

### 1. Introduction

#### Definition of administrative law

\*Wade & Forsyth, Administrative Law, 11th ed., pp. 4-5

\*Jhaveri, Ramsden & Scully-Hill, Administrative Law in Hong Kong, 2nd ed., pp7-8, 41-86

- **Control of governmental power**
  - exercise of power by govt officials, bureaus; public bodies, not exactly part of govt but exercise regulatory (perform statutory functions)
  - A body of legal principles and procedures that govern the exercise of public power; defined by its purpose
  - JR as a cure to wrongdoings, an important puzzle in the judiciary
- **How control is exercise by judicial review** (focus of this course)
  - but not the only way of control of restrictive
  - Other mechanisms: e.g., complaints against officers, ombudsmen (make recommendation to the govt; representations of election to advice LegCo)
- **Inherent limitation of JR**
  - A real case is needed (if no case then no JR); **court cannot act in absence of case**: political concern, need someone to bring up the case; requires a parties
  - But the reality is the applicants face risk of e.g., paying costs in litigation
  - Responsive only to a case
- Diff from constitutional law
  - Const.: to define the powers of the State
  - vs administrative law: a subsidiary purpose; regulate the exercise of those constitutionally established powers by ensuring that public officials acted within their scope

#### Purposes of administrative law

\*Jhaveri, Ramsden & Scully-Hill pp1-8 (6)

- **Keep the powers of the govt within their legal bounds**
  - Protect the citizen against their abuse
  - Set legal standards of conduct for public authorities
  - Provides a body of norms with which the decision-maker must comply if his exercise of power is to be deemed lawful
- **To challenge the govt's decision**
  - Not to value the govt decision is good or bad;

- Govt be held accountable; must be acting accordingly of what is lawful; cannot exceed what its power has been given to; cannot act in a way contrary to the constitution (BL); cannot act unfair to person in question
- All about Legality: the limitations of the power
- Different from an appeal (can reverse the decision with the correct decision; having the full power to deal with the merit and the outcome of the case; not about the procedure being fair or not)
- JR is not an avenue for appeal; but supervising function to control the exercise of public power
- **Facilitate good governance**
  - Instrumental/functional point of view
  - Rules and principles likely to lead to decisions which are consistent, coherent, recent and fair to an individual
  - Operates in the mind of decision maker, not just to an individual; e.g., unfair decision is likely to be quashed
  - Improving the standards of public administration, instituting appropriate internal procedures
  - Judicial principles led to changes in the manner in which the executive approach decision making
- **Provide remedies for wrongs committed by public authorities**
  - Legal warrant for what the govt does, if it acts unlawfully the citizen has an effective legal remedy
  - Declare sth unlawful e.g., policy, decision made by the govt; Judiciary declaration
  - A portal to attain remedies to declare sth unlawful/unconstitutional

## **What is judicial review / constitutional context**

\*De Smith's Judicial Review, 8th ed., §1-001, §1-014

\* Hong Kong Basic Law, Article 80

- **JR: process of court determining the lawfulness of a decision-maker's action**
  - Whether the decision was lawful, rational or procedurally fair
  - reviewing the legality of acts and decisions of public bodies or bodies performing public functions
- **Not concerned the merits or substantive outcome of the decision**
  - Grounds of review to be established before the review
  - If there is unfairness, set aside or quash the decision? JR does not do that, but **simply adjudicate on whether a legal standard has been breached**

- the court to **remit the decision back to the original decision maker**; that the decision adopted is unfair; give opportunity for him to respond; with a fair procedure
- **The value and significance of JR**
  - Court to develop and apply legal standards of public administration
  - provide procedures through which individuals, groups and business enterprises may bring public law disputes to court.
- Challenge of JR
  - To balance competing interests

## 2. A brief history

Baker, An Introduction to English Legal History, 3rd ed, pp164-175

Law Commission, Report on Remedies in Administrative Law (1976)

### **\*administrative law in HK**

- Unique constitutional setup in HK, how the political system operates
- Derived from English law; but HK differs in some extent

### **History of development:**

- Genesis in law derived from
  - e.g., Royal Prerogative (that prescribe how the sovereign should be acting; later available to the citizens through courts in England; in writ, the crown is one of the parties)
- Rise of an administrative state
  - regulation of government power
  - public discretion, the need of administrative law
- Unique in HK
  - Outcome of JR; type of cases before HK court; nothing to do with the principles we talked about
  - But **depending on many other factors** other than the principles e.g., **the political landscape in HK**
  - E.g., large push of political, democratic representation back then (politically driven)-> later using JR as mechanism for change (if they believe they cannot achieve such aim by democratic way; to challenge the authorities)
  - The change in HK: the type of JR, **driven by what the current issues arise at present time** (now: e.g., delist companies in stock exchange; ppl come to HK asserting that they are victim of torture and seeking refugee status)
  - **Classic JR: unfairness cases, unchanged**

### 3. Judicial review – empowering and key provisions

- **s.21K of High Court Ordinance (Cap.4)**

- Legal basis for application for JR; the procedure that need to be gone through
- The need to attain leave; the requirements

- **0.53 of Rules of the High Court**

- Application of JR e.g.,
- unique regime that covers all application for JR; as to timing & all other requirements (e.g., cases appropriate for application, grant of leave to apply for JR, hearing of application for JR...); cannot seek to abuse the process
- no counterpart in ordinary civil case

### 4. Not only decisions but statutory provisions amenable to challenge

\* *Leung v SJ* [2006] 4 HKLRD 211, §27

- **Targets of JR**

- **Decision in a decision:**

- e.g., public authority's decision (on facts and circumstances on individual case); different from policy (guidelines adopted by the govt to apply to the future to a broad
- can target be judgment, order, decision or other proceeding in respect of which relief sought

- **Permissible to simply target statutory provision:** to oppose so and bring constitutional challenges

- BL and BOR as guarantee or basis to attack so; the only basis for the challenges

→ Focus here in this course: decisions and policies

### 5. Procedural exclusivity

\*Stephen Thomson, *Administrative Law in Hong Kong*, pp.64-75

Jhaveri, Ramsden & Scully-Hill pp87-109

- **General rule: Public law matter** > can be determined by judicial proceedings under 0.53

- Requirement for a **Sufficient Public Element** for JR
- **Built-in protection, procedures and rules unique to JR (0.53)**, applicants cannot seek to abuse the process (see *O'Reilly v Mackman*)
- public law issues should generally be transacted by way of judicial review, and that private law issues should generally by transacted by way of ordinary procedure
  - eg., right to JR; pay leave/permission to JR vs no need permission in ordinary civil cases

- **Reason for the division: prevent abuse of the JR process**
  - E.g., Time difference in time: 6-year limitation of action to sue for ordinary civil proceeding (limitation ordinance) vs unlimited time period for JR
  - E.g., Different right in bring the claim: Need to pay leave (permission) in JR vs. in civil does not need permission
  - But purely private matter does not go through JR
- **Exception- Collateral challenge**
  - Where the public law issue is simply a **collateral** issue or **insignificant** issue in the overall scheme of the case -> cannot subject to JR
  - **Target the main issue only**; even if the small part of the case is regarding public matter (public issue as the small issue > okay to go to ordinary civil proceedings); the main issue needs to be a public law issue
  - Pointed out in O'Reilly:
    - Procedural exclusivity is only a general rule. There are exceptions to this rule: "for though it may normally be appropriate to apply it by the summary process of *striking out the action*, there may be **exceptions**, particularly where **the invalidity of the decision arises as a collateral issue** in a claim for **infringement of a right of the plaintiff arising under private law**, or where none of the parties objects to the adoption of the procedure by writ or originating summons" (p 285F per Lord Diplock) (emphasis supplied).
    - **O'Reilly v Mackman [1983] 2 AC 237**
    - **Next Digital Limited v Commissioner of Police [2021] HKCFI 1677**

## **6. Public/private divide**

\*Stephen Thomson, Administrative Law in Hong Kong, pp.75-86  
 Jhaveri, Ramsden & Scully-Hill pp109-137

### **Fundamental requirements**

- **The concept of publicness**
  - to show that the provision you challenged is **in the public law domain**; need to be **amendable to JR** vs. private law matter is not available for JR
  - amenability of JR: ultimate Q is whether the case show **sufficient public element**
- show that the case involves **sufficient public element**, look at:
  - **identity of the decision maker**
  - **the decision maker's power**
    - where the decision maker gets its power
    - an indicator: founded/governed & recognition by **ordinances**: more likely to involve public element
    - e.g., ESF (founded by ordinance);

