HCAL 188/2016

[2021] HKCFI 3003

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF FIRST INSTANCE**

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 188 OF 2016

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| BETWEEN | CHOI CHUEN SUN  And  COMMISSIOINER OF CORRECTIONAL SERVICES  SUPERINTENDENT (HEAD OF INSTITUTION) OF STANLEY PRISON | Applicant  1st Respondent  2nd Respondent |

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Before: Hon Lisa Wong J in Court

Date of Hearing: 28 August 2018

Date of Judgment: 26 November 2021

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**J U D G M E N T**

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***A. OVERVIEW***

1. The issue raised by this application for judicial review is the extent to which a person in custody (“**PIC”** or **“PICs**” as appropriate) should be allowed to maintain contacts with persons outside prison by telephone.
2. Such issue arises for determination in the context of a challenge by Mr Choi Chuen Sun (who served part of a sentence of imprisonment at the Stanley Prison (“**SP**”) between 25 March 2015 and 14 August 2016) to:

(1) the constitutionality and legality of Chapter 56-01 (“**SO 56-01**”) of the Standing Orders (“**SO**” or “**SOs**” as appropriate) issued, and as amended in February 2013, by the Commissioner of Correctional Services (“**Commissioner**”), the 1st respondent herein; and

(2) the legality of the decision (“**Decision**”) made by the Superintendent (Head of Institution (“**HoI**”)) of the SP, the 2nd respondent herein, on 17 May 2016, rejecting the applicant’s application to phone Mr Tsoi Yiu Cheong Richard (“**Mr Tsoi**”) of the Society for Community Organisation (“**SoCO**”).

1. Mr Justice Thomas Au (as Au JA then was) granted leave on 30 March 2017.
2. The SoCO was initially named, but subsequently removed by the order made by this court on 27 December 2017, as an interested party, given that it is not a person directly affected by this application, as required under Order 53, rule 1A of the Rules of the High Court (Cap 4A). Consequently, this court refused the SoCO’s application to be heard as an interested party.
3. The applicant has, by paragraph 4 of the skeleton arguments for him, abandoned the fifth and sixth grounds for judicial review[[1]](#footnote-1), thereby giving up the challenge to the Decision.
4. Hence, this judgment concerns only SO 56-01.

***B. STATUTORY AUTHORITY FOR THE SOs***

***B.1 Prison Ordinance (Cap 234)***

1. The starting point is s 9 of the Prison Ordinance (“**Ordinance**”), which puts prisoners under the control of the Commissioner.
2. By s 25(1)(a), (g), (h) and (l), the Chief Executive in Council (“**CE in C**”) is empowered to make rules providing respectively for (1) the regulation and government of prisons; (2) the conditions under which visitors may be allowed in prisons; (3) the discipline, instruction and correction of prisoners; and (4) all other matters relating to prisons.

***B.2 Prison Rules (Cap 234A)***

1. The Prison Rules (“**Rules**”) are the subsidiary legislation made by the CE in C pursuant to the powers granted under s 25.
2. The rules relevant to this application are to be found in Part I (entitled “General Rules for the Government of Prisons”). More specifically, sub-division 7 of Division 3 (entitled “General Treatment”) of Part I contains rules on “communications and visits” applicable to convicted PICs[[2]](#footnote-2), of which the applicant was one.
3. Insofar as it is material:
4. Social visits[[3]](#footnote-3) - A PIC can be visited by his/her relatives and friends (rule 48). Among other restrictions for the maintenance of discipline and order in the prison and for the prevention of crime, under rule 48(a) and (b), visits by relatives and friends are limited to no more than 3 persons for 30 minutes for each visit and to 2 visits per month. The superintendent of a correctional facility may, in special cases, extend the duration of a visit (rule 48(g)). A convicted PIC may also be permitted to see his relatives/friends for the purpose of making arrangements respecting his property or for any other special reason (rule 48(h)).
5. Letters - Subject to certain restrictions, a PIC may send as many letters to any persons, with one letter per week at public expense, and to receive any number of letters from any person (rule 47(1), (2) & (5)). However, save and except letters to and from lawyers or certain specified persons, both outgoing and incoming letters are subject to screening, i.e. being opened, searched, read and/or even stopped, as needed (rules 47A, 47B & 47C). The purposes of screening are, *inter alia*, to protect any individual’s personal safety and to maintain the security, good order and discipline of the prison (rule 47A(2), (4) & (5)).
6. Rule 77(4) empowers the Commissioner to “issue such orders as may be necessary for the government of all institutions under his control **in conformity with [the Rules]**” (「署長須按需要發出命令，**以便遵照本規則的規定**，管治所有受其控制的院所，和維持受僱於該等院所的人(部屬人員除外)的紀律。」) (applicant’s emphasis).

***C. RELEVANT SOs***

1. Internal guidelines for the operation and management of correctional facilities are contained in, *inter alia*, the SOs[[4]](#footnote-4) which were issued, and from time to time amended, by the Commissioner pursuant to the power conferred by rule 77(4) of the Rules.
2. For present purposes, we shall look at chapters 55 (mails and visits), 56 (phone calls) and 58 (which is partly concerned with phone calls by PICs having spouse/children/parents/siblings (“**family members**” collectively) outside Hong Kong).
3. More particularly, SO 55-13 supplements rule 48 of the Rules regarding social visits:
4. An inmate in a detention centre (“**DC**”), rehabilitation centre (“**RC**”), training centre (“**TC**”) and drug addiction treatment centre (“**DATC**”) and young PICs can, without application, receive 4 social visits each month (paragraph 14).
5. Any other convicted PIC may, upon application and on a case-by-case basis, be allowed 2 additional visits on weekdays by:

(a) his/her family members if the HoI is satisfied that such extra visits are in the interest of his/her rehabilitation and relationship with his/her family; and

(b) other relatives under special circumstances

(paragraphs 9 & 12). Approval for these 2 additional visits by family members/relatives, if given, would be given in one go at the admission interview (paragraph 14).

1. Further social visits within the same calendar month may be approved upon individual application (paragraph 15).
2. Visitors other than those permitted under the Rules (i.e. relatives and friends) may be allowed on application upon conditions relating to the interest of the PIC, the good order and discipline of the institution and impact on public interest (paragraph 14).
3. A PIC must on admission declare the identities of his/her visitors who must be his/her relatives and friends though subsequent amendments to the list may be approved upon application (paragraph 1).
4. Regarding letters, in addition to those permitted under rules 47 to 47C, the HoI may permit PICs:

(1) in DC/RC/TC/DATC;

(2) under 21; and

(3) who have a genuine need to write and send additional letters but do not have sufficient earnings to pay the cost thereof

to write and send more than 1 letter per week at public expense (SO 55-17 paragraph 3).

1. As for telecommunication, neither the Ordinance nor the Rules contains any stipulation regulating the making of telephone calls by PICs. The SOs, by chapters 56 and 58, fill the gap. More specifically:
2. SO 58-01 reads:

“**Person in Custody Privileges**

1. A [PIC] will be eligible for privileges upon admission … .

1. The followings are listed as *privileges*:

* …
* one call to [PICs’ family members] **outside the territory.**”

(emphasis added save for the heading)

1. Then, SO 58-17 elaborates on how the said privilege under paragraph 2 of SO 58-01 can be exercised:

“**Phone Call to [PIC’s family members] outside the Territory**

If a [PIC] has not received any visit from and has made no phone call to his/her [family members] in the past two consecutive months, he/she may be eligible to make one 10-minute phone call to his/her [family members] **outside the territory**. He/she will bear the cost of all charged telephone call.” (emphasis added save for the heading)

(3) Where a PIC wishes (a) to call a person within Hong Kong or a person outside Hong Kong who is not a family member or (b) to make more than one call to his family members outside Hong Kong, he can turn to SO 56-01, the constitutionality and legality of which is under scrutiny, which provides:

“**[PIC] Phone Call**

1. Apart from the privilege of making phone call to [PICs’ family members] outside the territory, HoI may under the following **special circumstances** and on being satisfied with a [PIC’s] **genuine** **need for a timely communication** with his friends and relatives, allow a [PIC] to make local or overseas phone calls, on case-to-case basis:

* To inform them of the [PIC’s] detention or whereabouts;
* To arrange for bail, fine payment or other legal matters;
* To acquire information about the latest situation of his/her [family member] who is critically ill or being affected by natural disasters; or
* **Any other situations where HoI considers it justifiable to approve on compassionate grounds.**”

(emphasis added save for the heading)

(4) SO 56-02 then sets out how a phone call allowed under SO 56-01 is to be made:

“**Manner in Conducting [PIC] Phone Call**

1. Calls will be supervised and monitored by an officer appointed by HoI.
2. A record showing the date, time, name and PRN[[5]](#footnote-5) of the [PIC] and the name and telephone number of the receiver must be maintained.
3. The phone call should normally be made between 0900 hours and 1700 hours daily. HoI may exercise discretion to approve a request for making the phone call between unlock to 0900 hours or from 1700 hours to lockup on justifiable grounds. A request for making phone call during the period between lockup and unlock must have the personal approval of AC(O) with full justification.
4. The responsibility of reminding phone call receivers on monitoring and recording of conversation should be taken up by [PICs] who have to sign an undertaking form specifying such prior to making the phone call.”

