

## Week 1

### Judicial review – empowering and key provisions

- **s.21K of High Court Ordinance (Cap.4)**
  - Legal basis for application for JR; the procedure that need to be gone through; The need to attain leave; the requirements
- **O.53 of Rules of the High Court**
  - unique regime that covers all application for JR; as to timing & all other requirements (e.g., cases appropriate for application, grant of leave to apply for JR, hearing of application for JR...); cannot seek to abuse the process; no counterpart in ordinary civil case

### **Targets of JR**

- **Public authority's decision** (on facts and circumstances on individual case); different from **policy** (guidelines adopted by the govt to apply to the future to a broad; can target be **judgment, order, decision** or other **proceeding** in respect of which relief sought
- Permissible to simply target **statutory provision**: to oppose so and bring **constitutional challenges** (BL and BOR as the only basis or guarantee to attack) - *Leung v SJ* [2006] 4 HKLRD 211, §27

### **Procedural exclusivity**

- **General rule: Public law matter** > can be determined by judicial proceedings under **O.53**
  - Requirement for a **Sufficient Public Element** for JR
  - **Built-in protection, procedures and rules unique to JR (O.53)**, applicants cannot seek to abuse the process - *O'Reilly v Mackman*
  - **public law** issues should generally be transacted by way of **judicial review**, and that **private law** issues should generally be transacted by way of **ordinary procedure**
    - eg., right to JR; pay leave/permission to JR vs no need permission in ordinary civil cases
- **Reason for the division: prevent abuse of the JR process**
  - E.g, **Time difference in time**: 6-year limitation of action to sue for ordinary civil proceeding (limitation ordinance) vs unlimited time period for JR
  - E.g., **Different right in bring the claim**: Need to pay leave (permission) in JR vs. in civil does not need permission
  - But purely private matter does not go through JR
- **Exception- Collateral challenge** - *O'Reilly v Mackman* (p1); *Next Digital Limited v Commissioner of Police* (p1)
  - Where the public law issue is simply a **collateral** issue or **insignificant** issue in the overall scheme of the case -> **cannot subject to JR**
  - **Target the main issue only**; even if the small part of the case is regarding public matter (public issue as the small issue > okay to go to ordinary civil proceedings); the main issue needs to be a public law issue
  - **Procedural exclusivity is only a general rule**. There are **exceptions to this rule**: “for though it may normally be appropriate to apply it by the summary process of **striking out the action**, there may be **exceptions**, particularly where **the invalidity of the decision arises as a collateral issue** in a claim for **infringement of a right of the plaintiff arising under private law**, or where **none of the parties objects to the adoption of the procedure by writ or originating summons**”

## Public/private divide

### Fundamental requirements

- **The concept of publicness:** to show that the provision challenged is **in the public law domain**; need to be **amendable to JR** vs. private law mater is not available for JR
- **amenability of JR:** ultimate Q is whether the case show **sufficient public element**, consider factors:
  - **Identity of the decision maker**
  - **The decision maker's power** (where the decision maker gets its power)
    - an indicator: founded/governed & recognition by **ordinances**: more likely to involve **public element** > e.g., ESF (founded by ordinance); bar association (an association of members, all for the purpose of regulating the profession; not founded by ordinances but recognized by statute)
  - **The decision itself** (Q: what is the nature and source of the power being exercise)
    - **source of the power being exercised**; the actual position being challenged
      - **contractual, commercial and employment** decisions taken by public bodies would tend to be **private law and non-statutory**
    - the **nature** of the power: Q of in what capacity the govt is acting (**private capacity**, or **commercial decision**)

### Lease cases:

- Govt as landlord w **commercial** and **economic** interest > exercising capacity as **private landowner** > **private** - *Hang Wah Chong Investment* (p2); *Anderson Asphalt Ltd* (p.4)
- Requirement of **additional public elements**: mere presence of some public element is insufficient (always a built-in town planning element in HK) - *Anderson Asphalt Ltd v SJ*
- **Public consultation is not sufficient** to make the decision reviewable - *Rank Profit Industries Ltd* (P5)

### Exceptions:

- **Special purpose lease:**
  - where the making of the decision was the performance of a public function, involves the **balancing completing public interests** consideration > amenable to JR - *Hong Kong and China Gas Co Ltd* (p2)
  - involves **public stated policy** > made know to the public > sufficient public element - *Hong Kong and China Gas Co Ltd* (p2)
- **Direct implementation of small house policy** - *Koon Bing Leung* (p.5)
  - exception: indirect implementation of SHP (govt's preservation for the policy) is not amenable to JR - *SIME DARBY MOTOR SERVICES LIMITED* – latest appeal

### Other contexts (p.8)

- HA serving notice to quit – involves public housing – serving of the quit governed by statute – public - *Wan Yung Sang v Housing Authority*
- Govt in private capacity to have freedom to contract – for commercial purpose – private - *Ngo Kee Construction Co Ltd v Housing Authority*
- Bar Association – recognised by statute – ensure public interest – public - *Leung Sze Ho Albert v Bar Council of the Hong Kong Bar Association*
- Employment based on contract – private - *Li Fung Kei v Council of the University of Hong Kong*

## Week 2: Leave, Delay, Standing & Limits of JR

### 1. Leave to Apply for Judicial Review

- **Statutory provisions** governing leave to apply for judicial review
  - **Section 21K(3) of the High Court Ordinance (Cap. 4)**  
No application for judicial review shall be made **unless the leave** of the Court of First Instance **has been obtained** in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a **sufficient interest in the matter** to which the application relates.
  - **RHC Order 53, rule 3**
    - Leave must be made ex parte (one side); Form No.86 (requirements to satisfy); (7) requirement of **sufficient interest**
- The applicable **merits threshold** in a leave application - *Po Fun Chan v Winnie Cheung*
  - Test should be one of **arguability**: should be **reasonably arguable**, can enjoy realistic prospect of success
  - does not mean at the initial stage need to show the high chance of win, but there is **a chance/prospect to win**, that winning could well happen
  - **increasing the threshold due to policy concern**: the need to oppose certainty, to safeguard public resources, prevent floodgate...
  - look at whether the allegation of law enjoys the access to court
- Other matters which will be considered at the leave stage
  - **Standing** (show sufficient interest, even if there is cross-respect, it won't be good enough for leave)
  - **Timing** (whether considered JR promptly)
  - **Cumulative requirement**: exhaustion of alternative remedies Only as last resort
- **The manner to apply for leave to apply for judicial review** - Filing **Form No.86**

