ADMINISTRATIVE LAW IN HONG KONG

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CHAPTER 7

PROCEDURAL FAIRNESS

1. Introduction

The ground of judicial review known as 'procedural fairness' is concerned with regulating the process of administrative decision-making. 'Fairness' in this sense embodies two key concepts, which have otherwise been known to comprise the rules of natural justice: the rule against bias (*nemo iudex in causa sua*) and the fair hearing rule (*audi alteram partem*). The term fairness is primarily used in administrative law as the basis for procedural review, rather than as a means to challenge the substantive quality of a decision.[1] For example, non-residents may not invoke the principle of fairness to challenge the decision to deport them from Hong Kong.[2] However, the fairness principle may apply where the non-resident was not first provided with an opportunity to put their case prior to deportation.[3] In short, this ground is solely concerned with the process, not the outcome, of a decision.

The fairness principle is a judicial construct. It is therefore somewhat inevitable that what is deemed necessary for a procedure to be 'fair' is modeled on the court process of adjudication. There are two essential features of the adjudicatory model.[4] Firstly, adjudication is predicated on an adversarial proceeding where two parties are engaged in 'gladiatorial combat' before a judge.[5] This means that a party has the opportunity to challenge the other side, including cross-examination of witnesses. Equally, for the proceeding to be valid under the adversarial model there is a need for procedural equality between the parties. Thus, if an adjudicator were predisposed to decide for one side because of a personal interest in the outcome of the case, this would offend the rule

1 Still, the view that fairness only applies as the basis for procedural review is not entirely accurate. The Hong Kong courts recognise that administrative decisions can be challenged on fairness grounds, particularly where a departure from a legitimate expectation would be so unfair as to amount to an abuse of power (chapter 10). The need to secure a fair outcome has also influenced standards of judicial review, such as the doctrine of anxious scrutiny. See generally S Jhaveri, *Transforming Fairness as a Ground of Judicial Review in Hong Kong*, (2013) 11(2) International Journal of Constitutional Law, at pp 358-381.

2 Rather, in the absence of the existence of a special legal interest that justifies the court's protection, the substantive decision can only be challenged on *Wednesbury* grounds (see chapter 9).

3 See the seminal decision, *Attorney-General v Ng Yuen Shiu* [1983] 1 HKC 23 (Privy Council) considered in chapter 10.

4 D Jabbari, *Critical Theory in Administrative Law,* (1994) 14 Oxford Journal of Legal Studies, 189 at p 209.

5 Ganz, *Administrative Procedures* (1974, Sweet & Maxwell) at pp 1–2.

against bias. Secondly, the adjudicative model facilitates the effective participation of affected parties. At a minimum, this means the affected individual should receive notice of the hearing and details of the other side's case, be permitted legal representation and be able to make submissions at an oral hearing. As will be seen in this chapter, the adversarial and participatory aspects of the adjudicative model are central to understanding the fairness principle in administrative law.

The principle of procedural fairness serves two main purposes within administrative law. Firstly, given that it is based on principles of bipolar adjudication it encourages decision-making that is conscious of the needs and interests of the individual affected by such decision. Such individuated form of decision-making is in keeping with the classic red light conception of administrative law, protecting individuals from unwanted intrusion from the state by providing them with a mechanism to challenge such decision.[6] It is also consistent with an underlying value of human rights law, to ensure that the inherent dignity of the individual is respected by the state. Thus where an individual serving a long-term prison sentence sought release from prison but was flatly denied, he should be given reasons because of the 'obvious human desire to be told the reason for a decision so gravely affecting his future'.[7] Secondly, as Craig notes the principle of procedural fairness can also influence the quality of substantive decisions.[8] All exercises of administrative power are aimed at serving a purpose; the adoption of a fair procedure may be instrumental in securing this purpose. For example, where an authority is empowered to grant alcohol licences to those of 'good character' a more accurate licensing decision would be arrived at if the authority held a hearing to fully test whether an applicant meets this criterion. In short, the procedural fairness ground serves an instrumental role in ensuring that administrative decisions are consistent with their underlying objectives.

Still, the potential adverse consequences arising from a rigorous application of the fairness principle cannot be ignored. Unlike the rarity of a successful *Wednesbury* challenge, the courts have been somewhat more astute to finding procedural unfairness. The Hong Kong courts have noted that *Wednesbury* does not furnish an intense enough standard when reviewing the propriety of administrative procedure.[9] In turn the rationale underpinning *Wednesbury* – that the court should avoid merits review and substitution – is inapplicable insofar as choices over procedural design is concerned. Accordingly, the courts have a greater role to play in fashioning the appropriate procedural mechanisms that the authority must adhere to in the course of decision-making. Yet, such a heightened judicial role can give rise to a basic objection that the courts are imposing a particular set of values on public administration, which may come at the expense of administration-sided values and priorities.[10] The model of adjudication is

6 See chapter 1.

7 *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at p 551 (Lord Mustill).

8 P Craig, *Administrative Law* (2008, Sweet & Maxwell, 6th ed) at p 372.

9 See *Pearl Securities v Stock Exchange of Hong Kong* [1999] 1 HKC 448 at 457E-458A–C (Keith J).

10 For a robust criticism of the procedural fairness principle, see M. Loughlin, *A Study of the Crisis in Administrative Law Theory, The University of Toronto Law Journal*, Vol. 28, No 2 (Spring, 1978), at pp 215-241.

fundamentally based on a bipolar adversarial setting, where a judge is to decide the outcome of a contentious dispute based upon submissions from the competing parties in the hearing. However, many issues that confront the administration are polycentric in character; they cannot be neatly constructed as a bipolar issue given the variety of sectional interests involved.[11] Adopting an inquisitorial, rather than an adversarial procedure may better serve the interests of public administration where confronted with polycentric issues.[12] In this respect, the discussion in chapter 1 on the alternative methods of administrative control to those that are adjudication-centred will also be pertinent here. A further consequence of the adjudicative model is that it can undermine administrative goals of speed and efficiency. This is not to say that speed and efficiency should be equated with a preference for administrative convenience, but rather that quick and decisive action may be justified in the public interest. For example, there is a public interest in maintaining the integrity of Hong Kong's financial markets. This interest may justify the Stock Exchange adopting informal procedures when disciplining companies for alleged breaches of the Listing Rules, rather than investor confidence being damaged because of the delays and uncertainties arising from a full-blown adversarial hearing.[13] Essentially, in applying the fairness principle, there is a need for the courts to have regard to the values and interests of public administration in exercising its review jurisdiction.