- e.g., bar association (an association of members, all for the purpose of regulating the profession; not founded by ordinances but recognized by statute)
- **the decision itself**
  - Q: what is the nature and source of the power being exercised

**The decision:** The source and nature of the power

- **source of the power being exercised;** the actual position being challenged
  - e.g., sue a contractor; sources of power from the contract -> JR not applicable
  - e.g., statutory power; since the statute applies to the public, tells that it involves public element -> JR applicable
- **the nature of the power:** what is it the public body is doing;
  - does not mean everything that the government does, or once there is public body involved, it will be public in nature > look into case details
    - not everything it does can be subject to JR (a more difficult exercise)
  - **Q: in what capacity the govt is acting**
    - is the government acting in its private capacity, or in exercising a commercial decision (dividing line is still: whether there is a sufficient public element)
  - Examples:
    - contractual, commercial and employment decisions taken by public bodies would tend to be private law and non-statutory
    - e.g., lease context: regarding land resources; power to exercise through govt lease;
    - vs private land owner (entitled to have any rental rate) might be exercising capacity as private landowner
  - See govt lease cases (classic example in HK)
    - land as a very limited resource in HK

**NOTE: not all public bodies exercise public functions**, or acting in exercise of statutory power; while a non-statutory body could be exercising public function that can be susceptible to JR

- govt acting in privately or commercially
- dividing line is whether there is sufficient public element
- question of impression
- **Cases: public (govt lease, more fundamental area) vs private**
  - govt lease (e.g., restriction on use of land for specified purpose like agriculture)

\* *Hang Wah Chong Investment Co Ltd v AG* [1981] 1 WLR 1141

\* *Hong Kong and China Gas Co Ltd v Director of Lands* [1997] 1 HKLRD 1291

\* *Anderson Asphalt Ltd v SJ* [2009] 3 HKLRD 215

- **Summary of lease cases** (in recording) [revisit]

- Application of the law to facts; structured analysis
- Indicators to look for: decision maker, nature and function of the decision
- Exceptions

\* *Rank Profit Industries Ltd v Director of Lands* [2009] 1 HKLRD 177

\* *Koon Bing Leung case v Directors of Lands*

\* *Sime Darby Motor Services Ltd v. Director of Lands* [2022] 4 HKLRD 714

\* *Wan Yung Sang v Housing Authority*, HCAL 135/2009 (*unrep.*, 6 July 2011)

\* *Ngo Kee Construction Co Ltd v Housing Authority* [2001] 1 HKC 493

\* *Leung Sze Ho Albert v Bar Council of the Hong Kong Bar Association* [2015] 5 HKLRD 791

\* *Li Fung Kei v Council of the University of Hong Kong* [2018] 4 HKC 231

\* *Tan Shih Ying v City University of Hong Kong*, HCAL 36/2012 (*unrep.*, 7 December 2012)

## Questions raised at lecture 2 [check recording]

**Q:** Do you think R v ESF was wrongly decided? It is quite absurd to say the expulsion of a student falls in public law, plus considering the alternative judgement in Tan Shih Ying v CityU. Pity there was no appeal since it ruled in favour for R.

- Complaint regarding expelling the student, argument that no opportunity is given to him to make representation before being kicked out of school
- Court: look at sources of power, basis of regulation (with status of by-law)
- Opinion: Wrongly decided?
  - ESF despite created by statute, but still need to look at the **function** of school (in this sense punishing a student is reasonable); even it is a public body, not all its function is public
  - Look at timing of the case: before 2014, greater focus on source of power in this case
  - Different degree of severity -> amenability

**Q:** Is it true to say, in private law proceedings against the Government (such as Director of Lands v Yin Sheun Enterprises Ltd and Ying Ho Co Ltd v SJ), it is impossible to conclude whether the adoption of private procedure for the disputes attributed to the non-amenability to JR or the consent of the parties? [Note1: Since private proceedings instead of JR can

commence upon consent; Note2: There as no mentioning of the public/private divide in the cases].

- Para 19 of (26) director of lands case
- Relevant principles; but the context in the case being legal context of land resumption; regarding govt demanding premium over a land
- Where amenability is not the issue in this case

**Q:** Ying Ho Co Ltd v SJ took place in private law proceeding (And we don't really know the reason as per above). To me, if I were acting for the Government, I would say JR should be used since it concerned a rejection of MLP based on the then upcoming policy (Hong Kong's planned new airport). While the policy did not materialise back then – But a government measure in anticipation of a policy could be said to contain “public element”. Am I right to say so?

- (27) Ying Ho Co Ltd & Others and Secretary for Justice
  - Para 102: reaffirmation of Hang Wah Chong case
  - Developers having disagreement with govt; regarding seeking approval of govt; DDH clause; refused development of the developers; govt's clause of building an airport; land developer in breach of its own obligation in a contractual context as it was required to commence operation but claimed that the govt was wrong in the use of land
  - dispute about \*money\*, private law matter
- Procedural exclusivity: correct procedure to be used

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#### Cases where involving both private and public issue?

- (14) Cocks v Thanet
  - Private litigant; public authority decide the person does not satisfy the requirement of homelessness;
  - Reasoning: in order to succeed in case of private law action, need to determine the def of homelessness in question is wrong in public law (the substance of the complaint); cannot go by private law action
  - Look at the precondition/essential ingredient of the case: the public element here; the def of homelessness -> JR first
- (16) Roy v Kensington
  - Doctor against statutory body; private law case; regarding practice allowance
  - Issue: respondent questioned the private law proceeding, as it determined C not to receive the money -> should be public law (p5)



- Reasoning: if involving right to sue in private law, incidentally involving public law, issue in a mixture but not determinative (fundamental) issue in the case; court would not reject JR of the case, as the person has right to sue
- With public law embedded in the issue, JR is still available

**Q:** Last lecture you opined *Sime Darby Motor Services Ltd v Director of Lands* seems to be wrongly decided since the Small House Policy (containing the public element) was quite distant from that land exchange claim. Meanwhile, from the judgement, the “policy” seems rather to be “not entertaining non-small house land exchange applications within village environment boundaries” (rather than the Small House Policy per se). In such case, could it be said the Judge was right since the a “policy” did exist (save judicial copying)?

- small house policy: expectation to have benefits; publicly available document (publicly known);
- but the practice/policy is
  - (1) internal,
  - (2) more in a nature of internal guideline, of how land officers treat these land, and
  - (3) referring to Bank Profit case para 41-42: analogy of a developer leasing out flats, publishing a policy to the public is just as a private owner letting tenants knowing the... does not change the fact that is not amenable to JR, still need to look at the context of the policy

**Q:** Last time you said the *Sime Darby* case should not be amenable to JR because it is only relevant to SHP but not concerned with the application for building a small house. However, if the reservation of land for SHP was the main reason the government rejected the applicant’s request for land exchange, the government’s decision seems to be based on policy reasons instead of commercial motivation. Should that not be in the public domain?

- as opposed to the question be: e.g, SHP for the purpose of a hospital; Q of where to draw the line
- in the case, town-planning element is not sufficient, despite being a public element

### 1. Leave to Apply for Judicial Review

Chapter 9, Thomson, Administrative Law in Hong Kong

- **The purpose of a leave (permission) requirement in judicial review**
  - Distinction between proceedings brought “as of right” and those which require prior permission from the court.
  - **The right to access the court and “qualitative” filtering**
    - JR > First obtain permission to do so > question of right to access
    - Reasons:
      - as a filter to **avoid floodgate**, esp. involving the public resources, limited scope of JR (need to demonstrate interest for the leave)
      - **limited role of the court**: not to make policy, court not meant to be always challenging the administrative role;
      - **separation of power**, negative impact of JR on govt and govt body: if no leave, they would need to respond to every cases -> **waste of public resources**; govt body distracted from their original job
      - **governance system**: presumption that the decisions are final; but if there is a framework challenging them -> deny/challenge the certainty and finality of the decision
- **Statutory provisions governing leave to apply for judicial review**
  - **Section 21K(3) of the High Court Ordinance (Cap. 4)**

No application for judicial review shall be made **unless the leave** of the Court of First Instance **has been obtained** in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a **sufficient interest in the matter** to which the application relates.
  - **RHC Order 53, rule 3**
    - Leave must be made ex parte (one side)
    - Form No.86 (requirements to satisfy)
    - (7) requirement of sufficient interest
- The applicable **merits threshold** in a leave application
  - **Previous threshold**
    - The leave as a provisional view
    - Spectrum of review: stations where the case not deemed as a sure win nor a complete refusal? -> Need to show the position that you're more likely to win

