Po Fun Chan A

and

Winnie Cheung

B

Li CJ, Bokhary, Chan and Ribeiro PJJ and Litton NPJ
Final Appeal No 10 of 2007 (Civil)
22, 30 November 2007

Administrative law — judicial review — application for leave — appropriate test — potential arguability test discarded — arguability test adopted: must be reasonably arguable claim which enjoyed realistic prospects of success C

X sought leave to apply for judicial review pursuant to O.53 r.3 of the Rules of the High Court (Cap.4, Sub.Leg.) to restore his name D to the register of the Institute of Certified Public Accountants (the Institute), following a brief suspension from practice expiring on 17 December 2005. On 6 February 2006, a judge refused leave and on 6 March 2006 refused to extend the time to appeal against that decision, making orders for costs against X (the costs orders). E Subsequently, on 26 April 2006, X's name was restored on the register, rendering academic all issues except for the costs orders. On 30 June 2006, a Justice of Appeal granted X's application for leave to appeal against the Judge's refusal of leave out of time. X had also applied to amend the Form 86A notice of application for leave by, *inter alia*, adding F a new allegation of delay by the Institute and for orders of *certiorari* to quash what were said to be five of the Institute's "decisions", one of which was made after the Judge's decision. The Court of Appeal acceded to the application to amend Form 86A and then allowed X's appeal, granting him leave to apply for judicial review, based on the G Institute's delayed restoration of his name to the register. At issue before the Court of Final Appeal was whether the appropriate test for leave applications for judicial review was "potential arguability", which merely required the applicant to show that on *further* consideration at a *subsequent* hearing an arguable case *might* be demonstrated; or the H higher threshold of "arguability".

Held, allowing the appeal, discharging the orders of the CA and restoring the Judge's orders including the costs orders, that:
(*Per* Li CJ, the other Judges agreeing) I

(1) The "potential arguability" test would be discarded. "Arguability" was the appropriate test and applied to issues of both law and fact. This test represented a higher threshold: only a reasonably arguable claim which enjoyed realistic prospects of success should be given leave to proceed. The requirement for leave to apply J for judicial review was an important filter to prevent public authorities from being unduly vexed with unarguable challenges

A and uncertainty as to the validity of their decisions (*R v Legal Aid Board, ex p Hughes* (1992) 24 HLR 698, *Lee Sap Pat v Commissioner of Inland Revenue* [1991] 2 HKC 251, *Sharma v Brown-Antoine & Others* [2007] 1 WLR 780 applied; *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] B AC 617, *Yu Pik Ying v Director of Immigration* [2002] 1 HKC 18, *Wong Chung Ki v Chief Executive of HKSAR* [2003] 1 HKC 404, *Shem Yin Fun v Director of Legal Aid* [2003] 1 HKC 568, *Leung v Secretary for Justice* (unrep., HCAL 160/2004, [2005] HKEC 998), *Smart Gain Investment Ltd v Town Planning Board* (unrep., C CACV 106/2006, [2006] HKEC 2063) considered; *Ho Ming Sai & Others v Director of Immigration* [1994] 1 HKLR 21 overruled). (See paras.7, 14–17.)

(*Per* Litton NPJ, the other Judges agreeing)

(2) In extending time to appeal against the Judge's decision, the CA D effectively allowed X to initiate a new case, bypassing the first instance leave stage of proceedings. In acting as it did, the CA was not in fact exercising its appellate jurisdiction under s.13(2) of the High Court Ordinance (Cap.4), dealing with an *appeal from an order of the Court of First Instance*. It was in effect exercising an E original jurisdiction on material put before it after the Judge had given her decision. Further, the exercise of power under O.53 r.3(1) was discretionary. Where an application was made many months after the time limit under O.53 r.4, which required applications to be made promptly and in any event within three F months; or where the orders sought would have no practical benefit, the judge was entitled to refuse leave, however strong the complaint might otherwise be. This alone was sufficient ground to allow the appeal. (See paras.37, 49, 52–53.)

(3) Moreover, X's application to quash the Institute's decisions by G *certiorari* would bring him no practical benefit at all and would be a wholly academic exercise. (See para.56.)

(4) And it was doubtful that a determination of the "substantive complaint" in X's favour would necessarily result in a reversal of the costs orders, seeing that it proceeded on a new case never H presented to the Judge. (See para.57.)

(*Per* Bokhary PJ, Chan PJ agreeing)

(5) "Arguability" had proved its worth as an effective but not unduly restrictive element in the filter constituted by a leave requirement. The filtering out of unarguable judicial review cases was naturally I conducive to according expedition to those arguable judicial review cases in particular need of being dealt with expeditiously. (See para.19.)

(6) Rarely and exceptionally, the public interest in having a particular point of law decided was so great as to warrant leave to pursue an J application or appeal even though the case had become academic as between the immediate parties. This was not such a case. And any issue as to costs should be dealt with on such an appreciation

as could be formed on a broad view of the matter. This represented practical justice. (See para.18.)

[*Editor's note*: see *Hong Kong Civil Procedure 2008*, Vol.1, pp.834–835 paras.53/3–53/4.]

