HCAL 2346/2020

[2021] HKCFI 1781

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF FIRST INSTANCE**

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO 2346 OF 2020

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| BETWEEN |  |  |
|  | PANG LOK SZE | Applicant |
|  | and |  |
|  | DIRECTOR OF PUBLIC PROSECUTIONS | Putative Respondent |

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Before: Hon Alex Lee J in Court

Date of Hearing: 31 May 2021

Date of Judgment: 30 June 2021

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JUDGMENT

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**Introduction**

1. This is about the Applicant’s application for leave to apply for judicial review (“**JR**”). The decision being challenged is that of the Putative Respondent (“**PR**”) dated 3 September 2020 refusing to prosecute (“**Decision**”)[[1]](#footnote-1). To be more precise, it is about the decision not to prosecute two suspects for any offence under the Prevention of Cruelty to Animals Ordinance (Cap 169) (“**PCAO**”) in respect of a suspected case of animal cruelty which took place on 14 February 2020.
2. The body of the Amended Form 86 consists of 54 pages and that is quite an exceptional length for this type of documents. Given the loquacity of that document, it is difficult to decipher what exactly the issues are in this case. With respect, Mr Liu[[2]](#footnote-2), counsel for the PR, has reasonable cause to complain and lament that the observation of Litton PJ in *Lau Kong Yung v Director of Immigration*[[3]](#footnote-3) which has been repeated in subsequent cases has once again not been taken heed of by practitioners.
3. Yet, by a summons dated 5 May 2021 (“**Summons**”), the Applicant seeks leave to file an even longer “Re-Amended Form 86” which runs up to 62 pages. It can be seen that one purpose for the proposed amendments is to correct an important factual mistake which forms the plank of the Applicant’s original case, namely that the Decision was made and communicated to the Interested Party[[4]](#footnote-4) only after the expiry of the statutory 6-month time limit for instituting the prosecution[[5]](#footnote-5). As can be seen in the chronology below, the Decision was in fact made and communicated to the Interested Party a few days before the expiry of the time limit. As a result of this proposed correction, corresponding amendments are also sought to be made in respect of the remedies requested. Another purpose of the proposed amendments, however, is to expand the scope of the JR by also relying on the “Victims of Crime Charter” (“**Charter**”). Mr Liu takes great exception to this latter purpose.

**Applicant’s grounds of challenge**

1. At the request of the court, Mr McCoy, counsel for the Applicant, has helpfully prepared a two-page summary which delineates the proposed re-amended grounds of challenge as follows[[6]](#footnote-6):
2. Procedural impropriety:
3. The PR had failed to make the Decision and to communicate the Decision to members of the public within a reasonable time in light of the statutory time bar (“**the Failure**”).
4. There is a breach of legitimate expectation as the public has relied upon the PR’s proper discharge of duty and obligations under the Prosecution Code (“**Code**”) and the Charter.
5. Illegality:

Breach of Art 35 of the Basic Law (“**BL 35**”) in that the Failure has assailed the Applicant’s exercise of her right to access to court.

1. Perversity and irrationality:
2. The PR had failed to consider the relevance and importance of *timing* of the Decision and the communication of the Decision, in light of
3. the statutory time limit of bringing a criminal prosecution under PCAO; and
4. the particular circumstances of this case being a serious crime committed against animals (i.e. the victims being animals who could not seek recourse themselves and had to rely upon members of the public to vindicate the cruelty and injustice committed against them by way of private prosecution).
5. The Decision was one which no reasonable prosecutor properly advised as to facts and the law could have reached.

**PR’s Objections**

1. The stance of Mr Liu is that the new amendments should not be allowed at all. However, he is happy to argue against the re-amended grounds *de bene esse*. Mr Liu submits that in any event the application for leave to JR shall fail *in limine* and he succinctly encapsulates his objections as follows:
2. Lack of Jurisdiction:
3. the Decision was made within the constitutional limit protected by Article 63 of the Basic Law (“BL 63”) and there are no exceptional circumstances in the present case invoking the Court’s supervisory jurisdiction; and
4. the Applicant lacks standing qua either as a member of the public or a victim to make this application for JR;
5. Applicant’s grounds not reasonably arguable[[7]](#footnote-7):

It is submitted, in particular, that the Decision was plainly based on the insufficiency of evidence which resulted in the conclusion that there is no reasonable prospect of conviction. There was no contravention of the Code and the Charter throughout the decision making process, and the Decision was made and communicated to SPCA before the expiration of the 6-month statutory period. There is no restriction of the Applicant’s right of access to Courts since she was all along at liberty to commence private prosecution without the need to wait for the Decision.