- Potential agreeability test: if court takes the view that one party would possibly win the case -> potentially arguable -> court would grant the leave -> a low threshold (as it is only potential, e.g., waiting for govt's disclosure of document)
- Later defined as a too low threshold that is not acceptable by the court, alternative set out in Cheung case:
- **The law now: Po Fun Chan v Winnie Cheung (2007) 10 HKCFAR 676**
  - Test should be one of **arguability**: should be **reasonably arguable**, can enjoy realistic prospect of success
  - does not mean at the initial stage need to show the high chance of win, but there is a chance/prospect to win, that winning could well happen
  - **increasing the threshold due to policy concern**: the need to oppose certainty, to safeguard public resources, prevent floodgate... (see above reasons)
  - look at whether the allegation of law enjoys the access to court
- Other matters which will be considered at the leave stage
  - **Standing** (show sufficient interest, even if there is cross-respect, it won't be good enough for leave)
  - **Timing** (whether considered JR promptly)
  - **Cumulative requirement**: exhaustion of alternative remedies Only as last resort
- The manner to apply for leave to apply for judicial review
  - Filing Form No.86

## 2. Promptness and Delay

Chapter 5, Thomson, Administrative Law in Hong Kong

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

- **Section 21(K)(3) & 21K(6)** of the High Court Ordinance  
**21(K)(3):**

**21K(6):**

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

(a) **leave for the making of the application;** or

(b) any relief sought on the application,

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

- **RHC Order 53, rule 4**

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

- Define what is considered to be an ‘**undue delay**’; an inappropriate, excessive or disproportionate delay
- **Primary requirement: Promptness**
  - **Promptly:** can be shorter than 3 months; **within the 3-month window, still need to be prompt enough;** court can be flexible to decide if applicant has acted promptly to grant leave
- **The exception**
  - **Unless:** need to provide good reason for the delay (factors to consider)
- Examples:
  - e.g., not aware of the grant is not a reasonable ground,
  - e.g., serve of notice as the starting point (?)

- **Law Chun Loy v Secretary for Justice, HCAL 13/2006, 26 October 2006**

- Listed with clear law and principles
- A failure to act promptly, therefore, and in any event within three months, constitutes of itself undue delay

- The need to **identify when time starts to run**
- **Applications for an extension of time to apply for leave**
  - \* **AW v Director of Immigration [2016] 2 HKC 393**

- **Factors to consider**

- **The length of the delay:** The longer the delay, the more cogent the reason has to be for extending time
  
- **The reasons for the delay**
  - Party receiving the letter late but due to continuous negotiation with the govt; acting proactively (?)
  - Hardships e.g., covid, illness > might be valid reason; but there are cases leave was refused on ground of poor health
  - Party applied for legal aid within the 2-month timeframe, where the process takes time: court requires more than that, requires applicant to speed up the matter in legal aid; also look at the when the applicant applied for legal aid
  - Merely the time taken to apply for extension of the scope of legal aid were hardly matters that could constitute valid grounds justifying any delay
  
- **The merits of the intended challenge**
  - Where an applicant is many months out of time, leave may be refused 'however strong the complaint might otherwise be' (Po Fun Chan v Winnie Cheung (2007) 10 HKCFAR 676 at 693B to C, per Litton NPJ).
  - An applicant who sleeps upon his rights may be barred from pursuing them in judicial review even though he may have a meritorious case (Law Chun Loy v Secretary for Justice [2006] HKCU 1795, HCAL 13/2005, 26 October 2006, at §13, per Hartmann J)
  - Not about showing the real prospect of success (as this is a minimum requirement even if in time);
  - need to show merits more than that, show that it is a strong case, above the basic minimum; stronger the case, more likely to be granted leave
  - only a significant matter to be taken into account, not the sole criterion
  
- **Prejudice to the parties and good administration**
  - Two sides: to the applicant if time is not extended & to the respondent & public administration if the challenge is allowed to proceed out of time
  - Harm, undesirable effect as result of the delay
  - Affecting a wider group of people
  - The original rationale: the need to act promptly -> minimum disruption of governance; could be used to against applicant
  
- **Points of general public importance**
  - Affecting wider community > wider impact > stronger case
  - But would still need to consider all other factors

- **Whether the challenge is against a continuing policy**

- Continuing policy, would support applicant: even if being late, there could be other parties who are in the impact by the policy could bring up JR
- e.g., SHP, adopted long time ago, but continuing policy, involving constitutionality > a persistent issue
- e.g., where the policy itself is flawed and one could show he is sufficiently impacted by it
- e.g., can challenge the particular aspect of the policy in regard to its application on your case facts (question of facts)
- fact-sensitive, diff facts could shape diff argument

➔ Court would be looking at all of them, to balance the scale

- **Refusal of relief on the ground of delay**

- Sec 21(k): Effect of the delay could be found on both **(1) at the leave stage & (2) on deciding relief (the kind of relief) to be granted**
- More on the relief topic

\* **R v Dairy Tribunal ex p Caswell [1990] 2 AC 738**

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

Chapter 6, Thomson, Administrative Law in Hong Kong

- **The underlying rationale** behind the requirements of standing in judicial review

- keep judicial review within its proper bounds and to **prevent abuse of the court's process**
  - 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 - *Kwok Cheuk Kin v Commissioner of Police* [2017] 6 HKC 93.
- **Prevent applicants causing unnecessary burden on the govt**; need to show sufficient, good allegation
  - Distinguish private right: defined in other sources e.g., contract; right exercisable by the person infringed
  - Vs in public law, is about interest: a boarder concept than right; having impact on others; does not need to show right to claim for interest
  - E.g., SHP case, applicant not having the relevant right but interest
- Common scenario: **applicant acts as representative** (see *Kwok Cheuk Kin cases*)
  - The applicant is not to be regarded as having a sufficient interest merely because the issue raised by him is of public interest

- '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.' - *R (Feakins) v Secretary of State for Environment, Food and Rural Affairs* [2004] 1 WLR 1761

- **Statutory provisions**

- Section 21K(3) of the High Court Ordinance
- RHC Order 53, rule 3(7)

- **Case law on the approach to standing**

- \* **R v IRC ex p National Federation of Self-Employed and Small Businesses [1982] AC 617.**
- \* **Re Wong Chi Kin, CACV 80/2014, 26 September 2014.**
- \* **Kwok Cheuk Kin v Commissioner of Police [2017] 6 HKC 93.**
- \* **Ho Kar Hei v Director of Immigration [2018] HKCFI 2517.**
- \* **803 Funds Ltd v Director of Buildings [2021] 2 HKLRD 1274.**
- \* **Kwok Cheuk Kin v President of LegCo [2021] 1 HKLRD 1247.**
- \* **Kwok Cheuk Kin v Director of Lands [2021] HKCFA 38.**
- \* **Kwok Cheuk Kin v Chief Executive in Council [2023] HKCFI 3074.**

#### 4. Alternative Remedies

- JR as **remedy of the last resort**; applicants only have exhausted all other **effective alternative remedies** to turn to JR; otherwise leave application will be refused
- Effective in the same that the body can E.g., when the appeal body has no power to address the problem > then can go to JR
- \* **Stock Exchange of Hong Kong Ltd v New World Development Co Ltd (2006) 9 HKCFAR 234**
- \* **Leung Ka Lau v Medical Council of Hong Kong [2021] HKCFI 2914**

#### 5. Limitations on Judicial Review

Chapter 8, Thomson, Administrative Law in Hong Kong

- \* **Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 (check)**
- \* **Bahadur v Director of Immigration [2001] 3 HKLRD 225.**
- **Clean Air Foundation v Government of HKSAR, HCAL 35/2007 (unrep., 26 July 2007)**
- \* **Leung Chun Ying v Albert Ho Chun Yan (2013) 16 HKCFAR 735**

## Lecture 2 questions

1. In *Ngo Kee Construction* 2001, it was held that gov as a party has freedom to contract - does it mean that all contract-based or contract-related cases are private, and hence not amendable in JR (as the law is in the UK).

The decision involved in *Ngo Kee* was to suspend an approved contractor from tendering for contracts. This was held to be a commercial decision and was not subject to judicial review. Such a decision was part of the tendering scheme which, in the absence of statutory underpinning, a public body was entitled to make up its mind on who should be awarded the contract. As we have discussed in class, the court will look at all relevant factors including whether the case is really of a private nature. If the matter is contractual in nature, and especially with no statutory underpinning, this is a strong consideration in support of the matter being not amenable to judicial review. At the same time, however, the case law also emphasizes that no one single test is determinative, and you still have to look at all the circumstances in the round. So do not assume that all contract based cases will invariably be in the private domain (though most will) - there may be exceptions - e.g., if the contracts are entered into in furtherance of a wider public policy, or where there is statutory underpinning. Ultimately, the test is fact-sensitive and one cannot draw rigid lines in the sand, though there will be useful pointers one or way or another.

