natural and ordinary meaning', much less I would add a literal meaning, and then put the onus on anyone seeking to advance different meaning to establish some ground which compels acceptance of that different meaning. It is context and purpose that will, in the vast majority of cases, be determinative of the meaning of the words.

the other parts of the report, the Court of Appeal did not regard the applicant as being directly affected by them and opined that the Marine Department and the named officers were in a better position than the applicant to challenge those findings.
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sought to be construed, rather than attempting as a starting point to look at words in a vacuum.” (per Chief Justice Ma, at para 4).

- See Yung Chi Keung v Protection of Wages on Insolvency Board & Anor (2016) 19 HKCFAR 469; FACV 14/2015 (17.5.2016). “This Court has on numerous occasions stated that statutory construction requires a purposive approach to be adopted; in other words, the words of a statute must be construed in the light of their purpose. Context of course also plays an important part. However, it must always be borne in mind that context and purpose are not to be seen in isolation. Just as it would be wrong to construe words in a statute without regard to context and purpose, it is equally impermissible to ignore the actual words used in a statute in order to construe its effect. In China Field Ltd v Appeal Tribunal (Buildings)(No 2), Lord Millett NPJ warned of the impermissibility of adopting an approach which would “distort or even ignore the plain meaning of the text and construe the statute in whatever manner achieves a result which they [the courts] consider desirable.” While the plain or natural meaning of the relevant text may not always be clearcut (hence the obvious need to bear in mind as a starting point context and purpose), the actual words used cannot be ignored. The Court is after all an “interpreter not a legislator”.” (per Chief Justice Ma, at para 22).

3.1.3 In case of any divergence in meaning between the Chinese and the English texts of an Ordinance, the Ordinance has to be construed in accordance with s.10B(3) of the Interpretation and General Clauses Ordinance, Cap. 1.

**Interpretation and General Clauses Ordinance, Cap. 1**

10B. Construction of Ordinances in both official languages

(3) Where a comparison of the authentic texts of an Ordinance discloses a difference of meaning which the rules of statutory interpretation ordinarily applicable do not resolve, the meaning which best reconciles the texts, having regard to the object and purposes of the Ordinance, shall be adopted.

3.1.4 More detailed discussion on the rules of statutory interpretation can be found in “Legislation about Legislation – a general overview of Hong Kong’s Interpretation and General Clauses Ordinance (Cap. 1)” published on the website of the Department of Justice\(^1\).

3.2 EXERCISE OF DISCRETION

3.2.1 Where the decision involves the exercise of discretionary power, it is a fundamental principle that such discretionary power should be exercised only by those to whom it is given and that they should retain it unhampered by improper constraints

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\(^1\) https://www.doj.gov.hk
or restrictions. It should also be exercised reasonably, in good faith, on proper grounds and in accordance with the principles of natural justice. In other words, it must not be abused.

3.3 GROUNDS OF ILLEGALITY

3.3.1 There are a number of grounds upon which a Court might hold that a decision has been made illegally. These grounds include:

Grounds in relation to the basis of power:
(a) The empowering legislation is unconstitutional;
(b) The subsidiary legislation which confers power on the decision-maker is *ultra vires* the primary legislation;
(c) The meaning of empowering subsidiary legislation cannot be ascertained;
(d) The decision-maker acts in excess of his power;

Grounds in relation to the manner in which the power is exercised:
(e) Power not exercised by the person entrusted with the power:
   (1) The power conferred upon one authority is in substance exercised by another;
   (2) There is unlawful delegation of power;
(f) Errors:
   (1) There is a decisive error of law;
   (2) The decision is materially influenced by a material error of facts;
(g) Irrelevant considerations:
   The decision-maker takes into account an irrelevant consideration or fails to take into account a relevant consideration;
(h) Failure to observe the non-fettering principle:
   (1) The exercise of a discretion by the decision-maker is fettered as the decision-maker acts under dictation or applies the policy rigidly without regard to the merits of the particular case;
   (2) The decision-maker misinterprets or misapplies an established policy;
(i) Improper purposes and bad faith:
   (1) The decision is motivated by an improper purpose;
   (2) The decision is made in bad faith; and
(j) There is an inordinate delay for the decision-maker to make the decision.

These grounds will be discussed below.

**Grounds in relation to the basis of power**

(a) **Unconstitutionality**

3.3.2 Legislation and executive acts must not contravene the provisions of the Basic Law, including those concerning human rights. Any legislation or executive act which contravenes the Basic Law may be set aside in judicial review proceedings on grounds of illegality.
3.3.3 Details of constitutional challenges to legislation and executive acts are covered in Chapter 6 below.

(b) Ultra vires subsidiary legislation

3.3.4 The term “subsidiary legislation” or “subordinate legislation” is defined under s.3 of the Interpretation and General Clauses Ordinance, Cap. 1 as “any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect”. It is common that powers exercised by public officers are derived from subordinate legislation.

3.3.5 It is a general principle that subsidiary legislation must be confined within the scope of the primary legislation, i.e. the Ordinance enacted by the LegCo under which the subsidiary legislation is made. It cannot contradict or enlarge the scope of authority conferred by the primary legislation.

3.3.6 The maker of a piece of subsidiary legislation acts “intra vires” if the effect of the legislation remains within the scope of the authority conferred by the primary legislation; and acts “ultra vires” if he ventures beyond the limits. In order to ascertain if a piece of subsidiary legislation is “ultra vires”, it is necessary to construe: (1) the primary legislation which delegates the power to make law, and (2) the provision in the subsidiary legislation which is alleged to be beyond the power conferred.

3.3.7 Subsidiary legislation is susceptible to judicial review if it is ultra vires. It has been held that the courts of Hong Kong should adopt a benevolent construction of subsidiary legislation and there is a presumption against legislation being intended to provide what is inconvenient or unreasonable.

Case Example

- In Singway Co Ltd v AG [1974] HKLR 275; HCA 3826/1973 (20.6.1974), the Court confirmed that it is well settled law that subordinate legislation must be given a benevolent construction in determining whether the subordinate legislation has been shown to be within the powers conferred by statute (at 293).

3.3.8 Subsidiary legislation may be enacted to stipulate the manner of exercise of the power in the primary legislation, which is legitimate and more often than not necessary and desirable. However, if the subsidiary legislation is inconsistent with the primary legislation by which the enabling power is conferred, it offends s.28(b) of the Interpretation and General Clauses Ordinance, Cap. 1 and is ultra vires.

Case Example

- In Cheung Yick Hung v The Law Society of Hong Kong [2016] 5 HKLRD 466, HCMP 1304/2016 (5.10.2016), the Court of Appeal found that s.6(5)(e) of the
Chapter 3 Illegality

Legal Practitioners Ordinance, Cap. 159 (“LPO”) did not set out the circumstances under which the power to amend an already issued practising certificate may be exercised. Nor did it provide that the power was subject to any condition precedent. However, s.7(2)(a) of the Practising Certificate (Special Conditions) Rules, Cap. 159Y (the “Rules”) imposed the condition that the power of the Law Society of Hong Kong to amend an extant practising certificate by imposing conditions is exercisable only if there was a pending application by the solicitor for a practising certificate at any time during the period for which the extant practising certificate was in force (the “Condition”). It was held that s.7(2)(a) of the Rules was inconsistent with the enabling provision (i.e. s.6(5)(e) of LPO) insofar as it imposed the Condition to the exercise of the general power conferred on the Law Society of Hong Kong by the primary legislation and was ultra vires.

3.3.9 As a general rule, a power to regulate an activity under the primary legislation does not prima facie give the maker of subsidiary legislation the power to prohibit the activity totally. Prohibition of an activity in part may, however, be needed for effective regulation and approved.

Case Example

- In Ng Enterprises Limited v The Urban Council [1996] 2 HKLR 437; Privy Council Appeal No. 22/1996 (29.7.1996), the issue was whether the power to make regulations for both fixed-pitch and itinerant hawking under s.83A of the Public Health and Municipal Services Ordinance, Cap. 132 could lawfully include the power to prohibit absolutely itinerant hawking by subsidiary legislation. The Privy Council held that the extent to which such partial prohibition was permissible depended on the terms of the power to regulate and the context in which the power was to be operated (at 444A). The removal of itinerant hawkers from the licensing scheme did not go beyond the Urban Council’s powers given it was not a case where the subsidiary legislation was seeking to prohibit an activity rendered lawful by the primary legislation. On the contrary, the activity was itself unlawful under the primary legislation and it was the grant of a licence under the Council’s scheme rendering it lawful (at 445A).

(c) Uncertainty

3.3.10 Subsidiary legislation whose meaning cannot be ascertained with reasonable certainty is ultra vires and void.

- See Wade & Forsyth, Administrative Law, 11th edn, p 741. “A regulation or byelaw whose meaning cannot be ascertained with reasonable certainty is ultra vires and void. Thus a local authority byelaw which ordained that ‘no person shall wilfully annoy passengers in the streets’ was struck down. And a byelaw forbidding the flying of hang-gliders over a pleasure ground without specifying
(d) Acting in excess of power

3.3.11 A decision-maker must act within the power conferred by the law. If a decision-maker does something for which no power has been granted or in excess of the conferred power, the decision is liable to be quashed by the Court.

Case Example

- In *Wong Kam Kuen v Commissioner for Television and Entertainment Licensing* [2003] 3 HKLRD 596; CACV 41/2003 (30.7.2003), the Court held that it was ultra vires the powers of the Commissioner to impose his own views of indecency and obscenity in assessing whether a game installed by an amusement game licensee was in breach of a licensing condition because such matters fell within the purview of the Control of Obscene and Indecent Articles Ordinance, Cap. 390. If the Commissioner considered that a game in question was obscene, he should submit the game to the Obscene Articles Tribunal for assessment.

3.3.12 Whether an incidental power should be inferred must be viewed in the context of the express power conferred by the statute to see whether the implied power is reasonably required for the effective exercise of that express power. A power would not be implied for reasons of convenience and desirability. Also, an act done in the public interest does not in itself confer the necessary jurisdiction on the decision-maker.

Case Example

- In *Re Sea Dragon Billiard and Snooker Association* [1991] 1 HKLR 711; HCMP 2442 & 3645/1990 (22.1.1991), the Director of Fire Services might serve a Fire Hazard Abatement Notice (“FHAN”) under s.9(1)(a) of the Fire Services Ordinance, Cap. 95 if he was satisfied of the existence in or on any premises of any fire hazard. The Director served on the applicant a FHAN which said the running of a billiard saloon in an industrial building constituted a fire hazard and effectively required the applicant to relocate its business. The Court held that, for a fire hazard to exist, the person against whom a FHAN was served must have done something which amounted to a hazard. For commendable reasons the Director had come to the view that a commercial billiard saloon should not be permitted in industrial building, but s.9(1)(a) was not intended for such purpose and the Director cannot allow this power to come in by the back door by reason of a strained construction (at 720H to 721A).

- In *Man Hing Medical Suppliers (International) Ltd v Director of Health* [2015] 3 HKLRD 224; HCAL 62/2014 (21.5.2015), the Director of Health ordered recall of a product that was suspected to be unregistered proprietary Chinese medicine. There was no express power under the Chinese Medicine Ordinance, Cap. 549
“CMO”) to order recall. The Court found that the ordinary meaning of the words of the power to "seize, remove and detain" was different in nature from the meaning of "recall". It was held that a power to order recall was not reasonably necessary for the effective exercise of the power to seize, remove and detain under s.146(2)(c) and (f) of CMO. As a matter of principle the Court should not imply a power for reasons of convenience and desirability: Hazell v Hammersmith Fulham LBC [1992] 2 AC 1, at 31E, per Lord Templeman.

**Grounds in relation to the manner in which the power is exercised**

(e) Power not exercised by the person entrusted with the power

(1) Power in the wrong hands

3.3.13 An arrangement by which a power conferred upon one authority is in substance exercised by another is unlawful and such exercise of power is invalid.

**Case Example**

- See *Re Hong Kong Hunters’ Association Ltd [1980] HKLR 179; HCMP 57/1980 (8.2.1980)*. The Director of Agriculture and Fisheries was the licensing authority for the issue of game licences under the repealed s.14 of the Wild Animals Protection Ordinance, Cap. 170. Game licences were issued in the past on an annual basis. In 1979, some of those licences expired and applications were made for their renewal. On 4.12.1979, the Executive Council advised and the Acting Governor ordered that game hunting should be prohibited and that appropriate amendments should be made to the Ordinance. Pursuant to that directive, the Director refused those applications without any explanation before the Ordinance was duly amended. The applicant, being an association of game licensees, applied for judicial review of the Director’s decision, contending that the Director had failed to perform his duty according to law. “The wording of the Executive Council’s decision is most unfortunate ... As it was, their present directive put the Director in a most invidious position. In his capacity as such Director, he must perform his duty in accordance with that directive. In his capacity as licensing authority, he must exercise his discretion independently and judicially to the best of his ability in accordance with the provisions of the Ordinance ... However, we regret to say that he has not exercised his discretion because he felt his discretion was fettered by the directive of the Executive Council and he has indicated generally that he would not renew any hunting licences ... We therefore hold that the Director has failed to exercise his discretion under s.14 of the Ordinance thereby acting contrary to the provisions of the law. In the result, we make the declaration sought by the applicant on this motion.” (per Li J at 182 and 183)
(2) Unlawful delegation of power

3.3.14 The presumed intention of the legislature is that discretionary power should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable.

3.3.15 Power to delegate will be construed by the courts in the same way as other powers, and will not extend to sub-delegation in the absence of some express or implied provision to that effect. In the case of judicial or disciplinary functions the courts may construe general powers of delegation restrictively.

Case Example

- See Rowse v Secretary for the Civil Service & Ors [2008] 5 HKLRD 217; HCAL 41/2007 (4.7.2008). The applicant, a senior civil servant, was charged with misconduct in discharging his duties relating to the sponsorship of a festival of music for Hong Kong. Disciplinary proceedings were commenced. The various charges against him were either substantiated or partially substantiated. He appealed to the Chief Executive. The Chief Executive delegated his power to hear an appeal to the Chief Secretary for Administration who subsequently rejected the applicant’s representations. The Court held that the Chief Executive acted ultra vires in delegating his powers under s.20 of the Public Service (Administration) Order to the Chief Secretary for Administration. “In all the circumstances, I am unable to find any convincing grounds for concluding that, despite the apparent contrary intention appearing in the Administration Order, the Order is to be read as giving an implied power to the Chief Executive to delegate his powers and functions under s.20.” “That being so, I must conclude that the Chief Executive acted outside of the powers given to him in the Administration Order when he purported to delegate the determination of the applicant’s s.20 appeal. The delegation being invalid, so too was the Chief Secretary’s decision made pursuant to that delegation.” (per Hartmann J (as he then was) at paras 231 and 232).

3.3.16 In practice, a great deal of delegation is required for the operation of the Government. This has to be authorised by statute, either expressly or impliedly. Under the Interpretation and General Clauses Ordinance, Cap. 1, there is a wide general power of delegation that will allow delegation in many cases.

Interpretation and General Clauses Ordinance, Cap. 1

43. Delegation by specified public officers

(1) Where any Ordinance confers powers or imposes duties upon a specified public officer, such public officer may delegate any other public officer or the person for the time being holding any office designated by him to exercise such powers
or perform such duties on his behalf, and thereupon, or from the date specified by such specified public officer, the person delegated shall have and may exercise such powers and perform such duties.

(2) Nothing in subsection (1) shall authorise a specified public officer to delegate any person to make subsidiary legislation or to hear any appeal.

**Case Example**

- In *Ng Chi Keung v Secretary for Justice* [2016] 2 HKLRD 1330; HCAL 27/2013 (21.4.2016), it was held that the Secretary for Justice had the power to intervene under s.14(1) of the Magistrates Ordinance, Cap. 227. He had the power to delegate his duties to any legal officer under s.7 of the Legal Officers Ordinance, Cap. 87 and s.43 of the Interpretation and General Clauses Ordinance, Cap. 1. It was held that in the absence of evidence to the contrary, the Secretary for Justice must be deemed to have delegated the power to intervene the private prosecution to the Director of Public Prosecutions.

3.3.17 The person who made the delegation can always exercise the power himself or cancel or vary any delegation.

**Interpretation and General Clauses Ordinance, Cap. 1**

44. **Effect of delegation of powers and duties**

(1) Where any Ordinance confers power upon any person to delegate the exercise on his behalf of any of the powers or the performance of any of the duties conferred or imposed upon him under any Ordinance —

(a) such delegation shall not preclude the person so delegating from exercising or performing at any time any of the powers or duties so delegated;

(b) such delegation may be conditional, qualified or limited in such manner as the person so delegating may think fit;

(c) where the delegation may be made only with the approval of some person, such delegation may be conditional, qualified or limited in such manner as the person whose approval is required may think fit;

(d) the delegation may be to a named person or to the person for the time being holding any office designated by the person so delegating; and

(e) any delegation may be amended by the person so delegating.

(2) The delegation of any power shall be deemed to include the delegation of any duty incidental thereto or connected therewith and the delegation of any duty shall be deemed to include the delegation of any power incidental thereto or connected therewith.

3.3.18 Delegation should be distinguished from agency, although there are similarities between the two concepts. A public authority is at liberty to employ agents in the execution of its powers. It may thus employ lawyers in legal proceedings or consultants in construction projects. The important element is that it should take its decisions of policy itself, and observe any statutory requirements scrupulously.
3.3.19 An unauthorised act of an agent may generally be ratified by the principal but the unauthorised act of the delegate, in the absence of statutory authority, cannot be ratified by the delegator. Public authorities are generally allowed to ratify the acts of their agents retrospectively, both under the ordinary rules of agency and under liberal interpretation of statutes. Occasionally the Court may invoke the rules of agency to justify a questionable delegation.

3.3.20 In the context of Government departments and bureaux, another relevant principle is the “Carltona principle”. It is derived from the famous English Court of Appeal case (*Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560 (6.10.1943)), and is the basis on which civil servants exercise their ministers’ powers. As explained by Lord Greene MR in that case (at 563), it is widely recognised in many jurisdictions that the “functions which are given to ministers ... are functions so multifarious that no minister could ever personally attend to them ... The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case”.

3.3.21 This is not considered true delegation because the official acts not as a delegate but in his minister’s name. Legally and constitutionally the act of the official is the act of the minister, without any need for specific authorisation in advance or ratification afterwards. The minister is responsible for anything that his officials have done under his authority. Even where there are express statutory powers of delegation they are not in fact employed as between the minister and his own officials. The case would be different where the official is to be empowered to act by way of delegation in his own name rather than the minister’s.

3.3.22 There are limits to the applicability of the *Carltona* principle. It generally applies only to the departments of the Government, and not to other statutory bodies or executive agencies. It does not cover those situations in which the minister is expected to exercise a power personally and not through officials, such as hearing statutory appeals or petitions.

- See *Wade & Forsyth, Administrative Law, 11th edn, p 268*. “On this approach legal responsibility, not accountability to Parliament, determines the reach of the Carltona principle; and it thus extends beyond central government ... (But) the application of the Carltona principle to executive agencies has been persuasively criticised on the ground that ministerial responsibility for such agencies is too weak to justify its application.”

3.3.23 The *Carltona* principle is acknowledged in Hong Kong but its application is relatively rare because of the wide general power of delegation already mentioned.
Case Example

- See *HKSAR v Lee Ming Tee & Anor* (2001) 4 HKCFAR 133; FACC 8/2000 (22.3.2001). The Financial Secretary appointed an inspector to undertake an investigation into the affairs of the defendant’s companies. The inspector’s work was monitored by the Steering Group chaired by the Deputy Secretary for Monetary Affairs (“DSMA”) on behalf of the Financial Secretary. The CFA approved of the position that the DSMA was to be regarded as the Financial Secretary’s representative, and stated by way of obiter dicta that the Carltona principle applied to “a Secretary in the HKSAR Government”. (per Ribeiro PJ at 153)

(f) Errors

(1) Decisive error of law

3.3.24 Apart from the example of a decision-maker making an error as to the meaning and scope of the relevant power-conferring law, a decision is also liable to be quashed if the decision-maker makes any other decisive error of law in the course of coming to the decision.

Case Example

- In *Wong Chi Man v Director of Food and Environmental Hygiene* [2014] 2 HKLRD 1124; HCAL 93/2013 (5.5.2014), the Director decided to terminate the applicant’s public market stall tenancy agreement upon the findings that the applicant had permitted his sister to register the stall’s proprietor, and was thus in breach of a clause in the tenancy agreement. The Court held that, construing the clause in its proper context, the applicant was entitled to use the stall for the licensed business purpose either personally or by a registered authorised person. There was no breach of the relevant clause and the Director’s decision, which had been confirmed by an appeal board, was quashed by the Court.

- In *PCCW-HKT Telephone Ltd & Anor v Secretary for Commerce and Economic Development & Anor* (2017) 20 HKCFAR 592; FACV 11/2017 (27.12.2017), the Court found that the licence fee levied under the Telecommunications Ordinance, Cap. 106 (“TO”) was in substance a tax, which was not authorised under the TO. Also, the Court accepted that the authority given to the Financial Secretary by s.10(1) of the Trading Funds Ordinance, Cap. 430 (“TFO”) to direct the transfer of surpluses into the general revenue did not authorise the fixing of fees at a level designed to raise surplus funds for application as if raised by taxation. It was held that it was an error of law to fail to construe s.7(2) of the TO as not permitting the prescribing of a licence fee which included an element of what in substance was a tax upon the licensee and it was an error of law to construe the TFO as permitting the inclusion in budgets of the Office of the
Telecommunications Authority Trading Fund of projections for notional tax or dividends to be treated as surplus funds under s.10(1) of the TFO.

(2) Material error of fact

3.3.25 Traditionally, the Court’s function in judicial review proceedings is limited to reviewing the legality of the decision-making process and the courts have been reluctant to review the factual basis of decisions.

3.3.26 However, it is now recognised that a material error of fact may constitute a self-standing ground of review under the concept of illegality. It is based on the principle that it is unfair to leave an applicant with no remedy where a clear error of fact has had a material effect upon the decision or the action taken.

**Case Example**

- In *Smart Gain Investment Ltd v Town Planning Board and Another*, unreported, *HCAL 12/2007* (6.11.2007), the applicant applied for judicial review against the decision of the Town Planning Board (the “Board”) in relation to the applicant’s objections to include four pieces of agricultural land which it owned into a “Conservation Area” zone under the Draft Outline Zoning Plans. One of the reasons that the Board dismissed the applicant’s objections was that the sites “comprised wooded slopes and river valley” which formed a very significant and attractive landscape. Based on evidence from a site visit, the Court found that three of the sites did not comprise wooded slopes and river valley and it was plain that a mistake of fact had been made. It was held that such mistake of fact gave rise to objective unfairness. The Court allowed the application for judicial review, and quashed the Board’s decision and remitted the decision to the Board for reconsideration.

(g) Irrelevant considerations

3.3.27 A decision-maker must consider all relevant factors in making the decision and ignore irrelevant ones. Normally relevant factors include: (i) statutory criteria; (ii) any relevant policies; and (iii) the merits of the individual case. In the meantime, a decision-maker must not take into account an irrelevant consideration. Political factors are normally irrelevant, unless they are written into the statute.

**Case Example**

- In *Tam Heung Man v Hong Kong Institute of Certified Public Accountants* [2008] 1 *HKLDR 238; HCAL 9/2007* (28.8.2007), the applicant was elected to be a Member of the LegCo representing the accountancy functional constituency. She continued her predecessors’ practice of issuing newsletters to electors through the Institute, which was a statutory body responsible for the
registration and regulation of professional accountants. The Institute stopped distributing the applicant’s newsletters in September 2006 by reason of her “increasingly political stance”, the wish of the Council of the Institute to “segregate itself from her political and personal viewpoints” and her “ongoing attacks and criticisms” against the Institute. The Institute however did, inter alia, provide the applicant’s contact details and a link to her website to its accountant members; it also agreed to circulate such information as it considered in the interest of the profession to be disseminated.

The Court held that the Institute had effectively denied the applicant her ability to communicate with her constituents. It had failed to consider that the register it maintained was the only available link between the applicant and the electorate (given the applicant was prohibited from using the electoral register for this purpose) and a disclaimer could adequately ensure that the recipients know the content of the newsletters did not represent the view of the Institute. The difference of opinion between the applicant and the Institute, the political stance expressed in the newsletters and the Institute’s reliance on the Personal Data (Privacy) Ordinance, Cap. 486 were held to be irrelevant considerations. The Institute’s decision was set aside and it was ordered to distribute the newsletters again.

3.3.28 In a decision involving the weighing of many complex factors, it will always be possible to point to some factors which should arguably have been taken into account or left out of account; even if they should have been, the Court should not intervene unless it is convinced that this would have resulted in the decision going the other way.

Case Example

- In Kaisilk Development Ltd v Secretary for Planning, Environment and Lands (2000) 9 HKPRL 311; HCAL 148/1999 (10.3.2000), one of the grounds relied on by the applicant was the Secretary’s failure to take into account a relevant consideration, namely, a valuation report prepared by the surveyor instructed by the applicant. The Court stated that “[a]s pointed out in R. v Chief Registrar of Friendly Societies, Ex parte New Cross Building Society [1984] 1 QB 227, that in practice, the discretionary remedy of judicial review would only be afforded if it was satisfied that the relevant error had, or might have, materially influenced the decision” (at para 41). The Court held that the report was a critique of the method of valuation adopted by the Land Development Corporation, which was based on historic data. Once the Secretary was satisfied that the assessment should be based on current market value rather than historic data, the report would not have influenced him at all and thus this ground of judicial review did not succeed.
(h) Failure to observe the non-fettering principle

(1) Fettering discretion

3.3.29 When the legislature confers on a particular authority the discretion to make a decision, only that authority may exercise the discretion (subject to proper and lawful delegation). If the decision-maker allows his discretion to be fettered by: (a) acting under dictation; or (b) adopting an over-rigid policy, the decision is liable to be quashed.

3.3.30 Acting under dictation: An authority delegated with a statutory discretion must address the matter for consideration on its own. It cannot mechanically accept instructions from, or adopt the view of, another authority as to the manner of exercising its discretion in a particular case, unless that other authority has been expressly empowered to give such direction or unless the deciding authority or officer is a subordinate element in an administrative hierarchy within which instructions from above may properly be given on the question at issue.

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**Case Example**

- In *Re Hong Kong Hunters’ Association Ltd [1980] HKLR 179; HCMP 57/1980 (8.2.1980)*, it was held that the Director of Agriculture and Fisheries had failed to exercise his discretion under the then s.14 of the Wild Animals Protection Ordinance, Cap. 170 because he felt his discretion was fettered by the directive of the Executive Council to prohibit game hunting and he had indicated generally that he would not renew any gaming licences.

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3.3.31 Adopting an over-rigid policy: Departmental policies and guidelines are legitimate provided that they do not contradict the aim of the legislation and are not followed so inflexibly that they fetter discretion. The general rule is that anyone who has a statutory discretion must not “shut his ears to an application”. Each case must be considered on its own merits. An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance.

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**Case Example**

- In *Wise Union Industries Ltd v Hong Kong Science and Technology Parks Corporation [2009] 5 HKLRD 620; HCAL 12 & 13/2009 (13.10.2009)*, the corporation, a statutory body established to manage land resources designated for technologies development use, had adopted a standing policy that disallowed concrete batching plants on its industrial sites. Two companies applied to set up asphalt-cum-concrete batching plant and asphalt recycling plants respectively but were rejected. The Court held that a decision-maker must not apply his policy blindly or rigidly and the policy it adopted must fairly admit of exceptions. Even if, on the face of it, a policy did not preclude the decision-maker from departing from it, an actual rigid implementation of the
policy was still unacceptable (at 632). In respect of the application of Wise Union Industries Ltd, it was held that the company had not made out a case of rigid adherence to the policies concerned and its application for judicial review was dismissed. (The other company’s application for judicial review was allowed on another ground.)

3.3.32 However, the above rules ought not to be carried to the extreme of prohibiting a Government department from consulting other authorities, or of preventing the Administration from devising its policy or acting in accordance with its policy. There is always a difference between seeking advice and then genuinely exercising one’s own discretion and acting obediently or automatically under someone else’s advice or directions. Similarly, a public authority may properly take into account any relevant Government policy in its decisions, provided that it genuinely decides each case based on its own merits.

Case Example

• See British Oxygen Co Ltd v Minister of Technology [1971] AC 610 (15.7.1970). The Board of Trade made it a rule to refuse all applications for investment grants for items costing less than £25. The claimant had invested over £4 m in oxygen cylinders, but since each cylinder cost only about £20 the Board refused a grant, after giving full consideration to the case. The House of Lords upheld the Board’s action. Lord Reid said, “if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him” (at 624). He added the familiar proviso, “provided that the authority is always willing to listen to anyone with something new to say — of course I do not mean to say that there need be an oral hearing” (at 625). “The general rule is that anyone who has to exercise a statutory discretion must not ‘shut his ears to an application’.” (at 625).

3.3.33 Contractual fetters on discretion: An authority’s powers may include the making of binding contracts. Like policies, contracts may be inconsistent with an authority’s proper exercise of its discretion. In general, an authority may not by contract fetter itself so as to disable itself from exercising its discretion as required by law. Any such contract would be ultra vires, void and unenforceable in law. The prime duty of an authority is to preserve its own freedom to decide in every case as the public interest requires at the time.

