Administrative Law in Hong Kong

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Procedural Fairness, Procedural Impropriety and Natural Justice

There is a long history in the common law tradition of the courts protecting procedural fairness.[1] The courts have developed a framework of common law rules for the upholding of procedural protections and natural justice, in addition to such statutory protections as there may be. These provide an important baseline of procedural protections in individuals' dealings with public bodies, as well as promoting the integrity of a just system of public administration. Though public bodies will often have significant, sometimes overwhelming, power over the individual, the individual is still entitled to fair treatment and procedural propriety.

Lord Bridge of Harwich articulated the theme of this aspect of law:

> the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.[2]

It is not for the courts to take an abstract view of fairness or to consider whether another procedure might have been better or fairer.[3] The courts are concerned with instances of actual unfairness,[4] and they have not admitted

[1] Typically this was seen in a judicial or quasi-judicial context, but was extended to a wider range of decision makers – *Ridge* v *Baldwin* [1964] AC 40 (HL).

[2] *Lloyd* v *McMahon* [1987] AC 625, pp.702–703, per Lord Bridge of Harwich.

[3] *R* v *Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 351, pp.560–561, cited with approval in *Liu Pik Han* v *Hong Kong Federation of Insurers Appeals Tribunal* [2005] HKEC 1046.

[4] It was proposed by Megarry V-C that there is a "substantial distinction between the forfeiture cases and the application cases", namely, between those in which there is a decision to take

such a thing as "technical breach of natural justice".[5] Where the impugned procedure does not cause substantial prejudice to the applicant, the courts retain the discretion to refuse relief.[6]

Right to a Fair Hearing

A person who stands to be directly affected by a decision may be entitled to present his own case or version of the facts to the decision maker. This applies both in the context of an individual over which a decision maker has jurisdiction (for example, an applicant for a licence), and in the context of adjudication, where the adjudicator should hear both sides equally and afford to them an equal opportunity to present their respective case or version of the facts.[7] The principle *audi alteram partem*, literally "hear the other side", is particularly relevant in the latter case, part of which is that "the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other".[8]

something away (such as membership of an organisation or a licence), and those in which there is a decision merely to refuse to grant the applicant what he seeks (such as membership of an organisation or a licence). He proposed that a higher standard of procedural fairness attached to forfeiture than to application cases, and that in normal application cases there is no requirement of an opportunity to be heard – *McInnes* v *Onslow-Fane* [1978] 1 WLR 1520 (HL), p.1529. Wade and Forsyth disputed both the notion that such a distinction applies to the exercise of statutory powers, and the claim that there is no requirement of an opportunity to be heard in normal application cases (Wade and Forsyth, *Administrative Law* (11th edn), p.464, fn.459). It is indeed doubtful whether any real distinction exists between forfeiture cases and application cases. In both cases, fairness requirements will be determined in the context of the extent to which the applicant is substantively affected by the decision in question. If Applicant A will be more greatly prejudiced by the decision in an application case (for example, for recognition as a torture claimant) than Applicant B will be prejudiced by the decision in a forfeiture case (for example, failing to have a trading licence renewed), then Applicant A's case will likely attract more stringent requirements of procedural fairness regardless of the forfeiture/application distinction. The distinction seems to be in the vein of the technical approach to natural justice that the courts have claimed to reject. Nevertheless, the courts have sometimes applied the forfeiture/application distinction in Hong Kong: *Pearl Securities Ltd* v *Stock Exchange of Hong Kong Ltd* [1999] 2 HKLRD 243, pp.255–256 (application case; albeit that this was simply borne in mind as one of the factors in determining what fairness required in that case); and *Chan Mei Yee* v *Director of Immigration* [2000] HKEC 788 (forfeiture case).

[5] *George* v *Secretary of State for the Environment* [1979] 77 LGR 689, p.617, per Lord Denning MR. He noted that Kerr J said in *Lake District Special Planning Board* v *Secretary of State for the Environment* [1975] JPL 220 that he "accept[ed] the submission that there can be no such thing as a "technical" breach of the rules of natural justice, since the concept of natural justice is not concerned with the observance of technicalities but with matters of substance". See also *Malloch* v *Aberdeen Corporation (No 1)*, 1971 SC (HL) 85, p.118.

