A

Lam Siu Po

and

Commissioner of Police

B

Li CJ, Bokhary, Chan and Ribeiro PJJ and Lord Woolf NPJ
Final Appeal No 9 of 2008 (Civil)
10–11, 26 March 2009

C *Human rights — right to fair and public hearing — art.10 applied to civil servants who faced determination of their rights and obligations — for particular class of civil servants to be excluded from art.10 protection, Government must show that: (a) protection had been expressly excluded by law; and (b) such exclusion justified on objective grounds relating to effective functioning of*
D *State or some other public necessity — Hong Kong Bill of Rights Ordinance (Cap.383) s.8 art.10*

Administrative law — police disciplinary proceedings — absolute bar to legal representation under reg.9(11) and 9(12) contrary to right to fair hearing and so unconstitutional — as a result, tribunal had discretion to permit legal
E *representation where fairness so required — Police (Discipline) Regulations (Cap.232A, Sub.Leg.) reg.9(11), 9(12)*

Administrative law — police disciplinary proceedings — failing to be prudent in financial affairs under PGO 6-01(8) — element of leading to impairment
F *of operational efficiency, that flowed from his serious pecuniary embarrassment, was separate element that had to be proved as matter of fact — Police General Orders 6-01(8) (1999)*

X, a police constable who had been adjudged bankrupt, was convicted
G of a disciplinary charge relating to serious pecuniary embarrassment stemming from financial imprudence, brought under the 1999 version of the Police General Orders (PGO) 6-01(8) and was compulsorily retired with deferred benefit. On his appeal to the Court of Final Appeal, X contended that the prohibition on legal representation
H under reg.9(11) and 9(12) of the Police (Discipline) Regulations (Cap.232A, Sub.Leg.) was unconstitutional, as being contrary to art.10 of the Hong Kong Bill of Rights. Article 10 provides that "In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing ...". The
I Commissioner of Police (the Commissioner) responded that art.10 was incompatible with internal hearings of a disciplined service, where proceedings ought to be dealt with expeditiously and with a minimum of formality.

J **Held**, allowing the appeal (*Per* Ribeiro PJ), that:

(1) As to when art.10 protection came into play, the formula "a determination of his rights and obligations in a suit at law" had

spawned considerable uncertainty and this was clearly an area of developing jurisprudence. Having said that, the *Eskelinen* approach would be adopted in Hong Kong and art.10 applied to civil servants who faced a determination of their rights and obligations. For a particular class of civil servants to be excluded from art.10 protection there had to be strong justification for doing so, and the Government must show that: (a) the protection had been expressly excluded by law; and (b) if so, the exclusion was justified on objective grounds related to the effective functioning of the State or some other public necessity which justified removal of the article's protection. Finally, since art.10 engagement depended on whether an individual's civil rights and obligations were to be determined, it might be engaged only in relation to some, but not all, the matters dealt with by a particular administrative authority or tribunal (*Eskelinen v Finland* (2007) 45 EHRR 43 applied; *Lombardo v Italy* (1992) 21 EHRR 188, *Pellegrin v France* (2001) 31 EHRR 26 considered). (See paras.67, 80–91.)

(2) Here, first, art.10 was clearly engaged in relation to disciplinary proceedings. X faced a determination of his civil right to remain in employment and the proceedings had a direct and highly adverse impact on his livelihood and pension. Second, while there had been an express exclusion by reg.9(11) and 9(12), the Commissioner had not shown sufficient objective justification for excluding art.10 protection. The requirements of police disciplinary tribunals did not justify a total ban on legal representation regardless of the requirements of fairness. The effective functioning of the police would not be impaired by allowing its disciplinary tribunals a discretion to permit an officer to be legally represented where fairness so dictated (*Ringeisen v Austria (No 1)* (1979–80) 1 EHRR 455, *R (Wright) v Secretary of State for Health* [2009] 1 AC 739, *Lombardo v Italy* (1992) 21 EHRR 188, *Pellegrin v France* (2001) 31 EHRR 26, *Campbell v United Kingdom* (1985) 7 EHRR 165, *Stock Exchange of Hong Kong v New World Development Co Ltd* (2006) 9 HKCFAR 234, *Eskelinen v Finland* (2007) 45 EHRR 43 applied; *Fraser v Mudge* [1975] 1 WLR 1132, *Maynard v Osmond* [1977] QB 240 not followed; *陳庚秋訴香港警務處處長* (unrep., HCMP 2824/2004, [2005] CHKEC 5) overruled to the extent of holding that art.10 was inapplicable to police disciplinary proceedings). (See paras.93–106.)

(3) As for the Commissioner's argument that giving effect to art.10 would destroy or radically alter the entire administrative system, by requiring decisions to be taken publicly by independent and impartial tribunals, this was not the case. Article 10 did not require every element of protection to be present at every stage before tribunals. It could be given effect by viewing the

A determination of a person's rights and obligations as an entire process, beginning with an administrative procedure which was subject to control by a "court of full jurisdiction". A "court of full jurisdiction" was one that at least could: (a) supply the missing protection(s) mandated by art.10, such as independence B or publicity; or (b) exercise its supervisory jurisdiction so as to correct or quash the non-compliant aspect. In Hong Kong, a court exercising its judicial review jurisdiction without statutory interference was likely to qualify for most purposes as a court of full jurisdiction (*Le Compte v Belgium* (1982) 4 EHRR 1, *Albert v* C *Belgium* (1983) 5 EHRR 533, *Chow Shun Yung v Wei Pih* (2003) 6 HKCFAR 299, *Tse Wai Chun v Solicitors Disciplinary Tribunal* [2002] 3 HKLRD 712, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, *Runa Begum v Tower Hamlets London Borough Council* [2003] D 2 AC 430, *Gulmez v Turkey* (16330/02) ECHR 20 May 2008, *R (Wright) v Secretary of State for Health* [2009] 1 AC 739 applied). (See paras.109–133.)

(4) Regulation 9(11) and 9(12), which imposed a blanket restriction on professional legal representation in police disciplinary E proceedings, so preventing a tribunal from complying with its duty of fairness, were systemically incompatible with art.10 and so null and void. As a result, while there was no absolute right to legal representation, the tribunal had a discretion to permit such representation where fairness so required (*Stock Exchange of Hong* F *Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234 applied). (See paras.135–142, 168–169.)

(5) Here, accordingly, the tribunal's omission to consider whether X should be allowed legal representation in itself deprived X of a fair hearing. While it was not necessary to examine whether G X should have been allowed legal representation, the factors substantially favoured doing so: the charge and the potential penalty being "normally terminatory" were very serious; the true construction of PGO 6-01(8) gave rise to a point of law; and the facts raised questions as to X's capacity to represent himself. H (See paras.143–147.)

(6) On the true construction of PGO 6-01(8), the three elements of the offence were causally linked and occurred in a sequence: the serious pecuniary embarrassment "stems from" financial imprudence and in turn "leads to" the impairment of operational I efficiency. The third element did not follow automatically, but required the Commissioner to prove impairment of X's operational efficiency as a separate element of the offence and matter of fact, which flowed directly from his serious pecuniary embarrassment (*Ng Kam Chuen v Commissioner of Police* (unrep., CACV 241/1997, J [1998] HKLRD (Yrbk) 25) not followed; *Leung Fuk Wah v Commissioner of Police* [2002] 3 HKLRD 653, *陳庚秋訴香港警務處*

處長 (unrep., HCMP 2824/2004, [2005] CHKEC 5) distinguished). (See paras.148–166.)

(7) (*Per* Bokhary PJ, Lord Woolf NPJ agreeing) As a bar to legal representation, reg.9(11) and 9(12) was first repealed by s.3 of the Hong Kong Bill of Rights Ordinance (Cap.383), which repealed all pre-existing legislation that was inconsistent with it, when it came into effect on 8 June 1991. Second, reg.9(11) and 9(12) was inconsistent with art.10 and would be treated as void for unconstitutionality. The fair hearing clause of art.10 guaranteed the fairness of the hearings to which it applied. On the fundamental question, namely whether our constitution permitted legislation that brought about unfairness at disciplinary proceedings, our constitution did not permit that. Disciplinary proceedings — whether in respect of professions, disciplined services or occupations — were determinations of rights and obligations in suits at law under art.10. This did not mean that persons could simply insist on being permitted to be legally represented. Legal representation at defaulter hearings was now a matter of discretion. Whether a defaulter should be permitted to be legally represented depended on whether fairness so required in all the circumstances. This would primarily be for the tribunal to assess, and no court would disturb such assessment except for plainly compelling reasons (*Eskelinen v Finland* (2007) 45 EHRR 43 applied; *陳庚秋訴香港警務處處長* (unrep., HCMP 2824/2004, [2005] CHKEC 5) overruled). (See paras.18–25.)

人權 — 接受公正公開審訊的權利 — 第10款適用於權利和義務須予判定的公務員 — 政府如要把某類公務員排除於第10款的保障範圍之外，便先要證明：(a)法律已明確排除對有關人士的保障；及(b)此等排除得到客觀理由支持，該等理由關乎國家的有效運作或某種公共必要性 — 《香港人權法案條例》(第383章) 第8條第10款

行政法 — 警員紀律程序 — 第9(11)及(12)條規例完全禁止違紀警員聘用法律代表，該規定有違接受公正審訊的權利，故屬違憲 — 因此，只要合乎公義，紀律審裁體可酌情准許違紀警員聘用法律代表 — 《警察紀律規例》(第232章，附屬法例A) 第9(11)、(12)條規例

行政法 — 警員紀律程序 — 警員未有謹慎地處理個人財務，違反《警察通例》第6-01(8)條 — 「因嚴重財政困難而令警員的工作效率受到影響」的元素乃屬獨立元素，須另行證明在事實上成立 — 《警察通例》第6-01(8)條 (1999年版)

X本是一名警員。他被法庭判定破產，並被控以一項違紀行為，即不謹慎理財而導致嚴重財政困難 (違反《警察通例》第6-01(8)條 (1999年版))。他被裁定控罪成立，且被命令強迫退休和延付福利。他現上訴至終審法院，辯稱《警察紀律規例》(第232章，附屬法例A) 第9(11)及9(12)條規例下禁止違紀警員聘用法律代表的規定因違反《香港人權法案》第10條而違憲。該第10條規定：「任何人…因其權利義務涉訟須予判定時，

A 應有權受…公正公開審問。」警務處處長(下稱「處長」)回應指第10條與紀律部隊內部聆訊互不相容，因為內部程序應當迅速進行，形式上的規限應減到最低。

裁決——上訴得直(判詞由常任法官李義作出)：

B (1) 就第10條在何等情況下適用而言，「因其權利義務涉訟須予判定」一詞產生了一定的不明確性，而這方面的法理顯然仍在發展當中。縱然如此，香港將採用*Eskelinen*一案的做法，而第10條適用於權利和義務須予判定的公務員。如要把某類公務員排除於第10條的保障範圍之外，便先要提出有力的理據；就此而言，政府必須證
C 明：(a)法律已明確排除對有關人士的保障；及(b)此等排除得到客觀理由支持，該等理由關乎國家的有效運作或某種公共必要性。最後，由於第10條的適用性須取決於個別人士的民事權利和義務是否須予判定，該條文有可能只適用於部份(而非所有)經由某個行政當局或審裁體處理的事宜(引用*Eskelinen v Finland* (2007) 45 EHRR
D 43；*Lombardo v Italy* (1992) 21 EHRR 188，*Pellegrin v France* (2001) 31 EHRR 26予以考慮)。(見第67、80至91段)

(2) 在本案中，首先，第10條顯然適用於紀律程序。X繼續受僱的民事權利須予判定，而涉案紀律程序對他的生計和退休福利帶來直接和相當嚴重的衝擊。第二，雖然第9(11)及(12)條規例明文禁止違紀警
E 員聘用法律代表，但處長未能提出充分的客觀理由以支持把X排除於第10條的保障範圍之外。警察紀律審裁體的規定並不支持在不顧公義下完全禁止違紀警員聘用法律代表。容許紀律審裁體在合乎公義下酌情准許違紀警員聘用法律代表，並不會損害警隊的有效運作(引用*Ringeisen v Austria (No 1)* (1971) 1 EHRR 455，*R (Wright) v*
F *Secretary of State for Health* [2009] 2 WLR 267，*Lombardo v Italy* (1992) 21 EHRR 188，*Pellegrin v France* (2001) 31 EHRR 26，*Campbell v United Kingdom* (1985) 7 EHRR 165，*Stock Exchange of Hong Kong v New World Development Co Ltd* (2006) 9 HKCFAR 234，*Eskelinen v Finland* (2007) 45 EHRR 43；在下述案例裁定第10條不適用於警員
G 紀律程序的範疇內，推翻*Fraser v Mudge* [1976] 1 WLR，*Maynard v Osmond* [1977] 1 WB 240，*陳庚秋訴香港警務處處長* (unrep., HCMP 2824/2004，[2005] CHKEC 5))。(見第93至106段)

(3) 處長曾辯稱，實施第10條將摧毀整個行政架構或使之面目全非。就此而言，只要要求獨立持平的審裁體公開作出裁決，處長的論
H 點便無法成立。第10條並不要求在審裁體席前的每一個階段向有關人士提供每一方面的保障。一個實施第10條的方法是把某人權利和義務的判定視為一整個過程，其起始點是一個受到「具有全面司法管轄權的法庭」監控的行政程序。「具有全面司法管轄權的法庭」至少可以：(a)提供第10條所賦予但在有關程序中缺少的保障，
I 例如獨立性或公開性；或(b)行使監管性司法管轄權，以糾正或撤去不合規之處。在香港，就大部份目的而言，在免受法例干預下行使司法覆核管轄權的法庭將很可能合資格成為具有全面司法管轄權的法庭(引用*Le Compte v Belgium* (1981) 4 EHRR 1，*Albert v Belgium* (1983) 5 EHRR 533，*Chow Shun Yung v Wei Pih* (2003)
J 6 HKCFAR 299，*Tse Wai Chun v Solicitors Disciplinary Tribunal* [2002] 3 HKLRD 712，*R (Alconbury Developments Ltd) v Secretary*

of State for the Environment [2003] 2 AC 295，*Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430，*Gulmez v Turkey* (16330/02) ECHR 20 May 2008，*R (Wright) v Secretary of State for Health* [2009] 2 WLR 267）。（見第109至133段）

(4) 第9(11)及9(12)條規例在法律上無效，因為它們全盤限制警員紀律程序中的專業法律代表，令審裁體無法履行公平行事的職責，故此系統性地與第10條互不相容。結果是，雖然違紀警員不享有絕對權利聘用法律代表，但假如合乎公義，審裁體可酌情准許違紀警員聘用法律代表（引用 *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234）。（見第135至142、168至169段）

