Wong Tak Wai

and

Commissioner of Correctional Services

(Court of Appeal)

(Civil Appeal No 231 of 2009)

Stock V-P, Kwan JA and Andrew Cheung J

12, 13 May, 21 July 2010

Administrative law — prison disciplinary proceedings — determination by superintendent of prison that applicant-inmate committed offences against prison discipline — such determination not tainted with apparent bias — standard of proof in these proceedings was beyond reasonable doubt

Human rights — right to fair and public hearing — prison disciplinary proceedings — whether involved "determination of any criminal charge" for purpose of art.10 and hence required higher standard of proof — Hong Kong Bill of Rights Ordinance (Cap.383) s.8 arts.10, 11(1) — Prison Rules (Cap.234A, Sub.Leg.) rr.63(1)(c), 69

行政法 — 監獄的紀律處分程序 — 由監獄監督裁定申請人即被羈留者已作出違反監獄紀律的行為 — 該裁定不沾染明顯的偏見 — 在這些程序中的舉證標準是毫無合理疑點

人權 — 公平和公開聆訊的權利 — 監獄的紀律處分程序 — 是否涉及第10條所指的的「任何刑事指控的裁定」，而需要較高的舉證標準 — 《香港人權法案條例》（第383章）第8條的第10，11(1)條 — 《監獄規則》(第234A章，附屬法例) 第63(1)(c)及69條

A prison superintendent determined that, X, an inmate, had committed offences against prison discipline in five cases between May 2007 and January 2008 (the Determination). The offences concerned the possession of unauthorised articles and the use of abusive language. X was sentenced to forfeiture of 98 days' remission. In four of the five cases, the standard of proof applied by the superintendent was on a balance of probabilities. X's appeals to the Commissioner of Correctional Services, who was in a position to conduct a full review on the merits, were dismissed. In judicial review proceedings, X was largely successful at first instance, and all the determinations and decisions were quashed for lack of an independent and impartial tribunal and because the standard of proof applied in the four cases was erroneous. The Commissioner appealed.

Held, allowing the appeal in part, that:

Absence of an independent and impartial tribunal

(1) (*Per* Andrew Cheung J, Stock V-P agreeing) The test for apparent bias was whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there was a reasonable apprehension of bias. In the context of prison disciplinary proceedings, a fair-minded and informed observer would be realistic and pragmatic, bearing in mind the unique situation concerning prisons and prison life. They would also bear in mind that in the present case, the front-line officers were several rungs removed from the superintendent, although they were stationed in the same prison. The superintendent would normally have limited direct contact at work with the reporting officers and the other front-line officers. The superintendent would not be involved in the direct supervision of prisoners. Therefore, a fair-minded and informed observer would place the superintendent in the same category as the Commissioner and conclude that there was no reasonable apprehension of bias, unless, on the facts of a particular case, something more was present to tip the scales (*Currie v Alberta (Edmonton Remand Centre)* (2006) 276 DLR (4th) 143, *R v Board of Visitors of Franklin Prison* [1986] 1 WLR 130, *R (Al-Hasan) v Secretary of State for the Home Department* [2005] 1 WLR 688 considered). (See paras.137–143.)

(2) (*Per* Kwan JA, disagreeing on this point) As independence provided the structural framework which secured impartiality, legitimate doubts over the lack of independence could lead to reasonable misgivings over impartiality, whether the adjudicating superintendent would be free of a predisposition to favour the interests of either side. Public perception from an objective viewpoint would conclude there was a real possibility that the adjudicating superintendent might be subconsciously biased. (See para.64.)

Curative principle

(3) If apparent bias had been established, then it would be necessary to consider whether the determination process as a whole cured any procedural unfairness arising so as to ensure compliance with art.10 of the Hong Kong Bill of Rights. The High Court on a judicial review had no jurisdiction to reach its own conclusion on the primary facts, and so did not afford full jurisdiction and would not have cured the breach of art.10 or the lack of independence and impartiality at the first stage of the process before the superintendent. However, there was compliance with art.10 through the appeal from the superintendent to the Commissioner. Given the wide power

of the Commissioner to enquire fully into the merits and to hold a rehearing where the justice of the matter required, he was armed with full jurisdiction to deal with the case as the nature of the challenged decision required (*Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237, *R (Wright) v Secretary of State for Health* [2009] 1 AC 739, *Tsfayo v United Kingdom* (2009) 48 EHRR 18 considered). (See paras.77–78, 85.)