(footnote added)

1. In the instant case, Mr Tsoi and Mr Wong Chi Yuen of the SoCO (“**Mr Wong**”), the intended receivers of the applicant’s proposed phone calls, are obviously not the applicant’s family. Further, on all occasions, the applicant wished to telephone either of these 2 gentlemen not for any of the purposes specified in the first 3 bullet points under SO 56-01. His applications therefore fell to be considered under the fourth bullet point. The “**2nd Application**” to call Mr Wong ([60] to [62] below) was an instance of grant of approval under the fourth bullet point under SO 56-1. On the other hand, the “**1st Application**” to call Mr Tsoi ([55] to [58] below) was turned down for the lack of any genuine need on the part of the applicant for a timely communication with Mr Tsoi that could be justified on compassionate grounds. The “**3rd Application**” to call Mr Tsoi ([63] to [74] below) was, according to the respondents, declined due to the applicant’s failure to complete and sign the undertaking form mandated by paragraph 4 of SO 56-02.

***D. SUMMARY OF MEANS FOR PICS TO COMMUNICATE WITH OUTSIDERS***

1. Under the above-quoted provisions of the Rules and the SOs, a PIC can communicate with persons outside prison in a variety of ways.

***D.1 Social visits***

1. At a minimum, under the Rules, up to three relatives/friends (in any combination) may visit a PIC, each time for a 30-minute session, twice a month.
2. Additional visits may be allowed:
3. PICs at DC/RC/TC/DATC and young PICs automatically have 2 more social visits per month.
4. Any other convicted PIC may at the admission interview applies for, and obtains, general permission from the HoI for 2 more visits per month by his/her family and/or relatives on weekdays if the HoI is satisfied that it is in the interest of his/her rehabilitation and relationship with his/her family for the PIC to receive more visits by his/her family or that there are special circumstances for his/her other relatives to visit him/her. According to paragraph 23 of the affirmation dated 6 June 2017 (“**Wong’s affirmation**”) of Wong Chi Wai (“**Superintendent Wong**”)[[6]](#footnote-6), approval for such additional visits is generally given to encourage PICs to maintain and/or strengthen familial and social bonding through regular visits.
5. Further social visits within the same calendar month may also be approved upon individual application.
6. Moreover, the duration of a social visit may be extended in special cases.
7. Visitors other than those permitted under the Rules may be allowed on application upon conditions relating to the interest of the PIC, the good order and discipline of the institution and impact on public interest.
8. Lastly, it is worth mentioning that the CSD works with various NGOs, SoCO being one of them, to provide rehabilitation programmes to PICs. There is no limit as to the number of NGO visits that a PIC may receive. During a NGO visit, the PIC and the NGO representative can communicate without being separated by any physical barrier, although a CSD staff would be present.
9. There are a total of twenty-four correctional institutions in Hong Kong: five on the Hong Kong Island, five on the Kowloon peninsula, ten in the New Territories, four on the Lantau Island and three on Hei Ling Chau[[7]](#footnote-7).
10. To facilitate social visits of PICs, all institutions are opened for such purpose on Saturdays, Sundays and public holidays and are closed only for one to two weekdays.
11. Given the relatively small geographic area of Hong Kong, the well-developed transportation system of the territory and the facilitative visiting days and hours adopted by correctional facilities, this court does not agree with the observation of Mr Stanley Ma, counsel for the applicant, that Hong Kong’s correctional facilities are generally remotely located or not easy to physically access.
12. The applicant has no contactable family either in or out of Hong Kong. Upon his admission to the SP in March 2015, he put down *inter alios* the following SoCO members[[8]](#footnote-8) in his list of visitors: Mr Tsoi, Mr Wong and one Mr Ng Wai Tung. As at 1 June 2017, the applicant had declared eighteen visitors. Five such visitors including Mr Tsoi had visited the applicant on eight occasions between June 2015 and April 2017. Mr Tsoi himself had visited the applicant four times on an irregular basis.
13. Following his transfer to the Tai Lam Correctional Institution (“**TLCI**”) in August 2016, the CSD referred the applicant to receive NGO service from the SoCO to assist his integration into society after his release. From August 2016 to May 2017, the applicant had received a total of seven visits by staff of the SoCO.

***D.2 Written correspondence***

1. Subject to screening by the CSD, a PIC may send and receive as many letters as he likes, with one letter per month posted at public expense. Further, the HoI may allow (1) PICs in DC/RC/TC/DATC; (2) PICs under 21; and (3) PICs who have a genuine need to write and send additional letters but do not have sufficient earnings to pay the cost thereof, to write and send more than 1 letter per week at public expense. Copies of various letters sent and received by the applicant during his imprisonment at the SP and TLCI are included in the hearing bundles.
2. We have a relatively small territory. The Hongkong Post is reputably efficient. Letters sent by post for local delivery are normally received within a day or two. Letter is thus an effective and efficient means of communication.

***D.3 Telecommunication***

1. Third, a PIC may make one 10-minute phone call to his family members outside Hong Kong if he (1) has not been visited by his family members in Hong Kong and (2) has not telephoned them, in 2 consecutive months. This threshold was lowered to one month with effect from 27 June 2016 to allow PICs to have more frequent communication with their family members outside Hong Kong. Although an application is required for vetting purpose, such privilege can be enjoyed automatically once the said 2 conditions are met.
2. According to paragraphs 35 and 36 of Wong’s affirmation, the arrangement for phone calls under SO 58-17 by PICs whose family members are outside Hong Kong came into force on 2 January 2014. The review resulting in such change followed a steady increase in the population of PICs of other nationalities from 2009 to 2013 (see footnote 15 of Wong’s affirmation). The purpose of such change is to compensate for the comparatively disadvantaged position of PICs whose family members are outside Hong Kong and therefore cannot readily visit them in person.
3. The statistics of telephone call applications under SO 58-17 from 2014 to 2016 before the court is as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| Year | 2014 | 2015 | 2016 |
| Application Number | 7,126 | 9,530 | 12,108 |
| Rejected cases | 124 (1.70%) | 118 (1.20%) | 35 (0.3%) |
| Approved cases | 7,002 (98.30%) | 9,412 (98.80%) | 12,073 (99.7%) |

There was a marked increase (28.3%) in phone calls made under SO 58-17 in 2016 after the threshold for the making of such phone calls was lowered in June 2016.

1. Apart from the privilege of calling his/her family members outside Hong Kong (if any) exercisable as aforesaid, a PIC may, on a case- by-case basis, be permitted to make a phone call (local or overseas) if he has a genuine need for a timely communication for a specified or special reason that is justifiable on compassionate grounds.

1. The statistics of telephone call applications under SO 56-01 from 2014 to 2016 before the court is as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| Year | 2014 | 2015 | 2016 |
| Application  Number | 2,873 | 4,438 | 3,652[[9]](#footnote-9) |
| Rejected cases | 0 | 8 (0.18%) | 40 (1.10%) |
| Approved cases | 2,873 (100%) | 4,430 (99.82%) | 3,612 (98.90%) |

1. The applicant has, in paragraphs 128 and 129 of the Amended Form 86 dated 20 August 2018 (“**Form 86**”), expressed the opinion that “the local prisoner would have no expectation on approval even if he could fulfil any of the categories [under SO 56-01]” (*sic*) and that “the breadth of the discretion given to the officer in charge under SO 56-01 gives rise to a risk of arbitrary or discriminatory decision”. He has unfortunately not adduced evidence of any supporting fact or circumstance. In the light of the statistics set out in [34] and [36] above, such bare assertions seem to me to be detached from reality and unfair.

1. Whilst encouraging PICs to maintain, strengthen or re-establish ties with their relatives and friends, “the CSD has only limited resources and manpower to handle the administrative work in relation to the making of phone calls” and “extra resources will be required to install new telephone booths[[10]](#footnote-10) if the number of approved cases for making telephone calls substantially increases”. See paragraph 31 of Wong’s affirmation.

***D.4 Other channels of communication***

1. According to paragraph 14(d) of Wong’s affirmation, there are other channels of communications including but not limited to video calls at the Mongkok Counselling Centre. This service is provided where the relatives and friends of a PIC should have difficulties in attending the penal institution due to age, pregnancy, disabilities or other special circumstances.
2. I have included in this section means of communication other than by telephone. In my view, a critical review of the restrictions on a PIC’s communication with the outside world by telephone, being just one way of communication, should not be conducted in isolation without regard to the availability, adequacy, effectiveness and efficiency of the other means by which a PIC can keep contacts with the outside world. Such approach is, I believe, supported by the opinion of the European Court of Human Rights (“**ECtHR**”) in *AB v Netherlands* (2003) 37 EHRR 48 at [92] (see [84] below).

***E. APPLICATION TO MAKE PHONE CALLS***

1. For a comprehensive view and understanding of the present case, it would be useful to know how an application to make a phone call is made, processed and determined.
2. Given the particular circumstances leading to this application, I shall focus on applications submitted under the fourth bullet point of SO 56-01.
3. A PIC making such an application must complete a「在囚人士的致電申請」(“**Form**”) and a「在囚人士致電承諾書」 (“**Undertaking**”). The latter is printed on the back of the former. Their contents reflect the terms of SO 56-02.