行政法——司法覆核——申請許可——適當的驗證標準——棄用"潛在可爭辯性"驗證標準——採用"可爭辯性"驗證標準：有關申索須為可合理地辯證成立，且須具有真實的成功機會

X是一名會計師。他曾被暫時吊銷執業資格，直至2005年12月17日。隨後，他入稟法院，根據《高等法院規則》(第4章，附屬法例) 第53號命令第3條規則申請許可提出司法覆核，尋求將其姓名重新列入香港會計師公會 (下稱"公會") 的註冊名冊。2006年2月6日，一名原訟法庭法官拒絕批准上述申請；2006年3月6日，該法官拒絕延展X對上述裁決提出上訴的時限，並下令X支付訟費 (下稱"涉案訟費令")。其後，X的姓名於2006年4月26日獲重新列入公會的註冊名冊，與訟雙方的所有爭議點也隨之而變成純理論問題，但涉案訟費令則例外。2006年6月30日，一名上訴法庭法官批准X的下列申請：(a) 准許逾時對於原審法官拒絕給予逾期許可的裁決提出上訴；及(b)對表格86A (即申請許可通知書) 作出修訂，修訂包括加入一項指公會曾出現延誤的新指控，以及申請移審令，以撤銷公會被指曾經作出的五項"決定"，其中一項是於原審法官頒發裁決之後作出。上訴法庭繼而裁定X上訴得直，准許他對於公會延遲將他的姓名重新列入註冊名冊一事提出司法覆核。終審法院現要審理的問題是：就申請許可提出司法覆核而言，適當的驗證標準應當是"潛在可爭辯性" (即只要求申請人證明，在*隨後*聆訊中經過*進一步*考慮後，*或*能展示申請人的案情可辯證成立) 抑或是要求較高的"可爭辯性"。

裁決——上訴得直，撤銷上訴法庭的命令，回復原審法官的裁決 (包括涉案訟費令)：

(判詞由首席法官李國能作出，其內容得到其餘四位法官贊同)

(1) 法庭不能再運用"潛在可爭辯性"驗證標準。"可爭辯性"是適當的驗證標準，亦同樣適用於法律問題及事實問題。這個驗證標準的要求較高：只有可合理地辯證成立、且具有真實成功機會的申索，才應獲許可進行。司法覆核機制下的申請許可規定，乃是重要的把關，有助保護公共機構免受無法辯證成立的申索過份纏擾，以及使公共機構毋須終日受到其所作決定是否有效的問題困擾 (引用 *R v Legal Aid Board, ex p Hughes* (1992) 24 HLR 698，*Lee Sap Pat v Commissioner of Inland Revenue* [1991] 2 HKC 251，*Sharma v Brown-Antoine & Others* [2007] 1 WLR 780；*Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617，*Yu Pik Ying v Director of Immigration* [2002] 1 HKC 18，*Wong Chung Ki v Chief Executive of HKSAR* [2003] 1 HKC 404，*Shem Yin Fun v Director of Legal Aid* [2003] 1 HKC 568，*Leung v Secretary for Justice* (unrep., HCAL 160/2004，[2005] HKEC 998)，*Smart Gain Investment Ltd v Town Planning Board* (unrep., CACV 106/2006，[2006] HKEC 2063予以考慮；推翻 *Ho Ming Sai & Others v Director of Immigration* [1994] 1 HKLR 21)。(見第7、14至17段)

(判詞由非常任法官烈顯倫作出，其內容得到其餘四位法官贊同)

(2) 上訴法庭延展X對於原審法官的裁決提出上訴的時限，變相容許他提起新訟案，繞過原訟法庭的申請許可程序。事實上，上訴法庭在作出上述做法時，並非在行使《高等法院條例》(第4章) 第13(2)條下關乎審理*來自原訟法庭的命令的上訴*的上訴級司法管轄權，而是於原審法官已作出裁決之後，根據呈堂資料，行使原訟級司法管轄權。此外，原訟法庭法官在第53號命令第3(1)條規則下的權力及其行使，均屬酌情性質。假如一項許可申請於第53號命令第4條規則所訂明的時限屆滿多個月後才提出 (該規則規定申請須從速提出，並無論如何均須於三個月內提出)，或假如所尋求的命令沒有實際作用，則即使申請的理據如何充分，法官仍有權拒絕給予許可。單是這點，已足以支持裁定本案上訴得直。(見第37、49、52至53段)

(3) 再者，X申請移審令以撤銷公會的決定，純屬理論性的申請，對X來說毫無實際益處。(見第56段)

(4) 此外，X所指的"實質投訴"從未呈示原審法官，因此，即使法庭裁定該等"實質投訴"成立，這也不一定代表涉案訟費令會被推翻。(見第57段)

(判詞由常任法官包致金作出，其內容得到常任法官陳兆愷贊同)

(5) 在建基於"許可"規定的篩選機制下，"可爭辯性"已獲證明為有效而不過於嚴格的元素。將欠缺爭辯性的司法覆核申請篩走，自然有助令那些可辯證成立、且特別需要從速處理的司法覆核申請盡快得到處理。(見第19段)

(6) 假如案件對於與訟各方已變得純屬理論性，則除非涉案法律問題涉及重大公眾利益和需要由法庭裁決，否則法庭不會給予許可進行申請或上訴。這種情況相當罕見和特殊。至於訟費上的爭議點，法庭應綜觀案情，然後作出定奪。這代表着切實的公義。(見第18段)

Mr Jonathan Harris SC, instructed by Richards Butler, for the appellants.

Mr Gerard McCoy SC, Mr Alexander Stock and Ms Annie Leung, instructed by King & Co, for the respondent.