(5) 據此，在本案中，審裁體忽略考慮X應否獲准聘用法律代表代為應訊，本身已令X無法接受公平審訊。雖然本院毋須探究X應否獲准聘用法律代表代為應訊，但有關因素普遍支持X：涉案控罪以及相關懲罰（「通常是終止聘用」）均非常嚴重；《警察通例》第6-01(8)條的釋義牽涉法律論點；而案情令人懷疑X是否有能力代表自己應訊。（見第143至147段）

(6) 按照《警察通例》第6-01(8)條的正確解釋，涉案控罪的三個元素既有因果關係，也順序出現：嚴重財政困難「源於」不謹慎理財，並「導致」工作效率受到影響。第三個元素並不是自動產生；它是一個獨立的元素，而處長須證明X的工作效率事實上因他的嚴重財政困難而直接受到影響（不依循 *Ng Kam Chuen v Commissioner of Police* (unrep., CACV 241/1997，[1998] HKLRD (Yrbk) 25）；*Leung Fuk Wah v Commissioner of Police* [2002] 3 HKLRD 653，*陳庚秋訴香港警務處處長* (unrep., HCMP 2824/2004，[2005] CHKEC 5）予以區別）。（見第148至166段）

(7) （判詞由常任法官包致金作出，其內容得到非常任法官伍爾夫勳爵贊同）第9(11)及9(12)條規例禁止違紀警員聘用法律代表。首先，該等規例被《香港人權法案條例》（第383章）第3條廢除，該條文於1991年6月8日生效時，廢除了所有與之不一致的先前法例。第二，第9(11)及9(12)條規例與第10條不相一致，須視作因違憲而無效。第10條保證其所適用的聆訊得以公平地進行。對於「我們的憲法是否容納任何令紀律程序變得不公平的法例？」這一根本問題，答案是否定的。不論是關乎專業、紀律部隊還是任何行業，紀律程序均屬於第10條所指的「因[某人]權利義務涉訟須予判定」。這並不表示有關人士乾脆可堅持獲准聘用法律代表代為應訊。違紀人士在聆訊中可否聘用法律代表，現今已是一個須運用酌情權決定的問題。違紀人士應否獲准聘用法律代表，須取決於此舉在所有相關情況下是否合乎公義。這基本上是由有關審裁體評核，而除非有顯然地令人信服的理由，否則法院不會貿然干預審裁體的評核（引用 *Eskelinen v Finland* (2007) 45 EHRR 43；推翻 *陳庚秋訴香港警務處處長* (unrep., HCMP 2824/2004，[2005] CHKEC 5)）。（見第18至25段）

Mr Johannes Chan SC and Ms Margaret Ng, instructed by Lau Pau & Co and assigned by the Director of Legal Aid, for the appellant.

Mr Anderson Chow SC, instructed by the Department of Justice and Mr Louie Wong, Department of Justice, for the respondent.

Legislation mentioned in the judgment

Basic Law of the Hong Kong Special Administrative Region arts.35, 39

Hong Kong Bill of Rights Ordinance (Cap.383) ss.3, 6(1), 7, s.8 art.10

Hong Kong Letters Patent 1917 to 1995 art.VII(3)

International Covenant on Civil and Political Rights art.14(1)

Police (Conduct) Regulations 1999 [England] regs.17, 21

Police (Conduct) Regulations 2004 [England] regs.18(1)(b), 23(3), 24(3)

Police (Discipline) Regulations (Cap.232A, Sub.Leg.) regs.2, 3(2)(e), 9, 9(11), 9(12), 13, 28

Police Force Ordinance (Cap.232) ss.30, 45, 46

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Bakker v Austria (2004) 39 EHRR 26

Benthem v The Netherlands (1986) 8 EHRR 1

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Campbell v United Kingdom (1985) 7 EHRR 165

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Cvetkovic v Serbia (17271/04) ECHR 10 June 2008

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Engel v The Netherlands (1979) 1 EHRR 647

Eskelinen v Finland (2007) 45 EHRR 43

Ezeh v United Kingdom (2004) 39 EHRR 1

Feldbrugge v The Netherlands (1986) 8 EHRR 425

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Maynard v Osmond [1977] QB 240, [1976] 3 WLR 711, [1977] 1 All ER 64

McKenzie v McKenzie [1971] P 33, [1970] 3 WLR 472, [1970] 3 All ER 1034
Mennitto v Italy (2002) 34 EHRR 48
Mitin v Ukraine (38724/02) ECHR 14 February 2008
Ng Ka Ling v Director of Immigration (1999) 2 HKCFAR 4, [1999] 1 HKLRD 315, [1999] 1 HKC 291
Ng Kam Chuen v Commissioner of Police (unrep., CACV 241/1997, [1998] HKLRD (Yrbk) 25)
Ng Kam Chuen v Secretary for Justice [1999] 2 HKC 291
Pellegrin v France (2001) 31 EHRR 26
Perterer v Austria (CCPR/C/81/D/1015/2001); 12 IHRR 80 (2005)
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, [2001] 2 WLR 1389, [2001] 2 All ER 929
R (Wright) v Secretary of State for Health [2009] 1 AC 739, [2009] 2 WLR 267, [2009] 2 All ER 129
R v Man Wai Keung (No 2) [1992] 2 HKCLR 207
R v Secretary of State for the Home Department, ex p Tarrant [1985] QB 251, [1984] 2 WLR 613, [1984] 1 All ER 799
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Bagg's Case, Re (1615) 11 Co Rep 93
Bandaranayake v Sri Lanka (CCPR/C/93/D/1376/2005)
Casanovas v France (CCPR/C/51/D/441/1990)

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Fong Hin Wah, Re [1985] HKLR 332
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B Grieves v United Kingdom (2004) 39 EHRR 2
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G QB 198, [1993] 3 WLR 1125, [1993] 4 All ER 539
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H Solicitor (302/02) v Law Society of Hong Kong [2006] 2 HKC 40
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何建民訴香港警務處陳健雄警司 (unrep., CACV 145/2005)
陳國雄訴香港警務處處長 (unrep., HCAL 86/2003)

Other materials mentioned in the judgment

J Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, art.6(1)

Police General Order, 6-01(8)
United Nations General Assembly Resolution 2200 A (XXI), 16 December 1966
United Nations General Comment No 32 (CCPR/C/GC/32), 15 IHRR 1 (2008)

Li CJ

1. I agree with the judgment of Mr Justice Ribeiro PJ.

Bokhary PJ

2. There can be circumstances in which a hearing would be unfair if legal representation (by which I mean representation by a legal practitioner) is not permitted. The natural expectation is that if and when such unfairness occurs, the courts would provide a remedy to redress the consequences of that unfairness. But what if there appears to be a statutory provision by which legal representation is barred at hearings of the type concerned?

Provision barring legal representation

3. The validity of a statutory bar to legal representation is under challenge in the present case. It is contained in subsidiary legislation, being the one to be found in reg.9(11) and (12) of the Police (Discipline) Regulations (Cap.232A, Sub.Leg.) made by the Chief Executive in Council under the regulation-making power conferred by s.45 of the Police Force Ordinance (Cap.232). I will refer to it as "the reg.9(11) and (12) bar". Regulation 9 lays down the procedure to be followed when a defaulter (ie a police officer charged with a disciplinary offence) has pleaded not guilty. Paragraphs (11) and (12) of reg.9 read:

> (11) A defaulter may be represented by:
>
> (a) an inspector or other junior police officer of his choice; or
> (b) any other police officer of his choice who is qualified as a barrister or solicitor,
>
> who may conduct the defence on his behalf.
>
> (12) Subject to para.(11), no barrister or solicitor may appear on behalf of the defaulter.

Material facts

4. Shortly stated, the material facts of the present case are as follows. The appellant, a police constable, engaged in stock market dealings. He lost heavily, found himself deeply in debt, petitioned for his own bankruptcy and was adjudicated bankrupt in September 2000.

A Consequently he was charged in December that year with a disciplinary offence. It was the offence of contravening Police General Order 6-01(8) (PGO 6-01(8)) which at that time read:

> A police officer shall be prudent in his financial affairs. Serious
B pecuniary embarrassment stemming from financial imprudence which leads to the impairment of an officer's operational efficiency will result in disciplinary action.

PGO 6-01(8) is one of the provisions of the Police General Orders
C made by the Commissioner of Police under the general order-making power conferred on him by s.46 of the Police Force Ordinance.

Conviction at disciplinary hearing

D 5. There were two disciplinary hearings. The first hearing ended in the appellant being convicted on 2 March 2001. But that conviction was set aside by the Force Discipline Officer for procedural irregularity. The police officer who had represented the appellant at the first hearing was not available at the second hearing, which commenced
E on 14 December 2001. That police officer was replaced by another defaulter's representative. But the appellant lost confidence in that replacement. And after being told that he could not engage a legal practitioner to defend him, the appellant appeared in person at the second hearing.

F 6. On 27 March 2002 the appellant was again convicted. The penalty imposed on him was compulsory retirement with deferred benefits. Originally the penalty was suspended for 12 months. But it was subsequently varied so as to come into earlier effect. Consequently the appellant was compulsorily retired from the Police
G Force on 23 October 2002 with deferred benefits.

Judicial review fails in the courts below

7. On 21 January 2003 the appellant took out an application for
H leave to bring judicial review proceedings for the quashing of the decisions by which he was convicted and compulsorily retired. He obtained leave to do so on certain grounds. Then he sought leave to do so on additional grounds as well. The proceedings for which leave had been granted and the application to apply on additional grounds
I as well were heard together. Both were dismissed with costs *nisi* by Chung J on 23 August 2005. Judgment was not given until that date even though the hearing had ended on 11 November 2004. That lack of expedition is to be contrasted with the expedition displayed when Tang V-P delivered the judgment of the Court of Appeal (consisting of
J himself, Yeung JA and Yam J) on 8 November 2007 after hearing the appellant's appeal to them on the 2nd of that month. They dismissed

that appeal with costs *nisi*. By the leave which they granted him, the appellant now appeals to us.

Appellant's argument

8. The argument presented by Prof Johannes Chan SC for the appellant involves questions as to (i) the validity of the statutory bar against legal representation with which the appellant was confronted and (ii) the elements of the offence of which he was convicted. Shortly stated, the argument runs thus. First, the reg.9(11) and (12) bar is invalid. Secondly, the impairment of operational efficiency is an element of the offence under PGO 6-01(8). Thirdly, legal representation should have been permitted. Fourthly and finally, if the appellant had been legally represented, he might have been acquitted by reason of the evidence as a whole being insufficient to prove that his operational efficiency had been impaired within the meaning of PGO 6-01(8). So there are four parts, so to speak, to the argument.

Vires

9. As I have pointed out, the first part of the argument consists of a challenge to the validity of the reg.9(11) and (12) bar. At first instance and in the appeal to the Court of Appeal, that challenge was made on two bases. These were that the reg.9(11) and (12) bar is (i) *ultra vires* as being beyond the regulation-making power conferred by s.45 of the Police Force Ordinance and (ii) inconsistent with art.10 of the Bill of Rights (s.8, Cap.383). Not having pursued the *ultra vires* argument when applying for and obtaining the Court of Appeal's leave to appeal to us, the appellant did not include that argument in his printed case. As set out in his printed case, the challenge to the validity of the reg.9(11) and (12) bar rests solely on his submission that it is inconsistent with art.10 of the Bill of Rights. Nevertheless we have heard oral argument on the question of *vires*.

10. The regulation-making power concerned, namely the one conferred by s.45 of the Police Force Ordinance, is in extremely wide terms. It includes "power to make regulations providing for appropriate tribunals to inquire into disciplinary offences by [police officers below the rank of superintendent] and generally for the procedure in cases where [such an officer] is alleged to have committed any of the disciplinary offences specified in the regulations". Regulation 9 has always barred legal representation in defaulter proceedings. That bar was introduced in 1977 when it was provided by reg.9(11) that no barrister or solicitor may appear on behalf of a defaulter. In 1982 it was provided (or perhaps spelt out for the avoidance of doubt) that a defaulter may be represented by a police officer even if that police officer happens to be qualified as a barrister or solicitor. That is not

A equivalent to being represented by a legal practitioner. So it is not legal representation.

11. On the question of *vires*, Mr Anderson Chow SC for the respondent submits as follows. The *vires* of subsidiary legislation is to be determined by reference to the law as it stood at the time B when the subsidiary legislation in question was made. And as the law stood in 1977 when it was first provided by reg.9 that no barrister or solicitor may appear on behalf of a defaulter, so providing by subsidiary legislation was permitted. That appears by the decisions of the English Court of Appeal in *Fraser v Mudge* [1975] 1 WLR 1132 C and *Maynard v Osmond* [1977] QB 240.

12. As to the common law's exposure to legislative modification in the absence of any entrenched guarantee against such modification, I do not think that the correctness of those decisions was doubted in Hong Kong in 1977, in 1982 or indeed at any time thereafter. Until the D advent of the Bill of Rights in 1991 these things were seen in much the same way as they were seen in 1977. It is therefore necessary to turn to the Bill of Rights.

E ## *Article 10 of the Bill of Rights*

13. Article 10 of the Bill of Rights reads:

> All persons shall be equal before the courts and tribunals. In the F determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) G or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public H except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

14. At first instance, the appellant had also relied on art.35 of our I constitution the Basic Law of the Hong Kong Special Administrative Region, which article reads:

> Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their J lawful rights and interests or for representation in the courts, and to judicial remedies.

> Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.

But when this case reached the Court of Appeal, the appellant abandoned his reliance on art.35 because we had by then held in *Stock Exchange of Hong Kong v New World Development Co Ltd* (2006) 9 HKCFAR 234 that the reference to "the courts" in art.35 is a reference to the judiciary and nothing else.

Bill of Rights and the ICCPR

15. As is well established, the Bill of Rights is the embodiment of the application to Hong Kong of the International Covenant on Civil and Political Rights (the ICCPR) from which it is taken almost verbatim. Consequently the Bill of Rights is — and has always been — entrenched. Today it is entrenched by art.39 of the Basic Law which provides, relevantly to present purposes, that the ICCPR as applied to Hong Kong shall remain in force and that the rights and freedoms thereunder may not be restricted. The Bill of Rights was introduced by the Hong Kong Bill of Rights Ordinance (Cap.383), which came into effect on 8 June 1991. By s.3 of that Ordinance, all pre-existing legislation inconsistent with the Bill of Rights was expressly repealed. The legislation thus repealed was of course not revived upon s.3 ceasing to exist as from 1 July 1997. What about subsequent legislation? In pre-handover times (when Hong Kong's constitutional instruments were the Letters Patent and the Royal Instructions) the entrenchment of the Bill of Rights was by art.VII(3) of the Letters Patent. That article was added to the Letters Patent simultaneously with the coming into effect of the Bill of Rights. It prohibited the Legislative Council from making any law that restricts the rights and freedoms enjoyed in Hong Kong in a manner inconsistent with the ICCPR as applied to Hong Kong. That arrangement lasted until 1 July 1997 when the Basic Law came into effect, and art.39 thereof took over the entrenchment of the Bill of Rights.