The courts have mediated these competing individual and public interests by applying the fairness principle flexibly. What amounts to a fair procedure is a context specific and value-laden exercise. It is incumbent on the courts to balance these competing interests both in determining whether the fairness principle should apply, and if so, to what degree. As this chapter demonstrates, there are a number of factors to be taken into account in determining the application of the fairness principle to the process of administrative decision-making. Where legislation sets out an explicit procedure that must be observed, then it justifiably falls within the courts' responsibility in upholding legislative intent to ensure such procedure is faithfully adhered to by the administration. However, statutory terminology is seldom so specific where procedural requirements are concerned. Often the authority is conferred autonomy to design its own procedures. Nor is the consequence of a failure to adhere to any prescribed procedure often made explicit in legislation, leading the courts to evaluate the relative importance of statutory procedural requirements. As a consequence of there being statutory ambiguity or omission concerning the appropriate procedure, the courts have developed the common law to fill in the gaps, assuming there to be a general legislative intent for statutory discretions to respect the common law. In determining the degree to which procedural fairness should apply, a prevalent approach adopted in the common law is to assess the impact of an administrative decision on the legal interests involved. Thus where an individual had a mere hope that they would benefit from a favourable exercise

11 *Ibid* at 193. For further analysis of the concept of polycentricity, see chapter 5.

12 For a classic example, see *Bushell v Secretary of State for the Environment* [1980] UKHL 1, [1980] 3 WLR 22 (role of adjudicative procedures at an inquiry into the building of a new motorway).

13 See *Stock Exchange of Hong Kong v New World Development* [2006] 2 HKC 533, discussed below.

of discretion, the fairness principle would not apply to their case, or at least not with any rigour. By contrast, if a party's legal interest were impinged, such as their property interests or fundamental rights of a non-derogable character, this would favour the application of a thicker version of the fairness principle.

This chapter starts by examining procedural requirements that arise from statute, before going on to examine the doctrine of procedural fairness as developed in the common law. It will end with an examination of the rule against bias.

2. Statutory Procedures

Statutory procedural requirements vary considerably in their scope and content, but there are a number that occur frequently in legislation. These include a duty to consult a party prior to a decision being made against them, a duty to consult affected parties before a new policy is introduced, a right to be represented, a right of appeal against an adverse decision, a duty to give reasons justifying the decision, and a time limit for making decisions. Some of these requirements can be seen in the following pieces of legislation.

(a) Examples of statutory procedural requirements

Housing Ordinance
(Cap 283)

20(1) Where a lease has been terminated under s 19(1)(a)or (aa), or where a notice to quit has been given under s 19(1)(b), the tenant may appeal to the panel, appointed under s 7A(1), not later than 15 days after the date on which –

(a) service of the notice of termination has been effected under s 19A(2); or

(b) notice to quit has been given under s 19(1)(b), as the case may be.

Provided that where the chairman of the panel is satisfied that the tenant is unable to appeal by reason of ill-health, absence or other cause thought sufficient by the chairman, he may permit an appeal to be made on behalf of the tenant by a person authorized under the lease to occupy the land or part of it.

Inland Revenue Ordinance
(Cap 112)

82A (3) An assessment of additional tax may be made only by the Commissioner personally or a deputy commissioner personally.

(4) Before making an assessment of additional tax the commissioner or a deputy commissioner, as the case may be, shall –

(a) cause notice to be given to the person he proposes so to assess which shall –

Taken together the *Prabakar* and *FB* decisions provide a good illustration of how the importance of the legal interest at stake impacts on the nature of government decision-making processes. Where the court finds a legal interest to be of particular importance (such as the right to be free from torture), this in turn will justify closer judicial scrutiny of the government's procedure and also a greater willingness from the courts to declare that such procedures are unlawful.[46]

(d) Components of a 'fair hearing'

(i) Requirement for notice

The first major requirement of the fair hearing rule is that parties likely to be affected by a decision are given sufficient advanced notice of any proposed action taken by the authority. The basic principle underlying the notice requirement is that persons affected by decisions should not be taken by surprise. Notice is required so that affected persons can at least attend the hearing (if one is being held), and if they wish to argue their case. This entails knowing the case against them or their interests, including the disclosure of all materials that are relevant to the charges made against them.[47] The notice should be sufficiently clear so that the affected parties can prepare their case, which may include disclosure of all documents pertinent to the authority's case.[48]

Yet, the requirement to give notice does not necessarily mean the decision-maker has to give 'chapter and verse' of all charges or arguments made against a person. It is sufficient if a person is made aware broadly of the argument made so that they are able to respond accordingly. Often, the generality or specificity of the charges/arguments made known to the individual will depend on the subject matter in issue. In *R v Home Secretary, ex parte Fayed*,[49] it was held that while the British Nationality Act precluded the Secretary of State from giving reasons for refusing British nationality to an applicant, there was still an obligation to disclose the matters causing difficulty with respect to the applicant's good character. Lord Woolf MR said that the duty to give notice required the Secretary of State to do no more than 'identify the subject of his concern in such terms as to enable the applicant to make such submissions as he can'.[50]

The notice requirement does not mean that the person affected must actually receive notice, but just that reasonable steps be taken to provide notice. What is reasonable in the circumstances will vary, depending on the class of persons and interests to be affected. The larger the class, the more acceptable general methods of notification will be. Yet not every large class of potentially affected

46 For an analysis of *Prabakar* and *FB*, see: generally, S Jhaveri, *Transforming Fairness as a Ground of Judicial Review in Hong Kong* (2013) International Journal of Constitutional Law 11(2) at pp 358–38.

47 *Li Hong Mi v A-G for Hong Kong* [1920] AC 735, PC4 at 737–738 (Lord Haldane); *Mohamed Yaqub Khan v. Attorney General* [1986] HKCU 330 (HC) (Mortimer J).

48 *Lam Sze Ming and Another v Commissioner of Police* [2002] HKCU 891 (CA) at 25–26 (Cheung JA).

49 [1998] 1WLR 763 (CA).

50 *Ibid* at 776.

persons will justify a general approach. If the decision maker can identify a specific group with a special interest, then more direct notice will likely be required, irrespective of the actual size of the group. In an English case,[51] the Secretary of State for Health failed to provide adequate notice of a decision to ban oral snuff (tobacco) products. The applicant tobacco firm was the only company producing oral snuff in the UK, and the Secretary had already entered into voluntary agreements with the company whereby it agreed to restrict its marketing of the product and place health warnings on the packaging. However, the Secretary only gave the applicants three months' notice within which to make representations prior to the ban. While this was extended by a further month, the applicants did not receive the full information required to make their representations. On review, the court held that a greater degree of notice was required as the Secretary of State for Health knew (by virtue of the voluntary agreements) exactly who would be affected by his decision to ban the products and that their business would be dramatically affected by his decision.

(ii) The need for a 'hearing'

A key tenet of the procedural fairness doctrine is that an individual is provided with the opportunity to have their say before any decision is taken which affects their interests. In this respect, the most obvious way for individuals to participate in the decision making process is through an oral hearing. An oral hearing provides an affected individual with an important mechanism to put their case effectively and is often a prerequisite for other procedural safeguards, including the right to cross-examination. Yet from an administrative point of view, it must also be recognised that the imposition of an oral hearing is expensive of time and resources. Given the tension between ensuring a fair procedure and respecting administrative efficiency, it is unsurprising that the common law does not impose an absolute right to an oral hearing. Rather, whether an oral hearing is required will depend on a host of factors, context specific, as can be seen in the following decision.