2. JR needs to pass sufficient interest tests; but for legal rights (e.g. constitutional rights protected in BORO/BL) - is there no requirement, or is it like the UK where there is a victim test for HRA/EU law claims?

In a constitutional challenge, the Applicant will need to show that a constitutionally protected right which he enjoys (e.g., freedom of expression or right to private property) has been, or is at the very least, is at real risk of being infringed. If an Applicant is able to show that, it is likely that he will be regarded as having sufficient interest - because HIS constitutional right is being directly affected. In other cases, where an Applicant is seeking to invoke a constitutional right on behalf of the public at large, then the court will consider issues relating to whether the Applicant is entitled to proceed on the principles on representative standing - see the CFA decision in *Kwok Cheuk Kin* on the SHP as an example.



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

Thomson, Administrative Law in Hong Kong (2018), pp247-248

\* Jhaveri, Ramsden & Scully-Hill, Administrative Law in Hong Kong, 2nd ed., pp297-300

- One of 4 main grounds in JR
  - Legality, proportionality, rationality, procedural fairness, natural justice
- Some concepts
  - (1) ***nemo iudex in causa sua*** – **no one should be judge in his own cause**
    - Rule against bias (next lecture)
  - (2) ***audi alteram partem*** – **hear the other side (the right to be heard)**
    - The fair hearing rule (focus in this lecture)
    - E.g., in the context of adjudication, where the adjudicator should hear both sides equally and afford to them an equal opportunity to present their respective case or version of the facts.
- Modern day content of (2) includes (but is not limited to)
  - (i) **notice** (right to be informed about the decision may affect him)
  - (ii) **written representations**
  - (iii) **disclosure prior to decision**
    - the decision maker to provide adequate disclosure of such materials as are relevant to the decision-making process
  - (iv) **oral hearing**
    - not an absolute right, context-dependent
      - does not translate in every case to a right to be orally heard;
      - fairness will dictate whether a right to be orally heard can be established in the individual circumstances of the case.
      - Nor is a party automatically entitled to an oral hearing under Article 10 of the Bill of Rights
    - Factors to weight in favor of the right to an oral hearing
      - Cases with factual or legal complexity: a dispute of fact or law exists which is difficult to examine on paper
      - where a **negative decision** could detrimentally affect an existing right or interest (e.g., a decision to revoke a license, remove a person from public housing or rescind a permanent residence entitlement)
      - where **constitutional or fundamental rights**, or other important interests are at stake
  - (v) **legal representation**
    - factors to weight in favor of the right to legal representation
      - the more serious the charge and potential penalty

- points of law are at issue
- the capacity of the individual to present his own case
- factors to weigh against it
  - proceedings are of such a nature that speed is required, as “over-lawyering” might substantially lengthen and complicate proceedings

**(vi) reasons**

- increase transparency in public decision-making
- improve the accountability of decision makers

• **Serves (at least) the following purposes**

- (i) decision-making conscious of **needs and interests of individuals affected**
- (ii) may **influence quality of substantive decision**

- here, talking not about substantive fairness and equality (of cases decision itself), only about procedure
- vs BL25, BOR Art.1, 3, 4: substantive rights; “all HK people to be treated equally”; natural justice; rights enjoyed equally, substantive rights and fairness; rights listed are not about procedural fairness
- vs as a matter of common law: e.g., “treating like cases alike” - Lord Hoffman; equal treatment of similar cases > substantive; avoid irrationality

- what justice entail: context-dependent, depends on circumstances of each case

\* **Ridge v Baldwin [1964] AC 40, esp 66, 79, 121, 124, 132**

\* **R v Secretary of State for the Home Department, ex p Doody [1994] 1 AC 531, 560D-G\***

\* **Chu Ping Tak v Commissioner of Police [2002] 3 HKC 663, §§53-73**

• **Sources of principle of fairness in HK**

– **(i) common law (ii) Hong Kong Bill of Rights art.10 (“BOR10”)**

- “fair and public hearing by a competent, independent and impartial tribunal established by law”
  - guarantee procedural fairness
- =ICCPR art.14 which is incorporated under Basic Law art.39 [NB HKBORO (Cap.383) has exceptions, eg prisoners]
  - Constitutional status, entrenched in BL & domesticated in BOR

• Content is however the same in all sources:

- Context wise they are the same, protecting the same right

- But there are some Exception to the BOR: BOR does not apply for some situations (see Part III e.g., armed forces, immigration legislation);
- if not fallen within the exception of BOR, resort to common law (depending on the circumstances of each case, what rights are involved)

\* ***Wong Tak Wai v Commissioner of Correctional Services [2010] 4 HKLRD 409, §37 (Kwan JA)***

- Para 37 the distinguishment

• **Purpose:**

- Decision making process: more conscious of the needs and impact of the affected decision
- Result of application of rule of natural justice: can impact and improve the substantive decision
- Improving administrative decision-making: efficiency

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

Thomson pp248-253

\* Jhaveri, Ramsden & Scully-Hill pp320-329

• **Right to be informed of charges**

- in cases of disciplinary proceedings e.g., determining the appropriate sanction
- The person who is likely to be affected by the decision: to be informed the charges (see 3. Ridge p.121, opportunity to defense himself); D to be told the substance of the charge so that D can defend himself (p.6)

• **Disclosure of materials relied upon before decision is made**

- In order to make relevant response, to be disclosed either materials made by the other side, or relied by the decision maker in making the decision
  - 4. R v Secretary: 563 D-564D: what needs to be disclosed, depending on the context)
 

*“This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed. Whether such a duty exists, how far it goes and how it should be performed depend so entirely on the circumstances of the individual case that I prefer not to reason from any general proposition on the subject.”*
  - 5 p.2: Chu; not provided with documents, para 72-73:
 

judge said Chu was not given access to the document > might have diff outcome if have the access; not only the risk but actual prejudice, that can have the influence on the decision;
  - **ATV v Communications Authority [2013] 3 HKLRD 618: level of disclosure**

- **Right to be heard vs right to oral hearing**

- Difference: **No absolute right** to an oral hearing
  - i.e. deprived such right does not amount to unfairness;
  - when written form might be enough to make meaningful representation; e.g., dispute merely on contractual right, can be heard by other methods (by interpretation of the terms by written form)
  - when cases involving assessment of creditability of witnesses (he said she said situation), oral hearing might suit better show credible evidence
- Indicators/factors to consider:
  - **material dispute of fact**; when written form does not sufficiently expose the facts, but does not necessary follow there should be oral hearing > context dependent
  - **substantial constitutional (fundamental) right**: where percussion is serious, D might be need of oral hearing (as D might be better represented his argument by way of oral hearing)
- **Written form vs oral**: See *ST v Betty Kwan* [2014] 4 HKC 419
- **Right to be heard**: see *鍾凱研 v General of the Salvation Army*

- \* *Liu Pik Han v Hong Kong Federation of Insurers Appeal Tribunal* [2005] 3 HKC 242
- \* *Ng Nga Wo v Director of Health*, HCAL 16/2006 (unrep., 16 May 2006)
- \* *ATV v Communications Authority* [2013] 3 HKLRD 618
- \* *ST v Betty Kwan* [2014] 4 HKC 419
- \* *R (Osborn) v. Parole Board* [2014] AC 1115
- \* *AIA International Ltd v Appeal Tribunal of Hong Kong Federation of Insurers* [2017] 5 HKC 83
- \* *Registrar of Hong Kong Institute of Certified Public Accountants v Disciplinary Committee of Hong Kong Institute of Certified Public Accountants* [2020] 5 HKLRD 262
- \* *Up Energy Development Group Ltd v Stock Exchange of Hong Kong Ltd* [2021] HKCFI 3813; HCAL 949/2021 (unrep., 21 December 2021)
- \* *鍾凱研 v General of the Salvation Army* [2023] HKCFI 3273

### 3. Legal representation

Thomson pp253-256

Jhaveri, Ramsden & Scully-Hill pp329-337

- **Not an absolute right; context-dependent**
  - Aim to have **meaningful and focus representation** of the applicant to the tribunal

- Disciplinary guideline providing such provision
- Consider the dispute and issue involved: whether the case really require legal representation, depending on circumstances of each case
  - E.g., If involving a serious case > allow legal representative to better argue a case; vs requiring expertise at certain fields expert evidence, experiences civil servants at better position to argue the case than lawyers

