KWOK CHEUK KIN v COMMISSIONER OF POLICE & ANOR

COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 55 OF 2017
CHOW J
29 SEPTEMBER, 19 OCTOBER 2017

Administrative Law – Judicial review – Decision of Commission of Police – Standing – Sufficient interest requirement – Whether applicant had sufficient interest in the subject matter to be granted leave to apply for judicial review – Whether special meeting held by Hong Kong Police Inspectors' Association and Junior Police Officers' Association exempted from notice requirement – Whether special meeting public meeting – Public Order Ordinance (Cap 245) s 7(1) – Rules of the High Court (Cap 4A) O 53 r 3(7)

行政法 — 司法覆核 — 警務處處長 — 理據 — 要求充足的利益 — 申請人在相關的事宜上是否具充足的利益獲批司法覆核許可 — 香港警務督察協會與香港警察隊員佐級協會召開的特別會是否可豁免通知的要求 — 特別會議是否公眾會議 — 《公安條例》(第245章)第7(1)條 — 《高等法院規則》(第4A章)第53令第3(7)條

The Hong Kong Police Inspectors' Association (the HKPIA) and the Junior Police Officers' Association (the JPOA) were both staff associations. They were independent from and were not subordinate bodies of the Police Force. The Police Sports and Recreation Club (PSRC) was a private club offering a range of sports, recreation, catering and conferencing facilities for members of the PSRC and members of the Police Officers' Club (POC).

Only members of the POC and PSRC, and guests invited by members with full escort, were allowed entry into the PSRC. It was not open to the public. Prior to entry, a member was required to present his proof of identity, normally in the form of membership card (PSRC or POC), warrant card or civilian staff card, for inspection at the main entrance of the PSRC by security staff. A member could normally invite up to no more than three guests at any one time to enter the club premises of the PSRC.

On 20 February 2017, the JPOA published a letter on their website announcing that they would convene a special meeting of the representatives on 22 February 2017 at 7:00 pm at the PSRC for the purpose of reporting on the work done in support of seven colleagues convicted of 'assault occasioning actual bodily harm' and, in the case of one of them, the additional offence of 'common assault' in DCCC 980/2015 (see [2017] HKCU 358). The letter stated that apart from the representatives of the JPOA, all members would be welcomed to attend the meeting.

On or about 20 February 2017, the HKPIA also announced on their website that they would convene a special meeting of the members at the same time, date and venue as the aforesaid meeting of the JPOA for the purpose of reporting to

members the support and follow up arrangements for staff who were recently involved in a court case due to the unlawful 'Occupy Movement'. A

The joint special meeting of the JPOA and HKPIA (the Special Meeting) were held between 7 pm and 9:30 pm on 22 February 2017 at the PSRC. No notification of intention to hold the meeting was given to the Commissioner of Police pursuant to s 7(1) of the Public Order Ordinance (Cap 245) (the Ordinance). It was reported in the media that over 30,000 participants attended the Special Meeting. Some well-known public figures who were not current or retired police officers, including a number of legislative councillors, were also invited to attend the Special Meeting. They were introduced as 'observers' and seated on the stage alongside various speakers. At the meeting, a resolution was passed to the effect that the Chief Executive of the Government of the HKSAR would be requested to promote legislation for the offence of 'insulting public officers in the execution of duties'. B C

Subsequent to the Special Meeting, the Commissioner of Police (the Commissioner) (through his representative) and the Secretary for Security both publicly expressed the view that the special meeting was excepted from the definition of 'meeting' contained in s 2(1) because of its 'professional' or 'business' nature, and accordingly no advance notification of intention to hold the meeting was required to be given to the Commissioner under s 7(1). D

On 27 February 2017, the applicant filed his Form 86 to seek leave to apply for judicial review of the Commissioner's alleged decision that the JPOA and HKPIA did not have to apply to him for a 'letter of no objection' in respect of the holding of the Special Meeting. E

On or about 25 April 2017 and 18 September 2017 respectively, the applicant applied to amend and re-amend his Form 86. The decision under challenge was reformulated as '[t]he statement(s) made by the 1st Respondent in or around 23rd to 24th February 2017 and by the 2nd Respondent on 27th February 2017 to the effect that no notification has to be given under [the Ordinance] with respect to [the Special Meeting]'. The applicant sought declaratory relief to this effect, and an order of mandamus to require the Commissioner to investigate into the conduct of the Special Meeting, particularly with respect to whether there were reasonable grounds to believe that any offence under the Ordinance had been committed. F G

Held, refusing leave to judicial review:

The Special Meeting was not a 'public meeting'