16. It was said in the course of the argument before us and has often been said before — no doubt truly — that the text of the ICCPR involves a considerable measure of compromise between different systems. The article of the ICCPR from which we got art.10 of the Bill of Rights is no exception to that and is, indeed, a good example of it. But then there is the question of why, despite the differences between their systems, so many nations have set out to achieve, succeeded in achieving and subscribed to the ICCPR. There must have been a powerful idea at work. Perhaps it was the idea that rights and freedoms are shared things, so that unless everyone has them in due measure, nobody's position would be what it should. True it is that some people would, through the possession of raw power, still have privileges. But

such privileges would be selfish and ultimately insecure. The ICCPR employs a largeness of language by which fundamental values are appropriately moulded into and presented as enforceable rights and freedoms. Neither its content nor its context suggests anything narrow. Certainly I would not attribute a narrow meaning to any of the rights and freedoms contained in the ICCPR as applied to Hong Kong through the Bill of Rights entrenched by the Basic Law. They are to be approached generously.

17. If there was ever any doubt as to that approach, it was laid to rest by the famous statement of the Chief Justice for the Court in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at p.29A that "the courts should give a generous interpretation" to the rights and freedoms contained in the fundamental rights and freedoms chapter of the Basic Law in order to give persons in Hong Kong "the full measure of fundamental rights and freedoms so guaranteed". The rights under art.10 of the Bill of Rights are among those rights, being guaranteed by art.39 of the Basic Law, which article is in that chapter.

Article 10 applies to disciplinary proceedings

18. Article 10 of the Bill of Rights is taken word for word from art.14(1) of the ICCPR and closely resembles art.6(1) of the European Convention on Human Rights. We have been shown what the European Court of Human Rights has said about art.6(1) of that Convention and the Human Rights Committee has said about art.14(1) of the ICCPR. Looking in particular at *Eskelinen v Finland* (2007) 45 EHRR 43 and General Comment No 32 (90th Session) (CCPR/C/GC/32), it would appear that the European Court of Human Rights has arrived at the view that art.6(1) has application to proceedings such as disciplinary proceedings while the Human Rights Committee has not — or at least has not yet — arrived at such a view in regard to art.14(1).

19. Mr Chow contends that if it were held that art.10 applies to disciplinary proceedings, the consequences would be (i) that such proceedings must be heard in public and (ii) that the result of such proceedings must be made public subject only to the exceptions spelt out in art.10. Quite simply, I do not think that either of those consequences would ensue. No provision, especially not one that guarantees a fundamental right or freedom, should be interpreted so that its components trip each other up and defeat its purpose. Every provision, especially one of that nature, should be interpreted so that its components operate in harmony to achieve its purpose. Article 10 of the Bill of Rights is entrenched for the purpose of guaranteeing the protection of the individual in an important context. And it is to be interpreted and applied to further that purpose. Fairness at disciplinary hearings is an aspect of that purpose. So is sparing the individual from harmful publicity unless, exceptionally, publicity is

in the interest of the individual or is so much in the public interest as to override any individual interest in privacy. There are various types of art.10 suits at law. Disciplinary proceedings are of a sort in which, while fairness is always needed, privacy is usually appropriate. If art.10 applies to disciplinary proceedings, it would mandate fairness at disciplinary hearings but would not mandate publicity at such hearings or for their results.

20. As to the competence, independence and impartiality required by art.10, there can be no objection in principle to disciplinary proceedings against police officers being heard by tribunals consisting of police officers without any non-police element. Whether any objection can be taken to any given adjudicating police officer in any given case depends on the circumstances.

21. It should be mentioned that an appeal to the courts where such an appeal is available, or judicial review by the courts where no such appeal is available, can supply any essential element such as independence or publicity that might otherwise be missing from a tribunal's arrangements.

22. True it is that legal representation is not permitted at hearings before the Labour Tribunal or the Small Claims Tribunal. But there are in this connection crucial differences between those two tribunals on the one hand and disciplinary tribunals on the other. Neither the Labour Tribunal nor the Small Claims Tribunal award punishment. An element of mediation features prominently in the process of the Labour Tribunal and, in practice, to some extent in the process of the Small Claims Tribunal too. Hearings before each of those two tribunals have an inquisitorial element. Each of them is empowered to transfer claims to a court, whereupon legal representation becomes permissible. And appeals from each of them lie to the courts.

23. The fair hearing clause of art.10 of the Bill of Rights guarantees the fairness of the hearings to which it applies. Whether it applies to disciplinary proceedings depends on whether such proceedings are determinations of rights and obligations in suits at law within its meaning. If they are, then the fairness of such proceedings is secure. Let it be remembered that fairness does not always carry a right to be legally represented. It only carries a right to be legally represented when denying that right would be unfair. The rights typically involved in disciplinary proceedings are important ones extending to the right to remain in a profession, service or occupation.

24. Having regard to their context, the words "determination of ... rights and obligations in a suit at law" call for a generous interpretation. The fundamental question is whether our constitution permits legislation that brings about unfairness at disciplinary proceedings. My answer is that our constitution does not permit that. In my view, disciplinary proceedings — whether in respect of professions, disciplined services or occupations — are determinations of rights and obligations in suits at law within the meaning of art.10.

So art.10 applies to disciplinary proceedings. In fairness to the Court of Appeal in the present case, it should be mentioned that they felt bound by their own decision in *陳庚秋訴香港警務處處長* (unrep., HCMP 2824/2004, [2005] CHKEC 5) that art.10 does not apply to the hearing of defaulter proceedings. Their judgment in the present case was given before we held in *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117 that the Court of Appeal may depart from a previous decision of their own if they are satisfied that it is plainly wrong.

Bar to legal representation has gone. Now a matter of discretion

25. Procedural fairness works because it is flexible. Whether it calls for legal representation in any given instance depends on the circumstances. As a bar to legal representation at defaulter hearings no matter what the circumstance, the reg.9(11) and (12) bar was inconsistent with the fair hearing clause of art.10 of the Bill of Rights. Accordingly the reg.9(11) and (12) bar was repealed by s.3 of the Hong Kong Bill of Rights Ordinance for such inconsistency or, if one does not regard it as having been repealed, is to be treated as void for unconstitutionality by reason of such inconsistency. Subsidiary legislation that was *intra vires* when made may be impliedly revoked by subsequent legislation inconsistent with it. That was the situation in *A-G v Chan Kei Lung* [1977] HKLR 312 decided by the Court of Appeal. The present situation goes beyond implied revocation, although even that would be enough. Legal representation at defaulter hearings is now a matter of discretion. Whether a defaulter should be permitted to be legally represented depends on whether fairness so requires in all the circumstances. That is primarily for the disciplinary tribunal to assess. And no court would disturb such an assessment except for plainly compelling reasons.

26. As I see it, the legal position in the present situation bears comparison with the one under the decision of the Court of Appeal in *R v Man Wai Keung (No 2)* [1992] 2 HKCLR 207. In that case a constitutional challenge was brought against a provision in the Criminal Procedure Ordinance (Cap.221), which barred the awarding of costs to a certain category of appellants whose convictions have been quashed, namely those who have been ordered to be retried. That bar was struck down for inconsistency with the equality clause of art.10 of the Bill of Rights. So the absence of finality due to a retrial having been ordered ceased to be a bar to an award of costs. And it became instead a discretionary factor to be taken into account when deciding whether to withhold costs from an appellant even though his conviction had been quashed. Similarly the repeal of the reg.9(11) and (12) bar does not mean that persons facing disciplinary charges can simply insist on being permitted to be legally represented. What it means is that the disciplinary tribunal has a discretion to permit

such a person to be legally represented, and should do so if refusing such permission would be unfair.

27. There are some disciplinary tribunals before which legal representation is quite common. Legal practitioners understand, as they should, that their duty is not only to their clients but also to those tribunals. Such are the traditions and responsibilities of professional advocates. Their role is a constitutional one, always to be approached as such and never to be abused. Most of them certainly need no reminder of that. But just in case some of them might sometimes need such a reminder, I have seen fit respectfully to issue one, meaning of course no offence thereby.

Assessment primarily for the tribunal to make

28. It is always to be remembered that whether fairness requires that legal representation be permitted at a disciplinary hearing is primarily for the disciplinary tribunal to assess, and that no court would disturb such an assessment except for plainly compelling reasons. It may transpire that defaulter proceedings in which fairness requires that the defaulter be permitted to be legally represented will not be numerous. Anyway it depends on the circumstances of each case.

Impairment of operational efficiency is an element of the offence

29. Being of the view that the appellant's attack against the reg.9(11) and (12) bar — and therefore the first part of his argument — succeeds, I turn to the second part of his argument. It is that the impairment of operational efficiency is an element of the offence under PGO 6-01(8). Since PGO 6-01(8) is a penal provision, any ambiguity in it would have to be resolved in favour of a person charged under it. As it happens however, the appellant does not even need to rely on that canon of construction. PGO 6-01(8) says in plain terms that what will result in disciplinary action is "[s]erious pecuniary embarrassment stemming from financial imprudence which leads to the impairment of an officer's operational efficiency". If the embarrassment does not lead to such impairment, then it is plainly not what PGO 6-01(8) says will result in disciplinary action. In my view, the impairment of operational efficiency is an element of the disciplinary offence under PGO 6-01(8). It should, in fairness to the Court of Appeal in the present case, be mentioned that they were confronted by previous decisions of theirs, including *Leung Fuk Wah v Commissioner of Police* [2002] 3 HKLRD 653, to the effect that, as Tang V-P put it in the present case, "serious pecuniary embarrassment would *necessarily* lead to impairment of operational efficiency". (Emphasis supplied.)

30. Since the impairment of operational efficiency is an element of the offence, the burden of proving it is on those who bring a charge. As to the standard of proof, nothing need be added to what we

said in the *Solicitor (24/07)* case. In so far as Stone J held in *Ng Kam Chuen v Secretary for Justice* [1999] 2 HKC 291 that the impairment of operational efficiency is an element of the disciplinary offence under PGO 6-01(8), he was right. But I am unable to accept his view (expressed at p.297A–D) that "upon the demonstration of serious pecuniary embarrassment … the evidential burden then shifts to the accused officer to establish that his efficiency as an officer has *not* been impaired" or, alternatively, that there is a "rebuttable presumption" of such impairment. (Emphasis in the original.) In my view, that is not so. The position is straightforward. Drawing inferences is legitimate. But the position is not complicated by any presumption or the shifting of any onus, evidential or otherwise.

Legal representation should have been permitted

31. Having held in favour of the second part of the appellant's argument, I turn to the third part of his argument. It is that he should have been permitted to be legally represented at the disciplinary hearing. Since they regarded the reg.9(11) and (12) bar as valid, neither the disciplinary tribunal nor either of the courts below made an assessment of whether, in the circumstances of the present case, fairness required that the appellant be permitted to be legally represented at the disciplinary tribunal. Such an assessment has to be made here and now.

32. In granting the appellant leave to appeal to us, the Court of Appeal expressly and rightly declined to treat the appellant's points of law as academic. I am of the view that in all the circumstances fairness required that the appellant be permitted to be legally represented at the disciplinary hearing. Accordingly, I am of the view that the third part of the appellant's argument succeeds.

Might have been acquitted if legally represented

33. What remains is the fourth and final part of the appellant's argument. It is that if he had been legally represented, he might have been acquitted by reason of the evidence as a whole being insufficient to prove that his operational efficiency had been impaired within the meaning of PGO 6-01(8).

34. In this connection, too, it is pertinent to note that in granting the appellant leave to appeal to us, the Court of Appeal expressly and rightly declined to treat the appellant's points of law as academic. Suppose the appellant had been legally represented at the disciplinary hearing. Might he then have been acquitted by reason of the evidence as a whole being insufficient to prove that his operational efficiency had been impaired within the meaning of PGO 6-01(8)? The question of impairment of operational efficiency is of course pre-eminently to be resolved by an assessment to be made by the disciplinary tribunal.

A court would normally be very slow to disturb such an assessment since the subject-matter is by definition an operational matter. But in the present case there is a real possibility that the state of the evidence would have been crucially different if the appellant's defence at the disciplinary hearing had been in the hands of a legal practitioner. In other words, the difference might well have been the difference between an acquittal and a conviction. Accordingly I am of the view that the fourth and final part of the appellant's argument — and therefore the whole of his argument — succeeds.

Equality

35. As Prof Chan has observed, there is nothing in reg.9 or elsewhere to prevent the case against a defaulter being presented by a Government lawyer or indeed a lawyer in private practice. So the bar to legal representation operates only against defaulters. And that, Prof Chan said, means that the reg.9(11) and (12) bar is also inconsistent with the equality clause of art.10 of the Bill of Rights even though the invariable practice appears to be for the case against a defaulter to be presented by a police officer. This point as to an inequality of arms does not appear to have been canvassed below. And there is no need to pronounce on it since the challenge to the validity of the reg.9(11) and (12) bar succeeds without it.

Result

36. For the foregoing reasons, I would allow the appeal and quash the decisions by which the appellant was convicted and compulsorily retired. It is accepted on the appellant's behalf that the quashing of those decisions does not preclude a fresh — and fair — hearing before the disciplinary tribunal. Whether that or some other course offers the best way forward hereafter is not a question before the Court. I would make no order as to costs as between the parties but order that the appellant's costs be taxed under the Legal Aid Regulations (Cap.91A, Sub.Leg.). Finally, I wish to express my thanks to both legal teams for the very helpful arguments which they have prepared and presented.

Chan PJ

37. I agree with the judgment of Mr Justice Ribeiro PJ.

Ribeiro PJ

38. In this appeal, the applicability and operation of art.10 of the Bill of Rights (Article 10) fall to be considered in connection with police disciplinary proceedings. The appellant, a police constable, complains that the exclusion of professional legal representation by the relevant regulations deprived him of a fair hearing. He therefore challenges

A the constitutional validity of that exclusion and the lawfulness of the disciplinary proceedings.

A. The disciplinary proceedings

B

A.1 The conduct of the appellant

39. The appellant joined the Force in 1988 and had a commendable record of service, consistently rated as "very good". However, in the six-month period between November 1999 and May 2000, he engaged C in speculation on the stock market and incurred significant losses. He had a monthly salary of $22,210 but was placing buy and sell orders in five-figure (and occasionally in low six-figure) amounts. Such trading was initially financed from his own savings, but he went on to incur debts by drawing on seven credit cards and taking personal loans D from five finance companies. He bought shares for the total sum of $1,827,508.49 and sold them for $1,340,375.69 and so lost $487,127.80 on his trades. When he realised that his indebtedness had become unmanageable, he made a full report of his situation to his superior officers, disclosing an indebtedness of $621,404. On 26 September E 2000, he was declared bankrupt upon his own petition.