**Whether the JR academic**

1. As regards the remedies the Applicant requested and as stated in the proposed Re-Amended Form 86, they include a declaration that the Decision was unlawful or alternatively, declaratory relief to the effect that the Decision should have been made within a reasonable time so as to allow other people sufficient time to lay their own complaint. Additionally, the Applicant seeks declarations that the Decision was perverse and irrational and was in breach of a legitimate expectation and the Applicant’s right to court is protected by BL 35. Besides, the Applicant seeks an order of certiorari to quash the Decision. Lastly, there is a request for costs.
2. Having looked at the remedies sought, an issue arises as to whether the JR would serve any useful propose. Proceedings of JR and their remedies are discretionary in nature. Therefore, even if the Applicant is successful in the judicial review, the court still retains a discretion not to award any remedies. In the present case, it is pertinent to note that the underlying suspected offence had already been time-barred at the time the original Form 86 was filed, so that prosecution (public or private) of that suspected offence is no longer possible. Therefore, even if the Applicant could obtain the declaratory remedies, it is difficult to see what practical benefit would be there to her. In this light, the present application is academic and on this basis alone leave could be refused: *Chan Po Fun Peter v Cheung CW Winnie[[8]](#footnote-8).*
3. Nevertheless, in deference to counsel’s substantial written and oral submissions on the proposed re-amended grounds and in view of the amount of media interest that this case has engendered, I should deal with those submissions briefly.

**Background facts**

9. Before turning to the Applicant’s grounds of challenge, it is necessary to set out the relevant background facts. The following chronology of events, which is not in dispute, is based on the written submissions of the parties:

1. On 14 February 2020, the Police received a report from a security guard of the Hong Kong Garden in Sham Tseng (“**the Estate**”) that some dead or injured animals were found on a slope near the Estate. Inspectors of SPCA were also alerted. It was then discovered that there were 15 carcasses and 9 injured animals (cats, chinchillas and others) (“**the Incident**”)[[9]](#footnote-9).
2. On the next few days, a few more animals were found in the vicinity by SPCA and security guards of the Estate. Altogether, there were 30 animals found, with 15 dead and 15 injured. The SPCA assisted in rescuing and providing care for those animals[[10]](#footnote-10).
3. A preliminary Police investigation led them to a fifth-floor apartment in the Estate. No animals were found in the three-bedroom flat but there were pet cages and feeding appliances that were recovered as evidence – suggesting that animals had previously been housed there as pets prior to being dropped from a height[[11]](#footnote-11).
4. On 17 February 2020, a secondary school teacher, accompanied by his lawyer attended Tsuen Wan Police Station and he was arrested on suspicion of animal cruelty and detained for further investigation[[12]](#footnote-12).
5. On 18 February 2020, A second man, believed to be the boyfriend/cohabitee of the 49-year-old man also attended the Tsuen Wan Police Station[[13]](#footnote-13).
6. On 12 August 2020, the PR made the Decision;
7. On 13 August 2020, the Police communicated the Decision to the SPCA via email;
8. On 15 August 2020, the prosecution of the suspected PCAO offence was time-barred;[[14]](#footnote-14)
9. On 2 September 2020, the Department of Justice (“DOJ”) in reply to media enquiry, publicly confirmed that the two suspects were not prosecuted on the basis of insufficiency of evidence[[15]](#footnote-15).
10. On 3 September 2020, the Applicant and her boyfriend adopted the cat “Potter” from the SPCA; by then they were informed by the SPCA that “Potter” was one of the surviving animals from the Incident[[16]](#footnote-16).
11. On 30 November 2020, the Applicant filed the original Form 86[[17]](#footnote-17).
12. On 27 January 2020, an order was made by consent for the Applicant to amend the Form 86[[18]](#footnote-18).

Misleading media reports

10. There is one matter concerning (4), (5) and (9) above which needs clarifications.

11. My attention has been drawn that there had been reports in the media asserting that the two aforesaid suspects (the teacher and his partner) had “surrendered” themselves to the Police by attending the Police Station[[19]](#footnote-19). Some even described the couple as having “turned themselves in”[[20]](#footnote-20). Some went even further and said that the DOJ had “confirmed that the two men who threw 30 animals out of a Hong Kong apartment will not be facing prosecution”[[21]](#footnote-21), as if the guilt of the two individuals was a forgone conclusion. In fact, these reports are inaccurate and capable of being misleading. The PR confirms that the two suspects did not “surrender” to the Police in the sense of turning themselves in and admitting any offences and that they had only attended Tsuen Wan Police Station with their solicitor after the Incident upon the invitation of the Police. More importantly, neither of them had made any confession to the alleged offence[[22]](#footnote-22). To all of this, the Applicant does not gainsay. In the circumstances, it is perhaps unfortunate that no earlier effort had been made to disabuse the public of any false impressions which might have been generated by the inaccurate media reports.

