A **Gurung Bhakta Bahadur** Applicant

and

Director of Immigration & Another Respondents

B

(Court of First Instance)
(Constitutional and Administrative
Law List No 1579 of 2000)

C

Hartmann J in Chambers
11 January and 2 February 2001

Administrative law — Chief Executive-in-Council — appeals and objections
D *— whether s.64(3) precluded judicial review of administrative decision, if person aggrieved chose to seek redress by appeal to Chief Executive-in-Council — whether s.64(3) ousted court from reviewing decision of Chief Executive-in-Council on appeal — Interpretation and General Clauses Ordinance (Cap.1) s.64(3)*

E *Words and phrases — "instead of" — Interpretation and General Clauses Ordinance (Cap.1) s.64(3)*

[Interpretation and General Clauses Ordinance (Cap.1) s.64, 64(3), (4)]

F *行政法──行政長官會同行政會議──上訴及反對──如果某人受屈而選擇上訴至行政長官會同行政會議尋求糾正，第**64(3)**條是否禁止司法覆核行政議決──第**64(3)**條是否禁止法院於上訴時覆核行政長官會同行政會議的決定──《釋義及通則條例》(第**1**章)第**64(3)**條*

G *詞彙──"取代"──《釋義及通則條例》(第**1**章)第**64(3)**條*

[《釋義及通則條例》(第1章)第64、64(3)、(4)條]

X obtained leave to bring judicial review proceedings against Rs, namely, the Director of Immigration (the Director) and the Chief
H Executive-in-Council (the Chief Executive), seeking to quash the decisions of: (a) the Director in refusing to grant him permission to remain in Hong Kong; and (b) the Chief Executive confirming that decision. Rs sought to set aside the granting of the leave, relying on s.64(3) of the Interpretation and General Clauses Ordinance (Cap.1),
I which provided "The conferring by any Ordinance of a right of appeal or objection to the Chief Executive ... shall not prevent any person from applying [for judicial review], *instead of* appealing or making an objection to the Chief Executive ... but no proceedings by way [of judicial review] shall be taken against the Chief Executive ... in respect
J of any such appeal or objection to the Chief Executive ...". It was submitted first, that the words "instead of" imposed an election on

an aggrieved person to choose *either* to seek redress in the High Court *or* to appeal to the Chief Executive but not both, hence X could not challenge the Director's decision by way of judicial review. Secondly, that the latter part of s.64(3) constituted an ouster clause which prevented X from seeking judicial review of the Chief Executive's decision.

Held, dismissing Rs' summonses, that:

Whether s.64(3) precluded judicial review of Director's decision

(1) On an ordinary construction of s.64(3), and applying the common law presumption that access to the courts was not to be denied in a statutory instrument save by the clearest language, an aggrieved person seeking to challenge the decision of an administrative authority had a choice of *both* appealing to the Chief Executive *and* challenging the decision by way of judicial review. This construction was supported by the following considerations. (See pp.232B–233H.)

(2) First, it was clear from s.64(4) that when the Chief Executive sat in Council to consider any appeal or objection, he acted in an administrative or executive capacity and not in a judicial or quasi-judicial one. Further, appeals on the merits and judicial reviews were different creatures. In the absence of plain language to the contrary, it could be inferred that the Legislature would never have intended that a person who had a justifiable grievance on both the merits and the lawfulness of a decision be forced to elect to proceed on only one (*R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122, *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815 applied). (See p.232C–J.)

(3) Secondly, neither would the interests of certainty or finality be served by Rs' interpretation of s.64(3). Certainty was not served where an aggrieved person had to choose one form of potential redress at the expense of another very different form. Further, s.64 provided for time-limits in appealing to the Chief Executive while a fundamental principle underlying judicial review was that a person must challenge the decision expeditiously. Therefore, the statutory provisions of time-limits and the principles of review worked together to bring about finality. (See pp.232I–233H.)

Whether court ousted from reviewing decisions of Chief Executive

(4) The second half of s.64(3) was a "complete ouster" provision which protected decisions of the Chief Executive made on appeal from judicial review, unless the Chief Executive had exceeded his jurisdiction. Where the Chief Executive had exceeded his jurisdiction, that decision was a nullity and open to review. Hence, although s.64(3) did not act as an absolute bar to the court exercising its jurisdiction of review, the review was limited to correcting an error or law which affected jurisdiction as opposed to a mere error of law. Here, the question of whether the Chief

A Executive had exceeded his jurisdiction would be considered at the judicial review (*Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 2 AC 147, *A-G v Ryan* [1980] AC 718, *South East Asia Fire Bricks Sdn Bhd v Non Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363, *O'Reilly v Mackman* B [1983] 2 AC 237, *R v Secretary of State for the Home Department, ex p Fayed* [1998] 1 WLR 763 applied). (See pp.233I–241C.)