\* *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234

\* *Rowse v Secretary for Civil Service* [2008] 5 HKC 405 See Para 168-169

\* *Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 234

#### 4. Specific issues (\* Jhaveri, Ramsden & Scully-Hill pp313-320)

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

\* *R v Home Secretary, ex p Bugdaycay* [1987] 1 AC 514

\* *Secretary for Security v Prabakar* (2004) 7 HKCFAR 187

\* *MA v Director of Immigration*, HCAL 10/2010, (unrep., 6 January 2011), §§94-95

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

- The availability of redress in judicial review for the absence of a fair hearing is subject to the curative principle.
- If a subsequent procedural step such as an appeal or rehearing occurs which "cures" the deficiency of fairness in the original hearing, the applicant is not necessarily entitled to relief in judicial review on the basis of that deficiency.
  - See *Wong Tak Wai*
- Decision that does not comply completely with the requirement of procedural fairness at early stage of the decision might be cured, if the person affected to the recourse to the further hearing or at an appeal, which itself provides a fair process
  - If procedure suggests there is a right of re-hearing and appeal > if the procedure provides all mechanism requires by law (the fairness requirement)> cannot say in JR the right is denied
    - look at the process overall, if one of the stage can achieve fairness then it is good enough
  - See **chung hoi yin para 85**: examine the entirety of the process to evidence allegations of unfairness; judge concluded that the applicant is given fair opportunity to refute the allegations
  - Consider the target of the challenge (on statute or decision)

- Whether JR is a sufficient remedy: where JR does not resolve factual dispute (no cross examination from the other side in JR);
- if involving a statute that prohibit the fair procedure > JR the statute > if successful could get permission to strike down the statute > where legislature would need to reconsider it;
- if involving the decision that prohibit so > JR the decision > remitted to the decision maker > advantages for the applicant would be the decision maker would need to bind to the finding to the JR court

\* **Lam Siu Po v Commissioner of Police (2009) 12 HKCFAR 234**

\* **Wong Tak Wai v Commissioner of Correctional Services [2010] 4 HKLRD 409**

## Week 4 Procedural Fairness II

### 1. Duty to provide adequate reasons

Thomson, *Administrative Law in Hong Kong* (2018), pp257-265

\*Jhaveri, Ramsden & Scully-Hill, *Administrative Law in Hong Kong*, 2<sup>nd</sup> ed., pp337-344

**Two situations in which reasons may be required** for an administrative decision

- (1) Where a **decision appears aberrant without reasons**, then it will have to be explained to assess the decision's legality
- (2) The furnishing of reasons may be required **where an important legal interest is affected** by a decision
  - situations where individual's legal rights are being 'forfeited' (e.g., interests of asylum seekers, sentence of mandatory life imprisonment)

- \* **\**Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority* (1997-1998) 1 HKCFAR 279**
- \* *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 WLR 242 – types of cases where reasons need not to be given
- \* **\**Lister v CEIC***, CACV 172/2012 (*unrep.*, 25 April 2013)
- \* *Pearl Securities Ltd v Stock Exchange of Hong Kong* [1999] 2 HKLRD 243
- \* *Secretary for Security v Prabakar* (2004) 7 HKCFAR 187
- \* *Smart Gain Investment Ltd v Town Planning Board*, HCAL 12/2006 (*unrep.*, 6 November 2007)
- \* *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302
- \* *PVQ v Permanent Secretary for Security* [2021] HKCA 444
- \* *Capital Rich Development v Town Planning Board* [2007] 2 HKLRD 155
- \* *Cai Zhenrong v Stock Exchange of Hong Kong Ltd* [2021] HKCFI 1899 HCAL 2337/2020

### 2. Rule against bias

\*Thomson pp264-271

- Consider the **state of mind of decision maker**
- **Two different kind of bias: actual and appearance bias**
  - **Actual bias:** decision maker actually being biased, required evidence that they are indeed biased in the decision making process
    - But hard to establish so: as state of mind, hard to determine so; and the law does not provide the situation where the public can challenge the decision maker or the judges; Unless there is their admission
  - **Appearance bias:** justice seen to be done, rules not constrained to actual bias
  - Distinction: viewpoint from the judge, their **subjective mind vs on public perception**, as to whether there is bias
- **2 instances**
  - Where the judge or decision maker is a party to litigation, or having interest in the outcome of the case
    - Case 15 Bow street
  - Where the judge is not a party nor having interest but through their **conduct or behavior** that could give suspicion that there can be bias
    - Over-argumentative judge
    - Judicial intervene
    - The perception created by the conduct by a reasonable bystander
- \* **R v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No.2) [2000] 1 AC 119**
- \* **Deacons v White & Carter (Councils) Ltd [2003] 6 HKCFAR 322**
- \* Chui v Cheng [2023] 3 HKLRD 950
- \* Granton Natural Resources Co Ltd v Armco Metals International Ltd (HCCT 5/2012, 7 Dec 2012)

Other cases:

- \* PCCW-HKT Telephone Ltd v Telecommunications Authority [2008] 2 HKLRD 282
- \* Rowse v Secretary for Civil Service [2008] 5 HKC 405, §§54-69, 144-169
- \* Dr X v The Education and Accreditation Committee of the Medical Council of Hong Kong & Anor [2013] HKLRD 167
- \* Falcon Private Bank Ltd v Borry Bernard Edouard Charles Ltd (2014) 17 HKCFAR 281
- \* ZN v Secretary for Justice [2016] 1 HKLRD 174
- \* Up Energy Development Group Ltd v Stock Exchange of Hong Kong Ltd [2021] HKCFI 3813; HCAL 949/2021 (unrep., 21 December 2021)
- \* Meerabux v AG of Belize [2005] 2 AC 513
- \* Re P (A Barrister) [2005] 1 WLR 3019
- \* Porter v Magill [2002] 2 AC 357



**Note:**

- Separating the two bias
  - One requires evidence (actually pre-determining the issue)
  - How the public would perceive the judge's behavior, by an objective view
- But even bias established, it can be erased
  - Disclosure of doc to erase concern of bias
- Reason insufficient as a weak point?
  - Could possibly reach the same outcome when decision maker gives reasons subsequently, applicant might be hard to succeed in the case
  - But as one way to demonstrate the illegality of a decision
  - Legality might be the fundamental and first priority that an applicant
  - Can challenge on ground that the reasons are so bad to reach a legit decision

## Lecture 5 – Illegality

### Analytical Framework in Assessing Legality

- **Illegality**, or *ultra vires* i.e. “beyond his power”
  - means a decision which either contravenes or exceeds the authority given to make the decision or is a decision which fulfills a purpose other than that for which the authority was given to the decision-maker
- The first step: find out the **meaning of the empowering statute, regulation or policy on proper construction**

- See the modern approach to statutory interpretation in *HKSAR v Chan Chun Kit* (2022) 25 HKCFAR 191

Held	Para 10-11: Principles of statutory interpretation <ul style="list-style-type: none"><li>• <b>Modern approach:</b> consider <b>context</b> and <b>purpose</b>, what is the mischief the statute is to combat</li><li>• Tension between words and the purpose: but cannot simply look at the purpose, actual words are important too</li><li>• Context here: taken in its widest sense (including history of the provision, e.g., statutory amendment, showing the reason behind the change)</li></ul>
Note	<p>Not in common law, otherwise it would be hard to identify</p> <p>One approach: <b>purposive approach</b>, not just read it literally, but the purpose underlined, informing the reading of the words to resolve ambiguity</p>

- The second step: glean from
  - the **evidence** (usually through contemporaneous reasons given by the decision-maker, or **justification given by affidavit in the JR**, or other objective material, the **basis of the exercise or non-exercise of power**,
  - to ascertain whether the decision-maker has exceeded or improperly exercised the power conferred on him
  - decisions in itself might not always be explanatory, reason might not be given (duty to give reasons); look at all evidence for the reasons behind
  - court does not always intervene, although it has discretion to do so; court does not have the power to strike down the decision itself? But can rule on whether decision maker is contravening the power given to make the decision

### Various permutations of illegality – When can the Court intervene?

- Not necessarily distinct categories; can have overlaps

1. A statute may say “Decision-maker can do X”; the decision-maker in purported exercise of that power does Y. In such a case **Y clearly exceeds the authority** and is ***ultra vires***

- Decision maker simply not empowered by the statute to make the decision
- No.27 *Building Authority v Appeal Tribunal (Buildings)* [2016] 1 HKRLD 1381
- No. 7 *Re Sea Dragon Billiard and Snooker Association* [1991] 1 HKLR 711