12. At this juncture, I would like to put a marker here that based on the material before this court, there may be some evidence to suggest that the animals had been kept at the fifth-floor apartment of the Estate. However, the Applicant has not pointed to any evidence which she says is capable of establishing the identity of the perpetrator(s) of the suspected offence to the requisite criminal standard, namely beyond reasonable doubt. The position would, I hope, become clearer if one considers the following possibilities, namely that the animals could have been thrown out of the apartment by: (1) either of the two suspects; (2) both of them acting together; (3) a trespasser to the apartment; or (4) if it was (1), then which one of them did it. Take heed that I am not suggesting that there should never be a prosecution without a suspect making confessions. That would very much depend on the availability of other evidence on the identity of the perpetrator(s). Needless to say, investigation and obtaining of evidence is the job of the law enforcement agencies (and in this case the Police). The job of the PR, on the other hand, is to assess the evidence provided to them and to decide whether there should be a prosecution based on the evidence available. Here, the Applicant is not alleging that the Police was not doing their job. If I understand correctly, the Applicant is also not alleging that the PR had already been provided with sufficient evidence which may enable them to form a view as to the actual identity of the perpetrator(s). I shall further elaborate on this.

**Consideration**

Merits of the Decision

13. Contrary to the submission of the PR, I do not understand that the Applicant is challenging the merits of the Decision. My understanding is that, by the re-amended grounds, she is challenging the tardiness of the Decision and its communication, the limited scope of the communication, the alleged procedural impropriety of the decision-making process and the alleged unlawfulness and irrationality of the Decision. However, should I be wrong on this, it is in any event well-established that formulation of policies and assessment of evidence are primarily matters for the decision maker (which is PR in this case) and the court should not usurp the latter’s function. The court’s role in JR is supervisory and it is only concerned with the lawfulness (rather than the merits) of the decision in question. Therefore, even if the Decision is not one which the court might or would have come to, the court would not intervene by way of judicial review unless there are errors of law or procedural unfairness or irrationality in the decision: *Television Broadcast Ltd v Communications Authority*[[23]](#footnote-23).

Amenability & BL 63

14. Many a paragraph in the Re-Amended Form 86 is devoted to whether the Decision is susceptible to JR and reference is made to a number of overseas case authorities from other common law jurisdictions including *R v Director of Public Prosecutions, ex p C*[[24]](#footnote-24); *R v Director of Public Prosecutions ,* *R v Director of Public Prosecutions, ex p Manning* [[25]](#footnote-25); *R v DPP, ex p Jones* [[26]](#footnote-26) ; *R v DPP, ex p Peter Dennis*[[27]](#footnote-27); *R(F) v Director of Public Prosecutions*[[28]](#footnote-28); and *R (Pullen) v Health and Safety Executive*[[29]](#footnote-29).

15. With respect, as far as Hong Kong is concerned, the starting point for consideration must be BL 63. The article says,

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

There is also s15(1) of the Criminal Procedure Ordinance (Cap 221) which says,

“The Secretary for Justice shall not be bound to prosecute an accused person in any case in which he may be of opinion that the interests of public justice do not require his interference.”

16. Recently, this Court has in *Tong Ying Kit v Secretary for Justice*[[30]](#footnote-30) reaffirmed the position that, under the framework of BL 63, the independence of the DOJ’s control of criminal prosecutions is protected from judicial encroachment, barring extremely rare situations. This is to follow a consistent line of local case authorities, all of which paying due regard to our mini-constitution: *RV v Director of Immigration*[[31]](#footnote-31); *Re Leung Lai Fun* [[32]](#footnote-32); and more recently *Kwok Cheuk Kin v 律政司刑事檢控專員梁‍卓‍然*.

17. In *Re Leung Lai Fun*, the Court of Appeal approved the judgment of Hartmann J (as he then was) in *RV v Director of Immigration,* where it is held that BL 63 includes the protection of the independence of the Department of Justice’s control of criminal prosecutions from judicial encroachment. It is only if the case belongs to those extremely rare situations, such as where there is evidence proving that the DOJ has acted in obedience to political instruction when making the decision, or is acting in bad faith, such as to cause the Court to find that the prosecutorial decision is unconstitutional, that the Court will have jurisdiction to review the decision concerned. Otherwise the Court should not encroach on the right of the DOJ to control prosecutions. This is the major premise which is founded on principle. This judgment of *Re Leung Lai Fun*, needless to say, is binding on this court.

Whether “truly exceptional circumstances” present

18. Recognising the very high threshold of “truly exceptional circumstances” which the Applicant has to meet, Mr McCoy relies on the following which he says, cumulatively, amount to “truly exceptional circumstances” in the present case:

* 1. A breach of the Applicant’s legitimate expectation that the DPP would act in accordance with both the Code and the Charter;
  2. A breach of the Applicant’s legitimate expectation that the DPP would communicate the Decision not to prosecute within a reasonable time;
  3. The cumulative breaches of the Applicant’s legitimate expectation amounted to a breach of BL 35 and therefore was an unconstitutional act and decision;
  4. The significant public interest in animal rights and welfare in Hong Kong, and the particular public attention to the Incident on 14 February 2020; and
  5. There were no less than 30 innocent victims involved in the Incident.