Ng Nga Wo v Director of Health
[2006] HKCU 768

The applicant, a medical practitioner, was convicted of possession of a dangerous drug contrary to s 8(1)(a) of the Dangerous Drugs Ordinance (Cap 134). Previously, the applicant had already been convicted of an offence of failing to keep a proper record of dangerous drugs, contrary to regs 5(1)(a) and 5(7) of the Dangerous Drugs Regulations (Cap 134A). The Director of Health, in his capacity as the Registrar of Clinics, wrote to the Agricultural Mutual Assistance Society (the medical clinic which employed the applicant) to ask that they consider removing the applicant from their employment. The Registrar of Clinics had the right to deem a medical practitioner not fit to be employed by a medical clinic. The applicant

51 *R v Secretary of State for Health, ex parte US Tobacco International Inc* [1992] 1 All ER 212 (QBD).

wrote a long letter to the Director of Health and made representations on a variety of matters, including the circumstances leading to his conviction, his subsequent dealings with the society as well as his fitness to be employed at a registered clinic. The Registrar of Clinics, by letter, stated that he considered the applicant not fit to be employed by any clinic registered under Medical Clinics Ordinance (Cap 343).

Chu J:

27. [It] is said that the decision affects the applicant's ability to be registered as a medical practitioner, hence his livelihood. Therefore, the applicant has a right to be heard and that he should have been afforded a chance to be heard orally. Additionally it should have been made known to him the factors against him and the reasons for the Registrar's decision.

30. The applicant's first ground of challenge relates to the right to be heard. In *R v Home Secretary, ex parte Doody* [1994] 1 AC 531, Lord Mustill stated that:

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

31. Notwithstanding the principle of fairness, I do not consider that the applicant has a potentially arguable case that there has been a breach.

32. Firstly, the applicant accepts that he was aware of the Registrar's letter dated 1 August 2005 shortly after it was issued. He knew that as a result of his repeated conviction under the Dangerous Drugs Ordinance, the Registrar was having doubts as to his fitness to be employed in a registered clinic. Admittedly at about the same time, the applicant was further made aware by the Society that his employment would be terminated after 10 October 2005 and that this would be brought to the notice of the Registrar. It is open to the applicant, if he so wished, to make representations to the Registrar on his suitability to be employed by a registered clinic.

33. Secondly, the applicant had indeed exercised his right to be heard by his letter to the Registrar dated 31 October 2005. As noted above, this is a lengthy and substantial representation. The applicant has not indicated in these proceedings what further representations he would wish to make in addition to what was already stated in this letter. Therefore, it cannot be said that he had no opportunity to put forward his case and advance arguments favourable to him before the Registrar made his decision.

34. Thirdly ... [the] right to be heard does not entail a right to make oral submissions. The applicant has not shown any special circumstances or considerations that require the Registrar to hear the applicant orally before making a decision. No unfairness has been shown either.

35. Fourthly, this is not a case that the applicant had not been made aware

of the adverse factors against him. On the contrary, the Registrar had by the letter dated 1 August 2005 clearly identified the cause for concern, namely, the applicant had been convicted of an offence under the Dangerous Drugs Ordinance in July 2005, when there was a similar previous conviction in 2001. It cannot be said that the applicant did not appreciate or had difficulty comprehending the case against him. To say the least, his letter dated 31 October 2005 to the Registrar demonstrated that he was well aware of the concerns of the Registrar.

36. Fifthly, even if the applicant can argue that he did not have an opportunity to be heard, which I do not accept, he has not shown what prejudice he has suffered. In *Leung Fuk Wah Oil v Commissioner of Police* [2002] 3 HKLR 653, Cheung JA observed that:

> Judicial review is a discretionary remedy. If the breach of the principle of fairness does not produce a substantial prejudice to the applicant, the court is bound to take this into account in deciding whether relief should be given. This is consistent with the concept that the court should not substitute its own decision for that of the decision maker.

37. On the facts of this case, there is no prospect of the court exercising the discretion to grant the applicant the relief sought.

COMMENTARY

1. Requirement of an oral hearing: general principles

As illustrated in *Ng Nga Wo*, *audi alteram partem* does not necessarily require the affected party to have an oral hearing prior to an administrative decision being taken. Whether an oral hearing is required depends on an assessment of what fairness requires in the circumstances. There are a number of guiding principles in this respect.

An oral hearing is likely to be necessary where there are disputes of law or fact which may be difficult to explain on paper and therefore need to be examined orally and through face-to-face interactions. This is especially the case where the law or facts at issue are intricate or substantial.[52] Thus, in a famous English decision,[53] an Army disciplinary board did not have to convene an oral hearing to investigate allegations that a soldier had used racist language. This was because the language used was of a 'direct and crude nature' and did not raise any 'subtle possibility of subconscious motivation'. Similarly, where findings of a tribunal hinge on credibility considerations, such as whether the version of chain of events as testified by a witness is to be believed, then an oral hearing is necessary to fully test the evidence.[54]

As noted above, the strength of the individual legal interest affects the standards

52 *New World Development Co Ltd v Stock Exchange of Hong Kong* (CACV 170 of 2004, 27 May 2005) at pp 142-143 (Reyes J).

53 *R v Army Board of the Defence Council, ex parte Anderson* [1992] 1 QB 169 (Taylor LJ).

54 *Liu Pik Han v Hong Kong Federation of Insurers Appeals Tribunal* [2005] 3 HKC 242.

of fairness and in turn the need for an oral hearing. Thus, a stronger case can be made for an oral hearing where a decision could have a detrimental impact on an individual's pre-existing legal interest, as opposed to where an individual merely has a hope or expectation of acquiring a benefit. Similarly, constitutional rights under the Basic Law and fundamental rights that resonate in international law can also be invoked to support higher standards of procedural fairness, particularly where a connection can be made between the denial of an oral hearing and the interference with such rights. Similarly, where an individual is subject to disciplinary proceedings, particularly for offences of a criminal character, a strong case can be made that an oral hearing must necessarily be held.[55]

Other considerations will also factor into whether an oral hearing is required. Generally, it is incumbent on the individual subject to administrative proceedings to first request an oral hearing.[56] Where the individual concerned has failed to do so, and instead elected to make representations in written form, then it is likely that the court will find there to be no procedural unfairness arising out of the failure to hold an oral hearing. Similarly, an oral hearing may be unnecessary because it serves no useful purpose.[57] This may be because, as in *Ng Nga Wo*, the applicant had already put all aspects of his case in detailed written correspondence. Alternatively, as discussed at length in chapter 6, the court may form the view that the outcome of a disciplinary proceeding is inevitable and an oral hearing would do nothing to change this substantive outcome.

Merely because an oral hearing is held at the first stage of an administrative proceeding, it does not mean that one must be held on appeal. The appellate function is to assess whether the first tier decision-maker arrived at the correct result, on the law or evidence. It may be that the affected individual has already been given a reasonable opportunity to put their case by way of an oral hearing such that an oral hearing is deemed unnecessary in the circumstances.[58] Thus, in the circumstances of a particular case the appellate body may justifiably form the view that an oral hearing would serve no useful purpose.