Case Example

• See Fairland Overseas Development Co Ltd v Secretary for Justice [2007] 4 HKLRD 949; HCA 2154/2005 (31.8.2007). The Government had agreed with the plaintiff that in return for the plaintiff’s withdrawing its objection to the proposed resumption of a small part of a private road for the construction of a new road, the Government would, upon the opening of the new road, erect
traffic signs prohibiting container vehicles from entering the private road thus preserving the environmental amenity of the area. Upon the completion of the new road, the Government received complaints about the intended traffic signs. The plaintiff sought specific performance of the contract. The Government contended that even if the contract existed in fact, it constituted an unlawful fetter of the Commissioner for Transport’s discretion to erect traffic signs on any road under the Road Traffic (Traffic Control) Regulations, Cap. 374G. The Court (Recorder Gerard McCoy SC) held that the contract which existed in fact was unenforceable in law as being ultra vires. “The Commissioner cannot divest himself of authority so as to become powerless to act. This contract would in substance have the effect of transferring the exercise of the statutory discretion from the Commissioner to the plaintiff – a type of unlawful subdelegation.” (at para 93) “The Commissioner’s abilities to respond to current or varying concerns would be severely circumscribed by the contract. The contract did not impair the Commissioner’s discretion; it denied it. It foreclosed the catalogue of relevant considerations by making the public interest subjugated to private contract. The merits of any other competing future decision were already eliminated. It was a dictation by the plaintiff and equally became an abdication by the Commissioner. Neither is allowed – here there was both.” (at para 94)

3.3.34 However, it would be wrong to conclude that a public authority can always escape from its contractual obligations by contending that it fetters its discretion. There will often be situations where a public authority must be at liberty to bind itself for the very purpose of exercising its powers effectively. Expressly or impliedly the LegCo grants contractual capacity to many public bodies in order that they can effectively fulfil their functions. Effectively entering into some contracts is part of many public bodies’ statutory birthright. Since most contracts fetter freedom of action in some way, there may be difficult questions of degree in determining how far the authority may legally commit itself for the future.

- See Wade & Forsyth, Administrative Law, 11th edn, p 278. “The important question is whether there is incompatibility between the purposes of the statutory powers and the purposes for which the contract is made. In cases where there is no commercial element the Court is normally ready to condemn any restriction on a public authority’s freedom to act in the public interest. Thus a planning authority cannot bind itself by contract either to grant or to refuse planning permission in the future. In one case (Triggs v Staines Urban District Council [1969] 1 Ch 10; (12.2.1968)) a local authority designated a sports ground as a proposed public open space, but made a formal agreement with the owner that this designation should cease to operate if the authority had not purchased the land by a certain time, that it would not purchase the land either voluntarily or compulsorily during a certain period, and that it would not make any claim for betterment. All these undertakings were void as clearly incompatible with the authority’s duty to preserve its powers intact.”
(2) Misinterpretation or misapplication of established policy

3.3.35 It is essential that a policy which has been applied by a decision-maker is properly understood, interpreted and applied. If the decision-maker fails properly to understand the policy, the decision would be as defective as it would be if no regard had been paid to the policy.

Case Example

• In Leung Kam Yung Ivy v Commissioner for Television and Entertainment Licensing & Anor [2001] 2 HKC 555; HCAL 1986/2000 (30.3.2001), the applicant held a licence for operating a mah-jong parlour. The relevant policy statement indicated that a balanced view would be taken on the degree of public reaction to an application for a licence and the general environment of the vicinity of the proposed gaming premises. It was further said if an existing licensee had to relocate his premises “at no fault of his own”, the application could be considered with some degree of sympathy. Upon the surrender of tenancy at the existing premises, the applicant’s licence was suspended and her applications for relocation were rejected on the basis that “there was no cogent need” for gaming tables in the district. The Court held that the Commissioner imported the word “cogent” into the consideration, which set a more stringent standard and distorted the policy. The evidence also showed the absence of balance in the overall consideration. The Commissioner’s decision was quashed.

3.3.36 Policy statements must be read in their proper contexts and with common sense. They should be read in the way in which an educated person acquainted with the factual context would do so, giving it its plain and ordinary meaning.

Case Example

• In Hong Kong Television Network Ltd v Chief Executive in Council [2016] 2 HKLRD 1005; CACV 111/2015 (6.4.2016), whether the “gradual and orderly approach” in granting additional free television licences adopted by the Chief Executive in Council (“CEIC”) departed from the general policy statements which said: “There is no pre-set ceiling on the number of licences to be issued” was considered. It was held that policy statements must be read in their proper contexts and with common sense. A policy statement must be read as a whole, and undue emphasis on individual expressions or passages in isolation is inappropriate. In all cases, one must bear firmly in mind the context and background, in order to have a full and complete understanding of the policy concerned. (at para 55) It was held that by adopting the gradual and orderly approach, the CEIC 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. There was neither a misunderstanding of the relevant policy statements nor a departure from them. (at para 76)
The ground that a decision-maker failed to follow, misinterpreted or misapplied an established policy can also be used to support a ground of review premised on irrationality (see Chapter 4 below for details) or failure to give effect to a procedural or substantive legitimate expectation (see Chapter 5 below for details).

(i) Improper purposes and bad faith

(1) Improper purposes

Where a statute confers a power on a decision-maker, he must use that power for a purpose intended by the statute. If a power granted for one purpose is exercised for a different purpose, that power has not been validly exercised. Such an abuse of power may be manifested by an improper motive, and may equally be the result of an honest misunderstanding of the nature and extent of powers conferred upon a public authority. Where the purpose of a power is not spelt out in the statute, the Court will determine what, if any, the implied restrictions on its exercise should be.

Case Example

- In Lee Ma Loi v Commissioner of Land Revenue & Anor [1992] 1 HKLR 200; CACV 8/1992 (3.6.1992), the Commissioner used his power to assess and collect tax to confiscate money suspected of being raised by smuggling. The Court confirmed that it has been long established that where a person or authority is entrusted with statutory powers those powers are to be used “bona fide for the statutory purposes, and for none other”. The Court held that there was an abuse of statutory purpose and therefore dismissed the Commissioner’s appeal.

- In Incorporated Owners of Wah Kai Industrial Centre & Ors v Secretary for Justice [2000] 2 HKLRD 458; HCAL 120/1999 (1.3.2000), the Court laid down the tests on whether an administrative act was done for an improper purpose (at 475I to 476H), which are summarised as follows:
  (1) If the actor has in truth used his power for the purpose for which it was conferred, it is immaterial that he achieved as well a subsidiary object;
  (2) If the actor pursues more than one purpose, the legality of the act is determined by reference to the dominant purpose. A purpose is not dominant if the power would still have been exercised without regard to that purpose; and
  (3) Where an unauthorised purpose has in fact been pursued, the question is then whether the act had been significantly or substantially influenced by it. If the actor would have come to the same decision having regard to only the authorised purposes, the act can still be upheld.
(2) **Bad faith**

3.3.39 A statutory power is exercised unlawfully if it is not exercised honestly and in good faith. Cases of bad faith are rare. In some cases this ground is applied alongside the ground of improper purposes.

(j) **Inordinate delay**

3.3.40 Inordinate delay in performing a legal duty such as determining an application for a licence or an objection may amount to an abuse and is susceptible to judicial review.

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**Case Example**

- In *Kong Tai Shoes Manufacturing Co Ltd v Commissioner of Inland Revenue [2012] 4 HKLRD 780; HCAL 34/2011 (30.9.2011)*, the applicant’s profits tax assessments for certain financial years were issued only days before the statutory six-year limitation period expired. After the assessments were issued, the Commissioner refused to unconditionally hold over the tax in dispute and required the applicant to purchase tax reserve certificates instead pending his determination of the applicant’s objections. Under s.64(2) of the Inland Revenue Ordinance, Cap. 112, the Commissioner is required to determine an objection “within reasonable time”. Although the Court dismissed the applicant’s judicial review against the assessments and the refusal to hold over, it held that there had been inordinate delay on the Commissioner’s part in making a determination, which was *ultra vires* of s.64(2). The Court granted an order to compel the Commissioner to make a determination by a certain date.

3.3.41 In the absence of a stated time limit, it would be necessary to seek assistance from s.70 of the Interpretation and General Clauses Ordinance, Cap. 1, which provides that: “Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises”.

### 3.4 ESTOPPEL, WAIVER, CONSENT AND DISCRETION

3.4.1 Estoppel as a principle of law is, in essence, that a person who by some statement or representation of fact causes another to act to his detriment in reliance on the truth of it is not allowed to deny it later, even though it is wrong. In public law, the doctrine of estoppel cannot be invoked where its application is incompatible with the free and proper exercise of an authority’s powers or the due performance of its duties in the public interest. Nor can estoppel be pleaded to justify action which is *ultra vires*. 
3.4.4 While the law in relation to contractual fetters on discretion, estoppel, waiver and consent may create injustice in certain circumstances where the person aggrieved might have relied upon an authority's undertaking, representation or misleading advice, the person aggrieved is not without redress. Where appropriate, the person may rely on the protection of legitimate expectation (see Chapter 5) which may have taken the place of estoppel. The private law action in negligent misstatement and other appropriate remedies detailed in Chapter 10 may also provide solutions. Such remedies are important points to be noted.

Case Example

- See Western Fish Products Ltd v Penwith DC [1981] 2 All ER 204 (22.5.1978). In this case, a firm purchased a disused factory for the purpose of manufacturing fish products and incurred expenditure after being told orally on behalf of the local authority's chief planning officer that an application for an established use certificate would be purely a formality. The local authority eventually refused the certificate and planning permission. The Court of Appeal dismissed the firm's claim, having stated the general principle that estoppel could not be raised to prevent the exercise of a statutory discretion or to prevent or excuse the performance of a statutory duty.

3.4.2 Estoppels, however, have been allowed to operate against public authorities in minor matters of formality, where no question of ultra vires arises.

Case Example

- See Wells v Minister of Housing and Local Government [1967] 1 WLR 1000 (11.5.1967). In that case, the Court held that it could ignore the fact that the proper statutory application had not been made before a planning authority's determination, since the authority itself had led the landowner to suppose that it was not required. The authority was thus estopped from taking the objection. “Now I know that a public authority cannot be estopped from doing its public duty, but I do think it can be estopped from relying on technicalities.” (per Lord Denning MR at 1007). The dictum was approved by the Court of Appeal in Western Fish Products Ltd v Penwith DC [1981] 2 All ER 204 (22.5.1978).

3.4.3 In a similar vein, no waiver or consent can legitimise action of an authority which is ultra vires.

Case Example

- See Wade and Forsyth, Administrative Law, 11th edn, pp 198-199. “Waiver and consent are in their effects closely akin to estoppel, and not always clearly distinguishable from it. But no rigid distinction need be made, since for present purposes the law is similar. The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses. Once again, the principle of ultra vires must prevail when it comes into conflict with the ordinary rules of law. A contrasting rule is that a public authority which has made some order or regulation is not normally at liberty to waive the observance of it by exercising a dispensing power. The principle here is that law which exists for the general public benefit may not be waived with the same freedom as the rights of a private person. In other cases, where neither of these rules is infringed, waiver and consent may operate in a normal way so as to modify rights and duties.”
3.4.4 While the law in relation to contractual fetters on discretion, estoppel, waiver and consent may create injustice in certain circumstances where the person aggrieved might have relied upon an authority’s undertaking, representation or misleading advice, the person aggrieved is not without redress. Where appropriate, the person may rely on the protection of legitimate expectation (see Chapter 5) which may have taken the place of estoppel. The private law action in negligent misstatement and other appropriate remedies detailed in Chapter 10 may also provide solutions. Such remedies are important points to be noted.
4. IRRATIONALITY

4.1 WEDNESBURY UNREASONABLENESS

4.1.1 Discretionary powers of public authorities have to be exercised reasonably. This, however, does not mean a decision may be struck down simply because the judge thinks that it is unreasonable or had he been the decision-maker he would have made a different decision.

4.1.2 In judicial review, what is meant by “reasonable” is that the public authority’s decision must not be “Wednesbury unreasonable” (or irrational). This term is derived from the case of Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223 (10.11.1947). It means the decision is so absurd that no sensible person could have properly made it. The test clearly requires a high degree of unreasonableness.

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Case Example

- See Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223 (10.11.1947). “… if a decision … is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. … but to prove a case of that kind would require something overwhelming …” “It is true the discretion must be exercised reasonably. … For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. … Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.” (per Lord Greene MR at 229, 230)

- The principle was later articulated in Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (22.11.1984) by Lord Diplock that a decision is said to be “Wednesbury unreasonable” if it is “so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.” (at 410)

4.1.3 Hong Kong courts have from time to time been invited to consider the doctrine of irrationality in judicial reviews (especially involving decisions made by tribunals), and have provided illustrations of where the line is to be drawn between reasonable and unreasonable decision-making.
### Chapter 4 Irrationality

#### Case Example

- In *Chan Heung Mui & Ors v The Director of Immigration*, unreported, CACV 168/1992 (24.3.1993), Litton JA (as he then was) observed at paras 37 to 39:

  ‘...It must always be borne in mind that it is for the Director [of Immigration] and not for the courts to administer the scheme of immigration control under the Ordinance. If “irrationality” is the ground of challenge, the threshold is very high. It only applies to a decision which is “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”: per Lord Diplock in *CCSU v. Minister for the Civil Service* (1985) AC 374 at 410G.

  The expression "Wednesbury unreasonableness" or "irrationality" is used so often by lawyers that it may take on a life of its own, separated from its roots. It is worth recalling the genesis of this ground of attack. For it to succeed the court must be able to infer that the decision-maker must have made a mistake of law by, for instance, straying wholly outside the scope of the statute or taking into account totally irrelevant considerations: see Lord Diplock in *CCSU* at 410H.

  Obviously, if the facts set up by the applicant in his challenge were such as to raise *prima facie* a case of irrationality, to the high degree indicated in *CCSU v. Minister for the Civil Service* (supra), then the authority concerned cannot hide behind a wall of silence. The difficulty facing the appellants in this case is that, in my judgment, they have not come within striking distance of setting up a case of "irrationality"…’

- In *PCCW-HKT Telephone Limited v The Telecommunications Authority*, unreported, HCAL 152/2002 (30.6.2004), the decision of the Telecommunications Authority not to set certain interim terms and conditions was held to be irrational by Hartmann J (as he then was) for its arbitrariness and failure to exercise powers given to the Authority under the relevant Ordinance which demanded on that occasion to be exercised.

- In *Dr Yuk-Kong Lau v Medical Council of Hong Kong* [2001] 5 HKC 218, HCAL 4/2007 (8.8.2011), Chu JA expressed consciousness of the Court’s limited role in judicial review and that due deference should be afforded to the views of the decision-making tribunal. However, Her Ladyship observed, “…the court can only accord a degree of appreciation if it is told what it is being asked to appreciate. Where, as in here, the materials before the court demonstrate that the reasons given for the decision cannot withstand scrutiny, after due and generous regard to the possible differences that reasonable man may have on the matter, the court will have no choice but to quash the decision as being *Wednesbury* unreasonable.” (at 237)
4.2 PROPORTIONALITY AND FUNDAMENTAL RIGHTS

4.2.1 In addition to *Wednesbury* unreasonableness, the principle of proportionality has emerged in the context of judicial scrutiny of public authorities’ decisions affecting rights protected by the Basic Law or the HKBORO. The substantive review of administrative decisions affecting fundamental rights on the basis of proportionality has developed under the influence of human rights law. You may wish to refer to Chapter 6.6 of this Guide for more detailed discussions.
5. PROCEDURAL IMPROPRIETY

5.1 NATURAL JUSTICE

5.1.1 Practically any public officer who decides anything affecting the rights, interests or legitimate expectations of the public will be under a “duty to act fairly” or to obey the “rules of natural justice” (these two expressions being used interchangeably). Broadly speaking, this means that the decision-maker must be unbiased and that he must give an appropriate chance to make representations to those affected before he makes the decision.

5.1.2 The decision-maker who decides only after complying with the duty to act fairly will be better informed of the consequences and implications of his decision and thus tend to make a better decision.

Case Example

- See *Kioa v West* (1985) 159 CLR 550 (18.12.1985) referred to in *Thapa Indra Bahadur v Secretary for Security* (1999) 8 HKPLR 77; HCAL 18/1999 (21.10.1999) where this was said, “... there is a common law duty to act fairly, in the sense of according procedural fairness in the making of administrative decisions which affect rights, interest and legitimate expectations, subject only to clear manifestation of a contrary statutory intention.” “... The reference to ‘right or interest’ ... must be understood as relating to personal liberty, status, preservation of livelihood and reputation as well as to proprietary rights and interests” (per Mason J (as he then was) at 582, 584).

5.1.3 The rules of natural justice are of varying content. They are not written on “tablets of stone” but vary with the precise context.

Case Example

- See *Lloyd v McMahon* [1987] AC 625 (12.2.1987) referred to by the former Chief Justice Li in *Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority* (1997-1998) 1 HKCFAR 279; FACC 1/1998 (25.11.1998) where this was said, “... the rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depended upon the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates....” (per Lord Bridge at 702).
5.1.4 The legislature is presumed to intend that the rules of natural justice are to be followed when it grants discretion to officials. Thus statutes will not be interpreted so as to exclude the rules unless the legislature intended to oust them in very clear terms.

Case Example

- In *Lau Ping v R* [1970] HKLR 343; CACC 120/1970 (6.6.1970), the Court of Appeal allowed the appeal by the driver cum owner of a vehicle, whose vehicle was ordered to be detained by the order of the magistrate without hearing the owner, under the then regulation 41B of the then Road Traffic (Taxis, (Public) Omnibuses, Public Light Buses and Public Cars) Regulations, Cap. 220 sub. leg. The Court of Appeal considered that in the absence of any express provision in s.3(1)(l) of the then Road Traffic Ordinance, Cap. 220, enabling the Governor-in-Council to abrogate the common law principle that no man should be deprived of his property without first being given an opportunity of being heard, meant that regulation 41B was *ultra vires* s.3(1)(l).

5.1.5 Whether fairness is required in the performance of a public function and what is involved in order to achieve fairness is for the decision of the courts as a matter of law.

Case Example

- In *Pearl Securities Ltd v Stock Exchange of Hong Kong Ltd* [1999] 2 HKLRD 243; HCAL 39/1998 (9.2.1999), the Court, in considering whether it was the Court or the decision-maker who decides what fairness actually required, cited various authorities with approval, to the effect that whether fairness was required and what was involved in order to achieve fairness was for the decision of the Court as a matter of law.

5.1.6 The rules of natural justice require decision-makers to comply with procedural safeguards when making a decision which may have adverse effect on a person. The procedural safeguards include –

(a) Right to a fair hearing;
(b) Rule against bias; and
(c) Protection of legitimate expectation.

5.2 RIGHT TO A FAIR HEARING

5.2.1 Fairness does not require an oral hearing in all cases. The obligation is to receive and consider representations and these may be in writing. The essential trigger
for an oral hearing is whether a dispute of fact arises that will only be able to be resolved by oral evidence.

Case Example

- In *ST v Betty Kwan and another* [2014] 4 HKLRD 277; CACV 115/2013 (26.6.2014), the appellant challenged the dismissal, without an oral hearing, of his petition against the Director of Immigration’s decision to reject his torture claim. Considering that various matters should have been probed and clarified at an oral hearing, rather than left to the drawing of inference based on common sense and assumptions, the Court of Appeal allowed the appeal. It stated the general principles on whether to hold an oral hearing: “Amongst other things, the question of whether an oral hearing should be afforded must depend on the standards of fairness required, the nature of the decision-making process in question, the procedural history of the matter including whether there has been an oral hearing before, the interest at stake and the importance of the decision (in terms of its outcome and consequence), the issues involved, and how the presence or absence of an oral hearing would affect the quality of the opportunity to make worthwhile or effective representations.” (per Cheung CJHC (as he then was) at para 26).

5.2.2 The heart of a fair procedure and hearing is that there should be a reasonable opportunity for a person to know about and respond to adverse materials received by and relied on by the decision-maker. This generally requires disclosure of damaging or adverse materials to which the decision-maker has access. As explained by the Court of Appeal in *ATV v Communications Authority (No 2)* [2013] 3 HKLRD 618; CACV 258/2012 (15.5.2013), the details required of the disclosure must be such so as to enable the person to make “meaningful and focused representations”. The extent of what fairness demands is dependent on the context of each case. This would depend, *inter alia*, on:

(a) The statute that creates the discretion;
(b) The *prima facie* relevance, credibility and significance of the evidence or materials vis-à-vis the decision which is to be made;
(c) The nature of the relevant decision and its objective significance to the affected person; and
(d) Whether there are countervailing factors against disclosure, such as: confidentiality for the protection of the witness from genuine fear of, say reprisal or harm, or national security.

5.2.3 If it is shown that, as a matter of fairness and natural justice, the documents or material ought to have been disclosed by the decision-maker to the applicant so as to afford him an opportunity to respond to them, the Court would proceed to the next stage to consider whether to exercise its discretion to quash the decision. One of the factors that the Court would consider is whether there is any prejudice caused by the procedural unfairness.
5.2.4 The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice.

Case Example

- In *Tso Tak Keung, Eddy v Secretary for the Civil Service*, unreported, HCAL 28/2005 (14.9.2006), the applicant, who was an assistant immigration officer, challenged the use of a video-tape interview record obtained in criminal proceedings by the Inquiry Committee which was appointed to inquire into his alleged misconduct following acquittal of all counts of criminal charges. The Court held that in disciplinary proceedings, video-tape interview records containing a defendant’s confession which were inadmissible during the criminal trial on the ground of lack of voluntariness were admissible in the subsequent disciplinary proceedings under the Public Service (Administration) Order provided that they were relevant to the proceedings; the question of voluntariness went only to weight of evidence. (Note: Appeal by the applicant dismissed: [2009] 3 HKLRD 497; CACV 366/2006 (9.3.2009))

5.2.5 There is no general right to legal representation in administrative proceedings, though the authority has the discretion to permit legal representation if fairness requires it. How the discretion to allow legal representation is to be exercised will vary according to the circumstances of each case.

Case Example

- In *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237; FACV 9/2008 (26.3.2009), the appellant, an ex-police officer who was required to be compulsorily retired after convicted of a disciplinary charge, brought a constitutional challenge against the validity of a statutory bar to legal representation in disciplinary proceedings. The CFA held that by excluding the possibility of the tribunal exercising the discretion of allowing legal representation, the appellant was deprived of a fair hearing. The relevant regulations were declared inconsistent with HKBOR 10, unconstitutional, null, void and of no effect. HKBOR 10 provides, *inter alia*, that: “In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing ...”. Bokhary PJ (as he then was) held that disciplinary proceedings – whether in respect of professions, disciplined services or occupations – were determinations of rights and obligations in suits at law under Article 10. However, whether legal representation should be permitted would depend on whether fairness so requires in all the circumstances. This would primarily be for the tribunal to assess, and no Court would disturb such assessment except for plainly compelling reasons.
5.2.6 Where there is an oral hearing, fairness may require the authority to allow witnesses to be questioned and allow comments on the whole case, for example, where there are factual disputes.

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**Case Example**

- In *Re Ngai Kin Wah* [1987] 1 HKC 236; HCMP 2911/1985 (27.3.1986), a customs officer challenged by way of judicial review *inter alia* the punishments imposed on him by the adjudicator upon a disciplinary hearing. During the disciplinary hearing, the applicant was denied an opportunity to question an “expert witness” whose evidence was replied upon by the adjudicator. The adjudicator also prevented the applicant from cross-examining a key factual witness on one of his statements. The Court, granting the application for judicial review, held that the adjudicator’s failure to allow cross-examination deprived the applicant of an opportunity to elicit further useful evidence material to the charge and to undermine the credibility of the key witness. It was found that credibility of the key witness was of the greatest relevance to the case, and denying the applicant a fair opportunity of cross-examining was a form of procedural impropriety sufficiently serious to justify the Court coming to the conclusion that there had been a substantial denial of natural justice unless the actual material relied on would have been clearly and manifestly inadequate to make any effective dent or impression on the credibility of the witness.

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5.2.7 Undue delay in disciplinary proceedings resulting in prejudice constitutes a breach of the fairness requirements. Thus, unexplained lengthy delay in initiating police disciplinary proceedings resulted in the quashing of the disciplinary proceedings.

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**Case Example**

- In *Leung Chun Yin v Secretary for Justice*, unreported, HCAL 66/2004 (17.6.2005), the applicant alleged that there was delay in commencing disciplinary proceedings against him. The Court held that there was no undue delay having regard to the large number of staff involved and the volume of evidence required to be examined.

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5.2.8 Delegated hearing: The decision-maker need not conduct a hearing himself and may conduct a hearing through another body or person(s) to receive evidence and submissions from interested parties. In some cases, when issues of credibility of witnesses or other reasons pertaining to the proper assessment of a matter which requires the presence of the decision-maker are not engaged, provided that the decision-maker is fully informed of the evidence and submissions before making a decision, there is no breach of natural justice.
Case Example

- In *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551 (13.10.1966), a committee of the Board made a written report to the Board (which ultimately made zoning orders) after holding a public inquiry at which the appellants gave evidence. The report stated what submissions had been made at the hearing but did not state what evidence was given, nor did it contain a summary of the evidence. In holding that the Board had failed to discharge its duty to act judicially, the Privy Council accepted that it would have been a matter of procedure if the Board had appointed a person or persons to hear and receive evidence and submissions from interested parties for the purpose of informing the Board of the evidence and submissions. If the Board, before reaching a decision, was fully informed of the evidence given and the submissions made and had considered them, then it could not have been said that the Board had not heard the interested parties and had acted contrary to the principles of natural justice. The Privy Council further said that “[i]n some circumstances, it may suffice for the Board to have before it and to consider an accurate summary of the relevant evidence and submissions if the summary adequately disclosed the evidence and submissions to the Board.” (per Viscount Dilhorne at 568)

- In *R v The Town Planning Board and Another* [1996] 2 HKLRD 267; HCMP 2457/1995 (8.6.1996), the applicant complained that the Secretary to the Board had earlier prepared and presented a paper to the Board for consideration in his absence. The Court, deriving assistance from *Jeffs*, held that the applicant’s case had received full and fair consideration because all those of the Board who took part in making the decision on a later date were fully apprised of all the representations both oral and written which the Board had up to that time received in connection with the applicant’s objection.

5.2.9 *Ex post facto* hearing: While a prior hearing may be better than a subsequent hearing, a subsequent hearing (e.g. on appeal) is better than no hearing at all. In some cases the courts have held that statutory provisions for an administrative appeal or even full judicial review on the merits are sufficient to negative the existence of any implied duty to have a hearing before the original decision is made. This approach may be acceptable where the original decision does not cause significant detriment to the person affected, or where there is also a paramount need for prompt action (e.g. matter affecting public health), or where it is otherwise impracticable to afford antecedent hearings. (See De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 7th edn, p 491 and para 5.3.11 below.)

5.2.10 A person who does not request a public hearing or to be allowed legal representation by reason that such request would be categorically denied, cannot be considered to have waived his right to a public hearing or legal representation.
Chapter 5   Procedural Impropriety

Case Example

- In Lam Chi Pan v Commissioner of Police [2010] 1 HKC 120; CACV 193/2008 (18.12.2009), the applicant was subjected to police disciplinary proceedings and was represented by a senior inspector in the proceedings. He was convicted of one charge and was dismissed from the police force. The main issue in the appeal was whether Lam Siu Po v Commissioner of Police (2009) 12 HKCFAR 237; FACV 9/2008 (26.3.2009) discussed above was distinguishable on the ground that the applicant here had never requested legal representation before the disciplinary tribunal. The Court of Appeal held that the right to legal representation was one aspect of the requirement of a fair hearing. Prior to the CFA decision in Lam Siu Po, the Court of Appeal had consistently (though wrongly) held that regulations 9(11) and (12) of the Police (Discipline) Regulations, Cap. 232A were constitutional and there was no right to legal representation. It was unreal to say that the applicant had not been deprived of a fair hearing when he could not be expected to ask for legal representation. It smacked of formalism to say that the applicant ought nevertheless to have requested legal representation. The outcome of such an application was certain. Nor was it right that since the applicant had not sought to challenge the constitutionality of regulations 9(11) and (12) by judicial review, he could not complain that proceedings under the regime of regulations 9(11) and (12) were unfair. Since it was clear that the applicant had not waived his right to legal representation, Lam Siu Po could not be distinguished on the basis that the applicant had never requested legal representation before the tribunal (at paras 38, 39 and 48).

5.3   RULE AGAINST BIAS, THE REQUIREMENT OF IMPARTIALITY AND INDEPENDENCE

5.3.1   The rule against bias stems from the common law principle that “justice should not only be done but should manifestly and undoubtedly be seen to be done” (per Lord Hewart CJ in R v Sussex Justices, ex p McCarthy [1924] 1 KB 256 (9.11.1923) at 259) and that “no man is to be a judge in his own cause” (per Lord Campbell in Dimes v Proprietors of Grand Junction Canal (1852) 3 HLC 759 (29.6.1852) at 793).

5.3.2   There are three types of bias:

(a)   Actual bias;
(b)   Presumed bias; and
(c)   Apparent bias.

5.3.3   Actual bias: This covers the situation where the decision-maker has been influenced by partiality or prejudice in reaching his decision or where it has been demonstrated that the decision-maker is actually prejudiced in favour of or against a party (i.e. pre-determination). The decision-maker is automatically disqualified from determining the case.
5.3.4 Presumed bias: Bias is presumed and the decision-maker is automatically disqualified where he has a pecuniary or personal interest in the subject matter (e.g. close connection based on marriage, blood or friendship).

Case Example

- In *R v Or Sai Por* [1987] HKLR 956; HCMA 191/1987 (13.5.1987), the members of a licensing committee resolved and publicly declared before a hearing that they would not renew a certain licence until certain hotel premises were built. The Court held that a decision-maker may form a tentative view of a matter but not a concluded view. (Also see *English v Bay of Islands Licensing Committee* (1921) NZLR 127 (6.10.1920).)