Legislation mentioned in the judgment

High Court Ordinance (Cap.4) ss.13(2), 21K, 21K(3)

Professional Accountants Ordinance (Cap.50) ss.22(1), 35(1)(a), 39

Rules of the High Court (Cap.4, Sub.Leg.) O.53, O.53 rr.3, 3(1), 3(2), 4, 7

Rules of the Supreme Court [England] O.53

Cases cited in the judgment

Ho Ming Sai & Others v Director of Immigration [1994] 1 HKLR 21, (1993) 3 HKPLR 157

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, [1981] 2 WLR 722, [1981] 2 All ER 93

Lee Sap Pat v Commissioner of Inland Revenue [1991] 2 HKC 251

Leung v Secretary for Justice (unrep., HCAL 160/2004, [2005] HKEC 998)

R v Legal Aid Board, ex p Hughes (1992) 24 HLR 698

Sharma v Brown-Antoine & Others [2006] UKPC 57, [2007] 1 WLR 780
Shem Yin Fun v Director of Legal Aid [2003] 1 HKC 568
Smart Gain Investment Ltd v Town Planning Board (unrep., CACV 106/2006, [2006] HKEC 2063)
Wong Chung Ki v Chief Executive of HKSAR [2003] 1 HKC 404
Yu Pik Ying v Director of Immigration [2002] 1 HKC 18

Cases in List of Authorities not cited in the judgment

Ainsbury v Millingon [1987] 1 WLR 379, [1987] 1 All ER 929
Campagnono v Italy (unrep., 23 March 2006)
Capital Rich Development Ltd v Town Planning Board [2007] 2 HKLRD 155
Chan Hiang Leng Colin v Minister of Information [1997] 1 LRC 107
Ching Poh v Cheng Yueng & Co [1998] 3 HKC 643
Chit Fai Motors Co Ltd v Commissioner for Transport [2004] 1 HKC 465
Crossing Electronic (Chemicals) Ltd v A-G [1994] 2 HKC 601
Lykourezos v Greece [2006] 21 BHRC 593
Matalulu v DPP [2003] 4 LRC 712
Medical Council of Hong Kong v Chow Siu Shek (2000) 3 HKCFAR 144, [2000] 2 HKLRD 674, [2000] 2 HKC 428
O'Reilly v Mackman [1983] 2 AC 237, [1982] 3 WLR 1096, [1982] 3 All ER 1124
R v Broadcasting Complaints Commission, ex p Owen [1985] 1 QB 1153, [1985] 2 WLR 1025, [1985] 2 All ER 522
R v Commissioner for the Special Purposes of the Income Tax Acts, ex p Stipplechoice Ltd (No 1) [1985] 2 All ER 465, [1985] STC 248
R v Criminal Injuries Board, ex p A [1999] 2 AC 330, [1999] 2 WLR 974
R v Dairy Tribunal, ex p Caswell [1990] 2 AC 738, [1990] 2 WLR 1320, [1990] 2 All ER 434
R v Greenwich LBC, ex p Lovelace [1991] 1 WLR 506, [1991] 3 All ER 511
R v Holderness BC, ex p James Robert Developments Ltd (1993) 66 P & CR 46, [1993] 1 PLR 108
R v Independent Television Commission, ex p Church of Scientology [1996] COD 443
R v Inland Revenue Commissioners, ex p Opman International UK [1986] 1 WLR 568, [1986] 1 All ER 328, [1986] STC 18
R v Liverpool City Council, ex p Newman [1993] COD 65
R v Secretary of State for Social Services, ex p Wellcome Foundation Ltd [1987] 1 WLR 1166, [1987] 2 All ER 1025
R v Secretary of State for the Home Department, ex p Begum [1990] COD 107
R v Secretary of State for the Home Department, ex p Khalid Al-Nafeesi [1990] COD 106

A **R v Secretary of State for the Home Department, ex p Richard (unrep., CO/3629/95, 24 October 1995)**
R v Secretary of State for the Home Department, ex p Salem [1999] 1 AC 450, [1999] 2 WLR 483, [1999] 2 All ER 42
R v Secretary of State for the Home Department, ex p Swati [1986]
B **1 WLR 477, [1986] 1 All ER 717**
R v Warley Justices, ex p Callis [1994] COD 240
Sidabras v Lithuania [2004] ECHR 5548/00
So Wing Keung v Sing Tao Ltd [2005] 1 HKLRD 11
Tshikangu v Newham LBC [2001] EWHC Admin 92
C **Westminster City Council v Crovalgrange Ltd [1986] 1 WLR 674, [1986] 2 All ER 353, (1986) 83 Cr App R 155**

Li CJ

1. In this case, the Judge at first instance (Chu J) refused to grant
D **leave to the respondent to apply for judicial review. The Court of Appeal held that leave should be granted. I agree with the judgment of Mr Justice Litton NPJ allowing the appeal. For the reasons he gives, the orders set out in the concluding paragraph of his judgment should be made, including restoring the Judge's order refusing leave.**

E

The potential arguability test

2. In dealing with the application for leave, the Judge applied the following test:

F

> Whether the materials before the court have disclosed matters which on further consideration might demonstrate an arguable case for the grant of the relief sought.