2. *Instances where fairness has demanded an oral hearing*

(a) Where an individual faces charges akin to fraud and the sentencing options are serious

In *Liu Pik Han v Hong Kong Federation of Insurers Appeals Tribunal,*[59] the applicant was an insurance agent. In the course of registering with the Insurance Agents Registration Board (IARB), the applicant was said to have made a false declaration as to whether she had been a director of a company that had become insolvent. Because of this misleading declaration, the IARB prohibited the applicant from registration for 17 months pursuant to clause 39 of the Code of Practice of Hong Kong Federation of Insurers. The applicant appealed against this decision to the Appeals Tribunal, who refused to grant

55 *Ibid.*

56 *Cheung Koon Kit v Commissioner of Correctional Services of the HKSAR* [2004] HKCU 944 at 26 (Hartmann J).

57 *Chow Shun Yung v Wei Pih* (2003) 6 HKCFAR 299; [2003] 4 HKC 341 at 347-353 (Ribeiro PJ).

58 See eg *ST v Betty Kwan* [2013] HKEC 337.

59 [2005] 3 HKC 242.

an oral hearing and thus opted to consider the appeal on the papers. The Appeals Tribunal refused an oral hearing as they found that conviction and sentence imposed by the IARB was appropriate, that it was irrefutable that the applicant had made a false declaration, and further, there was no sufficient and valid evidence to support an appeal.

Lam J held that the failure to provide the applicant with an oral hearing to contest the IARB's decision was unlawful. First, the applicant was facing a serious charge of misconduct with implications on her integrity. The allegation of deliberate concealment for the purpose of obtaining her registration carried with it an imputation of fraud. This blemish on her record would undoubtedly affect her career as a professional insurance agent. Second, the sanctions for breaching the Code of Practice were serious. The sentencing options included suspension or termination as a recognised insurance agent. The applicant could not only lose her job, her career in the insurance industry could also be irrevocably damaged. Thirdly, there were some disputes concerning the applicant's state of mind when she made the declarations; she should have been given the opportunity to clarify these events at an oral hearing.[60]

(b) Where there are serious evidential conflicts over allegations of criminality

In *Lam Tat Ming v The Chief Executive of the HKSAR*[61] the issue was whether a police officer the subject of disciplinary action was entitled to an oral hearing on petition to the Chief Executive. The applicant was deprived of his pension by a decision of the Secretary for Civil Service on the grounds that he had received bribes from triad members. The applicant petitioned this decision to the Chief Executive, who upheld the findings of the Secretary without appointing a panel to conduct an oral hearing. The applicant argued that the failure of the Chief Executive to conduct an oral hearing of the petition was unlawful.

Tang VP for the Court of Appeal found for the applicant on this point. In the circumstances, the Chief Executive, who would not be expected to conduct a hearing with witnesses, ought to have exercised his discretion to refer the matter to a Panel who could then establish an oral hearing. An oral hearing was considered necessary because of the seriousness of the consequences, here focused on allegations of criminal wrongdoing. There was also a 'serious conflict' over the allegation that should have been properly tested through an oral hearing.[62]

60 *Ibid*, at 257A–258C, 259B–C.
61 [2012] 4 HKC 161.
62 *Ibid* at 50–53.

3. *Instances where an oral hearing was validly refused*

(a) Prison officer compulsorily retired for a disciplinary offence had 'nothing of complexity' to offer by way of mitigation, negating the need for an oral hearing

In *Cheung Koon Kit v Commissioner of Correctional Services of the HKSAR*,[63] the applicant, an officer in the Correctional Services Department, sought judicial review to challenge the decision to order his compulsory retirement with a deferred pension. The applicant had been found guilty of smuggling cigarettes into prison for the prisoners' use. By letter, the Commissioner informed the applicant that his compulsory retirement was under consideration. The applicant wrote a detailed plea in mitigation, asking for a second chance or the opportunity to resign voluntarily so that he could find another job and so continue to support his parents. The Commissioner then made his decision that the applicant be compulsorily retired from the service. The applicant challenged the Commissioner's decision on the ground that the failure to provide him with the opportunity to orally present his plea in mitigation gave rise to procedural unfairness.

Hartmann J rejected the applicant's submissions, noting as a general proposition that in administrative matters written representations will often provide the affected party with sufficient means to put their case. Indeed, written representations may actually be beneficial to the affected party as they can seek the input of a lawyer to put their case in the strongest possible terms. However, Hartmann J also acknowledged that there may be 'circumstances in which, perhaps because of the complexity of the issues or other pressing considerations, an oral hearing will be the only fair way of proceeding.' On the facts in Cheung Koon Kit, however, an oral hearing was unwarranted. First, the applicant did not seek an oral hearing to those responsible for overseeing the disciplinary proceedings. Second, the applicant's case essentially came down to mitigation, yet there was 'nothing of complexity' that demanded oral advocacy and further elaboration beyond that was already provided in the written correspondence.[64]

(b) No general right to an oral hearing in torture claim appeals

In *ST v Betty Kwan*[65] the issue arose as to whether an oral hearing was necessary on an appeal against the Director of Immigration's decision to deny the applicant's torture claim. The Director denied the claim on credibility grounds and because the claimant was unable to show that he would be personally at risk of torture upon repatriation to his country of origin. Pursuant to the high standard of fairness principle, torture claimants have a right to an oral hearing at the first tier inquiry into their claim by an immigration officer. However, this right does not extend to any subsequent appeal against the officer's findings. Whether an oral hearing will be held on appeal is contingent on the adjudicator's discretion, taking into account the

63 [2004] HKCU 944.

64 *Ibid* at 27–31. Similar reasoning was also adopted in In *Lawe William Enterprises Ltd, Re an application for judicial review* [1990] HKLR 365.

65 [2013] 3 HKC 87.

circumstances of the case. In the circumstances, the adjudicator refused the appeal on the papers and also declined to hold an oral hearing. This was because taking the applicant's case at its highest, there was no evidence of a personal risk of torture. The applicant argued that this decision violated the high standard of fairness principle.

Au J rejected the applicant's argument. It is only in appropriate cases that an adjudicator in considering an appeal is required to hold an oral hearing to 'probe' further into the evidence. For example, an oral hearing on appeal may be necessary where it is readily apparent that something had gone 'amiss' or had obviously been overlooked at the first tier hearing. However, it is ultimately the torture claimant who bears the initial burden to prove their claim and therefore the onus is on them to present their claim at the first tier hearing. Given that the applicant was unable to establish at the first tier hearing and in his written grounds of appeal that he would be personally at risk of torture, there was no need to conduct an oral hearing.[66]

(iii) Right to challenge the opposing case

The fair hearing rule also requires that an affected party be able to challenge the opposition case, including the right to cross-examination witnesses as the following case demonstrates.

Ngai Kin-wah, Re
[1987] 1 HKC 236

The applicant, a customs officer, when off-duty, acquired the release of valuable goods by requesting that another customs officer stamp for their release. The applicant appeared before a disciplinary tribunal of the Customs and Excise Department and was denied the opportunity to cross-examine a prosecution witness.