### 2. Promptness and Delay

- The **underlying rationale** behind: public policy; JR provides a relatively quick and straightforward procedure for identifying and redressing public law wrongs
  - the **potential to disrupt the orderly administration of public services**
    - The decision of public bodies often feed into broader or multi-stage decision-making process, the striking down of one decision may result in a chain or domino effect as the legality of other decisions is affected > more time lapses > affect the downstream decisions
  - the **potential to cause hardship to**, or in some way to prejudice, **third parties** who, for example, may already have acted upon the decision under challenge
  - earliest reasonable notification that a public law decision is being challenged and for an **early resolution of that challenge**.
  - See *Law Chun Loy v Secretary for Justice*
- **Statutory provisions** governing timing and delay – **the relevant test** - *Law Chun Loy v Secretary for Justice*
  - **Section 21(K)(3) & 21K(6)** of the High Court Ordinance  
**21(K)(3)**:

### 21K(6):

"Where the Court of First Instance considers that there has been undue delay in making an application for judicial review, **the Court may refuse to grant-**

- (a) leave for the making of the application; or
- (b) any relief sought on the application,

**if** it considers that the granting of the relief sought would be likely to cause **substantial hardship** to, or **substantially prejudice the rights of**, any person or would be **detrimental to good administration**."

### ○ RHC Order 53, rule 4

An application for leave to apply for judicial review shall be made **promptly** and in any event **within three months** from the date when grounds for the application first arose **unless** the Court considers that **there is good reason for extending the period** within which the application shall be made.

- Define what is considered to be an '**undue delay**':, an inappropriate, excessive or disproportionate delay
  - **Primary requirement: Promptness**
    - **Promptly**: can be shorter than 3 months; within the 3-month window, still need to be prompt enough; court can be flexible to decide if applicant has acted promptly to grant leave
  - **The exception: Unless**: need to **provide good reason** for the delay (factors to consider)
  - Examples: not aware of the grant is not a reasonable ground, serve of notice as the starting point (?)
- The need to **identify when time starts to run**
  - **Applications for an extension of time to apply for leave** - *AW v Director of Immigration*

### **Factors to consider** (Court would be looking at all of them, to balance the scale) - *AW*

- **The length of the delay**: The longer the delay, the more cogent the reason has to be for extending time
- **The reasons for the delay** - *AW*
  - Party receiving the letter late but due to continuous negotiation with the govt; party required to act proactively
  - Hardships e.g., covid, illness > might be valid reason; but there are cases leave was refused on ground of poor health
  - Party applied for legal aid within the 2-month timeframe, where the process takes time: court requires more than that, requires applicant to speed up the matter in legal aid; also look at the when the applicant applied for legal aid
  - Merely the tie taken to apply for extension of the scope of legal aid were hardly matters that could constitute valid grounds justifying any delay
- **The merits of the intended challenge is not the concern**
  - Where an applicant is many months out of time, leave may be refused 'however strong the complaint might otherwise be' (*Po Fun Chan v Winnie Cheung*)
  - An applicant who sleeps upon his rights may be barred from pursuing them in judicial review even though he may have a meritorious case- *Law Chun Loy*

- Not about showing the real prospect of success (as this is a minimum requirement even if in time); but need to show merits more than that, **show that it is a strong case**, above the basic minimum; stronger the case, more likely to be granted leave
- only a significant matter to be taken into account, not the sole criterion
- **Prejudice to the parties and good administration - *R v Dairy Tribunal ex p Caswell***
  - Two sides: to the applicant if time is not extended & to the respondent & public administration if the challenge is allowed to proceed out of time
  - Harm/undesirable effect as result of the delay, affecting a wider group of people > strong prejudice
  - The original rationale: the need to act promptly -> minimum disruption of governance; could be used to against applicant
- **Points of general public importance**
  - Affecting wider community > wider impact > stronger case; But would still need to consider all other factors
- **Whether the challenge is against a continuing policy**
  - Continuing policy, would support applicant: even if being late, there could be other parties who are in the impact by the policy could bring up JR
    - e.g., SHP, adopted long time ago, but continuing policy, involving constitutionality > a persistent issue
    - e.g., where the policy itself is flawed and one could show he is sufficiently impacted by it
    - e.g., can challenge the particular aspect of the policy in regard to its application on your case facts (question of facts)
    - fact-sensitive, diff facts could shape diff argument
- **Refusal of relief on the ground of delay**
  - Sec 21(k): Effect of the delay could be found on both **(1) at the leave stage & (2) on deciding relief (the kind of relief) to be granted**
  - More on the relief topic

### 3. **Sufficient Interest & Standing** 充足的利益及理據

- **The underlying rationale** behind the requirements of standing in judicial review: keep judicial review within its proper bounds and to prevent abuse of the court's process & Prevent applicants causing unnecessary burden on the govt; need to show sufficient, good allegation
- **Requirements**
  - Applicant need to be **directly involved/as a member/has direct interest** in the matter - *R v IRC ex p National Federation; Ho Kar Hei; Kwok Cheuk Kin cases*
  - Applicant acts **as representative** is not to be regarded as having a sufficient interest merely because the issue raised by him is of public interest (*Kwok Cheuk Kin*)
    - Mere fact that there is general public interest in the finding is **not sufficient** for the applicant has sufficient interest > requires something more – *Wong Chi Kin*
    - **exception: SHP challenge**, involving application of rule of law in - *Kwok Cheuk Kin v Director of Lands [2021] HKCFA 38*.
  - Applicant needs to show **genuine claim of right** (his action is not to be contradicts to his claim of right) – *Kwok Cheuk Kin cases*
- **Factors to consider** the court adopts a holistic approach by taking into account a host of relevant considerations including - *Kwok Cheuk Kin v Commissioner of Police [2017]*
  - the merits of the application
  - the importance of vindicating the rule of law

- the importance of the issue raised
- the existence and absence of any other challengers who have a greater interest in the matter
- the nature of the breach of duty against which relief is sought
- **Statutory provisions**
  - Section 21K(3) of the High Court Ordinance
  - RHC Order 53, rule 3(7)

4. **Alternative Remedies** - *Stock Exchange of Hong Kong Ltd; Leung Ka Lau*

- JR as **remedy of the last resort**; applicants only have exhausted all other **effective alternative remedies** to turn to JR; otherwise leave application will be refused
- only in exceptional circumstances the court would depart from the rule