1. The Form requires the PIC making the application to, *inter alia*:
2. fill in his own personal particulars (name, PRN, work unit and location of detention); and
3. the name, address and telephone number of, and the PIC’s relationship with, the receiver;
4. state whether PIC has received any visit from his family members in the preceding 2 months (shortened to 1 month with effect from 27 June 2016);
5. further state whether he has received any permission to telephone his family members in the preceding 2 months (shortened to 1 month with effect from 27 June 2016);
6. if the answer to either question is “yes” or if the receiver is not a family member of the PIC outside Hong Kong, state the reason for the call.
7. By signing the Undertaking, the PIC agrees to comply with a number of conditions when he/she makes the approved call. In particular, by paragraph 3 under “General Conditions” (「一般條件」) (“**General Condition 3**”), the PIC agrees (1) to the telephone conversation being monitored and recorded by the CSD, (2) to remind the receiver of such monitoring and recording before the beginning of the telephone conversation and (3) to immediately inform the monitoring officer who will stop the conversation if the receiver does not accept the monitoring and recording of the telephone conversation.
8. Upon submission of an application, the responsible officer will interview the PIC to verify the reason put forward for the call so as to see whether he has a genuine need for a timely communication with the receiver and whether compassionate ground exists to justify the call. The list of justifiable reasons and compassionate grounds is not exhaustive. All relevant circumstances, including the PIC’s representation, are taken into account.
9. A senior officer (i.e. one not below the rank of chief officer) will then consider the application. As a matter of practice, where a telephone call application is refused, the senior officer will (1) verbally inform the PIC of the refusal and the reason therefor and (2) entertain further representation from the PIC, if any.
10. There is no limit on the number of applications that one can make. A fresh application, if considered justified, may be made.
11. PICs can also approach CSD staff to convey verbal messages to their relatives and friends after an unsuccessful application to make a phone call. During his stay at the TLCI, the institutional management had, at the applicant’s requests, relay verbal messages to his friends on eight occasions.
12. Although there is no appeal mechanism as such against the rejection of a phone call application, there are various channels of complaint available to a PIC whose telephone call application is denied. From 2014 to March 2017, a total of six complaints about telephone call arrangements had been made to visiting justices of peace, the CSD’s Complaint Investigation Unit (“**CIU**”), a member of the Legislative Council and the Ombudsman. All six complaints were found to be unsubstantiated after investigation.
13. See paragraphs 34 and 41 to 47 of Wong’s affirmation.

***F. FACTUAL BACKGROUND***

1. Notwithstanding the abandonment of the application for judicial review of the Decision, to put the challenge to SO 56-01 in proper perspective, I should still set out the events prompting this application for judicial review.
2. The applicant is a repeat offender with a record of more than forty convictions since 1978. On 6 March 2015, he was ordered by the Post-Release Supervision Board to re-imprisonment for four months and twenty-two days for breaching the condition of a supervision order dated 26 June 2014 made under the Post-Release Supervision of Prisoners Ordinance (Cap 475). On 25 March 2015, the applicant was admitted to the SP. Then, on 23 June 2015, he was convicted of, and sentenced to a total of fifty-two months’ imprisonment for, one count of attempted robbery and four counts of theft. The applicant served such sentence at the SP until 14 August 2016 and thereafter at the TLCI[[11]](#footnote-11).
3. During his imprisonment at the SP, the applicant made altogether five applications to make a phone call. Two such applications were withdrawn. The parties have therefore gone into the details of the remaining three applications, the last of which gave rise to the now abandoned application for judicial review of the Decision.

***F.1 Unsuccessful 1st Application***

1. The 1st Application was made on 19 May 2015 to call Mr Tsoi. The applicant described Mr Tsoi as a friend (「友」) in the Form. He gave the following reason for the call:「因本人２個「月」內沒有探訪，及早前寄了信予他至今尚未回信，因此要求打電話給他，索取資料。」 It is thus incorrect for the applicant to allege in paragraph 14 of the Form 86 that he had specified that he would like to obtain from Mr Tsoi “further information on law related to prisoner’s right”.
2. The 1st Application was turned down. The applicant alleges that no reason was given to him or recorded on the copy of the Form that was subsequently provided to him in response to a personal data request made under the Personal Data (Privacy) Ordinance (Cap 486).
3. On the other hand, according to the Commissioner, upon receiving the 1st Application, Officer Ho Chi Fai (“**Officer Ho**”) interviewed the applicant on the spot. The applicant confirmed to Officer Ho that he had no urgent need to make the call. It was then explained to him that permission to make phone call is only for those in urgent need and his request would not be recommended. Officer Ho noted the following at the foot of the Form:

“Not Recommended. The receiver is on subject’s visitor list. RU2[[12]](#footnote-12) staff may call the visitor, asking him to visit the subject upon his request. However, subject refused. There is no urgency. Subject would just like to send greeting to the receiver, and ask him to send him information regarding his casual personal matter, with no urgency” (footnote added).

1. After Officer Ho reported the case to him, Chief Officer (Penal Administration) Pang Angel Anthony (“**CO Pang**”) interviewed the applicant on the same day. The applicant indicated that he wished to call Mr Tsoi because he had not replied to his letters. However, the mail record showed that the applicant had not sent any letter to Mr Tsoi since his admission to the SP on 7 March 2015. Upon questioning by CO Pang, the applicant confirmed that he had no urgent need to call Mr Tsoi and provided no reason that might justify the phone call on any compassionate ground. The 1st Application was therefore denied. CO Pang verbally explained the refusal to the applicant there and then at the interview. The applicant was then asked if he required RU2 staff to call his friend to visit him but he replied in the negative. He was advised to approach RU staff if he had any further query. He was also encouraged to maintain contact with his friend by letter.

As the applicant has not taken issue with the refusal of the 1st Application, there is no need to resolve the truthfulness of the reason given by the applicant for the call or whether reason was given for the refusal.

***F.2 Successful 2nd Application***

1. About 9 months later, on 22 February 2016[[13]](#footnote-13), the 2nd Application was made to call Mr Wong. This time, the applicant did not put down any reason for the call in the Form. He alleges in paragraphs 18 and 19 of the Form 86 that he wished to call Mr Wong because “he had not been visited for two months and that there had been no reply from Wong to his previous letter, therefore he would like to call Wong for seeking information on law related to prisoner’s right”.
2. However, Officer Cheung Chiu (“**Officer Cheung**”) had noted on the Form (*sic*):

“The subject PIC claimed that he desperately needs his friend to help him to handle his housing problem. He received a letter from the Housing Authority saying that his application for public housing was suspended due to imprisonment. He worried that he would not have accommodation upon his discharge. He did not have any family member and did not have visit for months. In early February, he had sent a letter to his friend, who was familiar with public housing application procedures, for helping him to seek legal advice to challenge the procedure of the Housing authority, but he had not received any reply yet. RU2 staff had helped him to call his friend, who said that he was too busy to visit or mail to subject. His request to call his friend was assessed and recommended on compassionate grounds”.

1. Chief Officer (Penal Administration) Yu Kwong Hung (“**CO Yu**”) approved the 2nd Application. The true reason behind the 2nd Application does not matter as it was in any event granted on compassionate ground.

***F.3 Unsuccessful 3rd Application***

1. Then, on 9 May 2016, the applicant submitted a Stanley Prison Prisoner Submission stating that:「本人在兩個月內沒有親友探訪,為此要求自行致電 (xxxxxxxx) 于香港社區組織協會,社區組織幹事蔡耀昌先生(朋友)投訴赤柱監獄有關官員行為及行政失當。」It is printed at the top of this submission form: “Prisoner may use this sheet in making submission or request, unless specified form is required by the authority.”[[14]](#footnote-14)
2. The Form and the Undertaking are specified for applications to make phone call. The following entry dated 9 May 2016 was made in what seems to be a chronological log with the title “APPLICATIONS/ INTERVIEW/INFORMATION” kept in respect of the applicant’s detention at the SP (“**Log**”):

“Subject PIC approached me and requested for making a local phone call to his friend. Besides, he handed in a submission relating to his request. In his submission, he claimed that he wished to lodge a complaint against staff members of SP. The proper complaint channels were explained to him. The subject was also enquired if he wished to have his allegation to be referred to CIU or other complaint channels. The subject replied in negative and insisted that he would only wished [SoCO] to follow his matters. As such, a set of application form for phone call was issued to him. Apart from the above, he had no other request or complaint.”

1. Hence, on 17 May 2016, the applicant purported to comply with the relevant formalities by filling in and signing the Form. It is suggested in paragraph 21 of the Form 86 that the applicant “purported to rely on the same grounds as stated in his Prisoner Submission Form dated 9th May 2016”. In fact, the applicant left the space for the reason for the call blank.