As to (i) & (ii): “legitimate expectation”

19. These two considerations, which are about “legitimate expectation”, are inter-related in that they are said to have arisen from two public documents issued by the DOJ:

1. the Code[[33]](#footnote-33), which is a set of statements and instructions to guide prosecutors in conducting prosecutions; and
2. the Charter[[34]](#footnote-34), which informs the public as to what their rights and obligations are when they come into contact with the criminal justice system.

20. The law relating to “legitimate expectation” has been fully explained by the Court of Final Appeal in *Ng Siu Tung v Director of Immigration*[[35]](#footnote-35) as follows:

* + 1. The law requires that a legitimate expectation arising from a promise or representation, the expectation being that the promise or representation would be honoured, be properly taken into account in the decision-making process so long as to do so falls within the power, statutory or otherwise, of the decision-maker.
    2. Unless there are reasons recognised by law for not giving effect to legitimate expectations, then effect should be given to them. Where the conduct of the public official has given rise to a legitimate expectation, then fairness requires that, if effect is not given to the expectation, the decision-maker should express its reasons so that they may be tested by a court in the event that the decision is challenged.
    3. Even if the decision involves the making of a political choice by reference to policy considerations, the decision-maker must make the choice in the light of the legitimate expectation of the parties.
    4. It follows that if the decision-maker does not comply with the third requirement just stated, the decision will *usually* be vitiated by reason of failure to take account of a relevant consideration. The qualification “usually” is added, as the jurisdiction to review an administrative decision for failure to take account of a relevant consideration, will only be exercised when the decision is materially affected by that failure.

21. Furthermore, to be legitimate, an expectation must be reasonable in the light of the official conduct which was said to have given rise to the expectation. This depended on the conduct of the relevant public authority and what it had committed itself to, as well as what the applicants factually expected and what they were entitled to expect: *Ng Siu Tung v Director of Immigration*[[36]](#footnote-36)*,* applying *A-G of Hong Kong v Ng Yuen Shiu*[[37]](#footnote-37).

22. Having considered the submissions of counsel, I am unable to accept that the public (and the Applicant in particular) has any “legitimate expectation” to be informed of the Decision and to be informed within a “reasonable time” before the expiry of the time limit. My reasons are as follows.

23. First of all, there has not been any representation by the DOJ, by words or by conduct, expressly or impliedly, that the public (and the Applicant) would be informed of the Decision. As regards the Code, as pointed out by Mr Liu,

1. Para 23.2 only provides for situations where advice “may” be given where it is practicable to those with a “legitimate interest” or where it is otherwise appropriate, and a “legitimate interest” includes the interest of “an entity with a proper interest in knowing the basis of the advice given”[[38]](#footnote-38). Although the interest of the community and the media may be regarded as “legitimate interest”, it is only in case of “the open dispensation of justice where previous proceedings have been public”[[39]](#footnote-39). None of the above is applicable here.
2. Para 23.4 sets out a list of non-exhaustive circumstances in which the giving of reasons may be contrary to public interest or otherwise inappropriate and at least sub-para (b), (c) and (e) are applicable in the present case. In this regard, the following dictum from *ex p Manning*[[40]](#footnote-40) is apposite:

“The practical arguments against imposition of such an obligation, Mr Turner submits, are very strong. The Director might have received information in confidence which he would not be free to disclose; some of the information on which he relied might be subject to public interest immunity; disclosure might prejudice a continuing inquiry or investigation; such reasons might be prejudicial and damaging to a third party and lay the Director open to proceedings for defamation. In a complex case involving a mass of material, the composition of reasons which adequately summarised the reasons for the decision would be a very difficult and time-consuming task, which would involve considerable expense.”

24. As regards the Charter, “Potter” is not a “person” and therefore also by definition not a “victim”. As such, the Charter does not apply to him. It is also noteworthy that, although para 5 of the Charter says “if a decision is made not to prosecute, victims shall be told of that decision”, it does not say that that has to be done before the expiry of the time limitation.

25. Secondly, there was no breach of the Code or the Charter by the PR. As pointed out by Mr Liu:

1. In relation to the Code, the owner(s) of the concerned animals could not be identified. The Police had informed the SPCA of the Decision two days before the expiry of the statutory time limit. On the other hand, the Applicant was not a victim of the suspected offence and she did not have any legitimate interest in the present case for the purpose of para 23.2 of the Code. In any event, there is no evidence that she had at any stage made any enquiries with the Police or the DOJ on the subject matter.
2. In relation to the Charter, at the time when the Decision was made, the Applicant was not a “victim” even in the wider sense of the word. The fact that she adopted “Potter” more than two weeks after the expiry of the time limit cannot suddenly turn her into a “victim” with the right to be informed of the Decision.