[6] *Leung Fuk Wah Oil* v *Commissioner of Police* [2002] 3 HKLRD 653 (CA), para.40, per Cheung JA; see also *Siu Chi Wan* v *Secretary for Civil Service* [2008] HKEC 1134, paras.52–56.

[7] For an example of this principle violated in court proceedings, see *Yu Cho Lam* v *Commissioner of Police* [2016] 1 HKLRD 257. See also *Kanda* v *Malaya* [1962] AC 322 (PC) (Malaya), p.337.

[8] *Kanda* v *Malaya* [1962] AC 322 (PC) (Malaya), p.337, per Lord Denning. It was said that it is trite that the rule is to safeguard procedural fairness – *Hysan Development Co Ltd* v *Town Planning Board* [2014] HKEC 1869 (CA), para.166.

There may be a statutory duty to hear a party;[9] statute might instead purport to divest an individual of such a right, though this would be subject to Basic Law and Bill of Rights protections. When the statute makes no express provision on the matter, it is to the common law that one must turn to establish whether the applicant can claim a right to be heard. There is no automatic common law right to be heard. The courts have instead applied a fairness test to determine whether the right exists at common law in a given case. As Lord Mustill explained:

> 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.[10]

Moreover, a right to be heard does not translate in every case to a right to be orally heard[11]; fairness will dictate whether a right to be orally heard can be established in the individual circumstances of the case. Nor is a party automatically entitled to an oral hearing under Article 10 of the Bill of Rights,[12] which does not, in any event, require that every element of the protections it confers be present at every stage of a given procedure.[13]

The establishment of a common law right to be heard inevitably depends on context. Nevertheless, certain factors, if sufficiently demonstrated, are likely to weigh in favour of the right to an oral hearing being recognised by the court. They include a situation in which a dispute of fact or law exists which is difficult to examine on paper. In these circumstances, the applicant's interests in fairness would tend to be appropriately served by convening an oral hearing in order to allow the factual or legal dispute to be fairly ventilated.[14] It may also weigh in favour of an oral hearing that the possibility of cross-examination should be afforded to a person subject to particular proceedings.[15]

Where a negative decision could detrimentally affect an existing right or interest, fairness may require there to be an oral hearing so that the applicant is given the best opportunity to present his case. This might include, for example,

[9] An example of a statutory right to be orally heard can be found in the Town Planning Ordinance (cap.131), s.6B(3).

[10] *R* v *Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, per Lord Mustill.

[11] *Ng Nga Wo* v *Director of Health* [2006] HKEC 843, para.34, per Chu J; *Spruce* v *The University of Hong Kong* [1993] 2 HKLR 65 (PC), p.72.

[12] *Liu Pik Han* v *Hong Kong Federation of Insurers Appeals Tribunal* [2005] HKEC 1046, para.33.

[13] *Lam Tat Ming* v *Chief Executive of the HKSAR* [2012] 1 HKLRD 801, paras.19–20. On the curing of procedural defects, see p.253.

[14] Though complexity alone will not automatically warrant an oral hearing as a matter of fairness – *Ch'ng Poh* v *Chief Executive of HKSAR* [2003] HKEC 1441, para.110.

[15] *Lam Tat Ming* v *Chief Executive of the HKSAR* [2012] 1 HKLRD 801, paras.52–55.

a decision to revoke a licence, remove a person from public housing or rescind a permanent residence entitlement.[16] Similarly, if substantial prejudice would be caused to the applicant by not affording the opportunity of an oral hearing, fairness may require that one is offered. This might include, for example, disciplinary proceedings in which the person subject to the proceedings may stand to have pay withheld or be dismissed from employment.[17] Fairness may require there to be an oral hearing where constitutional or fundamental rights, or other important interests, are at stake, so that suitably high procedural safeguards are afforded to best protect such rights. These factors are non-exhaustive and they do not automatically lead to the establishment of the right to an oral hearing. They instead weigh in favour of such a right being established at common law, and as these factors accumulate in a single case, so should the strength of the argument that such a right be established.