1. Again, there is a dispute as to whether the applicant was given the reason for the refusal of the 3rd Application. The applicant alleges in paragraph 22 of the Form 86 and paragraphs 12 and 13 of his affirmation that no reason was given.
2. The greater controversy is, however, related to the signing of the Undertaking. More specifically, it appears that the applicant did at some point sign on the Undertaking but his signature was subsequently crossed out. The questions are who crossed out the applicant’s signature and why the signature was crossed out.
3. The applicant says in paragraph 25 of the Form 86 that he “has no idea if his signature has been crossed out subsequently but asserted that he did never cross out the signature when he submitted the *Application Form* with the *Undertaking* to the CSD officer”. See also paragraphs 5(ii) and (iii), 10, 11, 12 and 14 of the applicant’s affirmation. In particular, the applicant alleges in paragraph 14 that he always consents to the monitoring and recording of his phone calls by agreeing to and signing the Undertaking.
4. On the other hand, according to Officer Cheung, in the morning on 17 May 2016, the applicant submitted to him the Form for the 3rd Application without completing or signing the Undertaking. The officer returned the document to the applicant and reminded him of the requirement to complete and sign the Undertaking. The applicant re-submitted to Officer Cheung the Form and the Undertaking 2 to 3 minutes later. This time, the Undertaking was signed but the fields for the applicant’s name and PRN and the date of the document were left blank. The applicant then told Officer Cheung that he considered General Condition 3 a breach of his human rights. He proceeded to cross out his signature on the Undertaking in the presence of Officer Cheung and re-submitted the paper to the officer[[15]](#footnote-15). Officer Cheung advised the applicant that if he refused to complete or sign the Undertaking, his application could not be acceded to. The applicant indicated that he understood but still refused to complete or sign the Undertaking. He also told the officer that he had no urgent need to speak to Mr Tsoi. Officer Cheung noted at the foot of the Undertaking in the applicant’s presence: “The subject PIC refused to sign the [Undertaking].”
5. In the afternoon on the same day, Officer Cheung recorded at the bottom of the Form:

“According to [SO 56-02] “Manner in Conducting [PIC] Phone Call”, [PICs] have to sign [the Undertaking] for application for making phone call prior to making the phone call. However, the subject refused to sign the [Undertaking]. In view of this situation, he is not recommended to make a phone call.”

1. In addition, Officer Cheung also recorded his interview with the applicant in the Log as follows:

“Subject person-in-custody (PIC) was interviewed by the undersigned regarding his request for making a telephone call to his friend (蔡耀昌) who was on the subject’s visitor list. Before he handed in the [Form], he questioned the undersigned why the telephone conversation was subject to staff monitoring and recording, and he was dissatisfied with the condition imposed. He then crossed his signature on the [Undertaking] in front of the undersigned.

I explained to him that according to [SO 56-02], [PICs] had to sign [the Undertaking] when he applied to make phone call of which he needed to consent to have the phone conversation supervised and monitored by an officer appointed by [HoI]. The PIC showed his understanding but refused to sign the [Undertaking]. The PIC was told that if he refused to sign the [Undertaking], his application for making phone call could not be acceded to. The PIC showed his understanding but he still refused to sign the [Undertaking].

When being asked whether he had any urgent need for making request to make phone call, he replied in negative. Nevertheless, he was advised to approach RU2 staff if he needed any other assistance and he was encouraged to write letters or to contact his friends through RU2 staff. He showed his understanding and had no other requests or complaints.”

1. Officer Cheung reported the case to CO Yu who interviewed the applicant on 18 May 2016. The applicant admitted to CO Yu that he had crossed out his signature on the Undertaking as he did not accept the monitoring and recording of his telephone conversation. He indicated that he understood that his application would only be considered if he signed on the Undertaking. Nevertheless, he insisted that he would not do so, whereupon he was informed by CO Yu of the refusal of the 3rd Application on the ground that he had refused to sign the Undertaking.
2. CO Yu made the following record of his interview with the applicant in the Log:

“Entry dated 17.5.2016 by [Officer Cheung] refers. Subject PIC requested for making a phone call to his friend named Choi Yiu Cheong (蔡耀昌). Yet, he refused to sign on the [Undertaking] in the presence of [Officer CHEUNG], claiming that he was dissatisfied with the relevant condition regulating the process of making phone call.

Upon interview by the undersigned, he was told that he should sign the [Undertaking] so as to express his consensus on being supervised and monitored by staff members as stipulated in [SO 56-02] while he was making the call. He was further told that if he refused to sign the [Undertaking], his request could not be acceded to. He showed his understanding but still insisted on not signing the [Undertaking]. Apart from the above, he had no other request or complaint of any nature.”

1. In short, it is the respondents’ case that the 3rd Application was declined because the applicant refused to sign the Undertaking as prescribed by SO 56-02.
2. The complaints made by the applicant in respect of the 3rd Applicant, if true, would amount to allegations (1) that the abovementioned official records regarding the handling of the 3rd Application were fabricated and (2) that in reliance on such false documents, Officer Cheung and CO Yu lied in their respective affirmations about how they processed the 3rd Application. These are very serious allegations. Yet, there has not been any application to cross-examine either Officer Cheung or CO Yu.
3. The Decision was made on the 3rd Application. In view of the abandonment by the applicant of both grounds material to the judicial review of the Decision, there is no point in ascertaining who crossed out the applicant’s signature on the Undertaking for the 3rd Application and why such signature was crossed out. I therefore decline the invitation to do so in paragraphs 105 to 110 of the skeleton arguments for the applicant.

***G. GROUNDS FOR JUDICIAL REVIEW OF SO 56-1***

1. I gratefully adopt Mr Jonathan Chan’s succinct summary of the grounds for judicial review of SO 56-01 raised in the Form 86 (“**Grounds**”) in paragraph 10 of his skeleton argument for the respondents:
2. “**Ground 1**”: SO 56-01 is unconstitutional in imposing a blanket restriction on a PIC’s right to make telephone calls to persons within Hong Kong, thereby infringing the freedom of communication and right to privacy under article 30 (“**BL 30**”) of the Basic Law (“**BL**”) and article 14 (“**BOR 14**”) of the Hong Kong Bill of Rights (“**BOR**”) under s 8 of the Hong Kong Bill of Rights Ordinance (Cap 383) (“**BORO**”);
3. “**Ground 2**”: The implementation of SO 56-01 is unconstitutional in failing to provide for a right to be heard and/or fair hearing and/or further remedies to a PIC applying to make a telephone call, which right is guaranteed under article 10 of the BOR (“**BOR 10**”) and BOR 14(1);
4. “**Ground 3**”: SO 56-01 is *ultra vire* in that nothing in the Ordinance or the Rules is capable of conferring upon the Commissioner a power to impose restriction on the right of a PIC to make telephone calls; and
5. “**Ground 4**”: SO 56-01 is unconstitutional in discriminating against PICs who do not have family members outside Hong Kong when those having such family members are allowed to make telephone calls to them without the need for an application, thereby violating article 25 of the BL (“**BL 25**”) and article 22 of the BOR (“**BOR 22**”).

***H. SOME CURTAILMENT OF COMMUNICATION WITH OUTSIDE WORLD A NATURAL AND NECESSARY INCIDENT OF LOSS OF LIBERTY UPON IMPRISONMENT***

1. Before I deliberate on each of the Grounds, it would inform their consideration to firstly generally appreciate that some restrictions naturally and necessarily follow a sentence of imprisonment.

The Commissioner accepts (rightly) that prisoners do not, by virtue of imprisonment or detention, lose their constitutionally protected rights. See paragraph 15 of the skeleton argument for the respondents.

1. However, the exercise or enjoyment of certain rights is necessarily inconsistent with, and curtailed by, the forfeiture of the right to liberty upon imprisonment.
2. See, for example, *R v Board of Visitors of Hull Prison, ex p St Germain* [1979] QB 425 at p 455, *Raymond v Honey* [1979] 1 AC 1 at 10G-H, *Hirst v United Kingdom (No 2)* (2006) 42 EHHR 41 at [69], *Dickson v United Kingdom* (2007) 44 EHHR 21 at [68], *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166, *per* Andrew Cheung J (as the Chief Justice then was) at [93] to [94] and *HKSAR v Wan Thomas* [2016] 5 HKLRD 656, *per* Poon JA (as the Chief Judge then was) at [75]-[76].
3. Focusing on this case, it concerns PICs’ communication with the outside world. What Lord Phillips MR (giving the judgment of the court) said in *R (Nilsen) v Governor of Full Sutton Prison* [2005] 1 WLR 1028[[16]](#footnote-16) at [22] is pertinent:

“Criminals who are deprived of their liberty by a sentence of imprisonment are deprived of enjoyment of their possessions and of **communication with the outside world**, save in so far as the prison authorities permit this. **Prison rules must necessarily make provision** for the use prisoners may make of their possessions and **for** **what may be sent from the outside world in to prisoners and what prisoners may send out**.” (emphasis added)

At [23], after citing his Lordship’s own speech in *R (Mellor) v Secretary for State for the Home Department* [2002] QB 13 at [52], Lord Phillips continued:

“… a degree of restriction of the right of freedom of expression was a justifiable element in imprisonment, not merely in order to accommodate the orderly running of a prison, but **as part of the penal objective of deprivation of liberty**.” (emphasis added)

And at [25]:

“**Penal legislation is not required to spell out those aspects of a prison regime that properly constitute an incident of the punishment of deprivation of liberty.** The powers conferred on the Secretary of State under the Prison Act 1953 include, at least, the power to have regard, when regulating what a prisoner can and cannot do, to the natural incidents of penal punishment.” (emphasis added)

And at [26]:

“It is not so easy to define the test of what are the natural incidents of penal punishment, these are certainly susceptible to change as a result of changes in attitude to punishment. In *Mellor*, … Lord Phillips of Worth Matravers MR expressed the view:

“**Penal sanctions are imposed, in part, to exact retribution for wrongdoing.** If there were no system of penal sanctions, members of the public would be likely to taken the law into their own hands. In my judgment, it is legitimate to have regard to public perception when considering the characteristics of a penal system.”