26. Thirdly, as to the Applicant’s contention that she has a legitimate expectation that the PR would communicate the Decision “within a reasonable time” before the prosecution was time-barred, with due respect, that contention carries with it ramifications which would undesirably burden the Police and the DOJ by encroaching the time for investigation and for the DOJ to properly consider its advice to the Police. Besides, it would contravene the legislative intent for allowing the prosecution the full 6-month period to lay summons before prosecution is time-barred. Last but not least, it would be inherently detrimental and counter-productive to the objective of bringing the culprits into justice. In the circumstances, the legitimate expectation which the Applicant contends for is not a reasonable one.

27. Fourthly, as regards McCoy’s reliance on the UK Divisional Court decision in *R v Director of Public Prosecutions, ex p Manning*[[41]](#footnote-41) to support his proposition that the Courts were more willing to take victim’s interest into account where a death had occurred, with respect, I am unable to see how that judgment could assist the Applicant. This is because:

1. the judgment in *ex p Manning* was confined to cases in which the following conditions were fulfilled, namely: (1) there has been a death in custody suggesting that unlawful force has been used; (2) a properly directed jury at the conclusion of a properly conducted inquest had returned a lawful verdict of “unlawful killing”; and (3) when there was credible evidence to identify the person responsible for the use of unlawful force against whom a prima facie case existed[[42]](#footnote-42). However, we have none of the above here;
2. that case was about the duty to give reasons[[43]](#footnote-43). However, the grounds about “legitimate expectation” is not so much about the reasons for the Decision, but about the timing of the communication of the Decision to the public (and the Applicant); and
3. the judgment was based on the “right to life” which is put at the forefront of the European Convention for the Protection of Human Rights and fundamental Freedoms. Here, “Potter” is yet to enjoy a similar right under the Basic Law.

As (iii): Right to court

28. This consideration can be shortly dealt with. If anyone had been minded to institute a private prosecution against any of the suspects, he or she would not have to wait for the making or communication of the Decision: *Re C (Bankrupt)*[[44]](#footnote-44). The right to court protected by BL 35 is simply not engaged.

29. To be fair to Mr McCoy, although the point is included in his written skeleton submission, he exercised measure and did not dwell on this during his oral submission.

As to (iv)&(v): animal rights and public attention

30. With respect, if the Applicant fails on her contention about “legitimate expectation”, then I am unable to see how the considerations under heads can constitute any “truly exceptional circumstances”. This is so, especially when the Applicant fairly concedes that the DOJ does not have a general duty to inform the public of its decisions not to prosecute before the expiration of the time bar for every summary offence[[45]](#footnote-45). As such, for the present purpose there can be no valid distinction to be drawn between offences under PCAO and other offences which are subject to a time limit.

31. I agree with Mr Liu’s submission that the Applicant’s contention based on the “dichotomy between human and animal” is artificial, given that the interests of animals can usually be represented and protected by their owners and/or other interested parties (such as the SPCA or other non-governmental organisations) who could have followed up with the investigation and had their voices heard during the investigation, as provided by the Code and the Charter. Therefore, there is no justification to impose a burden on the DOJ to inform the general public (even in the absence of any enquiry) of its decisions not to prosecute, whether before or after the expiry of the time limit.

32. As to whether cases involving animal cruelty should be made a special category of its own so that the DOJ would be under a duty to inform the public of the Decision within a reasonable time, whilst I recognize that the advocacy for animal rights and welfare is a very worthy cause and that the Incident was a particularly nasty one which rightly attracts public condemnation, in my judgment it would be wrong to let hard cases make bad law. As discussed above, the duty which the Applicant contends for would have ramifications across the board which could actually harm the administration of justice as a whole.

33. As to the number of animals involved, if cases concerning animal lives are, as the Applicant contends, of such an important and exceptional nature so as to justify judicial encroachment of prosecutorial independence, then in my judgment it would matter not whether the case involved just one animal or more. I will come to the Applicant’s standing in due course. At this juncture, it is noted that according to the Applicant’s own case, she brings in the present proceedings for and on behalf of “Potter” but not the other animals concerned[[46]](#footnote-46).

34. Without in any way deprecating the admirable sincerity and effort of the Applicant and her legal team in the present proceedings, if they think that the present law is inadequate for the protection of animal rights and welfare and has caused unnecessary difficulties in for prosecuting cases of animal cruelty, then perhaps a holistic review of all the relevant law should be conducted and the avenue of reform lies elsewhere. JR is simply not an appropriate vehicle for that undertaking. As mentioned above, formulation of policies is not a proper matter for the court in a JR.

Conclusion on “truly exceptional circumstances”

35. Based on the above, in my judgment the considerations relied upon by the Applicant, whether taken individually or as a whole, do not come any way close to “truly exceptional circumstances” in the sense of *RV v Director of Immigration* so as to render the Decision unconstitutional and subject to judicial review.