G **(See para.38 of Chu J's judgment). This test is known as "the potential arguability test". It was laid down by the Court of Appeal in *Ho Ming Sai & Others v Director of Immigration* [1994] 1 HKLR 21 (*Ho Ming Sai*) (Kempster JA, Litton JA and Godfrey J).**

3. In *Ho Ming Sai*, the judge (Nazareth JA sitting at first instance)
H **had dealt with the leave application by asking whether the applicants had shown that they had an arguable case. The Court of Appeal rejected the judge's approach and adopted the potential arguability test, recognizing it to set a lower threshold. (See pp.23–24, 28 and 31).**

I **4. The adoption of that test by the Court of Appeal was based on what Lord Diplock had said in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (*Federation of Self-Employed*) at pp.643H–644B.**

J

> … The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the

> court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.

That case was the first occasion when the House of Lords considered O.53, which had come into effect in January 1978 (See p.636B). This provision reformed and simplified the procedure for judicial review so that the technicalities formerly associated with the prerogative writs would no longer arise. The question of the appropriate test did not arise in the case and had not been addressed in argument.

5. Order 53 was introduced into the Hong Kong rules of court some two years after England by rules made in December 1979. See LN 312 of 1979. When *Ho Ming Sai* was decided in February 1993, the English courts had in fact moved away from the potential arguability test and had settled on a higher threshold, that is, the test of arguability. See *R v Legal Aid Board, ex p Hughes* (1992) 24 HLR 698 (*Hughes*) (July 1992). But *Hughes* was not considered in *Ho Ming Sai*. Nor was the earlier decision of Court of Appeal decision in *Lee Sap Pat v Commissioner of Inland Revenue* [1991] 2 HKC 251 (Yang CJ, Fuad V-P and Clough JA) referred to. In that case, the threshold of arguability (as opposed to potential arguability) was used (at p.257F), but without argument, as the question of the proper test was not in issue. It is likely that these two authorities were not brought to the attention of the Court of Appeal in *Ho Ming Sai*[1].

The arguability test

6. In *Hughes*, Lord Donaldson in the English Court of Appeal formulated the arguability test in the following passage which is often cited (at pp.702–703). He said that Lord Diplock "may well have been right in 1981" to state the potential arguability test in *Federation of Self-Employed*.

> However, things have moved on since then. This was an *ex parte* application. In such a case leave is or should now only be granted if

[1] The report of the decision in *Ho Ming Sai* did not contain a list of the authorities cited in argument but not in the judgment.

> *prima facie* there is already an arguable case for granting the relief claimed. This is not necessarily to be determined on "a quick perusal of the material" although clearly any in-depth examination is inappropriate. Furthermore, a "*prima facie* arguable" case is not established merely by the disclosure of "what *might on further consideration* turn out to be an arguable case." … It is only when there is clearly an arguable case that leave should be granted *ex parte*. Equally, it is only when *prima facie* there is clearly no arguable case that leave should be refused *ex parte*.[2]

He then referred to a small category of cases where the judge hearing the leave application might need to know more about it. In these instances, he said that the judge should adjourn the leave application for an *inter partes* hearing and observed:

> This is quite different from a substantive hearing in that the respondent need only summarise its answer sufficiently to enable the judge to decide whether there is or is not an *arguable* case.[3]

7. In *Sharma v Brown-Antoine & Others* [2007] 1 WLR 780 (the Privy Council), Lord Bingham and Lord Walker in their joint judgment stated that the ordinary rule to apply is the arguability test (at p.787E).

> The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy.It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen." (at p.787H.)

Potential arguability is not sufficient.

8. In applying the test of arguability, Lord Bingham and Lord Walker observed (at p.787E–G):

> But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468, para.62, in a passage applicable, *mutatis mutandis*, to arguability:

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[2] Note that the emphasis in the passages quoted from *Hughes* is Lord Donaldson's emphasis.
[3] Ibid.

> … the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.

The view there expressed was not that the arguability test itself is flexible but that whether that test is satisfied in a particular case would depend on the nature and gravity of the issue raised.

9. The issue that arose in *Sharma* was whether the Chief Justice of Trinidad and Tobago should be granted leave to apply for judicial review to challenge a decision to prosecute him for attempting to pervert the course of justice on the ground that the decision was influenced by political pressure. The Privy Council's decision that leave should not have been granted did not turn on arguability. It held that the Chief Justice's complaint would best be investigated and resolved in a single set of criminal proceedings, including a possible stay application for abuse of process.

The appropriate test to be addressed

10. Since the Court of Appeal's decision in *Ho Ming Sai*, judges at first instance have been bound to apply the potential arguability test. However, in *Leung v Secretary for Justice* (unrep., HCAL 160/2004, [2005] HKEC 998), Hartmann J, who has wide experience in this area of the law, whilst accepting that judges at first instance were bound by the test, expressed sympathy with the view that the test was too weak (at para.16). The Court of Appeal has continued to apply the test. But it has indicated from time to time that the question whether this test remains the appropriate one may need to be reconsidered. See *Wong Chung Ki v Chief Executive of HKSAR* [2003] 1 HKC 404 (*Wong Chung Ki*) at para.22 (*per* Keith JA) and para.38 (*per* Godfrey V-P), *Yu Pik Ying v Director of Immigration* [2002] 1 HKC 18 at p.29 (*per* Keith JA). See also *Smart Gain Investment Ltd v Town Planning Board* (unrep., CACV 106/2006, [2006] HKEC 2063) at para.3 (*per* Ma CJHC).