We endorse that statement. In considering what restrictions can properly be placed on prisoners as natural incidents of imprisonment regard can be had to the expectations of right thinking members of the democracy whose laws have deprived the prisoners of their liberty.” (emphasis added)

1. McCombe J observed in *R (Taylor) v Governor of Her Majesty’s Prison Risley* [2004] EWHC 2654 (Admin)[[17]](#footnote-17) at [33]:

“… It is clear that there have been limitations on communications that Mr Taylor would not have wished. However, **communication by prisoners with outsiders cannot be expected to be necessarily on a level that might be expected by those at liberty**. There can be little doubt that **communication by prisoners with those outside prison will inevitably be subject to controls** **as the Prison Rules envisage**. Enabling and barring are each examples of such controls. …” (emphasis added)

1. The ECtHR said in *AB v Netherlands, supra,* at [90] to [94] in respect of access to telephone facilities in prisons:

“90. As regards the applicant’s complaint of being restricted in establishing contacts with persons outside prison because of limited facilities for letter writing or telephoning, the Court takes into account the importance for prisoners to be able to maintain contact with their family and friends outside prison.

91. According to the rules in force at the material time, detainees were entitled to send two or three letters per week and to receive letters at all times. The costs of writing materials and postage were borne by the prison authorities. In the circumstances, the Court cannot find that the applicant was arbitrarily or unreasonably restricted in his possibilities to maintain contacts by letter with persons outside prison.

92. In respect of the telephone facilities, the Court considers that Art.8 of the Convention[[18]](#footnote-18) **cannot be interpreted as guaranteeing prisoners the right to make telephone calls, in particular where the facilities for contact by way of correspondence are available and adequate**.

93. Where, as in the present case, telephone facilities are provided by the prison authorities, these may — **having regard to the ordinary and reasonable conditions of prison life — be subjected to legitimate restrictions**, for example, in the light of the shared nature of the facilities with other prisoners and the requirements of the prevention of disorder and crime. In this context and to the extent that such conditions may be regarded as an interference with private life or correspondence, the Court finds that **they may be considered justified in terms of the second paragraph of Art. 8**.

94. Consequently, the Court finds that the restrictions complained of do not disclose any appearance of a violation of Art. 8 of the Convention.” (footnotes and emphasis added)

1. *AB v Netherlands* concerned the control of the applicant’s correspondence with the European Commission of Human Rights by prison authorities of the Netherlands Antilles and the complete ban on the applicant’s correspondence with his lawyer, who was a former inmate. Telephone is one way of correspondence. The case is on point. I see no reason not to follow *AB v Netherlands*.
2. In Hong Kong, the Court of Appeal analysed in *HKSAR v Wan Thomas*[[19]](#footnote-19), *supra*:

“78. Here, we are concerned with visits to prisoners. Visits enable prisoners to maintain contact with the outside world in particular his family and friends. We note in *August v Electoral Commission* 1999 (3) SA 1 (a case which A Cheung J referred to in *Chan Kin Sum v Secretary for Justice* at [92]), the Constitutional Court in South Africa said at [18]:

[18] It is a **well-established principle of our common law, predating the era of constitutionalism**, that prisoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have placed. Of course, **the inroads which incarceration necessarily makes upon prisoners' personal rights and liberties are very considerable**. They no longer have freedom of movement and have no choice regarding the place of their imprisonment. **Their contact with the outside world is limited and regulated.** They must submit to the discipline of prison life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in prison. Nevertheless, there is a substantial residue of basic rights which they may not be denied; and, if they are denied them, then they are entitled to legal redress.

79. Although the Constitutional Court was stating the **common law** **position** when it said that **the prisoners' contact with the outside world would be limited and regulated**, it seemed to be suggesting that the limitation is necessarily inconsistent with their imprisonment. Put slightly differently, it seems that the Constitutional Court took the view that **such limitation is a necessary incident to imprisonment, just like loss of liberty and place of imprisonment**.” (emphasis added)

1. The above authorities, in my view, support the proposition that a PIC’s right to communicate with the outside world is necessarily restricted and regulated by virtue of the loss of liberty that comes with a sentence of imprisonment.
2. Mr Ma has not persuaded me to think otherwise.
3. First, I do not find *Potter v Scottish Prison Service* [2007] CSOH 56, a decision from the Outer House of the Scottish Court of Session, heavily relied upon by Mr Ma, of much assistance.
4. *Potter* was concerned with a challenge to the Scottish Prison Service’s policy of attaching an automated message to all outgoing telephone calls made by a prisoner informing the receiver that the call was coming from a prison; that it would be logged and may be recorded and/or monitored; and that if the receiver did not wish to accept the call, he/she should hang up. The petitioner, who was serving 21 years for assault and armed robbery, petitioned for judicial review of the lawfulness of the policy, claiming that the message infringed his rights under article 8 of the ECHR[[20]](#footnote-20) as it was “an unnecessary and embarrassing reminder” of where he was calling from. Various situations/ examples in which the petitioner felt or might potentially feel embarrassed by the information in the pre-recorded message that he was in prison were cited. The respondents conceded that article 8 was engaged. The petition succeeded at first instance.
5. Mr Ma tries to derive support from what Lord Glennie said at [5] and [6]:

“5. … It is well established (…) that the protection afforded by Article 8(1) extends to telephone calls. Mr Duncan accepted that this was so. This is not only because communication by any means, including by telephone, is an essential feature of private and family life.

6. It was common ground before me that, by virtue of the policy by which a pre-recorded message tells everyone answering the telephone that the call emanates from a prison, Article 8 of the Convention is “engaged”. In other words, it is accepted on behalf of the respondent that the inclusion of that pre-recorded message constitutes interference by a public authority with the exercise of a right protected by Article 8. Of course, telephones have not always been available to prisoners; and it might once have thought that the provision of access to a telephone was a privilege rather than merely the base point for an argument that interference with the free use of the telephone might amount to a breach of the prisoner’s rights. But times have moved on. **If no provision at all were now made for prisoners to communicate with the outside world by telephone**, that lack of provision mightitself now give rise to a challenge on Article 8 grounds. In light of the concession by the respondents that Article 8 is engaged, I do not need to consider that question. …”

1. As Mr Ma fairly pointed out, this part of Lord Glennie’s speech in *Potter* was *obiter*. The complaint there was not that no provision was made for prisoners to use telephone. The situation referred to by Lord Glennie is clearly distinguishable. In the present case, the Commissioner does provide PICs with regulated access to telecommunication with the outside world under, *inter alia*, SO 56.
2. Upon the Scottish Ministers’ appeal, the Outer House’s decision in *Potter* was overturned and remitted back by the Inner House ([2007] SLT 1019) on the ground that the petition was allowed prematurely before a hearing of the disputed factual evidence. It is worthy of note that Lord Matthews said at [557] that if there was interference with the petitioner’s rights to respect for private and family life, home and correspondence under article 8, it was “marginal at best” and “proportionate”.
3. Second, the following *dicta* by Lord Rodger in *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395 at [33] does not assist the applicant either:

“My Lords, **although convicted of crimes and deprived of their liberty, prisoners have the right to send and receive letters and to make and receive telephone calls**. Many of the communications to relatives and friends are social or deal with purely personal matters, but prisoners may also wish to contact the courts or their legal advisers in relation to legal problems, real or perceived. Whatever the nature of the communications, **there is a risk that some prisoners may abuse the system to breach the security of their prison. The prison authorities can therefore take measures to counteract that risk by opening, reading and, if necessary, censoring or blocking correspondence.**” (applicant’s emphasis)

1. *Watkins* was a misfeasance claim for damages against prison officers for opening the prisoner’s correspondence with his legal advisors in breach of the prison rules. The issue was whether it is an essential ingredient of the tort of misfeasance in public office to establish loss or damage. The House of Lords held that it is.
2. *Watkins* was not at all about a prisoner’s entitlement to correspondence, whether by telephone or otherwise.
3. Third, Mr Ma has also referred to rule 24.1 of the *European Prison Rules* under which prisoners’ right to use telephone in addition to correspondence is provided for and paragraphs 14.252 to 14.271 of the *Report of the Inquiry into Prison Disturbances in England and Wales in April 1990* (Cm 1456, 1991) by Woolf LJ (as he then was) to support the existence of an established norm that encourages prisoners to communicate with the outside world by all accessible means, including by telephone.
4. However, the present case is not one involving a complete ban on the use of telephone by PICs. The question raised herein is the degree to which access to telephone should be provided to prisoners.

1. For these reasons, I accept Mr Chang’s submission that a PIC’s contacts with the outside world, including by telephone, is necessarily curtailed and regulated by virtue of his sentence of imprisonment. He does not enjoy the full scale of rights of communication as a person at liberty does.

***I. GROUND 1: INFRINGEMENT OF FREEDOM OF COMMUNICATION AND RIGHT TO PRIVACY***

1. On this note, I turn to Ground 1.

***I.1 BL 30 & BOR 14***

1. BL 30 reads:

“The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.”