There are, by contrast, factors which, if sufficiently established, would tend to weigh against the finding that there should be an oral hearing. If the individual did not request a hearing, this can weigh against his subsequent complaint that no hearing was offered; though he will not be automatically entitled to a hearing if he requests one.[18] If the individual made written representations instead of requesting an oral hearing, he runs the risk of being held to have waived his right to an oral hearing. If the court considers that an oral hearing would serve no useful purpose, or that there is nothing of factual or legal complexity requiring an oral hearing, then the court is less likely to find that fairness requires there to be a hearing.[19]

Where factors weighing in favour of a common law right to an oral hearing are coexistent with factors weighing against it, the court will conduct a balancing exercise to decide whether, overall, fairness requires or does not require that an oral hearing be given. The contextual nature of this exercise is illustrated by contrasting two near-contemporaneous decisions, the first of which is *Ng Nga Wo* v *Director of Health*.[20] An applicant medical practitioner had been convicted in 2001 of an offence under the Dangerous Drugs Regulations (cap.134A) and fined accordingly. In 2005, he was convicted under the Dangerous Drugs Ordinance (cap.134) and again fined. There was correspondence between the Director of Health (in his capacity as Registrar of Clinics) and the clinic at which the applicant was employed with regard to his fitness to be registered as a medical practitioner. The applicant then wrote a particular letter to the Registrar, after which the Registrar decided that he was

[16] This is due not to the forfeiture/application distinction as such, but the requirements of fairness in the context of individual cases.

[17] *Id.*

[18] *R (on the application of West)* v *Parole Board for England and Wales* [2002] EWCA Civ 1641, para.44.

[19] In the context of court hearings, see *Chow Shun Yung* v *Wei Pih* (2003) 6 HKCFAR 299, para.37.

[20] *Ng Nga Wo* v *Director of Health* [2006] HKEC 843.

no longer suitable to be employed by any clinic registered under the Medical Clinics Ordinance (cap.343). A request made for review of the decision was declined. No oral hearing was given to the applicant.

It was averred that the Registrar's decision affected the applicant's livelihood. That would be a serious matter for the applicant, and its gravity on his career prospects, professional reputation and income might weigh strongly in favour of an oral hearing. However, there were factors weighing against such a finding. First, there was a period of almost three months during which the applicant made no representations to the Registrar. Second, the form which the applicant's letter took was of importance: it was a "long" letter which constituted a "lengthy and substantial representation". This would impact on any argument that fairness required there to be an oral hearing, for:

> 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.[21]

The applicant failed to demonstrate that unfairness had resulted, that any special circumstances or considerations existed which recommended an oral hearing, that he was unaware of the adverse factors against him or that he did not appreciate or had difficulty comprehending the case against him. He also failed to show what prejudice had been suffered by not having had the opportunity of an oral hearing. Furthermore, "[t]he right to be heard does not entail a right to make oral submissions".[22] The submission of full written representations by a putative applicant can (but will not necessarily) discharge the right to be heard.[23] When these factors were balanced against the gravity of the Registrar's decision on the applicant's circumstances, it would not point to the conclusion that fairness required that an oral hearing be given.

This may be contrasted with the decision in *Liu Pik Han* v *Hong Kong Federation of Insurers Appeals Tribunal*.[24] The applicant was an insurance agent whose registration was suspended by the Insurance Agents Registration Board due to its decision that she was no longer a fit and proper person to act as an insurance agent due to false declarations made to the Board. The applicant exercised a statutory right of appeal to the Hong Kong Federation of Insurers Appeals Tribunal, but the appeal was dismissed. Neither the Board nor the Appeals Tribunal gave the opportunity of an oral hearing.

The applicant faced a charge of serious misconduct which carried with it an imputation of fraud. It would be a serious blemish on her record and have an

[21] *Id.*, para.33, per Chu J.
[22] *Id.*, para.34, per Chu J; *Spruce* v *The University of Hong Kong* [1993] 2 HKLR 65 (PC), p.72.
[23] *Lloyd* v *McMahon* [1987] AC 625.
[24] *Liu Pik Han* v *Hong Kong Federation of Insurers Appeals Tribunal* [2005] HKEC 1046.