5. **Limitations on Judicial Review**

- only when there is **error of law**, the court would step in (any error of law made by a public body will make its decision a nullity and that a statutory exclusion clause does not deprive the courts from their jurisdiction in judicial review unless it expressly states this) - *Anisminic Ltd v Foreign Compensation*
- Not role of court to indicate its own preference on govt policy, court only ask question of legality - *Clean Air Foundation v Government of HKSAR*

### 1. Concepts of Procedural Fairness and Natural Justice

- One of 4 main grounds in JR: Legality, proportionality, rationality, procedural fairness & natural justice
- Some concepts
  - (1) *nemo judex in causa sua* – **no one should be judge in his own cause** - Rule against bias (next lecture)
  - (2) *audi alteram partem* – **hear the other side (the right to be heard)**
    - The fair hearing rule (focus in this lecture): E.g., 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.
- Modern day content of right to be heard includes (but is not limited to) - *Ridge v Baldwin; ex p Doody*
  - (i) **notice** (right to be informed) about the decision may affect him, either before or after the decision - *ex p Doody*; 鍾凱研
  - (ii) **written representations**
  - (iii) **disclosure prior to decision** (right to be informed) - *ATV v Communications Authority*
    - the decision maker to provide adequate disclosure of such materials as are relevant to the decision-making process
  - (iv) **oral hearing** (right to be heard) - *ST v Betty Kwan* – *written form vs oral hearing*; 鍾凱研 v *General of the Salvation Army*
    - not an absolute right, context-dependent
      - does not translate in every case to a right to be orally heard; Nor is a party automatically entitled to an oral hearing under Article 10 of the Bill of Rights
      - fairness will dictate whether a right to be orally heard can be established in the individual circumstances of the case
    - **Factors** to weight in favour of the right to an oral hearing
      - Cases with **factual or legal complexity**: a dispute of fact or law exists which is difficult to examine on paper
      - where a **negative decision** could detrimentally **affect an existing right or interest** (e.g., a decision to revoke a license, remove a person from public housing or rescind a permanent residence entitlement)
      - where **constitutional or fundamental rights**, or other important interests are at stake
  - (v) **legal representation** – *Stock Exchange of Hong Kong Ltd*
    - factors to weight in favour of the right to legal representation
      - the **more serious the charge** and potential penalty -*ex p Doody*
      - **points of law** are at issue
      - the **capacity of the individual** to present his own case
    - factors to weigh against it
      - proceedings are of such a nature that **speed** is required, as “over-lawyering” might substantially lengthen and complicate proceedings
  - (vi) **reasons** (**duty to give adequate reason**, see week 4) – *Oriental Daily Publisher p.21*
    - increase **transparency** in public decision-making & improve the **accountability** of decision makers
- **Serves (at least) the following purposes**
  - (i) decision-making conscious of **needs and interests of individuals affected**
  - (ii) procedural fairness here may **influence quality of substantive decision**

- **Requirement of demonstrating substantial prejudice**
  - It is not sufficient to merely demonstrate the existences of unfairness, but a real possible risk of prejudice that can affect the decision outcome - *Chu Ping Tak*
  - Risk of prejudice would be enough, need not to show actual prejudice
- **Sources of principle of fairness in HK – (i) common law (ii) Hong Kong Bill of Rights art.10 (“BOR10”) - *Wong Tak Wai (the distinguishment)***
  - “fair and public hearing by a competent, independent and impartial tribunal established by law” - guarantee procedural fairness
  - =ICCPR art.14 which is incorporated under Basic Law art.39 [NB HKBORO (Cap.383) has exceptions, eg prisoners]
    - Constitutional status, entrenched in BL & domesticated in BOR
- Content is however the same in all sources, protecting the same right
  - But there are some Exception to the BOR: BOR does not apply for some situations (see Part III e.g., armed forces, immigration legislation);
  - if not fallen within the exception of BOR, resort to common law (depending on the circumstances of each case, what rights are involved)

## 2. Right to be informed and to be heard

- **Right to be informed of charges**
  - in cases of disciplinary proceedings e.g., determining the appropriate sanction
  - The person who is likely to be affected by the decision: to be informed the charges (see 3. Ridge p.121, opportunity to defense himself); D to be told the substance of the charge so that D can defend himself (p.6)
- **Disclosure of materials relied upon before decision is made**
  - In order to make relevant response, to be disclosed either materials made by the other side, or relied by the decision maker in making the decision
    - what needs to be disclosed, depending on the context - *R v Secretary*
    - need to **demonstrate substantial prejudice** - 5 p.2: *Chu Ping Tak*
    - **level of disclosure**, only disclose what is relevant, meaningful and focused representation - *ATV v Communications Authority*
- **Right to be heard vs right to oral hearing**
  - Difference: **No absolute right** to an oral hearing, i.e. deprived such right does not amount to unfairness;
    - when written form might be enough to make meaningful representation; e.g., dispute merely on contractual right, can be heard by other methods (by interpretation of the terms by written form)
    - when cases involving assessment of creditability of witnesses (he said she said situation), oral hearing might suit better show credible evidence
- **Factors to consider - *ST v Betty Kwan – written form vs oral***
  - **interest at stake**; involving **substantial constitutional (fundamental) right**: where percussion is serious, D might be need of oral hearing (as D might be better represented his argument by way of oral hearing - *Prabakar*)
  - **evidence material** to the claim (in terms of facts and law, whether better addressed at oral hearing); depends on what relevant facts and issue are in dispute;



- **material dispute & complexity of fact** (to be better address orally; if adjudicator not sure about the form of hearing> might indicate there should be oral hearing; when written form does not sufficiently expose the facts, but does not necessary follow there should be oral hearing > context dependent
- **benefits of oral hearing:** decision maker to ask the question of whether oral hearing could bring benefits, to lead to a better process and outcome
- **inherent limitation of written submission;** an indicator for oral hearing
- **nature of the issue involved**

- **Matter of spectrum** (from serious, middle, light cases): intuitive judgement based on facts - *鍾凱研 v General of the Salvation Army- right to be heard*

### 3. Legal representation

- **Not an absolute right; context-dependent**
  - Aim to have **meaningful and focus representation** of the applicant to the tribunal
  - Disciplinary guideline providing such provision
  - Consider the dispute and issue involved: whether the case really require legal representation, depending on circumstances of each case
    - E.g., If involving a serious case > allow legal representative to better argue a case; vs requiring expertise at certain fields expert evidence, experiences civil servants at better position to argue the case than lawyers
- requirement of **fair and proportionate & factors** guiding how discretion should be exercised - *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd (p18)*