11. Having had the benefit of submissions, the Court should take this opportunity of addressing the question of the appropriate test to be applied when considering applications for leave to apply for judicial review. In recent times, the number of judicial review challenges has grown. This phenomenon is consistent with what has happened in many common law jurisdictions. It is important that authoritative guidance is given regarding the applicable test in leave applications.

A ***The two tests compared***

12. On the arguability test, the court in granting leave must be satisfied that an arguable case for relief has been shown. In contrast, on the potential arguability test, the applicant need not demonstrate an arguable case. It is sufficient for him merely to satisfy the court B that on *further* consideration at a *subsequent* hearing an arguable case *might* be demonstrated. In practice, the application of the potential arguability test may give rise to difficulties. What further materials and arguments may be available subsequently may not be apparent at the leave application. Moreover, on further consideration after C leave is given, the court would no longer be concerned with whether an arguable case has been shown but with the substantive question whether the reliefs claimed should be granted.

13. The arguability test undoubtedly imposes a higher threshold compared to the potential arguability test. Under the former test, leave D would be refused in cases which cannot be shown to be arguable. But under the latter test, only the plainly hopeless cases would be screened out. See *Wong Chung Ki* at para.21.

E ***The appropriate test***

14. The requirement for leave to apply for judicial review is an important filter introduced by statute. Section 21K(3) of the High Court Ordinance (Cap.4) and O.53 r.3(1) of the Rules of the High Court F (Cap.4, Sub.Leg.). Its purpose is to prevent public authorities from being unduly vexed with unarguable challenges. Whilst in a society governed by the rule of law, it is of fundamental importance for citizens to have access to the courts to challenge decisions made by public authorities on judicial review, the public interest in good public G administration requires that public authorities should not have to face uncertainty as to the validity of their decisions as a result of unarguable claims. Nor should third parties affected by their decisions face such uncertainty.

15. The purpose of the leave requirement would be better served H by the adoption of the arguability test instead of the potential arguability test. The granting of leave to apply for judicial review is a matter for the court's discretion to be exercised judicially. The test which should be applied is the arguability test. Under this test, arguability must mean reasonable arguability. A claim for relief which is not reasonably I arguable could not be regarded as arguable. A reasonably arguable case is one which enjoys realistic prospects of success. Whilst the test adopted represents a higher threshold than the potential arguability test, claims which are reasonably arguable would be given leave to go forward under it. It is in the public interest that challenges which are J not reasonably arguable should not be given leave to proceed.

16. In *Wong Chung Ki*, Keith JA (at para.22) raised the possibility of a flexible test so that the test is one of arguability where the issue

is one of statutory construction but is one of potential arguability where the issue is say, one of procedural fairness involving the investigation of facts[4]. Such an approach should be rejected. The same test should be applicable whether the issue is one of law or fact. Further, intractable difficulties may arise in distinguishing issues of law from issues of fact and in dealing with grounds which involve both issues of law and fact or which raise questions of mixed law and fact.

17. With the discarding of the potential arguability test and the adoption of the arguability test, more time may need to be spent by the judge in dealing with leave applications than previously. "A quick perusal" of the material may not be sufficient in reaching a decision whether the arguability test is satisfied. In appropriate cases, the judge may require an oral hearing, with notice to the respondent in suitable cases.

Bokhary PJ

18. Rarely and exceptionally, the public interest in having a particular point of law decided can be so great as to warrant leave to pursue an application or appeal even though the case has become academic as between the immediate parties save perhaps as to costs. Normally, however, such a case should proceed no further. And any issue as to costs should be dealt with on such an appreciation as can be formed on a broad view of the matter. This broad approach avoids further costs. It represents practical justice. And it is the approach called for in the present case. I agree with the result proposed by Mr Justice Litton NPJ and his reasons for proposing the same. It is, as he has so clearly explained, the best justice that can be done in the situation with which this Court has been presented.

19. There is a broad spectrum of proceedings, original and appellate, that require leave to pursue. Arguability has long operated across that spectrum as the threshold for the grant of leave. It has proved its worth as an effective but not unduly restrictive element in the filter constituted by a leave requirement. And it is to be applied as the threshold for the grant of leave to apply for judicial review. I agree with what the Chief Justice says in this connection. The filtering out of unarguable judicial review cases is naturally conducive to according expedition to those arguable judicial review cases in particular need of being dealt with expeditiously.

Chan PJ

20. I agree with the judgment of the Chief Justice on the test to be applied in the application for leave in judicial review cases. There is

[4] On the basis of Keith JA's suggestion, the arguability test was applied by Chu J in dealing with a challenge which turned on statutory construction in *Shem Yin Fun v Director of Legal Aid* [2003] 1 HKC 568 at para.18.

A obviously a need to filter out unarguable cases and it is important to set such a test.

21. I also agree with the judgment of Mr Justice Litton NPJ and the result proposed by him. I share the observations made by Mr Justice Bokhary PJ on academic cases and the broad approach
B required to do practical justice.

Ribeiro PJ

22. I entirely agree with the judgments of the Chief Justice and of Mr Justice Litton NPJ.
C

Litton NPJ

Introduction

D 23. In an ideal world, timely redress by the court would follow an established grievance, at a cost proportionate to the issues. It has not been attained in this case. Far from it. Nearly two years have elapsed since the matters complained of by the respondent to this appeal first arose; and yet we are still at the stage of whether leave to issue
E proceedings should be given. The question for us now, having regard to the long history of the matter, is therefore simply this: What order should we make so that the matter can be disposed of in as just, expeditious and economical a manner as is now possible?