**The Applicant’s standing**

36. Mr McCoy rightly accepts[[47]](#footnote-47) that whether an applicant has standing (*locus standi*) in the sense of having “sufficient interest in the matter” in order to bring the JR is a matter which goes to jurisdiction: s21K(3) of the High Court Ordinance, Cap 4. Therefore, the question must be considered in the legal and factual context of the whole case: *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement*[[48]](#footnote-48).

37. The most recent case on *locus standi* is *Kwok Cheuk Kin v President of Legislative Council for and on behalf of the Legislative Council and Secretary for Justice*[[49]](#footnote-49), which was recently applied in *Hui Chi Fung v Secretary for Justice*[[50]](#footnote-50). The over-arching question is this: “in the particular context whether the preservation of the rule of law requires standing be given to this applicant to ventilate the issues raised in the application in light of the interest he has.”

38. The basis for the Applicant to say that she has standing in the present proceedings, as stated in the proposed Re-Amended Form 86, is two-fold[[51]](#footnote-51):

* 1. for and on behalf of her adopted cat Potter, as the proper victim; and
  2. as a concerned pet owner in Hong Kong to secure a form of justice for her adopted cat, the animals involved in the Incident (both alive and dead) and those who will continue to be abused if the matter is left the way it is.

39. Bearing in mind the relevant principles and having regard to all that the Applicant has said on this topic in the proposed Re-Amended Form 86, I am not satisfied that the Applicant has standing in the present proceedings. My reasons are as follows:

1. the Applicant only decided to adopt “Potter” on 3 September 2020 which was more than two weeks after the Decision was communicated to SPCA and by which time the suspected offence had already been time-barred;
2. there is no evidence showing that the Applicant had at any stage (before or after the expiry of the time limit) made any enquiries with either the Police or the DOJ on the subject matter;
3. I agree with Mr Liu that there are other potential challengers who have a greater interest in the subject matter, e.g. animal welfare groups, the SPCA and other non-governmental organisations[[52]](#footnote-52). These organisations would clearly have better standing than the Applicant, given their sufficient size and organisational qualities with constituent members interested in the matter, and their status as responsible and respected body with a genuine concern for the subject matter of this JR (i.e. animal rights and prevention of animal cruelty) with expertise; and
4. the mere fact that those bodies are not challenging the Decision cannot by itself confers standing upon the Applicant. On the other hand, it can be properly assumed, without offending the rule of law, that there is no need for the Court to entertain this JR application: *R (on the application of McCourt) v Parole Board of England and Wales*[[53]](#footnote-53); and
5. as discussed above, the Applicant’s contentions on amenability, legitimate expectation and BL 35 are bad ones. Moreover, as can be seen in due course, her challenge to the Decision on conventional grounds also lacks merits. In the circumstances, it is difficult to see how the preservation of the rule of law would require standing to be given to her to ventilate the issues raised in the application in light of the interest she has.

**The conventional grounds**

40. Given my aforesaid rulings, I hope that I can be forgiven for being brief in dealing with the Applicant’s conventional grounds as follows:

* + 1. as to the ground of procedural impropriety, it has no merits as the PR was under no obligation to make the Decision and to communicate it to the public “within a reasonable time” as the Applicant contends and there was no such “legitimate expectation” either;
    2. as to the ground of illegality, it also fails as BL 35 is not engaged. I note that the Applicant has not provided any other arguments as to why she says the Decision is illegal; and
    3. as to the ground of perversity and irrationality, it is not reasonably arguable. As noted above, reason had been given by the PR for the Decision, namely insufficiency of evidence. It is not the Applicant’s case that there is sufficient evidence for the PR to prosecute the two suspects. In any event, assessment of the evidence in the suspect criminal case at the pre-charge stage is a matter for the prosecution. If the DOJ formed the view that the evidence was insufficient, which they clearly did, then it is difficult to see how it can be said that the Decision is “irrational” in the public law sense.

41. The Applicant suggests that the DOJ could have laid an information or made a complaint to the magistrates’ court first, so as to stop the clock from ticking, and then to withdraw the charges after a proper evaluation of both the evidence and public interest in bringing a prosecution. With the greatest respect, this, as Mr Liu says, is an “alarming” suggestion and in my view should not have been raised at all. The suggestion is to ask the DOJ to ignore its own published charging policy[[54]](#footnote-54) and to lay a charge even in situations when the PR is of the view that there is a less than reasonable prospect of conviction. The suggestion also takes little account of the presumption of innocence and the possible social stigma that a suspect may carry just because he or she is being charged. Should the Applicant’s suggestion be adopted by the Prosecution in practice, it would spell a very sad day for the criminal justice system in Hong Kong.

**Conclusion**

1. Based on all of the aforesaid reasons, the Applicant’s summons for the application for leave to amend the Amended Form 86 is refused. The leave application for JR is also refused.