### 4. Specific issues

#### (1) **Fundamental rights and high standard of fairness**

- fundamental right at stake (freedom from inhumane treatment in the context of exercising the power deport) > apply higher standard of fairness, subject rigorous examination and anxious scrutiny for procedural fairness - *Prabakar*

#### (2) **BOR10 - “fair and public hearing by a competent, independent and impartial tribunal established by law” – the “curative” principle**

- 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 - *Wong Tak Wai, p.20, see factors considered in the further hearing/appeal process*
- Decision that does not comply completely with the requirement of procedural fairness at early stage of the decision might be cured, if the person affected to the recourse to the further hearing or at an appeal, which itself provides a fair process
  - If procedure suggests there is a right of re-hearing and appeal > if the procedure provides all mechanism requires by law (the fairness requirement)> cannot say in JR the right is denied > look at the process overall, if one of the stage can achieve fairness then it is good enough
  - Consider the **target of the challenge** (on statue or decision)
    - Whether JR is a sufficient remedy: where JR does not resolve factual dispute (no cross examination from the other side in JR);
    - if involving a statue that prohibit the fair procedure > JR the statue > if successful could get permission to strike down the statue > where legislature would need to reconsider it;
    - if involving the decision that prohibit so > JR the decision > remitted to the decision maker > advantages for the applicant would be the decision maker would need to bind to the finding to the JR court

## 1. Duty to provide adequate reasons

- **No general duty to give reason, but exceptions: two situations in which reasons may be required** for an administrative decision - *Lister v CEIC*
  - (1) Where a **decision appears aberrant without reasons**, then it will have to be explained to assess the decision's legality
    - look at the **rarity of the occasion**: whether the decision is **inconsistent to previous decision** - *Pearl Securities Ltd v Stock Exchange of Hong Kong*
  - (2) The furnishing of reasons may be required **where an important legal interest is affected** by a decision - *Prabakar*
    - situations where individual's fundamental legal rights are being 'forfeited' > cases can speak for themselves > higher standard of fairness
- **Factors to consider as to whether there is duty to give reason** - *Lister v CEIC (p.23)*
  - **nature of the matter**: technical issues/broad macro-economic policy > court does not deal with this vs. issue of interest and rights > court's duty > ask for reasons
  - **the process during the decision making process** e.g., whether there is a mature decision, already an open and transparent process dealing with objection
- **Source of duty**: duty to give reason may arise from **statute** either expressly or by necessary implication, or from **common law** - *Oriental Daily Publisher Ltd*
- **Adequacy of reasons** - *Oriental Daily Publisher Ltd; R v Higher Education Funding Council, ex parte Institute of Dental Surgery*
  - only address serious/substantial ones
  - **no precise test**, consider all circumstances, approach sensibly: reasons may speak for themselves, **may not require great elaboration** & may be brief
- **Other scenarios**
  - copying of judgment > not conclusive, but may indicate whether the process was fair & has considered positions of both sides; affect public confidence – *Smart Gain*
  - additional reasons given > court being cautious & apply sceptical view; but does not mean parties cannot do so, as it might be genuine discussion - *ex p Ermakov*
- **3 alternatives of relief** - *PVQ v Permanent Secretary for Security*
  - court may order decision maker to **give reason**;
  - where the reason demonstrate the decision is flawed and illegal, court may order that **decision be quashed**
  - court accepting the duty to give reason and that is not given, but no fairness to party: no relief granted

## 2. Rule against bias (Consider the **state of mind of decision maker**)

- **Actual bias:** decision maker actually being biased, required evidence that they are indeed biased in the decision making process (view point from judge's subjective mind)
- **Appearance bias:** justice seen to be done (**public perception**, how the public would perceive the judge's behaviour, as to whether there is bias)
  - **2 situations**
    - Where the judge or decision maker is a **party to litigation**, or having a financial or proprietary interest in the outcome of the case - *Bow street*
    - Where the judge is not a party nor having interest but through their **conduct or behaviour** that could give suspicion that there can be bias
      - Over-argumentative judge
      - Judicial intervention (permissible to have preconceived views but not permissible to turn blind eyes on the opposite side) – *Chui v Cheng*
      - The perception created by the conduct by a reasonable bystander
      - whether sufficient reasons given/whether disclosure of documents
  - **Apparent bias test** - *Deacons v White & Case LLP; Chui v Cheng* (vs test of real danger of bias in English law)
    - **Step 1:** Court first **ascertains all circumstances** which have the bearing to suggest the judge is biased
    - **Step 2:** whether a **reasonable, objective and informed person** would on the correct facts reasonably apprehend that the judge has not brought or will not bring an impartial mind to bear on the adjudication of the case (**objective test**)

### Analytical Framework in Assessing Legality

- **Illegality**, or *ultra vires* i.e. “beyond his power”, means a decision which either contravenes or exceeds the authority given to make the decision or is a decision which fulfils a purpose other than that for which the authority was given to the decision-maker
  - court does not always intervene (e.g., in macro-social policy matter), although it has discretion to do so
  - court does not have the power to strike down the decision itself, but can rule on whether decision maker is contravening the power given to make the decision
- **The first step:** find out the **meaning of the empowering statute, regulation or policy on proper construction**
  - **Modern purposive approach** to statutory interpretation (consider context and purpose) - *HKSAR v Chan Chun Kit* (2022) 25 HKCFAR 191
- **The second step:** glean from all circumstances for evidence where the decision maker has exceeded or improperly exercised the power conferred on him
  - **the decision** itself (usually through contemporaneous reasons given by the decision-maker); but decisions in itself might not always be explanatory, reason might not be given (duty to give reasons); look at all evidence for the reasons behind
    - **justification given by affidavit in the JR**, or other **objective material**, the **basis of the exercise or non-exercise of power**,

### Various permutations of illegality – When can the Court intervene? (Not necessarily distinct categories; can have overlaps)