(5) Authorities relied upon by Rs in which the courts refused to question decisions protected by "ouster" provisions all concerned time-limit clauses and their place in the broader statutory scheme. C In contrast, the principles above, concerned provisions which attempted absolutely to protect the decision of an inferior tribunal from judicial scrutiny. Such provisions allowed no limited or qualified access to the courts, stood on their own, and were not an integral part of some greater statutory scheme created by the D Legislature for the public good (*Smith v East Elloe Rural District Council* [1956] AC 736, *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122, *R v Secretary of State for the Environment, ex p Kent* [1990] JPL 124 distinguished; *R v Cornwall County Council, ex p Huntington* [1994] 1 All ER 694 applied). (See E pp.238E–240D.)

Summonses

This hearing dealt with two summonses issued by the respondents, seeking to set aside the granting of leave *ex parte* to the applicant for F judicial review in relation to their decisions refusing to grant him permission to remain in Hong Kong. The facts are set out in the judgment.

Mr Hectar Pun, instructed by Joseph CT Lee & Co, for the applicant.

G Mr William Marshall SC and Mr Caspar Chu, Government Counsel, for the respondents.

Legislation mentioned in the judgment

Bahamas Nationality Act 1973 [Bahamas] s.16

H British Nationality Act 1981 [Eng] s.44(2)

Foreign Compensation Act 1950 [Eng] s.4(4)

Immigration Ordinance (Cap.115) s.53, 53(1), (3), (4)

Industrial Relations Act 1967 [Malaysia] s.29(3)

Interpretation and General Clauses Ordinance (Cap.1) ss.39A, I 39A(1)(b), (1)(c), 64(3)–(5)

Cases cited in the judgment

Akram v Secretary for Security [2000] 1 HKLRD 164

Anisminic Ltd v Foreign Compensation Commission (No 2) [1969] J 2 AC 147, [1969] 2 WLR 163, [1969] 1 All ER 208

A-G v Ryan [1980] AC 718, [1980] 2 WLR 143

O'Reilly v Mackman [1983] 2 AC 237, [1982] 3 WLR 1096, [1982] 3 All ER 1124

R v Cornwall County Council, ex p Huntingdon [1994] 1 All ER 694

R v Panel on Take-overs and Mergers, ex p Datafin Plc [1987] QB 815, [1987] 2 WLR 699, [1987] 1 All ER 564, [1987] BCLC 104

R v Secretary of State for the Environment, ex p Kent [1990] JPL 124, [1990] COD 78

R v Secretary of State for the Environment, ex p Ostler [1977] QB 122, [1976] 3 WLR 288, [1976] 3 All ER 90

R v Secretary of State for the Home Department, ex p Fayed [1998] 1 WLR 763, [1997] 1 All ER 228, [1997] INLR 137, [1997] COD 205

Smith v East Elloe Rural District Council [1956] AC 736, [1956] 2 WLR 888, [1956] 1 All ER 855

South East Asia Fire Bricks Sdn Bhd v Non Metallic Mineral Products Manufacturing Employees Union [1981] AC 363, [1980] 3 WLR 318, [1980] 2 All ER 689

Other material mentioned in the judgment

Wade, "Constitutional and Administrative Aspects of *Anisminic Ltd v Foreign Compensation Commission (No 2)*" (1969) 85 LQR 198

Hartmann J in Chambers

Introduction

On 21 July 2000, the applicant obtained leave *ex parte* to bring judicial review proceedings against both the Director of Immigration (the Director) and the Chief Executive-in-Council. In those proceedings, the applicant sought to quash a decision of the Director refusing to grant him permission to remain in Hong Kong as a dependent of his wife. The applicant further sought to quash a decision of the Chief Executive in terms of which the Chief Executive confirmed the Director's decision despite an objection made by the applicant pursuant to s.53 of the Immigration Ordinance (Cap.115).

On 30 November 2000, the respondents issued proceedings by way of summons seeking to set aside the granting of leave in so far as it related to the second respondent; that is, the Chief Executive. The relief was sought on the basis that s.64(3) of the Interpretation and General Clauses Ordinance (Cap.1) (the Interpretation Ordinance) bars a person who has elected to appeal or submit an objection to the Chief Executive from thereafter seeking to judicially review the Chief Executive's decision in the matter.