(1) The notification requirement under s 7(1) of the Ordinance applied only to a meeting held or to be held in a 'public place' as defined in s 2(1), ie a place to which for the time being the public or any section of the public were entitled or permitted to have access, whether on payment or otherwise. No notification of intention to hold a meeting in a place other than a 'public place' was required to be given to the Commissioner under s 7(1). Nonetheless, a meeting held in private premises could nevertheless be a meeting held in a 'public place' if, on the occasion and for the purposes of that meeting, the public or any section of the public were permitted to have access to the relevant private premises. The critical question was whether the meeting was open to the public or any section of the public, and not whether the meeting took place in public or private premises, although the fact that the meeting took place in private premises would obviously be relevant to the former question (para 23). H I

(2) Private premises to which access was restricted to the lawful occupiers' invitees or licensees (in addition to the lawful occupiers themselves) would not generally be regarded as 'public places' under the Ordinance. *Lam Shine-Chow v The Queen* [1985] 1 HKC 162, *R v Chan Chu Shi* [1990] 1 HKC 341 and *HKSAR v Chau Fung* [1999] 4 HKC 652 followed (paras 24-27).

(3) The Special Meeting was held in the club premises of the PSRC, which undoubtedly were private premises. There was no evidence to indicate that the public or any section of the public were permitted to have access to the PSRC to attend that meeting. Entry into the PSRC was generally restricted to members of the POC or PSRC and up to 3 guests per member. On the day in question, everyday access control was implemented at the various entrances of the PSRC. In particular, members (each bringing no more than 3 guests) intending to enter the PSRC were required to show their proof of identity for inspection before admission. Security or PSRC staff at the entrances conducted inspection on the proof of identity shown by each member before he/she, and his/her guests, could gain entry into the PSRC. It was clear that the PSRC, and more specifically the venue of the Special Meeting in the PSRC, was not on the occasion and for the purpose of that meeting a place to which the public or any section of the public were entitled or permitted to have access. The fact that some of the participants of the Special Meeting were not members of the JPOA or HKPIA (or indeed members of the PSRC or POC) did not alter the aforesaid conclusion. Accordingly, the Special Meeting was not a 'public meeting', and no notification of intention to hold that meeting was required to be given to the Commissioner under the Ordinance (paras 28-29).

The applicant lacked standing to make the present application

(4) The principles applicable in determining the question of standing in judicial review were as follows.

(i) Where the decision affected the applicant's personal right or interest over and above that of the general public or a section of the public, the applicant should have little difficulty in showing a sufficient interest in the matter to which the application related.

(ii) Where, however, the decision did not have such effect and the applicant was effectively pursuing the application as a representative of public interest, the court would adopt a holistic approach by taking into account a host of relevant considerations including the merits of the application, the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who had a greater interest in the matter, and the nature of the breach of duty against which relief was sought. An applicant was not to be regarded as having a sufficient interest merely because the issue raised by him was of public interest, or because of the strong merits of the proposed challenge

(iii) Although there had undoubtedly been a trend to liberalise the requirement of standing in judicial review, the need to show a sufficient interest in the matter to which the application related remained an important filter to keep judicial review within its proper bounds and to prevent abuse of the court's process. Where the applicant did not have a personal right or interest in the subject matter of the judicial review but claimed to make the application in a representative capacity, the court ought to be vigilant in examining

whether he was genuinely advancing a public interest in making the application or was motivated by other reasons.

R (Feakins) v Secretary of State for Environment, Food and Rural Affairs [2003] EWCA Civ 1546, [2004] 1 WLR 1761 and *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, [2011] 3 WLR 871 considered (para 34).

(5) In so far as personal standing was concerned, the sort of assemblies that the applicant had participated or assisted in was very different in nature from the Special Meeting. In particular, they all involved public meetings or public processions in public places (para 35).

(6) As for representative standing, whilst the determination of the issues raised in the present application and the proper construction of the Ordinance would affect persons other than the applicant, an applicant was not to be regarded as having a 'sufficient interest' because the issue raised by him was of public interest. Besides, there could be no real comparison between the Special Meeting and other public assemblies that the applicant previously participated that it was meaningless to talk about differential or inconsistent treatment. Also, it was plainly incorrect to say that there was no potential claimant that was better placed to bring the present challenge. The applicant was not a Police Officer or staff, or a member of the PSRC or the POC, who might have been inconvenienced by the Special Meeting (paras 34(3), 36).

(7) By seeking an order of mandamus to require the Commissioner to 'investigate into the conduct of the [Special Meeting], particularly with respect to whether there were reasonable grounds to believe that any offence under [the Ordinance] has been committed', it seemed clear that the applicant's aim was not to advance any public interest for a greater freedom of assembly, but to put pressure on or force the Commissioner to carry out investigation with a view to the organisers and/or participants of the Special Meeting being charged for having committed criminal offence(s). The applicant could properly be described as a 'mere busybody' or 'mere meddler', without it being necessary to label his application as having been actuated by ill motive or ill-will. *AXA General Insurance* (above) and *Re Wong Chi Kin (黃志堅)* [2014] HKCU 2242; (CACV 80/2014, Lam VP, Cheung and Yuen JJA, 26 September 2014, unreported) followed (para 37).