1. A statute may say “Decision-maker can do X”; the decision-maker in purported exercise of that power does Y. In such a case **Y clearly exceeds the authority** and is *ultra vires* (Decision maker **not empowered by the statute** to make the decision) - *Building Authority v Appeal Tribunal; Re Sea Dragon Billiard and Snooker Association*
2. If a decision-maker **unreasonably refuses to use the power** conferred upon him or to consider using such power (“outright refusal to consider the relevant matter”), this **frustrates the policy and object of statute** (Vs. pure ultra vires as positive acts, here is negative act of not doing st) - *Padfield*
  - consider discretion given to the decision maker (he/she might have discretion not to use the power in a reasonable way) - *Chan Noi Heung*
  - decision maker cannot refuse to use the power when person has acted reasonably and comply to local law - *Wheeler v Leicester City Council*
3. If a decision-maker uses the power for a **purpose different** from the purpose of the power-conferring statute
  - Identify the exact reason, and for what reason is reasonable
  - If more than one purposes, decide which one is the dominant one
  - Whether the reason is contrary to be inherently impermissible
4. If a decision-maker takes into account **irrelevant considerations** or **fails to take into account relevant considerations** (a species of “misdirection in point of law”) - *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*
  - (1) where a decision maker has **taken into account an irrelevant consideration** (decision made based on wrong reasons or factors)
    - Examples of invalid considerations (1) political factors (unless specifically stated); (2) any personal feelings / emotions of the decision-maker.

(2) where he or she has **failed to take into account a relevant consideration**

- **due duty to act to inquire:** did the Secretary-of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly? - *Secretary of State for Education and Science*
  - The relevance of considerations will typically be assessed according to the appropriate (1) **statutory provisions (criteria and purposes)**, though the factual, legal and policy context of the case (2) relevant policies; (3) circumstances and merits of each individual case (E.g., departmental circulars, policy documents, practical considerations and the common law) - *R v Somerset Country Council exp Fewings*
- case where decision maker has taken into account relevant consideration (discretion given & considered public interest) - *Riaz Hussain*
- **A common ground for attack; If err in law, decision to be quashed**

5. If a decision-maker **fetters (limits) its own discretion** (usually in context of rigid policy)

- a decision maker **must decide & actively make a decision**: they cannot ordinarily refuse to decide or abstain from deciding - *British Oxygen Co Ltd*
- When the law gives one **discretion**
  - discretion must be exercised in accordance with such policy or guidance - *British Oxygen Co Ltd*
  - **cannot mechanically fetter discretion without considering relevant consideration** = not exercising the power - *Wise Union Industries Ltd; Lo Yuet Hing*
- Conceptual different from not regarding relevant consideration, but here is not considering any consideration at all
- Prove the existence of policy (may be published or internal guideline)

6. If a decision-maker **wrongfully delegates his power**

- **Agency situation:** If the statute specifically grant power for one decision maker, only he or she would have such power (someone on department's behalf to sign sth)
- **Effect:** this would have the effect of unlawfully expanding their powers or taking them beyond their jurisdiction > undesirable outcomes that the person relies on the agent's statement could suffer loss (E.g., in context of legitimate expectation)
- Court generally accepts that **some delegation of power is reasonable** (e.g., some staff approving the decision, a valid delegation), but principle only goes so far
- One solution which preserves the ultra vires principle is to attach no strict legal effect in public law to the statement or representation, but to allow the person affected to sue for the tort of negligent misrepresentation, and thereby for compensation.
- An uncommon challenge

7. If a decision **makes an error of fact** – but note the **high standard of review** for factual errors - *Smart Gain Investment Ltd; Capital Rich Development*

- If a material fact that the decision maker based on is non-existent or having insufficient evidence, the decision itself is false, irrationality in sense of reasonableness

## Week 6 – Unreasonableness and Irrationality

- **Standard of review: Wednesbury unreasonableness** - *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*; *Council of Civil Service Union*
  - **a decision so unreasonable that no reasonable decision maker could ever have come to it**
  - the extent to which the decision was so **outstandingly bad/almost be described as being done in bad faith** that it should not be regarded as **unlawful**
  - a ground of review in its own right, but courts sometimes describe violation of another ground as being unreasonable (e.g., failure to take into account of relevant consideration, exercise of discretion for an improper purpose or fettering of discretion may each be deemed unreasonable) - *Wednesbury Corporation*
- **Substantive review vs Procedural review**
  - **Substantive review** - *Wednesbury*
    - high standard of review
    - relatively few real-life situation where a decision maker made a decision which is so egregious that it falls foul of Wednesbury unreasonableness
  - **Procedural review**: - *Zestra Asia Ltd*
    - Lower standard of review, focus on the **process** leading to the decision rather than the decision itself.
    - where the decision has **departed from what is procedurally reasonable** and would therefore be required to retake the decision
    - easier to examine the decision-making process and to identify procedural deficiencies which can be regarded as unreasonable: the court can avoid criticism that it is trespassing on the domain of executive decision makers by affirming that the decision maker was free to exercise its discretion
- **How rigours/intense the test is to apply (sliding scale/spectrum of review)**
  - **Low intensity of review**
    - **Judicial deterrence**: Court's reluctance to review particular kinds of decision out of concern for adherence to **separation of powers**
    - decisions informed by policy consideration (**policy-laden, esoteric or security based**) to a greater extent than is normally the case - *ex p Smith and Ors*
  - **Higher Intensity of review**
    - Where **human or fundamental rights** are involved, the basis of the decision called for "the **most anxious scrutiny**" - *ex p Bugdaycay*
    - Can be provided for in statute
      - Protection of the Harbour Ordinance (Cap. 531): statutory presumption against reclamation in the harbour
- **Consider completing factors** (where case can involve both interference with human rights & complex policy matter) - *ex p Smith and Ors*
  - Look at the merits
  - Factors to consider
- **Constitutional JR: proportionality test** (a different framework compared to traditional JR)

## Week 7 Legitimate Expectation

### Definition

- Public body making promise to the public or individual/class of individuals about certain procedure, polity or decision - *Ng Yuen Shiu; Ng Siu Tang*
  - **Requirement of fairness:** it would be **unfair** to not order that decision
  - **Justification by reasons:** unless there is sufficient reasons why it should not honour that promise
- Analogy with promissory estoppel (misrepresentation clear and free of doubt, unequivocal), same as in legitimate expectation in public law
- **as a judicial control** of public bodies which change their conduct or position – departing from a previous representation or conduct
- **Procedural vs Substantive legitimate expectation** (the more recent innovation in the law of HK)