On 10 January 2001, a further summons was issued by the respondents. This second summons sought to set aside the granting of leave in so far as it related to the first respondent; that is, the Director.

A The relief sought also flowed from s.64(3) of the Interpretation Ordinance, the contention being that, having elected to lodge an objection to the Director's decision with the Chief Executive, the applicant was now barred in terms of s.64(3) from applying also to judicially review the Director's decision.

B

The scope of this judgment

This judgment relates solely to the matters raised in the respondents' summonses; essentially therefore to the important issue of the true C meaning and effect of s.64(3) of the Interpretation Ordinance. It does not deal with the substantive merits of the applicant's challenge to the decisions of the Director and the Chief Executive.

D

Background to the matter

The applicant comes from Nepal. He is a national of that state. He and his wife were married in Nepal. The wife, however, was born in Hong Kong and is a permanent resident here. In early August 1998, the applicant came to Hong Kong as a visitor to be with his wife. A E few days later he applied to the Director for a change of his immigrant status, seeking to remain in Hong Kong as a dependent of his wife. On 13 July 1999, the Director refused the application. He did so on the basis that he was not satisfied that the applicant's wife, the sponsor, was capable of supporting the applicant to a reasonable standard of F living nor was he satisfied that the applicant was a genuine dependent of his wife.

Being aggrieved by this decision, which is the first decision challenged by the applicant in his judicial review proceedings, the applicant chose to seek redress in terms of s.53 of the Immigration G Ordinance. Subsection (1) of that section reads:

> … any person aggrieved by a decision, act or omission of any public officer taken, done or made in the exercise or performance of any powers, functions or duties under this Ordinance may by notice in H writing lodged with the Chief Secretary within the time prescribed in sub-s.(2) object to that decision, act or omission.

Subsection (3) of that section provides that an objection lodged by a person in the position of the applicant shall be considered by the Chief I Executive-in-Council.

On 16 June 2000, the applicant was advised that the Chief Executive-in-Council had confirmed the decision of the Director. The letter from the Secretary for Security read:

J

> At the meeting of the Chief Executive-in-Council on 30 May 2000, Members considered the objection you lodged on 17 July 1999. The

> Council advised and the Chief Executive ordered that the decision of the Director of Immigration in respect of the application by you should be confirmed.

This is the second decision challenged by the applicant. It was a decision made by the Chief Executive pursuant to sub-s.(4) of s.53 which reads:

> On consideration of an objection under sub-s.(1) … the Chief Executive-in-Council … may confirm, vary or reverse the decision, act or omission of the public officer or substitute therefor such other decision or make such other order as he thinks fit.

Section 64(3) of the Interpretation Ordinance

In 1950, the recently enacted Interpretation Ordinance was amended by the addition to it of a new section: 39A. The object of this new section was to standardise procedures for appealing to the then Governor-in-Council against decisions of administrative authorities. More particularly, s.39A(1)(b) provided that, whenever any Ordinance allowed for appeal to the Governor-in-Council, nothing contained in that statute:

> … shall be deemed to prevent any person from applying to the Supreme Court for a *mandamus*, injunction, prohibition or any other order should he elect so to do, instead of appealing to the Governor-in-Council, but no proceedings by way of *mandamus*, injunction, prohibition or other order shall be taken against the Governor-in-Council in respect of such provision or provisions;

Subsection (1)(c) continued by providing that:

> … every order of the Governor-in-Council on any appeal under such provision shall be final and may be enforced by the Supreme Court as if it had been an order of that court.

Mr Marshall, who appeared for the respondents, said that his investigations had not been able to shed light on why these two subsections had been made into law. Nothing appears in *Hansard* on the point.

In 1966, s.39A was reconstituted as s.64 of the Interpretation Ordinance. What was originally s.39A(1)(b) is today, s.64(3) and reads as follows:

> The conferring by any Ordinance of a right of appeal or objection to the Chief Executive-in-Council shall not prevent any person from applying to the High Court for an order of *mandamus*, *certiorari*, prohibition, injunction or any other order, instead of appealing or making an objection to the Chief Executive-in-Council, where an

A application for such an order would lie, but no proceedings by way of *mandamus*, *certiorari*, prohibition, injunction or other order shall be taken against the Chief Executive-in-Council in respect of any such appeal or objection to the Chief Executive-in-Council or any proceedings connected therewith.