1. BOR 14 stipulates:

“(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, … or correspondence, … .

(2) Everyone has the right to the protection of the law against such interference … .”

1. BOR 14 corresponds to article 17 of the International Covenant on Civil and Political Rights (“**ICCPR**”). The ICCPR is given constitutional recognition by the first paragraph of article 39 of the BL (“**BL 39**”) incorporating the provisions of, *inter alia*, the ICCPR insofar as they have been applied in Hong Kong.
2. The Commissioner accepts that “correspondence” in BOR 14 incorporates all forms of communication, including intercourse by telecommunication: *Leung Kwok Hung v Chief Executive of the HKSAR*, HCAL 107/2005, unreported, Hartmann J (as he then was), 9 February 2006, at [107]. The ECtHR also held in *Klass v Federal Republic of Germany* (1978) 2 EHRR 214 at [41] that telephone communications are covered by the notions of “correspondence” and “private life” referred to by article 8(1) of the ECHR which, as stated in footnote 18 above, is similar to BOR 14.

***I.2 Second paragraph of BL 39 and s 9 of BORO inapplicable***

1. Mr Chang relies on the second paragraph of BL 39:

“The rights and freedoms enjoyed by Hong Kong residents shall not be restricted **unless as prescribed by law**. …”

and s 9 of the BORO:

“… persons lawfully detained in penal establishments of whatever character are **subject to such restrictions as may be authorized by law** from time to time **for the preservation of … custodial discipline**.” (respondents’ emphasis)

1. Counsel submits that once a restriction is shown to be prescribed/authorised by law, and in the case of BOR 14, for the preservation of custodial discipline, the rights and freedoms are not engaged, except those that are non-derogable and absolute. And the access to telephone communication under BL 30 and BOR 14 is not one of such rights. In support, Mr Chang cites *Chim Shing Chung v Commissioner of Correctional Services* (1996) 6 HKPLR 313 at 322D-323E *per* Litton VP (as he then was) and at 326A-D *per* Liu JA.
2. Such argument for the Commissioner leads to lengthy and detailed counter-submission by Mr Ma as to what amounts to “law” for the purposes of the second paragraph of BL 39 and s 9 of the BORO. Without intending any disrespect to counsel, I do not propose to set out or address such submission. It is not necessary to do so.
3. The short answer to Mr Chang’s submission is that the SOs are simply not law but mere operational guideline for prison officers: *Chim Shing Chung v Commissioner of Correctional Services, supra,* at 326D-E *per* Liu JA and *Brian Alfred Hall v Secretary for Justice*, HCAL 84/2004, unreported, 5 July 2005, *per* Hartmann J at [29].
4. Hence, subject to the question of proportionality (see subsection I.3 below), the requirement under SO 56-01 for a PIC to demonstrate the presence of the specified or other special circumstances/compassionate grounds giving rise to a genuine need for a timely communication in order to use the telephone *prima facie* constitutes interference by the Commissioner with the exercise of a right protected by BL 30 and BOR 14.
5. I disagree with Mr Chang that either of those provisions is not engaged.

***I.3 Justification of SO 56-01***

1. Mr Ma has, in the course of his submission, referred to the use of telephone by inmates in other jurisdictions. Country conditions and penal systems vary from jurisdiction to jurisdiction. I do not derive as much assistance from cross-referencing what is done in other places as counsel would hope.
2. The management of prison and maintenance of custodial discipline are matters within the expertise and professional judgment of the Commissioner. See *Leung Kwok Hung (Long Hair) v Commissioner of Correctional Services* [2018] 2 HKLRD 933, *per* Lam VP (as Lam PJ then was) at [112]. One would expect him to apply his expertise and exercise his professional judgment having regard to the actual circumstances of Hong Kong and its correctional facilities. He would also unavoidably have to work with, and apply with care, the finite resources allocated to his department. In this connection, I have already mentioned in [38] above paragraph 31 of Wong’s affirmation which deposes (1) that the CSD has only limited resources and manpower to handle the administrative work in relation to the making of phone calls (including the need to consider the telephone call application, to verify the identity of the recipient, to monitor the telephone conversation, etc); (2) that the department currently has a limited number of telephone booths in penal institutions and (3) that extra resources will be required to install new telephone booths if the number of approved cases for making telephone calls substantially increases. As it is, it appears from the statistics quoted in [34] and [36] above that, as it is, the CSD has been processing, and approving, a significant number of applications to make telephone call.
3. While the Commissioner is subject to the court’s supervisory jurisdiction, the court exercises its power in a principled manner according to public law. It does not just step into the shoes of the Commissioner and substitutes its own opinion for his. The courts are not equipped with the same professional expertise in the assessment of the significance of conformity in reformation and discipline. See again *Leung Kwok Hung (Long Hair)* at [112].
4. The management of PICs’ contacts with persons outside prison, including the regulation of access to a telephone, is just one aspect of the operation of the correctional institutions in Hong Kong. It is also part of a whole package of facilities made available to PICs to make contacts with persons outside prison. As pointed out in [40] above, I share the view that the sufficiency or otherwise of the arrangements for telephone access should not be judged in isolation from the adequacy, effectiveness and efficiency of the other means of communication with outside world made available to PICs, which I have already considered and discussed under subsections D.1 and D.2 above.
5. The premise underlying Ground 1 is that SO 56-01 imposes a blanket ban on the use of telephone by PICs. This is simply an inaccurate reading of SO 56-01. As observed in [109] above, it in fact allows the use of a telephone by a PIC who can demonstrate that he has a genuine need for a timely communication for the specified or other special circumstances that can be justified on compassionate grounds.
6. Having reminded myself of these matters, I next apply the four-step proportionality test as explained by the Court of Final Appeal in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372:
7. Whether SO 56-01 pursues a legitimate aim;
8. Whether SO 56-01 is rationally connected to such aim;
9. Whether SO 56-01 is no more than necessary to accomplish that aim;
10. Whether a reasonable balance had been struck between the social benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, in particular, whether pursuit of the societal interest resulted in an unacceptably harsh burden on the individual.
11. Mr Ma has dwelled exclusively or almost exclusively on the reformation and social rehabilitation aspect of the penitentiary system which he seeks to support by article 6(3) of the BOR (“**BOR 6(3)**”). BOR 6(3) stipulates: “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” Further, with reference to rule 24.1 of the *European Prison Rules* and paragraphs 14.252 to 14.271 of Lord Woolf LJ’s *Report of the Inquiry into Prison Disturbances in England and Wales in April 1990,* counsel highlights and stresses the effectiveness of telephone contacts in maintaining, strengthening and re-establishing social linksand how the implementation of SO 56-01 jeopardises or may jeopardise the achievement of such objective.
12. With respect, Mr Ma has approached this case entirely from his client’s point of view in disregard of the competing penal objective to deprive PICs of liberty and to exact retribution for wrongdoings, as noted by Lord Phillips in *R (Mellor) v Secretary for State for the Home Department, supra* (see [82] above)*.*
13. In this connection, it has already been concluded under section H above that a PIC’s contacts with the outside world, including by telephone, is necessarily curtailed and regulated by virtue of his sentence of imprisonment so that, in any case, he does not enjoy the full scale of rights of communication as a person at liberty does.
14. I take the view that:
15. The requirement of an application for, and the grant of, approval to make phone calls on a case-by-case basis on grounds of need under SO 56-01 pursue and balance both the retributory and rehabilitative objectives of the penal system, which are equally legitimate aims.
16. The need for approval so granted is also rationally connected to, and is no more than necessary to accomplish, both such objectives.
17. The measured mechanism under SO 56-1 through which a PIC can have the use of a telephone strikes a reasonable balance under the fourth stage of the proportionality test. In this regard, I note that Lam VP (as Lam PJ then was) said in *Leung Kwok Hung (Long Hair) v Commissioner of Correctional Services* [2018] 2 HKLRD 933 at [115]: “In a prison setting, in view of the satisfaction of the first three steps in the proportionality test, I do not see any basis to suggest that the fourth step as explained in *Hysan* is not met.”[[21]](#footnote-21)

***I.4 Conclusion on Ground 1***

1. To sum up, SO 56-01 engages BL 30 and BOR 14 but is justified and proportionate.
2. ***GROUND 2: NO RIGHT TO BE HEARD***
3. It is argued on behalf of the applicant that a right to be heard and/or a fair hearing and/or further remedies to a PIC applying to make a phone call under SO 56-01 is guaranteed by BOR 10 which reads:

“**Equality before courts and right to fair and public hearing**

All persons shall be equal **before the courts and tribunals**. In the **determination of any criminal charge** against him, or of his rights and obligations in a **suit at law**, everyone shall be entitled to a fair and public hearing by a **competent, independent and impartial tribunal established by law**. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.” (emphasis added)

and BOR 14(1):

“(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, … or correspondence, … .”