A.2 The policy of the Police Force

40. The appellant is, unfortunately, not the only police officer to F find himself in such a predicament. Policies and procedures have been established for dealing with "officers with unmanageable debts", abbreviated in police terminology to "OUDs". It is recognized that an OUD may be compromised or susceptible to corrupt overtures. And in a number of cases, the stresses of such debts have tragically driven G officers to suicide. These considerations have resulted in detailed administrative instructions being issued from time to time[1] aimed at preventing officers from incurring unmanageable debts, at identifying and managing those who have done so and at dealing with the disciplinary aspects of such conduct. They provide guidance as to the H appropriate deployment of OUDs so as to avoid, for instance, postings where public money may be handled or where greater opportunities may exist for corruption. Consideration also has to be given as to whether an OUD should be allowed to carry firearms.

41. The administrative instructions state that officers have the I responsibility not to incur expenses they are unable to afford, including expenses in relation to "speculation in the stock, financial and property market". While a sympathetic view is taken of officers who become

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[1] The Administrative Instructions on the Management of Indebtedness distributed under cover of the Commissioner's Memo dated 17 April 2000 were those in force at the relevant time.

indebted due to unforeseen or compassionate circumstances, there is "no sympathy for officers who … have had unmanageable debts due to financial imprudence, resulting in the impairment of the officers' operational efficiency".

A.3 The disciplinary provisions

42. The Police Force is of course a disciplined force. By s.30 of the Police Force Ordinance,[2] every police officer is required to obey all lawful orders of his superior officers and to obey and conform to police regulations and orders made under the Ordinance.

43. By s.45, powers are given to the Chief Executive in Council to make regulations including those providing for discipline and punishments, for appropriate tribunals to inquire into disciplinary offences and for the procedure to be followed.

44. Section 46 empowers the Commissioner of Police to make such orders (known as "police general orders" or "PGOs") as he thinks expedient to enable him to administer the police force and render it more efficient.

45. The Police (Discipline) Regulations made under s.45 create disciplinary offences including the offence under reg.3(2)(e) of "contravention of police regulations, or any police orders, whether written or verbal". The Regulations lay down detailed rules as to the procedure to be followed at disciplinary hearings and, most importantly for present purposes, by reg.9(11) and 9(12), they provide that:

> (11) A defaulter[3] may be represented by:
>
> (a) an inspector or other junior police officer of his choice; or
> (b) any other police officer of his choice who is qualified as a barrister or solicitor,
>
> who may conduct the defence on his behalf.
>
> (12) Subject to para.(11), no barrister or solicitor may appear on behalf of the defaulter.

Mr Anderson Chow SC, appearing with Mr Louie Wong SGC for the Commissioner, realistically accepts that these regulations represent a total ban on professional legal representation. An officer who has acquired legal qualifications may have many fine qualities but the services which he can provide cannot in general be equated

[2] Cap.232.

[3] Defined by reg.2 as "a police officer charged with a disciplinary offence".

A with professional legal representation. Moreover, legally qualified officers are in any event in very short supply. At present, only one such officer has publicly indicated a readiness to act in the role of representative.

46. The police general order issued in respect of unmanageable
B debts is PGO 6-01(8) which, in the version applicable at the material time, provided:

> A police officer shall be prudent in his financial affairs. Serious pecuniary embarrassment stemming from financial imprudence
C which leads to the impairment of an officer's operational efficiency will result in disciplinary action.

A.4 The disciplinary proceedings

D 47. The charge against the appellant was that, contrary to reg.3(2)(e):

> … on 26 September 2000, in Hong Kong, you did fail to be prudent with your financial affairs by incurring unmanageable debts of about
E HK$620,000 that resulted in serious pecuniary embarrassment as evidenced by the making of a bankruptcy order against you whereby your operational efficiency as a police officer was impaired contrary to PGO 6-01(8).

F 48. In fact, two sets of disciplinary proceedings were held. The first took place in January 2001 before Superintendent Cheng Po Yan sitting as the Adjudicating Officer. The prosecutor was Inspector Yeung Chun Po who called witnesses including three of the appellant's superior officers, namely, Sergeant Yeung Kai Kwong, Inspector Li
G Hon Man and Chief Inspector Wong Koon Ho. Pursuant to reg.9(11), the appellant was represented by Senior Inspector Wong Wai Hung. The appellant was found guilty and on 13 March 2001, he was sentenced to be dismissed. That was the most severe punishment available[4] and would have involved not only termination of the
H appellant's employment but also the loss of his pension rights.

49. However, on 19 August 2001, the appellant was told that it had been decided to set aside his conviction and to have a re-hearing. He was later told that this was because the Force Discipline Officer considered there to have been procedural irregularities or potential
I unfairness at the hearing, but that *prima facie* evidence to support the charge nevertheless existed.

50. The second set of proceedings started in December 2001 and, with various adjournments, ran into March 2002. The Adjudicating

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[4] Under reg.13.

Officer this time was Superintendent Lo Tat Fai. The prosecutor and police witnesses called were the same. However, the Senior Inspector who had represented the appellant was not available and the appellant had difficulty finding someone to represent him. He eventually secured the assistance of Senior Inspector Wong Kwok Ming but, lacking confidence in him, asked him to withdraw at an early stage. On 22 January 2002, he asked the tribunal whether he could employ a solicitor (or an auxiliary officer or a civil servant from another department) to represent him and was told that he could only have a solicitor who was a serving regular officer and that otherwise, the answer was "no". He therefore represented himself at the hearings.

51. On 27 March 2002, the tribunal found the appellant guilty and referred the case to a senior police officer[5] for sentence. He was initially given a sentence of compulsory retirement with deferred benefits, suspended for 12 months.[6] However, this was considered inadequate by the Force Discipline Officer who, on 26 July 2002, increased it to an immediate sentence of compulsory retirement with deferred benefits. This meant that the appellant's employment as a police officer was terminated and, while his accrued pension rights were not lost, his pension could not be drawn until he reaches what would have been the normal age of retirement. The sentence was ratified by the Commissioner on 21 October 2002.

B. The appellant's complaint and the decisions below

52. On 21 January 2003, the appellant lodged what was described at first instance as a "homemade" notice of application for judicial review. After legal aid was obtained and various extensions of time granted, a formal application prepared by counsel was lodged on 5 October 2004. This sought orders of *certiorari* quashing the convictions and sentences and a declaration that reg.9(11) and 9(12), to the extent that they restricted the appellant's choice of representative at the hearing, are unconstitutional and void.

53. The matter came before Chung J who dismissed the application for judicial review.[7] His decision deals with grounds that are no longer relied on and does not address any of the issues that have become material in the present appeal.

54. In the Court of Appeal,[8] Ms Margaret Ng, then appearing as counsel for the appellant (now assisting Mr Johannes Chan SC on the present appeal), advanced the argument which is at the core of this appeal, namely, that in depriving the tribunal of any discretion

[5] Defined by reg.2 to mean "a chief superintendent, assistant commissioner or senior assistant commissioner".

[6] Suspended sentences are dealt with by reg.28.

[7] (unrep., HCAL 7/2003, [2005] HKEC 1324).

[8] [2008] 2 HKLRD 27 Tang V-P, Yeung JA and Yam J.

A to permit legal representation, reg.9(11) and 9(12) prevented the appellant from having a fair hearing in contravention of Article 10. This was rejected by Tang V-P (giving the Court's judgment) on the ground that the Court was bound by the unreported Court of Appeal decision in 陳庚秋訴香港警務處處長 (*Chan Keng Chau v Commissioner*
B *of Police*).[9] In that case, Yeung JA considered the protection afforded to an officer on disciplinary charges sufficient on the basis that judicial review was available and that officers in a disciplined force are better equipped and more suitable than judges for determining whether one of their number has breached discipline. He therefore held that
C Article 10 "does not apply to a police officer facing [a] disciplinary hearing ..."[10]

55. Tang V-P also rejected the argument that reg.9(11) and 9(12) are *ultra vires* s.45 of the Ordinance, noting that at the time when the regulations were made, the exclusion of legal representation
D in disciplinary hearings, especially within a disciplined force, was considered justifiable and would have fallen within relevant rule-making powers, as indicated in *Maynard v Osmond*.[11]

56. The Court of Appeal went on to hold that, in any event, judicial review should be refused since on the construction of PGO
E 6-01(8) adopted in earlier Court of Appeal decisions[12] and on the admitted facts, the appellant's conviction in the present case was inevitable.

57. However, the Court of Appeal granted leave to appeal to this Court.[13] Three questions of great general or public importance were
F identified, namely:

(1) Whether Article 10 is engaged in police disciplinary proceedings;
(2) Whether reg.9(11) and 9(12) are consistent with Article 10;
G and,
(3) Whether it is necessary or permissible to adduce evidence to prove or disprove an "impairment of operational efficiency" as a police officer (in addition to "serious pecuniary financial embarrassment stemming from financial imprudence") in
H establishing a disciplinary offence under PGO 6-01(8).

C. Article 10 and related treaty provisions

58. Article 10 provides:

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[9] (unrep., HCMP 2824/2004) Yeung JA and Tang J.
[10] paras.48–51.
J [11] [1977] 1 QB 240.
[12] *Chan Keng Chau v Commissioner of Police* and *Leung Fuk Wah v Commissioner of Police*.
[13] (unrep., CACV 340/2005, [2008] HKEC 802) Tang V-P, Yeung JA and Yam J.

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

59. Article 10 is in terms identical to art.14(1) of the International Covenant on Civil and Political Rights (ICCPR),[14] which I will refer to simply as "Article 14(1)". It follows that the General Comments and published Communications of the Human Rights Committee (HRC) concerning Article 14(1) give guidance to an understanding of Article 10.

60. Article 39 of the Basic Law gives constitutional force to Article 10, stipulating that the ICCPR's provisions "as applied to Hong Kong" shall remain in force and "shall be implemented through the laws of the HKSAR", and that:

> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

61. Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[15] which I shall refer to as "Article 6(1)", is in very similar terms:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection

[14] Adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 2200 A (XXI) of 16 December 1966.

[15] Opened for signature by member states of the council of Europe at Rome on 4 November 1950.

A of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

62. In my view, the jurisprudence of the European Court of Human B Rights at Strasbourg (the European court or the Strasbourg court) in relation to Article 6(1) is of immediate relevance to an understanding of Article 14.1 and Article 10, notwithstanding certain differences in wording.

63. Differences appear in the English texts of the two treaties C particularly in relation to the conditions which trigger engagement of the respective articles.

(a) In Article 6(1), the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal D established by law" is activated if the person claiming its protection faces "a determination of his *civil rights and obligations*".

(b) And in Article 14.1 (and, it goes without saying, in the identical wording of Article 10), the entitlement "to a fair and public hearing by a competent, independent and impartial tribunal established E by law" is triggered where the individual concerned faces a "determination of … his *rights and obligations in a suit at law*".

64. However, the rendering of the words I have italicised is precisely the same in the French texts of both treaties. They both refer to F "*droits et obligations de caractère civil*".[16] As the Joint Dissenting Opinion of the European court in *Feldbrugge v The Netherlands*[17] explains, the English text of Article 6(1) had originally also followed the wording of Article 14.1, referring to "rights and obligations in a suit at law". It was changed at the last moment to refer instead to "civil rights G and obligations" merely to align the English text more closely with the language of the French text and not to effect any substantive change.

65. Moreover, in my view, even without having regard to the drafting history of the two articles, the ordinary meaning of the H two phrases in the English text, understood in the context of each article, is the same. They both refer to determinations of civil rights

I [16] The French text of Article 14.1 relevantly provides:"Tous sont égaux devant les tribunaux et les cours de justice. Toute personne a droit à ce que sa cause soit entendue équitablement et publiquement par un tribunal compétent, indépendant et impartial, établi par la loi, qui décidera soit du bien-fondé de toute accusation en matière pénale dirigée contre elle, soit des contestations sur *ses droits et obligations de caractère civil*." And the French text of Article 6(1) relevantly states: "Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par J la loi, qui décidera, soit des contestations sur ses *droits et obligations de caractère civil*, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle."

[17] (1986) 8 EHRR 425 at p.444–445, paras.20–22.

and obligations distinguishing them from determinations of criminal charges which are also dealt with in juxtaposition by the two articles. In other words, the words "suit at law" referred to in the ICCPR are intended to convey the meaning of "a *civil* suit at law", as opposed to the determination of a criminal charge.

D. The legal principles

D.1 When is Article 10 engaged?

66. As noted above, the Article 10 protections come into play (leaving aside criminal charges) when a person is subject to "a determination of his rights and obligations in a suit at law". This formula has spawned considerable uncertainty.

D.1a Article 10 and the rule of law

67. Article 10 gives effect to the rule of law. When it is engaged, it enables the individual faced with a determination by a governmental or public authority[18] which may affect his civil rights and obligations to say: "I am entitled to the protections of Article 10, including the right to a fair and public hearing by a competent, independent and impartial tribunal established by law". As Lord Hoffmann, referring to Article 6(1), puts it in *Runa Begum v Tower Hamlets London Borough Council*:[19]

> One of the purposes of art.6, in requiring that disputes over civil rights should be decided by or subject to the control of a judicial body, is to uphold the rule of law and the separation of powers …

And as the Strasbourg court stated in one of its earlier decisions:

> in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.[20]

D.1b A historical gap

68. It is against this backdrop, recognizing the basic importance of Article 10 and its equivalents to the rule of law, that the difficulties encountered in establishing when the protections are engaged should be viewed.

69. Those difficulties stem from a gap in the protections contained in the text of the ICCPR (which, as we have seen, was duplicated in the ECHR). That gap, which has been traced in the international

[18] This limitation deriving from s.7 of the Hong Kong Bill of Rights Ordinance.

[19] [2003] 2 AC 430 at p.445, para.27.