2. If a decision-maker **unreasonably refuses to use the power** conferred upon him or to consider using such power (“outright refusal to consider the relevant matter”), this frustrates the policy and object of statute

- Vs. pure *ultra vires* as positive acts, here is negative act of not doing sth
- No. 8: *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997;
- No.9: *Chan Noi Heung v Chief Executive in Council* [2008] 3 HKC 452
- No.11: *Wheeler v Leicester City Council* [1985] AC 1054
- Not always clear as to the right interpretation of the statute

3. If a decision-maker uses the power for a **purpose different** from the purpose of the power-conferring statute

- Identify the exact reason, and for what reason is reasonable
- If more than one purposes, decide which one is the dominant one
- Whether the reason is contrary to be inherently impermissible

4. If a decision-maker takes into account **irrelevant considerations** or **fails to take into account relevant considerations** (also described as a species of “misdirection in point of law”)

\* No.12 Thomson, *Administrative Law in Hong Kong* (2018), pp154-162

- irrelevant considerations is about establishing that the decision maker made a decision on the basis of the wrong reasons or factors taken into account.
- This ground of review comprises two alternative or complementary parts:
  - (1) where a decision maker has **taken into account an irrelevant consideration**
  - (2) where he or she has **failed to take into account a relevant consideration**
    - The relevance of considerations will typically be assessed according to the appropriate statutory provisions, though the factual, legal and policy context of the case
    - E.g., departmental circulars, policy documents, practical considerations and the common law
- A common ground for attack

- If err in law, decision to be quashed
- Typical valid considerations would include: (1) criteria and purposes laid down by statute; (2) relevant policies; (3) circumstances and merits of each individual case.
- Examples of invalid considerations would include: (1) political factors (unless specifically stated); (2) any personal feelings / emotions of the decision-maker.
- No. 13. Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014
- No.14 R v Somerset County Council exp Fewings [1995] 1 WLR 1037
- No. 28 Riaz Hussain v Permanent Secretary for Security [2020] HKCFI 253

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

- \* No 17. Thomson, Administrative Law in Hong Kong (2018), pp175-189
  - Two principal dimensions:
    - (1) a decision maker must decide: they cannot ordinarily refuse to decide or abstain from deciding.
    - (2) a decision maker must actively make a decision, and cannot resolve at a given time what decisions will be made in the future.
  - Obligation to decide
  - Obligation to Decide with a Sufficiently Open Mind
    - Unlawful policies
    - Unlawful Application of Lawful Policies
  - Fettering Discretion through Contract
  - When the law gives one discretion, but mechanically apply so without considering relevant consideration; just as not exercising the power at all
  - Conceptual different from not regarding relevant consideration, but here is not considering any consideration at all
  - Prove the existence of policy; (may be published or internal guideline)
  - No.19 British Oxygen Co Ltd v Board of Trade [1971] AC 610
  - No.20 Wise Union Industries Ltd v Hong Kong Science and Technology Parks Corp [2009] 5 HKLRD 620
  - No.29 Lo Yuet Hing v Hong Kong Housing Authority [2002] 4 HKC 391

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

- \* No.21 Thomson, Administrative Law in Hong Kong (2018), pp165-171
  - Unlawful Delegation
    - Carltona Principle
    - Status of Delegator and Delegate

- Nature of Delegated Power

- If the statute specifically grants power for one decision maker, only he or she would have such power (E.g., Situation where one on department's behalf to sign sth)
- Court generally accepts that some delegation of power is reasonable (e.g., some staff approving the decision, a valid delegation), but principle only goes so far;
- Agency situation
- An uncommon challenge

7. If a decision **makes an error of fact** – but note the **high standard of review** for factual errors

- If a material fact that the decision maker based on is non-existent, the decision itself is false, irrationality in sense of reasonableness
- *No.25 Smart Gain Investment Ltd v Town Planning Board* (HCAL 12/2006, 6.11.2007)

### Reading List

1. Thomson, Administrative Law in Hong Kong (2018), pp 125-129

- **Statutory power of decision body**

- Source of legal power typically being statutory power, which is of limited scope; discretion given by the statute (stated expressly in the statute to decision maker must be exercised reasonably;
- while there could also be implied powers (e.g., The use of broad or subjective language in statute, such as the conferral on a body of discretion to be exercised "as it thinks fit")
- Statutory interpretation to ascertain the capacity of a statutory corporation
- As Lord Nicholls of Birkenhead put it:  
*'No statutory power is of unlimited scope. The discretion given by Parliament is never absolute or unfettered. Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose ... The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation.'*
- courts cannot give powers to bodies which they do not already enjoy and extend the scope of statutory power beyond that provided for in the statute

- **Issue of agency**

- Under strict legal doctrine, legal validity cannot be given to anything the public body or one of its officials says or does which would have the effect of unlawfully expanding their powers or taking them beyond their jurisdiction.

- This could lead undesirable outcomes that the person relies on the agent's statement could suffer loss (E.g., in context of legitimate expectation)
  - One solution which preserves the ultra vires principle is to attach no strict legal effect in public law to the statement or representation, but to allow the person affected to sue for the tort of negligent misrepresentation, and thereby for compensation.
2. Administrative Law in Hong Kong (2nd edn), pp 361-434
  3. Hong Kong Television Network Ltd v Chief Executive in Council [2015] 2 HKLRD 1035
  4. HKSAR v Chan Chun Kit (2022) 25 HKCFAR 191
  5. HKSAR v Lam Kwong Wai (2006) 9 HKCFAR 574
  6. Medical Council of Hong Kong v Chow Siu Shek (2000) 3 HKCFAR 144
  7. Re Sea Dragon Billiard and Snooker Association [1991] 1 HKLR 711
  8. Padfield v Minister for Agriculture, Fisheries and Food [1968] AC 997
  9. Chan Noi Heung v Chief Executive in Council [2008] 3 HKC 452

#### 10. Thomson, Administrative Law in Hong Kong (2018), pp 150-153

### **Abuse of Power and Misuse of Power**

- "bad faith" in the context of administrative law: for an unauthorised purpose'; 'in good faith' means merely 'for legitimate reasons'
- "the doctrine of legitimate expectation" to give judicial relief against abuse of executive power
  - E.g., where an authority promises a benefit in the knowledge that the recipient of the promise is not entitled to that benefit, and thereafter reneges on the promise.
  - However, it is questionable whether it is typical for breaches of legitimate expectations to be characterised by abuse of power
- Abuse necessarily includes misuse; but misuse need not, include abuse
  - Abuse of power:
    - Over-broad definition in the English case law
    - whilst in Hong Kong as improper purposes or motives, as have bias and bad faith, discretionary powers it was said could not be abused by acting "illegally or irrationally"
  - Misuses of power
    - E.g., An authority may fail to honour a previous representation due to an error or misunderstanding, or due to a change in practice or policy)

11. Wheeler v Leicester City Council [1985] AC 1054
12. Thomson, Administrative Law in Hong Kong (2018), pp154-162
13. Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014
14. R v Somerset County Council exp Fewings [1995] 1 WLR 1037

15. Capital Rich Development v Town Planning Board [2007] 2 HKLRD 155
16. Deng Suet Yan v Hong Kong Housing Authority [2017] 4 HKLRD 73
17. Thomson, Administrative Law in Hong Kong (2018), pp175-189
18. Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281; (1971) 22 PCR 255
19. British Oxygen Co Ltd v Board of Trade [1971] AC 610
20. Wise Union Industries Ltd v Hong Kong Science and Technology Parks Corp [2009] 5 HKLRD 620
21. Thomson, Administrative Law in Hong Kong (2018), pp165-171
22. Carltona Ltd v Commissioner of Works [1943] 2 All ER 560
23. Thomson, Administrative Law in Hong Kong (2018), pp190-203

#### Error of Fact

- Jurisdictional Error of Fact
- Non-Jurisdictional Error of Fact
- Admission of Fresh Evidence

#### Error of Law

#### Distinction between Error of Fact and Error of Law

24. Nguyen Ho v Director of Immigration [1991] 1 HKLR 576
25. Smart Gain Investment Ltd v Town Planning Board (HCAL 12/2006, 6.11.2007)
26. Aswad Browne v The Parole Board of England & Wales [2018] EWCA Civ 2024
27. Building Authority v Appeal Tribunal (Buildings) [2016] 1 HKRLD 1381
28. Riaz Hussain v Permanent Secretary for Security [2020] HKCFI 253
29. Lo Yuet Hing v Hong Kong Housing Authority [2002] 4 HKC 391

## Week 6 – Unreasonableness and Irrationality

Thomson, Administrative Law in Hong Kong: Chapter 18.