adverse impact on her career development as an insurance agent. She had already been dismissed from her employment and barred from registration for a substantial period of time; the consequences were not only financial. Furthermore, whilst it was true that the applicant did not request a hearing, she was not told that she could request one. She could therefore not be held to have waived her right to an oral hearing. The real question was whether the issues could be "fairly and properly disposed of without any oral hearing".[25] By contrast with the applicant in *Ng Nga Wo* who had set out lengthy and detailed representations in his letter to the decision maker, the applicant in the present case had only made written representations of a "sketchy nature".[26] There was also a live dispute about the applicant's intent when making the false declarations and her credibility. Though there were inconsistencies in her case, fairness required that the applicant be given an opportunity to explain them at an oral hearing. There were also other ambiguities in relation to which the Board ought to have sought clarification from the applicant. This was a case in which the Board should, as a matter of fairness, have invited the applicant to "attend an oral hearing on its own volition".[27]

The Appeals Tribunal had, meanwhile, dismissed the appeal without offering an oral hearing, providing only uninformative reasons. This was notwithstanding the fact that the applicant had added further materials to support her case, in view of which the "matter cried out for an oral hearing".[28] The Tribunal had therefore also acted unfairly, though it is important to note the court's view that, had the Tribunal afforded the applicant an oral hearing, this might have remedied the absence of an oral hearing by the Board.[29] The court therefore quashed the decisions and granted mandamus for the matter to be brought before a differently constituted Board for consideration.

If a hearing does take place, and if persons other than those expressly authorised to participate in its deliberation contribute thereto or participate therein, this should not result in the decision maker unlawfully divesting or relinquishing its discretion, and any such contribution or participation should be as open, public and fair as practicable.[30] The fairness of a hearing may be influenced by a number of factors, such as the length of the hearing, the scope of the hearing, the complexity of the issues in question, a lack of time for members on the decision-making panel to read and digest the written materials placed before them, and the partial absence of some members who participated in the decision-making process but were not present throughout the hearing.[31]

[25] *Id.*, para.38, per Lam J. [26] *Id.*, para.40, per Lam J. [27] *Id.*, para.43, per Lam J.
[28] *Id.*, para.45, per Lam J. [29] *Id.*, para.45.
[30] *Dato Tan Leong Min* v *Insider Dealing Tribunal* [1998] 1 HKLRD 630; *Lam Kwok Pun* v *Dental Council of Hong Kong* [2000] 4 HKC 181.
[31] *Hysan Development Co Ltd* v *Town Planning Board* [2014] HKEC 1869 (CA). If members of a decision-making panel have been wholly or partially absent from a hearing at which representations have been made by the affected person, adequate arrangements should be in

The availability of redress in judicial review for the absence of a fair hearing is subject to the curative principle. If a subsequent procedural step such as an appeal or rehearing occurs which "cures" the deficiency of fairness in the original hearing, the applicant is not necessarily entitled to relief in judicial review on the basis of that deficiency.[32] It was doubted in the Privy Council on appeal from Australia that there was a general rule that appellate proceedings could not cure a failure of natural justice in the original proceedings.[33] This position was followed in Hong Kong in relation to an appeal to a committee of the Urban Council[34] and to the Commissioner of Police.[35] In deciding whether to award relief in judicial review, the court will look to see whether, taking the procedure as a whole – both original and appellate – the applicant has still not been treated fairly.[36] The availability of judicial review does not necessarily cure a procedural defect.[37]

Right to Be Legally Represented

There is sometimes expressly provided in statute a right to be legally represented or a prohibition on legal representation. For example, there is a statutory right of representation before the Appeal Board on Closure Orders (Immediate Health Hazard),[38] whereas counsel or a solicitor are not entitled to be heard by the Appeal Board under the Accreditation of Academic and

place to ensure that those members are properly apprised of the relevant representations – *id.*, paras.172–179. Subba Rao J stated in *Rao* v *Andhra Pradesh State Road Transport Corporation* [1959] AIR 308, p.327 that "[i]f one person hears and another decides, then personal hearing becomes an empty formality". See also *R* v *Chester City Council, ex parte Quietlynn Ltd* (1985) 83 LGR 308; and *The Queen* v *Town Planning Board, ex parte REDA* [1996] 2 HKLR 267, p.284.

[32] The curative principle applies not only in relation to hearings, but also to other aspects of procedure such as the giving of reasons (*Akram* v *Secretary for Security* [2000] 1 HKLRD 164); and apparent bias (*Wong Tak Wai* v *Commissioner of Correctional Services* [2010] 4 HKLRD 409 (CA)). An example of a defect which can be cured is where an error of law has been made which can be corrected on appeal – *R* v *Director of Immigration, ex parte Do Giau* [1992] 1 HKLR 287, p.316 (though it was not cured in this case).