B

The old sub-s.(1)(c) of s.39A has been replaced by s.64(4) which reads:

The Chief Executive-in-Council, when considering any appeal or objection to him (whether by way of petition or otherwise, and C whether such appeal or objection is made by virtue of any Ordinance or otherwise) shall act in an administrative or executive capacity and not in a judicial or quasi-judicial capacity and shall be entitled to consider and take into account any evidence, material, information or advice in his absolute discretion.

D

Whatever the previous position may have been, that subsection makes it plain that today, when the Chief Executive sits in Council to consider any appeal or objection, he acts in an administrative or executive capacity and not in one that is judicial or quasi-judicial. There is a E **material difference between the two. In *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122 (at p.135), Lord Denning MR expressed it thus:**

In making a judicial decision, the tribunal considers the rights of the F parties without regard to the public interest. But in an administrative decision (such as a compulsory purchase order) the public interest plays an important part. The question is, to what extent are private interests to be subordinated to the public interest.

G

The interpretation of s.64(3) proposed by the respondents

As I comprehend the argument, it is submitted on behalf of the respondents that s.64(3) precludes judicial review of an administrative authority's decision if the person aggrieved by that decision chooses H **to seek redress by way of what I will, in general terms, describe as an appeal to the Chief Executive-in-Council. What is contended is that the phrase in the subsection which reads — "instead of appealing or making an objection to the Chief Executive-in-Council" — imposes upon an aggrieved person an election. That person must choose either** I **to seek redress in the supervisory jurisdiction of the High Court or to proceed by way of an appeal to the Chief Executive. If the aggrieved party chooses the latter course, the right to judicially review the administrative authority's decision falls away and with it any right to judicially review the decision of the Executive. That is so, it is argued,** J **because the Legislature created the statutory remedy of an appeal to the Chief Executive-in-Council and, in so doing, made it plain in the**

wording of the subsection that if an aggrieved person chose not to seek redress through the courts but rather by way of the statutory remedy that chosen pathway excluded the court's supervisory jurisdiction. As the respondents put it: if the Legislature created the statutory remedy, it is entitled to limit it in the interests of finality and certainty.

On behalf of the respondents, Mr Marshall contends that it would, on his reading, be more accurate to describe the subsection as "elective" rather than an "ouster" section which absolutely precludes the supervisory jurisdiction of the High Court. An aggrieved person, he says, has the right to seek judicial review of the public authority's decision but it is a right dependent on his election. The same principle applies, he says, when a statute provides for a time-limit beyond which judicial review is no longer allowed.

This Court's interpretation of s.64(3)

With respect, I do not consider such a comparison to be of assistance. Section 64(3) does not seek to compress an aggrieved person's judicial remedies into a time frame dictated by public interest. If I accept the respondents' interpretation of s.64(3) it means that the Legislature will have imposed upon an aggrieved party a single choice: does that person proceed on the merits by way of appeal or does that person embark on an entirely different process; namely, to ask the High Court to identify and correct a recognisable public law wrong entirely outside the merits of the matter? What cannot be ignored is that appeals on the merits and judicial reviews are not of the same breed, the one being little more than a clone of the other. They are — to pursue the metaphor — different creatures. In this regard I can do no better than cite the words of Sir John Donaldson MR (as he then was) in *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815 (at p.842):

> There was some failure on the part of the applicants to appreciate, or at least to act in recognition of the fact, that an application for judicial review is not an appeal. The panel and not the court is the body charged with the duty of evaluating the evidence and finding the facts. The role of the court is wholly different. It is, in an appropriate case, to review the decision of the panel and to consider whether there has been "illegality", ie whether the panel has misdirected itself in law; "irrationality", ie whether the panel's decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it …

It is difficult to accept that the Legislature would have intended a person who has a justifiable grievance on both the merits of an authority's decision and also on the lawfulness of that decision to nevertheless be forced to elect to proceed on only one. I believe that,

A in the absence of plain language to the contrary, it can be inferred that the Legislature would never have countenanced such a result, one that could lead to a predicament of some absurdity.

Nor have I been persuaded that either the interests of certainty or finality are served by the interpretation of s.64(3), that is urged upon B me. How is certainty served when an aggrieved person must choose one form of potential redress at the expense of another very different form? Some lip service may be paid to the principle of finality but s.64 provides for time-limits in appealing to the Chief Executive while a fundamental principle underlying judicial review is that if a person C wishes to challenge the legality of an administrative action he ought to do so expeditiously. The statutory provision of time-limits and the principles of judicial review work together therefore to bring about finality.