24. The stultifying factor is this: No live issue remains between
F the parties except possibly the question of costs involved in the lower courts: Not all the costs, but at the most two sets of costs of proceedings in chambers, as explained below.

G ***Brief history***

25. The respondent (Dr Chan) is a certified public accountant: That is to say, his name is on the register kept by the Registrar of the Hong Kong Institute of Certified Public Accountants under s.22(1) of the Professional Accountants Ordinance (Cap.50). He has practised as such
H for many years. In 1973 he was admitted as a Fellow of the Institute (then known as the Hong Kong Society of Accountants).

26. In September 2003, an order was made by the Disciplinary Committee of the Institute under s.35(1)(a) whereby Dr Chan's name was removed from the register for a period of six months. Because
I of successive appeals lodged against the order by Dr Chan, the removal order only came into effect on 17 June 2005. The period of six months expired on 17 December 2005.

27. There was correspondence in the year 2005 between Dr Chan and the Institute (much of it irrelevant to this appeal). On 8 July 2005
J Dr Chan wrote:

> I understand that I have to apply for re-admission. May I invite you to send me a full set of forms for such use so that I may seek your advice if I have difficulty.

28. The Institute responded on 22 July 2005 inviting Dr Chan to download the application form under "Members-Registration Matters" available on the Institute's website.

29. On 5 August 2005 Dr Chan submitted his application, under cover of a letter dated 2 August 2005 which said:

> … may I submit my application for membership hopefully to be, if approved, effective on 16 December 2005, the 6-month anniversary. Please give guidance so that such application may be considered smoothly in the Institute.

30. Under the procedures adopted by the Institute, Dr Chan's application was treated as a fresh application for registration. He was required to satisfy an "aptitude test", despite the fact that he had been a practising accountant since 1947. Amongst documents he had to submit were: (i) a certified copy of his identity card or passport; (ii) a certified copy of "each of educational certificate and relevant examination record/transcript for the highest academic qualification" he had attained; and (iii) two character references.

31. Apart from an annual fee for a practising certificate, he was also required to pay a first registration fee. He duly complied with those requirements.

32. By a letter dated 8 August 2005, Dr Chan reiterated his intention to apply for membership "to resume to be effective on 17 December 2005 (6 months from date of your order of removal)".

33. The Institute replied by letter dated 21 September which stated that the Registration and Practising Committee (the Committee) had considered his request to restore his name to the register with effect from 17 December 2005 but had resolved not to consider his application until the six-month removal period had expired. His completed form was returned together with his supporting documents. The fees paid were refunded. He was told that no duplicate of his material was kept by the Institute. He was invited to download the latest version of the application form for new members, and told to re-submit his application after 17 December.

34. On 10 December 2005 Dr Chan wrote, asking that the Committee should meet on 18 December to consider his application. He wrote again on 12 December asking that if no special meeting of the Committee was to be held, his application should be submitted directly to the Council.

35. The Institute replied by letter dated 16 December as follows:

> There are established procedures for consideration of applications of this nature and it is important that all applications are considered in the same manner. Accordingly, your application will first be considered by the Registration and Practising Committee which will make a recommendation for consideration by the Council.
>
> The next scheduled meeting of the Committee after you become eligible to apply is in February 2006, for which the deadline for submissions is 31 December 2005 …

36. The "established procedures" referred to in this letter are those for new applications for membership. There were, apparently, no "established procedures" as such for dealing with applications by members of long-standing whose names had been removed for a short period, following disciplinary proceedings.

The broad picture

37. Pausing here and looking broadly at how matters stood at the end of December 2005: The legislature had, by enacting the Professional Accountants Ordinance and in particular s.39, given the Council of the Institute certain legal powers (not derived from contract only) to affect the right of professional accountants to continue practising their profession. Hence remedies are available in public law for abuse of such powers or unfairness in the exercise of such powers. Judicial review is the means by which judges of the Court of First Instance exercise a general supervisory jurisdiction over bodies performing public functions, to ensure proper and fair treatment. The exercise of this jurisdiction is governed by s.21K of the High Court Ordinance (Cap.4) and O.53 of the Rules of the High Court (Cap.4, Sub.Leg.). Section 21K(3) and O.53 r.3(1) prohibit applications for judicial review without leave, and applications for leave must be in the form set out in r.3(2). I agree with the judgment of the Chief Justice. The arguability test should be adopted in considering leave applications. The intention behind the rule is that public authorities and the like should not be vexed with unarguable claims. The requirement of leave under r.3 is no mere formality.

The legal proceedings

38. On 20 December 2005 Dr Chan lodged in person an application for leave to apply for judicial review. This was eventually heard by Chu J on 27 January 2006, after notice of the *ex parte* application had been given to the proposed respondents and counsel had been instructed to appear for them. The grounds in support of the application were discursive and extravagant. The proposed respondents were: (1) Winnie CW Cheung, "Chief Executive and Registrar" of the Institute; and

(2) Mark Fong, Chairman of the Registration and Practising Committee of the Institute. The Institute as such was not named.

39. None of the material as summarized in paras.27 to 36 above were set out in support of the application. These came much later, as will be explained below.