The standard of proof

(4) Prison disciplinary proceedings in the present cases could be regarded as "the determination of any criminal charge" pursuant to art.10, and so the standard of proof should be beyond reasonable doubt as required by art.11(1). The wrong standard of proof was therefore adopted for four of the cases. (See para.100.)

(5) In reaching the conclusion that the proceedings could be regarded as "the determination of any criminal charge", the courts applied three criteria: (a) the classification of the offence under domestic law; (b) the nature of the offence; and (c) the nature and severity of the potential sanction. The three criteria were alternative and not necessarily cumulative. (See paras.86–88.)

(6) Here, it was clear that criteria (a) and (b) were not met. The offences were classified as disciplinary under domestic law and, although misconduct by a prisoner might take different forms, the misconduct complained of against the applicant — the possession of unauthorised articles and the use of abusive words — were not criminal in nature. As for (c), forfeiture of remission imposed as punishment constituted deprivation of liberty. In the five cases involving X, he was given a total loss of remission of 98 days. This could not be regarded as sufficiently unimportant or inconsequential or not appreciably detrimental so as to displace the presumed criminal nature of the charges against him (*Engel v The Netherlands (No 1)* (1979–80) 1 EHRR 647, *R (West) v Parole Board* [2005] 1 WLR 350 considered). (See paras.88, 96, 99.)

Compellability of witnesses

(7) As for X's submissions that for prison disciplinary proceedings, the minimum standards of fairness required that witnesses called by the prisoner should be compellable, it would be better to approach this kind of complaint on a case-by-case basis, with due regard to the specific circumstances of the case, instead of making it an inflexible requirement that witnesses called by prisoners must be compellable, as inmates summoned by prisoners to testify might refuse to do so for a variety of reasons. (See paras.108–110.)

Appeal

This was an appeal by the applicant against the judgment of Barnabas Fung J. The facts are set out in the judgment.

Mr Kwok Sui Hay, instructed by Brian Kong & Co and assigned by the Director of Legal Aid, for the applicant.

Mr Anderson Chow SC and Ms Eva Sit, instructed by the Department of Justice, for the respondent.

Legislation mentioned in the judgment

Criminal Justice Act 1991 [England] ss.33(1), s.33(2), 42

Hong Kong Bill of Rights Ordinance (Cap.383) ss.2, 8 arts.10, 11(1), 9

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

Prison Ordinance (Cap.234) ss.2, 25(1)

Prison Rules (Cap.234A, Sub.Leg.) rr.57, 58, 59, 60, 61, 61(d), 61(k)(i), 62, 63, 63(1)(c), 63(2), 63(2A), 63(3), 69, 69(1), 69(2), 69(4), 79, 81, 83, 94, 95

Rules of the High Court (Cap.4A, Sub.Leg.) O.59 r.6(1)(b), O.59 r.6(1)(c)

Cases cited in the judgment

Albert and Le Compte v Belgium (1983) 5 EHRR 533

Bryan v United Kingdom (1996) 21 EHRR 342

Calvin v Carr [1980] AC 574, [1979] 2 WLR 755, [1979] 2 All ER 440

Campbell and Fell v United Kingdom (1985) 7 EHRR 165

Currie v Alberta (Edmonton Remand Centre) (2006) 276 DLR (4th) 143

Deacons v White & Case Ltd Liability Partnership (2003) 6 HKCFAR 322, [2004] 1 HKLRD 291, [2003] 3 HKC 374

Engel v The Netherlands (No 1) (1979–80) 1 EHRR 647

Ezeh and Connors v United Kingdom (2004) 39 EHRR 1

Gillies v Secretary of State for Work and Pensions [2006] UKHL 2, [2006] 1 WLR 781, [2006] 1 All ER 731

Han v Customs and Excise Commissioners [2001] EWCA Civ 1048, [2001] 1 WLR 2253, [2001] 4 All ER 687

Koon Wing Yee v Insider Dealing Tribunal (2008) 11 HKCFAR 170, [2008] 3 HKLRD 372