5.3.5 Apparent bias: Where there is no automatic disqualification due to actual or presumed bias, a decision-maker may nevertheless have apparent bias in reaching his decision. The test for apparent bias (the “real possibility” test) is “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased” (per Lord Hope in *Porter v Magill* [2002] 2 AC 357 (13.12.2001) at para 103, adopted by Lord Bingham in *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 (19.6.2003) at para 14). The House of Lords made clear in *Lawal* that the “fair-minded and informed observer” would adopt a “balanced approach” and was “neither complacent nor unduly sensitive or suspicious”. The formulation for apparent bias has been adopted by the CFA in Hong Kong.

Case Example

- In *Deacons v White and Case* (2003) 6 HKCFAR 322; FAMV 22 & 23/2003 (6.8.2003), the CFA in considering whether the deputy judge who was a friend of one partner of the plaintiff law firm was biased said that “… the view of the fair-
minded and informed observer as to whether a reasonable apprehension of bias arises may differ from the reviewing court's own view, and that it is through the prism of such an observer's perception that the court should consider whether the case is one of apparent bias.”

- In [Rowse v Secretary for Civil Service](2008) 5 HKLRD 217; HCAL 41/2007 (4.7.2008), the Court held that a fair-minded and informed observer would conclude after considering the fact of the case that there was a real possibility of bias on the part of the Law Officer arising out of his dual advisory role in giving advice to the Secretary for the Civil Service (“SCS”) on the institution of disciplinary proceedings and thereafter on whether to find the applicant guilty of the disciplinary charge. It was further contended that the impartiality of the Inquiry Committee was undermined by an appearance of bias on the part of a member appointed by the SCS, the authority to whom the Committee would submit a report after the inquiry. The applicant alleged that there was apparent bias on the part of the member who had made an application to the SCS for re-employment and hence, his future lay in the hands of the SCS. The Court did not think that those facts would have given rise to a real possibility that the member, and through him the Committee itself, might have been biased, in the mind of a fair-minded, independent observer.

- In [ZN v Secretary for Justice & Ors](2016) 1 HKLRD 174; HCAL 15/2015 (13.11.2015), the Secretary for Justice (the “respondent”) made an application for Zervos J (as he then was) to recuse himself from hearing the application for judicial review involving an issue of human trafficking on the ground of apparent bias. During Zervos J’s previous office as the Director of Public Prosecutions (“DPP”), he was involved in the formulation of new initiatives to address and combat human trafficking. The respondent submitted that Zervos J’s previous active involvement in combating human trafficking would lead “to a fair-minded and informed observer would conclude that there was a real possibility or a real danger that the judge was biased” (test for apparent bias). In dismissing this application, Zervos J found that the fair-minded and informed observer would not conclude that there was a real possibility that the judge would be biased. The fair-minded observer would view his actions and statements in the past as being general in nature in relation to his previous office as DPP in addressing the problem of human trafficking. The fair-minded observer would also take into account that the issue to be decided upon in the present judicial review application was primarily a question of law concerning a determination of the duties and obligations of the HKSAR Government under HKBOR 4 and whether there has been any failure to fulfil such duties and obligations as determined to apply in the context of the present case.

5.3.6 A decision-maker who is biased cannot successfully argue that he tried not to let his bias influence his decision.
Case Example

- In *R v Ho Chiu Hung* [1996] 4 HKC 593; HCMA 359/1996 (21.6.1996), the magistrate who had convicted the defendant of a similar offence refused the defence counsel’s application that the case be transferred to another magistrate. The appellant lodged an appeal against the conviction. It was held that the magistrate only considered whether he would be personally biased but he had failed to consider all the circumstances including whether the circumstances dictated that no other magistrate could hear the case and the admission of knowledge by the appellant in his previous plea before him might have unconsciously influenced him in his findings against the appellant.

5.3.7 The rule against bias may be excluded by an ordinance (e.g. s.52 of the Rating Ordinance, Cap. 116), or the doctrine of necessity or waiver by the person affected. However, even if the common law rule against bias is excluded, HKBOR 10 (text given in para 5.3.10 below) would still need to be complied with unless it is excluded by law and the exclusion was justified on objective grounds related to the effective functioning of the State or some other public necessity which justified removal of the Article’s protection. Further, the European Court of Human Rights has held that it is unlikely that the requirements of independence and impartiality can be waived, in view of their importance for confidence in the judicial system generally and that waiver “in so far as it is permissible” must be established in an unequivocal manner (*Oberschlick v Austria* (1995) 19 EHRR 389 (23.5.1991) at para 51).

Case Example

- In *Kwan Kong Co Ltd v Town Planning Board* [1996] 2 HKLR 363; CACV 194/1995 (11.7.1996), the appellant alleged that the decision of the Board violated his right to a fair hearing by a competent, independent and impartial tribunal guaranteed by HKBOR 10. This was on the ground that the vice-chairman and some members of the Board were public officers. The Court of Appeal held that HKBOR 10 was not engaged given that the Board was simply part of an administrative process in dealing with objections to draft plans and to put forward to the Governor-in-Council (now the Chief Executive-in-Council), with or without amendments, the draft plan for approval, together with a schedule of the objections. Any final ‘determination’ of the appellant’s rights and obligations in terms of HKBOR 10 was made by the Governor-in-Council. Litton VP (as he then was) held that the function of the Board was to promote the “health, safety, convenience and general welfare of the community” by undertaking the systematic preparation of draft plans upon the directions of the Governor. It was difficult to see how that function could properly be discharged without the presence of at least some of the officials such as the Director of Planning, Secretary for Transport, Director of Environmental Protection, etc, or their representatives. Godfrey JA (as he then was) held that the law must allow for the departmental bias which public officers were expected and required to have. The relevant question was whether, when the members of the Board came to make up their minds, they genuinely
addressed themselves to the question with minds which were open to persuasion. There was no evidence in the present case to the contrary; nor would one expect there to be.

5.3.8 There is a distinction between pre-disposition and pre-determination. Administrative decision-makers will naturally approach their task with a legitimate pre-disposition to decide in accordance with their previously articulated views or policies. Where there is simply a pre-disposition to decide one way rather than the other in accordance with previous policies, there is no question of apparent bias. But the decision-maker must keep an open mind and not allow himself to slip from pre-disposition to pre-determination.

5.3.9 It is also self-evident that ministerial or departmental policy cannot be regarded as disqualifying bias. An administrator’s decision cannot be impugned on the ground that he has advocated a particular scheme or that he is known to support it as a matter of policy. The whole object of putting the power into his hands is that he may exercise it according to Government policy.

Case Example

- In **PCCW-HKT Telephone Ltd v Telecommunications Authority [2008] 2 HKLRD 282; CACV 60/2007 (18.9.2007)**, the applicant contended that the Telecommunications Authority was acting under a real likelihood of apparent pre-determination in a consultation exercise on a proposed policy change. It was held that no case was made out of apparent bias on the materials on which the applicant relied. The Court of Appeal endorsed the submission of the Telecommunications Authority that the Authority as regulator should candidly articulate his thinking and provisional views; it was not only unobjectionable, it was good administrative practice. If the Authority held strong views regarding a proposal, the forcefulness of his views might well serve to elicit responses from persons holding different views who might otherwise not be included to contribute to the debate.

5.3.10 It is fundamental in our law that a public tribunal which has the power to discipline an individual, and to make findings which will strip him of his livelihood, must be seen to be impartial. HKBOR 10 provides, *inter alia*, that “in the determination of 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 …”. An arrangement which satisfies the requirements of the common law will almost certainly conform with the fairness requirement of HKBOR 10 (*Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237 (CFA); FACV 9/2008 (26.3.2010), at para 137).

5.3.11 The courts have not insisted that the initial or primary administrative decision-maker, whether an individual or a tribunal, should comply with every aspect of HKBOR 10. What the courts do insist upon is that the applicant aggrieved by the decision of the initial or primary decision-maker should be able to bring the dispute
subsequently before a Court of “full jurisdiction”. By this, it means full jurisdiction to deal with the case as the nature of the decision requires. Availability of appeal or judicial review would generally be sufficient for the purpose of complying with Article 10 and curing the defect at first instance.

**Case Example**

- In *Wong Tak Wai v Commissioner of Correctional Services*, unreported, HCAL 64/2008 (31.8.2009), the Court of First Instance found that the hearing of prison disciplinary proceedings with punishment in the form of forfeiture of remission by a Superintendent charged with the administration of the penal institution and/or supervision of the reporting officer in question lacked the independence or impartiality for a fair hearing under HKBOR 10 and the same conclusion was reached via the test of reasonable apprehension of bias. The Court of Appeal subsequently allowed the Commissioner’s appeal ([2010] 4 HKLRD 409; CACV 231/2009 (21.7.2010)) and held *inter alia* that given the wide power of the Commissioner (in determining an appeal by a prisoner against the decision of the Superintendent) to enquire into the merits fully and to hold a rehearing where the justice of the matters required, he was armed with full jurisdiction to deal with the case as the challenged decision required. The Court held that the safeguards for a fair adjudication were met and that there was compliance with the requirements for a fair hearing through the appeal to the Commissioner.

**5.4 PROTECTION OF LEGITIMATE EXPECTATIONS**

5.4.1 The legitimate expectation doctrine holds that where a decision-maker leads a person affected by a decision legitimately to expect either that a particular procedure will be followed in reaching a decision or that a particular (and generally favourable) decision will be made (and such a decision would be within his powers), then, save where there is an overriding public interest, that legitimate expectation must be protected.

5.4.2 There are two essential requirements for legitimate expectation, namely:

(a) The expectation must be induced by the decision-maker either expressly (e.g. a promise or undertaking) or impliedly (e.g. past practice); and

(b) The representation must be clear, unambiguous and devoid of relevant qualification.

**Case Example**

- See *AG v Ng Yuen Shiu* [1983] 2 AC 629; PCA 16/1982 (21.2.1983). “The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority
has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.” (per Lord Fraser at 636 and 637).

- Also see Lam Yuet Mei v Permanent Secretary for Education and Manpower of the Education and Manpower Bureau [2004] 3 HKLRD 524; HCAL 36/2004 (9.8.2004). An expectation will not be regarded as reasonable or legitimate if the applicant could have foreseen that the subject matter of the representation was likely to alter, or that it would not have been respected by the relevant agency, or that the applicant knew that the representor did not intend his statement to create an expectation. Detrimental reliance usually had to be established for a claim based on legitimate expectation to succeed.

5.4.3 Expectations are generally divided into two groups, i.e. procedural expectations and substantive expectations.

5.4.4 Procedural expectations: These are expectations that a particular procedure will be followed and they are protected simply by requiring that the promised procedure be followed.

Case Example

- In AG v Ng Yuen Shiu [1983] 2 AC 629 (21.2.1983), the Government announced that certain illegal immigrants who were liable to deportation would be interviewed individually and treated on their merits in each case. The Privy Council held that where a public authority has promised to follow certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The removal order was quashed as the appellant had only been allowed to answer questions without being given an opportunity to state his own case.

5.4.5 Substantive legitimate expectation: This refers to a reasonable expectation of a favourable decision on the basis of a representation (or promise) or an established practice. Generally, substantive expectations are procedurally protected: the decision-maker will have to give the person affected an opportunity to make representations before the expectation is denied. But exceptionally, where the Court consider that the procedural protection may not be adequate to remedy the unfairness occasioned by the decision-maker’s breach of promise or established practice, it may give substantive protection to legitimate expectation in an appropriate case.
5.5 EXCLUSION OF NATURAL JUSTICE

5.5.1 The rules of natural justice may be excluded in the following situations:

(a) National security;
(b) Emergencies (most situations are covered by statutes); and
(c) Pure master and servant relationship.

Case Example

In *Chu Woan Chyi & Ors v Director of Immigration* [2007] 3 HKC 168; HCAL 32/2003 (23.3.2007), four members of Falun Gong were refused entry to Hong Kong because it was believed that they presented a security risk, but the basis for such belief was not disclosed. The Court held amongst other things that the issue of multiple entry permits to the four applicants did not vest them (being aliens) with any sort of legitimate expectation that they would be admitted into Hong Kong. The Director of Immigration was not obliged to give reasons or to allow representations. The Director of Immigration was entitled to make such enquiries as he saw fit and was not under an obligation to provide a hearing in coming to such an administrative decision. (Note decision on appeal: [2009] 6 HKC 77; CACV 119/2007 (4.9.2009))

5.6 DUTY TO GIVE REASONS

5.6.1 There is no general common law rule which requires reasons to be given by an administrative tribunal or even a Court of law for its decision. But it will generally be prudent for a decision-maker to give careful thought to whether reasons should be given.

5.6.2 Whether it is desirable or necessary to give reasons depends on the circumstances of the case. For instance, the Court may infer that a decision is arbitrary and unreasonable if reasons are not given.

Case Example

In *Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority* [1997] 3 HKC 93; CACV 66/1997 (28.10.1997), the Court of Appeal held that whilst there was no express provision in the Control of Obscene and Indecent Articles Ordinance, Cap. 390 requiring the Obscene Articles Tribunal to give reasons for its decisions, it was not only desirable but necessary to know the reasons for a particular decision under appeal. Accordingly, it was only right to imply a duty on the Tribunal to give reasons when it made a decision for an interim classification under s.15 and a determination under s.29 of the Ordinance.

5.4.6 Overriding public interest: Once a legitimate expectation has been established, the Administration may have good reasons to resile from its clear representation or promise previously made (e.g. policy changes). The onus is on the Administration to give good reasons why it has failed to give effect to the legitimate expectation in any particular case. Overriding public interest would be accepted by the Court as a good reason provided that the Administration can establish it. The Court may demand cogent evidence in support and has taken the view that “the government or the relevant government agency must remain free to change its policy .... But the adoption of a new policy does not relieve a decision-maker from his duty to take account of a legitimate expectation.” (see *Ng Siu Tung & Ors v Director of Immigration* (2002) 5 HKCFAR 1; FACV 1/2001 (10.1.2002) at para 93).

5.4.7 Revocation of legitimate expectation: A legitimate expectation can be cancelled in the following ways:

(a) Express representation (the statement issued must be clear and unambiguous and a fair hearing may have to be provided in certain circumstances);
(b) Implied representation (through an event or series of events); and
(c) Legislation (clear statutory provisions override any expectation however founded).
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(b) Emergencies (most situations are covered by statutes); and
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In Lister Assets Ltd and Others v The Chief Executive in Council, unreported, CACV 172/2012 (25.4.2013), which involved an appeal against refusal of leave to apply for judicial review, the Court of Appeal stated the two situations in which, by way of exception to the general rule, reasons may be required for an administration decision: (1) where the decision appears aberrant, so that the reasons for reaching that decision should be made known to the recipient so that he may know whether the aberration is a legal one; (2) where the decision engages an interest such as personal liberty that is so highly regarded by the law that fairness requires that reasons be given as of right. It held that such general position has been affirmed in relation to the Chief Executive-in-Council or the Chief Executive in various contexts, and fairness is, ultimately, the test of whether the Chief Executive-in-Council must give reasons in a particular case.

5.6.3 How detailed the reasons should be would depend upon the circumstances of the particular case.

Case Example

- In Lau Tak Pui & Ors v Immigration Tribunal [1992] 1 HKLR 374; CACV 179/1991 (8.1.1992), it was held that an outlined reasons showing to what issues the decision-maker had directed his mind and the evidence upon which he had based his conclusion might be sufficient.

- In Dr Ip Kay Lo v Medical Council of Hong Kong [2003] 3 HKLRD 851; CACV 295/2002 (28.7.2003), the Court held that detailed decision was required where a medical doctor was found guilty of a serious professional misconduct of making fraudulent representation to another doctor given the complexity of the case and the serious consequences to his professional reputation and livelihood.

5.6.4 The Court may, in appropriate cases, admit ex post facto reasons but generally adopts a cautious approach.

Case Example

- In R (Nash) v Chelsea College of Art and Design [2001] EWHC Admin 538 (11.7.2001), the Court set out its approach on whether a later reason provided by way of evidence in judicial review should be regarded as or as part of the original reason for a challenged decision: (1) Where there is a statutory duty to give reasons as part of the notification of the decision, the adequacy of the reasons is itself made a condition of the legality of the decision. Only in exceptional circumstances will the Court accept subsequent evidence of the reasons; (2) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include: (a) whether the new reasons are consistent with the original reasons, (b) whether it is clear that the new reasons are indeed the original reasons; (c) whether there is a real risk that the later reasons have been composed subsequently in order to support the decision, or are a retrospective justification of the decision; (d) the delay before the later reasons were put
5.6.5 There is a growing tendency to make express provisions in legislation creating administrative tribunals requiring the relevant tribunal to give reasons for its decision (e.g. s.25 of the Administrative Appeals Board Ordinance, Cap. 442; s.15 of the Municipal Services Appeals Board Ordinance, Cap. 220). Likewise, the Administration may also be expected to impose in new legislation a duty on individual decision-makers to give reasons for their decisions (e.g. ss.3(7C) and 8(E) of the Buildings Ordinance, Cap. 123; s.5A(5) of the Societies Ordinance, Cap. 151; s.22(7) of the Electronic Transactions Ordinance, Cap. 553).
6. CONSTITUTIONAL CHALLENGE

6.1 THE NATURE OF CONSTITUTIONAL CHALLENGE

6.1.1 A constitutional challenge by way of judicial review is a challenge on the constitutionality of a legislative provision (whether in primary or subsidiary legislation) or any executive act (e.g. a Government policy or an administrative decision) in that such legislative provision or executive act is inconsistent with any constitutional instrument.

6.1.2 The applicants in judicial review applications may rely on the provisions of the Basic Law including those concerning human rights, to challenge a legislative provision or an executive act.

6.2 THE NATURE OF THE BASIC LAW

6.2.1 The Basic Law is the constitutional document of the HKSAR. Given its constitutional status, any law (including primary or subsidiary legislation) or executive act inconsistent with any provision of the Basic Law shall be invalid.

6.2.2 The courts of Hong Kong have power to strike down statutory provisions and quash or otherwise declare acts of the Government as unconstitutional, if they are found to be inconsistent with the Basic Law.

Case Example

* In *Ng Ka Ling & Ors v Director of Immigration (1999) 2 HKCFAR 4; FACV 14-16/1998* (29.1.1999), some Chinese nationals born on the Mainland to parents who were Hong Kong permanent residents, entered Hong Kong before 1.7.1997 either on a two-way permit or by ways not through an immigration control point. They sought to establish their status as Hong Kong permanent residents under BL 24(2)(3) on the basis that they were persons of Chinese nationality born outside Hong Kong of those residents listed in BL 24(2)(1) or BL 24(2)(2). The CFA, in finding the Immigration (Amendment) (No. 3) Ordinance 1997 unconstitutional to the extent that it required permanent residents residing on the Mainland to hold a one-way permit before they could enjoy their right of abode, declared that the courts of Hong Kong have the constitutional jurisdiction to examine whether the legislation enacted by the legislature of the HKSAR or acts of the executive authorities of the HKSAR are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid.

(The one-way permit procedure has subsequently been maintained based on an SCNPC interpretation of BL 22(4). The determination in *Ng Ka Ling* regarding the constitutional jurisdiction of the Court is not affected.)
6.3 THE INTERPRETATION OF THE BASIC LAW

6.3.1 Being an entrenched constitutional document, the Basic Law states general principles and expresses purposes without descending to particularities and details. Therefore, its provisions must be interpreted with a purposive approach, namely the gaps and ambiguities must be resolved to give effect to the principles and purposes ascertained from the language, the context and relevant extrinsic materials.

6.3.2 It is a developed principle that the fundamental rights and freedoms guaranteed in the Basic Law must be interpreted generously. Moreover, restrictions to those rights and freedoms must be narrowly interpreted.

Case Example

• The applicant in Director of Immigration v Chong Fung Yuen (2001) 4 HKCFAR 211; FACV 26/2000 (20.7.2001) was a Chinese citizen born in Hong Kong after the resumption of the exercise of sovereignty, and sought to establish his right of abode in Hong Kong under BL 24(2)(1). However, neither of his parents was a Hong Kong permanent resident at the time of his birth. The CFA decided that a purposive approach must be adopted for the interpretation of the Basic Law provisions, and a literal, technical, narrow or rigid approach must be avoided. To assist in interpretation, the courts should consider other provisions and the Preamble of the Basic Law as internal aids, and also extrinsic materials before the enactment of the Basic Law such as the Joint Declaration. The Court also confirmed the principle established in Ng Ka Ling that a generous interpretation should be given to the constitutional guarantees of freedoms in the Basic Law. Having considered BL 24(2)(1) in its context and purpose, the Court held that its clear meaning was that Chinese citizens born in Hong Kong before or after 1.7.1997 had the right of abode in Hong Kong irrespective of their parents’ immigration status in Hong Kong at the time of birth.

6.3.3 The constitutional jurisdiction of the Hong Kong courts is obligatory, not discretionary. This means that if there is inconsistency between the Basic Law (or any other documents with constitutional effect) and other legislation or an executive act, the Court is bound to declare such legislation or executive act invalid to the extent of the inconsistency. (In respect of legislation, please see also the Court’s obligation and power to make remedial interpretation in para 6.9.)

6.4 THE EFFECT OF INTERPRETATION OF THE BASIC LAW BY SCNPC

6.4.1 Under the constitutional framework of the HKSAR, the Basic Law is a national law of the PRC, having been enacted by the National People’s Congress pursuant to Article 31 of the Constitution of the PRC.
6.4.2 The Hong Kong courts’ jurisdiction to interpret the Basic Law under BL 158(2) and to declare any legislative provision or executive act unconstitutional by their inconsistency with the Basic Law provision in issue, is subject to:

(a) the free-standing power of interpretation of the Basic Law vested in the SCNPC under BL 158(1); and
(b) the SCNPC’s power of interpretation of the Basic Law by reference from the Hong Kong courts under BL 158(3). Such reference under BL 158(3) shall only be made by the Hong Kong courts before making a final and unappealable judgment, and if such a judgment will be affected by the interpretation of a Basic Law provision which concerns either (i) affairs which are the responsibility of the Central People’s Government, or (ii) the relationship between the Central Authorities and the HKSAR.

6.4.3 The power of the SCNPC to interpret the Basic Law is derived from Article 67(4) of the Constitution of the PRC and is provided for expressly in the Basic Law in BL 158(1) and is in general and unqualified terms. An interpretation of the Basic Law issued by the SCNPC is binding on the courts of the HKSAR. It declares what the law is and has always been since the coming into effect of the Basic Law on 1.7.1997. The Hong Kong courts shall follow the SCNPC’s interpretation, but the SCNPC’s interpretation will not affect judgments previously rendered.

Case Example

- In Lau Kong Yung & Ors v Director of Immigration (1999) 2 HKCFAR 300; FACV 10/1999 (3.12.1999), the CFA recognised that the SCNPC’s power to interpret the Basic Law under BL 158(1), as a national law of the PRC, was general and unrestricted. The Hong Kong courts’ power to interpret the Basic Law under BL 158(2) actually stemmed from such general power of interpretation of the SCNPC under BL 158(1). Further, the power of the Hong Kong courts to interpret the Basic Law in adjudicating cases is also subject to the SCNPC’s power of interpretation under both BL 158(1) and (3).

- Yau Wai Ching and Anor v Chief Executive of HKSAR (2017) 20 HKCFAR 390; FACV 7, 8, 9 & 10/2017 (1.9.2017) concerns proceedings taken out by the Chief Executive and Secretary for Justice (the Government) by way of judicial review and pursuant to s.73 of the Legislative Council Ordinance, Cap. 542, on the grounds that the LegCo oaths purportedly taken by the LegCo members elect Yau Wai Ching and Leung Chung Hang were contrary to the law. The CFA Appeal Committee followed the CFA’s previous decisions on the scope of BL 158(1), the power of the SCNPC to interpret provisions of the Basic Law and the effect of such interpretations, holding that 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 HKSAR, which includes legislative interpretation which can clarify or supplement laws. An interpretation of the Basic Law issued by the SCNPC is binding on the courts of Hong Kong and the effect of such interpretation dates back to the coming into effect of the Basic Law on 1.7.1997.
6.5 PROVISIONS OF THE ICCPR AS APPLIED TO HONG KONG

6.5.1 In accordance with BL 39(2), restrictions of the rights and freedoms enjoyed by Hong Kong residents must be prescribed by law and shall not contravene the provisions of BL 39(1), which provides that the provisions of the ICCPR “as applied to Hong Kong” shall remain in force and shall be implemented through the laws of the HKSAR.

6.5.2 The provisions of the ICCPR “as applied to Hong Kong” have been incorporated into the law of Hong Kong by the HKBORO, and the Bill of Rights in Part II is subject to the exceptions in Part III of the HKBORO:

(i) Section 11 of the HKBORO provides for an exception, namely that the HKBORO does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of such legislation, as regards persons not having the right to enter and remain in Hong Kong (see Ubamaka v Secretary for Security (2012) 15 HKCFAR 743; FACV 15/2011 (21.12.2012)).

(ii) Another exception can be found in s.9 of the HKBORO, namely “members of and persons serving with the armed forces of the government responsible for the foreign affairs of Hong Kong and persons lawfully detained in penal establishments of whatever character are subject to such restrictions as may from time to time be authorised by law for the preservation of service and custodial discipline”.

Case Example

- In Ghulam Rbani v Secretary for Justice (2014) 17 HKCFAR 138; FACV 15/2013 (13.3.2014), the appellant brought proceedings against the Director of Immigration for damages for false imprisonment, claiming that he had been unlawfully detained pursuant to s.32(2A) of the Immigration Ordinance, Cap. 115. While holding that the immigration exception in s.11 of the HKBORO precluded the appellant from challenging the detention on the grounds of HKBOR 5 (right to liberty), the CFA found the Government to be liable in that part of the appellant’s detention was excessive and inconsistent with the common law Hardial Singh principles.

6.6 THE PROPORTIONALITY TEST APPLIED IN CONSTITUTIONAL CHALLENGES

6.6.1 When a constitutional challenge involves a restriction of constitutionally guaranteed rights or freedoms, the Court first has to identify whether the right or freedom in issue is absolute in nature such that no restrictions on the right are permissible. Absolute rights or freedoms, such as the right not to be subjected to
torture or cruel, inhuman or degrading treatment or punishment under HKBOR 3, cannot be restricted under any circumstances.

6.6.2 Where other rights or freedoms are concerned, the Court adopts the proportionality test as an analytical tool to examine whether the restriction of such rights is proportionate to the legitimate aim(s) sought to be achieved thereby. Most of the rights and freedoms are protected under Chapter III of the Basic Law2 and the HKBOR.

6.6.3 Hong Kong courts adopt a four-step analysis when applying the proportionality test, which is typically formulated as follows:

(a) The restriction must pursue a legitimate aim;
(b) The restriction must be rationally connected to that legitimate aim;
(c) The restriction or limitation must be no more than is necessary to accomplish that legitimate aim; and
(d) A reasonable balance has to be struck between the societal benefits of the encroachment and the inroads made into the constitutionally guaranteed rights of the individual, asking in particular whether pursuit of the societal interest resulted in an unacceptably harsh burden on the individual.

6.6.4 Below are a few examples of how the proportionality test has been applied by the Hong Kong courts in constitutional challenges involving constitutionally guaranteed rights and freedoms:

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**Case Example**

- In *Hysan Development Co Ltd & Ors v Town Planning Board (2016)* 19 HKCFAR 372, FACV 21 & 22/2015 (26.9.2016), the appellants challenged a series of planning restrictions by the Town Planning Board, such as building height restrictions and non-building areas. The CFA decided that the restrictions engaged BL 6 and BL 105, which expressly required the HKSAR to protect private property rights. Having considered a substantial body of overseas and local jurisprudence, the CFA explicitly added a fourth step to the proportionality analysis, which involved asking whether there was a reasonable balance struck between societal interest and the encroachment on constitutional rights of an individual (see para 6.6.3 above). The CFA held that in general terms, where the Board reached decisions which were not flawed on traditional judicially reviweable grounds, any imposed restrictions which encroached upon a landowner's property rights should be subject to constitutional review applying the “manifestly without reasonable foundation” standard (i.e. whether the encroaching measure was “manifestly without reasonable foundation”). The CFA further commented that Board decisions imposing planning restrictions arrived

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2 Examples of constitutionally guaranteed rights and freedoms outside Chapter III are BL 6: Right of private ownership of property; BL 87: Rights previously enjoyed by parties to legal proceedings; BL 105: Right to compensation for deprivation of property; BL 136: Freedom to run educational undertakings; BL 137: Academic freedom; BL 141: Freedom of religious belief.
at lawfully and in conformity with the principles of traditional judicial review would unlikely be susceptible to constitutional review unless the measures were exceptionally unreasonable.

- In *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950; FACV 2/2013 (17.12.2013), the appellant challenged that the seven-year residence requirement under the Comprehensive Social Security Assistance Scheme was inconsistent with “the right to social welfare in accordance with law” guaranteed by BL 36 and BL 145. Applying the proportionality test, the CFA found that the seven-year residence requirement conflicted with the Government’s one-way permit family reunion policy and population policy aimed at rejuvenating the ageing population. Furthermore, as the introduction of the requirement achieved only an insignificant level of savings, it was not rationally connected to the declared aim.