Deputy Judge Downey:

> Lastly, complaint is made of the adjudicator's refusal to allow the applicant to cross-examine Kwok Kong-wing with regard to his statement made on 27 October 1981. There is no doubt that this happened, as the transcript of the last few lines of the applicant's questioning of this witness clearly shows ...
>
> This conduct of the adjudicator was doubly unfortunate, to say the least. Firstly, it deprived the applicant of an opportunity to undermine the credibility of Kwok Kong-wing by bringing out inconsistencies and possible contradictions between his evidence and what he apparently said in his first statement some six months after the relevant date. Secondly, it meant that one of the reasons why Mantell J quashed the earlier decision and ordered a rehearing was completely ignored. At the hearing in 1984, the applicant was unable to attack the credit of the witness by this form of cross-examination because he was never given copies of the witness statements. At the hearing in 1985, he had the statements, but was prevented from making use of them. Whatever mistakes were made at the earlier hearing, it was, in my respectful

66 *Ibid* at 34–39; 44–49.

view the clear duty of the adjudicator, and all other persons involved in the further effort to establish this disciplinary offence against this applicant, to ensure that the rehearing was conducted in accordance with the ruling and guidance of this court. Unfortunately and regrettably, that did not happen.

[Counsel] contended that a denial of cross-examination would not be fatal if it would be irrelevant, and cited the recent decision of Penlington J in *Choy Yiwong* (MP No 2595 of 1985, 20 December 1985). With respect, that proposition is self-evident and applies to all forms of hearings. But, when, as in this case, the essential issue was whether the principal prosecution witness was telling the truth, or seeking to cover up for himself or others by pointing the finger at the applicant, the credibility of that witness was of the greatest relevance to the issues before the adjudicator. In my view, denying the applicant a fair opportunity of cross-examining as to credit was a form of 'procedural impropriety' sufficiently serious to justify the court coming to the conclusion that there had been a substantial denial of natural justice, unless the actual material would have been clearly and manifestly inadequate to make any effective dent or impression on the credibility of the witness.

When there has been a blanket denial of cross-examination on an important issue, as distinct from merely refusing to allow a specific question or line of questions, it is very difficult to say that no substantial injustice has occurred. There will be instances where detailed comparison of the evidence of the witness and the material available to the cross-examining party would result in no adverse effect upon the credibility of the witness. But, experience shows that such instances are rare. Where the discrepancies between the evidence of a witness and his or her previous written statements can fairly be described as semantic or mere quibbles, or attributable to errors or nuances of translation or style, the tribunal of first instance, and more especially the reviewing tribunal, can normally give them little or no weight. But, what may seem to be slight discrepancies or matters of small weight, may assume quite unexpected and disproportionate significance when actually used in cross-examination. When confronted with any inconsistency or apparent contradiction, a witness may react in such a way that his or her demeanour gives rise to genuine uncertainty as to his or her reliability, or results in answers or explanations which expose further weaknesses or contradictions even if they fall short of confessions of perjury or other wrongdoing of the kind associated with some film or television courtroom dramas. In my judgment, when the available ammunition has some power, albeit slight, it is extremely difficult to say that it would have made no difference to the actual result of the contest, when there has been absolutely no opportunity to use it.

COMMENTARY

1. No general right to cross-examination

Ngai Kin-wah (above) sets out the reasons why cross-examination is often instrumental to a fair procedure. However, there is no general right to cross-examination. Whether cross-examination is permitted will depend on the circumstances of the particular case. In *R v Board of Visitors of Hull Prison, ex parte St Germain (No 2)*,[67] the applicant, a prisoner, was convicted of

67 [1979] 1 WLR 1401.

serious disciplinary charges resulting from a prison riot. During the disciplinary hearing, the applicant was denied the opportunity to challenge hearsay evidence put to the prison authorities. The contested evidence was considered fundamental to the arguments put against the prisoner and therefore the right to cross-examination was essential. Further, where hearsay evidence is admitted, the applicant ought to have been able to call the witnesses in order to challenge them, or the evidence ought to have been disregarded.

By contrast, in *Bushell v Secretary of State for the Environment*[68] no right to cross-examine was found where the subject matter of examination extended to policy matters beyond the scope of a motorway planning inquiry. As Lord Edmund-Davies stated: 'There is a massive body of accepted decisions establishing that procedural fairness requires that a party be given an opportunity of challenging by cross-examination witnesses called by other parties on relevant issues.' Therefore, where the cross-examination itself will serve no useful purpose, such as by not contesting the relevant issues, then its denial will not violate procedural fairness.

(iv) Legal representation

Another key aspect of the fair hearing rule concerns the permissibility of legal representation. Whether representation is permitted depends on the circumstances of each case. The Court of Final Appeal in the following judgment summarised factors relevant to determining whether a party is entitled to legal representation in administrative proceedings.

Stock Exchange of Hong Kong Ltd v
New World Development Co Ltd
[2006] 2 HKC 533

The Listing Division of the Stock Exchange of Hong Kong concluded in a report that the company, New World Development, and its four executive directors, should be publicly censured for releasing price sensitive information in breach of the company's listing agreement. The company sought to challenge the report's recommendation and a disciplinary committee was convened. The committee composed market practitioners, not lawyers or judges. The proceedings were designed to be relatively informal, with lengthy submissions discouraged. A legal adviser could attend the hearings and advise clients during the course of the proceedings. However, submissions and answers were to be given by the parties concerned, not their legal advisers. In commencing judicial review proceedings, one of the claims made by the company was that they were denied their common law right to full legal representation before the disciplinary committee.

Justice Ribeiro PJ:

> [This] is not a case where the respondents face a prohibition against legal representation. On the contrary, as the provisions of the Disciplinary Procedures ... indicate, persons appearing can avail themselves of legal assistance and advice before and during the hearing. The proceedings being

68 [1981] AC 75, [1980] 2 All ER 608.

primarily by way of written submissions (DP 2.5), their lawyers can and may be expected to draft the same. Their lawyers can accompany them and can confer with them at any stage of the hearing (DP 5.1). The lawyers may also, at the disciplinary committee's request, clarify or elaborate upon any answer given by their client (DP 6.3). And, prior to final submissions, the client can confer with the lawyer who will no doubt prepare submissions to be advanced (DP 6.3) ...

The issue in the present case therefore concerns the precise mode and extent of legal representation which should be permitted at the hearing. The answer must depend on what is fair and proportionate, applying the common law approach ...

[Counsel] based his submissions on a dictum of Lord Denning MR in *Pett v Greyhound Racing Association Ltd* [1969] 1 QB 125. After emphasizing the value and importance of legal representation to a layman, his Lordship stated: '... when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor.' (at p 132) On that basis, Mr. Griffiths suggested that in the circumstances of the present case, the respondents were entitled to legal representation as of right.