[33] *Calvin* v *Carr* [1980] AC 574 (PC) (Australia). The "general rule" had been proposed by Megarry J in *Leary* v *National Union of Vehicle Builders* [1971] Ch 34, p.49. See also *Lloyd* v *McMahon* [1987] AC 625 (HL).

[34] *Sea Dragon Billiard and Snooker Association* v *Urban Council* [1991] 2 HKLR 114 (CA).

[35] *Lee Sze Chung* v *Commissioner of Police* [2003] 3 HKLRD L1 (CA). See also *Liu Pik Han* v *Hong Kong Federation of Insurers Appeals Tribunal* [2005] HKEC 1046, para.45.

[36] *Stock Exchange of Hong Kong Ltd* v *Onshine Securities Ltd* [1994] 1 HKC 319 (CA); *Lee Sze Chung* v *Commissioner of Police* [2003] 3 HKLRD L1 (CA), paras.23–24. Article 10 of the Bill of Rights did "not require every element of the protections conferred to be present at every stage of the determination of a person's rights and obligations, but only that such protections should be effective when the determination is viewed as an entire process" – *Lam Siu Po* v *Commissioner of Police* [2009] 4 HKLRD 575 (CFA), para.109, per Ribeiro PJ.

[37] See *Wong Tak Wai* v *Commissioner of Police* [2010] 4 HKLRD 409 (CA), paras.71–78 (in the context of Article 10 of the Hong Kong Bill of Rights).

[38] Public Health and Municipal Services Ordinance (cap. 132), s.128D(7)(b).

Vocational Qualifications Ordinance[39] – though such a restriction will have to be constitutionally compliant to be valid.

When the statute makes no express provision either way, the court will apply a fairness test to establish whether a party is entitled to have a legal representative address a tribunal or question witnesses.[40] The tribunal will, unless prohibited by statute, have discretion on whether to permit legal representatives to address them, and the function of the court in such cases is to assess whether fairness would have required that the tribunal exercise its discretion to permit legal representatives to address them. In order to enable a tribunal to exercise that discretion, the court may declare as unconstitutional legislative provisions that constitute a blanket restriction on legal representation in certain proceedings, as on the basis that they violate Article 10 of the Bill of Rights.[41] As Bokhary PJ stated in the Court of Final Appeal "our constitution does not permit" legislation that brings about unfairness in disciplinary proceedings, but that does not enable the individual to insist on representation; it merely gives the tribunal the necessary discretion to consider whether legal representatives should be permitted to address the tribunal.[42]

In deciding whether fairness requires that legal representatives be permitted to address the tribunal, various factors will tend to weigh in favour of such a finding. The more serious the charge and potential penalty resulting from tribunal proceedings, the more likely it is that fairness would require representation. If points of law are at issue, or there are procedural difficulties such as the conduct of cross-examination of witnesses, this might also support the contention that fairness requires that legal representatives be permitted to address the tribunal. The lesser the capacity of the individual to present his own case, the greater the argument that fairness requires that he be given an opportunity to have a legal representative address the tribunal on his behalf. This may include the extent to which the individual is uneducated, inarticulate or mentally incapable. Pronounced inequality between the individual and the decision maker may also tip the balance in favour of the individual having a legal representative address the tribunal.[43] For example, there may be pronounced power or informational inequalities between the parties, or a lack of equality of arms.[44] Significant public interest in disciplinary or similar

[39] Accreditation of Academic and Vocational Qualifications Ordinance (cap. 592), s.13(4).

[40] *R* v *Board of Visitors of HM Prison, the Maze, ex parte Hone* [1988] AC 379; *Stock Exchange of Hong Kong Ltd* v *New World Development Co Ltd* (2006) 9 HKCFAR 234, para.98.

[41] *Lam Siu Po* v *Commissioner of Police* [2009] 4 HKLRD 575, paras.135–142 and 168–169.

[42] *Id.*, paras.24–26.

[43] These factors are taken from, *inter alia*, discussion in *R* v *Secretary of State for the Home Department, ex parte Tarrant* [1985] QB 251, pp.285–286; and *Stock Exchange of Hong Kong Ltd* v *New World Development Co Ltd* (2006) 9 HKCFAR 234, para.101.