- In *QT v Director of Immigration* (2018) 21 HKCFAR 324; FACV 1/2018 (4.7.2018), the applicant challenged the Director’s decision of refusing to grant her a dependant visa to stay in Hong Kong as the “spouse” of her partner with whom she had entered into a same-sex civil partnership in England and who had been granted an employment visa to work in Hong Kong. The Director refused the applicant’s dependant visa application on the grounds that under the dependant policy (“the Policy”), “spouse” meant a party to a marriage between a man and a woman as recognised under Hong Kong law. Applying the proportionality test, the CFA held that excluding same-sex couples whose relationship had been legalised in the form of a civil partnership from the Policy was not rationally connected to the stated aims of attracting foreign talent and maintaining strict immigration control, thus amounting to indirect discrimination on the grounds of sexual orientation.

### 6.7 MARGIN OF DISCRETION

6.7.1 Typically, the courts apply a standard of reasonable necessity (i.e. no more than necessary for achieving the legitimate aim) when considering whether the measure which restricts fundamental rights satisfies the proportionality test; this involves a stricter judicial scrutiny of executive decisions than that applies under the *Wednesbury* doctrine. In other cases involving interferences with fundamental rights, the courts recognise that a wider margin of discretion should be accorded to the legislature or executive where difficult choices have to be made between the rights of the individual and the needs of society. The degree and extent of the margin of discretion that the Court would accord to the relevant authority would depend on, for example, the subject matter under scrutiny. The scope of the margin of discretion in different contexts has been closely examined by the Court in recent years.

**Case Example**

- In *Hysan Development Co Ltd & Ors v Town Planning Board* (2016) 19 HKCFAR
372; [2016] 6 HKC 58 (26.9.2016), certain planning restrictions laid down by the Town Planning Board were challenged on the basis that they were in violation of the protection of private property rights conferred by the Basic Law. It was held by the CFA that the scope of the margin of discretion may vary having regard to a number of factors, including: “(i) the significance of and degree of interference with the right in question; and (ii) the identity of the decision-maker as well as the nature and features of the encroaching measure relevant to setting the margin of discretion.” (per Ribeiro PJ at para 107)

Ribeiro PJ further held that: “... a decision-maker’s views resulting in the promulgation of the impugned measure may be given much weight and thus afforded a wide margin of discretion reflected by use of a ‘manifest’ standard where the decision-maker is likely to be better placed than the Court to assess what is needed in the public interest. The Court may for instance, be satisfied that he had special access to information; special expertise in its assessment; or an overview enabling him to assess competing and possibly prior claims for scarce resources. The Court might also refrain from intervening because the measure reflects a predictive or judgmental decision which it was the institutional role of the decision-maker to take and as to which no single ‘right answer’ exists.” (para 116)

6.7.2 In dealing with matters involving socio-economic policy, the Court will be less inclined to interfere and more ready to accord a wider margin of discretion to the authority concerned.

Case Example

- In R (Ahmad) v London Borough of Newham [2009] 3 All ER 755 (4.3.2009), the applicant challenged a local authority’s house allocation policy on the ground of irrationality that it did not contain a mechanism for identifying those with the greatest housing need in according priority. The House of Lords was reluctant to interfere having found that the scheme was not in breach of the statutory requirements. The “court is in no position to rewrite the whole policy and to weigh the claims of the multitude who are not before the court against the claims of the few who are. ...” (per Baroness Hale at para 15) and “... what is important is to emphasise that once a housing allocation scheme complies with the [statutory] requirements ... , the courts should be very slow to interfere on the ground of alleged irrationality. ...” (per Lord Neuberger at para 55)

6.7.3 The CFA has considered the concept of margin of discretion in the context of the Government’s socio-economic policies in a number of cases. The authorities show that where the impugned measures or decisions involve the implementation of the Government’s socio-economic policies and limited public funds, the Court will not usually put itself in the place of the executive or legislature to decide what is the best option unless the measures or decisions are “manifestly without reasonable justification.”
Case Example

- In *Fok Chun Wa v Hospital Authority (2012) 15 HKCFAR 409; FACV 10/2011* (2.4.2012), the main complaint was that the second applicant (and other women who were similarly from the Mainland and had substantial connections with Hong Kong) had been unlawfully discriminated against in that the level of fees payable by them for obstetric services in public hospitals in Hong Kong were substantially higher than those payable by Hong Kong resident women. The Chief Justice commented that “(t)hese 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.” (per Chief Justice Ma at para 90)

- In *Kong Yunming v Director of Social Welfare (2013) 16 HKCFAR 950; FACV 2/2013* (17.12.2013) the applicant challenged the Government’s policy requiring all recipients of Comprehensive Social Security Assistance to have been a Hong Kong resident for at least seven years. The CFA said, “As this Court has recognised, some rights are non-derogable and absolute, in which case, no infringement is permitted and no question of proportionality arises (Ubamaka Edward Wilson v Secretary for Security, FACV 15/2011 (21.12.2012), involving, for example, the prohibition of torture and of cruel, inhuman or degrading treatment or punishment). But in other cases, it is well-established that the law may validly create restrictions on constitutionally protected rights provided that each such restriction can be justified on a proportionality analysis.” (para 38)

“...In some cases involving fundamental rights such as freedom of expression or freedom of peaceful assembly, or rights bearing on criminal liability such as the presumption of innocence, the Court has regarded the restriction as disproportionate unless it goes no further than necessary to achieve the legitimate objective in question. This is sometimes called the ‘minimal impairment test’. Similarly, in discrimination cases where the differentiating inroad is based on certain personal characteristics sometimes referred to as ‘inherently suspect grounds’ such as race, colour, sex or sexual orientation, the Court will subject the impugned measure to ‘intense scrutiny’, requiring weighty evidence that it goes no further than necessary to achieve the legitimate objective in question.” (para 40)

“Where the disputed measure involves implementation of the Government’s socio-economic policy choices regarding the allocation of limited public funds without impinging upon fundamental rights or involving possible discrimination on inherently suspect grounds, the Court has held that it has a duty to intervene
only where the impugned measure is ‘manifestly without reasonable justification’.” (per Ribeiro PJ at para 41)

6.7.4 The degree of margin of discretion has also been considered in the context of election matters. The courts have recognised that in areas which involve political and policy considerations (such as election matters), the Court in applying the proportionality test in the scrutiny of legislative restriction should accord a due margin of discretion to the legislature and the Government. In other words, the Court should only interfere if it finds that, upon scrutiny, the restriction is “manifestly without justifiable foundation”.

**Case Example**

- **Leung Chun Ying v Ho Chun Yan Albert & Anor** (2013) 16 HKCFAR 735; FACV 24, 25 & 27/2012 (11.7.2013) were appeals to the CFA concerning elections for the Chief Executive under the Chief Executive Election Ordinance, Cap. 569 (“the CEEO”). The challenges included the constitutionality of the absolute seven day time limit for lodging election petitions contained in s.34(1) of the CEEO which was said to contravene the right of access to the courts under BL 35. The Chief Justice considered the margin of appreciation which could be accorded by the Court to the legislature and said “[i]n Fok Chun Wa v Hospital Authority, this Court emphasized the point that the concept of margin of appreciation reflected the different constitutional roles of the judiciary on the one hand, and the executive and legislature on the other. In the context of election law, this difference in roles must be borne in mind... Elections, however, also involve political and policy considerations and it is in these areas where the legislature is involved. The determination that seven days is the appropriate limit for the lodging of election petitions is one that does involve considerations other than legal ones... the right of access to the courts is not an unlimited one, particularly in the present context.” (per Chief Justice Ma at para 45)

- **In Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs** [2017] 5 HKC 242; [2017] HKCFA 44 (11.7.2017), the applicant challenged the constitutionality of a legislative provision having the effect of preventing a member of the LegCo who has resigned from standing for election at the by-election consequent on that member’s resignation. The Court was required to consider whether to afford a wide margin of appreciation to the legislature in the application of the legal principles. Chief Justice Ma held, “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.” (para 55)
6.8 EXAMPLES OF CONSTITUTIONAL CHALLENGES

6.8.1 Below are a few landmark examples where constitutional rights and freedoms are relied on to challenge an executive act or policy or a legislative provision. Although some of them are not applications for judicial review, the legal principles developed in such cases are equally applicable in judicial review applications.

(a) Freedom of Expression

Case Example

- In HKSAR v Ng Kung Siu (1999) 2 HKCFAR 442; FACC 4/1999 (15.12.1999), the defendants were convicted of desecrating the national flag and the regional flag contrary to s.7 of the National Flag and National Emblem Ordinance (Instrument A401) and s.7 of the Regional Flag and Regional Emblem Ordinance (Instrument A602) in relation to the use of an extensively defaced national flag and regional flag when taking part in a public procession. The defendants argued that the criminal offence provisions contravened their freedom of expression under BL 27 and HKBOR 16. While recognising that freedom of expression was a fundamental freedom in a democratic society, the CFA noted that this freedom was not absolute and may be subject to restrictions. It held that the provisions served a legitimate aim of protecting the national flag and the regional flag as unique symbols of the Nation and the HKSAR respectively. It noted that the restriction on freedom of expression was limited in that it only banned one mode of expression but did not interfere with a person’s freedom to express the same message by other modes, and concluded that the provisions constituted a justifiable restriction on the right to freedom of expression. This ruling was reaffirmed by the CFA in HKSAR v Koo Sze Yiu (2014) 17 HKCFAR 811; FAMC 40/2014 (10.11.2014).

- In HKSAR v Fong Kwok Shan Christine (2017) 20 HKCFAR 425; FACC 2/2017 (4.10.2017), the appellant challenged, among others, that the conviction under s.12(1) of the Administrative Instructions for Regulating Admittance and Conduct of Person for displaying a sign, message or banner in the public gallery of the LegCo contravened BL 27 and HKBOR 16. The CFA did not accept that the private property rights of the Government (or the LegCo in that case) under BL 6 and BL 105 trump a demonstrator’s right to freedom of expression, and it held that any measures restricting BL 27 and HKBOR 16 must satisfy the proportionality test. The CFA noted that s.12 of the Administrative Instructions was limited in scope and targeted intrusive behaviour to protect good order during a LegCo meeting. It held that a reasonable balance had been struck between the benefit to society of enabling the LegCo properly to carry out its constitutional functions on the one hand and the limited restriction on the right to freedom of expression on the other.
(b) Freedom of Assembly and Demonstration

Case Example

- In *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229; FACC 1/2005 (8.7.2005), the appellants challenged that the scheme established by the Public Order Ordinance, Cap. 245, for notification and control of public processions contravened their right to freedom of assembly guaranteed by BL 27. The CFA held that notification is required to enable the Police to fulfil the positive duty of the Government to take reasonable and appropriate measures to enable lawful demonstrations to take place peacefully, and hence the statutory requirement for notification is constitutional. It noted that a legal requirement for notification was widespread in jurisdictions around the world. That said, the Commissioner of Police must apply the proportionality test when exercising his statutory discretion to restrict the right of peaceful assembly.

- In *Yeung May Wan v HKSAR* (2005) 8 HKCFAR 137; FACC 19/2004 (5.5.2005), the defendants were a group of Falun Gong practitioners who demonstrated outside the Liaison Office of the Central People’s Government. After ignoring several warnings by the Police that they were causing an obstruction, the defendants were arrested and later convicted, among other offences, of obstruction of a public place contrary to s.4A of the Summary Offences Ordinance, Cap. 228. As the obstruction was part of a peaceful demonstration, the CFA found that substantial weight should be accorded to the freedom of assembly and demonstration of the defendants under BL 27. A balance must be struck between the conflicting interests of different users of the highway based on a requirement of reasonableness, and whether any particular instance of obstruction went beyond what was reasonable was a question of fact and degree depending on all the circumstances, including its extent and duration, the time and place where it occurred and the purpose for which it was done. Here, the Magistrate (who convicted the defendants) failed to give due regard to their right to freedom of assembly and demonstration in evaluating the reasonableness of the obstruction, and therefore, the convictions had to be quashed.

(c) Equality and Discrimination

Case Example

- In *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335; FACC 12/2006 (17.7.2007), the defendant challenged that the offence of homosexual buggery committed otherwise than in private in s.118F(1) of the Crimes Ordinance, Cap. 200, contravened the right to equality guaranteed by BL 25 and HKBOR 1 and 22. The CFA noted that s.118F(1) only criminalised homosexual buggery otherwise than in private but did not criminalise heterosexuals for the same or comparable conduct, and in the absence of any genuine need for the differential treatment,
This amounted to unlawful discrimination on the grounds of sexual orientation.

(d) Social Welfare

Case Example

- In *Yao Man Fai George v Director of Social Welfare* [2012] 4 HKC 180; CACV 153/2010 (17.2.2012), the applicant challenged the requirement that applicants of Comprehensive Social Security Assistance (“CSSA”) must have resided in Hong Kong continuously for at least one year before the date of application on the grounds that such requirement contravened BL 36 (right to social welfare), among other rights and freedoms. The Court accepted that in the context of social welfare, the courts should only intervene where the line drawn was self-evidently unreasonable. Applying the proportionality test, the Court of Appeal recognised that the one-year requirement served the legitimate aim of restricting public expenditure by excluding those who have lived outside Hong Kong “for a long time”. However, the Court considered that the one-year requirement did not achieve this aim as it caught those who had not been absent from Hong Kong for “a long time” within any sensible meaning of that phrase in the context of the issue, and held that the requirement was unconstitutional. See also the discussions in *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950; FACV 2/2013 (17.12.2013).

(e) Right of Access to the Courts

6.8.2 Please see the case of *Leung Chun Ying v Ho Chun Yan Albert and Another* (2013) 16 HKCFAR 735, FACV 24, 25 & 27/2012 (11.7.2013) at para 6.7.4 above.

(f) Right to Fair Hearing

6.8.3 Please see the cases in Chapter 5: Procedural Impropriety.

(g) Right of Abode

6.8.4 Please see the cases in Chapter 8: Judicial Review in Practice (Immigration Matters).

6.9 CONSTITUTIONAL REMEDIES

6.9.1 A ruling of unconstitutionality renders a legislative enactment or an executive act null, void and of no effect at all. Given the potential significant impact of a
ruling of unconstitutionality, the Court has developed various tools to limit the scope and extent of such impact where appropriate.

(a) Remedial Interpretation

6.9.2 When a legislative provision is found unconstitutional on initial reading, the Court has the obligation and implied power under the Basic Law to make a remedial interpretation of the provision to preserve its validity as far as possible. Such an interpretation involves the well-known techniques of severing, reading in, reading down and striking out. Only when a remedial interpretation is not possible should the Court declare the provision unconstitutional and invalid in its entirety.

Case Example

- In Gurung Kesh Bahadur v Director of Immigration (2002) 5 HKCFAR 480; FACV 17/2001 (30.7.2002), the CFA found that the application of s.11(10) of the Immigration Ordinance, Cap. 115 (which provides that a person’s permission to remain in Hong Kong expires upon his departure) to a non-permanent resident whose permitted limit of stay had not expired was in contravention of BL 31 (freedom of movement of Hong Kong residents). Applying the principle of remedial interpretation, the Court read down s.11(10) to be applicable to persons who were not non-permanent residents with an unexpired limit of stay (e.g. visitors).

- HKSAR v Lam Kwong Wai (2006) 9 HKCFAR 574, FACC 4/2005 (31.8.2006) was concerned with the offence of possession of imitation firearm under s.20(1) of the Firearms and Ammunition Ordinance, Cap. 238. The CFA held that placing a persuasive burden on a defendant to prove (on a balance of probabilities) the defences under s.20(3) was inconsistent with the presumption of innocence guaranteed under HKBOR 11(1). Applying the principle of remedial interpretation, the Court read down s.20(1) and (3)(c) as imposing a mere evidential burden (which is generally regarded as consistent with the presumption of innocence) in order to make it compatible with the Basic Law and HKBOR.

(b) Temporary Validity or Suspension

6.9.3 A ruling of unconstitutionality applies both retrospectively and prospectively. Hong Kong courts have jurisdiction to grant a temporary suspension order to a law or executive action which it has declared unconstitutional if so warranted by the circumstances (see Koo Sze Yiu & Anor v Chief Executive of the HKSAR (2006) 9 HKCFAR 441; FACV 13/2006 (12.7.2006) below).

6.9.4 In very exceptional circumstances, for instance in a situation of necessity such as where a legal vacuum would be resulted with serious harm to public interest, the Court may be urged to grant a temporary validity order to a law which has been declared unconstitutional so as to allow the Government time to remedy the situation by
corrective legislation before the full effect of the declaration takes place. A temporary validity order differs from a temporary suspension order in that while the latter suspends the operation of the declaration of unconstitutionality, it does not shield the Government from legal liability for functioning pursuant to what has been declared unconstitutional. A temporary validity order on the other hand shields the executive from legal liability arising from its continuing reliance on or adherence to the old law during the interim period.

6.9.5 A temporary validity order was granted at first instance (but later reversed on appeal by the CFA) in Koo Sze Yiu. The CFA in Koo Sze Yiu left open the question of whether there was jurisdiction to grant such an order and, in any event, the degree of necessity on such occasions was not sufficient for a temporary validity order to be granted in Koo Sze Yiu. The availability of such an order was later discussed and again left open in Chan Kin Sum.

Case Example

- In Koo Sze Yiu & Anor v Chief Executive of the HKSAR (2006) 9 HKCFAR 441; FACV 13/2006 (12.7.2006), it was held that the Law Enforcement (Covert Surveillance Procedure) Order issued by the Chief Executive to regulate the use of covert surveillance was unconstitutional. The Court of First Instance made a temporary validity order of the Order for six months pending corrective legislation. Leaving open the question whether there was jurisdiction to make an order for temporary validity, the CFA held that there was nothing in the present case to justify temporary validity, noting that the scenario concerned was “by no means as serious” as a virtual legal vacuum or a virtually blank statute book. The CFA nevertheless found that the danger to be averted in that case was of a sufficient magnitude to justify the grant of an order suspending the coming into operation of the declaration of unconstitutionality for 6 months pending the enactment of corrective legislation.

- In Chan Kin Sum v Secretary for Justice [2009] 2 HKLRD 166; HCAL 79/2008 (8.12.2008), the relevant provisions of the Legislative Council Ordinance, Cap. 542, which disqualified prisoners from being registered as electors and from voting, were held by the Court of First Instance to be unconstitutional for contravening the right to vote guaranteed under BL 26 and HKBOR 21. By a separate judgment of 11.3.2009, the Court granted a temporary suspension order up to the end of October 2009 for the Government to introduce the necessary amendments to the Legislative Council Ordinance.

- In W v Registrar of Marriages (2013) 16 HKCFAR 112; FACV 4/2012 (13.5.2013) the applicant who was a post-operative male-to-female transsexual person argued that the refusal to register a marriage between the applicant and a biological male was in violation of her constitutional right to marry guaranteed by BL 37 and HKBOR 19(2). “Man” and “woman” were construed by the Registrar of Marriages as referring only to the biological gender fixed at birth for the purpose of s.20(1)(d) of the Matrimonial Causes Ordinance, Cap. 179, and s.40 of the Marriage Ordinance, Cap. 181. Under this construction, the applicant
was treated as a biological male and thus could not marry another biological male. The CFA held that this construction was incompatible with the constitutional right to marry and the relevant legislative provisions must be read to include, within the meaning of “woman” and “female”, a post-operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery. In dealing with the exact form of declarations to be made, the Court (in a separate judgment of 16.7.2013) granted an order suspending the coming into operation of the declarations for 12 months for the Government to introduce the necessary amendments to the Marriage Ordinance and the Matrimonial Causes Ordinance to put in place a constitutionally compliant scheme.

(c) Prospective Overruling

6.9.6 Apart from the grant of an order of temporary suspension or validity, the courts may also consider limiting the temporal effect of a ruling of unconstitutionality to a specified extent. This may either take the form of an order that the law as declared by the judgment would only apply to events after the date of the judgment, or that the effect of the judgment covers the case in question but is retrospective to that extent and no further. Such orders are commonly known as prospective overruling.

6.9.7 However, bearing in mind that under the common law a declaratory judgment operates retrospectively as well as prospectively, the Hong Kong courts, thus far, have not made any such order, and have left open the question if such exceptional judicial measure is within the power of the courts.

Case Example

- In HKSAR v Hung Chan Wa & Anor (2006) 9 HKCFAR 614; FACC 1/2006 (31.8.2006), the CFA applied remedial interpretation to read down s.47(1) and (2) of the Dangerous Drugs Ordinance, Cap. 134, as imposing only an evidential burden of proof so as to save its constitutionality. For fear that there would be a flood of applications to the courts by persons previously convicted on the wrong basis for extension of time to appeal against conviction thus resulting in gravely disruptive consequences for the criminal justice system, the Prosecutions sought a form of prospective overruling to impose a temporal limitation on the Court’s judgment so that its retrospective effect would be limited to the extent specified. The CFA having taken the view that exercise of the power of prospective overruling was not justified in the circumstances, left open the question whether the extraordinary power did exist.

6.9.8 Outside Hong Kong, the juridical basis of granting such a ruling is controversial.
7. THE PROCESS OF JUDICIAL REVIEW

7.1 APPLICATION FOR LEAVE

7.1.1 An application for judicial review can only be taken out with the leave of a judge of the High Court (namely, the Court of First Instance or, on appeal, the Court of Appeal). Subject to any statute which limits the time for bringing a leave application in any special circumstances, or unless time is extended by the Court upon good reasons being shown, an application for leave must be made promptly and, in any event, within 3 months from when the grounds of the application first arose.

7.1.2 An application for leave (in Form 86) is made on an ex parte basis (without the proposed respondent being served with the application) and will be placed before the judge in charge of the Constitutional and Administrative Law List or such other judge as may be assigned for determination.

7.1.3 The Court imposes a heavy burden on an applicant to make full and frank disclosure where an ex parte application for leave is made to the Court. Failure to comply with the duty may lead to refusal of leave for that reason alone.

Case Example

- See So Wing Keung v Sing Tao Ltd & Anor [2005] 2 HKLRD 11; CACV 245/2004 (11.10.2004), Ma CJHC (as the Chief Justice then was) explained, albeit not in the context of a judicial review, that normally in ex parte applications the duty to make full and frank disclosure applied to facts rather than law. However, the overall duty on the party applying for an ex parte order was to present the case fully and fairly to the judge hearing the matter, whether relating to fact or law. By “fully and fairly” the learned judge did not mean that an advocate was expected to deal with every little nuance in an application but he must highlight to the judge the weaknesses in particular in his case, whether on fact or in law.

- See Kan Hung Cheung v The Director of Immigration, unreported, HCAL 74/2007 (13.2.2008), Cheung J (as he then was) held that the duty to make full and frank disclosure applied to all ex parte applications, including an application for leave to commence judicial review proceedings. Materiality was not determined by asking if the judge had had before him the additional facts later disclosed would he have come to the same conclusion. The right test was that the Court must be fully informed of all facts that were relevant to the weighing question which the Court had to make in deciding whether or not to make the order. Or put another way, material facts were those which were material for the judge to know in dealing with the application before it. Material facts included not only facts known to the applicant but also any additional facts which should be known if proper enquiries were made. An applicant had a duty to inform the Court as soon as he became
aware that the Court had been mis-informed or given incomplete information at the time of the ex parte application. There was also a duty to disclose any material change of circumstances while the proceedings remained on an ex parte basis.

7.2 GRANT OF LEAVE

7.2.1 The Court shall not grant leave to apply for judicial review if the applicant does not have a sufficient interest in the matter to which the application relates (see Chapter 2.6).

7.2.2 Sufficient interest aside, an applicant must show that he has a “reasonably arguable” case for the relief sought on the materials presented in the application. Potential arguability, which used to be the test, no longer suffices for the granting of leave.

Case Example

- See Peter Po Fun Chan v Winnie CW Cheung & Anor (2007) 10 HKCFAR 676; FACV 10/2007 (30.11.2007) where the revised test as laid down by the CFA was that leave should not be granted unless the case was “reasonably arguable” in that it enjoyed a realistic prospect of success. The same test should be applicable whether the issue was one of law or fact.

7.2.3 Unless satisfied on consideration of the application on paper only that leave should be granted, the Court may call for additional information, evidence or submissions from the applicant or direct that the application be served on the proposed respondent for him to file a short initial response on specific issues or generally to which the applicant may further reply. The Court may also direct an oral hearing to hear from the applicant only or, if appropriate, the proposed respondent as well on the Court’s own motion or upon the proposed respondent’s request before deciding whether to grant leave.

Case Example

- See the costs judgment of Lam JA (as he then was) in Re Leung Kwok Hung; Re Ho Chun Yan, Albert [2013] 1 HKLRD A1; HCAL 83 & 84/2012 (28.9.2012) where the rationale for different procedural directions for the disposal of a leave application as the exercise of case management discretion of the Court was elaborated.

7.2.4 As mentioned in Chapter 2.4, it is a well-established general principle that an applicant should exhaust all appeal procedures or alternative remedies before resorting to judicial review.

5 For statistics on outcome of leave applications in recent years, see para 1.1.3 under Chapter 1.
7.2.5 If leave is granted to the applicant by way of an order made *ex parte*, a person aggrieved (whether a respondent or interested party) may apply to set aside the order. The usual grounds for setting aside leave are material non-disclosure, abuse, delay or lack of reasonable arguability, as the case may be.

7.3 INTERIM RELIEF

7.3.1 An applicant may find it necessary to seek an order for interim relief pending decision on leave to apply for judicial review or if leave is granted for such interim relief until substantive determination in order to preserve the *status quo*. Such interim relief often takes the form of an order of stay (i.e. interim injunctive relief) of prospective execution or continued execution of the decision or act being impugned.

7.3.2 The Court is slow to grant such interim relief before leave to judicial review is granted and the parties having been heard *inter partes*, save perhaps in cases of extreme urgency or where there would be irreversible harm otherwise.

7.3.3 When considering an application for interim relief, the Court has to determine the balance of convenience. The paramount consideration is the wider public interest and how that interest is to be served if the order sought is not granted or, if granted, is to be served during the continuance of the order.

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Case Example

- See *Society for Protection of the Harbour Ltd v Chief Executive in Council & Ors [2003] 3 HKLRD 960; HCAL 102/2003* (6.10.2003), the Court, in ascertaining where the balance of convenience lay in the wider public interest, refused to grant interim injunctive relief to stop the continuation of the reclamation work under the Central Reclamation Plan approved in December 2002 as the alleged “irreparable and irreversible harm” was not supported by the evidence.

7.3.4 The wider public interest generally requires the Court’s critical consideration of factors including the strength of the applicant’s *prima facie* case, the harm involved, and financial implications (if any) albeit they are of much less relevance than other factors in the context of public law challenges.

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Case Example

- See *梁頌恆 v 立法會主席; 郭卓堅 v 香港特首林鄭月娥* unreported, [2018] HKCFI 1869; HCAL 1160/2018 & 1165/2018 (14.8.2018) where the Court refused to grant the applications for “stay of execution of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Bill passed by the Legislative Council” pending the Court’s determination of the relevant applications for judicial review. The Court noted that the *American Cyanamid* principles governing the grant of
interlocutory injunction remained applicable, subject to necessary modifications, *inter alia*:- (i) where an interim injunction is sought to restrain a government from enforcing what is *prima facie* the law of the land, the applicant will normally need to establish a “strong *prima facie* case” that the law is invalid; (ii) the Court must take into account the public interest in the balancing exercise when considering the balance of convenience. The degree of importance attached to public interest would depend on the nature of decision under challenge; (iii) relevance of damages as an alternative remedy will also vary depending on the nature of the decision. Although financial consequences are not to be ignored, they should not be regarded as the sole measure in assessing the balance of convenience; (iv) ultimately, the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”; (v) save in exceptional circumstances, interim relief may only be granted if leave to apply for judicial review has been obtained; and (vi) even where leave to apply for judicial review has been obtained, the existence of an early hearing date for the substantive application for judicial review is a good reason for the Court to refuse to grant interim relief.

7.3.5 In addition or alternative to granting a stay or interim injunctive relief, the Court may order an expedited substantive hearing with directions for abridgement of time for completing procedural steps. In which case, the parties (more often the respondent) will have less time to prepare for the evidence and the legal submissions to be lodged.

Case Example

- See *Tong Wai Ting (suing by his next friend) v Secretary for Education & Ors, unreported, HCAL 73/2009 (24.8.2009)*, the applicant, being a student suffering from mild intellectual disability, challenged certain educational arrangements bearing upon his continued study in the new academic year 2009/2010. The Court compressed the whole process in such a way that it was able to hand down a judgment dismissing the judicial review within 2 months after the application for leave to apply for judicial review was first made.

7.4 FILING SUBSTANTIVE APPLICATION

7.4.1 Within 14 days after the grant of leave (notified by a CALL-1 Form), the applicant has to issue the formal application for judicial review (in Form 86A).

7.4.2 The Form 86A together with copies of the application for leave (in Form 86) and the supporting affidavit or affirmation shall be served on all persons directly affected.

7.4.3 The proper respondent to an application for judicial review, when the Court’s supervisory jurisdiction over criminal proceedings in an inferior Court is invoked,
is the other party to the proceedings in the inferior Court, and not the inferior Court itself.  

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**Case Example**

- See *Natrass v AG* [1996] 1 HKC 480; HCMP 2337/1995 (19.12.1995), the application for judicial review related to the decision of a District Court judge to discharge himself from continuing to preside over a criminal trial. The Court seized of the judicial review disapproved of the service of the application on the District Court judge when the objection was to the correctness of the judge’s decision rather than his conduct; the judge was not “one of the persons directly affected” by the judge’s own ruling such that he should be required to be served under the Court rules.

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7.4.4 The applicant also needs to serve, within 14 days, the order granting leave and any directions given by the Court on the respondent and such interested parties as may be directed by the Court. If an interested party, as served or on his own motion, decides to take part in the judicial review, the Court may, as appropriate, give such directions on the service of papers, filing of evidence and the future conduct of the proceedings in addition to or in variation of what the rules of Court provide.