(8) For the aforementioned reasons and the obvious lack of merits in the proposed challenge, it was clear that the applicant did not have sufficient standing under O 53 r 3(7) of the Rules of the High Court (Cap 4A). The application for leave to apply for judicial review must be refused. Where an application for leave was dismissed for the absence of standing, it could properly be regarded as an abuse of the court's process (paras 38, 40).

Obiter

(9) The effect of s 7(2)(b) of the Ordinance was to exempt a meeting in private premises from the notification requirement where the attendance at the meeting did not exceed 500 persons. It did not have the effect of turning what would otherwise not be a public meeting into a public meeting just because the attendance at the meeting exceeded 500 persons (para 30).

(10) Having regard to the purpose of the Special Meeting, the identity of the persons being invited, the matters discussed at the Meeting, the conduct of the

participants, as well as the resolution passed at the meeting, it was reasonably arguable that the Special Meeting was not, or might not have been, excepted from the definition of 'meeting' in s 2(1) of the Ordinance as being 'gathering or assembly of persons convened or organised exclusively··· as a conference or seminar bona fide intended for the discussion of topics of a··· professional, business··· character.' (para 39).

Cases referred to

AXA General Insurance Ltd v HM Advocate [2011] UKSC 46, [2012] 1 AC 868, [2011] 3 WLR 871 (UK, SC)

HKSAR v Chau Fung [1999] 4 HKC 652, (1999) 8 HKPLR 1323 (CFI)

Lam Shine-Chow v The Queen [1985] 1 HKC 162 (CA)

R (Feakins) v Secretary of State for Environment, Food and Rural Affairs [2003] EWCA Civ 1546, [2004] 1 WLR 1761 (CA, Eng)

R v Chan Chu Shi [1990] 1 HKC 341 (HC)

R v Edwards (Llewellyn) (1978) 67 Cr App Rep 228, [1978] Crim LR 564 (CA, Eng)

Wong Chi Kin (黃志堅), Re [2014] HKCU 2242; (CACV 80/2014, Lam VP, Cheung and Yuen JJA, 26 September 2014, unreported) (CA)

Legislation referred to

Public Order Ordinance (Cap 245) ss 2(1), 7, 17A(2)
Rules of the High Court (Cap 4A) O 53 r 3(7)
Societies Ordinance (Cap 151)

[*Editorial note*: for bodies and decisions susceptible to judicial review, see *Halsbury's Laws of Hong Kong*, Title 10, Administrative Law, [10.163], and see *Hong Kong Civil Court Practice 1*, commentary under RHC O 53 r 3.]

Application

This was an application for leave to judicial review of the decision of the Commissioner of the Police and the Secretary for Security to the effect that no notification had to be given under the Public Order Ordinance (Cap 245) with respect to the special meeting that took place in the Police Sports and Recreation Club on 22 February 2017. The facts appear sufficiently in the following judgment.

Ernest CY Ng (Ho, Tse, Wai & Partners) for the applicant.

Abraham Chan SC and Leone Cheung (Law Officer (Civil Law)) for the putative respondents.

Chow J:

INTRODUCTION

1. On 22 February 2017, the Hong Kong Police Inspectors' Association and the Junior Police Officers' Association held a joint special meeting at the Police Sports and Recreation Club. It is not in dispute that no notification of intention to hold the meeting was given to the Commissioner

of Police pursuant to s 7(1) of the Public Order Ordinance (Cap 245) (the Ordinance)[1]. A

2. The Commissioner (through his representative) and the Secretary for Security both publicly expressed the view that the special meeting was excepted from the definition of 'meeting' contained in s 2(1) because of its 'professional' or 'business' nature, and accordingly no advance notification of intention to hold the meeting was required to be given to the Commissioner under s 7(1). B

3. The applicant contends, however, that the meeting was a 'public meeting' for the purpose of s 7(1) and notification of intention to hold that meeting was required to be given to the Commissioner, with the consequence that the meeting was an 'unauthorized assembly' within the meaning of s 17A(2). C

4. In his draft Re-Amended Form 86, the applicant seeks declaratory relief to this effect, as well as an order of mandamus to require the Commissioner to investigate into the conduct of the meeting, particularly with respect to whether there are reasonable grounds to believe that any offence under the Ordinance has been committed. D

5. The application for leave to apply for judicial review came before this court on 29 September 2017. The putative respondents objected to leave being granted on the grounds that:- E

(1) the meeting was not a 'meeting' given its purpose;

(2) neither was it a 'public meeting' given its venue; and

(3) the applicant clearly lacked standing to make the application.