I accept, of course, that the first principle of construction is that plain D words must be given their plain meaning. But I do not see that I in any way offend the principle by coming to an interpretation of s.64(3) that avoids the potential predicaments encased in the interpretation suggested by the respondents. I say this in light of a second principle too; namely, that there is a common law presumption (made historically E to secure the rule of law) that access to the courts is not to be denied in a statutory instrument save by the clearest language.

It is my understanding that in the first half of s.64(3), an option is offered. But it is not an option that is mutually exclusive. The phrase "instead of" means no more than "rather"; in short that an aggrieved F person may choose rather to seek judicial review than proceeding by way of appeal to the Chief Executive-in-Council. But the offer of an alternative does not of itself indicate that the choice must be only one or the other and not, where circumstances permit, a choice of both procedures. The language used is nowhere near clear enough for G that to be the unambiguous meaning. As I see it, the true intent of the subsection, as a matter of ordinary construction, is to say that an aggrieved person seeking to challenge the decision of an administrative authority has a choice of *both* procedures but if an appeal is made to the Chief Executive-in-Council a decision on that matter will not itself H be subject to judicial review.

In summary, while s.64(3) concedes that rights of appeal to the Chief Executive do not prevent an aggrieved person from also (or only) seeking judicial review of an administrative authority's decision, it purports to protect from similar challenge the valid decisions of the I Chief Executive made when he is called upon to decide such appeals.

Accordingly, in my judgment, in so far as s.64(3) may be described as an "ouster" section, it seeks only to oust (that is, to preclude) decisions of the Chief Executive from the scrutiny of the High Court and does not purport to limit the procedural options open to an J aggrieved party when deciding how best to challenge the decision of an administrative authority.

But is the Court ousted from reviewing decisions of the Chief Executive-in-Council?

In the present case, although the Chief Executive had the power in terms of s.64(5) of the Interpretation Ordinance to vary the Director's decision or substitute it with a different decision, he chose not to do so. The Chief Executive did no more than confirm the Director's decision. As such, it appears to me that in the present case, whether or not the decision of the Chief Executive is subject to any degree to judicial review, will not, in practical terms, affect the outcome of the applicant's judicial review. I say so because the Chief Executive has not made a distinct decision severable from the decision of the Director, a decision capable of standing on its own even if the decision of the Director is found to be a nullity. My brother, Chung J, expressed it thus in *Akram v Secretary for Security* [2000] 1 HKLRD 164 (at p.177):

> … The Governor-in-Council merely decided … that the applicant's appeal was rejected. The Governor-in-Council did not make a separate order from the one made by the Secretary for Security earlier. Hence, once the deportation order is found to be a nullity, there is nothing to which the decision to reject the appeal can "attach".

But that, of course, does not dispose of the central complaint; namely, that, by reason of s.64(3), the Chief Executive's decision is immune from judicial review and accordingly the Chief Executive-in-Council should not be a party to the applicant's proceedings.

The relevant wording of the subsection bears repeating as the question is one of construction. It is drafted in the following terms:

> … but no proceedings by way of *mandamus*, *certiorari*, prohibition, injunction or other order shall be taken against the Chief Executive-in-Council in respect of any such appeal or objection to the Chief Executive-in-Council or any proceedings connected therewith.

These are strong words. They clearly constitute a total "ouster" provision and not one that is qualified in some way; for example, by allowing access to the courts but only within a restricted period of time. As such, I am of the view that if s.64(3) is in any way to be subject to the supervisory jurisdiction of the High Court it can only be upon the principles first enunciated in *Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 1 All ER 208.

The wording at issue in *Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 1 All ER 208 was contained in the Foreign Compensation Act of 1950. Under that statute, a commission was constituted and given powers to determine claims for compensation, the funds coming from foreign governments which had taken

A measures against the property of British subjects. Section 4(4) of the statute provided that a determination by the commission of any application made to it "shall not be called in question in any court of law". Here too the words, while more general, were clear and unqualified. The commission rejected a claim made by Anisminic Ltd
B which then took judicial review proceedings seeking a declaration that the commission's determination was a nullity.