[20] *Golder v United Kingdom* (1975) 1 EHRR 524, para.34.

jurisprudence,[21] concerns the scope of the words "rights and obligations in a suit at law" and "civil rights and obligations". To a common lawyer, the existence of such a gap may not be obvious since one might assume that the phrase "civil rights and obligations" encompasses all rights and obligations outside the sphere of the criminal law. However, in many countries subscribing to the ICCPR and the ECHR, "civil rights and obligations" would not be understood to be so all-embracing. Distinctions may be drawn, for instance, between public and private law rights and between the law administered in civil and administrative courts. As Lord Hoffmann explains:

> … the term "civil rights and obligations" was originally intended to mean those rights and obligations which, in continental European systems of law, were adjudicated upon by the civil courts. These were, essentially, rights and obligations in private law. The term was not intended to cover administrative decisions which were conventionally subject to review (if at all) by administrative courts. It was not that the draftsmen of the Convention did not think it desirable that administrative decisions should be subject to the rule of law. But administrative decision-making raised special problems which meant that it could not be lumped in with the adjudication of private law rights and made subject to the same judicial requirements of independence, publicity and so forth. So the judicial control of administrative action was left for future consideration.[22]

70. The need for certain administrative processes which affect the rights and obligations of individuals to be dealt with on a separate and different footing was spelt out, for instance, in the Joint Dissenting Opinion in *Feldbrugge v The Netherlands* as follows:[23]

> The judicialisation of dispute procedures, as guaranteed by Article 6(1), is eminently appropriate in the realm of relations between individuals but not necessarily so in the administrative sphere, where organisational, social and economic considerations may legitimately warrant dispute procedures of a less judicial and formal kind. The present case is concerned with the operation of a collective statutory scheme for the allocation of public welfare. As examples of the special characteristics of such schemes, material to the issue of procedural safeguards, one might cite the large numbers of decisions to be taken, the medical aspects, the lack of resources or expertise of the persons affected, the need to balance the public interest for

[21] See the Joint Dissenting Opinion in *Feldbrugge v The Netherlands* at pp.444–445, paras.19–22; and the Dissenting Opinion of Ms Ruth Wedgwood in *Wolfgang Lederbauer v Austria* (CCPR/C/90/D/1454/2006); 15 IHRR 1 (2008), paras.4.1–4.10.

[22] *Runa Begum v Tower Hamlets London Borough Council* at p.445, para.28.

[23] at p.443, para.15.

> efficient administration against the private interest. Judicialisation of procedures for allocation of public welfare benefits would in many cases necessitate recourse by claimants to lawyers and medical experts and hence lead to an increase in expense and the length of the proceedings.

71. While common law systems may not distinguish between administrative and "judicialised" processes affecting civil rights and obligations in terms of the structure of their courts or the legal classifications used, the distinction between the processes is nevertheless real and the need to avoid the "over-lawyering" or "over-judicialisation" of procedures in certain administrative and disciplinary tribunals is recognised.[24]

72. As the *travaux préparatoires* of the ICCPR[25] **show, it was acknowledged by the delegations concerned that the proper approach to determinations of rights and obligations by administrative bodies "had not been fully thrashed out and should be examined more thoroughly". Such "thrashing out" has, however, not occurred — hence, the gap.**

D.1c Filling the gap

73. The existence of such a gap presented a risk that the protections intended to be conferred by Article 10 and its equivalents might be wholly undermined. As the European court stated (in a slightly different context) in *Golder v United Kingdom*:[26]

> Were art.6 para.1 (art.6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook …

74. It is accordingly not surprising that the unmistakeable trend of the international jurisprudence has been to close the gap and to extend the protection of the equivalents of Article 10 in a variety of ways. Whereas the drafting history of Article 14.1 and Article 6(1) indicates that the "right to a court" provided by those articles was

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[24] eg, *Stock Exchange of Hong Kong v New World Development Co Ltd* (2006) 9 HKCFAR 234 at p.271, para.109.

[25] Relating to the fifth session of the United Nations Commission on Human Rights held on 1 June 1949.

[26] at para.35.

originally not intended to apply to decisions by administrative tribunals or to the legal relations between, for instance, civil servants and the State which employs them, that restrictive approach, as Lord Walker of Gestingthorpe pointed out,[27] "is now of no more than historical interest".

75. A significant early step taken by the European court and the HRC towards enlarging the scope of Article 10 protections involved establishing that the concepts which trigger the protections had an "autonomous" meaning under the conventions and could not be evaded by use of domestic law definitions.[28] As Lord Millett points out:

> According to the consistent case law of the Strasbourg court the concept of "civil rights and obligations" is autonomous. Its scope cannot be determined solely by reference to the domestic law of the respondent state .... Any other conclusion could lead to results incompatible with the object and purpose of the Convention, since it would be open to contracting states, by reclassifying the rights granted by their own domestic legal systems, to exclude particular categories of civil actions from the operation of art.6(1).[29]

76. In *Yvon Landry v Canada*,[30] the HRC extended Article 14.1's scope in two additional ways. First, it rejected the governmental or public status of one of the parties as a basis in itself for excluding the protections and secondly, (as was pointed out by Mr Anderson Chow SC) it held that the protections are applicable where a case which might otherwise have fallen outside the article is in fact adjudicated upon by a tribunal having judicial characteristics. The well-known passage in the Communication runs as follows:

> ... the concept of a "suit at law" or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems when there is no inherent difference between public law and private law, and where the Courts normally exercise control over the proceedings, either at first instance or on appeal specifically provided by statute or

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[27] *Runa Begum v Tower Hamlets London Borough Council* at p.464, para.109, citing Lord Hoffmann in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at pp.327–330, paras.78–88.

[28] *König v Federal Republic of Germany* (1979–80) 2 EHRR 170, para.88; *Feldbrugge v The Netherlands*, para.26.

[29] *Runa Begum v Tower Hamlets London Borough Council* at p.459, para.82, citing *König v Federal Republic of Germany* at pp.192–193, para.88; and *Benthem v The Netherlands* (1986) 8 EHRR 1 at p.9, para.34.

[30] (CCPR/C/27/D/112/1981).

> else by way of judicial review. In this regard, each communication must be examined in the light of its particular features.[31]

77. Another step taken towards plugging the gap has involved the Strasbourg court deciding that Article 6(1) is engaged where the determination involves elements of both public and private law, but where the latter are found to be predominant. Thus, in *H v Belgium*,[32] a case concerning the application of a disbarred *avocat* to be readmitted to the roll of *avocats*, the Court found that aspects of the profession of *avocat* and thus of the determination undoubtedly had public law features, but that they were outweighed by other features of a private law character.

78. A major extension was made in *Ringeisen v Austria (No 1)*[33] which was concerned with the regulation of land transfers by a District Land Transactions Commission with an appeal to a Regional Commission. It therefore involved, as Lord Hoffmann notes in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*,[34] "a classic regulatory power exercisable by an administrative body". The European court nevertheless held that Article 6(1) was engaged and that it could intervene on the ground that the administrative decision was "decisive" for the enforceability of the private law contract for the sale of land. "Thus," as Lord Hoffmann points out, "a decision on a question of public law by an administrative body could attract art.6(1) by virtue of its effect on private law rights."[35] This has had a major impact since many decisions by administrative bodies and disciplinary tribunals[36] have a direct impact on the civil rights and obligations of the individual concerned, attracting the protection of Article 10.

79. This extended approach has been held to apply to planning cases.[37] It has also been adopted in relation to claims for non-contributory welfare benefits, as in *Salesi v Italy*[38] and *Mennitto v Italy*.[39] As Lord Millett explains in relation to those two cases:

> The decisions had the effect of extending art.6(1) to disputes in connection with non-contributory welfare schemes. In each case the critical feature which brought it within art.6(1) was that the

[31] at para.9.2. See also the Dissenting Opinion of Ms Ruth Wedgwood in *Wolfgang Lederbauer v Austria*, paras.5.5 and 5.6; and *Perterer v Austria* (CCPR/C/81/D/1015/2001); 12 IHRR 80 (2005), para.9.2.

[32] (1988) 10 EHRR 339 at pp.347–349, paras.45–48.

[33] (1979–80) 1 EHRR 455.

[34] at p.328, para.80.

[35] at para.80.

[36] As in *König v Federal Republic of Germany* (1979–80) 2 EHRR 170.

[37] eg, *Bryan v United Kingdom* (1996) 21 EHRR 342.

[38] (1993) 26 EHRR 187.

[39] (2002) 34 EHRR 48.

A claimant "suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the Constitution" (26 EHRR 187, p.199 para.19).[40]

B **D.1d The Eskelinen decision**

80. In its recent decision in *Vilho Eskelinen v Finland*,[41] the Grand Chamber of the Strasbourg court took a major step towards extending the protection of Article 6(1) to civil servants generally, adopting an approach which may indicate the course which later developments
C **in the jurisprudence might take.**

81. As previously noted, the relationship between civil servants and the State as employer had originally not been intended to come within the relevant articles. However, the process of gradual extension of the protections has also occurred in this context. *Lombardo v Italy*,[42]
D **was a case involving the claim for an enhanced pension by a *Carabinieri* officer who had been invalided out of service. The Italian government contended that Article 6(1) was not engaged, arguing that as a civil servant, the claimant's relationship with the State had been of a public law nature, his appointment having been a unilateral act by the State**
E **pursuant to special legislation. The Court nonetheless held that Article 6(1) applied, treating the pension claim as a pecuniary or economic claim falling outside the civil service relationship.[43]**

82. In *Pellegrin v France*,[44] the European court proceeded to reduce substantially the number of civil servants excluded from protection
F **by propounding a new "functional criterion". It noted that certain civil servants "wield a portion of the State's sovereign power" and reasoned that in relation to that category of persons, the State may have a legitimate interest "in requiring of these servants a special bond of trust and loyalty" thereby justifying the State in removing**
G **their relationship with such employees from the scrutiny of an Article 6(1) tribunal. It stated:**

> The Court therefore rules that the only disputes excluded from the scope of art.6(1) of the Convention are those which are raised
H by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police.[45]

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[40] *Runa Begum v Tower Hamlets London Borough Council* at pp.460–461, para.90.

[41] (2007) 45 EHRR 43.

J [42] (1992) 21 EHRR 188.

[43] at para.17.

[44] (2001) 31 EHRR 26.

[45] at para.66.

The Court made an exception, even within the excluded category, in respect of pension claims since "on retirement employees break the special bond between themselves and the authorities …"[46]

83. While the motivation behind this new "functional criterion" was to expand the coverage of Article 6(1), it was plainly not a satisfactory or easily workable means for delineating when the article's protections are engaged. It is inherently discriminatory as between civil servants and based upon the somewhat mystical concept of "a special bond of trust and loyalty" with the State.

84. The unsatisfactory features of *Pellegrin* were prominently exposed in the *Eskelinen*[47] case which involved claims by five police officers and a civilian office assistant working as a public servant for wage supplements as compensation for being posted in a remote part of the country. As the Grand Chamber noted:

> On a strict application of the *Pellegrin* approach it would appear that the office assistant applicant in the present case would enjoy the guarantees of art.6(1), whereas there is no doubt that the police officer applicants would not. This would be so irrespective of the fact that the dispute was identical for all the applicants.[48]

85. It observed that:

> Arts.1 and 14 of the Convention stipulate that "everyone within [the] jurisdiction" of the contracting states must enjoy the rights and freedoms in Section I "without discrimination on any ground".

And it expressed the opinion that:

> As a general rule, the guarantees in the Convention extend to civil servants;[49] and that … there should therefore be convincing reasons for excluding any category of applicant from the protection of art.6(1).[50]

86. Accordingly, the *Pellegrin* functional criterion was replaced by a two-fold test:

> … in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in art.6, two conditions must be fulfilled. First, the State in its national law must have expressly excluded access

[46] at para.67.
[47] (2007) 45 EHRR 43.
[48] at para.51.
[49] at para.58.
[50] at para.59.

> to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest.[51]

Putting it another way:

> There will, in effect, be a presumption that art.6 applies. It will be for the respondent Government to demonstrate, first, that a civil servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under art.6 for the civil servant is justified.[52]

87. In giving an indication of when objective grounds justifying exclusion might exist, the Court did mention that it would be "for the State to show that the subject matter of the dispute in issue is related to the exercise of state power or that it has called into question the special bond",[53] a statement relied on by the respondent in the present case. However, as stated above, I find it difficult to give practical meaning to this abstract notion of a "special bond".

88. Of more concrete value is the Court's statement[54] which followed upon its observation that "there should therefore be convincing reasons for excluding any category of applicant from the protection of art.6(1)". The Court said:

> In the present case, where the applicants, police officers and administrative assistant alike, had, according to the national legislation, the right to have their claims for allowances examined by a tribunal, no *ground related to the effective functioning of the State or any other public necessity* has been advanced *which might require the removal of Convention protection* against unfair or lengthy proceedings.[55] (Emphasis added.)

89. The *Eskelinen* case therefore, in my view, lays down the principled approach of (i) placing the onus on the State to specify, in legislation, the particular class of civil servants who are to be excluded from the Convention's protection; and (ii) subjecting such legislation to scrutiny by the Court which asks whether objective grounds related to the effective functioning of the State or some other public necessity which justify removal of Convention protection have been established. As the Grand Chamber stated:

[51] at para.62.
[52] *Ibid*.
[53] at para.62.
[54] at para.59.
[55] *Ibid*.

> If a domestic system bars access to a court, the Court will verify that the dispute is indeed such as to justify the application of the exception to the guarantees of art.6. If it does not, then there is no issue and art.6(1) will apply.[56]

90. This is clearly an area of developing jurisprudence and the *Eskelinen* decision, although followed in subsequent cases[57] and highly significant, is obviously not the last word on the subject. I pause to note that the HRC has evidently fallen behind the European court in developments in this area. In its General Comment No 32 dated 23 August 2007,[58] it continues to adopt a piecemeal and necessarily disjointed approach to the phrase "in a suit at law", listing various instances when the protections are engaged, including in that list cases involving "the termination of employment of civil servants for other than disciplinary reasons".[59] I would respectfully adopt in preference the *Eskelinen* approach as the more principled. It is obviously more satisfactory not to discriminate against some classes of civil servants in connection with their access to a judicial tribunal unless there is strong justification for doing so. To recognize, as General Comment No 32 does, an entitlement to protection where the employment is terminated for *other than* disciplinary reasons appears to me to acknowledge that entitlement where it is least needed and to refuse protection where (in disciplinary proceedings) it is most likely to be important.

D.1e Purely disciplinary matters vs civil rights and obligations

91. Since Article 10's engagement depends on whether an individual's civil rights and obligations are to be determined (or whether he is facing a criminal charge) in a specific instance, Article 10 may be engaged only in relation to some, but not all, the matters dealt with by a particular administrative authority or administrative tribunal.

92. In other words, a specific charge brought before a particular disciplinary tribunal may or may not attract Article 10 protections depending on whether it involves determination of a criminal charge or of the individual's civil rights and obligations. This is well-recognized in cases concerned with drawing the line between criminal charges and the enforcement of internal discipline[60] and similar considerations arise in relation to disciplinary measures affecting the individual's civil

[56] at para.61.

[57] See, eg, *Mitin v Ukraine* (38724/02) ECHR 14 February 2008; and *Cvetkovic v Serbia* (17271/04) ECHR 10 June 2008.

[58] HRC, 90th Session, Geneva, 9–27 July 2007.

[59] at para.16.

[60] *Engel v The Netherlands* (1979) 1 EHRR 647; *Campbell v United Kingdom* (1985) 7 EHRR 165; *Ezeh v United Kingdom* (2004) 39 EHRR 1.