[44] *Stock Exchange of Hong Kong Ltd* v *New World Development Co Ltd* (2006) 9 HKCFAR 234, para.129.

proceedings to which the individual is subject might also recommend that, as a matter of fairness, legal representation is permitted to maximise procedural robustness.[45] This is not an exhaustive list of factors, as fairness criteria are open-ended.

Other factors may tend to weigh against the finding that a legal representative be permitted to address the tribunal, or will at least qualify as "legitimate concerns".[46] For example, if proceedings are of such a nature that speed is required, and if the making of legal representations would obstruct that requirement, this may weigh against the making of those representations. If "over-lawyering" might substantially lengthen and complicate proceedings, so as either to conflict with the objectives of a swift, lay tribunal mechanism, or which would make it difficult for appropriately qualified individuals to accept unremunerated appointment to the tribunal panel, this may also be a relevant factor.[47] The nature of proceedings can be relevant, such as their inherent informality and absence of standard procedures.[48] However, these concerns could only be considered with proper regard for the needs of procedural fairness and for proportionality in any procedural restrictions imposed.[49] They would not override the individual's interests in fairness. In any event, the tribunal, when deciding whether to permit legal representation, must approach the question with a sufficiently open mind, and should not apply a policy (actual or apparent) of not permitting legal representation unless compelling circumstances are demonstrated, in which case the tribunal may be fettering its discretion.[50]

Where the denial of legal representation may have resulted in material prejudice to the affected individual,[51] the court may strike down the decision resulting from the unfair process. It could also order the tribunal to permit legal representation at a rerun of proceedings, though this would in theory involve the court substituting its own decision for the tribunal's discretion on whether or not to permit representation. The court could therefore leave the tribunal to exercise that discretion, and if proceedings are again found to violate the individual's interests in fairness, the matter could again come for judicial review to be struck down a second time; this would be somewhat circuitous but would technically leave intact the tribunal's capacity to exercise

[45] *Rowse* v *Secretary for Civil Service* [2008] 5 HKLRD 217, paras.139–142.

[46] *Stock Exchange of Hong Kong Ltd* v *New World Development Co Ltd* (2006) 9 HKCFAR 234, para.109, per Ribeiro PJ.

[47] *Id.*, paras.101 and 109. See also *R* v *Secretary of State for the Home Department, ex parte Tarrant* [1985] QB 251, p.286.

[48] *Rowse* v *Secretary for Civil Service* [2008] 5 HKLRD 217, para.131.

[49] *Stock Exchange of Hong Kong Ltd* v *New World Development Co Ltd* (2006) 9 HKCFAR 234, para.109. These factors were reiterated in *Lam Siu Po* v *Commissioner of Police* [2009] 4 HKLRD 575, para.139; and *Dr Q* v *Health Committee of the Medical Council of Hong Kong* [2012] 3 HKLRD 206, para.73.

[50] *Rowse* v *Secretary for Civil Service* [2008] 5 HKLRD 217, para.129.

[51] *Id*, paras.127–141.

its own discretion. Nevertheless, if there is in the court's view a right and wrong answer as to whether an individual should be permitted to have legal representation in particular proceedings, and the court strikes down the wrong decision, leaving the tribunal to exercise its discretion afresh, a certain artificiality attaches to the claim that the tribunal has discretion in this regard.

It is worth noting that Article 35 of the Basic Law is not engaged in relation to representation before bodies other than courts. Article 35 provides, *inter alia*, that "Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies". If tribunals were regarded as "courts" under this provision, there would follow a constitutional right to representation in tribunals. However, the Court of Final Appeal has held that the reference in Article 35 to "courts" is only to "courts of law", namely those institutions "charged with exercising the independent judicial power" in Hong Kong.[52] In doing so, it expressly overruled two cases which had held otherwise.[53] It is important to recognise, however, that the distinction between courts and tribunals is not always clear cut, as illustrated where "tribunals" are administered by the Judiciary.[54]

Duty of Disclosure

Another aspect of procedural fairness is a potential duty on the decision maker to provide adequate disclosure of such materials as are relevant to the decision-making process:[55]

> The principle that a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is 'a duty lying upon everyone who decides anything'.[56]

The Privy Council declined, in an appeal from the Court of Appeal of the Supreme Court of Malaya, to investigate whether the evidence or representations

[52] *Stock Exchange of Hong Kong Ltd* v *New World Development Co Ltd* (2006) 9 HKCFAR 234, para.50.