I am unable to accept that submission. The authorities have not developed along the lines suggested by Lord Denning MR. Indeed, as was pointed out by Webster J in *R v Secretary of State for the Home Department, ex parte Tarrant* [1985] QB 251 at 273-274, in *Pett's* case the Court of Appeal was dealing with an interlocutory appeal against an interim injunction and was dealing 'only with the question whether it was arguable that the trainer was entitled, as of right, to legal representation ...' Webster J points out that at the substantive hearing, Lyell J found (see *Pett v Greyhound Racing Association Ltd (No 2)* [1970] 1 QB 46 at 63-66) that the defendant association had not acted contrary to the rules of natural justice in refusing the plaintiff legal representation at the inquiry, preferring the decision of the Privy Council in *University of Ceylon v Fernando* [1960] 1 WLR 223, to the dicta in *Pett (No 1)*.

More recent authority clearly establishes that there is no absolute right to have counsel address the tribunal or to question witnesses, any such entitlement depending on whether such procedures are required as a matter of fairness.

Thus, in *R v Board of Visitors of HM Prison, the Maze, ex parte Hone* [1988] AC 379, the House of Lords was concerned with a case involving prisoners charged with offences against prison discipline (which would also constitute criminal offences). The cases were referred to the prison's board of visitors and the prisoners were refused legal representation before them. Their argument that they were entitled as of right to legal representation at the hearing was rejected. Lord Goff of Chieveley (with whom the other Law Lords agreed) stated:

> '... though the rules of natural justice may require legal representation before a board of visitors, I can see no basis for Mr. Hill's submission that they should do so in every case as of right. Everything must depend on the circumstances of the particular case, as is amply demonstrated by the circumstances so carefully listed by Webster J in *Reg v Secretary of State for the Home Department, ex parte Tarrant* [1985] QB 251 as matters which boards of visitors should take into account. But it is easy to envisage circumstances in which the rules of

> natural justice do not call for representation, even though the disciplinary charge relates to a matter which constitutes in law a crime, as may well happen in the case of a simple assault where no question of law arises, and where the prisoner charged is capable of presenting his own case. To hold otherwise would result in wholly unnecessary delays in many cases, to the detriment of all concerned including the prisoner charged, and to wholly unnecessary waste of time and money, contrary to the public interest.' (at p 392)

The matters listed in *Ex parte Tarrant* ... referred to by Lord Goff include (with modifications to make the point more general): the seriousness of the charge and potential penalty; whether any points of law are likely to arise; the capacity of the individual to present his own case; procedural difficulties; the need for reasonable speed in making the adjudication; and the need for fairness among the individuals concerned. This approach was adopted in Hong Kong by Mayo J in *R v Hong Kong Polytechnic, ex p Jenny Chua Yee-yen* (1992) 2 HKPLR 34. Plainly, as these judgments emphasize, no list of such factors can be comprehensive. The common law principles of fairness operate flexibly, requiring the tribunal to respond reasonably to the requirements of fairness arising in each case, balancing any competing interests and considering what, if any, limits may proportionately be imposed on legal representation in consequence ...

The respondents invite the court to find that they have, here and now, made good the case that unless their lawyers are given the unrestricted right to address the disciplinary committee and to examine and cross-examine witnesses, the common law principles of fairness will necessarily be infringed. The Court of Appeal adopted this approach and found that such case had been made out.

Cheung JA's view was that the disciplinary committee's procedure of allowing lawyers to advise but not to act as advocates for the respondents at the hearing would result in cumbersome and unsatisfactory to-ing and fro-ing between lawyer and client and that this 'simply does not work' (43). He listed the factors identified by Mayo J in the *Hong Kong Polytechnic case* (above) and appears to have held that they militated in favour of a finding of unfairness. He did not, however, engage in any specific analysis of such unfairness.

Reyes J considered the restrictions contained in the Disciplinary Procedures to be unjustified, founding himself in the first place on the dictum of Lord Denning MR in *Pett (No 1)*. He points out that that dictum was applied in *Joplin v Chief Constable of the City of Vancouver* (1982) 2 CCC (3d) 396 (and upheld in the British Columbia Court of Appeal at (1985) 20 DLR (4th) 314) where a provision in police disciplinary regulations which excluded legal representation was held to be *ultra vires*. As I have stated above, the development of English and Hong Kong authority has not proceeded along the lines of giving an absolute entitlement to full legal representation whenever someone may be faced with serious disciplinary consequences. It may in any event be noted that in Joplin, one is concerned with regulations seeking to impose a blanket exclusion of legal representation. It may well be that such an exclusion is likely in most cases to offend against the principles of fairness. But that is not this case where, as stated above, the debate is as to the specific mode of legal representation to be permitted at a hearing.

Reyes J evidently gave weight to the potentially serious consequences of a public censure in the present case and to the likelihood that the directors, being laymen, would feel at a disadvantage presenting their cases ...

It is therefore common ground, and obviously correctly so, that what fairness requires depends on the circumstances. SEHK's policy, reflected in the Listing Rules and the Disciplinary Procedures, of limiting (at least in the first instance) the role of lawyers at the hearing is based upon the belief that limited representation suffices in most cases; that an informal, expert, lay tribunal, steeped in the ways of the stock exchange, is best placed to deal effectively and swiftly with disciplinary issues; that the public interest in maintaining confidence in the market requires swift investigation and treatment of suspected infringements; and that 'over-lawyering' the procedures would undermine many of these objectives, substantially lengthening and complicating proceedings, and making it difficult to persuade qualified individuals to accept unremunerated appointment to a Disciplinary Committee. These are plainly legitimate concerns. But they can only be pursued with proper regard for the needs of procedural fairness and for proportionality in any procedural restrictions imposed.

I am unable to accept that the features of this case identified by [counsel] compel the court to conclude that unfairness inexorably follows if directions authorizing full legal representation are not given at this point. To take these features in series:

(a) Seriousness of the sanctions: I agree that in considering what fairness requires, the seriousness of the sanctions must be taken into account. That remains a factor that should guide the chairman and the disciplinary committee not only regarding the handling of witnesses, but on its procedure generally when the issues are better defined.

(b) Difficult points of law exist: Assuming this to be so, written arguments have already been exchanged, obviously prepared by lawyers on both sides. Such submissions may or may not be enough to enable the disciplinary committee to decide the point. If not and if fairness so requires, it has a discretion to allow oral argument by legal representatives when the legal issues are better defined and the written submissions have been examined.

(c) The respondents are laymen who will not be able properly to present their own cases: Until the issues are well-defined and the substance of the evidence of any live witnesses is known, the court is in no position to assess whether this is the case. If such difficulties in fact arise, then it may well be proper to permit legal representation to the extent necessary.

(d) There is no equality of arms since the listing division would be represented by individuals who, while not court lawyers, are trained as lawyers and have experience of disciplinary cases while the respondents are laymen: if this is so at the hearing and if a risk of unfairness arises, it may well be proper to permit legal representation to the extent necessary.