A rights and obligations. However, it has been emphasised that it is for the court to decide on which side of the line any particular case falls, whatever the domestic classification of the offence may be. As the Strasbourg court stated in *Campbell v United Kingdom*:[61]

B > … If the contracting states were able at their discretion, by classifying an offence as disciplinary instead of criminal, to exclude the operation of the fundamental clauses of arts.6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with
C > the object and purpose of the Convention.

E. Is Article 10 engaged in the present case?

93. In my view, Article 10 is clearly engaged in relation to the disciplinary
D proceedings in the present case. The Administrative Instructions referred to above[62] make it clear that punishment for the disciplinary offence under PGO 6-01(8) with which the appellant was charged is "normally terminatory". Such was in fact the nature of the punishment meted out in this case. Although the relevant jurisprudence is still in the course
E of development, it has developed sufficiently to enable us to say that the appellant undoubtedly faced a determination of his rights and obligations in a suit at law, meaning his civil rights and obligations.

94. This conclusion can be reached by adopting the approach developed in *Ringeisen v Austria (No 1)*[63] since the disciplinary proceedings
F have a direct and highly adverse impact on the appellant's civil rights and obligations. As Baroness Hale of Richmond, held in *R (Wright) v Secretary of State for Health*,[64] by analogy with cases in which civil rights and obligations have been held by the Strasbourg court[65] to include the right to practise one's profession: "The right to remain in
G the employment one currently holds must be a civil right …" Moreover, where pension rights of civil servants have been affected, the relevant protections have readily been held applicable, as in *Lombardo v Italy*[66] and *Pellegrin v France*.[67]

95. The same conclusion is reached adopting the approach in
H *Vilho Eskelinen v Finland*,[68] whereby one asks whether the protection of Article 10 has expressly been excluded in respect of police officers such as the appellant facing disciplinary proceedings; and if so, whether

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[61] at paras.68–69.
[62] at section A.2 of this judgment.
[63] (1979–80) 1 EHRR 455.
[64] [2009] 1 AC 739 at para.19.
[65] *Le Compte v Belgium* (1982) 4 EHRR 1; *Bakker v Austria* (2004) 39 EHRR 26.
J [66] (1992) 21 EHRR 188.
[67] (2001) 31 EHRR 26.
[68] (2007) 45 EHRR 43.

the exclusion is justified on objective grounds related to the effective functioning of the State or some other public necessity which justifies removal of the article's protection.

96. In the present case, there has been an express prohibition by subordinate legislation of any legal representation which undoubtedly bears on the right to a fair hearing protected by Article 10 (as further discussed below). To that extent, I am prepared to accept that the first *Eskelinen* condition is complied with. However, the second condition has not been met: the Commissioner has not provided sufficient justification for excluding Article 10 protections in the disciplinary proceedings.

97. The justification offered, as expressed in the Respondent's printed case, is that Article 10's requirements:

> … would not be compatible with the character of police disciplinary proceedings, which are essentially domestic or internal hearings of a disciplined service where all participants have knowledge and experience of the procedures and demands of the police force, and where proceedings ought to be dealt with expeditiously and with a minimum of formality.

98. That submission echoes views which were current in the English Court of Appeal in the 1970's. Thus, in *Fraser v Mudge*,[69] a case dealing with prison discipline, Lord Denning MR stated:

> We all know that, when a man is brought up before his commanding officer for a breach of discipline, whether in the armed forces or in ships at sea, it never has been the practice to allow legal representation. It is of the first importance that the cases should be decided quickly. If legal representation were allowed, it would mean considerable delay. So also with breaches of prison discipline. They must be heard and decided speedily. Those who hear the cases must, of course, act fairly. They must let the man know the charge and give him a proper opportunity of presenting his case. But that can be done and is done without the matter being held up for legal representation. I do not think we ought to alter the existing practice.

99. About a year later, in *Maynard v Osmond*,[70] a police discipline case, Lord Denning MR expressed the view that a person on disciplinary charges ought in general to be entitled to legal representation or at least be permitted such representation at the discretion of the tribunal. But his Lordship nevertheless accepted that it was legitimate for Parliament or a minister to decree otherwise, particularly where a disciplined force

[69] [1975] 1 WLR 1132 at p.1133.
[70] [1977] 1 QB 240.

was concerned.[71] Rejecting the argument that regulations forbidding legal representation were *ultra vires*, his Lordship stated:

> In a disciplined force it is important that those responsible for maintaining discipline should have the conduct of disciplinary proceedings. So long as they are conducted fairly and in accordance with natural justice, the trial of disciplinary offences can safely be left to them.[72]

Orr LJ agreed and Waller LJ considered it appropriate to have "a commanding officer dealing with the discipline of his force, facing his men without the intervention of lawyers" as "an extension of everyday discipline."

100. The law has moved on since then. While (as noted above) the need to avoid the "over-lawyering" or "over-judicialisation" of procedures in certain disciplinary tribunals, including those of disciplined services, is fully acknowledged, it has to be recognized that the special needs of such tribunals must be pursued with proper regard for the constitutional safeguards conferred by Article 10.

101. Thus, speaking of prison discipline, the Strasbourg court in *Campbell v United Kingdom*[73] stated:

> [The Court] is well aware that in the prison context there are practical reasons and reasons of policy for establishing a special disciplinary regime, for example security considerations and the interests of public order, the need to deal with misconduct by inmates as expeditiously as possible, the availability of tailor-made sanctions which may not be at the disposal of the ordinary courts and the desire of the prison authorities to retain ultimate responsibility for discipline within their establishments.
>
> However, the guarantee of a fair hearing, which is the aim of art.6, is one of the fundamental principles of any democratic society, within the meaning of the Convention .... As the *Golder* judgment shows, justice cannot stop at the prison gate and there is, in appropriate cases, no warrant for depriving inmates of the safeguards of art.6.

102. And this Court, noting the special requirements of a disciplinary committee of the Hong Kong Stock Exchange, stated:

> SEHK's policy, reflected in the Listing Rules and the Disciplinary Procedures, of limiting (at least in the first instance) the role of lawyers at the hearing is based upon the belief that limited representation suffices in most cases; that an informal, expert, lay tribunal, steeped in

[71] at pp.253–254.
[72] at p.254.
[73] at para.69.

> the ways of the stock exchange, is best placed to deal effectively and swiftly with disciplinary issues; that the public interest in maintaining confidence in the market requires swift investigation and treatment of suspected infringements; and that "over-lawyering" the procedures would undermine many of these objectives, substantially lengthening and complicating proceedings, and making it difficult to persuade qualified individuals to accept unremunerated appointment to a Disciplinary Committee. These are plainly legitimate concerns. But they can only be pursued with proper regard for the needs of procedural fairness and for proportionality in any procedural restrictions imposed.[74]

103. I do not accept that the requirements of the police disciplinary tribunals in Hong Kong justify a total ban on legal representation regardless of the requirements of fairness. There seems to me to be little doubt that the effective functioning of the Police Force as a disciplined service will not be impaired by allowing its disciplinary tribunals a discretion to permit an officer to be legally represented where fairness so dictates. No ground of public necessity has been suggested as a basis for excluding the constitutional protection.

104. It is noteworthy that other police forces permit such legal representation with no apparent difficulty. Thus, in the United Kingdom, under the Police (Conduct) Regulations 1999, where an officer possibly faced the sanctions of dismissal, a requirement to resign or reduction in rank at the hands of the disciplinary tribunal, he had to be given notice of this and allowed to elect to be legally represented at the hearing.[75] And if he did so elect he could be represented by counsel or a solicitor at the hearing.[76] Those arrangements came into force some 10 years ago and were renewed (with some elaboration) in the current Police (Conduct) Regulations 2004.[77] Such renewal suggests that the 1999 Regulations have not had any harmful effect on policing in the United Kingdom.

105. In British Columbia, the courts went further. A provision in the relevant disciplinary regulations excluded legal representation in cases where a police officer was accused of a disciplinary offence carrying a maximum penalty other than dismissal, resignation or reduction in rank. It was held that even this restriction, limited to cases carrying lesser punishments, was incompatible with the requirements of fairness and therefore *ultra vires*.[78] There is no indication that this

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[74] *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234 at p.271, para.109.

[75] Regulation 17.

[76] Regulation 21.

[77] Regulations 18(1)(b), 23(3) and 24(3).

[78] *Joplin v Chief Constable of the City of Vancouver* (1985) 20 DLR (4th) 314.

A has impeded the effective functioning of the British Columbia police force.

106. I therefore conclude that no objective grounds have been established to justify excluding the disciplinary proceedings in the present case from the protection of Article 10. To the extent that the B Court of Appeal held in *Chan Keng Chau v Commissioner of Police*[79] that Article 10 is inapplicable to police disciplinary proceedings, I would overrule that decision.

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F. Compliance with Article 10 in general

107. Before turning to consider whether Article 10 is contravened in the present case, it is worthwhile considering what that article requires by way of compliance.

108. Where Article 10 is engaged, the person concerned becomes D entitled to "a fair and public hearing by a competent, independent and impartial tribunal established by law". This has sometimes been so interpreted as to give rise to an anxiety that giving effect to Article 10 would be to "over-judicialise" and therefore destroy or radically alter the entire administrative system by requiring decisions to be E taken publicly by independent and impartial tribunals imported into the administrative structure for that purpose. Such a fear was voiced in the Respondent's printed case:

> F If police disciplinary tribunals are to be chaired or presided by "independent" persons and conducted in accordance with the requirements of art.14(1) of the ICCPR (or the equivalent art.10 of HKBOR), they will lose their essential character of being domestic or internal hearings of a disciplined service and become much more formal and legalistic.

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F.1 Compliance viewing the entire determination process

109. It is, however, clear that Article 10 does not operate with such an undesirable effect. It does not require every element of the H protections conferred to be present at every stage of the determination of a person's rights and obligations, but only that such protections should be effective when the determination is viewed as an entire process, including as part of that process such appeals or judicial review as may be available.

I 110. Thus, in *Le Compte v Belgium*[80] the point was made as follows:

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[79] (unrep., HCMP 2824/2004) Yeung JA and Tang J.

[80] (1982) 4 EHRR 1 at para.51(a).

> Whilst art.6(1) embodies the "right to a court"… it nevertheless does not oblige the Contracting States to submit "*contestations*" (disputes) over "civil rights and obligations" to a procedure conducted at each of its stages before "tribunals" meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, *a fortiori*, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system.

111. In *Albert v Belgium*,[81] the Strasbourg court held that Article 6(1) was engaged where a professional association exercised the power of determining the right of a member to practise medicine. It held that this was compatible with the ECHR provided that suitable judicial supervision was in place:

> … the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of art.6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of art.6(1).[82]

112. The HRC has adopted a similar approach to Article 14.1. In *Yvon Landry v Canada*,[83] proceedings before a pension review board were challenged as inconsistent in various ways with Article 14.1. But since the Canadian legal system subjected such proceedings to judicial review and since the complainant had not sought to suggest that the remedies the court could provide "would not have availed in correcting whatever deficiencies may have marked the hearing of his case before the lower jurisdictions", the committee concluded:

> … the Canadian legal system does contain provisions in the Federal Court Act to ensure to the author the right to a fair hearing in the situation. Consequently, his basic allegations do not reveal the possibility of any breach of the Covenant.

113. As Lord Clyde pointed out in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*:[84]

> … the opening phrase in art.6(1), "in the determination", refers not only to the particular process of the making of the decision but

[81] (1983) 5 EHRR 533.
[82] at para.29.
[83] (CCPR/C/27/D/112/1981).
[84] at p.349, para.152.

A extends more widely to the whole process which leads up to the final resolution.

His Lordship cited *Zumtobel v Austria*,[85] where the Commission recalled that:

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> … art.6(1) of the Convention does not require that the procedure which determines civil rights and obligations is conducted at each of its stages before tribunals meeting the requirements of this provision. An administrative procedure may thus precede the
C determination of civil rights by the tribunal envisaged in art.6(1) of the Convention.

114. And as Lord Millett noted in *Runa Begum v Tower Hamlets London Borough Council*:[86]

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> Where an administrative decision is determinative of the claimant's civil rights, including his or her right to social security benefits or welfare assistance, the Strasbourg court has accepted that it may properly be made by a tribunal which is not itself possessed of the
E necessary independence, provided that measures to safeguard the impartiality of the tribunal and the fairness of its procedures are in place and its decisions are subject to ultimate judicial control by a court with "full jurisdiction".

F **115. I pause to note that in Hong Kong, this approach has been adopted by the Appeal Committee in *Chow Shun Yung v Wei Pih*,[87] and by the Court of Appeal in *Tse Wai Chun v Solicitors Disciplinary Tribunal*.[88]**

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F.2 A "court of full jurisdiction"

116. The position is therefore that Article 10 can be given effect without demanding radical changes to the administrative system provided that the process of determining a person's rights and
H **obligations beginning with the administrative process is subject to control by "a court of full jurisdiction".**

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[85] (1994) 17 EHRR 116, para.64.

[86] at p.463, para.100.

[87] (2003) 6 HKCFAR 299, para.37.

[88] [2002] 3 HKLRD 712, para.10. The Court of Appeal assumed without deciding that the Solicitors Disciplinary Tribunal was a "public authority" for the purposes of s.7 of the Hong
J Kong Bill of Rights Ordinance. This issue does not arise on the present appeal and references to the Court of Appeal's decision in the present judgment are not intended to imply acceptance that the Tribunal should be so categorized.

117. When then, can a court be said to have "full jurisdiction"? The answer, provided by Lord Hoffmann in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*[89] is: When it has "full jurisdiction to deal with the case as the nature of the decision requires":

> The reference to "full jurisdiction" has been frequently cited in subsequent cases and sometimes relied upon in argument as if it were authority for saying that a policy decision affecting civil rights by an administrator who does not comply with art.6(1) has to be re-viewable on its merits by an independent and impartial tribunal. … But subsequent European authority shows that "full jurisdiction" does not mean full decision-making power. It means full jurisdiction to deal with the case as the nature of the decision requires.

118. A court of full jurisdiction may deal with the case in the manner required in at least two different ways. It may do so by supplying one or more of the protections mandated by Article 10 which were missing below, for instance, by assuming the role of the necessary independent tribunal or by giving the individual concerned the needed public hearing. Or it may do so by exercising its supervisory jurisdiction so as to correct or quash some non-compliant aspect of the determination by the authority or tribunal concerned, for instance, where there has been a want of impartiality or some unfairness in the original process. If in assuming such a role, the court is armed with full jurisdiction to deal with the case as the nature of the challenged decision requires, there is compliance with Article 10's requirements.