[53] *Id.*, paras.69 and 134. The overruled cases were *Dr Ip Kay Lo* v *Medical Council of Hong Kong* [2003] 3 HKLRD 851; and *A Solicitor* v *Law Society of Hong Kong* [2004] HKEC 219.

[54] See pp.304–305.

[55] *Chan Tak Shing* v *Chief Executive of the HKSAR* [1999] 2 HKLRD 389; *Leung Fuk Wah* v *Commissioner of Police* [2002] 3 HKLRD 653; *Chu Ping Tak* v *Commissioner of Police* [2002] 3 HKLRD 679.

[56] *R* v *London Borough of Camden, ex parte Paddock* (transcript 8 September 1994), p.8, per Sedley J, quoting from *Board of Education* v *Rice* [1911] AC 179 (HL), p.182, per Lord Loreburn LC. See also *University of Ceylon* v *Fernando* [1960] 1 WLR 223 (PC) (Ceylon).

withheld from disclosure worked to the prejudice of the applicant – the risk of prejudice was sufficient.[57] This was followed in Hong Kong, where the view was taken that the fact the document withheld from disclosure contained no new ground of complaint or new facts made no difference in this regard.[58]

This approach was modified in *Leung Fuk Wah* v *Commissioner of Police*, where the Court of Appeal proceeded to investigate the material withheld from disclosure. It was "abundantly clear" that disclosure of new documents would "not have made the slightest difference" to the applicant's petition to the Commissioner of Police. The court exercised its discretion against granting relief on the basis that, as the applicant had not suffered prejudice, failure to observe the principle of fairness should not be a ground for quashing the decision.[59] This accords with the principle that there is no such thing as a technical breach of the rules of natural justice; the breach must produce actual unfairness.[60]

A distinction was later attempted between a total absence of substantive prejudice, and the presence of a risk of prejudice, in an apparent attempt to conciliate the two positions. However, though the court found that there was a risk of substantial prejudice, it only reached that conclusion after examining the material that had been withheld from disclosure.[61] Subsequent cases have also seen the court assess whether and to what extent there has been substantial prejudice resulting from non-disclosure.[62]

Full disclosure is not an automatic right, and there can be legitimate competing interests including maintaining confidentiality in an investigatory process and the public interest.[63] The court must also ensure that the level of disclosure required to meet the requisite standard of fairness would not impede or frustrate the purpose of enabling legislation.[64]

Duty to Give Adequate Reasons

The giving of reasons can increase transparency in public decision-making and improve the accountability of decision makers in both legal and political

[57] *Kanda* v *Malaya* [1962] AC 322 (PC) (Malaya), p.337.
[58] *Chan Tak Shing* v *Chief Executive of the HKSAR* [1999] 2 HKLRD 389.
[59] *Leung Fuk Wah* v *Commissioner of Police* [2002] 3 HKLRD 653, paras.75–76.
[60] *George* v *Secretary of State for the Environment* (1979) 38 P & CR 609, p.617, per Lord Denning MR; *The Queen* v *Director of Immigration, ex parte Do Giau* [1992] 1 HKLR 287, p.314; *Yim Shik Shi* v *Secretary for the Civil Service* [2004] HKEC 640; *Cheung Koon Kit* v *Commissioner of Correctional Services* [2004] HKEC 948, para.12, per Hartmann J; *Rowse* v *Secretary for Civil Service* [2008] 5 HKLRD 217, paras.135–141.
[61] *Chu Ping Tak* v *Commissioner of Police* [2002] 3 HKLRD 679.
[62] *Lam Ping Cheung* v *Law Society of Hong Kong* [2006] HKEC 2366; *Siu Chi Wan* v *Secretary for Civil Service* [2008] HKEC 1134, paras.37–39; *Ng Man Yin* v *Registration of Persons Tribunal* [2014] 1 HKLRD 1188, paras.61–67.
[63] *Asia Television Ltd* v *Communications Authority (No 2)* [2013] 3 HKLRD 618. [64] *Id.*