The Court of Appeal agreed that if the commission had erred, its error had gone to the merits and not to jurisdiction. The House of Lords, however, rejected the idea that the jurisdiction of an
C administrative tribunal was to be determined only at the outset of its inquiry, holding that a tribunal may do (or fail to do) something *during the course of its inquiry* which renders its decision a nullity. In this regard, Lord Reid said (at p.213):

D … there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the
E course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it
F was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors … then its decision is equally valid
G whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law …

Lord Wilberforce (at p.244) said:

H The question, what is the tribunal's proper area, is one which it has always been permissible to ask and to answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality, or unquestionability on its decisions. *These clauses in their nature can only relate to decisions given within the field of*
I *operation entrusted to the tribunal.* They may, according to the width and emphasis of their formulation, help to ascertain the extent of that field, to narrow it or to enlarge it, but unless one is to deny the statutory origin of the tribunal, and of its powers, they cannot preclude examination of that extent. It is sometimes said (the
J argument was presented in these terms) that the preclusive clause does not operate to decisions outside the permitted field because

> they are a nullity. There are dangers in the use of this word if it draws with it the difficult distinction between what is void and what is voidable, and I certainly do not wish to be taken to recognise that this distinction exists or to analyse it if it does. But it may be convenient so long as it is used to describe a decision made outside the permitted field, in other words, as a word of description rather than as in itself a touchstone. (Emphasis added.)

Accordingly, an administrative tribunal (such as the Chief Executive-in-Council determining an appeal) is protected from the supervisory scrutiny of the High Court provided it acts and makes its determinations within what Lord Wilberforce called its "permitted field". If, however, it exceeds its jurisdiction in the ways contemplated by Lord Reid then, by stepping outside its "jurisdiction" or "permitted field" it has made an erroneous inquiry and one which is a nullity.

In an oft-quoted *obiter dicta* passage in *O'Reilly v Mackman* [1983] 2 AC 237 (at p.278), another decision of the House of Lords, Lord Diplock commented:

> The breakthrough that the case of *Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 1 All ER 208 made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported "determination," not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity.

Anisminic Ltd v Foreign Compensation Commission (No 2) [1969] 1 All ER 208 has been criticised as being in disobedience of the express instructions of the Legislature but it is clear that it remains good law, the jurisprudential rationale being that if a tribunal could become a law unto itself, it would move dangerously towards dictatorship, the personalities presiding on the tribunal, empowered with an uncontrollable jurisdiction, becoming the sole judges of the validity of their own decisions. See, for example: "Constitutional and Administrative Aspects of _Anisminic Ltd v Foreign Compensation Commission (No 2)_" by Professor Wade (1969) 85 LQR 198.

In _Anisminic Ltd v Foreign Compensation Commission (No 2)_ [1969] 1 All ER 208 itself, Lord Wilberforce was aware of the potential criticism of disobedience of the express instructions of Parliament. In this regard, he said:

> The courts, when they decide that a "decision" is a "nullity", are not disregarding the preclusive clause. For just as it is their duty to attribute autonomy of decision of action to the tribunal within the

> designated area, so as the counterpart of this autonomy, they must ensure that the limits of that area which have been laid down are observed … In each task they are carrying out the intention of the Legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive. What would be the purpose of defining by statute the limit of a tribunals' powers, if by means of a clause inserted in the instrument of definition, those limits could safely be passed?

But are the principles enunciated in *Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 1 All ER 208 applicable to s.64(3) which specifically purports to preclude (or oust) proceedings by way of "*mandamus*, *certiorari*, prohibition, injunction or other order" the very proceedings through which the *Anisminic Ltd v Foreign Compensation Commission (No 2)* principles are made effective? Recent authorities indicate that the principles will still apply.

An authority directly in point is *A-G v Ryan* [1980] 2 WLR 143 (PC). This judgment of the Privy Council concerned an "ouster" provision in the Bahamas Nationality Act 1973 which entitled the Minister of Home Affairs of the Bahamas to refuse to register applications for citizenship. Section 16 of the statute provided:

> … the Minister shall not be required to assign any reason for the grant or refusal of any application … under this Act … and the decision of the Minister … shall not be subject to appeal *or review in any court*. (Emphasis added.)

Lord Diplock, in giving the judgment of the Board on the issue, said (at p.730):

> It is by now well-established law that to come within the prohibition of appeal or review by an ouster clause of this type, the decision must be one which the decision-making authority, under this Act, the Minister, had jurisdiction to make. If in purporting to make it he has gone outside his jurisdiction, it is *ultra vires* and is not a "decision" under the Act. The Supreme Court, in the exercise of its supervisory jurisdiction over inferior tribunals, which include executive authorities exercising quasi-judicial powers, may, in appropriate proceedings, either set it aside or declare it to be a nullity: *Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 2 AC 147, [1969] 1 All ER 208. It has long been settled law that a decision affecting legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. As Lord Selborne said as long ago as 1885 in *Spackman v Plumstead Board of Works* (1884–85) LR 10 App Cas 229 at p.240): "There would be no decision within the meaning of the statute if there were anything

> … done contrary to the essence of justice". See also *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66. Their Lordships, in agreement with all the Judges in the Court below, would therefore conclude that the ouster clause in s.16 of The Bahamas Nationality Act 1973 does not prevent the court from enquiring into the validity of the Minister's decision on the ground that it was made without jurisdiction and is *ultra vires*.