119. Thus, in *Le Compte v Belgium*,[90] the Strasbourg court having reiterated that the ECHR does not require the protections to be present at every stage, went on to consider whether the appeals tribunal and subsequently the Court of Cassation supplied the missing elements. It found that both these bodies did provide the necessary independence but that the needed publicity was still wanting.[91]

120. The House of Lords has pointed out that in many situations it is inevitable and in no way improper that the initial administrative determination of a person's civil rights and obligations should be taken by someone who is part of the administrative body concerned and so is plainly not independent. For instance, in the *Runa Begum*[92] case, a decision had to be taken, in the context of a local council's duty to house the homeless, as to whether the accommodation offered to the applicant was suitable and whether it was reasonable for her to accept it. If it was, the authority would be discharged from its duty

[89] at p.330, para.87.
[90] (1982) 4 EHRR 1.
[91] at paras.57 and 60–61.
[92] [2003] 2 AC 430.

A **if the offer was nevertheless refused. That decision was taken by a housing manager who was obviously not independent since, as Lord Millett noted, "She was an officer of the very council which was alleged to owe the duty."[93] However, the Article 6(1) requirement of independence was in the circumstances met by the availability of**
B **judicial review.**

121. The principle may also be illustrated by reference to the requirement of publicity. As the Strasbourg court recently re-iterated in *Gulmez v Turkey*,[94] publicity is a highly important aspect of a fair trial:

> C The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in art.6 para.1. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering
> D the administration of justice transparent, publicity contributes to the achievement of the aim of art.6 para.1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention …

E **But this does not mean that there must be publicity at the original hearing or at every stage. Where the matter proceeds to a public hearing before a court of full jurisdiction, the protection against secret trials is achieved.[95] This was the approach correctly adopted by the Court of Appeal in *Tse Wai Chun v Solicitors Disciplinary Tribunal*,[96]**
F **holding that whereas the Tribunal's hearing had been held *in camera*, the requirement of publicity was fulfilled on the statutory appeal to the Court of Appeal.**

122. It should however be stressed that the court giving the complainant the eventual public hearing must be a "court of full
G **jurisdiction" with sufficient powers to "deal with the case as the nature of the decision requires". Where the public hearing comes before a court with limited jurisdiction so that important aspects of the decision cannot be publicly reviewed, the article's requirements may not be met. This is what the Strasbourg court held to have occurred**
H **in *Albert v Belgium*,[97] notwithstanding the public hearing before the Court of Cassation:**

> The public character of the cassation proceedings does not suffice to remedy the defect found to exist at the stage of the disciplinary
> I proceedings. The Court of Cassation does not take cognisance of the

[93] at para.96.
[94] (16330/02) ECHR 20 May 2008, para.34.
J [95] See eg, *H v Belgium* at para.54.
[96] at para.26. See footnote 88 above as to the assumed basis of this decision.
[97] at para.36.

> merits of the case, which means that many aspects of "*contestations*" (disputes) concerning "civil rights and obligations", including review of the facts and assessment of the proportionality between the fault and the sanction, fall outside its jurisdiction.

123. Where the original determination is marred by a lack of impartiality or by unfairness, the court of full jurisdiction may have to quash that determination to ensure compliance. The fact that the reviewing court is itself impartial or will itself act fairly may not be sufficient since the original defects may have resulted, for instance, in skewed factual findings or materials wrongly excluded, preventing the court from fully addressing the decision in the manner demanded.

124. The requirements for proper compliance emerging from the Strasbourg court's jurisprudence are summarised by Lord Hoffmann (in the context of the requirement of independence) as follows:[98]

> The Strasbourg court … has said, first, that an administrative decision within the extended scope of art.6 is a determination of civil rights and obligations and therefore *prima facie* has to be made by an independent tribunal. But, secondly, if the administrator is not independent (as will virtually by definition be the case) it is permissible to consider whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient. Thirdly, it will be sufficient if the appellate (or reviewing) court has "full jurisdiction" over the administrative decision. And fourthly, as established in the landmark case of *Bryan v United Kingdom* (1996) 21 EHRR 342 , "full jurisdiction" does not necessarily mean jurisdiction to re-examine the merits of the case but, as I said in the *Alconbury* case [2003] 2 AC 295, 330, para.87, "jurisdiction to deal with the case as the nature of the decision requires".

F.3 Compliance through judicial review

125. In Hong Kong, as in the United Kingdom, virtually every administrative determination is potentially subject to judicial review. Given that the court does not, on a judicial review, conduct afresh any fact-finding exercise underlying the impugned decision, is the court which exercises its judicial review function to be regarded as a "court of full jurisdiction"?

126. As we have just seen, Lord Hoffmann emphasises that it is erroneous to believe that a decision has to be reviewable on its merits before the reviewing court can be considered a court of full jurisdiction. Furthermore, as we have noted, in *Yvon Landry v Canada*,[99] **the HRC considered the availability of judicial review under the**

[98] *Runa Begum v Tower Hamlets London Borough Council* at para.33.

[99] (CCPR/C/27/D/112/1981).

applicable Canadian statute sufficient to make the decision-making process compliant with Article 14.1. It is in my view clear, subject to what is stated below, that where a Hong Kong court is able to exercise its full powers on judicial review it is likely to qualify as a court of full jurisdiction for Article 10 purposes. This proposition assumes that there is no statutory restriction on the judicial review powers available to the court, a matter of obvious relevance to the present appeal to which I will return.

127. As Lord Millett points out, judicial review powers are substantial and include powers to intervene based on the decision-maker's unsatisfactory treatment of the facts:

> A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. It is not necessary to identify a specific error of law; if the decision cannot be supported the court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law. The court cannot substitute its own findings of fact for those of the decision-making authority if there was evidence to support them; and questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the decision-making authority and not the court. But these are the only significant limitations on the court's jurisdiction, and they are not very different from the limitations which practical considerations impose on an appellate court with full jurisdiction to entertain appeals on fact or law but which deals with them on the papers only and without hearing oral evidence.[100]

128. Such powers have been held sufficient in the international jurisprudence. Thus, in *Bryan v United Kingdom*,[101] the Strasbourg court noted that an appeal to the English High Court on points of law "was not capable of embracing all aspects of the inspector's decision" and that:

> … there was no rehearing as such of the original complaints submitted to the inspector; the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited.[102]

However, the breadth of the reviewing court's powers were noted:

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[100] *Runa Begum v Tower Hamlets London Borough Council*, para.99.

[101] (1996) 21 EHRR 342.

[102] at para.44.

> … apart from the classic grounds of unlawfulness under English law (going to such issues as fairness, procedural propriety, independence and impartiality), the inspector's decision could have been quashed by the High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the inspector was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no inspector properly directing himself would have drawn such an inference.[103]

Given that there were administrative safeguards at the level of the inspector's decision-making process and that there were no disputes as to primary fact, the argument being largely concerned with questions of policy, the Court held that the powers exercisable on judicial review were sufficient to qualify the process of determination as Article 6(1) compliant.

129. In the *Runa Begum* case, Lord Bingham of Cornhill concluded on the basis of his review of relevant European decisions, that:

> … taken together they provide compelling support for the conclusion that, in a context such as this, the absence of a full fact-finding jurisdiction in the tribunal to which appeal lies from an administrative decision-making body does not disqualify that tribunal for purposes of art.6(1).[104]

130. Lord Hoffmann, in the same case, commented that:

> An English lawyer can view with equanimity the extension of the scope of art.6 because the English conception of the rule of law requires the legality of virtually all governmental decisions affecting the individual to be subject to the scrutiny of the ordinary courts.[105]

His Lordship's view was that on principle, judicial review, even with its limitations, is generally sufficient:

> The concern of the court, as it has emphasised since *Golder's* case (1979) 1 EHRR 524 is to uphold the rule of law and to insist that decisions which on generally accepted principles are appropriate only for judicial decision should be so decided. In the case of decisions appropriate for administrative decision, its concern, again founded on the rule of law, is that there should be the possibility of adequate judicial review. For this purpose, cases like *Bryan* and

[103] *Ibid*.
[104] para.11.
[105] *Ibid*, para.35.

A *Kingsley* make it clear that limitations on practical grounds on the right to a review of the findings of fact will be acceptable.[106]

131. Lord Hoffmann did, however, make it plain (echoing the Strasbourg court in *Bryan*) that the sufficiency of judicial review is
B **dependent on the subject matter of the challenged decision, the manner in which it was arrived at, its content and the proposed grounds of challenge.[107] Different considerations may apply depending, for instance, on whether the impugned decision relates to administrative policy or to the way the facts were found:**

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> If, therefore, the question is one of policy or expediency, the "safeguards" [in the decision-making process] are irrelevant. No one expects the inspector to be independent or impartial in applying the Secretary of State's policy and this was the reason why the court
> D said that he was not for all purposes an independent or impartial tribunal. In this respect his position is no different from that of the Secretary of State himself. The reason why judicial review is sufficient in both cases to satisfy art.6 has nothing to do with the "safeguards" but depends upon the *Zumtobel* principle of respect for the decision
> E of an administrative authority on questions of expediency. It is only when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control, that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal.[108]

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132. In *R (Wright) v Secretary of State for Health*, Baroness Hale of Richmond summarises the position as follows:

> What amounts to "full jurisdiction" varies according to the nature
> G of the decision being made. It does not always require access to a court or tribunal even for the determination of disputed issues of fact. Much depends upon the subject matter of the decision and the quality of the initial decision-making process. If there is a "classic exercise of administrative discretion", even though determinative
> H of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, then judicial review may be adequate to supply the necessary access to a court, even if there is no jurisdiction to examine the factual merits of the case.[109]

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[106] *Ibid*, para.57.

[107] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the*
J *Regions*, para.116.

[108] *Ibid*, para.117.

[109] at para.23.

133. The powers enjoyed by a Hong Kong court on a judicial review are very similar to those exercised by the courts of England and Wales which have been held to constitute courts of full jurisdiction. Accordingly, it is my opinion that in Hong Kong, a court exercising its judicial review jurisdiction without statutory interference is likely to qualify for most purposes as a court of full jurisdiction.

G. Has Article 10 been contravened in the present case?

134. Given that the disciplinary proceedings faced by the appellant bring Article 10 into play, was his entitlement to "a fair and public hearing by a competent, independent and impartial tribunal established by law" met, looking at the process as a whole?

G.1 Matters which are not contraventions

135. The police disciplinary tribunal is obviously "established by law". It has furthermore never been suggested that either of the disciplinary tribunals convened was lacking in competence or impartiality. The only complaint is that the hearing was not fair because of the exclusion of legal representation in circumstances where, the appellant submits, fairness demanded that he be permitted such representation.

136. But before addressing that question, it is worth noting that there might have been a complaint concerning publicity and independence. The proceedings before the tribunal were held in private and the police superintendents who sat as the adjudicating officers cannot be regarded as independent, being officers subordinate to the Commissioner in whose name the disciplinary charges were brought. However, it was in my view right not to contend that those features of the disciplinary proceedings constituted a contravention of Article 10. Viewing the process as a whole, the protections of independence and publicity are achieved without any deficit through recourse to judicial review. Judges in the Court of First Instance and in the appellate courts are plainly independent of the Police Force and of the executive and legislative arms of government in general. The courts are open to the public and every relevant aspect of the charges, the evidence and the rulings made by the disciplinary tribunal can be (and have been) publicly discussed.

G.2 Legal representation and a fair hearing

137. Returning to the central complaint, one must ask: what are the requirements of a fair hearing under Article 10? In particular, what is required in terms of legal representation at disciplinary proceedings such as those under discussion? It is my view that the well-developed common law principles of procedural fairness supply the answer. An arrangement which satisfies the requirements of the common

law will almost certainly conform with the fairness requirements of Article 10.

138. At common law and in the absence of inconsistent legislative intervention, administrative and domestic tribunals are generally regarded as masters of their own procedure possessing a flexible discretion to take whatever procedural course may be dictated by the requirements of fairness.[110]

139. The common law requirements regarding legal representation at disciplinary proceedings were recently examined in *Stock Exchange of Hong Kong v New World Development Co Ltd*[111], and it is unnecessary to repeat the discussion of the authorities to be found in that judgment. The Court decided that there is no absolute right to legal representation, this being a matter to be dealt with in the tribunal's discretion in accordance with principles of fairness. The factors to be taken into account in deciding whether fairness requires such representation to be permitted include the seriousness of the charge and potential penalty; whether any points of law are likely to arise; the capacity of the individual to present his own case; procedural difficulties; the need for reasonable speed in making the adjudication; and the need for fairness among the individuals concerned. It was recognized that no list of factors could be exhaustive and that the common law principles operate flexibly, requiring the tribunal to respond reasonably to the requirements of fairness arising in each case, balancing any competing interests and considering what, if any, limits may proportionately be imposed on legal representation in consequence.[112]

G.3 Regulation 9(11) and 9(12) inconsistent with Article 10

140. As I noted in section A.3 above, Mr Chow SC realistically accepts that reg.9(11) and 9(12) impose a blanket restriction on professional legal representation in police disciplinary proceedings. The vice which results is that in a case where the common law principles and compliance with Article 10 compel the conclusion that the tribunal's discretion ought to be exercised in favour of allowing legal representation, reg.9(11) and 9(12) prevent that course from being followed. In other words, they make it part of the disciplinary scheme that the tribunal is prevented from complying with its duty of fairness where such duty calls for legal representation to be permitted.

[110] *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591; *Maynard v Osmond* [1977] QB 240; *R v Secretary of State for the Home Department, ex p Tarrant* [1985] QB 251.

[111] (2006) 9 HKCFAR 234.

[112] at paras.95–101.

141. Furthermore, the regulations prevent the court on a judicial review from remedying non-compliance by quashing the decision on the ground of unfairness. Being sanctioned by subordinate legislation, the refusal of legal representation could not be said to be unlawful as a matter of common law. Therefore, so long as they remain in force, the regulations divest the reviewing court of the status of a "court of full jurisdiction", depriving it of the power necessary to deal with the case as the nature of the decision (involving an unfair refusal of legal representation) requires. Non-compliance would therefore be unremedied unless the regulations are struck down so as to remove the obstacle to conformity with Article 10.

142. Regulation 9(11) and 9(12) are therefore systemically incompatible with Article 10. Pursuant to s.6(1) of the Hong Kong Bill of Rights Ordinance, the Court is empowered to make such order in respect of this violation of the Bill of Rights as it considers appropriate and just in the circumstances. In my view, it is appropriate and just that reg.9(11) and 9(12) be declared unconstitutional and invalid with the result that the tribunal, as master of its own procedure at common law, is able to exercise a discretion unfettered by those regulations to permit legal or other forms of representation where fairness requires this. I have been focussing on objections to the exclusion of professional legal representation by reg.9(12). However, there is no reason why the tribunal should be restricted to permitting non-professional representation only by fellow officers as envisaged by reg.9(11). The tribunal ought to be able, in its discretion, to permit other appropriate forms of representation if asked for, whether by a fellow officer or by a person from outside the Force who would in a courtroom setting be called a *McKenzie* friend.[113]

G.4 The appellant did not have a fair hearing

143. If the invalidity of the constraints imposed by the offending regulations had been established before the hearing the tribunal would have been obliged, pursuant to its duty to ensure that the appellant had a fair hearing in accordance with Article 10, to consider, by reference to factors such as those mentioned in the *Stock Exchange* case, whether his was a case calling for legal representation to be permitted.