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**Case Example**

- See *Cathay Pacific Airways Flight Attendants Union v Director-General of Civil Aviation, unreported, HCAL 19/2005* (6.12.2005), Cathay Pacific Airways Ltd was permitted to join as an interested party as the outcome of the judicial review brought to attack the Director-General’s approval of its proposed scheme to regulate rest periods of its aircraft crew would have a significant impact on its flight operations.

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**7.5  RESPONDENT AND THE DUTY OF CANDOUR**

7.5.1 Judicial review proceedings are predominantly conducted on the basis of affidavit or affirmation evidence which the parties choose to adduce before the Court.

7.5.2 Any respondent who intends to use any affidavit or affirmation at the substantive hearing is required to file it in the Registry as soon as practicable and in any event, unless the Court otherwise directs, within 56 days after service on him by the applicant of the Form 86A together with other relevant papers. An extension of time will only be granted by the Court in exceptional circumstances.

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6 Practice Direction SL3 (para 4) (effective on 2.4.2009).
7 Practice Direction SL3 (para 14) (effective on 2.4.2009).
Chapter 7  The Process of Judicial Review

Case Example

- See Cho Man Kit v Broadcasting Authority, unreported, HCAL 69/2007 (25.9.2007), the Court, having stressed the general interest of promptness in the judicial review process, extended the time (which having been extended twice by consent of the applicant) for the respondent to file its evidence with a warning that any further extension would not be granted unless the most exceptional reasons were put before the Court. The respondent was ordered to pay costs to the applicant on an indemnity basis.

7.5.3 A respondent has to discharge fully his duty of candour to the Court and the applicant in the proceedings once leave to apply for judicial review has been granted.

7.5.4 Specifically, the respondent’s evidence in the form of affidavit or affirmation is required to make a full and frank disclosure of all relevant facts and documents which may relate to the actual reasons for the decision being impugned or to any other aspects which are relevant, subject to any claim for non-disclosure based on legal professional privilege, public interest immunity or any other valid grounds.

Case Example

- See Chu Woan-Chyi & Ors v Director of Immigration & Anor [2009] 6 HKC 77; CACV 119/2007 (4.9.2009), the 1st to 4th applicants, all being residents of Taiwan and holding valid multiple entry permits, were denied entry to Hong Kong for a Falun Gong event for “security reasons”. In discussing the duty of candour incumbent on a decision-maker in judicial review proceedings, Ma CJHC (as the Chief Justice then was) pointed out that where the source of knowledge in a respondent’s affidavit was a document, the document ought itself to be exhibited unless sufficient reasons existed to the contrary; where security concerns were involved, the respondent could legitimately restrict the amount of materials which ought, in the public interest, to be disclosed and not to be in breach of the duty of candour provided that he (i) acted in good faith, (ii) discharged the burden of being full and frank as to the reasons justifying non-disclosure and (iii) provided explanations to obvious queries and, where necessary, made a claim for public interest immunity. Only then would the duty of candour be satisfied.

7.5.5 In judicial review proceedings, the focus is usually on the legality of the decision that is impugned; factual issues requiring the Court’s consideration in any given case are often limited. The respondent is also well expected by the Court to discharge fully the duty of candour. Mainly for these reasons, the Court rules do not provide for automatic discovery of documents in judicial review as in a writ action. The necessity to call witnesses and deponents of affidavits or affirmations to have them examined or cross-examined is also much more limited and rarely will the Court entertain such interlocutory applications. However, where the critical issue requires the Court to be
provided with adequate material or there are issues of fact to be resolved, the Court will be inclined to make the necessary orders.

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**Case Example**

- See *Chu Woan-Chyi & Ors v Director of Immigration & Anor* [2009] 6 HKC 77; *CACV 119/2007* (4.9.2009) at para 14 where Ma CJHC (as the Chief Justice then was) discussed the true nature and extent of the duty of candour in the general scheme of judicial review proceedings. See also *Hong Kong Telecommunications (HKT) Limited v Secretary for Commerce and Economic Development & Anor*, unreported, [2019] HKCA 44; *CACV 532/2018 & CAMP 155/2018* (9.1.2019) per Kwan JA (as she then was) at paras 46-57.

7.5.6 In performing any duty or engaging in any decision-making process, the respondent should act on the assumption that relevant communications, minutes of meetings and other records will generally be disclosed when the underlying act or decision is impugned in judicial review proceedings.

7.5.7 Any document or information protected by legal professional privilege is, however, immune from disclosure in legal proceedings in the absence of any waiver or statutory abrogation of the privilege.

7.5.8 Further, immunity from disclosure in litigation may be claimed on the grounds that such disclosure would be injurious to the public interest (i.e. public interest immunity). It is the usual practice for the Chief Secretary for Administration to sign a supporting certificate setting out the basis for the claim. The Court, if satisfied that the claim for public interest immunity is made out, will balance the public interest of withholding disclosure against that pertaining to full disclosure for the proper administration of justice in legal proceedings, and if the former outweighs the latter the Court will order that disclosure need not be made.

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**7.6 SUBSTANTIVE HEARING**

7.6.1 The date for hearing the substantive application is fixed according to the state of the Court’s diary with discretion of the Court to accommodate the availability of the parties’ counsel if requested by the parties and to the extent possible in the light of the degree of urgency of the application.

7.6.2 At the substantive hearing, the applicant for judicial review can only rely on the grounds and seek the relief set out in the Form 86 for which the Court has granted leave unless any subsequent amendment is allowed by the Court.

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**Case Example**

- See *Lau Kong Yung & Ors v The Director of Immigration* (1999) 2 HKCFAR 300;
**FACV 11/1999 (3.12.1999)**, the applicants claimed to have right of abode in Hong Kong and challenged the removal orders against them made by the Director. Litton PJ of the CFA (as he then was), in reversing the Court of Appeal’s order quashing the removal orders on, among others, acceptance of certain vague and general factors not clearly stated in the grounds of the application, vividly stated the general principle that once leave to apply for judicial review is granted, amendment of the grounds should rarely occur so as not to render the leave requirement as “simply the portals to a playground of infinite possibilities where the administrators could then be made to leap through more and more hoops of fire.”

7.6.3 Notwithstanding leave to apply for judicial review having been granted, it is incumbent on the applicant as well as his counsel and solicitors to review the merits of the application once the respondent’s evidence is received and to consider whether to proceed with the substantive hearing in the light of the evidence.  

7.6.4 If the parties are agreed on the terms to dispose of the judicial review without the need of a substantive hearing but require an order of the Court to put those terms into effect, they should file a draft consent order, together with a short statement signed by the parties’ solicitors, setting out the matters relied upon as justifying the making of the order, and citing the relevant authorities and statutory provisions. The Court, if satisfied that such an order can be made, will list the judicial review for hearing and announce the order in open court to which attendance of the parties or their legal representatives is excused. Otherwise, the proceedings will be listed for hearing in the normal way.  

7.6.5 The applicant, respondent and an interested person or intervener (if any) who is allowed or directed by the Court to take part in the judicial review are formal parties to the proceedings and enjoy all the rights of a litigant including the right of appeal if aggrieved by any order of the Court.  

7.6.6 Whether an inferior Court, appeal board or tribunal exercising judicial or quasi-judicial functions and properly named as a respondent in the judicial review as regards its decision should take any active role and be legally represented in the proceedings depends on the relevant statutory regime and factual circumstances, including the grounds on which the decision concerned is impugned.  

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**Case Example**

- See **Dato Tan Leong Min & Anor v The Insider Dealing Tribunal [1999] 2 HKC 83; CACV 162/1998 (27.1.1999)**, the issue on appeal concerned the role which the Insider Dealing Tribunal could fairly ask its counsel to fulfil in relation to the inquiry it presided over and the Tribunal appeared by counsel in the judicial review at first instance and on appeal. The Court of Appeal said the first instance judge in that case correctly described as the normal practice that “the more
modern practice when various tribunals are subject to judicial review is for them to take a neutral role, and to provide the court with as much information as possible, so that a just result follows.” On the facts, the Court of Appeal accepted that it was not wrong for the Tribunal to appear albeit it remained unusual.

7.6.7 Where the judicial review concerns an issue or legal principle of importance and either or both of the applicant and the respondent will not be legally represented at the substantive hearing, the Court may appoint an amicus curiae (a friend of the Court) to present disinterested legal arguments in a fair and impartial manner to assist the Court. The amicus so appointed does not have any right of appeal against any order of the Court.

Case Example

- See C v Director of Immigration & Anor, unreported, CACV 132/2008 (17.8.2009), although there were important issues on appeal regarding the appellants’ claims for certain substantive and procedural rights as “refugees”, Rogers VP of the Court of Appeal refused the application of the Centre for Comparative and Public Law of the University of Hong Kong to join as an amicus in the appeal as the parties proper were each very adequately represented by leading and junior counsel and the Court business would be vastly complicated and become unmanageable if academics were liberally allowed to take part and submit their academic views from research in the proceedings.

7.6.8 Apart from the formal parties to the proceedings and the amicus (if any), the Court has the discretion to grant leave to any other proper person to file evidence or make representation, either orally or in writing, at the substantive hearing which may be in opposition to or in support of the application, as the case may be.

7.6.9 Unless otherwise directed by the Court, the parties must follow the practice direction in filing skeleton arguments with the Court before the commencement of the hearing (7 clear days for those in support and 3 clear days for those in opposition).  

7.7 RELIEF (OTHER THAN DAMAGES)

7.7.1 If an applicant succeeds in his application for judicial review, the Court has the discretionary power to grant a form of final relief appropriate to the circumstances including an order of mandamus (to perform an act), prohibition or certiorari (to bring up and quash a decision), an injunction, a declaration (as to legal rights) or an award of damages, as the case may be.

7.7.2 The Court may withhold the grant to the successful applicant of the relief sought if there was undue delay on the part of the applicant in making the application

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10 Practice Direction SL3 (para 21) (effective on 2.4.2009).
for judicial review and the Court considers that granting the relief would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

**Case Example**

- See *Anderson Asphalt Ltd & Ors v The Secretary for Justice* [2009] 3 HKLRD 215; *HCAL 28/2006 & 98/2007* (16.3.2009), A Cheung J (as he then was) explained that the underlying rationale for denying leave or relief for undue delay applied to each and every step in the judicial review procedure, starting from an application for leave to apply for judicial review before a first instance judge up to and including the last step in the prosecution of a substantive application for judicial review to its logical conclusion in the Court of First Instance, and including any interlocutory appeals. In the learned judge’s view, it further extended and applied to the prosecution of any appeals from the refusal of relief after a substantive hearing for judicial review. Taking another way of looking at matters, his Lordship considered that “an application for leave” included any appeal from a refusal of leave at first instance. On the facts and given the Court’s refusal of the judicial review on other grounds, the question of the effect of delay, if any, on the question of relief was rendered academic. On appeal, the Court of Appeal [2010] 5 HKLRD 490; CACV 122/2009 (28.10.2010) agreed that the issue was academic.

7.7.3 Absent any issue of delay, the Court is slow to deny relief for mere administrative inconvenience or a fear of a flood of similar cases in future – the “floodgates” argument.

**Case Example**

- See *Re Lee Ka Ming (a minor)* [1991] 1 HKLR 307; *HCMP 1812/1990 & HCMP 1828/1990* (24.8.1990), the Court dealt with one application for judicial review of a decision of an Immigration Tribunal dismissing the appeal of the applicant against a removal order made against him and one for *habeas corpus* to secure the applicant’s liberty. In allowing the two applications, the learned judge rejected arguments advanced on behalf of the Director of Immigration that a decision in favour of the boy would, or might, have the effect of opening “the floodgates” and in any event, the Court was concerned with the boy’s rights under the law as it stood and if there should develop in future a situation in which a change in the law would appear necessary then that would be a matter for the legislature. The first instance judgment was reversed on appeal by the Court of Appeal, unreported, *CACV 162/1990 & 163/1990* (22.3.1991), on substantive grounds and the “floodgates” argument did not arise for consideration.

7.7.4 If the ground of procedural unfairness is established, the Court will consider as a relevant factor whether there is any prejudice to the applicant arising from the breach when deciding whether to exercise its discretion to quash the decision of the decision-making body below or grant some other appropriate relief, if any.
## Case Example

- See **Leung Fuk Wah Oil v Commissioner of Police [2002] 3 HKLRD 653; CACV 2744/2001 (28.3.2002)**, the Court of Appeal, in upholding the finding at first instance that there was unfairness in the hearing of the applicant’s appeal against his disciplinary conviction in that the appeal had relied on certain documents which were not disclosed to the applicant, held that judicial review being a discretionary remedy, the failure to observe the principle of fairness should not be a ground for quashing the decision as the applicant did not, as a matter of substance, suffer any prejudice; thus the discretion was exercised against the granting of any relief.

### 7.7.5
If a decision is quashed on grounds of unlawfulness (due to unfairness or other procedural impropriety or otherwise) and is capable of being reconsidered by the decision-making body below, the Court will generally make an order remitting the matter to that body for reconsideration in accordance with the law as pronounced in the judgment with any specific direction, if appropriate.

### Case Example

- See **Building Authority v Appeal Tribunal (Buildings) & Anor [2014] 1 HKLRD 716; CACV 277/2012 (3.1.2014)**, the Court of Appeal, having held that the Appeal Tribunal was wrong in its decision on the building appeal allowing the building plans submitted by the owner of the site concerned, refused to grant an order of mandamus directing the Appeal Tribunal to dismiss the building appeal. The matter was remitted to the Appeal Tribunal for reconsideration.

### 7.7.6
The Court may make a declaration or grant an injunction if it would be just and convenient having regard to the nature of the matters, the nature of the persons and bodies against whom relief may be granted, and all the circumstances of the case concerned.

### 7.7.7
A declaration serves to pronounce authoritatively the meaning of any constitutional or statutory provision, the validity (or otherwise) of any primary or subsidiary legislation, the legality of any policy or non-statutory arrangement, the lawfulness of the exercise of any administrative or legislative power, or the legal rights of parties to the judicial review, as the case may be, in the public law context. The Court may make such declarations as a form of relief if warranted.

### Case Example

- See **Securities and Futures Commission (“SFC”) v Tiger Asia Management LLC & Ors (2013) 16 HKCFAR 324; FACV 10-13/2012 (10.5.2013)**, the SFC in a statutory application under the Securities and Futures Ordinance, Cap. 571 (“SFO”), sought
orders including declarations that Tiger had contravened the prohibition on insider dealing. Lord Hoffmann, NPJ, in rejecting the argument that the Court’s power to make declarations in that application was confined to only those specified in s.213(2)(e) of the SFO, expressed the general sentiment that it was hard to see why, if a Court had found something to be the case, it should not make a declaration to that effect if it would be appropriate and useful to do so.

7.7.8 A declaration of unconstitutionality to the effect of striking down a statutory provision or a practice is not a coercive order and the Government is not obliged to take immediate action to implement the law in accordance with the declaration pending resolution of the appeal from the order.

Case Example

- See Vallejos Evangeline Banao v Commissioner of Registration & Anor [2011] 6 HKC 469; HCAL 124/2010 (28.10.2011), the applicant, who came from the Philippines and worked as a foreign domestic helper in Hong Kong, challenged the statutory provision in the Immigration Ordinance which deemed her not being “ordinarily resided” in Hong Kong while of that status, and thus effectively denied her right of abode in Hong Kong. Lam J (as he then was) at first instance held that the relevant provision was unconstitutional as being inconsistent with BL 24(2)(4). Noting that the Government had lodged an appeal against the judgment, the learned judge considered that there could be no basis for suggesting that by adopting a policy of not implementing the law on a full scale basis during the course of an appeal the Commissioner or other public official was guilty of contempt of Court.

- The ruling on unconstitutionality was later reversed by the Court of Appeal in CACV 204/2011 (28.3.2012), which order was upheld by the CFA in (2013) 16 HKCFAR 45; FACV 19/2012 (25.3.2013) but for different reasons.

7.7.9 If the Government should decide not to appeal against a declaration of unconstitutionality as regards any statutory provision or practice, or where an appeal is lodged it is finally determined not in its favour, the Government may require time to implement the law in accordance with the final judgment by introducing constitutionally compliant legislative changes. The legislative process before the legislature will also take time.

7.7.10 In order to avoid any potential confusion and disruption in the public administration in all sectors affected by the judgment and any perception that the Government is acting in defiance of the judgment in the meantime by continuing to apply the impugned law or carrying on the existing practice as a practical stop-gap measure, the Government may seek an order of the Court to suspend the coming into operation of the declaration of unconstitutionality for a fixed period subject to the possibility of a further extension for good cause shown.
7.7.11 Orders of temporary suspension and other forms of orders are covered in Chapter 6: Constitutional Challenge.

## 7.8 DAMAGES

7.8.1 On an application for judicial review, the Court may award damages to the applicant if such a claim is included in the application and the Court is satisfied that, if the claim had been made in a writ action begun by the applicant at the time of making his application, he would have been awarded damages.

7.8.2 This reflects the current law which does not recognise a general right to claim damages for losses caused by an unconstitutional or unlawful administrative action. There has to be either a concomitant and distinct cause of action in tort or a right to compensation under statute.

### Case Example

- See *A & Ors v Director of Immigration [2008] 4 HKLRD 752; CACV 314-317/2007 (18.7.2008)*, the applicants to the judicial review at first instance were claimants pending assessment under the CAT who challenged the lawfulness of their detention under the law. Their applications were initially dismissed. On appeal, the Court of Appeal reversed the judgment below and held that their detention was unlawful after the making of the CAT claims for being a violation of HKBOR 5(1) in the absence of a sufficiently accessible and certain policy. The matters then reverted to the Court of First Instance for assessment of damages for their unlawful detention, including their claims for basic or ordinary damages, aggravated damages and exemplary damages (see [2009] 3 HKLRD 44; HCAL 100/2006 & HCAL 10-11 & 28/2007 (3.3.2009)).

- But see the CFA’s judgment *Ghulam Rbani v Secretary for Justice for and on behalf of Director of Immigration (2014) 17 HKCFAR 138; FACV 15/2013 (13.3.2014)* on the inapplicability of HKBOR 5(1) in respect of such kind of detention.

7.8.3 The applicant for judicial review may choose to seek only non-monetary relief in the form of an order of *certiorari* for quashing the underlying impugned decision or a declaration of his relevant legal right and only if he is successful in the public law challenge that he will later commence a separate writ action to seek damages on the same cause (in tort or under statute).

7.8.4 Where leave to apply for judicial review on public law grounds was refused to an applicant and he did not pursue an appeal or the appeal was dismissed, a subsequent private law action by the applicant seeking to argue the same grounds in substance albeit for different relief may amount to an abuse of the Court process and be liable to be struck out.
Chapter 7  The Process of Judicial Review

**Case Example**

- See 何建民 v 香港警務處處長，Leung Fuk Wah Oil & Ors v Secretary for Justice for and on behalf of the Commissioner of Police [2014] 3 HKLRD 478; CACV 175, 200, 228 & 229/2012 (26.5.2014), the plaintiffs, being former police officers, sued the Commissioner for wrongful termination of their services following disciplinary proceedings held against them in which they were allegedly wrongfully prohibited legal representation. They had in fact earlier challenged their respective dismissal/compulsory retirement by applications for judicial review but none of which was successful; grounds challenging the constitutionality of the absolute bar to legal representation in disciplinary proceedings was raised in one of the applications but rejected based on the law then understood by the Court. The civil claims were struck out at first instance. On appeal, the Court of Appeal upheld the order below, holding that it was an abuse of process to advance those claims in the civil actions relying on the same constitutional challenge which should have been advanced in the judicial review proceedings.

7.8.5  Details of the other possible causes of action in tort for damages or statutory rights to compensation arising from administrative or judicial acts are covered in Chapter 10: Other Remedies.

**7.9  COSTS**

7.9.1  The general rule that costs will be awarded in favour of the successful party (“costs following the event”) in civil litigation applies equally to judicial review proceedings.

7.9.2  The Court may depart from making the usual order of costs following the event by taking into consideration the public interest character of the judicial review as one of the factors relevant to the exercise of discretion as to costs.

**Case Example**

- See Leung Kwok Hung v President of the Legislative Council (2014) 17 HKCFAR 841; FACV 1/2014 (5.12.2014), where the CFA laid down guidance for costs in various stages of judicial review proceedings. At first instance, as leave applications were meant to be ex parte, an unsuccessful applicant would generally not be ordered to pay the costs of a putative respondent or putative interested party save in special or unusual circumstances. The discretion to make such an award of costs should be sparingly exercised only for good reasons, which included the reason leading the opposing party to attend the hearing; whether that party’s attendance had been of material benefit to the Court; and the underlying lack of merits of the application, always bearing in mind the context that the Court had refused to grant leave. Where there was already a putative respondent whose costs the Court was minded to order the applicant to bear, the
Court would need to be persuaded of some additional justification if it was also to order the applicant to bear a putative interested party's costs. Such a party would not normally be entitled to costs unless he could show that there was likely to be a separate issue on which he was entitled to be heard, i.e. an issue not covered by the putative respondent; or he had an interest which required separate representation.

On appeal, the starting point was that costs should follow the event. Notwithstanding this, the public interest litigation factor might apply so that the Court of Appeal should not order the applicant to pay an opposing party's costs where: the proceedings were brought to seek guidance on a point of general public importance for the benefit of the community and the applicant stood to obtain no personal private gain from the outcome; and the applicant's case must also have had a real prospect of success and be reasonably arguable. The ultimate costs order remained in the Court's discretion.

Unless subject to the procedure under r.7 of the Hong Kong Court of Final Appeal Rules, Cap. 484A, an application for leave to appeal to the CFA against the Court of Appeal's dismissal of an appeal from a judge's refusal of leave to apply for judicial review would proceed by an *inter partes* hearing. Costs would be at the Appeal Committee's discretion, but the usual order on the dismissal of an application for leave would be that costs follow the event. The grant of leave to appeal to the full court of the CFA should be treated as a sufficient threshold test as to whether the Court should engage the discretion to apply the public interest litigation factor when considering the costs order. Whether or not that discretion to make no order as to costs would in fact be exercised would depend on all relevant factors.

- See also *Chan Noi Heung & Ors v The Chief Executive in Council [2009] 3 HKLRD 362; CACV 197/2007 (16.3.2009)*, the Court of Appeal also noted that however important the subject matter of the relevant litigation or however important any particular legal point might be, it was highly relevant for a Court (when considering the incidence of costs) to evaluate the merits of the failed challenge before it. If the issues that were raised by the unsuccessful applicant were, upon analysis, really quite hopeless, then it was difficult to conceive of a Court making an order other than costs following the event.

### 7.9.3

The Court has power to order that the quantum of costs of the receiving party be assessed on a more generous basis (i.e. “on an indemnity basis”) where the paying party has conducted the proceedings in an oppressive or otherwise unreasonable manner which does not meet with the Court’s approval.

### 7.9.4

In exceptional cases, the Court may also make a protective costs order (“PCO”), that is, an order to the effect that in the event the applying party is unsuccessful, there will be no requirement to pay costs to the successful party. Generally, a PCO may be made at any stage of the proceedings, on such conditions as the Court thinks fit, provided that the Court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the
applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. If those acting for the applicant are doing so pro bono, this will be likely to enhance the merits of the application for a PCO. It is for the Court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above. (Designing Hong Kong Ltd. v The Town Planning Board and Secretary for Justice (2018) 21 HKCFAR 237; [2018] HKCFA 16 (15.5.2018) applying R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600 (1.3.2005)).

7.10 APPEAL

7.10.1 Where leave is refused to the applicant or is granted on terms at first instance, the applicant may appeal against the order to the Court of Appeal within 14 days after such order. Where leave is granted and the judicial review is substantively determined, the applicant if dissatisfied may appeal against the order to the Court of Appeal within 28 days from the date of the judgment, order or decision concerned.

7.10.2 A respondent who, having been served with a notice of appeal, desires to contend that (i) the decision of the Court below should be varied, either in any event or in the event of the appeal being allowed in whole or in part, or (ii) the decision of the Court below should be affirmed on grounds other than those relied upon by that Court, or (iii) by way of cross-appeal, the decision of the Court below was wrong in whole or in part, must issue and serve a Respondent’s Notice.

7.10.3 Where leave to apply for judicial review was brought out of time and the extension of time was refused by the Court of First Instance, leave to appeal is required as a decision on extension of time is interlocutory in nature (Kwok Cheuk Kin v Leung Chun Ying; MI & Anor v Permanent Secretary for Security [2018] 4 HKC 440; [2018] HKCA 419 (23.7.2018)).

7.10.4 In exceptional cases, civil appeals may go directly from the Court of First Instance to the CFA (generally known as “leap-frog appeals”). The scope of a leap-frog appeal is provided for in the Hong Kong Court of Final Appeal Ordinance, Cap. 484, or other legislation, which includes (but is not limited to) where the Court of First Instance and all the parties involved agree that a point of law of great general or public importance is involved, the case relates wholly or mainly to the construction of the Basic Law, the judge is bound by a decision of the Court of Appeal or the CFA in previous proceedings, and the point was fully considered in the judgments given by the Court of Appeal or the CFA (as the case may be) in those previous proceedings. In addition, the Appeal Committee has to agree to grant leave for the leap-frog appeal to the CFA (Town Planning Board v Society for the Protection of the Harbour Ltd (2004) 7 HKCFAR 1; FACV 14/2003 (9.1.2004)).

7.10.5 A leap-frog appeal mechanism is also applicable to judicial review proceedings under the Chief Executive Election Ordinance, Cap. 569, where an appeal
against the decision of the Court of First Instance in relation to the Chief Executive election will be lodged to the CFA direct, subject to leave being granted by the Appeal Committee of the CFA (Re Ho Chun Yan, Albert (2012) 15 HKCFAR 686; FAMV 21-22, 24-26, 32-34/2012 (13.11.2012)).

7.11 INTERVENTION

7.11.1 An application for leave to intervene in judicial review proceedings may be made to the Court at any stage. Leave to intervene may be granted to a party who is “a proper person to be heard”, considering the following primary questions: (1) whether the appeal involves primarily a legal question of general public importance; (2) whether the proposed intervener’s fund of knowledge or particular point of view enables him to provide the Court with a more rounded picture than the Court would otherwise obtain; (3) conversely, whether the proposed intervener will merely repeat points that an existing party will be making; (4) overall, whether the intervention is likely to be helpful and appears justified; and (5) whether the intervention will cause any prejudice to the existing parties or the Court.

Case Example

- See QT v Director of Immigration & Ors, unreported, CACV 117/2016 [8.6.2017], the Court of Appeal considered that the Court of First Instance and the Court of Appeal had jurisdiction to grant leave to intervene to any party who was a proper person to be heard. The principles were well established in W v Registrar of Marriages [2010] 6 HKC 359; HCAL 120/2009 (5.10.2010), at para 261, as they were aptly summarised in Fordham, Judicial Review Handbook, 6th edn, pp 244 – 250. Applying the 5 principles as stated in para 7.11.1 above, the proposed applications for leave to intervene by leading international financial institutions were refused. In the CFA ((2018) 21 HKCFAR 150; [2018] HKCFA 17 (30.4.2018)), the proposed applications for leave to intervene were also similarly refused.
8. JUDICIAL REVIEW IN PRACTICE
( IMMIGRATION MATTERS)

8.1 INTRODUCTION

8.1.1 Developments concerning judicial review in recent years indicate that a bulk of the applications can be attributed to the increase in the number of immigration and non-refoulment cases. The volume of these judicial review cases arises for many reasons: the Immigration Department’s accelerated processing of non-refoulment claims and related appeals under the Unified Screening Mechanism (“USM”) (see para 8.4.12 below), the significance of the decisions to those affected, not least in human rights and economic terms etc.

8.1.2 These judicial review applications often go to the fundamental question of what rights a person in Hong Kong has under the law. The Basic Law provides that different categories of persons in Hong Kong have different rights; there are three different categories: permanent residents, non-permanent residents and persons who are not Hong Kong residents (non-residents).

8.1.3 A permanent resident enjoys the right of abode in Hong Kong, which, as defined in s.2A of the Immigration Ordinance, Cap. 115, includes the right to land in Hong Kong, not to have imposed upon him any condition of stay and not to be deported or removed. Permanent residents are entitled to obtain permanent identity cards which state their right of abode. Non-permanent residents are qualified to obtain Hong Kong identity cards but have no right of abode. Non-residents have no right of abode and are not qualified to obtain Hong Kong identity cards. Some fundamental rights are only enjoyed by permanent residents: e.g. the right to vote and the right to stand for election under BL 26 and the right to participate in public life under HKBOR 21. Other fundamental rights guaranteed by Chapter III of the Basic Law and the HKBOR are enjoyed by all Hong Kong residents (whether permanent or non-permanent). By virtue of BL 41, non-residents enjoy the fundamental rights in Chapter III of the Basic Law in accordance with law, including the HKBORO.

8.1.4 BL 154(2) provides that the HKSAR Government may apply immigration controls on entry into, stay in and departure from the HKSAR by persons from foreign states and regions. The Director of Immigration through the Immigration Ordinance implements and imposes such immigration controls.

8.1.5 It has been recognised by the courts that because of Hong Kong’s unique circumstances, the Immigration Department has to adopt stringent immigration control, and wide discretion has been given to the Director on immigration matters, the exercise of which would not lightly be interfered with by the courts.