In the 1996 Court of Appeal decision of *R v Secretary of State for the Home Department, ex p Fayed* [1997] 1 All ER 228, Lord Woolf MR cited *A-G v Ryan* [1980] 2 WLR 143 with approval. In that case, the Secretary of State for the Home Department accepted, without the need for argument, that s.44(2) of the British Nationality Act 1981 did not prevent the court exercising its jurisdiction to review a decision of his on traditional judicial review grounds. Section 44(2) of the Act read:

> The Secretary of State, a Governor or a Lieutenant-Governor, as the case may be, shall not be required to assign any reason for the grant or refusal of any application under this Act the decision on which is at his discretion; and the decision of the Secretary of State or a Governor or Lieutenant-Governor on any such application shall not be subject to appeal to, or review in, any court.

In my judgment, therefore, it is now settled law, applicable in the courts of Hong Kong, that in respect of what I will call "complete ouster" provisions, such as the one appearing in s.64(3), the *Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 1 All ER 208 principles will be applied.

The reasoning in Smith v East Elloe Rural District Council

During the course of his submissions, Mr Marshall placed before me a series of authorities, three of which may be cited here as being definitive of his arguments. They are *Smith v East Elloe Rural District Council* [1956] 1 All ER 855; *R v Secretary of State for the Environment, ex p Ostler* [1976] 3 All ER 90 and *R v Secretary of State for the Environment, ex p Kent* [1990] COD 78 at p.79.

In these cases the courts refused to question the decisions under challenge by reason of the fact that those decisions (of various tribunals) were protected by "ouster" provisions.

A great deal has been written about the apparent conflict between *Smith v East Elloe Rural District Council* [1956] 1 All ER 855 (and the line of cases following it) and the *Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 1 All ER 208 line of authorities. What is apparent, however, is that the *Smith v East Elloe Rural District Council* line of cases all concern time-limit clauses and their place in a broader statutory scheme.

In *Smith v East Elloe Rural District Council* [1956] 1 All ER 855, the Court upheld an "ouster" provision linked to a time-limit clause even in the face of an allegation of bad faith or fraud. In both *R v Secretary of State for the Environment, ex p Ostler* [1976] 3 All ER 90 and *R v Secretary of State for the Environment, ex p Kent* [1990] COD 78 at p.79 the courts upheld similar provisions linked to 6-week time-limit clauses. The *Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 1 All ER 208 principles, however, concern provisions which attempt absolutely to protect the decision of an inferior tribunal from judicial scrutiny, such provisions allowing no limited or qualified access to the courts, such provisions standing on their own and not being an integral part of some greater statutory scheme created by the Legislature for the public good: for example land acquisition for the building of roads.

If any explanation needs to be given for why there should be a distinction, I can do no better than quote the words of Lord Denning MR in *R v Secretary of State for the Environment, ex p Ostler* [1976] 3 All ER 90. The headnote of that case reads (in part) as follows:

> Since the respondent had failed to apply to the court within the period of six weeks from the date of publication of the order as required by para.4B of Sched.2 to the 1959 Act the court had no jurisdiction to entertain the application. It was immaterial that the respondent was seeking to question the validity of the order on the ground of bad faith for the provision in para.4 that, after the expiry of the time-limit, the order was not to "be questioned in any legal proceedings whatever" was absolute.

Lord Denning amplified the reasoning of the Court of Appeal (in the light of the earlier *Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 1 All ER 208 decision) in the following terms:

> Looking at it broadly, it seems to me that the policy underlying the 1959 Act is that when a compulsory purchase order has been made, then if it has been wrongly obtained or made, a person aggrieved should have a remedy. *But he must come promptly. He must come within six weeks. If he does so, the court can and will entertain his complaint. But if the six weeks expire without any application being made, the court cannot entertain it afterwards. The reason is because, as soon as that time has elapsed, the authority will take steps to acquire property, demolish it and so forth.* The public interest demands that they should be safe in doing so. Take this very case. The inquiry was held in 1973. The orders made early in 1974. Much work has already been done under them. It would be contrary to the public interest that the demolition should be held up or delayed by further evidence or inquiries. I think we are bound by *Smith v East Elloe Rural District Council* [1956] 1 All ER 855 to hold that Mr Ostler is barred by the 1959 Act from now questioning these orders. (Emphasis added.)