144. Believing, no doubt on the footing of reg.9(11) and 9(12), that it had no such discretion, the tribunal never considered the possibility of its exercise and obviously never examined the factors relevant to such exercise. In my view, this omission made the proceedings inherently unfair. On this basis alone, the conclusion must be reached that the appellant was indeed deprived of a fair hearing so that his conviction and sentence must be quashed.

[113] *McKenzie v McKenzie* [1971] P 33; *R v Secretary of State for the Home Department, ex p Tarrant* at p.298.

145. I do not consider it necessary for this Court (or any reviewing court) to undertake the exercise of applying relevant discretionary factors to the evidence in order to decide whether it would itself, in the tribunal's position, have exercised the discretion in favour of permitting legal representation. Much less do I consider it necessary to demonstrate that a refusal by the tribunal to exercise its discretion would have been irrational. In taking this view, I am respectfully in agreement with the approach adopted by Hartmann J in *Rowse v Secretary for the Civil Service*[114] As his Lordship pointed out, when deciding whether the requirement of a fair hearing is met, the court is simply concerned with deciding whether the constitutional standard has been complied with. The standard, as his Lordship stated, is one of fairness and not irrationality.

146. Nor do I consider it necessary or profitable to enter into the inevitably speculative realm of trying to determine how the evidence or the case might have progressed differently if a lawyer had been acting for the appellant.

147. I might add that if I had arrived at a different view and decided that this Court ought to examine the factors bearing on the exercise of the discretion, my conclusion would have been that the factors substantially favour allowing legal representation.

(a) The charge and the potential penalty were obviously very serious, punishment for an offence under PGO 6-01(8) being "normally terminatory". The actual sentence was undoubtedly severe, involving the loss of his pensionable employment as a policeman after 12 years of commendable service and deferral for many years of his enjoyment of the pension rights which had so far accrued.

(b) As the Court of Appeal's decision as to the meaning of PGO 6-01(8) (discussed below) shows, a point of law does arise. A sound grasp of the true construction of the PGO was a necessary starting-point for deciding how the evidence should be developed and the case handled.

(c) The fact that a re-hearing was involved with potential inconsistencies in the testimony of witnesses appearing on both occasions, especially viewed against the background of a fresh set of Administrative Instructions, ought to have raised questions as to the appellant's capacity to present his own case.

H. The suggested inevitability of conviction

H.1 The Court of Appeal's approach

148. In the Court of Appeal, Tang V-P accepted the argument that there was "a simple answer" to the appeal, namely, that relief by way of

[114] [2008] 5 HKLRD 217 at p.433, para.134.

judicial review had to be refused since the appellant's conviction was inevitable.[115] As I understand it, his Lordship's approach was that even if regs.9(11) and 9(12) were to be struck down as unconstitutional, the result would still be no different because, on what he considered to be the true construction of PGO 6-01(8), a conviction was inevitable. The tribunal itself did not adopt the construction advocated by Tang V-P, so the present discussion addresses the position adopted by the Court of Appeal in support of its "inevitability" proposition and not the tribunal's position.

149. As noted above, the version of PGO 6-01(8) promulgated on 22 September 1999 (the 1999 version) defined the disciplinary offence with which the appellant was charged as follows:

> A police officer shall be prudent in his financial affairs. Serious pecuniary embarrassment stemming from financial imprudence which leads to the impairment of an officer's operational efficiency will result in disciplinary action.

150. On its face, the disciplinary offence has three elements: (i) the officer must be guilty of conduct amounting to "financial imprudence"; (ii) such conduct must result in "serious pecuniary embarrassment"; and (iii) the serious pecuniary embarrassment must lead to impairment of that officer's operational efficiency.

151. Tang V-P pointed out that there was no dispute as to elements (i) and (ii) and held that this was sufficient, with no need for any evidence of element (iii):

> This court has consistently held that serious pecuniary embarrassment would necessarily lead to impairment of operational efficiency of a police officer within the meaning of PGO 6-01(8). See, for example, *陳庚秋* (*Chan Keng Chau*) and *Leung Fuk Wah v Commissioner of Police* [2002] 3 HKLRD 653.[116]

His Lordship added:

> We do not believe legal representation could have resulted in a different outcome. His conviction under PGO 6-01(8) was inevitable. So we would in any event have refused relief.[117]

152. The Court of Appeal's decision regarding the "inevitability" of the appellant's conviction is therefore apparently based (a) on its construction of PGO 6-01(8); (b) on the authority of the *Chan Keng Chau* and *Leung Fuk Wah* decisions; and (c) on a factual observation

[115] [2008] 2 HKLRD 27, para.22.
[116] at para.27.
[117] at para.28.

A that an officer who finds himself in serious pecuniary embarrassment necessarily has his operational efficiency impaired.

H.2 Construction of PGO 6-01(8)

B 153. The construction adopted by the Court of Appeal seems contrary to the ordinary meaning of the words of the applicable version of PGO 6-01(8). As noted above, it has, on its face three elements. Its language suggests that those three elements are causally linked and occur in a sequence: financial imprudence causing serious pecuniary C embarrassment causing the impairment of operational efficiency. Thus, the serious pecuniary embarrassment "stems from" financial imprudence and in turn "leads to" the impairment of operational efficiency. The Court of Appeal's approach does not reflect this.

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H.3 The two authorities cited

154. The first authority relied on, *Leung Fuk Wah v Commissioner of Police*,[118] was not in fact concerned with 1999 version of PGO 6-01(8). It was dealing with the preceding version issued on 30 January 1993 E (the 1993 version) which read as follows:

> A police officer shall be prudent in his financial affairs. Serious pecuniary embarrassment from whatever cause is regarded as a circumstance which impairs the efficiency of an officer.

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155. The 1993 version obviously differs significantly from the 1999 version. It centres on serious pecuniary embarrassment as the basis of the disciplinary offence "from whatever cause". The 1999 version, on the other hand, only treats serious pecuniary embarrassment as a G disciplinary matter if it stems from financial imprudence. Moreover, while the 1999 version refers to impairment of operational efficiency as something which serious pecuniary embarrassment "leads to", the 1993 uses quite different language. It states that serious pecuniary embarrassment "is regarded as a circumstance which impairs the H efficiency of an officer".

156. PGO 6-01(8) in its 1993 version was described by the Court of Appeal in *Ng Kam Chuen v Commissioner of Police*[119], as suffering from a "lack of clarity", as "not an easy provision to apply" and as "obscure".[120] The Court of Appeal thought its construction I was highly arguable and so reversed the earlier judgment of Keith J and granted the applicant leave to apply for judicial review. At the

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[118] [2002] 3 HKLRD 653.

[119] (unrep., CACV 241/1997, [1998] HKLRD (Yrbk) 25) Nazareth V-P, Liu and Leong JJA.

[120] at pp.5, 6 and 7 respectively.

substantive judicial review hearing,[121] Stone J construed the 1993 version as placing an ultimate legal burden on the Commissioner "of establishing both serious pecuniary embarrassment stemming from financial imprudence and consequent impairment of efficiency of the officer" and, upon proof of serious pecuniary embarrassment, as placing an evidential burden on the officer "to establish that his efficiency as an officer has not been impaired".[122]

157. This was the fray which the Court of Appeal in *Leung Fuk Wah* entered. Cheung JA (apparently for the Court) overruled Stone J and held:

> … as serious pecuniary embarrassment is regarded as a circumstance impairing efficiency, it is not necessary to adduce further evidence on the impairment of efficiency.

Like the earlier cases cited above, this was addressing the meaning and effect of the 1993 version.

158. Since we are only concerned with the 1999 version, I would prefer to say nothing as to the true construction of the 1993 version (as to which we have heard no argument). It is relevant to state this because PGO 6-01(8) was in fact further amended on 2 July 2003 (as a result of *Leung Fuk Wah*) to assume a form which has features in common with the 1993 version and may require discussion in some future case.

159. The point for present purposes is that since *Leung Fuk Wah* was concerned only with the 1993 version, it is not an authority on the meaning and effect of the 1999 version and provides no support for the Court of Appeal's view as to the inevitability of the appellant's conviction in the present case.

160. In the second authority relied on, *Chan Keng Chau v Commissioner of Police*[123] which was concerned with the 1999 version, the Court of Appeal was alive to the differences in the wording of the 1993 and 1999 versions. However, there was little analysis of the language of the latter. Yeung JA (for the Court) merely pointed to the need for special arrangements to be made for OUDs such as avoiding the handling of money or property or restrictions on carrying firearms and concluded (in translation):

> It is reasonable for the Commissioner to take the abovementioned measures. As such, it is inevitable that serious pecuniary embarrassment would impair the work efficiency of a police officer.[124]

[121] *Ng Kam Chuen v Secretary for Justice* [1999] 2 HKC 291.
[122] at pp.296–297.
[123] (unrep., HCMP 2824/2004) Yeung JA and Tang J.
[124] at paras.34–35.

161. The Court of Appeal in *Chan Keng Chau* did not rule on whether evidence of an impairment of operational efficiency was necessary or whether impairment would be presumed simply from the fact of serious pecuniary embarrassment. Instead, the Court declared itself satisfied that the Commissioner had in fact presented sufficient evidence of such impairment, pointing to various items of evidence adduced.[125]

162. I am therefore not persuaded that these two authorities provide any basis for the Court of Appeal's "inevitability" conclusion.

H.4 Inevitable Impairment as a matter of fact

163. The evidence does not support the conclusion that from the point of view of the Police Force, impairment of operational efficiency inevitably follows whenever an officer finds himself in a state of serious pecuniary embarrassment. On the contrary, the policy statements and other materials current at the time of the appellant's disciplinary proceedings suggest that it was regarded as a question of fact and evidence as to whether there was such impairment. Two examples will serve to illustrate this. I would emphasise that I do not refer to them for any view which they might express as to the proper construction of the relevant PGO but as demonstrating that it was evidently accepted by the Force that impairment of operational efficiency did not necessarily follow but could and should be separately established as a matter of fact.

164. Thus, shortly after Stone J's judgment, a memo from the Commissioner dated 15 April 1999 stated:

> … automatic restrictions placed on an officer, which flow from establishment of the latter's indebtedness but fail to take into consideration his specific circumstances, may not be capable of supporting a finding of impaired efficiency.
>
> The essence of PGO 6-01(8) is that the officer's inefficiency results from his/her financial imprudence not from matters outwith his/her control. … Where … a Formation Commander has not considered the officer's ability to perform his duties and has restricted the officer as a "matter of course", based solely on the officer's indebtedness, it can be said that the officer's efficiency has been impaired by circumstances outwith his control. This latter situation would not support establishment of the impairment to efficiency "pillar". (underlining in the original)

The 1999 version of PGO 6-01(8) was issued a few months later, reflecting this policy.

[125] at para.37.

165. In the Administrative Instructions issued on 17 April 2000, during the period when the appellant was engaging in his share trading, there is discussion of how bankrupt officers (who must be by definition in serious pecuniary embarrassment) are to be treated. Paragraph 81 states that if bankruptcy is due to financial imprudence "which leads to impairment of an officer's operational efficiency, disciplinary action in accordance with PGO 6-01(8) should be contemplated." Significantly, para.82 goes on to state:

> If there is no evidence to show that the operational efficiency of the bankrupt officer has been impaired but there is evidence that the bankruptcy is due to some reprehensible causes (eg gambling, overspending, high risk speculative investments, etc) … disciplinary action for an offence of "Conduct Calculated" [to lower the reputation of the Force], contravening respondent 3(2)(m) of the [Regulations] should be considered.

166. Accordingly, I am with respect unable to accept the Court of Appeal's views as to the "inevitability of conviction". A conviction could not be secured simply by pointing to the absence of dispute as to the elements of financial imprudence and serious pecuniary embarrassment and holding that impairment of operational efficiency followed automatically. Giving effect to the ordinary meaning of the words used in the 1999 version, proof of impairment of the officer's operational efficiency as a separate element of the offence, flowing from his serious pecuniary embarrassment was required. I do not consider that there was any evidential burden on the officer charged. The impairment alleged by the Commissioner had to be proved by him. He would not have lacked the means of doing this as evidence could be adduced from colleagues and superiors of the officer charged to show the ways in which his operational efficiency was said to have been impaired.

I. Ultra vires

167. In the light of my conclusions, it is unnecessary to deal with the alternative argument that reg.9(11) and 9(12) are *ultra vires* the rule-making power in s.45 of the Ordinance.

J. Conclusion

168. For the foregoing reasons, I conclude that:

(a) Article 10 is engaged in respect of the appellant's disciplinary proceedings.

(b) The requirement of a fair hearing means that the disciplinary tribunal ought to have considered permitting the appellant to be legally represented.

(c) In excluding the possibility of the tribunal exercising such a discretion, reg.9(11) and 9(12) are inconsistent with Article 10 and must be declared unconstitutional, null and void.

(d) Since the tribunal failed to consider and, if appropriate, to permit legal representation for the appellant, he was deprived of a fair hearing in accordance with Article 10 so that the disciplinary proceedings were unlawful and the resulting convictions and sentences must be quashed.

169. I would accordingly allow the appeal and make the following Orders:

(a) That the following orders or decisions be quashed, namely:

(i) The finding dated 2 March 2001 by the Adjudicating Officer that the appellant was guilty of the disciplinary offence charged and the award of dismissal dated 13 March 2001 made pursuant thereto.

(ii) The finding dated 27 March 2002 by the Adjudicating Officer that the appellant was guilty of the disciplinary offence charged, the consequent award of compulsory retirement with deferred benefits suspended for 12 months made on 4 April 2002 and the subsequent increased award of immediate compulsory retirement with deferred benefits made on 26 July 2002 and ratified by the Commissioner on 21 October 2002 to take effect from 23 October 2002.

(b) That a Declaration be granted declaring that reg.9(11) and 9(12) of the Police (Discipline) Regulations are inconsistent with Article 10 of the Bill of Rights and Article 39 of the Basic Law and are unconstitutional, null, void and of no effect.

(c) That there be no order as to costs as between the parties, but that the appellant's costs be taxed in accordance with the Legal Aid Regulations.

Lord Woolf NPJ

170. I agree with the judgment of Mr Justice Ribeiro PJ. Although there are differences in the treatment of some issues in the judgments of Mr Justice Bokhary and Mr Justice Ribeiro PJJ, the differences do not appear to me to be of significance to the outcome of this appeal and I also agree with the judgment of Mr Justice Bokhary PJ, without expressing any preference as to the views in the judgments as to which there are differences.

Li CJ

171. The appeal is unanimously allowed. We make the orders set out in the final paragraph of the judgment of Mr Justice Ribeiro PJ.