1. I have difficulty in seeing the materiality of BOR 10. As I read that article, what it guarantees is the dispensation of open justice in the defence of a criminal charge and in a suit of law before a court or tribunal, which includes “a fair and public hearing by a competent, independent and impartial tribunal established by law”. I have not been taken to any authority that BOR 10 extends to the determination of an administrative application such as the one under SO 56-01.
2. In any event, I have reviewed the Commissioner’s evidence, which I find credible, on how SO 56-01 and the complementary SO 56-02 are implemented in practice. The effect of such evidence is that an application under these SOs is not determined on paper just by consideration of the Form and the Undertaking. A junior CSD officer would interview the applicant with a view to, *inter alia*, verifying the reason put forward for the call to ascertain whether he has a genuinely need for a timely communication that can be justified on compassionate grounds. If the junior officer does not recommend the grant of approval, a senior officer would interview the applicant to, *inter alia*, receive further representation (if any) from him. To my mind, the two interviews provide a sufficient opportunity for the applying PIC to be heard before the determination of his application.
3. Indeed, the applicant’s complaint of not being heard is ungrounded in fact. The records kept and produced by the Commissioner in respect of the three phone call applications made by the applicant, which I have no reason not to accept, show that the applicant had indeed been heard twice, first by a junior officer and then by a senior officer before the rejection of each of the 1st and the 3rd Applications. Given his admission on both occasions that he had no genuine need to speak to Mr Tsoi in a timely manner, neither application fulfilled SO 56-01.
4. Notably, it will be recalled that the applicant did not put down any reason for having to call Mr Wong in the Form for the 2nd Application. Yet, Officer Cheung recommended approval of, and CO Yu approved, the 2nd Application after ascertaining orally with the applicant that he required Mr Wong’s assistance in dealing with his housing problem.
5. I see no merit in Ground 2.
6. ***GROUND 3: ULTRA VIRES***
7. The applicant’s *ultra vires* argument runs as follows:
8. The SOs were made by the Commissioner pursuant to rule 77(4) of the Rules.
9. Rule 77(4) mandates that the SOs so made should be in conformity with the Rules.
10. Neither the Ordinance nor the Rules imposes any restriction on a PIC’s access to telephone facilities.
11. SO 56-01, in only allowing a PIC to access a telephone in limited situations, does not conform to the Rules and is therefore *ultra vires*.
12. The first observation that can be made is that if the applicant were right, then to take his case to its logical end, completely unrestricted/ unregulated use of the telephone would have to be provided to PICs. However, Mr Ma denies that he is going so far.
13. To further test the argument, the Ordinance and the Rules do not in terms prohibit, restrict or limit PICs’ communication with the outside world by emails, mobile device applications (such as WhatsApp, WeChat, Weibo, QQ, Line etc) or social media (such as Facebook, Facebook Messenger, Instagram, Twitter etc). Taking this in two stages, if the applicant were correct:
14. First, a PIC should logically also be entitled to reach persons outside prison by all such means of communication without any restrictions. This does not sound right.
15. And if the Commissioner were to issue a SO allowing the use of all or some such means of communication by PICs but only on conditions, one would have to call such SO *ultra vires* rule 77(4) of the Rules and therefore liable to be struck down. This sounds even more absurd.
16. The heart of the problem is, I believe, the notion that if the Ordinance and the Rules are silent on what otherwise is a right outside of a prison setting, a PIC is entitled to the enjoyment of such “right” without any terms attached. I disagree and repeat the analysis under section H above. Under the common law, a PIC’s contacts with outsiders, including by telephone, is necessarily curtailed and regulated by virtue of his sentence of imprisonment. He does not enjoy the full scale of rights of communication as a person at liberty does. The applicant wrongly sees SO 56-1 as **creating** a restriction on a PIC’s right to use the telephone which, on proper analysis, has all along pre-existed under the common law.
17. Both *Raymond v Honey*, *supra*, and *Brian Alfred Hall*, *supra*, cited by Mr Ma, are distinguishable.
18. Before the court in *Raymond v Honey*, was a motion by the respondent who was serving a sentence of imprisonment and who was engaged in legal proceedings, to commit the governor of the prison for contempt of court in stopping (1) a letter that he wrote to his solicitors and (2) the documents that the respondent had prepared for an application for leave to commit the governor and assistant governor to prison for contempt. The governor took those actions after reading the letter in exercise of his powers under rules 33 and 37A(1) of the Prison Rules 1964. It was held that there was nothing in the Prison Act 1952 that conferred power to make regulations which would deny, or interfere with, the right of a convicted person to have unimpeded access to the courts. Accordingly, the governor’s action in intercepting the committal application to the court was clearly such as to deny, albeit temporarily, the respondent’s right of access to the court and was a contempt of court.
19. Unlike communication with outsiders, the right to unimpeded access to the courts and justice is not curtailed by, or inconsistent with, a sentence of imprisonment.
20. *Brian Alfred Hall* struck down, on *ultra vires* ground, the now repealed SO 58-01(3) under which certain privileges allowed under SO 58-01(2) were forfeited upon a PIC’s voluntary removal from everyday association with other prisoners (to what is called the Protection Unit). The applicant in *Hall* sought the removal for protection from further confrontation with a group of non-Chinese PICs. The privileges the loss of which the applicant complained about were possession of a radio for the whole period of detention in the Protection Unit and purchase of any canteen items except letter writing materials and stamps within the first twelve months in the Protection Unit.
21. The SOs may not permit the punishment of a prisoner other than in accordance with the Rules. And under rule 63(1) of the Rules, the Commissioner is empowered to punish a prisoner who commits an offence under rule 61 by, *inter alia*, withholding privileges for not more than 3 months. The Rules do not allow for privileges to be removed when a prisoner is not being punished for a disciplinary offence under rule 61. Removal from association is, however, not always a punishment. It can be a form of restraint to secure good order and discipline of the penal institution or to ensure the welfare of a prisoner. The indiscriminate withdrawal of privileges under SO 58-01(3) from prisoners in removal from association including those who entered the Protection Unit not as a punishment contravenes rule 63(1) and therefore *ultra vires*.
22. In the instant case, SO 56-01 is not inconsistent with any provision of the Rules.
23. Ground 3 is unsound.

***L. GROUND 4: DISCRIMINATION AGAINST PIC WITHOUT OVERSEAS FAMILY MEMBERS***

1. In support of Ground 4, Mr Ma citesBL 25 which guarantees that:

“All Hong Kong residents shall be equal before the law.”

and BOR 22 which similarly, and further, provides:

“**Equality before and equal protection of law**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

1. It is axiomatic that the principle of equality does not mean that all cases must be treated alike. Rather, it requires like cases to be treated alike and different cases to be treated differently.
2. As observed by Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 566C (cited with agreement by Li CJ in *Secretary for Justice v Yau Yuk Lung* (2007) HKCFAR 335 at [19]):

“… One type of conduct, or one factual situation, attracts one legal consequence, another type of conduct or situation attracts a different legal consequence. To be acceptable these distinctions should have a rational and fair basis. **Like cases should be treated alike, unlike cases should not be treated alike.** The circumstances which justify two cases being regarded as unlike, and therefore requiring or susceptible of different treatment, are infinite. In many circumstances opinions can differ on whether a suggested ground of distinction justifies a difference in legal treatment.” (emphasis added)

1. In *Zarb Adami v Malta* (2006) 44 EHRR 3, the ECtHR said at [71]:

“discrimination means treating **differently**, without an objective and reasonable justification, persons in **relevantly similar** situations. However, not every difference in treatment will amount to a violation of Art.14[[22]](#footnote-22). It must be established that other persons in an **analogous or relevantly similar** situation enjoy preferential treatment and that this distinction is discriminatory.” (footnote and emphasis added)

1. The same view was echoed by Lord Hoffmann in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 at [10] and [14]:

“10. … The principle that everyone is entitled to equal treatment by the state, that **like cases should be treated alike**, and **different cases should be treated differently**, will be found, in one form or another, in most human rights instruments and written constitutions …

…

14. … **Discrimination means a failure to treat like cases alike. There is obviously no discrimination when the cases are relevantly different.**  Indeed, it may be a breach of article 14 not to recognise the difference: see *Thlimmenos v Greece* (2001) 31 EHRR 411. **There is discrimination only if the cases are not sufficiently different to justify the difference in treatment.** The Strasbourg court sometimes expresses this by saying that the two cases must be in an “analogous situation”: see *Van der Mussele v Belgium* (1983) 6 EHRR 163, 179-180, para 46.” (emphasis added)

1. In *Thlimmenos v Greece* (2001) 31 EHRR 411, a case on religious discrimination, the European Commission on Human Rights said at [44] in relation to Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms:

“The right not to be discriminated against in the enjoyment of rights guaranteed under the Convention is also violated when States without an objective and reasonable justification **fail to treat differently persons whose situations are significantly different**.” (emphasis added)

1. Equally, in *Stec v United Kingdom* (2006) 43 EHRR 47, the ECtHR said at [51]:

“Article 14 does not prohibit a Member State from treating groups differently in order to correct ‘factual inequalities’ between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article”.

1. In *Matadeen v Pointu* [1999] 1 AC 98 at 109B-D, Lord Hoffmann first commented on the principle and then cautioned against over-zealous judicial intervention as follows:

“As a formulation of the principle of equality, the court cited Rault J. in *Police v. Rose* [1976] M.R. 79, 81: ‘Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently.’ Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that **treating like cases alike and unlike cases differently is a general axiom of rational behaviour**.