6. At the conclusion of the hearing, I informed that parties that the application was dismissed because it was clear that:- F

(1) the place at which the meeting was held was not at the material time a place to which the public or any section of the public was entitled or permitted to have access, and therefore it was not a meeting held in a 'public place', and hence not a 'public meeting', for the purpose of s 7(1); and G

(2) the applicant did not have a sufficient interest in the matter to which the application related,

with detailed reasons to be given later, which I now do. H

BASIC FACTS

7. For the purpose of disposing of the leave application, the following summary of the relevant facts should suffice.

8. The Hong Kong Police Inspectors' Association (the HKPIA), previously known as the Local Inspectors' Association, was originally I

1. In these reasons for decision, unless otherwise expressly indicated, references to sections or sub-sections shall be references to the sections or sub-sections of the Ordinance.

established in March 1957. It is a staff association comprising about 1,800 members, all being serving police offices at the inspectorate rank. The aim of the HKPIA is to advocate for the welfare of its members.

9. The Junior Police Officers' Association (the JPOA) was established on 27 October 1977. It is also a staff association comprising members who are police officers serving at the ranks of station sergeant, sergeant and police constable (collectively 'junior police officers') as well as retired junior police officers. The aim of the JPOA is to serve as a bridge of communication between junior police officers and the Force Management and the Government, and to seek fair treatment of junior police officers in terms of welfare, benefits and service conditions.

10. Both the HKPIA and JPOA are registered under the Societies Ordinance (Cap 151). They are independent from the Police Force and are not subordinate bodies of the Police Force.

11. The Police Sports and Recreation Club (PSRC) is a private club offering a range of sports, recreation, catering and conferencing facilities for members of the PSRC and members of the Police Officers' Club (POC). General POC membership is available to all serving and retired police officers at the inspectorate rank or above, civilian officers of equivalent status and qualified retired officers and family members. PSRC membership is available to all serving regular and auxiliary police officers, serving civilian staff attached to the Police Force, and qualified retired regular police officers and civilian staff.

12. The PSRC is located at No 430, Sai Yeung Choi Street North, Kowloon, which is Government property allocated to the Police Force. The Social Amenities Council of the Police Force oversees and manages the PSRC. Only members of the POC and PSRC, and guests invited by members with full escort, are allowed entry into the PSRC. It is not open to the public. Prior to entry, a member is required to present his proof of identity, normally in the form of membership card (PSRC or POC), warrant card or civilian staff card, for inspection at the main entrance of the PSRC by security staff.

13. A member may normally invite up to no more than three guests at any one time to enter the club premises of the PSRC. There are some exceptions to this general rule, which it is not necessary to set out in this decision. There are also specific rules requiring a guest admitted to the club premises to be accompanied at all times by the member who invites the guest. Again, there are some exceptions to this general requirement which are not relevant for the purpose of this decision.

14. The events which led to seven police officers being convicted of the offence of 'assault occasioning actual bodily harm' and, in the case of one of them, the additional offence of 'common assault' on 14 February 2017 in District Court Criminal Case No 980 of 2015 are well known, and do require recitation here.

15. Arising out of the aforesaid convictions, on 20 February 2017, the

JPOA published a letter on their website announcing that they would convene a special meeting of the representatives (特別代表大會) on 22 February 2017 at 7:00 pm at the PSRC for the purpose of reporting on the work done in support of seven colleagues (以滙報支援七位同事的工作報告). In the letter, it was stated that: (i) one of the purposes of establishing the JPOA was to reflect the majority views of colleagues to the Force Management so that the Force Management would understand the views of the officers at the lower ranks and be able to assess their morale; (ii) the JPOA had done a lot of work to support the seven colleagues who had been imprisoned, and (iii) the JPOA would report to the representatives and members of their work, receive the views of the representatives and members, and submit the same to the Force Management. The letter ended by stating that apart from the representatives of the JPOA, all members would be welcomed to attend the meeting.

16. On or about 20 February 2017, the HKPIA also announced on their website that they would convene a special meeting of the members (會員特別大會) at the same time, date and venue as the aforesaid meeting of the JPOA for the purpose of reporting to members the support and follow up arrangements for staff who were recently involved in a court case due to the unlawful 'Occupy Movement' (向會員報告近日因受非法佔領行動而涉案人員的支援工作及後續安排). The announcement stated that the matter was urgent and called on all 'brothers and sisters' to be united.