### Historical root of the doctrine

- development of **Procedural legitimate expectation** (a narrow notion)
  - the applicant expects to be treated, as a matter of procedure, in a particular way (e.g., right to be heard, expectation of an oral hearing, being given the opportunity to make representations); does not guarantee the outcome if follow the right procedural (focus on the process)
- the **expansion** of the doctrine to **Substantive legitimate expectation**: in 2000s
  - The applicant **expect to receive a particular substantive outcome**: refers to the outcome, actual benefits & entitlement (sth of substance, focus on the product)
  - now with wider application

### More recently: pushback against the development of substantive

- The court must tread a careful line between:
  - (1) Finding a body liable in public law where it has breached a legitimate expectation
  - (2) Trespassing on the capacity of the executive to alter its conduct or position, particular on policy issues
- **Courts refrain from ordering public bodies which specific decision to make in macro-economic/political field** - *Re Thomas Lai* (land use and planning, balance against the interest and needs of the public)
  - From a separation of powers perspective; decision maker makes a decision to wide public, issue addressing **balancing societal/economic interest**
  - court reluctant to give the doctrine of full force, policy statement cannot be overridden
  - question being: what is the best policy in that particular circumstances (e.g., COVID-19 pandemic with intense policy, govt should change the policy in light of the changing circumstances)
- Court typically adopt a **less invasive approach**
  - Requiring that public bodies shows they have **taken into account relevant consideration** parties' legitimate expectations arising from the body's previous position
  - The body should **give reasons** for the **departure** from its previous position – *R (Bibi)*; *Ng Shiu Tung* (adopting *R (Bibi)*)
  - If satisfy these requirements, the body's change of position will be lawful
- common law: **recognises public body can change its mind**, can **depart from its previous policy statement**

- issue being: but the change would affect people who are relying on previous policy
- balance value clashes: individual right & the need to guarantee fairness, the govt not the abusing their power with their relationship with the public vs. expected to change the policy - **case No.1 leading case:** Ng Yuen Shiu
- **sometimes policy reasons can defeat the expectation** (outweigh advantages of holding the body liable in public law), even it breaches the legitimate expectation
  - see **CCSU**: national security implications of consultation as an overriding consideration which defeated the expectation
  - see **Ng Siu Tung**: where the “overwhelming force” of immigration policy could override general representations on the right of abode made by the govt purportedly relied on six hundred thousand persons

## Elements

### 1. Representation made by a public body

- Can be in direct, implied or indirect form (Apply objective standard); can be a statement or usual/past practice - **CCSU**
- **Must have been made by a public decision maker** (i.e. by an entity **acting in the capacity of a public decision maker**)
  - A pre-election manifesto promise cannot generate a legitimate expectation as it is not made in the capacity of public decision maker - **Begbie**
- **Must be clear and unequivocal (Identity of decision maker** could suggest the proper interpretation of the representation)- **Yook Tong Electric Co Ltd**

### 2. Knowledge and Reliance of the Representation

- Detrimental reliance relevant but not essential
  - **Reliance:** have to actually rely on the statement; question of fact: Whether the applicant **had knowledge at the relevant time** in the timeline of events (vs subsequently come to have knowledge of representation)
  - **Detrimental:** putting a party in a worse position, showing detriments after the reliance > relevant but not essential > can strengthen the claim
    - **Begbie:** where govt policy was misrepresented through incompetence, but was corrected five weeks later; judge ruled no detrimental reliance despite disappointment of the applicant; **Re Thomas Lai** (no reliance)

## Legitimate expectation

- **Burden of proof** - **Paponette v. AG of Trinidad and Tobago**
  - The initial burden: **an applicant to prove the legitimacy of his expectation**
  - Once proved by applicant, onus shifts to the **authority to provide reasons to justify the frustration of the legitimate expectation.**
- **Consider Defined class of people/size of class of representation**
  - The broader the class claiming the benefit, the more likely it is that the supervening public interest would be held to justify the change of position
    - **No. 4 Coughlan** (strong facts, elderly case, a defined class of ppl > win the case)
    - **No. 6 Ng Siu Tung** (large no. of claimants; broader issue of right of abode > lose)
    - **No.9 Re Thomas Lai** (broad category > lose the case)
- **Standard of review:** Yet to be settled in HK



## Fairness Requirement

- if generally unfair to an individual (who acted accordingly to the statement), potentially unfair
- notion that public body should treat individual fairly
- related to misuse/abuse of power of the public body (where court has the power to revert the decision)

## Comments/Summary:

- Application of principle at its peak at the elderly case, which does not involve macro-political issue – *R v. North and East Devon Health Authority, ex p Coughlan*
- Has there been representation that is made **on behalf of a public authority** – *ex p Begbie*
- **change of circumstance:** need to make sure which decision maker you are talking about > should be the one who make the decision to hold him liable - *10. AG of Trinidad and Tobago*
- Representation can be made by express statement, but also **past conduct** - *CCSU*
- **Clear and unambiguous representation;** meaning of representation is an objective test - *7. Yook Tong Electric Co Ltd*
- need to show to have **knowledge of the representation** at the time
- **strong argument if can show detrimental reliance** > easier to argue that it is unfair – *R (Bibi)*
- distinguishing between **substantial and procedural**, court more willing to rule in procedural one; how far the court would rule decision maker to - *Ng Yuen Shiu (Procedural)*; *ex p Begbie (substantial)*
- **limited class of person, w/o broader social issue** > court more willing to rule - *ex p Coughlan*
  - vs broader issue e.g., right of abode > against substantive legitimate expectation argument
- yet to decide what is the standard of review (proportionality vs Wednesbury)
- **relief/remedy:** depend on the nature of the representation e.g., procedural > quash/remit it back; vs substantive > quashing & require the decision maker to make the decision again but to take into account the establish principle of legitimacy (do it again but do it the right way)

take into account the LE...50:00

## Week 8 – Proportionality

### Definition

- a concept introduced to provide a **structure and transparent way** of dealing with **competing interests and values**.
- a structure apply in face of different interests, **completing non-absolute rights** (e.g., freedom of speech, but not about absolute right e.g., free from torture)
  - HK court: proportionality concept based on the **basic law** and the **Bill of Rights**; also by reference to foreign jurisprudence.