The distinction between the *Smith v East Elloe Rural District Council* [1956] 1 All ER 855 line of cases and *Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 1 All ER 208 has, I believe, now become settled. An example of this is to be found in *R v Cornwall County Council, ex p Huntingdon* [1994] 1 All ER 694, a decision of the Court of Appeal in which Simon Brown LJ, in speaking of the apparent conflict between the two lines of authority to which I have referred, said as follows:

> These decisions … were subjected to close analysis by Mann J in the Cornwall application and I can do no better than quote with respectful approval this concluding passage from his judgment ([1992] 3 All ER 566 at p.575):
>
> > In my judgment, the decision in *R v Secretary of State for the Environment, ex p Ostler* [1976] 3 All ER 90 presents the same insuperable obstacle to [the applicant] as it did to the applicant in *R v Secretary of State for the Environment, ex p Kent* [1990] JPL 124. The question as to the ouster clause in the 1981 Act is one of construction and so far as this court is concerned, it has been authoritatively decided. The intention of Parliament when it uses an *Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 1 All ER 208 clause is that questions as to validity are not excluded (see [1969] 2 AC 147, [1969] 1 All ER 208 *per* Lord Wilberforce). When paragraphs such as those considered in *R v Secretary of State for the Environment, ex p Ostler* are used, then the legislative intention is that questions as to invalidity may be raised *on the specified grounds in the prescribed time and in the prescribed manner, but that otherwise the jurisdiction of the court is excluded in the interest of certainty*. (Emphasis added.)

The extent to which decisions of the Chief Executive-in-Council are subject to review

Having found that s.64(3) does not act as an absolute bar to this Court exercising its jurisdiction of review, the question then arises of the *extent* to which that jurisdiction may be exercised.

The applicable principles were, I believe, identified in the Privy Council decision in *South East Asia Fire Bricks Sdn Bhd v Non Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363. The "ouster" provision under consideration came from the Malaysian Industrial Relations Act 1967 (s.29(3)) which read:

> Subject to this Act, an award of the [Industrial] Court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called in question in any court of law.

In considering the effect of this section, Lord Fraser said:

The decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission (No 2)* [1969] 1 All ER 208 shows that, when words in a statute oust the power of the High Court to review decisions of an inferior tribunal by *certiorari*, they must be construed strictly, and that they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if "it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity": *per* Lord Reid at p.171. But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective. In *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 at p.70, Lord Denning MR suggested that the distinction between an error of law which affected jurisdiction and one which did not should now be "discarded". Their Lordships do not accept that suggestion. They consider that the law was correctly applied to the circumstances of that case in the dissenting opinion of Geoffrey Lane LJ when he said, at p.74:

> … the only circumstances in which this court can correct what is to my mind the error of the [county court] judge is if he was acting in excess of his jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of "structural alteration … or addition.

Conclusion

In my judgment, for the reasons given, both summonses issued by the respondents should be dismissed.

I am satisfied that s.64(3) of the Interpretation Ordinance does not prevent the applicant from seeking to judicially review the decision of the Director even though the applicant chose earlier to lodge an objection concerning that decision with the Chief Executive-in-Council.

I am further satisfied that s.64(3) of the Interpretation Ordinance does not prevent the applicant from seeking to judicially review the decision of the Chief Executive-in-Council if it can be shown that the Chief Executive-in-Council "has done or failed to do something in the course of the [appeal] inquiry which is of such a nature that its decision is a nullity".

Whether the applicant in the present case will be able to identify alleged acts or omissions of the Chief Executive-in-Council which are of such a nature as to nullify his administrative decision is not a matter which has been canvassed before me. Nor do I believe, at least without the assistance of Counsel, am I capable of making any such identification on the papers submitted by the applicant in support of his application for judicial review. If there is to be any attempt to identify such acts or

omissions it can most conveniently be done at the substantive judicial review hearing and the question decided then on its merits. A

As for costs, there will be an order *nisi* awarding costs to the applicant, such costs to be taxed if not agreed. The order *nisi* will become final 30 days after the handing down of this judgment if no application is made earlier to discharge or vary this order *nisi*. B