40. Dr Chan sought an order of *mandamus* to require the Registrar to "re-instate" his membership and to issue to him a practising certificate. The application also said:

> … the Applicant at this date of this Application has fully discharged the sentence imposed on him by the Disciplinary Order by paying in full the penalty, the costs awarded to the Society and has been deprived of membership and practicing rights for the six months from 17th to 18th June to this date …

41. Giving every allowance for the fact that Dr Chan was acting in person, it is still necessary to look closely at the nature of his complaint. In his notice of application for leave (Form 86A), the first two "decisions" he sought to impeach related to the earlier disciplinary proceedings which had finally been disposed of by the judgment of this Court. It was hopeless to try to re-open the matter. The third and last "decision" was one where the Institute refused "earlier consideration of the Application for re-registration of the Applicant": This, as the judge (Chu J) who heard the application understood the point as urged by Dr Chan, was on the basis that s.39 of the Professional Accountants Ordinance[5] provided for "automatic" re-instatement.

42. This was rightly rejected by the judge who, by her decision of 6 February 2006, dismissed the application with costs.

43. In support of his application Dr Chan had lodged an affirmation of 28 pages dated 20 December 2005 which can only be described as extravagant and bizarre (In it, for example, is a schedule headed "To Catch A Thief" which contains a photocopy of an advertisement of an old film entitled "To Catch A Thief", starring Cary Grant and Grace Kelly). If one read the affirmation with the most benevolent inclination to favour Dr Chan, it is possible to tease out of it this complaint: That

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[5] Section 39 of the Professional Accountants Ordinance provides:

(1) A person whose name has been removed from the register under the provisions of this Ordinance may apply to the Council for the restoration of his name to the register.

(2) The Council may, after making such inquiry as it may consider necessary, reject an application under sub-s.(1) or allow it, subject to such conditions if any as it may think fit to impose.

(3) The Council shall, if it allows an application under sub-s.(1), order the Registrar to restore the name of the applicant to the register and thereupon the Registrar shall restore the name accordingly.

there was allegedly procedural impropriety on the part of the Institute in dealing with his application, for treating Dr Chan as if he was a new recruit to the profession seeking admission as a member for the first time: Not as a member of long-standing, whose registration had, in effect, been suspended for a short period. But the point was so encrusted with polemics that no judge can be faulted for not grasping it as a valid point. In para.28 of his affirmation Dr Chan said:

> The applicant has no intention whatsoever to make a mountain out of a molehill — he merely wishes to seek sympathy from this honourable court to resume his 58 years of unblemished career smoothly through the order of *mandamus*.

44. When the judge heard the application on 27 January 2006, more than one month had elapsed since the "suspension" period had expired. But any notion of Dr Chan then complaining of delay as such would have been absurd. Two days before (on 25 January) he had lodged a notice of discontinuance. He was hoping then that his application would be dealt with by the Institute on 13 February, and had tried to persuade the respondents' solicitors to agree to an adjournment of his application. The matter only went ahead before the judge on 27 January because the solicitors for the respondents had by then fully prepared for the hearing, and had instructed counsel. They did not consent to an adjournment and said that Dr Chan should not be allowed to discontinue without leave and without dealing with the question of costs.

45. On the material then before the judge she cannot be faulted for dismissing the application for leave, with costs being awarded to the two persons named in Form 86A as respondents.

46. On 6 March 2006, pursuant to Dr Chan's application, Chu J refused to grant leave for extending the time to appeal against her decision of 6 February, and made a further order for costs against Dr Chan.

Restoration on the register

47. On 26 April 2006 Dr Chan's name was restored on the register. This rendered all issues as between Dr Chan and the Institute academic except for the two sets of costs awarded against him as mentioned in paras.42 and 46 above.

Court of Appeal

48. On 30 June 2006 Cheung JA gave Dr Chan leave to appeal against Chu J's decision of 6 February 2006 out of time. In his reasons for extending time the learned Justice of Appeal said:

> Although the applicant has by now been allowed to be re-registered, he clearly has shown sufficient interest to institute proceedings against the Institute arising from the delay in considering his application. These are not academic questions but real matters that affect the professional practice of the applicant. Without finally deciding on this issue, it does appear that he has satisfied the threshold that he has a potentially arguable case in his application for leave to apply for judicial review.

49. We do not have before us Dr Chan's application to the Court of Appeal to extend time for appeal, nor the material in support of such application. Hence the basis for Cheung JA's reasoning is obscure. Two points need to be made: (1) There was alongside the application for extension of time another application, namely to amend Form 86A, supported by a later affirmation dated 19 September 2006 which exhibited additional material amounting to over 160 pages. The focus of Dr Chan's case had radically shifted; Winnie CW Cheung and Mark Fong were deleted as proposed respondents and the Institute was named instead. None of this material was before Chu J. (2) As mentioned earlier (para.44 above), Dr Chan was not complaining of delay as such when he went before Chu J on 27 January 2006. "Delay" was a new complaint. In extending time for appeal against Chu J's decision, the learned Justice of Appeal was in effect allowing Dr Chan to initiate a new case, bypassing the first instance leave stage of the proceedings.

50. Pursuant to the leave given by Cheung JA, the appeal went before the Court of Appeal (Rogers V-P and Le Pichon JA) on 13 October 2006. In a short *extempore* judgment, Rogers V-P said:

> It suffices for me to say that I consider that leave to bring judicial review should have been granted right at the outset. To put it in very simple terms, this was a complaint that the applicant's application to be restored to the register, which was in the circumstances merely a formality, was delayed for so long that it, in effect, formed an extra penalty. In my view, his application to be restored to the register should have been dealt with very expeditiously and it was not and in those circumstances he is fully justified in bringing judicial review proceedings.