But the very banality of the principle [of treating like with like] must suggest a doubt as to whether merely to state it can provide an answer to the kind of problem which arises in this case. Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And, perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? **The reasons for not treating people uniformly often involve, as they do in this case, questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves. The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle - that it should always be the judges who have the last word on whether the principle has been observed.** In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied.” (emphasis added)

1. In Hong Kong, in *Raza v Chief Executive-in-Council* [2005] 3 HKLRD 561, Hartmann J explained the principle of equality and discrimination at [111]-[113]:

“111. ‘Discrimination’, of course, as it is to be understood in the ICCPR, does not exclude the different treatment of persons. In this regard, the Human Rights Committee established under art.28 of the ICCPR has commented:

‘Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.’

112. The editors, Harris and Joseph, in their work The International Covenant on Civil and Political Rights and United Kingdom Law (1995), have said that a differentiation is ‘objective’ if it has a legitimate aim and is ‘reasonable’ if it has a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

113. Within our own jurisdiction, in considering art.10 of the Bill of Rights – ‘All persons shall be equal before the courts and tribunals’ - Bokhary J (as he then was) set a similar test. In R v Man Wai Keung (No 2) [1992] 2 HKCLR 207 at 217, he said:

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

1. The above cases show that the requirement of *prima facie* “equal” treatment applies, and the need to support “different” treatment with objective and reasonable justification arises, only in cases where one deals with persons in **analogous** situations. If the situations are unlike or not analogous, there is no requirement to treat them in the same or any similar way; and different treatment, rather than having to be justified, should in fact be given.
2. The burden is on the applicant to first establish that persons in relevantly comparable situations face different treatments: *Navarro Luigi Recasa* *v Commissioner of Correctional Services* [2018] HKCFI 1815, *per* Au J at [77]-[78].
3. I fail to see how SO 56-01 can be said to be discriminatory. It applies equally to PICs who have family members outside Hong Kong and those who don’t. The same conditions have to be satisfied and the same application made.
4. What the applicant is really unhappy about is the arrangement under SO 58-17 for the enhanced use of a telephone by a PIC with overseas family members for a 10-minute call to such member(s). However, such privilege can only be enjoyed if the PIC has not received a visit from, or made a telephone call to, his/her family members for two consecutive months (1 month from 27 June 2016).
5. In assessing whether a treatment is discriminatory, the court should not confine its consideration to the particular facts of the case that it has to determine. The applicant herein has no contactable family whether within or without Hong Kong. One does not compare the peculiar situation the applicant finds himself in to that of a PIC with family members outside Hong Kong. The person whose position the court should take account of is a PIC having his/her family in Hong Kong.
6. That said, I am of the opinion that the situation of a PIC who has family members outside Hong Kong and who has not received a visit from, or made a telephone call to, his/her family for two consecutive months (1 month from 27 June 2016) and that of a PIC having family in Hong Kong who can visit him/her in person more readily are not at all analogous but are materially/significantly different to warrant the enhanced telephone use under SO 58-17.
7. Ground 4 is untenable.

***M. DISPOSITION***

1. For these reasons, I dismiss this application for judicial review.
2. I also make an order *nisi* that the applicant shall pay the respondents’ costs of these proceedings to be taxed, if not agreed, on a party-and-party basis. The applicant’s own costs shall be taxed in accordance with the Legal Aid Regulations (Cap 91A).

(Lisa Wong)

Judge of the Court of First Instance

High Court

Mr Stanley Ma, instructed by Tang, Wong & Chow, for the applicant

Mr Jonathan Chang, instructed by the Department for Justice, for the respondents

1. Which contend respectively that the Decision was (1) tainted with procedural improprieties because no reason was given for the refusal and (2) *Wednesbury* unreasonable. [↑](#footnote-ref-1)
2. Provisions relating to PICs awaiting trial are contained in Division 1 of Part II of the Rules.

   [↑](#footnote-ref-2)
3. There are also visits by approved persons visiting PICs in their official capacity. [↑](#footnote-ref-3)
4. There are also the Standing Procedures for the observance of all officers of the Correctional Services Department (“**CSD**”). [↑](#footnote-ref-4)
5. Which stands for “prisoner registered number”. [↑](#footnote-ref-5)
6. Then acting in the post of Superintendent (Penal Administration) in the Operation Division of the CSD Headquarters. [↑](#footnote-ref-6)
7. See (1) paragraph 20 of Wong’s affirmation and (2) the tabulated summary (of the individual correctional institutions and their broad locations, detailed addresses and social visiting dates and hours) handed up at the hearing. [↑](#footnote-ref-7)
8. According to the applicant, he has since about 2011 sought assistance from the SoCO in relation to various issues that he has encountered while in prison. [↑](#footnote-ref-8)
9. Subsequent to the relaxation of the threshold for the making of phone calls under SO 58-17 in June 2016, there was a corresponding decrease in phone call applications made under SO 56-01. [↑](#footnote-ref-9)
10. The CSD currently has a limited number of telephone booths in penal institutions. [↑](#footnote-ref-10)
11. The applicant was released on 12 May 2018 but has since 23 May 2018 been held in custody again due to his alleged involvement in other criminal activities. [↑](#footnote-ref-11)
12. “RU” stands for “Rehabilitation Unit”. [↑](#footnote-ref-12)
13. Initially, the applicant stated in the Form 86 that the 2nd Application was made in mid March 2016. Upon disclosure of the relevant Form by the Commissioner, the parties agree that the 2nd Application was in fact dated 22 February 2016. [↑](#footnote-ref-13)
14. In Chinese: 「赤柱監獄犯人可將一般內部申訴/要求事項寫在陳述書上。」 [↑](#footnote-ref-14)
15. There is, at page 139 of the first volume of the Bundle of Exhibits, a copy of the Undertaking bearing the applicant’s signature that was crossed out, before the making of any official remarks. [↑](#footnote-ref-15)
16. Which involved a judicial review of a decision by the prison governor to withhold the manuscript of the autobiography of the claimant who had been sentenced to six life sentences for six murders. The manuscript, which the claimant had previously sent out of the prison for publication, contained details of his crimes. He wished to have the manuscript back to revise it before publication. The prohibition was made on the strength of paragraph 34(9)(c) of the Prison Service Standing Orders 5, Section B published under s 47(1) of the Prison Act 1952. It prohibited correspondence containing material about a prisoner’s crimes intended for publication. It was argued by the claimant (1) that paragraph 34(9)(c) was unlawful and (2) that, on the facts, its application was disproportionate and infringed article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The claim was dismissed. The claimant’s appeal also failed.

    [↑](#footnote-ref-16)
17. Which concerned a judicial review of a decision by the governor of Prison Risley to adopt a blanket “call enabling” system, as opposed to a “call barring” system, in regulating phone calls by prisoners. A call enabling system requires a prisoner to give prior notification of outside numbers that he desires to call. If the numbers are approved, they are “enabled” to permit the prisoner to contact these numbers by using a personal identification number (PIN). A call barring system allows prisoners access to all outside numbers save those specifically barred. Following compromised judicial review proceedings regarding the call barring system, the Secretary of State issued a draft Prison Service Order, under which it would be mandatory for the call enabling regime to be operated for certain specified categories of prisoners. The claimant did not fall within any of such categories. And Prison Risley did not house exclusively prisoners for which the call enabling system must be operated. The claimant was permitted access to 21 personal numbers and 15 legal numbers. He had a large family and the movements of family members had made it difficult for him to maintain contacts under the call enabling system which, it was felt, detracted from reasonable communication with family members. It was argued that the call enabling system infringed article 8 of the European Convention on Human Rights (“**ECHR**”) and that the interference with the claimant’s rights under article 8 was not proportionate to the legitimate needs of prison management. The application was refused on the grounds (1) that the blanket operation of the enabling system at Risley (which had an unusually intense drug problem) was no more than necessary and proportionate to accompish the objective of restricting prisoner telephonic communication with the community at large in a manner that would be calculated to encourage or promote illegal drug use in prison and communication with the outside community in areas that would foster crime in other outside circumstances; and (2) that a mixed system at Risley may allow a prisoner on enabling to obtain access to the PIN of one on barring, thereby frustrating the objective at which the enabling system was aimed in the first place.

    [↑](#footnote-ref-17)
18. Which is similar to BOR 14 and reads:

    “**Right to respect for private and family life**

    1. Everyone has the right to respect for his private and family life, his home and his correspondence.

    2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” [↑](#footnote-ref-18)
19. Which construed the word “friends” in rule 203 of the Rules affecting PICs awaiting trial and, if it meant that the visitor and the PIC being visited must know each other personally, whether rule 203 was incompatible with BOR 6(2)(a) and 14. The Court of Appeal’s construction was reversed by the Court of Final Appeal but on grounds not concerning us. See (2018) 21 HKCFAR 214. [↑](#footnote-ref-19)
20. The rights enshrined in the ECHR are protected by s 6 of the Human Rights Act of 1998. [↑](#footnote-ref-20)
21. The reversal of the Court of Appeal’s decision by the Court of Final Appeal does not disturb such ruling. See (2020) 23 HKCFAR 456. [↑](#footnote-ref-21)
22. Which is article 14 of of the Convention for the Protection of Human Rights and Fundamental Freedoms, which similar to BOR 22 and reads:

    “Prohibition of discrimination

    The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” [↑](#footnote-ref-22)