(e) There is a material dispute of facts so that cross-examination is required: [counsel] pointed to the fact

> that the Report runs to some 750 pages, involving 11 deponents and 16 records of interview, with the defence possibly calling additional witnesses. If anything, this supports the chairman's wait-and-see approach. The listing division has indicated that it is only going to call four witnesses, and not the 11 whose 16 statements have been made available. When it becomes clear what evidence the witnesses actually to be called are expected to give, fairness may or may not require some or all of them to be cross-examined by counsel for the respondents. The chairman and the disciplinary committee will have to give careful consideration to that question, which has been left open.

COMMENTARY

1. Requirement of legal representation in administrative proceedings: general principles

As made clear in *New World Development*, there is no absolute right to legal representation in administrative proceedings. Rather there is a need to balance the competing interests to establish what fairness required in the particular circumstances. These competing interests can be briefly stated. On the one hand, an individual who is the subject of administrative proceedings is likely to benefit from having a trained advocate put their case in the most convincing terms. This is especially so where the administrative procedure is adversarial in form. Yet on the other hand, from the administration's perspective the presence of legal representation can result in longer, more formal and legalistic proceedings, which may ultimately have a detrimental effect on society and public administration. Indeed, these were the very concerns raised by the Stock Exchange of Hong Kong in resisting the 'over-lawyering' of their disciplinary procedures in the above case; that there was a public interest in maintaining confidence in the market, which required the speedy determination of alleged breaches of the Listing Rules. The presence of legal representation was said to be inimical to these goals.

Yet, as Ribeiro PJ observed, whilst the Stock Exchange's concerns were legitimate, they would not justify the blanket ban on legal representation in their disciplinary proceedings. A blanket denial of legal representation is fundamentally inconsistent with procedural fairness.[69] Indeed, whether legal representation is permitted will require examination of a variety of factors on a case-by-case basis, including the seriousness of the sanction; whether difficult points of law exist; whether the affected individual is a layman; whether there is equality of arms in the proceedings; whether there is a material dispute of fact.

It follows that the authorities are required to keep under review any request for legal representation and have primary responsibility for, as Ribeiro PJ noted, a 'balancing [of] any competing interests and considering what, if any, limits may

69 See *FB v Director of Immigration* [2009] 1 HKC 133; *Lam Siu Po v Commissioner of Police* [2010] 2 HKC 149 at paras 135-142, 168-169 (Ribeiro PJ).

proportionately be imposed on legal representation in consequence ...'[70] To ensure that the authority has acted fairly, it is incumbent on the courts in their review function to examine whether the correct balance has been struck on a proportionality assessment where legal representation has been denied.

2. *Instances where fairness demanded legal representation*

(a) Where there are complex charges and strong demands for political accountability

Where proceedings are colored by broader political considerations, and the subject matter that forms the basis for disciplinary charges is complex, a right to legal representation will be required for the procedure to be fair. In *Rowse v Secretary for Civil Service*,[71] a senior civil servant was reprimanded by an inquiry committee for mismanagement of a major international music event ('Harbour Fest') that was intended to relaunch Hong Kong after the SARS outbreak. The applicant was denied legal representation before the Inquiry Committee, who followed a policy of permitting such representation only for 'compelling reasons'. The applicant was fined one month's salary and warned of dismissal in the event of any future misconduct.

Hartmann J (as he then was) held that the authority's denial of legal representation was unlawful in the circumstances. First, the failures of Harbour Fest had become publicly notorious. The inquiry had taken on a political dimension and there was a strong public demand for accountability. Even though the disciplinary proceedings would be held in private, notoriety would nevertheless add an important extra dynamic and could, in all manner of ways, direct and indirect, conscious and unconscious, work to the detriment of the applicant, the witnesses and even the inquiry committee itself. Second, ascertaining responsibility for the staging of a large scale international music event was no simple task. It must have been evident that there was very likely to be refined and sophisticated arguments as to the context in which – in this particular case - evidence would have to be considered. The difficulties and the nuances of explaining to the Inquiry Committee the unique problems faced in that situation plainly required the services of a legally qualified advocate trained to separate out the relevant from the irrelevant and to express in the clearest manner possible the subtle and complex difficulties that would have arisen in organising the Harbour Fest. For these reasons the decision to deny the applicant with legal representation was held to be procedurally unfair.[72]

(b) To secure a 'high degree of fairness' in torture claims adjudication

In *FB v Director of Immigration*,[73] a group of individuals sought legal

70 [2006] 2 HKC 533. For further analysis on the proportionality doctrine, see Chapter 11.
71 [2008] 5 HKC 405.
72 *Ibid* at 127–129, 133, 141, 142. As to the implication of this case on civil service employment policies, see: L Floyd, *Reforming Hong Kong Public Sector Employment Law After Lam Siu Po and Rowse – Some Useful Comparison from Australian Law* (2009) 39 Hong Kong Law Journal 457.
73 [2009] 1 HKC 133.

protection from *refoulement* pursuant to art 3 of the Convention Against Torture and thus made a torture claim to the immigration department. The torture screening process involved several stages, including the completion of a questionnaire and interviews to ascertain the individual's fear of torture if *refouled*. However, torture claimants were not permitted to have a lawyer present when they complete the questionnaire or during the screening interviews. Nor were legal representatives allowed to be present at any subsequent appeal to the Chief Executive.

Saunders J held it would be procedurally unfair to deny legal representation to the claimants in circumstances where a momentous decision is being made concerning the claimant that may affect his life, limb and right to not be subjected to torture. In arriving at this conclusion, Saunders J relied on influential comparative jurisprudence that required administrators to assess an individual's need for legal representation according to a number of relevant considerations: (i) the applicant's capacity to understand the nature of the proceedings and the issues for determination; (ii) the applicant's ability to understand and communicate effectively in the language used by the tribunal; (iii) the legal and fact or complexity of the case; (iv) the importance of the decision to the applicant's liberty or welfare. In all of these respects, and particularly the final consideration, fairness demanded that torture claimants be permitted legal representation at every stage of the screening process.[74]

(c) Where challenging the integrity of a senior ranking employee and future career prospects were at stake

In *Au Hing Sik Charles v Commissioner of Police*[75] the applicant, a police officer, was disciplined by the Police Force for chewing gum during a police briefing, contrary to the Police Discipline Regulations. Having denied the allegation, he was subsequently charged with making a false statement also under the same regulations. The main prosecution witness at the disciplinary hearing was a police superintendent, being a senior member of the force, with whom the applicant said he had a history of personal animosity with. The applicant sought legal representation on the grounds that this was necessary for the purpose of cross-examining the superintendent on his integrity. The respondent refused the request for legal representation, noting that the facts of the case were straightforward and that only a minor disciplinary award was likely if the offences were proven.

Lam J found that the respondent's refusal to permit legal representation was unlawful for a number of reasons. First, in denying the applicant of legal representation, the respondent had not taken into account the rank differential between the applicant and the superintendent. Second given the alleged history of animosity between the applicant and superintendent, the case was not as straightforward as it appeared on its face. Third, whilst a friend could represent the applicant, this did not discharge the authority's duty to act fairly. A friend without legal training was likely to be less effective than a lawyer in the particular circumstances of this case, which called for a challenge to the integrity of a senior police officer before a tribunal made up of police officers. Fourth, even though the charges did not appear to be serious, given the significance the

74 *Ibid* at 146, 210-213, 216-217, 230. See also *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 271 at para 69 (French and Lee JJ).