17. The joint special meeting of the JPOA and HKPIA ('the Special Meeting') were held between 7:00 pm and 9:30 pm on 22 February 2017 at the PSRC, more specifically the Indoor Sports Hall, the covered spectators' stand (north perimeter), the football pitch (adjacent to the said spectators' stand) and the rugby pitch extending to the south perimeter, of the PSRC. During that period of time, the catering outlets (namely, the Chinese restaurant, main bar, The House of Chivalry, the Sportsman's Bar, and BBQ site), training facilities and sporting facilities at the PSRC such as the lawn bowls green, bowling center, tennis courts, and squash courts, remained open for the use of PSRC and POC members as well as their guests as usual.

18. It was reported in the media that over 30,000 participants attended the Special Meeting. Some well-known public figures who were not current or retired police officers, including a number of legislative councillors, were also invited to attend the Special Meeting. They were introduced as 'observers' and seated on the stage alongside various speakers. At the meeting, a resolution was passed to the effect that the Chief Executive of the Government of the HKSAR would be requested to promote legislation for the offence of 'insulting public officers in the execution of duties'.

19. Subsequent to the Special Meeting, in response to questions on whether the JPOA and HKPIA ought to have notified the Commissioner of the intention to hold the meeting in accordance with ss 7 and 8, both the Commissioner (through his representative) and the Secretary expressed the view that because of the 'professional' or 'business' nature of the meeting,

notification was not required to be given to the Commissioner under the Ordinance.

20. On 27 February 2017, the applicant filed his Form 86 to seek leave to apply for judicial review of the Commissioner's alleged decision that the JPOA and HKPIA did not have to apply to him for a 'letter of no objection' in respect of the holding of the Special Meeting.

21. On or about 25 April 2017 and 18 September 2017 respectively, the applicant applied to amend and re-amend his Form 86. The decision under challenge has now been reformulated as (inter alia) –

> 'The statement(s) made by the 1st Respondent in or around 23rd to 24th February 2017 and by the 2nd Respondent on 27th February 2017 to the effect that no notification has to be given under the Public Order Ordinance (Cap 245) with respect to [the Special Meeting]'.

The relief now sought by the applicant is summarised in para 4 above.

The Special Meeting was not a 'public meeting'

22. By s 7(1)(a), a 'public meeting' may take place if, but only if, *inter alia*, the Commissioner is notified under s 8 of the intention to hold the meeting. Under s 2(1):-

(1) the expression 'public meeting' is defined to mean 'any meeting held or to be held in a public place'; and

(2) the expression 'public place' is defined to mean 'any place to which for the time being the public or any section of the public are entitled or permitted to have access, whether on payment or otherwise, and, in relation to any meeting, includes any place which is or will be, on the occasion and for the purposes of such meeting, a public place'.

23. The combined effect of the above provisions in the Ordinance is that the notification requirement under s 7(1) applies only to a meeting held or to be held in a 'public place' as that expression is defined in s 2(1), ie, a place to which for the time being the public or any section of the public are entitled or permitted to have access, whether on payment or otherwise. No notification of intention to hold a meeting in a place other than a 'public place' is required to be given to the Commissioner under s 7(1). On the other hand, a meeting held in private premises may nevertheless be a meeting held in a 'public place' if, on the occasion and for the purposes of that meeting, the public or any section of the public are permitted to have access to the relevant private premises. In short, the critical question is whether the meeting is open to the public or any section of the public, and not whether the meeting takes place in public or private premises, although the fact that the meeting takes place in private premises would obviously be relevant to the former question.

24. The meaning of the expression 'public place' in the context of the Ordinance has received judicial consideration on a number of occasions. In

Lam Shine-Chow v The Queen [1985] 1 HKC 162, HCMA 183/1985 (21 March 1985), the question before the court was whether the common corridor on the 12th floor of a private building was a 'public place' for the purpose of the offence of fighting in public under s 25 of the Ordinance. Deputy High Court Judge Cruden held that it was not, for the following reasons:-

> '10 I now turn to consider the definition of 'public place' in the Public Order Ordinance, in the light of those authorities. The undisputed evidence is that No. 37 Belcher's Street is a private building. The individual private premises of the appellant and his neighbour are situate on the 12th floor of that building. I infer that the other floors are similarly occupied. The building is supplied with a caretaker. I also infer that as commonly occurs in Hong Kong in the case of multi-occupied private buildings access to the individual premises of the occupiers is obtained by corridors, staircases and lifts within the building which are shared in common with the occupiers.
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> 11 Access to the building is not, of course, limited to the occupiers but lawful access would also be available to their licensees and invitees. However, persons other than the occupiers, who may lawfully enter the premises are neither members of the public or any section of the public. Their legal right to access does not arise from being members of the public but solely by virtue of their status as licensees or invitees of the occupiers.'