### Common law

- **Classic Wednesbury test**
  - so unreasonable that no reasonable position maker would have come to that position;
  - Or the failure to take into account relevant considerations; or take into account obviously unreasonable and irrelevant considerations.
  - **high threshold**, implicit in classic formation; so unreasonable that no one would ever come to the same decision
- **Anxious scrutiny/heightened scrutiny**
  - **fundamental right** at stake - *No.3 Bugdaycay*; *No.10 MA v Director of Immigration*
  - **important right** with grave and adverse impact on the affected person but no fundamental right - *Town Planning Board v Society for Protection of Harbour Ltd*
- **Competing rights in concern** (tension between executive and court's role)- *R v Secretary of State, ex p Bugdaycay*; *10. MA v Director of Immigration*
  - fundamental right > anxious scrutiny
  - policy, economic, societal matters (court does not have expertise & understanding of separation of power) > apply deference, margin of appreciation

### Proportionality and fundamental rights

- **Step 1:** what is the constitutional right claimed engaged, Whether the right falls within the ambit of the provision that you seek to rely on (constitutional construction)
- **Step 2:** identify the **legal or administrative measure** said to infringe or restrict that right
- **Step 3:** Determine if right is **absolute or non-absolute**
- **Step 4: if non-absolute > proportionality test** (4-stage analysis) – *Kong Yunming*; *Hysan Development*
  - Stage 1: whether that restriction **pursues a legitimate societal aim** (legitimate aim)
  - Stage 2: whether the restriction is **rationality connected with the aim** (rational connection)
  - Stage 3: whether the means employed are **proportionate** or whether they are **excessive** (2 standards to apply) - *Hysan*
    - “no more than necessary”, reasonable necessity & “minimal impairment” approach
    - “manifestly without foundation”, the less stringent one
  - Stage 4: whether a **reasonable balance** has been struck between the **societal benefits of the measure** and the harm to the constitutional individual right

### Difference between common law and proportionality – *Pham*; *Hysan*

- Common law: only requires the court to consider whether the balance struck by the government was within the range of rational balances
- Proportionality: court to balance the competing concerns itself & whether the decision is a constitutional infringement

FULL INTENSITY REVIEW	STRUCTURED PROPORTIONALITY REVIEW (2 STANDARDS WITH DIFFERENT INTENSITIES)		VARIABLE INTENSITY WEDNESBURY UNREASONABLENESS REVIEW: COMMON LAW APPROACH (Sliding bar scale: Depending on nature of the subject matter)			NON-JUSTICIABLE
<p>Court decides “correctness” and whether power abused</p> <p>Question of law &gt; easy decision</p>	<p>Burden on decision-maker</p> <p>Step 1: identification of the constitutional right engaged</p> <p>Step 2: identify the legal or administrative measure said to infringe or restrict that right</p> <p>Step 3: Determine if right is absolute</p> <p>Step 4: <b>proportionality test (4-stage analysis)</b></p> <ol style="list-style-type: none"><li>whether restriction pursues a legitimate societal aim</li><li>whether restriction is rationally connected with the aim</li><li>whether the means employed are proportionate or excessive</li><li>whether a reasonable balance has been struck between the societal benefits of the measure and the harm to the individual right</li></ol> <p>Intensity of review in Stage 3 varies according to context</p>		<p><b>Anxious scrutiny unreasonableness review</b></p> <p>Burden on decision-maker to justify the decision</p> <p>when involves more fundamental/important rights</p>	<p><b>Standard <i>Wednesbury</i> unreasonableness review</b></p> <p>Burden on applicant</p>	<p><b>“Light touch” unreasonableness review</b></p> <p>Burden on applicant</p>	<p>But adequacy of justification still required</p>
	<p>“manifestly without foundation”: Deference/ Margin of appreciation</p>	<p>“no more than necessary”, reasonable necessity</p>				
<p>e.g., substantive regime expectation.</p> <p>cases involving pure questions of law.</p>	<ul style="list-style-type: none"><li><u>The court balance the competing interests itself</u>, then come to a judgement whether the decision was an unconstitutional infringement or unnecessary infringement (but not looking at the balance struck by the govt)</li><li>Involving rights that makers of BL and BORO sufficiently worthy to have constitutional protection,</li><li>Intensity of review in Stage 4: Some matters might be outside court’s ability to decide when it requires expertise</li></ul> <p>Not court overstepping its mark, reasons:</p> <ul style="list-style-type: none"><li>proportionality is about constitutional rights (protected in BL &amp; BORO)</li><li>proportionality is concepts inbuilt in BL (even in applying the balance itself to taking the matter out of the decision maker's hands and balancing the competing rights &amp; come to a view, the court is still doing no more than what it was required to under BL (which is the reason why court will adopt proportionality test when involving constitutional right, acting on its constitutional role)</li></ul>		<p>What they have in common: the court <u>would not balance the competing rights itself</u>, but <b>look at the balance struck by the decision maker</b> and come to a view as to whether the balance was reasonable.</p> <p><b>Anxious scrutiny: still firmly within the realms of the common law <i>Wednesbury</i></b></p> <ul style="list-style-type: none"><li>court does not engage in merits</li><li>court’s jurisdiction is supervisory</li><li>simply look at balance struck in decision making process</li></ul> <p>Tension between fundamental rights and giving deference to govt when the issue falls within the realm that is within the government's executive purview,</p> <ol style="list-style-type: none"><li>depending on the facts, and decision in question to decide the proper response of the court</li><li></li><li>The right approach? deciding margin of appreciation:</li></ol>			<p>not amenable to judicial review: non-public decisions</p> <p>e.g., taxation, not matter court to decide</p>

## Week 9 – Judicial Review Remedies

- **Overview**
  - JR exclusive remedies: **certiorari, mandamus and prohibition**
  - other three remedies which can be sought using either IR or ordinary procedure: **declaration, injunction, and damages**
    - damages (only be sought in relation to private law liability)
  - The remedies should be used in conformity with the separation of powers: to enforce or uphold legality, whilst refraining from encroachment (effect) on the merits
  - **limitation on the scope of remedies in JR**: available against an **actual decision** or **decision-making process which has led to an actual decision**; where not every decision is susceptible to review
- **21K of High Court Ordinance: Application for judicial review**
  - An application to the Court of First Instance for one or more of the following forms of relief—
    - (a) **an order of mandamus, prohibition or certiorari;**
    - (b) an injunction under section 21J restraining a person not entitled to do so from acting in an office to which that section applies, shall be made in accordance with rules of court by a procedure to be known as an **application for judicial review**.
  - An application for a declaration or an injunction (not being an injunction mentioned in subsection (1)) may be made in accordance with rules of court by way of an application for judicial review, and on such an application the Court of First Instance may grant the declaration or injunction claimed if it considers that, having regard to—
    - (a) **the nature of the matters** in respect of **which relief may be granted** by orders of mandamus, prohibition or certiorari;
    - (b) **the nature of the persons and bodies** against whom relief may be granted by such orders; and
    - (c) **all the circumstances of the case**,it would be **just and convenient** for the declaration to be made or the injunction to be granted, as the case may be.