**Costs**

1. The relevant legal principles on the issue of costs in JR proceedings, which are well-known, are as stated in *Leung Kwok Hung v President of the Legislative Council* (No 2)[[55]](#footnote-55) and applied in *Ahmad Ali v Director of Legal Aid*[[56]](#footnote-56) , all of which I need not repeat here.
2. I have no doubt that the applicant is acting in a public spirit and is pursuing a very worthy cause. I note also that she is not after any personal gain in the present application. Should she drop the proceedings after the hearing on 16 April 2021 where it was confirmed that the Decision had in fact been made and communicated to SPCA before the expiry of the time limit, she would have a stronger case to argue that, despite the refusal of leave, there should be no order as to costs based on the public interest factor.
3. Putting everything on balance, in the exercise of my discretion I make an order *nisi* that there the Applicant shall pay the PR’s costs incurred after the hearing on 16 April 2021. If neither party applies for a variation within 14 days from the date of this judgment, the order shall become absolute upon expiry of that period.
4. It only leaves me to thank counsel for their helpful assistance.

(Alex Lee)

Judge of the Court of First Instance

High Court

Mr Kim J McCoy, instructed by Messrs Patricia Ho & Associates, for the Applicant

Mr William Liu, Deputy Law Officer (Civil Law) (Ag), Mr Simon Kwong, Senior Public Prosecutor and Ms Naomi Chan, Counsel, for the Putative Respondent

1. Amended Form 86 filed on 1.2.2021. [↑](#footnote-ref-1)
2. And with him, Mr Kwan and Ms Chan. [↑](#footnote-ref-2)
3. (1999) 2 HKCFAR 300, at 340E-F, ie, “Grounds for quashing the exercise of administrative power by the court if well-founded should be capable of being stated clearly and succinctly, in a few numbered paragraphs. I would emphasize the word few.” See also the same observation repeated by Chow J (as he then was) in *Kwok Cheuk Kin v Director of Public Prosecutions and Anor* [2019] HKCFI 900, at §11. [↑](#footnote-ref-3)
4. Society for the Prevention of Cruelty to Animals (“**SPCA**”). [↑](#footnote-ref-4)
5. It was only shortly before 16 April 2020 (when the court dealt with the application of an intended intervener to intervene) that the Applicant obtained a confirmation from SPCA that they had been informed of the Decision before the expiry of the time limitation. [↑](#footnote-ref-5)
6. See “Applicant’s Summary of Proposed Amended Grounds” dated 30.5.2021. [↑](#footnote-ref-6)
7. See *Peter Chan Po Fun v Winnie Cheung* (2007) 10 HKCFAR. [↑](#footnote-ref-7)
8. [2008] 1 HKLRD 319, at §52 (per Litton NPJ) [↑](#footnote-ref-8)
9. [A/8/17-138/§§10-12] [↑](#footnote-ref-9)
10. [A/8/17-138/§14] [↑](#footnote-ref-10)
11. [A/8/17-138/§16] [↑](#footnote-ref-11)
12. [A/7/126-127/§11] [↑](#footnote-ref-12)
13. Ibid [↑](#footnote-ref-13)
14. See s 26 of the Magistrates Ordinance (Cap. 227). The 6-month period did not include the day of the offence: see *Secretary for Justice v Maxim’s Caterers Ltd* [2009] 4 HKLRD 723 §§8-13. [↑](#footnote-ref-14)
15. [A/7/126/§10] [↑](#footnote-ref-15)
16. [A/2/60/§17] [↑](#footnote-ref-16)
17. [A/1/1-55]] [↑](#footnote-ref-17)
18. [A/4/65]. This was just to correct the name of the Interested Party. [↑](#footnote-ref-18)
19. [B/11/223] [↑](#footnote-ref-19)
20. [B/11/225], [B/11/231] [↑](#footnote-ref-20)
21. [B/11/241] [↑](#footnote-ref-21)
22. [A/7/127/§12] [↑](#footnote-ref-22)
23. [2016] 2 HKLRD 41 at §146 [↑](#footnote-ref-23)
24. [1995] 1 Cr App R 136, at 139G-140A. [↑](#footnote-ref-24)
25. [2001] QB 330. [↑](#footnote-ref-25)
26. [2000] 1 IRLR 373 [↑](#footnote-ref-26)
27. [2006] EWHC 3211 (Admin) [↑](#footnote-ref-27)
28. [2014] 1 QB 581 [↑](#footnote-ref-28)
29. [2003] EWHC 2934 (Admin) [↑](#footnote-ref-29)
30. [2021] HKCFI 1397 [↑](#footnote-ref-30)
31. [2008] 4 HKLRD 529 [↑](#footnote-ref-31)
32. [2018] 1 HKLRD 523 [↑](#footnote-ref-32)
33. The relevant paragraphs are as follows:

    23.2 Reasons for decisions made in the course of prosecutions or of giving advice may be given where practicable, orally or in writing, to those with a legitimate interest in the matter or where it is otherwise appropriate. A legitimate interest includes:

    the interest of a court in knowing why a particular course of action has been taken;

    the interest of a victim of crime in the conduct of a case;

    the interest of an agency of government or an entity with a proper interest in knowing the basis of advice given;

    the interest of the community and the media in the open dispensation of justice where previous proceedings have been public.”