25. *R v Chan Chu Shi* [1990] 1 HKC 341, HCMA 1596/1989 (13 February 1990) also concerned the offence of fighting in public, and the question there was whether the World Trade Centre Carpark was a public place. The appeal was ultimately disposed of on the basis of lack of evidence regarding the status of the carpark. Nevertheless, Ryan J agreed with the above statement of principle by Deputy High Court Judge Cruden and also referred to the following judgment of Bridge LJ (as he then was) in *Edwards* (1978) Cr App R 228 at 231:-

> 'Approaching the matter quite independently of any authority and looking simply at the contrasting definitions of public place and private premises in the statue, it seems to this Court that it is quite impossible to hold that the expression public place can be construed as extending to the front gardens of private premises, simply on the footing on which the learned judge relied that members of the public have an implied licence to pass through those private gardens in order to obtain access to the front doors of private premises if they have some lawful occasion to do so. It is not qua members of the public that they thus enjoy access. It is qua lawful visitors. Indeed it is certainly only by permission of the owner, occupier or leasee of the premises that persons obtaining access to front doors in the manner referred to are entitled to access.'

26. In *HKSAR v Chau Fung* [1998] 4 HKC 652, the question arose whether a closed area near the border between Hong Kong and the Mainland which was not owned by any private owner was a 'public place' for the purpose of the offence of possession of offensive weapon in a public

place under s 33(1) of the Ordinance. On the special facts of that case, Woo J (as he then was) held that it was. The following statement of principle, at 659-660 of the law report, is of note:-

> 'The important point to note from these cases is that whether the persons who are entitled or permitted to have access to the particular location or area are so entitled or permitted qua their being members of the public or members of a section of the public. If they have access as a particular class of persons, though they may be considered also part of the public, that alone will not suffice. For example, persons pay for tickets to get into a cinema to watch a film, and despite the requirement of payment, the inside of the cinema that such persons are able to have access is a public place, because the persons are members of the public and have access qua that status. On the other hand, if contractors go into a private residential building to perform repair works, they are granted the licence by the occupiers or owners to do so, but the building cannot be considered a public place because although the contractors are members of the public, they do not have access to the building qua their being members of the public, but by their being invited in by the occupiers or owners.'

27. The above authorities show that private premises to which access is restricted to the lawful occupiers' invitees or licensees (in addition to, of course, the lawful occupiers themselves) would not generally be regarded as 'public places' under the Ordinance.

28. In the present case, the Special Meeting was held in the club premises of the PSRC, which undoubtedly were private premises. There is no evidence to indicate that the public or any section of the public were permitted to have access to the PSRC to attend that meeting. As earlier mentioned, entry into the PSRC is generally restricted to members of the POC or PSRC and up to 3 guests per member. On the day in question (according to the evidence of Ho Wai-hung, the Manager of the PSRC), everyday access control was implemented at the various entrances of the PSRC. In particular, members (each bringing no more than 3 guests) intending to enter the PSRC were required to show their proof of identity (ie, membership card or, in lieu of that, warrant card or civilian staff card) for inspection before admission. Security or PSRC staff at the entrances conducted inspection on the proof of identity shown by each member before he/she, and his/her guests, could gain entry into the PSRC. On these facts, it seems to me to be clear that the PSRC, and more specifically the venue of the Special Meeting in the PSRC, was not on the occasion and for the purpose of that meeting a place to which the public or any section of the public were entitled or permitted to have access. Accordingly, the Special Meeting was not a 'public meeting', and no notification of intention to hold that meeting was required to be given to the Commissioner under the Ordinance.

29. On behalf of the applicant, Mr Ng argues that the Special Meeting was a public meeting because 'the *correct* test is whether there was a bona fide selection process' for entry to the meeting and 'the screening

mechanism *must ensure that only members* are admitted, and that no members of the public are *in fact* admitted' (see para 12.2 of Mr Ng's skeleton submissions dated 22 September 2017). In my view, there is no proper basis to question the *bona fides* of the process by which access to the PSRC was restricted to members and up to 3 guests per member on the day in question. They gained entry into the PSRC as lawful licensees or invitees and not as members of the public or a section of the public. The fact that some of the participants of the Special Meeting (including the legislative counsellors and possibly some other guests) were not members of the JPOA or HKPIA (or indeed members of the PSRC or POC) did not mean that the PSRC, and more specifically the venue of the Special Meeting in the PSRC, became, on the occasion and for the purpose of that meeting, a place to which the public or any section of the public were entitled or permitted to have access.

30. In passing, I should mention that in the draft re-amended Form 86, reference is also made to s 7(2)(b) in support of the contention that the Special Meeting was a public meeting. At the hearing on 29 September 2017, Mr Ng expressed informed the court that the applicant would not rely on s 7(2)(b) for the purpose of his application for leave to apply for judicial review. With or without this concession, I consider it to be clear that s 7(2)(b) does not assist the applicant's case. Its effect is to exempt a meeting in private premises from the notification requirement where the attendance at the meeting does not exceed 500 persons. It does not, however, have the effect of turning what would otherwise not be a public meeting into a public meeting just because the attendance at the meeting exceeds 500 persons.