Case Example

• See Comilang Milagros Tecson & Anor v Commissioner of Registration & Ors, unreported, HCAL 28/2011 (15.6.2012) (“Comilang No. 1”), where Lam J (as he then was), in reviewing the jurisprudence on immigration control, quoted from
the judgment of A Cheung J (as he then was) in MA v Director of Immigration [2011] 2 HKLRD F6; HCAL 10/2010 (6.1.2011), para 97: “... As the courts, including this Court, have noted on various occasions, in the light of Hong Kong’s small geographical size, huge population, substantial daily intake of immigrants from the Mainland, and relatively high per capita income and living standards, and given Hong Kong’s local living and job market conditions, almost inevitably Hong Kong has to adopt very restrictive and tough immigration policies and practices. The courts recognise that the legislature has chosen to entrust the high responsibility for and wide discretions on immigration matters to the Director. It is an important responsibility, given Hong Kong’s unique circumstances, and the discretions conferred are indeed wide. And it is not at all surprising that the Director has consistently devised and implemented very restrictive and stringent immigration policies. The courts have said repeatedly that they will not lightly interfere with the Director’s policies or exercise of discretion, even though many of the cases involved, or potentially involved, family reunion, detention/freedom of the person, or other important subject matters. ...” (para 28)

Lam J added that: “there are many parents who harbour, perhaps understandably, the aspiration that their children be brought up in Hong Kong” (para 29) and “[t]here are also many aspiring immigrants with relatives in Hong Kong seeking to come here on the ground of family reunion. Some of them are parents living outside Hong Kong with children living here as permanent residents. Some of them are children with parents living here as permanent residents. There are also many applicants with spouses living here as permanent residents.” (para 30), but acknowledged that: “The Director is entrusted with the extremely important task of exercising immigration control. It is not appropriate for the court to usurp the role of the Director because the court does not have a macro picture of the overall immigration demand and the potential impact (political as well as socio-economic) of a change in the policy in the population strategy of Hong Kong. Faced with a hard case, it is tempting for the court to grant relief on an individual basis as a matter of discretion. Such temptation must be resisted because, unlike the Director, the court has no idea how many cases of similar nature are in the pipeline and what the implications would be if relief is granted in this instance. The court is simply not equipped with the necessary knowledge to reformulate the immigration policies for the Director.” (para 30)

This case was allowed on appeal: see CACV 183/2012, unreported, (2.5.2013). But the analysis of the cases above was not disturbed by the Court of Appeal: see Kwan JA (as she then was)’s observation in Safder Tehseen v Permanent Secretary for Security & Another, unreported, CACV 167/2012 (6.6.2013).

8.2 Right of Abode / Permanent Residency

8.2.1 Below is a brief historical survey of the Immigration Ordinance:

(1) In October 1971, the Immigration Ordinance was enacted and it became effective on
1.4.1972. There was then no reference to “right of abode” and “permanent resident” in the statute book. Instead, the 1971 Ordinance had a definition of “Hong Kong belonger” who enjoyed the right to land and could not be deported.

(2) On 19.12.1984, the Chinese Government and the British Government signed the Sino-British Joint Declaration, Section XIV of Annex I to which elaborated the basic policies of the PRC concerning the categories of persons who shall have the right of abode in Hong Kong.

(3) To pave the way for the implementation of the basic policies in Section XIV of Annex I to the Joint Declaration, the Immigration Ordinance underwent major amendments in 1987, to provide statutory underpinning for the concepts of “right of abode” and “permanent resident”. It was agreed that the categories of Hong Kong permanent resident were to be further expanded in 1997.

(4) By the 1987 amendments, s.2A which defines the right of abode in Hong Kong was added to the Immigration Ordinance. A new First Schedule was introduced to replace the old one defining who shall be Hong Kong permanent residents, namely: (a) persons who are wholly or partly of Chinese race and have been ordinarily resident in Hong Kong for a continuous period of not less than 7 years; (b) certain British Dependent Territories citizens; and (c) certain Commonwealth citizens.

(5) The Basic Law was promulgated on 4.4.1990. The definition of permanent residents in BL 24 mirrored Section XIV of Annex I to the Joint Declaration and is reflected in Schedule 1 to the current Immigration Ordinance.

(See Vallejos Evangeline Banao v Commissioner of Registration [2011] 6 HKC 469; HCAL 124/2010 (30.9.2011), paras 42 to 52.)

8.2.2 The determination of one’s entitlement to the right of abode is not a straightforward matter and has since the resumption of sovereignty on 1.7.1997 given rise to various significant lawsuits. A quick review of these important decisions is set out below.

8.2.3 The earlier right of abode disputes began with claims by children born in the Mainland for right of abode in the HKSAR under the Basic Law.

Case Example

- In Ng Ka Ling & Ors v Director of Immigration (1999) 2 HKCFAR 4; FACV 14/1998 (29.1.1999), the appellants were Chinese nationals born on the Mainland with parents who were Hong Kong permanent residents. They entered Hong Kong on or before 1.7.1997 either on a two-way permit and overstayed or not through an immigration control point. They sought to assert their right of abode pursuant to BL 24(2)(3) but failed to establish the same under the certificate of entitlement scheme introduced by the Immigration (Amendment) (No 3) Ordinance 1997. The CFA held that the certificate of entitlement scheme was unconstitutional to the extent that it required permanent residents residing on the Mainland to hold a one-way permit before they could exercise their right
of abode.\(^{11}\)

- In *Chan Kam Nga & Ors v Director of Immigration (1999)* 2 HKCFAR 82; FACV 13/1998 (29.1.1999), the appellants were Chinese nationals born in Mainland China to parents who only became permanent residents after their birth. The CFA held that persons falling within BL 24(2)(3) could acquire the right of abode in Hong Kong whether their parents had acquired permanent resident status before or after their birth. Accordingly, the additional restriction introduced by the Immigration (Amendment) (No 2) Ordinance 1997 that a person can only be a permanent resident under BL 24(2)(3) “if the parent had the right of abode at the time of the birth of the person” was unconstitutional.

8.2.4 The rulings in the *Ng Ka Ling* and *Chan Kam Nga* cases were later displaced by an Interpretation made by the SCNPC on BL 22(4) and 24(2)(3) on 26.6.1999. The legal effect of such SCNPC Interpretation has been the subject of discussion or arguments on a few subsequent occasions.

### Case Example

- In *Lau Kong Yung & Ors v Director of Immigration (1999)* 2 HKCFAR 300; FACV 10/1999 (3.12.1999), the CFA held that the interpretation by the SCNPC dated 26.6.1999 displaced the interpretations of BL 22(4) and 24(2)(3) laid down by the Court in *Ng Ka Ling* and *Chan Kam Nga*, and was a valid and binding interpretation which the courts of the HKSAR were under a duty to follow. The Interpretation had effect from 1.7.1997: (a) under BL 22(4), persons from other parts of China including those persons within BL 24(2)(3), who wished to enter Hong Kong for whatever reason, had to apply to the relevant authorities for approval in accordance with the relevant national laws and administrative regulations and had to hold valid documents issued by the relevant authorities before they could enter the HKSAR; and (b) to qualify as a permanent resident under BL 24(2)(3), it was necessary that both parents or either parent of the person concerned had to be a permanent resident within BL 24(2)(1) or BL 24(2)(2) at the time of birth of the person concerned.

- *Director of Immigration v Chong Fung Yuen (2001)* 4 HKCFAR 211; FACV 26/2000 (20.7.2001) concerned a right of abode claim by Master Chong who was a Chinese citizen born in Hong Kong while his parents were in Hong Kong lawfully with two-way permits from the Mainland on a visit. The CFA held that the character of BL 24(2)(1) was that of a provision defining one category of permanent residents with the right of abode and it did not concern affairs which are responsibility of the CPG or the relationship between the Central Authorities and the HKSAR. It was a provision within the HKSAR’s autonomy and was not an excluded provision. A judicial reference to the SCNPC under BL 158(3) was not

\(^{11}\)The one-way permit procedure was subsequently maintained based on the SCNPC Interpretation of BL 22(4) and 24(2)(3) dated 26.6.1999 after *Ng Ka Ling*. See *Ng Ka Ling & Ors v Director of Immigration (No. 2)* (1999) 2 HKCFAR 141; FACV 14/1998 (26.2.1999) and *Lau Kong Yung & Ors v Director of Immigration (1999)* 2 HKCFAR 300; FACV 10/1999 (3.12.1999).
therefore required. Considering the language of BL 24(2)(1) in the light of its context and purpose, the Court held that its clear meaning was that Chinese citizens born in Hong Kong before or after 1.7.1997 have the status of permanent residents. On the common law approach which the Court was under a duty to apply in the absence of a binding interpretation by the SCNPC, the statement in the 1999 SCNPC Interpretation that the legislative intent of all other categories of BL 24(2) has been reflected in the Preparatory Committee’s Opinions dated 10.8.1996 could not affect the clear meaning of BL 24(2)(1) properly reached by applying the common law approach.

- In Tam Nga Yin & Ors v Director of Immigration (2001) 4 HKCFAR 251; FACV 20/2000 (20.7.2001), the appellants were Chinese nationals born on the Mainland adopted by Hong Kong permanent residents, claiming the right of abode in Hong Kong under BL 24(2)(3). At the time of their adoption and indeed at the time of their birth, at least one of their adoptive parents had become a Hong Kong permanent resident. Adopting the same approach as in Chong Fung Yuen, the CFA did not consider BL 24(2)(3) to be an excluded provision warranting a judicial reference to the SCNPC under BL 158(3). The Court (with Bokhary PJ (as he then was) dissenting) held that, on the common law approach, it was plain that the phrase “born … of” referred only to natural children and was incapable of sustaining an interpretation that adopted children were included. Further, the time of birth requirement suggested that the relationship was the natural relationship and did not include the relationship arising from adoption. To apply the time of adoption instead of the time of birth would be to substitute a different requirement.

8.2.5 The last right of abode litigation (thus far) concerning children born in the Mainland was the Ng Siu Tung case which gave a landmark ruling on “legitimate expectation” and the scope of the Government’s “concession policy” (which allows certain persons to have their Hong Kong permanent resident status verified in accordance with the two judgments in Ng Ka Ling and Chan Kam Nga, notwithstanding that such persons were not parties to those two cases).

Case Example

- Ng Siu Tung & Ors v Director of Immigration (2002) 5 HKCFAR 1; FACV 1/2001 (10.1.2002). During the Ng Ka Ling and Chan Kam Nga litigation, senior Government officials had made various public statements including statements to the effect that the Government would abide by the decisions of the courts and would carry such decisions into effect. Pro forma letters were written by the Legal Aid Department to individual applicants for legal aid stating that there was no need for them to join in existing proceedings or to commence fresh proceedings. On the same day as the SCNPC Interpretation dated 26.6.1999 was issued, the Government made a public announcement of a policy to the effect that it would allow persons who had arrived in Hong Kong between 1.7.1997 and 29.1.1999 and had made a claim for the right of abode with the Immigration Department to have their asserted status as permanent resident verified in
accordance with the two judgments ("the concession policy").

- A large number of applicants, claiming to be in the same position as the parties in those two cases, subsequently argued that they were unaffected by the SCNPC Interpretation and should have their claims for permanent resident status verified according to the two judgments, or, alternatively, they were covered by the concession policy.

- The CFA stated the followings:

  (a) Upon the true construction of "judgments previously rendered shall not be affected" in BL 158(3), the judgments in Ng Ka Ling and Chan Kam Nga were binding only on the actual parties in those cases. The applicants in these appeals, not being parties in those cases, were affected by the SCNPC Interpretation and cannot benefit from the two judgments.

  (b) The Director was entitled to decide that whatever expectations these applicants might have, they were overridden by the immigration policy underlying the immigration legislation validated by the SCNPC Interpretation. Representees of the general representations made by the senior Government officials therefore could not succeed on this ground. But in respect of representees who were specific recipients of the Legal Aid pro forma replies, since the Director failed to give effect to their legitimate expectation that they might be allowed to enter and reside in Hong Kong under ss.11, 13 and 19(1) of the Immigration Ordinance as a matter of exceptional discretion, the removal orders issued against them must be quashed and these applicants were entitled to a fresh exercise of the Director’s discretion under those provisions.

  (c) There was no misinterpretation or misapplication of the concession policy by the Director in relying that there must be a record kept by the Immigration Department of a claim for right of abode, although in certain cases the Director had applied too strict a construction of what constituted a claim falling within the concession policy.  

8.2.6 The following cases concern claims by foreign nationals for the right of abode in the HKSAR under the Basic Law.

Case Example

- In Fateh Muhammad v Commissioner of Registration & Anor (2001) 4 HKCFAR 278; FACV 24/2000 (20.7.2001), the CFA held that s.2(4)(b) of the Immigration

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12 In a subsequent judgment, the CFA remitted certain factual issues to the Court of First Instance for determination in relation to the applicants’ claims that they were entitled to right of abode because they fell within the parameters of the concession policy: see (2002) 5 HKCFAR 499; FACV 1/2001 (30.7.2002); also see the Court of First Instance’s subsequent reports to the CFA in HCAL 81/1999: 1st report dated 3.10.2003; 2nd report dated 16.9.2005; 3rd report dated 23.8.2006; 4th report dated 7.2.2007; 5th report dated 1.6.2007; and 6th report dated 4.1.2008.
Ordinance was not unconstitutional. Subject to the possibility of an argument that an extremely short period of imprisonment did not interrupt the continuity of residence, being in prison or a training or detention centre pursuant to a criminal conviction which had never been quashed or a sentence or order which had never been set aside did not constitute ordinary residence in Hong Kong within the meaning of BL 24. The Court also held that para 1(4)(b) of Schedule 1 to the Immigration Ordinance was not unconstitutional. The seven continuous years required by BL 24(2)(4) must come immediately before the time when an application for permanent resident status was made in reliance on those seven continuous years.

- In Prem Singh v Director of Immigration (2003) 6 HKCFAR 26; FACV 7/2002 (11.2.2003), the CFA said that BL 24(2)(4) required non-Chinese persons to satisfy three conditions for permanent resident status: (1) having entered Hong Kong with valid travel documents (the “entry requirement”); (2) having ordinarily resided in Hong Kong for a continuous period of not less than seven years (the “seven-year requirement”); and (3) having taken Hong Kong as their place of permanent residence (the “permanence requirement”). The Court held that BL 24(2)(4) implicitly regarded satisfaction of the permanence requirement as achievable at a time when an applicant was still subject to a limit of stay. Hence, the condition that the applicant be “settled in Hong Kong” (para 3(1)(c) of Schedule 1 to the Immigration Ordinance) and defining “settled” as requiring that the applicant be “not subject to any limit of stay in Hong Kong” (para 1(5)(b) of Schedule 1 to the Immigration Ordinance), purported to impose a requirement which was incompatible with the requirements of BL 24(2)(4) and was to that extent unconstitutional. The Court also held that the two-week imprisonment during the relevant seven-year period in the case was not de minimis having regard to the qualitative aspect of the time spent in prison, i.e. reflecting sufficiently serious criminal conduct to warrant an immediate custodial sentence.

- In Vallejos and Domingo v Commissioner of Registration & Anor (2013) 16 HKCFAR 45; FACV 19 & 20/2012 (25.3.2013), the CFA held that s.2(4)(a)(vi) of the Immigration Ordinance which excluded foreign domestic helpers from being ordinarily resident in Hong Kong was constitutional. The words “ordinarily resided” were capable of assuming different meanings in different contexts. The immigration status of persons must be taken into account in deciding whether they satisfied the seven-year ordinary residence requirement. Having regard to the features of foreign domestic helpers’ stay in Hong Kong, the Court held that the quality of their residence was far-removed from what would traditionally be recognised as “ordinary residence” within BL 24(2)(4).

- In Asif Ali v Director of Immigration & Anor (2013) 16 HKCFAR 91; FACV 17/2011 (25.3.2013), the CFA held that a period of remand in custody pending trial resulting in criminal conviction and sentence of imprisonment, not being punitive in nature, is different from a period of imprisonment pursuant to the sentence of the Court after trial and was therefore not excluded from ordinary residence by virtue of s.2(4)(b) of the Immigration Ordinance. Further, if a period of remand in custody was within the meaning of s.2(4)(b), it would create
uncertainty in the administrative scheme for verifying right of abode claims, which would not have been the legislative intent before s.2(4)(b).

• In Gutierrez Joseph James, a minor v Commissioner of Registration & Anor (2014) 17 HKCFAR 518; FACV 2/2014 (18.9.2014), the CFA held that the questions of ordinary residence and place of permanent residence in an individual case were highly fact-sensitive. In general, a child aged 10 would not be expected to independently form the intention or to possess the means to establish his own place of permanent residence. Even though there may be rare occasions where that may occur, in the great majority of cases, the child would be living with and dependent upon the support of his parents or guardian so that the child’s position would for practical purposes follow that of his parents or guardian. One would take into account all relevant circumstances, asking whether there was 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 was possible), showing that he had taken Hong Kong as his place of permanent residence. The Court also held that the applicable regulations did not qualify as a right to “obtain” a Hong Kong identity card, but merely a right to “apply” for one. Therefore, the appellant’s absences during the seven-year period immediately before his application for verification had prevented him from being continuously ordinarily resident in Hong Kong during that period by reason of s.11(10) of the Immigration Ordinance which meant that his previous permission to land or remain in Hong Kong expired on each departure, requiring fresh permission to be obtained each time he returned. The CFA expressly left open the issue of whether the appellant’s permission to remain in Hong Kong as a visitor necessarily meant that he could not build up ordinary residence here, notwithstanding numerous visa extensions spanning many years; and the question of whether s.2(6) of the Immigration Ordinance might provide a basis for preventing interruption of continuity of ordinary residence in the appellant’s case.

8.2.7 Apart from determining whether a claim for the right of abode is established in accordance with the requirements under the Basic Law and the relevant statutory provisions, sometimes legal issues may arise as to whether a claim for right of abode has been made.

Case Example

• In Somporn Yoothip v Secretary for Security & Anor, unreported, CACV 276/2006 (22.6.2007), the Court of Appeal held that the relevant provisions of the Immigration Ordinance, Registration of Persons Ordinance and Registration of Persons Regulations pointed towards a duty on the part of the Commissioner of Registration to assist the applicant, in the circumstances where he had notified the registration officer that he had lived continuously for seven years in Hong Kong by submitting a form (known as ROP1) for replacement of an identity card, by referring him to the Director of Immigration so that his constitutional right as a permanent resident could be verified.
8.3 RIGHTS OF NON-PERMANENT RESIDENTS

8.3.1 As mentioned above, non-permanent residents enjoy all fundamental rights (save for a few) as enjoyed by permanent residents. There are occasions where the courts have held that the restrictions on the rights of non-permanent residents were unjustifiable.

Case Example

- In Gurung Kesh Bahadur v Director of Immigration (2002) 5 HKCFAR 480; FACV 17/2001 (30.7.2002), the CFA held that although s.11(10) of the Immigration Ordinance itself was not unconstitutional, its application to a non-permanent resident whose permitted limit of stay had not expired (like the applicant in the present case who has returned from overseas) was inconsistent with his rights to travel and to enter under BL 31. Section 11(10) continued validly to apply to persons who were not non-permanent residents with an unexpired limit of stay.

8.4 NON-RESIDENTS AND ILLEGAL IMMIGRANTS

8.4.1 The courts of Hong Kong have traditionally viewed the discretion of the Director of Immigration under the Immigration Ordinance, in terms of imposing immigration controls over persons who have no right to enter or stay in Hong Kong, as being a wide one, and have frequently expressed reluctance in interfering with its exercise.

8.4.2 That said, the courts may be more prepared to adopt an anxious scrutiny approach in examining the Director’s such decisions on foreigners, and their public law rights, in particular where issues of fundamental rights are involved in the context of detention and non-refoulement.

8.4.3 For persons from outside Hong Kong seeking to enter and stay here, usual attacks are against the Director’s decisions made under different entry visa policies, e.g. the employment policy, the dependant policy.
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Case Example

• In *Aguilar Joenaly Elmedorial v Director of Immigration*, unreported, FAMV 47/2013 (28.1.2014), the applicant was a foreign domestic helper whose employment visa renewal was refused because of her conviction for a non-immigration offence. The applicant argued that the Director had misunderstood his own policy which, properly construed, meant that a visa was only to be refused on the criminal or detrimental record ground if the applicant had a conviction for an immigration offence and not some other criminal offence bearing consequences short of deportation, in the absence of some convincing justification advanced by the Director. The Appeal Committee of the CFA rejected that argument.

• In *QT v Director of Immigration* [2018] 4 HKC 403; FACV 1/2018 (4.7.2018), the applicant was a British female national who had entered into a civil partnership in the United Kingdom with her same-sex partner. The applicant challenged the Director’s decision of refusing to grant her a dependant visa to stay in Hong Kong as the “spouse” of her same-sex partner who had been granted an employment visa to work in Hong Kong. The CFA restated the principles that the Director had very wide powers of immigration control under BL 154 and s.11 of the Immigration Ordinance, Cap. 115; however, when implementing the dependant visa policy, the Director had to exercise the powers in accordance with the principle of equality, and for the purpose for which they were given, as well as fairly and rationally, reflecting the rule of law. Failure to do so may lead to a successful judicial review challenge. The CFA rejected the Director’s argument that he was entitled to adopt a policy conferring the benefit of a dependant visa only on spouses in a union which, if celebrated in Hong Kong, would have been recognised as a valid marriage under Hong Kong law. The CFA also held that such a policy was not rationally connected to the aims of attracting talent to Hong Kong and strict immigration control.

Case Example

• In *Cheung Kin Ho & Ors v Registration of Persons Tribunal & Anor* [2014] 3 HKLRD 526; HCAL 2/2014 (12.6.2014), the applicants relied on certain acts done by the Immigration Department, subsequent to the fraud in their obtaining the entry permits on the Mainland to come to Hong Kong in the first place having been unearthed, to argue that they had a legitimate expectation that the Department continued to treat them as permanent residents and hence their stay in Hong Kong as ordinary residence. The Court, applying *Ng Siu Tung*, held that a legitimate expectation could not render something which was unlawful to
become lawful. In other words, the Court would not give effect to a purported expectation where to do so would involve the decision-maker acting contrary to the law. In this case, given that the applicants’ entry and stay in Hong Kong based on the entry permits (which were obtained by fraud, as confirmed by the relevant Mainland authorities) was unlawful, their residence in Hong Kong could not be regarded as ordinary residence as expressly excluded under s.2(4)(a)(i) of the Immigration Ordinance.

- In Ng Man Yin & Anor v Registration of Persons Tribunal [2014] 1 HKLRD 1188; HCAL 72/2011 (29.1.2014), the Court, having examined a line of authorities, laid down at para 74 the following principles on how the courts in Hong Kong should approach Mainland authorities’ correspondence:

  “(1) Statements made by the BEEA [Bureau of Entry and Exit Administration of the Mainland] as to the validity of OWPs [one-way permits] are relevant and in most cases weighty evidence as to the status of such permits.

  (2) Not only are the Hong Kong immigration authorities fully entitled to rely on such statements, it is inappropriate for them to be concerned with the process through which the Mainland authority decides whether a particular OWP is valid or not.

  (3) The above approach involves no abrogation of the Hong Kong authority’s duty to find on the facts. This is because, absent any substantial and serious issues of authenticity / irregularity as regards a BEEA communication, the only question of fact for the Hong Kong authority is: what is the BEEA’s conclusion as gleaned from the communication as to the validity or lawfulness of a given permit?

  (4) It will be an exceptional case where there is any scope to second guess what appears on a BEEA statement given the presumption of regularity that applies to such matters. ‘It is for the applicant to adduce cogent evidence to overcome this presumption and the Court will not disturb a tribunal’s assessment in this regard absent manifest factual error or Wednesbury unreasonableness.’ The mere fact that the applicant has adduced some conflicting evidence is entirely insufficient.”

8.4.5 On more and more occasions, foreigners have asserted a right to enter and stay in Hong Kong on the basis of the rights of their family members. Legal arguments for such right were raised and rejected by the CFA in Comilang, Milagros Tecson and Anor v Director of Immigration [2019] HKCFA 10; FACV 9 & 10/2018 (4.4.2019).

8.4.6 Moving on to the context of removal and deportation, challenges in such context may be mounted on conventional public law grounds.

Case Example

- In Sukhmander Singh v Permanent Secretary for Security, unreported, CACV 370/2005 (20.7.2006), the applicant had been severely wounded by the husband of a victim whom he had raped in Hong Kong. He claimed that his life would be
at risk if he was deported to India as he would, through lack of means, be compelled to live in the same village as his assailant. The Court of Appeal held that the Permanent Secretary failed to address the key question on the level of risk to the applicant if returned (including whether he would be compelled to live in the same village as his assailant). The matter was remitted to the Permanent Secretary for fresh decision.

8.4.7 Further, fundamental rights may also be relied on to resist removal or deportation. In particular, the question of non-refoulement protection as a fundamental right has emerged, which should be properly addressed by the immigration authorities as appropriate. The following sets out a brief background giving rise to this issue and discusses the important Court decisions that have shaped the current screening mechanism.

8.4.8 The CAT applies to Hong Kong. Under Article 3 of CAT, the HKSAR Government is obliged not to expel, return or surrender a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Case Example

- Following the CFA judgment in Secretary for Security v Sakthevel Prabakar (2004) 7 HKCFAR 187; FACV 16/2003 (8.6.2004), the Government was required to determine claims for protection under Article 3 of CAT independently from the screening of refugee claims by the UNHCR. The CFA held that high standards of fairness were required in the determination of a CAT claim. It required HKSAR Government to make an assessment independent of UNHCR, and that a claimant should be given every reasonable opportunity to establish his claim, because such determination may put a person's life and limb in jeopardy and may take away from him his fundamental human right not to be subjected to torture.

8.4.9 As a consequence, an administrative screening mechanism was implemented by the Government for screening CAT claims, comprising a first tier assessment by the Immigration Department and a second tier assessment by the Secretary for Security upon petition. Various aspects of such administrative screening process were challenged by way of judicial review for failure to meet the requirement of high standards of fairness.

Case Example

- In FB & Ors v Director of Immigration [2009] 2 HKLRD 346; HCAL 51, 105-7 & 125-6/2007 (5.12.2008), the Court declared unlawful: (a) the policy of not permitting legal representation during CAT screening interviews; (b) the policy of not providing legal assistance to CAT claimants in the screening process; (c) the examining officer and the decision-maker not being the same person; (d) the
decision-maker not sufficiently trained or instructed in the decision-making process (both the first tier decision and the petition determination); and (e) the absence of provision for oral hearing during the petition stage and for legal representation at the hearing.

8.4.10 Following the handing down of the judgment in *FB & Ors*, the Government suspended screening of CAT claims. It then resumed screening under an administrative scheme with enhanced measures on 24.12.2009, with an immigration officer being the first tier decision-maker and an independent adjudicator as the decision-maker on petition. The Immigration (Amendment) Ordinance 2012, introducing a new Part VIIIC to the Immigration Ordinance, was subsequently passed and became effective on 3.12.2012 to provide statutory backing for the screening process, covering the authority and procedures for determining claims as well as to provide for a statutory appeal board (namely, the Torture Claims Appeal Board) to handle appeals lodged by unsuccessful CAT claimants.

8.4.11 Two subsequent CFA judgments handed down in late 2012 and early 2013 further changed the landscape on this non-refoulement issue significantly.

**Case Example**

- In *Ubamaka Edward Wilson v Secretary for Security (2012) 15 HKCFAR 743; FACV 15/2011* (21.12.2012), the CFA held that s.11 of HKBORO, construed purposively, must be read as qualified by s.5 of HKBORO. Since the rights guaranteed by HKBOR 3 (i.e. prohibition on torture or cruel, inhuman or degrading treatment or punishment) are absolute and non-derogable, they are not excluded by s.11 of HKBORO insofar as the exercise of powers and the enforcement of duties under immigration legislation are concerned. One of the consequences arising from such construction was that the Government should not remove a person to a country where the person faces a genuine and substantial risk of being subjected to ill-treatment contrary to HKBOR 3.

- See *C & Others v Director of Immigration and Secretary for Security (2013) 16 HKCFAR 280; FACV 18-20/2011* (25.3.2013). While the 1951 Refugee Convention and its 1967 Protocol have not been extended to Hong Kong, the CFA held that given that it was the practice of the Director to have regard to humanitarian considerations when deciding whether or not to exercise his power to remove a refugee claimant, and that whether a claim of a fear of persecution was well-founded was a relevant humanitarian consideration, the Director must independently determine whether the claim was well-founded instead of relying on the determinations of the UNHCR in accordance with the high standards of fairness required having regard to the gravity of the consequence of the determination.

8.4.12 In view of the CFA decisions in *Ubamaka* and *C & Ors*, the Government on 3.3.2014 commenced the USM for determining claims for non-refoulement protection.
made by persons in Hong Kong against expulsion, return or surrender from Hong Kong to another country in respect of which the claimant has made a non-refoulement claim on all applicable grounds. Where any of these claims is substantiated, non-refoulement protection would be afforded to the claimant insofar as the risk continues to exist.

8.4.13 During the period leading to the implementation of the USM, the previous enhanced administrative CAT screening scheme had been subjected to a number of judicial review challenges, and further guidance has been given by the courts on the handling of CAT claims.

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**Case Example**

- In *TK v Michael C Jenkins, Esq* [2013] 1 HKC 526; CACV 286/2011 (21.11.2012), the Court of Appeal held that while the high standards of fairness may, depending on the facts, require the Director or the Adjudicator to probe further into an answer or an omission, there may be no duty to keep probing or inquiring where the objective circumstances made it reasonably clear that the claimant and his legal representative(s) were aware of what he had to show and had already produced or mentioned all that he wanted to produce or mention. The high standards of fairness certainly did not entitle the claimant, having stated a claim, to simply sit back and require the Director to disprove it. Under the high standards of fairness, it must be incumbent upon the Director, in most if not all cases, to clearly raise the issue of internal relocation, identify specifically or generally (as fairness of the circumstances require) the place(s) that could provide a safe haven to the claimant if returned to his country, make known or supply to the claimant the materials that the Director intended to rely on in relation to the issue, offer to the claimant whatever assistance in terms of gathering relevant information and materials that was fair and right for the Director (as opposed to the claimant and his legal representatives) to seek and obtain, and to afford the claimant a proper opportunity to deal with the issue so raised.