### 1. Types of Relief Available In Judicial Review (Main remedies: certiorari, mandamus and prohibition)

#### **Certiorari**

- **removing the legal effect of an act or decision**
  - when an **ultra vires act or decision is quashed by order of certiorari**, the act or decision is **regarded as nullity**
  - as far as the law is concerned, the act was never validly or performed, or the decision never validly made
  - consistent with the ultra vires principle (whereby a body has no legal power to do anything that is not within its power to do)
- court can order that the decision maker **retake the decision** with or without instruction on how that discretion should be exercised
  - any such instruction will usually not instruct the decision maker which decision to make > not to infringe separation of power
- available against inferior courts, tribunals & other bodies subject to review
- when **the act was in fact performed or the decision in fact made** (must be an act or decision capable of having its legal effect reduced)
  - a report or the initiation of a multi-stage procedure might not constitute an act or decision of which is capable of being removed

## **Mandamus**

- **to order DM to perform a legal duty/enforce a public law duty:** be confined to the enforcement of a legal obligation: usually be **a matter of how to act or decide**
  - Examples: direct that a **decision or determination be made**, a decision be **retaken**, **reasons** be provided an **oral hearing be held**
- **without specifying the correct decision or to compel a body to make a particular decision** (avoid trespassing on executive discretion & infringe separation of powers)

## **Prohibition**

- **Prohibits a body from doing something** (e.g., prohibiting the implementation of a decision, the cancellation of a licence, the demolition of a building....)
- Prohibition might be more appropriate than Certiorari in some situation
  - where there is procedural unfairness resulting from the lack of an opportunity for the applicant (facing removal order) to be heard
    - prohibition issued to **prevent the removal order from being executed** if and until the applicant had been given the opportunity to be heard
    - if procedural right being satisfied, the removal order might stand as being capable for being lawfully executed
- conduct a **balancing exercise** to wight the benefits of issuing prohibition against the disadvantages of doing so

## **Declarations**

- an order of the court which **declares legal rights, duties or statue** vs. certiorari, where an act, omission or decision is quashed and rendered legal nullity (declaration does not have this effect, but both be regarded as **mutually exclusive**)
- Might be more appropriate than certiorari in some situations
  - e.g., Director of Immigration purports to impose an additional immigration restriction on all residents in HK, but the restriction could only lawfully be imposed on temporary residents
    - if certiorari was issued > restriction would be quashed and would have to be remade
    - **certiorari may be more disruptive** and consuming of resources than is necessary
- **Useful where it is unclear which party made a decision** & more appropriate where **legislation is being tested for constitutionality**

## **Interim relief: stay of proceedings, interim injunctions**

- **Prohibitory** (restraining a future or continuing act/ pending the determination of the claim or **mandatory**)
- **Interim order:** sought on an urgent basis or because there is good reason why the applicant cannot reasonably be expected to wait until a perpetual order is made
- **Perpetual order:** made on the basis of law and legal entitlement (the award of an interim injunction does not guarantee the award of a perpetual injunction at a later stage)
- **Discretionary**
  - **having regard to all the circumstances** including the nature of the matters in respect of which relief may be granted by orders of certiorari, prohibition or mandamus
  - s.21K: granted if it would be “just and convenient for the ... injunction to be granted”
  - on **balance of convenience** (in favour of granting or refusing interim relief) rather than strict legal entitlement

## **Monetary Remedies** (Subject to a number of conditions – 0.53)

- **only be sought in relation to private law liability**, cannot be sought for public law liability (unless statue provides otherwise)
  - policy reason for disallowing damages to be sought for public law liability: concern for impact this would have on public resources; might develop a “compensation culture” for public law liability > encourage persons to bring JR application with financial motives in mind

- can be brought alongside a claim for breach of a public law duty to save time and resources where the matters are related (e.g., seek damages for expense incurred by the applicant participating in a flawed procedure)

**Combination of order:** the proper course may vary with the circumstances, but could involve one or more of certiorari, mandamus or declaration

- e.g., can solely order certiorari to quash the previous unlawful decision of the licensing authority, could either stand alone or be combined with an order of mandamus to compel the authority to rehear and determine the licence application

### **Availability of relief**

- **General rule: not available for**
  - (1) **Preliminary/premature decision** - *TVB v Communications Authority; Kwok Cheuk Kin*
  - (2) **Hypothetical or academic question** – *Chit Fai Motors*
    - due to policy reasons
      - the hypothetical question might **never become a real question**, in which case the resources of the parties and the court are consumed to no avail
      - when the hypothetical scenario materialises, there may be **new facts or variations** on existing facts which were not available or known at the time of the litigation
      - Not all of the parties relevant to the case may be capable of identification at the hypothetical stage
      - the general rule against hypothetical challenge is a means of discouraging speculative, frivolous or trivial litigation
- **Exceptions to the general rule for (1) preliminary decision & (2) hypothetical or academic question** (where relief could be sought)
  - when the question is one of **significant public interest**: where a wide range of ppl could well be affected
  - when no need for further facts, resolution of question involve **pure point of law** (esp when involving **constitutionality** of legislation) > better to resolve the question of law sooner rather than later
  - where there was a **real possibility that the same issue could arise again**
  - when **reasonable** to let ppl know consequence of acts
  - when it can **serve a useful purpose** e.g., where obtaining a declaration would assist the applicant in establishing a claim for damages based on breach of contract
  - where there are **conflicting decisions** – *Chit Fai Motors*
- (3) **Alternative remedies** can provide a more effective and appropriate remedy (**JR should only be a remedy of last resort**) – *Tsang Kin Chiu*
  - **EXCEPTION**: where there are **exceptional circumstances to justify** the continuation of the public law proceedings notwithstanding the alternative remedy
- (4) **Potential impact on third party** - *Shek Lai San v. SFC*
- (5) **Futility** (where relief does slightest difference or there is no substantial prejudice to applicant) – *Leung Fuk Wah*
  - **EXCEPTION**: where there is actual prejudice if relief not granted, as matter of fairness and natural justice - *Chu Ping Tak*

## **2. Delay** (see week 2)

- **Section 21K(6) of the High Court Ordinance:** The court retains discretion to refuse to grant relief sought on the application on the basis of delay