The applicant lacks standing to make the present application

31. Order 53 r 3(7) of the *Rules of High Court* provides that the court 'shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates'.

32. The question of what amounts to a 'sufficient interest' for this purpose was considered by the Court of Appeal in *Re Wong Chi Kin* [2014] HKCU 2242, CACV 80/2014 (26 September 2014). At para 11 of the judgment of Lam VP (on behalf of the Court of Appeal), the following was stated:-

> 'Though the requirement of standing in public law is a liberal one, an applicant must still have some interest in the matter to warrant leave being granted to him to challenge a public decision··· Leave would not be granted to a meddlesome busybody. Standing goes to jurisdiction and it has to be considered in the legal and factual context of the whole case. Merits are important. But there are other factors as well: the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who have a greater interest in the matter, the nature of the breach of duty against which relief is sought'.

33. His Lordship referred to the judgment of the Supreme Court of the United Kingdom in *AXA General Insurance Ltd v HM Advocate* [2012] AC 868, in particular the following statements of principle:-

(1) Lord Hope DPSC at para 63 –

> '… I would not like to risk a definition of what constitutes standing in the public law context. But I would hold that the words 'directly affected' which appear in r 58.8(2) capture the essence of what is to be looked for. One must, of course, distinguish between the mere busybody, to whom Lord Fraser of Tullybelton referred in *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 646, and the interest of the person affected by or having a reasonable concern in the matter to which the application related. The inclusion of the word 'directly' provides the necessary qualification to the word 'affected' to enable the court to draw that distinction. A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.'

(2) Lord Reed at para 170 –

> 'For the reasons I have explained, such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say 'might', because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context.'

34. I consider the following principles to be applicable in determining the question of standing in judicial review.

(1) Where the decision affects the applicant's personal right or interest over and above that of the general public or a section of the public, the applicant should have little difficulty in showing a sufficient

interest in the matter to which the application relates. A

(2) Where, however, the decision does not have such effect and the applicant is effectively pursuing the application as a representative of the public interest, the court adopts a holistic approach by taking into account a host of relevant considerations including the merits of the application, the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who have a greater interest in the matter, and the nature of the breach of duty against which relief is sought. B

(3) In such a situation, the applicant is not to be regarded as having a sufficient interest merely because the issue raised by him is of public interest. As observed by Dyson LJ (as he then was) in *R (Feakins) v Secretary of State for Environment, Food and Rural Affairs* [2004] 1 WLR 1761 at para 23, 'if a claimant has no sufficient private interest to support a claim to standing, then he should not be accorded standing *merely* because he raises an issue in which there is, objectively speaking, a public interest.' C D

(4) Equally, the applicant should not be regarded as having a sufficient interest merely because of the strong merits of the proposed challenge. As pointed out by Lord Reed in his judgment in *AXA General Insurance Ltd v HM Advocate* quoted above, 'the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted'. E F

(5) Although there has undoubtedly been a trend to liberalise the requirement of standing in judicial review, the need to show a sufficient interest in the matter to which the application relates remains, in my view, an important filter to keep judicial review within its proper bounds and to prevent abuse of the court's process, particularly having regard to the explosive increase in the number of applications for judicial review and, more importantly, the complexities of the applications seen in recent years in Hong Kong. G

(6) Where the applicant does not have a personal right or interest in the subject matter of the judicial review but claims to make the application in a representative capacity, the court ought to be vigilant in examining whether he is a genuinely advancing a public interest in making the application or is motivated by other reasons. In *R (Feakins) v Secretary of State for Environment, Food and Rural Affairs*, Dyson LJ stated, immediately following the sentence quoted above, the following – H I

> 'As Sedley J said in *R v Somerset County Council, Ex p Dixon* [1997] JPL 1030, when considering the issue of standing, the court had to ensure that the claimant was not prompted by an ill motive, and was not

> a mere busybody or a trouble-maker. Thus, if a claimant seeks to challenge a decision in which he has no private law interest, it is difficult to conceive of circumstances in which the court will accord him standing, even where there is a public interest in testing the lawfulness of the decision, if the claimant is acting out of ill-will or for some other improper purpose. It is an abuse of process to permit a claimant to bring a claim in such circumstances. If the real reason why a claimant wishes to challenge a decision in which, objectively, there is a public interest is not that he has a genuine concern about the decision, but some other reason, then that is material to the question whether he should be accorded standing.'