- **Standard of review: Wednesbury unreasonableness**

- a decision so unreasonable that no reasonable decision maker could ever have come to it
- focused on the extent to which the decision was so outstandingly bad that it should not be regarded as unlawful
- a ground of review in its own right. but courts sometimes describe violation of another ground as being unreasonable
  - e.g., failure to take into account of relevant consideration, exercise of discretion for an improper purpose or fettering of discretion may each be deemed unreasonable)

- **Substantive review vs Procedural review**

- Substantive review:
  - high standard of review
  - relatively few real-life situation where a decision maker made a decision which is so egregious that it falls foul of Wednesbury unreasonableness
    - **Wednesbury**
- Procedural review:
  - Lower standard of review
  - easier to examine the decision-making process and to identify procedural deficiencies which can be regarded as unreasonable
  - the court can avoid criticism that it is trespassing on the domain of executive decision makers by affirming that the decision maker was free to exercise its discretion
  - but it has departed from what is procedurally reasonable and would therefore be required to retake the decision
    - **Zestra Asia Ltd. V Commissioner for Transport**

- **How rigours/intense the test is to apply**

- Low intensity of review
  - Court's reluctance to review particular kinds of decision out of concern for adherence to **separation of powers**
  - In relation to decisions which are to be informed by **policy consideration** to a greater extent than is normally the case
    - **R v Ministry of Defence, ex p Smith and Ors [1996] QB 517**
- Higher Intensity of review
  - Where **human or fundamental rights** are involved, the basis of the decision called for "the most anxious scrutiny"



- 6. R v Secretary of State for the Home Department, ex p Bugdaycay [1987] AC 514
  - Can be provided for in statute
    - Protection of the Harbour Ordinance (Cap. 531): statutory presumption against reclamation in the harbour
  - Look at the merits
  - **A spectrum** or a **sliding scale** as to standard of review (involving personal rights vs. policy/decision making), standards vary from case to case
  - Factors to consider
- Constitutional JR: proportionality test (a different framework compared to traditional JR)

[Check case list]

## Week 7 Legitimate Expectation

Thompson, Administrative Law in Hong Kong, Chapter 17

### Definition

- Public body making promise to the public or individual/class of individuals about certain procedure, polity or decision;
  - it would be unfair to not order that decision, unless there is sufficient reasons why it should not honour that promise
  - see **Ng Yuen Shiu** P.638
- Analogy with promissory estoppel (misrepresentation clear and free of doubt, unequivocal), same as in legitimate expectation in public law
- **as a judicial control** of public bodies which change their conduct or position – departing from a previous representation or conduct
  - by imposing requirements on how the change can, and cannot, lawfully come about
- **Procedural vs Substantive legitimate expectation** (the more recent innovation in the law of HK)

### Historical root of the doctrine

- comes into spotlight in early 1990s, fair reasons for its development (see cases)
- development of **Procedural legitimate expectation** (a narrow notion),
  - the applicant expects to be treated, as a matter of procedure, in a particular way
    - e.g., initially dealing with the decision under certain procedure, if not following so, decision maybe quashed
    - e.g., right to be heard, expectation of an oral hearing, being given the opportunity to make representations
- the **expansion** of the doctrine to **Substantive legitimate expectation**: in 2000s
  - The applicant expect to receive a particular substantive outcome
  - substantive legitimate expectation: refers to the outcome, actual benefits & entitlement (sth of substance, focus on the product)
    - E.g., expect to receive a licence, residence status...
  - vs procedural: does not guarantee the outcome if follow the right procedural (focus on the process)
  - now with wider application

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

- **macro-economic/political field**
- The court must tread a careful line between:

- (1) Finding a body liable in public law where it has breached a legitimate expectation  
(2) Trespassing on the capacity of the executive to alter its conduct or position, particular on policy issues

- **Courts refrain from ordering public bodies which specific decision to make**
  - From a separation of powers perspective
  - decision maker makes a decision to wide public, issue addressing **balancing societal/economic interest**
    - **no. 9 Re Thomas Lai** (land use and planning, balance against the interest and needs of the public)
  - court reluctant to give the doctrine of full force, policy statement cannot be overridden
  - question being: what is the best policy in that particular circumstances
    - e.g., COVID-19 pandemic with intense policy, govt should change the policy in light of the changing circumstances
- Court typically adopt a **less invasive approach**:
  - Requiring that public bodies shows they have **taken into account relevant consideration** parties' legitimate expectations arising from the body's previous position
  - The body should **give reasons** for the departure from its previous position
  - If satisfy these requirements, the body's change of position will be lawful
    - **No.5 R (Bibi)**: see all these points
    - **No.6 Ng Siu Tung**: adopting R (Bibi)'s principles
- common law: **recognises public body can change its mind**, can **depart from its previous policy statement**
  - issue being: but the change would affect people who are relying on previous policy
  - value clashes: individual right & the need to guarantee fairness, the govt not the abusing their power with their relationship with the public vs. expected to change the policy
    - see **case No.1 leading case**: Ng Yuen Shiu
  - sometimes policy reasons can outweigh advantages of holding the body liable in public law, even it breaches an otherwise legitimate expectation
    - see **CCSU**: national security implications of consultation as an overriding consideration which defeated the expectation
    - see **Ng Siu Tung**: where the "overwhelming force" of immigration policy could override general representations on the right of abode made by the govt purportedly relied on six hundred thousand persons

## Elements

## Representation made by a public body

- Can be in direct form
- **Can be implied or indirect form**
  - Apply objective standard
    - E.g., **Usual/past practice** (case no.2 CCSU)
- **Must have been made by a public decision maker**
  - i.e. by an entity **acting in the capacity of a public decision maker**
    - e.g., A pre-election manifesto promise cannot generate a legitimate expectation as it is not made in the capacity of public decision maker (case no. 3 Begbie)
    - e.g., Cf, govt policy announcement > made in the capacity of a public decision maker > legitimate expectation
- **Must be clear and equivocal**
  - Identity of decision maker could suggest the proper interpretation of the representation
    - Case no.7 Yook Tong Electric Co Ltd v Commissioner for Transport

## Knowledge and Reliance of the Representation

- Concept of **detrimental reliance**:
  - (1) **Reliance**: have to actually rely on the statement; question of fact
    - Whether the applicant **had knowledge at the relevant time** in the timeline of events (vs subsequently come to have knowledge of representation)
  - (2) **Detrimental**: putting a party in a worse position, showing detriments after the reliance
    - Essential ingredient in legitimate expectation:
    - E.g., case no 3. Begbie: where govt policy was misrepresented through incompetence, but was corrected five weeks later; judge ruled no detrimental reliance despite disappointment of the applicant
- Both are **not a strict ingredient for the claim**, but can **strengthen the claim**
  - case no.3 Begbie (reliance is relevant & important)
  - Case no.9 Re Thomas Lai (no reliance)

## Legitimate expectation

- **Burden of proof**
  - The initial burden: **an applicant to prove the legitimacy of his expectation**
  - Once proved by applicant, onus shifts to the **authority to provide reasons to justify the frustration of the legitimate expectation.**
    - Case No.8 Paponette v. AG of Trinidad and Tobago

- **Defined class of people/size of class of representation**
  - The broader the class claiming the benefit, the more likely it is that the supervening public interest would be held to justify the change of position
    - **No. 4 Coughlan** (strong facts, elderly case, a defined class of ppl > win the case)
    - **No. 6 Ng Siu Tung** (large no. of claimants; broader issue of right of abode > lose)
    - **No.9 Re Thomas Lai** (broad category > lose the case)
- **Standard of review**
  - Yet to be settled in HK

### **Fairness Requirement**

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

### **Comments/Summary:**

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

## Key Issues for Discussion

- What is the basis for the doctrine of legitimate expectation in public law and judicial review?
- What are the differences between a procedural and substantive legitimate expectation?
- In what circumstances can a legitimate expectation be established? What are the relevant requirements?
- What is the relevance of detrimental reliance to a claim that a legitimate expectation has been frustrated?
- In what circumstances can a decision be made which departs from a legitimate expectation?
- To what extent can the doctrine of legitimate expectation be applied to “macro-statements” which are in the broad social, economic or political sphere?

## Q & A:

Q: It was mentioned last week that when the government wants to depart from its promise, it has to have regard to the existing legitimate expectation. It seems to overlap with the illegality ground (i.e. a decision-maker takes into account irrelevant considerations or fails to take into account relevant considerations). So does it mean that if the government fails to take legitimate expectation into account, the decision can be quashed both on the legitimate expectation ground and the illegality ground?