- In *AM v Director of Immigration* [2014] 1 HKC 416; HCAL 102/2012 (20.11.2013), the Court laid down principles on the extended meaning of state acquiescence for the purpose of assessing CAT claims regarding the element of state involvement. The Court also held that the Director and the adjudicator should set out clearly the country of origin materials they have considered, otherwise, they would risk the Court’s refusal to make an inference that the decision maker has considered relevant country of origin information.

- In *ST v Betty Kwan & Ors* [2014] 4 HKLRD 277; CACV 115/2013 (26.6.2014), the Court of Appeal confirmed that there was no absolute right to an oral hearing even in the CAT context. The ultimate question of whether to hold an oral hearing was one of fairness. The crux was to afford an opportunity to make worthwhile or effective representations in appropriate circumstances.
8.4.14 There is another important judgment of the CFA in this non-refoulement context involving substantiated torture claimants and refugees recognised under the mandate of the UNHCR (as opposed to persons with pending non-refoulement claims).

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**Case Example**

- **GA & Ors v Director of Immigration (2014) 17 HKCFAR 60; FACV 7-10/2013 (18.2.2014)** concerned a challenge against the Director’s policy generally not to permit mandated refugees and screened-in torture claimants to take up employment in Hong Kong save in exceptional circumstances. The CFA held that the appellants had no right to work in Hong Kong. It was clear that, subject to s.5 of HKBORO, s.11 of HKBORO was intended to except immigration legislation that dealt with each stage of a person’s stay in Hong Kong, from entry, through his stay in Hong Kong, to departure. Whether a person who did not have the right to enter and remain in Hong Kong was permitted to work during his stay in Hong Kong was eminently a matter of immigration control. In exercising his discretion, the Director should consider whether there are exceptional circumstances such that, as a consequence of the prohibition against working, inhuman or degrading treatment could be shown to exist or the individual concerned could be shown to be facing a substantial and imminent risk of inhuman or degrading treatment.

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8.4.15 Another aspect worth mentioning is the lodging of claims by CAT claimants for damages on grounds that their detention under the Immigration Ordinance was unlawful. These claims came about as a result of the Court of Appeal’s judgment in **A & Ors v Director of Immigration** [2008] 4 HKLRD 752; CACV 314-317/2007 (18.7.2008) that the exercise of the detention power under s.32(3) and (3A) of the Immigration Ordinance was unlawful, and violated HKBOR 5 for want of a sufficiently certain and accessible detention policy.

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**Case Example**

- In **Ghulam Rbani v Secretary for Justice for and on behalf of Director of Immigration** (2014) 17 HKCFAR 138; FACV 15/2013 (13.3.2014), the CFA confirmed that s.11 of HKBORO, read in conjunction with BL 41, operated to exempt the operation of HKBOR 5 and BL 28 vis-à-vis the exercise of powers to detain under s.32(2A) of the Immigration Ordinance. The Court also confirmed that common law Hardial Singh principles on false imprisonment applied to such detention and that the detainee should have sufficient information about the basis of his detention to enable him to make informed and meaningful representations to seek release. In passing, the Court recognised that s.11 of HKBORO was not considered in A & Ors (see para 7.8.2 above) and that the Court of Appeal in A & Ors did not lay down any obligation to make and publish detention policies.
8.5 FUNDAMENTAL RIGHTS CHALLENGES

8.5.1 As illustrated above, many of the judicial review challenges in the immigration context are based on fundamental human rights. Examples include Ubamaka, C & Ors, GA & Ors, Comilang.

8.5.2 Fundamental rights challenges by way of judicial review can also be mounted in other contexts where the Director of Immigration discharges his duty in a different capacity. The W case concerning a transsexual person’s wish to marry, where the Director assumes the capacity of the Registrar of Marriages, is an example.

Case Example

- In W v Registrar of Marriages (2013) 16 HKCFAR 112; FACV 4/2012 (13.5.2013), the Registrar of Marriages refused to allow W, a post-operative male-to-female transsexual, and her male partner to get married, on the ground that she did not qualify as a “woman” under the Marriage Ordinance and the Matrimonial Causes Ordinance. The CFA held that the criteria adopted by the Registrar which were limited to a person’s biological features existing at the time of birth and treated as immutable were incomplete, for they ignored the psychological and social elements of a person’s sexual identity and ignored any sex reassignment surgery that had occurred. In adopting such restrictive criteria, and bearing in mind that the Basic Law was a living instrument intended to meet changing needs and circumstances and that procreation was no longer regarded as essential to marriage in present-day multi-cultural Hong Kong, those provisions were inconsistent with and failed to give proper effect to the constitutional right to marry and were therefore unconstitutional. Additionally, those provisions were unconstitutional since they impaired the very essence of the right to marry. Viewing the realities of W’s position, by denying the psychological and social woman like her the right to marry a man, the provisions denied her the right to marry at all.

8.5.3 While the courts recognise that a degree of deference or margin of discretion is to be accorded to the legislature or executive where difficult choices may have to be made between the rights of the individual and the needs of the society, especially in socio-economic policy matters, the courts may nevertheless in appropriate cases discuss consequential issues that require attention and indicate how legislation would be beneficial in addressing such issues. For instance, see the W case.

Case Example

- In the W case (above), the CFA was content to deal with W and persons in W’s situation and left open the question whether transsexual persons who have undergone less extensive treatment might also qualify. The Court recognised that legislative intervention would be highly beneficial in various respects, including establishing a means for deciding who qualifies as a “woman” or a
9. JUDICIAL REVIEW IN PRACTICE (LAND, ENVIRONMENTAL, PLANNING AND BUILDING MATTERS)

9.1 INTRODUCTION

9.1.1 In recent years, there has been a surge of judicial review cases in Hong Kong concerning land, environmental, planning and building matters. These cases feature a wide array of issues such as standing and justiciability, and the different grounds for judicial review considered in the earlier chapters of this Guide.

9.2 JUDICIAL REVIEW CONCERNING LAND MATTERS

9.2.1 Under BL 7, the Government of the HKSAR is responsible for the management, use and development of land and for granting leases to individuals, legal persons or organisations for the use or development of land. In practice, this power is delegated by the Chief Executive to the Secretary for Development, and then to the officers of the Lands Department, which is the Government's executive arm for land administration. Land-related judicial review usually arises out of the administrative decisions taken by the Director of Lands (“the DL”) during the process of land disposal and acquisition, and also in the context of enforcement of lease conditions (e.g. issuance of a clearance notice and cancellation of a Government Land Licence due to a breach of lease conditions).

9.2.2 One of the most central issues in land-related judicial review is whether the decision is susceptible to judicial review.

Case Example

- Hang Wah Chong Investment Co. Ltd v Attorney General [1981] HKLR 336; Privy Council Appeal 16/1980 (23.3.1981) was a landmark case which ruled on the justiciability of decisions taken by the DL. In this case, the applicant (a lessee of Government land) intended to erect buildings that were subject to the approval of the then Director of Public Works (“the DPW”). The DPW granted approval conditional upon the payment of a premium, which was challenged by the applicant through judicial review proceedings. The Privy Council held that in demanding the premium, the DPW was merely acting as the Government’s land agent and hence, the decision should be dealt with within the framework of private law, not public law. This led to the establishment of the broad principle that decisions made in relation to Government leases (i.e. where the official acts merely as the Government’s land agent, taking care of the interests of the Government as a landlord) are not normally susceptible to judicial review.13

9.2.3 Judicial review cases in recent years suggest that certain decisions of the DL may be regarded by the courts as “public” in nature (i.e. affecting public law rights), 13 See Chapter 2.3.2 for limits on judicial review generally.

“man” for marriage purposes. The Court refrained from formulating a test and deciding questions regarding the implications of recognising an individual’s acquired gender for marriage purposes (by way of “judicial line-drawing”), and made it clear that it would be “distinctly preferable” for the legislature to introduce legislation similar to the Gender Recognition Act 2004 of the UK (paras 136 to 138).
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despite the DL’s role as the Government’s land agent and the long-standing principle that decisions made by the DL in such a capacity should generally be dealt with within the framework of private law, not public law.

**Case Example**

- In *Hong Kong and China Gas Co Ltd v Director of Lands [1997] 3 HKC 520; HCAL 50/1997* (21.11.1997), the DL decided not to extend a lease for specific purposes in the New Territories. Although the decision related to a Crown lease generally governed by the law of contract, Keith J (as he then was) held that the true question was whether the making of the decision amounted to the performance of a function within the public domain. As the DL’s decision was made pursuant to a published policy statement, in the context of which a host of competing interests including the interest of the community were taken into account, the decision was held to be made in the exercise of the DL’s public functions and amenable to judicial review. This ruling has subsequently been adopted by the Court of Appeal in *Kam Lan Koon & Ors v Secretary for Justice [1999] 3 HKC 591; CACV 197/1998* (29.07.1999).

- In *Wong Wai Hing Christopher v Director of Lands [2011] 1 HKLRD C2; HCAL 95, 97 & 98/2010* (24.9.2010), the DL recovered possession of land on which a village was situated, by issuing a Clearance Notice under s.6 of the Land (Miscellaneous Provisions) Ordinance, Cap. 28 (“the LMPO”). The DL was *prima facie* merely performing his role as the land agent of the Government. However, the Court looked at the powers which the LMPO conferred on the DL in the land recovery process. These included the ability to direct any persons or public officers to remove persons and properties remaining on the land, and the ability to direct the demolition of any structures. The Court therefore came to the view that the DL had considerable powers in dealing with unauthorised occupation of Government land, which went beyond the powers that could be exercised by a private landowner. In turn, the exercise of these powers was held to have a sufficiently public element to render it susceptible to judicial review.

- In *Chau Tam Yuet Ching v Director of Lands [2013] 3 HKLRD 169; CACV 170/2012* (24.5.2013), the DL, amongst others, cancelled Government Land Licences held by the applicant in respect of land in the Sai Kung area pursuant to the power under s.5 of the LMPO. The Court of Appeal considered both the authorities in which the DL’s decisions were held to be judicially reviewable, and those in which they were held not. The Court ultimately held that the mere presence of some public element in the decision by reason of the statutory power was not sufficient to transform it into a public law decision, and one should examine the statutory regime to see whether the regime instilled a sufficient public character into the decision to render it judicially reviewable. The Court accepted that the DL was exercising the right as a licensor and was performing a private function in making the decision in question, which was thus a commercial decision and not amenable to judicial review.
9.2.4 In summary, the position now is that the courts will determine whether or not decisions of the DL are justiciable on a case-by-case basis. Even decisions concerned with the same policy may not carry the same degree of public character. For example, in *Koon Ping Leung v Director of Lands*\(^\text{14}\), the DL’s refusal to grant land for building houses under the Small House Policy (“the Policy”) was held to be judicially reviewable. But in *Hung Hing v Director of Lands*\(^\text{15}\), the Court of Appeal held that not each and every matter concerning with the Policy was judicially reviewable, and the DL’s refusal to grant land for constructing vehicular access to houses built under the Policy was not. Therefore, in each case, the crucial question remains whether the role played or function performed by the Government official in making the decision in question is sufficiently public to render the decision amenable to judicial review.

9.3 ENVIRONMENTAL CHALLENGES

9.3.1 In the face of growing public concern about the state of the environment and the impact of environmental degradation on public health in Hong Kong, concerned citizens and interest groups have made applications for judicial review.

9.3.2 In the early-mid 2000s, the most significant environmental judicial review cases concerned the reclamation of the Victoria Harbour. The most notable challenges were brought by the Society for the Protection of the Harbour (“the Society”), a public interest organisation aiming at preventing excessive and/or unlawful reclamation of the Victoria Harbour.

**Case Example**

- In *Society for the Protection of the Harbour v Town Planning Board (2004)* 7 HKCFAR 1; FACV 14/2003 (9.1.2004), the Society challenged the decisions of the Town Planning Board (“the Board”) in respect of amendments to the Wanchai North Outline Zoning Plan which would permit a reclamation project along the Wanchai waterfront. The Society’s main ground was that the Board erred in law in that it had misinterpreted s.3 of the Protection of the Harbour Ordinance, Cap. 531, under which the harbour was recognised as a special public asset and natural heritage of Hong Kong people and specified a “presumption against reclamation” in the harbour. The Court (at both the Court of First Instance and the CFA levels) accepted the Society’s principal argument that s.3 required the Board to adopt the test of “overriding public need” i.e. there must be cogent and convincing materials before the Board that the overriding public need for reclamation rebutted the presumption against reclamation. Since the Board failed to adopt such a test, its decision was quashed for error of law and was remitted for reconsideration.

9.3.3 In recent years, environmental challenges by way of judicial review mostly concerned decisions made under the Environmental Impact Assessment Ordinance, Cap. 531, under which the harbour was recognised as a special public asset and natural heritage of Hong Kong people and specified a “presumption against reclamation” in the harbour. The Court (at both the Court of First Instance and the CFA levels) accepted the Society’s principal argument that s.3 required the Board to adopt the test of “overriding public need” i.e. there must be cogent and convincing materials before the Board that the overriding public need for reclamation rebutted the presumption against reclamation. Since the Board failed to adopt such a test, its decision was quashed for error of law and was remitted for reconsideration.

\(^{15}\) [2015] 5 HKLRD 516; CACV 118/2015 (17.09.2015).
499 (“the EIAO”). The EIAO is intended to provide for the protection of the environment and has introduced an environmental impact assessment (“the EIA”) process for “designated projects” (i.e. projects which are likely to have a significant adverse impact on the environment unless properly studied and controlled). Under the EIA process, proponents of projects must prepare an EIA report which meets the requirements of the “Study Brief” (“the SB”) (which is specific to the project) issued by the Director of Environmental Protection (“the DEP”) and the “Technical Memorandum” (“the TM”) (which sets out the more general principles, procedures, guidelines and criteria applicable to all projects) issued by the Secretary for the Environment. The judicial review cases mostly feature disputes over the interpretation of the requirements under the SB and the TM.

Case Example

- In Shiu Wing Steel Ltd v Director of Protection and Airport Authority (No.2) (2006) 9 HKCFAR 478; FACV 28/2005 (17.7.2006), the applicant (a steel mill operator) challenged the DEP’s decision to approve an EIA report prepared by the Airport Authority in respect of its proposed storage of aviation fuel by constructing a permanent air fuel farm next to the applicant’s site. At issue was whether the EIA report failed to contain a Quantitative Risk Assessment (“QRA”) embracing the scenario of a catastrophic failure of a fuel storage tank with an instantaneous or almost instantaneous loss of 100% of the tank’s contents. The CFA (overruling the Court of First Instance’s and Court of Appeal’s decisions) held that the meaning of the TM and the SB was a question of law for the Court, and, adopting a purposive interpretation, that “consideration of the potential environmental impacts of a project cannot be complete if the methodology adopted for their prediction omits the consequences of possible scenarios which may cause fatalities unless the causes of the scenarios are expected or anticipated” (at para 64). It was thus held that the absence of QRA in the EIA report meant that there was an omission or deficiency that may affect the results and conclusions of the report. The DEP therefore had no power to approve the EIA report and his decision was quashed.

- In Chu Yee Wah v Director of Environmental Protection [2011] 5 HKLRD 469; CACV 84/2011 (27.9.2011), the applicant challenged that the DEP had no power to approve an EIA report relating to designated projects of the Hong Kong-Zhuhai-Macao Bridge, due to lack of compliance with the requirements of the TM and the SB. Specifically, the key issue in debate was whether the impact of the projects on air quality was properly assessed in the EIA report. At the Court of First Instance, Fok JA (as he then was) sitting as a first instance judge accepted the applicant’s argument that the EIA report failed to include what was known as a “stand-alone” analysis i.e. a quantitative analysis of future air quality without the project in place but with other committed and planned projects. The DEP’s decisions to approve the EIA report and to issue the environmental permit for the projects were quashed as a result. The Court of Appeal (in allowing the DEP’s appeal) held that on the true construction of the TM and the SB, a “stand-alone” analysis was not required. Instead, it was deemed proper for the DEP to issue the environmental permit based on existing air quality objectives, which represented an acceptable environmental standard for measuring whether a designated project produced an environmental impact which was prejudicial to health.
Notably, Tang VP (as he then was) observed that while it was a matter of construction for the Court to decide what was required by the TM or the SB, “what information may be required by the Director to make an informed decision may be and often is a question of professional judgment” (at para 96).

• In **Ho Loy v Director of Environmental Protection & Chief Executive in Council, unreported, HCAL 100/2013** (12.8.2014), the applicant challenged, amongst others, the DEP’s decision of not exercising her power under s.14(1) of the EIAO to suspend or cancel the environmental permit issued in respect of a proposed bathing beach development at Lung Mei. The applicant’s fundamental ground of challenge was that, under the TM, it was mandatory to carry out a specific ecological impact assessment in relation to spotted seahorses, and that the failure to do so had (a) rendered a statement in the EIA report about Lung Mei not appearing to serve as critical/unique habitats for species of conservation importance (“the Statement”) misleading, wrong, or incomplete and (b) warranted the DEP’s exercise of her power to suspend or cancel the environmental permit. In his judgment, Au J (as he then was) turned to the proper construction of the relevant parts of the TM and concluded that an ecological impact assessment report in relation to spotted seahorses would only be required if the study area supported a "significant population" of the same. On the facts of the case, Au J was satisfied that the Agriculture, Fisheries and Conservation Department (which conducted general ecological surveys at Lung Mei) was entitled to exercise its professional judgment, and to conclude that the study area did not support a significant population of spotted seahorses. His Lordship therefore found that there was nothing misleading or incomplete about the Statement made based on the results of general ecological surveys done in the Lung Mei area, such that the DEP’s refusal to suspend or cancel the environmental permit could be considered irrational or Wednesbury unreasonable.

9.3.4 Apart from taking up the role as the approving authority, the DEP, in certain circumstances, also acts as a proponent under the EIAO. Recently, the multiple roles of the DEP have been challenged by way of judicial review. It has been confirmed by the CFA that the DEP, while being the approving authority, could also be a proponent under the EIAO, provided that in playing such a role, there would not be an inevitable conflict of interest.

**Case Example**

• In **Leung Hon Wai v Director of Environmental Protection (2015) 18 HKCFAR 568; FACV 2/2015** (18.12.2015), the Infrastructure Planning Group (“the IPG”) of the Environmental Protection Department (“the EPD”), as the proponent of a project to construct and operate a municipal waste incinerator on an artificial island near Shek Kwi Chau, made applications to the Environmental Assessment Division (“the EAD”) of the EPD in the name of the DEP under the EIAO, resulting in the DEP’s decisions to approve the EIA report and permit. The issue was whether the DEP, who headed the EPD, could be the named applicant while being the
9.4.2 One of the key challenges in judicial review concerns the scope of power intensity on the land. Challenges have been brought out of a concern for negative impacts of the planning DOZPs”) applicable to various districts in Hong Kong. Many of these judicial review challenges have increased substantially in recent years, due to the commencement been the subject of many judicial review applications. The number of planning judicial review challenges has increased substantially in recent years, due to the commencement by the Government of a comprehensive review of the Draft Outline Zoning Plans (“the DOZPs”) applicable to various districts in Hong Kong. Many of these judicial review challenges have been brought out of a concern for negative impacts of the planning restrictions that might be imposed under the DOZPs on the permissible development intensity on the land.

9.4.3 There are many examples of judicial review challenges founded upon other grounds, including a material error of fact.

9.4.4 There are also challenges alleging violations of constitutionally protected rights. The Constitutional and Administrative Court has held that many judicial review challenges founded upon other grounds, including a material error of fact. Consequently, the court has sometimes quashed the decisions of the Board of Review.

9.4 PLANNING CASES

9.4.1 The Town Planning Ordinance, Cap. 131 (“the TPO”) provides for the establishment of the Town Planning Board (“the Board”) whose functions are prescribed by s.3, which, inter alia, requires the Board to “undertake the systematic preparation of draft plans” for the lay-out of areas of Hong Kong as well as the types of building suitable for erection therein. The TPO also prescribes a public consultation procedure, whereby the Board must consider representations and comments on the draft plans from the public before submitting them to the Chief Executive in Council for approval. The planning process and the public consultation procedure affect people’s rights and have been the subject of many judicial review applications. The number of planning judicial review challenges has increased substantially in recent years, due to the commencement by the Government of a comprehensive review of the Draft Outline Zoning Plans (“the DOZPs”) applicable to various districts in Hong Kong. Many of these judicial review challenges have been brought out of a concern for negative impacts of the planning restrictions that might be imposed under the DOZPs on the permissible development intensity on the land.

9.4.2 One of the key challenges in judicial review concerns the scope of power of the Board.

Case Example

- In Turbo Top Ltd v Town Planning Board, unreported, HCAL 52/2011 (21.11.2011), the Board proposed amendments to the DOZP for the area where “Cheung Kong Centre” is situated, by rezoning the site as a “Commercial (1)” site and stipulating in the notes to the DOZP that the site should have a minimum of 800 public car parking spaces. The applicant contended that the decisions of the Board in respect of the amendments were ultra vires because they constituted impermissible “micro-managing” of the uses of a specific building rather than an area. At the Court of First Instance, Reyes J held that the decisions fell squarely within the functions of the Board as defined in the long title and s.3 and 4 of the TPO. For the “convenience and general welfare” of the community, the Board designated the site as a Commercial (1) site and imposed a minimum number of car parking spaces.
9.4.3 There are many examples of judicial review challenges founded upon other grounds, including a material error of fact.

### Case Example

- In *Smart Gain Investment Ltd v Town Planning Board and Another, unreported, HCAL 12/2007 (6.11.2007)*, the applicant owned four pieces of agricultural land in Clearwater Bay Peninsular North area, and objected to the inclusion of the land into a “Conservation Area” zone under the DOZP. The Board dismissed the applicant’s objections, on the grounds that the sites “comprised wooded slopes and river valley” which formed a very significant and attractive landscape. Based on evidence from a site visit, Cheung J (as he then was) found that three of the sites did not comprise wooded slopes and river valley. Given the Board’s mistaken finding, the Court allowed the application for judicial review, and quashed the Board’s decision and remitted the decision to the Board for reconsideration.

9.4.4 There are also challenges alleging violations of constitutionally guaranteed rights in planning decisions. The most common rights being involved are the rights contained under BL 6 and BL 105, which provide, respectively, that “The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law”, and that “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...”.

### Case Example

- In *Hysan Development Co Ltd & Ors v Town Planning Board (2016) 19 HKCFAR 372; FACV 21 & 22/2015 (26.9.2016)*, the Board, by way of two DOZPs, imposed planning restrictions in the Causeway Bay and Wanchai districts. The appellants owning extensive properties in the area challenged the restrictions on the grounds that their rights under BL 6 and BL 105 were infringed. The Court of Appeal remitted the case to the Board in the appellants’ favour, but rejected the contention that the restrictions infringed the appellants’ rights under the Basic Law. Upon the appellants’ appeal, the CFA held that BL 6 and BL 105 were engaged, and to determine the permissible extent of the restrictions, a proportionality test should be adopted with a four-step approach, i.e. the requirements of (1) legitimate aim, (2) rational connection, (3) proportionate means, and (4) a reasonable balance between the infringement of individual rights and the social benefits associated with the restrictions. Notably, while maintaining the order of remitter, Ribeiro PJ held that “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”, and it would 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” (at para 142). Ribeiro PJ also stated that “it is not the Board’s task to conduct a proportionality analysis” (at para 130), which is a matter for the Court.

9.4.5 A draft or approved plan may provide for the grant of permission for certain purposes. In such circumstances, the Board is empowered to grant or refuse to grant such permission upon an application under s.16 of the TPO, and such a decision is subject to a review by the Board under s.17. Recently, the exact scope of the Board’s power to review under s.17 was challenged.

Case Example

- In Town Planning Board v Town Planning Appeal Board (2017) 20 HKCFAR 196; FACV 8/2016 (16.2.2017), a permission under s.16 of the TPO, upon appeal, was granted by the Town Planning Appeal Board subject to certain conditions. However, during the course of implementation, the Board refused to grant approval for one of the conditions, and refused to review the refusal pursuant to s.17 of the TPO on the ground that it had no power to do so. The majority (in the ratio of 4:1) of the CFA held, upon the true construction of s.17, that the review under s.17 was a narrow one, and it covered only a decision to refuse to grant permission or that to grant permission with conditions under s.16 of the TPO, but not every decision made in relation to s.16 regardless of its nature.

9.5 BUILDING CASES

9.5.1 Apart from the general planning restrictions imposed by the Town Planning Board on the lay-out of areas and types of building in Hong Kong, a person seeking to erect a building or carry out building works is also subject to the Buildings Ordinance, Cap. 123 (“the BO”) concerning a specific development. The Building Authority (“the BA”) may, on the grounds stipulated under the BO, refuse to give approval of a plan of building works. In recent years, the proper interpretation of the statutory grounds of refusal under s.16 of the BO has been reviewed.

Case Example

- In Building Authority v Appeal Tribunal (Buildings) (2015) 18 HKCFAR 317; FACV 7/2014 (13.3.2015), the applicant submitted building plans for 39-storey buildings in replacement of 5-storey buildings, which were rejected by the BA on the grounds of, amongst others, s.16(1)(g) of the BO as the proposed buildings differed in height from buildings in the immediate neighbourhood, which would lead to increased density and in turn pose danger and/or inconvenience to traffic. The issue before the CFA was whether in the application of s.16(1)(g), consideration could be given to health, safety and other town planning aspects.
The Court, upon a purposive construction of s.16(1)(g), held that matters of health, safety and town planning would be relevant considerations provided that they were directly attributable (or in other words, causally related) to the difference identified under s.16(1)(g). As the role of the BA was different from that of the Town Planning Board, “height, design, type and intended use” of any proposed building set out under s.16(1)(g), while being town planning considerations, should be considered by the BA as they were specific to the proposed development, but not “general” town planning considerations. It was thus correct for the BA to consider the increased density and adverse traffic impact as a result of the difference in height.

* In *Real Estate Developers Association of Hong Kong v Building Authority* (2016) 19 HKCFAR 243; FACV 19/2015 (19.5.2016), the BA’s policy requiring particulars and proof of ownership or realistic prospects of ownership of the “site” in question be submitted with a general building plan of a proposed new building was challenged. The CFA held that s.16 of the BO should be construed in the context of other provisions of the BO and the Building (Planning) Regulations, Cap. 123F (“the BPR”). It was held that the concept of the “site” under the BPR could only include land that the applicant owned or had a realistic prospect of controlling, and on a purposive construction in the broader context of the BO, for land to qualify as a site, it must be land on which it was *bona fide* intended that the approved building would be built. Thus, the BA could require the provision of particulars of ownership or realistic prospects of control under s.16(1)(i) of the BO, and other provisions of s.16 would be engaged as well: “under (1)(a), the plans could be refused approval because that did not relate to such a site; under (1)(c) because the application did not contain the particulars of ownership or realistic prospect of control required and under (1)(d) because only building works in relation to which plans had been properly approved could be built” (at para 67).

9.5.2 The above cases highlight the importance for public officers to properly understand the interpretation and scope of any powers conferred on them by way of statutes before making decisions pursuant to such statutory powers.

9.6 THE TREND

9.6.1 The above serves to highlight some of the common issues that feature in applications for judicial review concerning land, environmental, planning and building matters. The areas of law covered in such challenges appear ever expanding since the public concerns for ecological preservation, commercial development, cultural heritage and other socio-economic interests (and hence the nature of the judicial review challenges being brought about) change over time. From the administrators’ point of view, keeping abreast of the implications of the latest judgments would help ensure the validity and effectiveness of any decisions taken.
10. OTHER REMEDIES

Apart from judicial review, there are other channels available for challenging an administrative decision or compensating a person’s loss arising from maladministration. The main types are:

(a) Private law actions for damages;
(b) Alternative dispute resolution;
(c) The Ombudsman;
(d) The Privacy Commissioner for Personal Data;
(e) Administrative Appeals Board and other tribunals and appeal boards
(f) Inquiries;
(g) Remedies under the HKBOR; and
(h) Ex gratia compensation.

10.1 PRIVATE LAW ACTIONS FOR DAMAGES

10.1.1 There are five main types of civil actions one may commence against the Administration for recovering losses, namely:

(a) Negligence;
(b) Breach of statutory duty;
(c) Misfeasance in public office;
(d) False imprisonment; and
(e) Malicious prosecution

(a) Negligence

10.1.2 Government and other public authorities have no general immunity from claims in negligence. For a claimant to succeed in an action in negligence against a public authority, he must establish all the elements of the tort that would have to be established if a private body or person was being sued. The elements are, in essence, that the claimant should have suffered damage as a result of the defendant breaching a duty of care owed to the claimant. The liability is based on well-established principles of the tort of negligence laid down in *Donoghue v Stevenson* [1932] AC 562 (26.5.1932).

10.1.3 Damage suffered: In general the damage suffered is limited to personal injury or physical damage to property that was both reasonably foreseeable and proximately caused by careless acts or omissions. The common law develops incrementally from analogous precedents. There have been many attempts to extend the tort of negligence to cases where the only form of damage suffered was economic loss without physical damage or personal injury. In general there is no such liability.

Case Example

inspector had negligently approved inadequate foundations for a building that later developed cracks and needed repair. The owner sold the house at a loss. The House of Lords ended a long period of controversy by holding that economic loss arising from certain defects in a building causing it to be less valuable did not at common law give rise to any claim except through a contract with the defendant.