35. In the present case, Mr Ng argues that the applicant has both personal standing and representative standing to bring the present application. With respect to his personal standing, this is based on the applicant's 'frequent participation and assistance in organising assemblies in the past and his intention to do so in the future' (see para 5 of Mr Ng's supplemental skeleton submissions dated 26 September 2017). It is apparent, however, from the evidence of the applicant that the sort of assemblies that he has participated or assisted in is very different in nature from the Special Meeting that the court is concerned with in the present application. In particular, none of those assemblies took place in private premises, or excluded participation by the public. They all involved public meetings or public processions in public places. Indeed, in para 4(a) of his 3rd affirmation, the applicant says that he is a 'frequent participant of public procession, public marches and protests as well as public meetings in Hong Kong', and in para 4(e) of the same affirmation, he says that it is his intention to 'continue to participate and/or assist in organising public meetings and/or protests of a similar kind and magnitude in future'.

36. In so far as representative standing is concerned, Mr Ng submits that the applicant has such standing on behalf of the public because 'the determination of the current issue, the proper construction of the [Ordinance] and the differential and inconsistent treatment between the [Special Meeting] and other assemblies [that the applicant participated in the past] will affect more than just the Applicant' and 'there is no potential claimant that is better placed to bring the matter to Court' (see paras 6.1 and 6.4 of Mr Ng's supplemental skeleton submissions dated 26 September 2017). I do not accept these submissions, for the following reasons:-

(1) While I accept that the determination of the issues raised in the present application and the proper construction of the Ordinance would affect persons other than the applicant, as earlier mentioned, an applicant is not to be regarded as having a 'sufficient interest' because the issue raised by him is of public interest.

(2) For reasons stated in para 35 above, there can be no real comparison between the Special Meeting and other assemblies that the applicant previously participated in the past. It is thus meaningless to talk

about differential or inconsistent treatment.

(3) It is plainly incorrect to say that there is no potential claimant that is better placed to bring the present challenge to the court. As pointed out by Mr Chan SC, '[t]he Applicant is not a Police Officer or staff. Nor is he a member of the PSRC or the Police Officers Club who might have been inconvenienced by the Meeting, and who would have had the use of the spectators' stand, football pitch, rugby pitch and/or Indoor Sports Hall at the PSRC but for their being booked by the Associations for the purpose of the Meeting. Indeed, there is no evidence that he was even in the vicinity of the PSRC at the time of the Meeting.'

37. It is ironic that in the present application, the applicant would be seeking an interpretation of the Ordinance by the court which would impose stricter regulatory constraints upon meetings and assemblies in Hong Kong. As a frequent participant of public meetings and procession, one would have thought that the applicant would instead be advocating for a more relaxed regulatory regime so that he, and other persons in a similar position, would enjoy greater freedom of assembly. By seeking an order of mandamus to require the Commissioner to 'investigate into the conduct of the [Special Meeting], particularly with respect to whether there are reasonable grounds to believe that any offence under [the Ordinance] has been committed', it seems clear that the applicant's aim is not to advance any public interest for a greater freedom of assembly, but to put pressure on or force the Commissioner to carry out investigation with a view to the organisers and/or participants of the Special Meeting being charged for having committed criminal offence(s). In my view, the applicant can properly be described as a 'mere busybody' or 'mere meddler', without it being necessary to label his application as having been actuated by ill motive or ill-will.

38. Bearing in mind also the obvious lack of merits in the proposed challenge, I consider it to be clear that the applicant does not have sufficient interest in the matter to which the present application relates as required by O 53 r 3(7) of the *Rules of High Court*, with the consequence that the application for leave to apply for judicial review must be refused.

39. Having reached the above conclusions, it is strictly not necessary for me to consider that the question of whether the Special Meeting is excepted from the definition of 'meeting' in s 2(1) as being a 'gathering or assembly of persons convened or organised exclusively ⋯ as a conference or seminar bona fide intended for the discussion of topics of a ⋯ professional, business ⋯ character.' Had it been necessary to do so, I would have considered it reasonably arguable that this exception does not, or may not, apply to the Special Meeting having regard to the purpose of the meeting, the identity of the persons being invited to attend the meeting, the matters discussed at the meeting, the conduct of the participants at the meeting, as well as the

resolution passed at the meeting.

DISPOSITION

40. For the foregoing reasons, the applications for leave to amend or re-amend the Form 86, as well as the application for leave to apply for judicial review, are dismissed. Where an application for leave to apply for judicial review is dismissed on the ground that the applicant has no standing to make the application, it may properly be regarded as an abuse of the court's process. Taking into account also the lack of merits in the proposed challenge and the substantial assistance that the court has received from the putative respondents (including the evidence filed on their behalf), I consider that the putative respondents ought to be entitled to the costs of resisting the various applications (including costs previously reserved), to be taxed if not agreed with certificate for one counsel. I so order.

41. Lastly, it remains for me to thank counsel for their assistance rendered to the court.

Reported by Ivy Ho