51. Although Rogers V-P's judgment says nothing about the application to amend Form 86A, it is clear from the formal order dated 13 October 2006 that the Court of Appeal, on the same day, in fact dealt with it by acceding to the application. It will be seen from that application that Dr Chan no longer sought leave to institute proceedings for *mandamus*: He asked for orders of *certiorari* to quash five separate "decisions" of the Institute ranging in time between 24 June 2005 and 2 March 2006: The last was after Chu J had handed down the reasons for her decision.

A

Section 13(2) High Court Ordinance (Cap.4)

52. In acting as it did, the Court of Appeal was not in fact exercising its appellate jurisdiction under s.13(2) of the High Court Ordinance, dealing with an *appeal from an order of the Court of First Instance*. It was
B in effect exercising an original jurisdiction on material put before it after the judge had given her decision. It is worth emphasizing that the exercise of power by a judge of first instance under O.53 r.3(1) is discretionary. Where an application is made many months after the time limit mentioned in r.4, or where the orders sought would lead
C to no practical benefit, the judge is entitled to refuse leave, however strong the complaint might otherwise be. These matters, we are told by counsel at the hearing before us, were not entertained by the Court of Appeal because its order of 13 October 2006 allowing Dr Chan's appeal was "practically by consent".

D 53. This alone is sufficient ground to allow the appeal.

Other grounds

54. The Court of Appeal was on 13 October dealing with a summons
E to amend Form 86A dated 19 September 2006, replacing an earlier summons dated 26 June 2006. Assuming 26 June 2006 to be the operative date of application for relief, this was still well over one year after the "1st decision" sought to be impeached. The Court of Appeal disregarded O.53 r.4 which requires applications to be made promptly
F and in any event within three months.

55. The "decisions" sought to be quashed by orders of *certiorari*, as set out in the amended Form 86A, boil down to the following: (1) The Institute, in requiring Dr Chan to apply for registration as if he was a newly qualified accountant, had acted unlawfully and
G oppressively. (2) The Institute was obliged in any event to deal with Dr Chan's application expeditiously: Any delay would in effect be an unauthorized prolongation of the period of six months' "suspension" as ordered by the Disciplinary Committee: The Institute had failed in this regard. (3) The Institute took irrelevant matters into consideration
H in entertaining Dr Chan's application: (a) Whether he had signed an audit report during the period of "suspension"; and (b) whether he should discharge an obligation to pay the Institute's legal costs in previous proceedings before the Council of the Institute would consider restoring his name to the register.

I 56. Dr Chan, in his amended Form 86A, was not claiming damages under O.53 r.7: He did not, as he said, wish to "make a mountain out of a molehill". So the quashing by *certiorari* of the "decisions" in his amended Form 86A would bring him no practical benefit at all. It would be a wholly academic exercise: Involving proceedings not only in the
J Court of First Instance but possibly through the Court of Appeal all the way to this Court.

57. In the printed case lodged on Dr Chan's behalf, para.9(d)(i), there is this assertion:

> By the time [Dr Chan] was restored to the register there were live costs issues which could only be fairly resolved following a determination of [his] substantive complaint, including a wrongful order made by Chu J that [Dr Chan] should bear the [Institute's] costs.

It is doubtful that a determination of the "substantive complaint" in Dr Chan's favour would necessarily result in a reversal of Chu J's cost orders, seeing that the "substantive complaint" proceeds on a new case never presented to Chu J. But assuming that assertion be correct, what "substantive" order would the court make? Certainly not orders of *certiorari* as sought, since such orders would achieve no purpose whatever. Rogers V-P expressed the hope that "... this sorry chapter, which has been now going on for a very long time ... will soon come to an end". With respect, it would seem that the Court of Appeal's decision would have the opposite effect.

The former solicitors' letter

58. In all probability, the Court of Appeal was led into error by a letter from the Institute's former solicitors dated 29 September 2006 which was placed before it at the hearing. There the solicitors referred to the amended Form 86A and said: "If the Form 86A had been presented in this version before Chu J several months ago, we think it highly likely Chu J would have granted leave without the necessity of any hearing ... Additionally ... if we had been asked to advise our clients ... whether leave to apply for judicial review should be granted based upon the grounds now articulated in the draft amended Form 86A, we consider, and have so advised our clients, such leave will be granted. Our clients have accepted this advice." The solicitors therefore proposed "a resolution of matters" on terms in summary as follows: (a) the Institute would not oppose the appeal so that the order of Chu J of 6 February 2006 would be set aside; (b) the Institute would consent to the amendment of Form 86A; and (c) certain costs to be paid by Dr Chan, other costs to be "in the cause of the judicial review proceedings themselves". There has since then been a change of solicitors and the Institute's present solicitors expressly disavow the stance taken by the former solicitors.

Conclusion

59. I would allow the appeal, discharge the orders of the Court of Appeal, restore Chu J's orders of 6 February 2006 and 6 March 2006, including her orders for costs. As to the costs of the appeal to the

A **Court of Appeal and to this Court, a broad brush approach is called for. Normally, a party who succeeds would get its costs; but in the circumstances, I would order that there be no award of costs as to either appeal, leaving each party to bear its own costs thereof.**

B **Li CJ**

60. The Court unanimously allows the appeal and makes the orders including the orders as to costs set out in para.59 above.