- See *Yuen Kun Yeu v AG of Hong Kong* [1988] AC 175 (10.6.1987). The appellants deposited large sums of money with a deposit-taking company, a company that the Commissioner for Deposit-taking Companies had kept on the register pursuant to the powers under the Deposit-taking Companies Ordinance, Cap. 328. As a result of mismanagement and fraud by its directors, the deposit-taking company went into liquidation and the appellants lost all of their money. The appellants sued the Commissioner for damages in negligence for permitting the continued registration of the deposit-taking company. The Privy Council held that the appellants' claim disclosed no cause of action and did not accept the appellants' argument that there was a special relationship between them and the Commissioner such as to give rise to a duty of care.

10.1.4 On the other hand, through incremental development of the law, there can be liability for economic loss caused by reliance upon negligent misstatements, but only where the maker has assumed or undertaken a responsibility towards the other who has relied on the statement. A duty of care may arise in such circumstances.

### Case Example

- See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (28.5.1963). The plaintiffs, who were advertising agents, were anxious to know whether they could safely give credit to a company, and they therefore sought bankers' reference about the company. The favourable references provided by the company's bankers turned out to be misleading and the plaintiffs suffered financial loss. The House of Lords decided in favour of the defendant bankers only because the references had been provided “without responsibility”. Had it been otherwise, a duty of care would have arisen and the defendants would have been liable for having made negligent misstatements.

10.1.5 Duty of care: Whether there was a duty of care is determined by whether the harm was reasonably foreseeable, whether the relationship between the parties was sufficiently “proximate” and whether the imposition of a duty of care was in the circumstances “fair, just and reasonable”.

10.1.6 Issues of public policy may arise when a claimant alleges that a public authority has been negligent in the performance of its public functions or the exercise of its discretionary administrative powers.
10.1.7 The Court would thus be slow in applying the ordinary law of negligence to the performance of a public law function or the exercise of an administrative discretion. New duties of care are developed incrementally and by analogy with established categories of liability rather than by the application of abstract principle.

10.1.8 The Court may, however, in the light of the circumstances of a particular case, decide to effect an incremental extension of the law once it is satisfied that it would be “fair, just and reasonable” to impose a duty of care.

Case Example

- See Home Office v. Dorset Yacht Co Ltd [1970] AC 1004 (6.5.1970). A group of young offenders (“Bostal boys”) were taken out on a training exercise. Due to careless supervision of the Bostal Officers, some of the Bostal boys escaped, boarded a nearby yacht and damaged it. The owner of the yacht sued the Home Office (the Ministry responsible for the custody of prisoners) for damages in negligence. The Home Office contended that there was no duty of care and thus no liability for the acts of persons other than its servants or agents. Despite the novel nature of the claim, the House of Lords held that the Home Office was liable for damage done by the escaping Bostal boys. Applying the doctrine of the law of tort that a duty of care arose from a relationship of proximity where the damage done was the natural and probable result of the breach of the duty, the House of Lords concluded that the custody of these dangerous boys imposed a duty to take reasonable care that they would not injure the public.
• See Pernett v Collins [1999] PNLR 77 (22.5.1998). A passenger was injured when the plane crashed. The passenger alleged that the crash was caused by defects that the statutory inspector had carelessly failed to spot when inspecting the aircraft prior to issuing its certificate of airworthiness. The Court of Appeal held on a preliminary point of law that there was sufficient proximity between the passenger and the statutory inspector to justify on a “fair just or reasonable” basis imposing a duty of care for personal injury. Liability for economic loss was distinguished from liability for personal injury.

(b) Breach of Statutory Duty

10.1.9 In general, a breach of statutory duty on the part of a public authority does not, by itself, give rise to any private law cause of action. However, it may give rise to a private law cause of action if, upon construction of the statute, it can be shown that the statutory duty was imposed for the protection of a limited class of the public and that the legislature intended to confer on that limited class a private right of action for breach of the duty.

10.1.10 It may not always be easy to ascertain whether there was such legislative intention. Factors to consider include the purpose of the statute, whether the loss is economic loss, whether there are other sanctions under the statute, and whether there are detailed provisions for the existence of detailed provisions for enforcement of the relevant duty.

Case Example

• See Digicel (St Lucia) Ltd (a company registered under the laws of St Lucia) and others v Cable & Wireless plc and others [2010] All ER (D) 107 (Apr) (15.4.2010). In considering the actionability of breaches of statutory obligations, Morgan J introduced a list of questions to be addressed (at Annex H to the judgment). “The indicators against actionability are the purpose of the statute ... the fact that the loss is economic loss, the existence of sanctions and the existence of detailed provisions for enforcement of the relevant duty.” (at para 180) “The arguments in favour of actionability are that the duty is placed on a private entity and that identifiable persons will suffer harm as a result of a breach of duty. The fact that the duty is expressed in terms which are not unsuitable for actionability is neutral on the question as to whether the duty is actionable.” (at para 181)

• See Dah Sing Insurance Services Ltd v Gill Gurbux Singh [2014] 1 HKLRD 691; CACV 255/2012 (23.12.2013). In answering the question on whether there is legislative intent to protect a particular class of the public, the Court of Appeal said that “I do not think the list of questions in Digicel (St Lucia) Ltd v Cable and Wireless plc would be answered all one way. It is a question of what weight should be given to various answers in different directions in order to arrive at the crucial answer to which all those questions are directed.” (per Kwan JA (as she then was) at para 69)
• See Chan Shu Chun & Anor v Dr Kung Yan Su & Anors, unreported, HCA 832/2014 (18.5.2017). Even when legislation creates criminal offences and imposes criminal sanctions, it does not necessarily follow that every such statute gives rise to private law claim. “In my view, given the legislative framework, the LegCo proceedings and other legislative materials, and looking at the matter as a whole, it is plain and obvious OSCO [Organized and Serious Crimes Ordinance] is designed to protect the public at large against the evils of organised crimes rather than to protect any limited class of persons... Overall, I find it plain and obvious the LegCo did not intend any private right of action in damages for mere breach of statutory duty laid down in ss.25 and 25A of OSCO, so no cause of action for breach of statutory duty simpliciter arises.” (per Marlene Ng DHCJ (as she then was) at para 64)

10.1.11 Schemes of social welfare serving the general public interest are unlikely to create private rights of action for breach of statutory duty, particularly where discretion has to be exercised.

Case Example

• See So Yuk Kam v Liu, Chan & Lam (A Firm) & Anor, unreported, DCCJ 1599/2012, (11.3.2014). The Employees Compensation Assistance Fund Board was responsible for administering a scheme established by the Employees Compensation Assistance Ordinance, Cap. 365 which the Court recognised to be in the nature of a social security scheme. The Court held that the Board was required under the Ordinance to carry out such inquiries as it considered necessary to make a determination or to facilitate the proper carrying out of its functions. “What inquiries are considered necessary is a matter to be determined by [the Board] in the circumstances of the relevant case. I agree that unless it is the intention of the legislature to confer a private right of action for breach of duty, it is inappropriate to superimpose on the statutory regime a common law duty of care giving rise to a claim in damages.” (per R Lai Deputy DJ (as he then was) at para 196).

(c) Misfeasance in Public Office

10.1.12 Misfeasance in public office: Public authorities or officers may be liable in damages for malicious, deliberate or injurious wrongdoing. There is thus a tort described as “misfeasance in public office”.

10.1.13 The law relating to the tort of misfeasance in public office has now been settled in the House of Lords’ decision in the Three Rivers case (2003). The fundamental requirement is abuse of power, bad faith or improper purpose. It could not be committed negligently or inadvertently and the tort is one of misfeasance, not nonfeasance.
Case Example

- In *Three Rivers District Council v the Governors and Company of the Bank of England (No. 3) [2003] 2 AC 1 (22.3.2001)*, Lord Steyn described the two varieties of the tort of misfeasance in public office:
  - the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person;
  - where a public officer acts knowing that he has no power to do the act complained of and the act will probably injure the plaintiff.

Both types involve bad faith on the part of the public officer.

- In *Tang Nin Mun v Secretary for Justice [2000] 2 HKLRD 324; CACV 13/2000 (30.5.2000)*, the Court of Appeal, having considered the House of Lords’ decision in the *Three Rivers* (the first hearing in 2000), held that a mental element of subjective knowledge on the part of the public officer that his actions would probably injure the plaintiff was required. There were three variants of subjective knowledge, namely where the officer:
  - specifically intended to injure the plaintiff; or
  - knew that in the ordinary course, injury to the plaintiff would follow, even though that was not his purpose; or
  - was recklessly indifferent as to whether or not his actions would cause the injury.

(d) False Imprisonment

10.1.14 An action of false imprisonment lies at the suit of a person unlawfully arrested, detained or detained for a longer period than is justifiable or otherwise imprisoned. It is a tort of strict liability. A police officer acting in obedience to a warrant is not liable to be sued for false imprisonment. Various statutory provisions may also authorise a police officer or other law enforcement agents to make an arrest with or without a warrant.

8. HKBOR

**Article 5**

**Liberty and security of person**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

(5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

**Case Example**

- See Ghulam Rbani v Secretary for Justice for and on behalf of The Director of Immigration [2014] 3 HKC 78; FACV 15/2013 (13.3.2014). The appellant, a Pakistani national, was placed under administrative detention by the Director of Immigration pending removal after serving a prison term imposed by the criminal court. The appellant sued the Director for damages for false imprisonment claiming that he was unlawfully detained after his release from prison. The CFA held that the appellant’s detention was initially lawful but the actual period of detention was excessive and inconsistent with the 2nd, 3rd and 4th Hardial Singh principles. The Director was duty bound to decide with reasonable diligence and expedition whether it would be possible to reach a decision on the repatriation of the appellant within the time limit for detention under the Immigration Ordinance. The CFA recognised that “[b]reach of the public law duty has the necessary causal connection with the detention and so is capable of constituting tortious unlawfulness if it ‘bears directly on the discretionary power that the executive is purporting to exercise.’” (per Ribeiro PJ at para 104)

(e) Malicious Prosecution

10.1.15 In general there is no duty of care in negligence in relation to the initiation or conduct of prosecutions.\(^\text{16}\) The tort of malicious prosecution provides a civil remedy for baseless and malicious prosecution. The burden of proof which has to be undertaken by the plaintiff in a case of malicious prosecution is a heavy one.

**Case Example**


“There are four ingredients in the tort of malicious prosecution. These are identified in pp 823-824 para 16-06 of Clerk & Lindsell on Torts (18th edn 2000) in a passage that was said by the House of Lords, correctly to state the law: see Martin v Watson [1996] 1 AC 74 at p80: In action of malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the plaintiff.

This passage has also been referred to as representing the law in the decision of

The majority of actions for malicious prosecution are brought against the police, but a private person who sets the law in motion may also incur liability. In the UK, malicious prosecution of civil proceedings is recognised as a viable tort at common law and there may be an implicit acceptance that it is also a viable tort in Hong Kong (see Chua, Grace Gonzales v Sobrevilla, Rhennie Boy Fernandez, unreported, DCCJ 3750/2015, per Tsui DJ at para 96).

10.2 ALTERNATIVE DISPUTE RESOLUTION

10.2.1 Alternative dispute resolution ("ADR") refers to processes for settling disputes by methods other than litigation. The various types of ADR include negotiation, conciliation, mediation, collaborative practice and arbitration. In general, the use of ADR promotes the early resolution of disputes. It provides a more flexible and less adversarial means to resolve disputes as compared with litigation. Parties are in better control of the outcome and may incur less cost in the process. In Hong Kong, mediation and arbitration are the more commonly used ADR processes.

10.2.2 Mediation: Mediation is a structured process in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties in identifying the issues in dispute, exploring options, communicating with one another and reaching an agreement regarding the resolution of the dispute. Parties enter into the mediation on a voluntary basis. The more common mode of mediation used in Hong Kong is facilitative mediation, but evaluative mediation is gaining interest amongst mediation practitioners and users.

10.2.3 As part of the Civil Justice Reform, the Judiciary issued Practice Direction 31 on Mediation, which came into effect on 1.1.2010, to encourage parties to use mediation for early settlement. Practice Direction 31 applies to all civil proceedings in the Court of First Instance and the District Court which have been begun by writ.

10.2.4 The Mediation Ordinance, Cap. 620 came into effect on 1.1.2013. The Mediation Ordinance aimed at providing a legal framework for the conduct of mediation without hampering the flexibility of the mediation process, and addressing some of the issues on which the then existing law was uncertain, such as confidentiality and the admissibility of mediation communications in evidence.

Case Example


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become part of the process which the Court approves of to the extent that parties may even be penalised in costs if they are not prepared to embark upon a mediation process” (per Rogers VP at para 3). The Court of Appeal further explained that confidentiality is fundamental to a mediation process. “Every mediation starts with an agreement between the parties and the mediator that what is said in mediation must be kept confidential and even the process of mediation and the fact that it is embarked upon should be kept, in my view, confidential. It is wholly wrong for any party, of their own motion, to refer to what was said or not said or arose out of mediation, unless and until, a concluded agreement has been reached in the mediation which encompasses what may be disclosed and not disclosed” (per Rogers VP at para 3).

10.2.5 Can mediation be used in the area of public law or judicial review? The occurrence of mediations as an alternative to judicial review remains rare although it is contended that mediation and judicial review can, and should co-exist19. Cases which may present problems or appear unsuitable for mediation include:

(a) cases requiring declarations of the Court;
(b) cases on alleged ultra vires issues;
(c) cases where points of law need to be decided;
(d) cases raising issues of public interest;
(e) cases where vindication of rights are at issue; and
(f) cases concerning the requirement of proper and lawful decision making by public bodies20.

Case Example

• See R (on the application of Cowl) v Plymouth City Council [2002] 1 WLR 803 (14.12.2001), a Court of Appeal case concerning the judicial review of the local authority’s decision to close a residential care home. Lord Woolf CJ, giving the judgment of the Court, challenged in forceful terms the prevailing view that public law disputes were not suitable for resolution through ADR.

“The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.” (at para 1)

10.2.6 Arbitration: Arbitration is a consensual process where parties agree to submit their disputes to be resolved by an impartial arbitral tribunal appointed by the parties. Arbitrations are commonly used to resolve constructions and commercial disputes. Arbitration provides parties with the flexibility to choose their arbitrators and preferred arbitration rules. The arbitration award is final and binding. There are limited grounds for appeal.

10.2.7 The Arbitration Ordinance, Cap. 609 unifies domestic and international regimes of arbitration on the basis of the law on international commercial arbitration as adopted by the United Nations Commission on International Trade Law on 21.6.1985 and amended on 7.7.2006 (“UNCITRAL Model Law”). It reinforces the advantages of arbitration, including respect for the parties’ autonomy, the savings in time and costs and protects confidentiality in arbitration proceedings and related Court hearing. An arbitral award made in Hong Kong can be enforced in over 150 contracting jurisdictions to the New York Convention.

Case Example

- See Pacific China Holdings Ltd v Grand Pacific Holdings Ltd, unreported, FAMV 18/2012 (21.2.2013). The CFA held that the courts may refuse to interfere with procedural decisions of arbitral tribunals and to set aside arbitral awards if the complaints advanced “do not constitute viable grounds for setting aside the award” under Art 34(2)(a)(ii) and (iv) of the UNCITRAL Model Law (per Chief Justice Ma at para 5). Chief Justice Ma further emphasised that “there is no basis for interference by the Court” where the tribunal has exercised proper procedural and case management discretions “reflecting its assessment of the requirements of procedural fairness as appropriate to the circumstances” (at para 5).

10.3 THE OMBUDSMAN

10.3.1 Since 2001 the Ombudsman (formerly the Commissioner for Administrative Complaints) has, under the Ombudsman Ordinance, Cap. 397, become a corporation sole and is given statutory backing for a complete “de-link” from the Administration, with the necessary powers for independent functioning.

10.3.2 The Ombudsman may investigate any action taken by or on behalf of an organisation (essentially Government departments and statutory bodies such as the Hospital Authority and the Securities and Futures Commission) appearing in Part I of Schedule 1 in the exercise of its administrative functions in consequence of maladministration (s.7(1)). “Action” is defined to include “omission, recommendation or decision” (s.2(1)). “Maladministration” is widely defined as "inefficient, bad or improper
administration”. Unreasonable conduct, abuse of power, delay, discourtesy and lack of consideration are included (s.2(1)).

10.3.3 The Ombudsman may also investigate any action taken by an organisation appearing in Part II of Schedule 1 (e.g. Police, ICAC) in the exercise of its administrative functions in relation to the Code on Access to Information in consequence of maladministration (s.7(1)).

10.3.4 The Ombudsman may decide to deal with a complaint by mediation if the subject matter involves minor maladministration (s.11B).

10.3.5 If the complaint relates to any action in respect of which the complainant has judicial or tribunal remedies (other than judicial review), the Ombudsman must not undertake or continue an investigation unless he is satisfied that it would not be reasonable to expect the complainant to resort to such remedies (s.10(1)(e)).

10.3.6 The Ombudsman must not undertake or continue any investigation relating to any matter specified in Schedule 2 which includes the conduct of any legal proceedings, any action taken in respect of appointments, discipline or other personnel matters, and any action taken by the police or the ICAC in relation to the investigation of any crime.

10.4 THE PRIVACY COMMISSIONER FOR PERSONAL DATA

10.4.1 Like the Ombudsman, the Privacy Commissioner for Personal Data is a corporation sole and given statutory backing to enforce the provisions in the Personal Data (Privacy) Ordinance, Cap. 486 (“PD(P)O”). His functions include the monitoring and supervising compliance with those provisions and investigating suspected breaches of the requirements under the PD(P)O. He may approve and issue codes of practice providing practical guidance for compliance with the statutory provisions.

10.4.2 The PD(P)O, enacted on 3.8.1995, is intended to protect the privacy of individual in relation to personal data. It was substantially amended in 2012 to tighten regulation of corporate data users on the use of customers’ personal data in direct marketing, to strengthen the Privacy Commissioner’s enforcement powers, to enable the Privacy Commissioner to provide legal assistance to an aggrieved individual seeking compensation for damages suffered and to provide for new exemptions from the Data Protection Principles (“DPP”) or other requirements.

10.4.3 The Ordinance covers the following main parts:

(a) 6 DPPs
(b) Access to and Correction of Personal Data
(c) Matching Procedures and Transfers of Personal Data
(d) Use or Provision of Personal Data in Direct Marketing
(e) Exemptions
(f) Functions and Powers of the Privacy Commissioner
(g) Offences and Compensation
Chapter 10  Other Remedies

A summary of the 6 DPPs (Schedule I of PD(P)O)

DPP1: personal data shall be collected for a purpose directly related to a function and activity of the data user; lawful and fair collection of adequate data; data subjects shall be informed of the purpose for which the data are collected and to be used.

DPP2: all practicable steps shall be taken to ensure the accuracy of personal data; data shall be deleted upon fulfillment of the purpose for which the data are used.

DPP3: unless the data subject has given prior consent, personal data shall be used for the purpose for which they were originally collected or a directly related purpose.

DPP4: all practicable steps shall be taken to ensure that personal data are protected against unauthorised or accidental access, processing or erasure.

DPP5: formulates and provides policies and practices in relation to personal data.

DPP6: individuals have rights of access to and correction of their personal data. Data users should comply with data access or data correction request within the time limit, unless reasons for rejection prescribed in the Ordinance are applicable.

(Reproduced from the website of the Office of the Privacy Commissioner for Personal Data, Hong Kong)

10.4.4 Offences: Subject to certain provisions for specific penalties, a data user who, without reasonable excuse, contravenes any requirement under the PD(P)O commits an offence (s.64A). The provision, however, does not apply to the breach of a DPP.

10.4.5 Compensation: An individual who suffers damage (including injury to feelings) by reason of a contravention of a requirement under the PD(P)O by a data user relating to personal data of that individual is entitled to compensation. The PD(P)O provides for due diligence defence (s.66).

10.4.6 Exemptions: The PD(P)O provides for various exemptions from specified DPPs or other provisions. The exemptions include performance of judicial functions (s.51A), domestic purposes (s.52), employment—staff planning (s.53), relevant process (s.55), personal references (s.56), security (s.57), crime or malpractice (s.58), health (s.59), care and guardianship of minors (s.59A), legal professional privilege (s.60), self-incrimination (s.60A), legal proceedings (s.60B), news (s.61), statistics and research (s.62), human embryos (s.63A), due diligence exercises (s.63B), emergency situations (s.63C) and transfer of records to Government Records Service (s.63D).

10.5 ADMINISTRATIVE APPEALS BOARD AND OTHER TRIBUNAL AND APPEALS BOARD

10.5.1 The Administrative Appeals Board (“AAB”) is an independent statutory body established in July 1994 under the AAB Ordinance, Cap. 442 (“AABO”). The AAB
will hear and determine appeals against certain administrative decisions which fall under its jurisdiction and as stipulated in the Schedule of the AABO, for example, certain decisions by the Privacy Commissioner for Personal Data and the Commissioner of Customs and Excise under the Dutiable Commodities Ordinance, Cap. 109.

10.5.2 Most AAB hearings are open to the public save for special circumstances when applications can be made by either party with justifications for anonymity or private hearing which is subject to approval by the presiding chairman. The Board has the power to confirm, revoke or vary the decisions appealed from. It has informal procedures and rules of evidence do not apply. The Board will give reasons in writing for their decisions which will be served on the parties to the appeal (s.25 of AABO).

10.5.3 Appeals from decisions of the AAB go to the Court of Appeal and sometimes judicial review may be available.

### Case Example

- See *Sino Asia Investment Ltd & Anor v Secretary for Justice*, unreported, HCAL 37/1998 (23.6.1998). Findlay J held that appeal provided under the AABO was a comprehensive and sophisticated appeal procedure, and the Court should not allow judicial review procedure to be used in its place unless it was shown that there were special reasons.

- See *Cathay Pacific Airways Ltd v Administrative Appeals Board* [2008] 5 HKLRD 539; HCAL 50/2008 (28.8.2008). The Court held that the decision of the Privacy Commissioner for Personal Data and the AAB were based on an incorrect construction of the true meaning and intent of the DPPs, and therefore, allowed the application for judicial review, quashed the decisions of the Commissioner and the AAB and remitted the matter to the Commissioner for fresh consideration.

10.5.4 There are also other tribunals that are established for specific purposes. For example, the Immigration Tribunal; Municipal Services Appeals Board; and various disciplinary tribunals and appeal boards for professionals, such as the Solicitors Disciplinary Tribunal and Electricity Ordinance Disciplinary Tribunal Panel. These tribunals and appeal boards are independent statutory bodies established to hear specific appeals as stipulated in the relevant ordinances.

### 10.6 INQUIRIES

10.6.1 Statutory or non-statutory inquiries may be conducted in relation to any particular matter or incident.

10.6.2 The Administration may appoint a non-statutory, administrative committee or inquiry to look into any particular matter or incident. Such committee or inquiry does not have power to summon witnesses or order the production of documents. Nor does it enjoy any immunity or protection against legal liabilities.
Previous non-statutory inquiries include:

- The Penny Stock Inquiry (July 2002)
- The SARS Inquiry (October 2003)
- The Harbour Fest Inquiry (May 2004)
- The Sai Wan Ho Development Inquiry (November 2005)

10.6.3 For statutory inquiries, the Chief Executive-in-Council may under the Commissions of Inquiry Ordinance, Cap. 86 appoint one or more Commissioners to inquire into the conduct of any public body, the conduct of any officer or into any matter which is in his opinion of public importance. The Commission enjoys statutory powers of investigation, including the power to summon any person to attend, to give evidence or to produce any document. Every inquiry held by a Commission shall be deemed to be a judicial proceeding. There are statutory provisions to protect the Commissioner and witnesses from suit or other proceedings for acts done or evidence given in the course of inquiries.

Statutory inquiries include:

- The Inspector MacLennan Inquiry (Jul 1980)
- The Witness Protection Inquiry (Jan 1993)
- The Garley Building Fire Inquiry (Dec 1996)
- The New Airport Opening Inquiry (Jul 1998)
- The Allegations relating to the Hong Kong Institute of Education Inquiry (Feb 2007)
- The Collision of Vessels near Lamma Island Inquiry (Oct 2012)
- Excess Lead Found in Drink Water Inquiry (August 2015)
- Diaphragm Wall and Platform Slab Construction Works at the Hung-Hom Station Extension under the Shatin to Central Link Project of the MTRC Inquiry (July 2018)

10.6.4 The LegCo may, in exercise of its powers under the Legislative Council (Powers and Privileges) Ordinance, Cap. 382, conduct an inquiry into any particular matter or incident. Normally, a committee or sub-committee would be set up and authorised by resolution of the LegCo to conduct the inquiry. The committee or sub-committee may, in exercise of the powers under the Ordinance, order any person to attend before it and to give evidence or to produce any document relevant to the subject matter of the inquiry. Every person lawfully ordered to attend to give evidence or to produce any document is entitled to the same right or privilege as before a Court of law (e.g. legal professional privilege and public interest immunity).
LegCo inquiries include:

- Inquiry into the circumstances surrounding the departure of Mr Leung Ming Yin from the Government and related issues (June 1997)
- Inquiry into the circumstances leading to the problems surrounding the commencement of the operation of the new Hong Kong International Airport at Chek Lap Kok since 6.7.1998 and related issues (January 1999)
- Inquiry into the building problems of Public Housing Units (January 2003)
- Inquiry into the handling of SARS outbreak by the Government and the Hospital Authority (July 2004)
- Inquiry into matters relating to the post-service work of Mr Leung Chin-man (December 2010)
- Inquiry into the issues arising from Lehman Brothers-related minibonds and structured financial products (Jun 2012)
- Study Mr Leung Chun-ying’s involvement as a member of the jury in the West Kowloon Reclamation Concept Plan Competition and related issues (June 2012)
- Inquiry into matters about the Agreement between Mr Leung Chun-ying and the Australian Firm UGL Limited (set up in November 2016)

10.7 REMEDIES UNDER THE HKBORO

HKBORO

6. Remedies for contravention of Bill of Rights
(1) A court or tribunal –
   (a) in proceedings within its jurisdiction in an action for breach of this Ordinance; and
   (b) in other proceedings within its jurisdiction in which a violation or threatened violation of the Bill of Rights is relevant,
   may grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances.

8. HKBOR

   Article 5
   Liberty and security of person
   (5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

   Article 11
   Rights of persons charged with or convicted of criminal offence
   (5) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of
such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

10.7.1 The United Nations Human Rights Committee in its General Comment No. 32, observed that the guarantee under Article 14(6) of the ICCPR (implemented by HKBOR 11(5)) does not apply if it is proved that the non-disclosure of such a material fact in good time is wholly or partly attributable to the accused. Furthermore, no compensation is due if the conviction is set aside upon appeal, i.e. before the judgment becomes final, or by a pardon that is humanitarian or discretionary in nature or motivated by considerations of equity, not implying that there has been a miscarriage of justice.

10.8 EX GRATIA COMPENSATION

10.8.1 *Ex gratia* compensation is sometimes paid to persons who are the victims of miscarriage of justice to compensate them for resulting losses, e.g. loss of liberty, loss of earnings, etc. *Ex gratia* compensation may be refused if there is serious doubt as to the claimant’s conduct.
Annex I - Judicial Review Flowcharts

The Stages of Judicial Review

Grounds for application first arose

Promptly and in any event within 3 months

Court may seek short response from putative respondent / interested party and/or direct an oral hearing

Applicant applies for leave on an ex parte basis

Leave refused

Applicant may appeal to the Court of Appeal within 14 days

Dismissible

Allowed and leave granted

Leave granted (after hearing or on papers only)

Respondent / interested party may apply to set aside leave

Dismissible

Allowed

Within 14 days

Applicant to issue formal application by Originating Summons, and serve the same on Respondent / interested party with supporting affidavit and the order granting leave

Within 56 days

Respondent to file affidavit in reply

Applicant may seek an order for interim relief

Parties to fix date for substantive hearing

7 clear working days before hearing

3 clear working days before hearing

Applicant and interested party supporting the application to file hearing bundles and skeleton arguments

Respondent and interested party opposing application to file skeleton arguments

Appeal

Within 28 days

Substantive hearing: JR dismissed or allowed
Annex I - Judicial Review Flowcharts

Is judicial review available? (decision, act or omission)

Was there a decision, act or omission alleged to be unlawful?

Yes

Was it made by a public body?

No

Are there exceptional circumstances for grant of declaratory relief?

No

Are there exceptional circumstances?

No

Did the decision, act or omission affect public law rights?

Yes

Does the applicant have locus standi to apply for judicial review?

No

Are there public law grounds for review?

Yes

(a) illegality; (b) irrationality

(c) procedural impropriety

Has judicial review been excluded?

No

Are there exceptional circumstances?

Yes

Has the applicant exhausted alternative remedies?

No

Application can be made

Yes

Application inappropriate

No

Respondent / interested party may apply to set aside leave

Within 14 days

Dismissed

Allowed

Respondent to file affidavit in reply

Applicant may seek an order for interim relief

Parties to fix date for substantive hearing

Respondent and interested party opposing application to file skeleton arguments

Substantive hearing: JR dismissed or allowed

Within 28 days

Appeal
Is judicial review available? (legislation only)

Is there any legislation alleged to be unlawful?

Yes → Does the applicant have *locus standi* to apply for judicial review?

Yes → Are there public law grounds for review?

(a) *ultra vires*;
(b) unconstitutionality

Yes → Application can be made

No → Are there exceptional circumstances for grant of declaratory relief?

No → Application inappropriate

Yes → No

No → Are there public law grounds for review?

Yes → Application can be made

No → Application inappropriate
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