A: Yes, legitimate expectation should be considered with other grounds of review. If the applicant establishes that there is a legitimate expectation arising from a statement or conduct from a public body, it would be wrong for the decision maker to act contrary to the legitimate expectation without taking into account, and having due regard, to the legitimate expectation before it departs from its promise. Thus, legitimate expectation and illegality challenges will often go hand in hand. [The critical questions to consider in your scenario are \(i\) whether there was, in fact, a legitimate expectation; \(ii\) what is the content of that expectation; \(iii\) whether the decision-maker departed from it; and \(iv\) whether the decision-maker took into account the expectation before deciding to depart from it. The "overlap" between legitimate expectation and illegality will likely arise when considering \(iv\) above.](#) Also, legitimate expectation may be inter-related to other grounds of challenge too, e.g., procedural fairness, especially when dealing with procedural legitimate expectations. One set of facts may give rise to a challenge based on both general unfairness, and a failure to adhere to a procedural legitimate expectation as well.

### Definition

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

### Historical background

- No. 2 CCSU: 1985, not yet adopted human right concepts; proportionality as the recognition of rights
- referring to doctrine of necessity, developed in pressure in modern Germany: the police was empowered by statute to adopt such measures
  - this statute was the first known textual basis requiring a proportionality analysis: balancing act between rights of private individual?
  - In a case in 1882 by the Prussian administrative court, the court decided that in order to meet the **principle of necessity**: the measure is deployed must not exceed in intensity what was required by the pursued objective.
- Further development
  - principle gradually evolved and developed into what we know now as proportionality
  - first developed and refined under the rubric of international and domestic human rights law e.g., ECHR, the ICCPR
- must not exceed what is required in (see Hysan case)

### Proportionality at common law

- **Classic Wednesbury test**
  - so unreasonable that no reasonable position maker would have come to that position; Or the failure to take into account relevant considerations; or take into account obviously unreasonable and irrelevant considerations.
  - **high threshold**, implicit in classic formation; so unreasonable that no one would ever come to the same decision
- Later anxious scrutiny/heightened scrutiny: No.3 Bugdaycay

1. Jhaveri, Ramsden & Scully-Hill, Administrative Law in Hong Kong, 2nd ed., pp435-480

### Proportionality at Common Law

2. Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
3. R v Secretary of State, ex p Bugdaycay [1987] AC 514
4. R v Ministry of Defence, ex p Smith and Ors [1996] QB 517
5. Pagtama v Director of Immigration, HCAL 13/2014 (unrep., 12 January 2016)
6. Pham v Secretary of State for the Home Department [2015] UKSC 19

### **Proportionality in Statutory Context**

7. Town Planning Board v Society for Protection of Harbour Ltd (2004) 7 HKCFAR 1; [2004] 2 HKLRD 902

### **Proportionality and Fundamental Rights**

8. Secretary for Security v Prabakar (2004) 7 HKCFAR 187
9. Fok Chun Wa v Hospital Authority (2012) 15 HKCFAR 409
10. MA v Director of Immigration HCAL 10/2010, (unrep., 6 January 2013)
11. Kong Yunming v Director of Social Welfare (2013) 16 HKCFAR 950
12. Hysan Development Co Ltd v Town Planning Board (2016) 19 HKCFAR 372



## Week 9 – Judicial Review Remedies

Textbook

Chapter 20, Thomson, Administrative Law in Hong Kong.

- **Overview**

- JR exclusive remedies: **certiorari, mandamus and prohibition**
- other three remedies which can be sought using either IR or ordinary procedure: **declaration, injunction, and damages**
  - damages (only be sought in relation to private law liability)
- The remedies should be used in conformity with the separation of powers: to enforce or uphold legality, whilst refraining from encroachment on the merits
- limitation on the scope of remedies in JR: available against an actual decision or decision-making process which has led to an actual decision; where not every decision is susceptible to review

- **21K of High Court Ordinance:** Application for judicial review

(1) An application to the Court of First Instance for one or more of the following forms of relief—

(a) **an order of mandamus, prohibition or certiorari;**

(b) **an injunction under section 21J restraining a person not entitled to do so from acting in an office to which that section applies,**

shall be made in accordance with rules of court by a procedure to be known as an **application for judicial review**.

(2) An application for a declaration or an injunction (not being an injunction mentioned in subsection (1)) may be made in accordance with rules of court by way of an application for judicial review, and on such an application the Court of First Instance may grant the declaration or injunction claimed if it considers that, having regard to—

(a) **the nature of the matters** in respect of **which relief may be granted** by orders of mandamus, prohibition or certiorari;

(b) **the nature of the persons and bodies** against whom relief may be granted by such orders; and

(c) **all the circumstances of the case,**

it would be **just and convenient** for the declaration to be made or the injunction to be granted, as the case may be.

## 1. Types of Relief Available In Judicial Review

- **Main remedies: certiorari, mandamus and prohibition**

### **Certiorari**

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

### **Mandamus**

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

### **Prohibition**

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

## **Declarations**

- an order of the court which declares legal rights, duties or status
- vs. certiorari, where an act, omission or decision is quashed and rendered legal nullity (declaration does not have this effect, but both be regarded as mutually exclusive)
- Might be more appropriate than certiorari in some situations
  - e.g., Director of Immigration purports to impose an additional immigration restriction on all residents in HK, but the restriction could only lawfully be imposed on temporary residents
  - if certiorari was issued > restriction would be quashed and would have to be remade
  - certiorari may be more disruptive and consuming of resources than is necessary
- Useful where it is unclear which party made a decision
- more appropriate where legislation is being tested for constitutionality
- **General rule: cannot be sought on so called hypothetical or academic question**
  - due to policy reasons
    - 1. the hypothetical question might never become a real question, in which case the resources of the parties and the court are consumed to no avail
    - 2. when the hypothetical scenario materialises, there may be new facts or variations on existing facts which were not available or known at the time of the litigation
    - 3. Not all of the parties relevant to the case may be capable of identification at the hypothetical stage

- 4. the general rule against hypothetical challenge is a means of discouraging speculative, frivolous or trivial litigation
- **Exceptions to the general rule** (where declaration could be sought)
  - when the question is one of **significant public interest**: where a wide range of ppl could well be affected
  - when no need for further facts, resolution of question involve **pure point of law** (esp when involving **constitutionality** of legislation) > better to resolve the question of law sooner rather than later
  - where there was a **real possibility that the same issue could arise again**
  - when reasonable to let ppl know consequence of acts
  - when it can **serve a useful purpose** e.g., where obtaining a declaration would assist the applicant in establishing a claim for damages based on breach of contract
  - where there are **conflicting decisions** – Chit Fai Motors
- Leung v Secretary for Justice [2006] 4 HKLRD 211

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

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

### **Monetary Remedies**

- Subject to a number of conditions – 0.53
- **only be sought in relation to private law liability**, cannot be sought for public law liability (unless statute provides otherwise)
  - policy reason for disallowing damages to be sought for public law liability: concern for impact this would have on public resources; might develop a “compensation

culture” for public law liability > encourage persons to bring JR application with financial motives in mind

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

### **Combination of order**

- the proper course may vary with the circumstances, but could involve one or more of certiorari, mandamus or declaration
  - e.g., can solely order certiorari to quash the previous unlawful decision of the licensing authority, could either stand alone or be combined with an order of mandamus to compel the authority to rehear and determine the licence application

### **2. Availability of Relief Against Preliminary Decisions / Prematurity**

- TVB v Communications Authority [2013] 5 HKC 593
- Kwok Cheuk Kin v Chief Executive of the HKSAR [2017] 5 HKC 579

### **3. Academic Questions**

- Chit Fai Motors v Commissioner for Transport [2004] 1 HKC 465
- Leung v Secretary for Justice [2006] 4 HKLRD 211
- Law Mei Mei v Airport Authority [2018] 4 HKLRD 312
  - strong policy reasons favouring the court’s ruling on so-called hypothetical question

### **4. Exhaustion of Alternative Remedies**

- Tsang Kin Chiu v Commissioner for Police [2015] 4 HKLRD 71

### **5. Potential Impact on Third Parties**

- Shek Lai San v. SFC [2010] 4 HKC 168

### **6. Futility**

- Leung Fuk Wah v Commissioner for Police [2002] 3 HKLRD 653.
- Chu Ping Tak v. Commissioner of Police [2002] 3 HKLRD 679.

### **7. Delay**

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