    …

    23.4 There are circumstances in which the giving of reasons may be contrary to the public interest or otherwise inappropriate, including where to do so:

    may prejudice ongoing investigations or the integrity of law enforcement;

    may adversely affect the interests of a victim of crime, a witness, a suspect or an accused;

    may adversely affect the administration of justice (especially in the case of a decision not to prosecute where public discussion may amount to a public trial without the safeguards of the criminal justice process);

    may expose information given confidentially or sensitive information, the exposure of which may give rise to legitimate concern to individuals;

    may be contrary to protections given by the Personal Data (Privacy) Ordinance, Cap. 486;

    may be contrary to legal professional privilege (unless waived) or public interest immunity. [↑](#footnote-ref-33)
34. In its preamble, a “victim” is defined as follows:

    “**Who is a victim?**

    A victim is a person who suffers physical or emotional harm, or loss or damage to property because of a criminal offence. This covers not only the person against whom the offence was committed but also anyone who has suffered directly from the commission of the offence. The definition of victim may include for example the parent of a child who has been sexually abused or the immediate family of a murder victim.”

    Then at Para 5, it says,

    **“5. The victim's right to information - investigation and prosecution**

    So far as can be done without prejudicing the progress or outcome, victims of crime shall be kept fully informed of the progress of the case. If a decision is made not to prosecute, victims shall be told of that decision. Where prosecution is proceeding, victims shall be told about the steps which follow in the prosecution process, the progress of the investigation, the role of victims as witnesses in the prosecution of the offence, the date and place of the hearing of the proceedings, and the final disposal of the case, including the outcome of any appeal. Victims shall have the right to ask to be notified of the offender's pending release, or escape, from penal custody, provided that the victims shall have given the Commissioner of Correctional Services their current address and the telephone number.”

    [↑](#footnote-ref-34)
35. (2002) 5 HKCFAR 1, at §§94-98. [↑](#footnote-ref-35)
36. Ibid, at §101. [↑](#footnote-ref-36)
37. [1983] 2 AC 629 [↑](#footnote-ref-37)
38. Cl 23.3(c) [↑](#footnote-ref-38)
39. Cl 23.2(d) [↑](#footnote-ref-39)
40. Supra, at §32. [↑](#footnote-ref-40)
41. Supra, at §33. [↑](#footnote-ref-41)
42. Ibid, at §25. [↑](#footnote-ref-42)
43. On this topic, there is a series of local case authorities for the proposition that the prosecution does not have a general duty to give reasons for its prosecutorial decisions: See *Ma Pui-tung v Department of Justice*, HCAL 15/2008 (dated 25.2.2008); and *Sino Bright Enterprises Co Ltd v Secrtary for Justice* [2020] 1 HKLRD 446. [↑](#footnote-ref-43)
44. [2006] 4 HKC 582, at §26 [↑](#footnote-ref-44)
45. At §62 of the Applicant’s Skeleton Submission [↑](#footnote-ref-45)
46. Re-Amended Form 86, at §41. [↑](#footnote-ref-46)
47. [A/8/141/§§36] [↑](#footnote-ref-47)
48. [1995] 1 WLR 386, at 395C-H. [↑](#footnote-ref-48)
49. [2021] 1 HKLRD 1247, at §§18-28 & 34. [↑](#footnote-ref-49)
50. [2021] HKCFI 1208, at §§16-20. [↑](#footnote-ref-50)
51. [A/8/144/§41] [↑](#footnote-ref-51)
52. Such as those named in the Applicant’s Re-Amended Form 86 [A/8/143/§39]. [↑](#footnote-ref-52)
53. [2020] EWHC 2320 (Admin), at §44. [↑](#footnote-ref-53)
54. See para 14 of the Code:

    “Prosecutors should apply The Statement of Prosecution Policy and Practice at all times. This means that prosecutors should consider:

    whether there is sufficient evidence to justify the institution of proceedings on the basis that it affords a reasonable prospect of conviction; and

    whether the public interest requires a prosecution to be pursued. The public interest will normally require that a prosecution be brought in a case of domestic violence if the victim is willing to give evidence.” [↑](#footnote-ref-54)
55. (2014) 17 HKCFAR 841 [↑](#footnote-ref-55)
56. HCAL 470/2019, [2019] HKCFI 1303 [↑](#footnote-ref-56)