75 [2011] HKCU 2477 (CFI).

Police Force attached to discipline and obedience, a conviction could have a substantial impact on the applicant's future career. Accordingly, taking all of these factors into account the absence of legal representation would be prejudicial to the applicant's interests.[76]

3. *Instances where fairness did not require legal representation*

(a) The need to maintain informality in disciplinary proceedings

In *Re Fong Hin Wah*[77] the applicant was compulsorily retired from employment as an immigration officer because of various allegations that he had engaged in unauthorised paid work and had intervened on behalf of a visa applicant outside of his official duties. At the disciplinary hearing the applicant was denied legal representation. The applicant argued that he should have been permitted legal representation at the hearing, given that his reputation and livelihood were at stake.

Mayo J held that no legal representation was necessary taking into account the informal nature of the disciplinary proceedings. First, members of the investigating committee were themselves laymen. The officer who presented the case for the Immigration Department was not legally qualified. Accordingly, 'the presence of a lawyer would have been incongruous in the context of the disciplinary hearing. The proceedings were of an informal nature and the Committee was not equipped to deal with legal submissions or arguments.' Second, Mayo J also drew from comparable proceedings at the Labour Tribunal, which also dealt with matters relating to the termination of contracts of employment. Given the similarity between the Labour Tribunal's jurisdiction and that of the disciplinary body set up by the immigration department, it was therefore instructive to look at the proceedings adopted in this specialist tribunal. In this respect, as parties were not permitted to be legally represented at the Labour Tribunal, which was designed to be informal and expeditious, it followed that it would be 'incongruous and inappropriate' for the applicant to be legally represented at the disciplinary hearing.[78]

(b) Taking into account the particular context of educational institutions and where the possible sanction was not serious

In *Leung Chak Sang v Lingnan University*,[79] the applicant, a student, was subject to university disciplinary proceedings for using impolite language towards an employee of the university. The disciplinary committee found the applicant guilty of misconduct, issued a reprimand and ordered that he submit a written apology to the employee concerned. The applicant, who was not permitted legal representation in the hearing at first instance or in appealing the decision, argued that the presence of a lawyer was necessary to ensure

76 *Ibid* at 53.

77 [1985] HKCU 31.

78 *Ibid*. Similar reasoning was also applied to justify the denial of legal representation to a student who sought to challenge an academic appeals committee a decision of the university that she be required to withdraw from her course: *Chau Yee Yen v Hong Kong Polytechnic* [1992] HKLY 15.

79 [2001] 2 HKC 435.

procedural fairness. The applicant argued that given his young age he was in a weaker position compared to his accuser, who was characterised as 'sophisticated and experienced'.

Chung J rejected the applicant's submission on the grounds that the likely penalty would not be severe enough to justify legal representation. In arriving at this conclusion, his lordship also took into account the informal nature of the disciplinary body. The particular context of educational institutions, and the responsibility that these institutions have for 'upbringing and supervision of a student', also influenced the degree of procedural fairness required.[80]

(c) Legal representation before the Ombudsman would defeat the statutory purpose of this investigatory mechanism

In *Beelab Semiconductor Ltd v Ombudsman*,[81] the applicant sought judicial review of the Ombudsman's decision relating to a complaint of maladministration. The applicant argued that the Ombudsman ought to have permitted the applicant to state his complaint in person and with the assistance of legal representation.

Poon J rejected this argument for several reasons. First, a finding that fairness required complainants to have legal representation would contradict the Ombudsman Ordinance, which provided that investigations shall be conducted in private and that counsel had no right of audience. Second, the Ombudsman's investigatory role was essentially inquisitorial in nature. It was not the Ombudsman's role to determine the parties' rights and he had no power to impose sanctions if maladministration was established. Third, the investigatory process was designed to be simple, inexpensive and efficient. Access to the Ombudsman would be undermined, and finite resources consumed, because of the proliferation of correspondence between lawyers and the Ombudsman that would ensue.[82]

(v) The duty to provide adequate reasons

For the fair hearing rule to have meaning, it is necessary that the authority takes into account the affected party's arguments and to address these points when providing reasons for its decision.[83] The imposition of a duty to provide reasons has a clear rationale. Reasons help demonstrate that the authority has acted properly and taken into account all relevant considerations. Reasons promote accountability and enhance consistency in decision-making. Where the authority does not give reasons for its decisions, it would prevent the affected party from detecting any faults in the reasoning process that may in

80 *Ibid* at 445-445, drawing from *Glynn v Keele University* [1971] 1 WLR 487 at 494–95.

81 [2010] HKCU 2037.

82 *Ibid* at 44-49. This conclusion seemed plain from the section 12(4) of the Ombudsman Ordinance (Cap 397), which provides: 'Every investigation shall be conducted in private and counsel and solicitors shall not have any right of audience before the Ombudsman, but may appear before him if he thinks fit.'

83 P Cane, *Administrative Law* (2004, Oxford University Press, 4th ed) at p 165.

turn support a claim for administrative or judicial review. Further, providing reasons is also of benefit to the authority itself in that it serves to concentrate its attention on the relevant issues.

However, as the following section demonstrates, there is no absolute duty to give reasons. The courts have refrained from imposing such a general duty, no doubt out of recognition that furnishing reasons can be resource intensive and simply may not be warranted in particular circumstances. Whether reasons should be given therefore turns on an assessment of what fairness requires in the circumstances. A statutory provision may also require reasons to be given, as shown in the following case.

Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority
[1998] 4 HKC 505

The respondent, Obscene Articles Tribunal, determined that two photographs of semi-naked women published by the appellant, Oriental Daily Publisher Ltd, were indecent. It was agreed that the Tribunal was under a duty to give reasons. However, the question was whether they had discharged this duty by giving adequate reasons. The appellant argued that the respondent merely identified the criteria in s 10 of the Control of Obscene and Indecent Articles Ordinance (Cap 390) without any more. The respondent argued that the concepts of indecency and obscenity were abstract and difficult to express and that the reasons given by the tribunal were adequate.

Li CJ:

... In deciding the question of obscenity and indecency, s 10 obliges the Tribunal to have regard to certain matters. This section, which is important for this appeal, provides:

A Tribunal shall have regard to -

(a) standards of morality, decency and propriety that are generally accepted by reasonable members of the community, and in relation thereto may, in the case of an article, have regard to any decision of a censor under s 10 of the Film Censorship Ordinance (Cap 392) in respect of a film within the meaning of s 2(1) of that Ordinance;

(b) the dominant effect of an article or of matter as a whole;

(c) in the case of an article, the persons or class of persons, or age groups of persons, to or amongst whom the article is, or is intended or is likely to be, published;

(d) in the case of matter publicly displayed, the location where the matter is or is to be publicly displayed and the persons or class of persons, or age groups of persons likely to view such matter; and

(e) whether the article or matter has an honest purpose or whether its content is merely camouflage designed to render acceptable any part of it.