Lam Siu Po v Commissioner of Police (2009) 12 HKCFAR 237, [2009] 4 HKLRD 575, [2010] 2 HKC 149

Lawal v Northern Spirit Ltd [2003] UKHL 35, [2004] 1 All ER 187, [2003] ICR 856

Lloyd v McMahon [1987] AC 625, [1987] 2 WLR 821, [1987] 1 All ER 1118

Lui Tat Hang Louis v Post-Release Supervision Board [2010] 1 HKC 297
Lutz v Germany (1988) 10 EHRR 182
Porter v Magill [2001] UKHL 67, [2002] 2 AC 357, [2002] 2 WLR 37, [2002] 1 All ER 465
R (Al-Hasan) v Secretary of State for the Home Department [2005] UKHL 13, [2005] 1 WLR 688, [2005] 1 All ER 927
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 WLR 1389, [2001] 2 All ER 929
R (McCann) v Manchester Crown Court [2002] UKHL 39, [2003] 1 AC 787, [2002] 3 WLR 1313, [2002] 4 All ER 593
R (West) v Parole Board [2005] UKHL 1, [2005] 1 WLR 350, [2005] 1 All ER 755
R (Wright) v Secretary of State for Health [2009] UKHL 3, [2009] 1 AC 739, [2009] 2 WLR 267, [2009] 2 All ER 129
R v Board of Visitors of Franklin Prison [1986] 1 WLR 130, [1986] 1 All ER 272
R v Board of Visitors of Hull Prison, ex p St Germain [1979] QB 425, [1979] 2 WLR 42, [1979] 1 All ER 701
R v Gough (Robert) [1993] AC 646, [1993] 2 WLR 883, [1993] 2 All ER 724
R v Her Majesty's Prison Service, ex p Hibbert (unrep., 16 January 1997)
R v Lippé [1991] 2 SCR 114
R v Valente (No 2) [1985] 2 SCR 673
Runa Begum v Tower Hamlets London Borough Council [2003] UKHL 5, [2003] 2 AC 430, [2003] 2 WLR 388, [2003] 1 All ER 731
Solicitor (24/07) v Law Society of Hong Kong (2008) 11 HKCFAR 117, [2008] 2 HKLRD 576, [2008] 2 HKC 1
Tsfayo v United Kingdom (2009) 48 EHRR 18
Whitfield v United Kingdom (2005) 41 EHRR 44
Wolff v McDonnell 418 US 539 (1974)
Young v United Kingdom (2007) 45 EHRR 29

Other materials mentioned in the judgment

Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, art.6, 6(1)
De Smith's Judicial Review (6th ed., 2007) para.8-025
Livingstone, Owen and Macdonald, *Prison Law* (4th ed.) para.9.33
Office of the High Commissioner for Human Rights, General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial (UN Doc/CCPR/C/GC/32) 21 August 2007, paras.34, 35, 56

Stock V-P

1. I have had the advantage of reading in draft the judgments of Kwan JA and Andrew Cheung J.

2. The only issue that separates them, although leading ultimately to the same result, is the question of apparent bias at the first tier, namely, whether a fair minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility, or a real danger, that an adjudicating superintendent of a prison, operating within the remit and duties imposed by that part of the Prison Rules which deals with prison discipline, was biased.

3. In the context of the present subject matter, resolution of that issue is not straightforward and is ultimately a question of "feel" and judgment:

> The problem of actual or apparent bias has been a particularly difficult one for the prison discipline system. Given that the governors involved in hearing charges have a fairly close relationship with prison officers bringing the charges, it must be asked whether the appearance of impartiality can ever fully be achieved.[1]

4. Determination of that issue in this case has not been made easier by the absence of evidence concerning the size of the prison and staff populations of individual prisons in Hong Kong. That said, the thrust of the evidence is that superintendents are somewhat removed in terms of duty and contact from prisoners as well as from those prison staff members from whom complaints against prisoners are likely to emanate.

5. I am on balance persuaded by the factors advanced by Cheung J to answer the "first-tier" appearance of bias question in favour of the Commissioner. I would add to those factors the point that the Rules impose upon superintendents a specific duty to observe the conduct of subordinate officers, as well as an express duty to control all matters in connection with which he or she is in charge, and that each superintendent is, by the Rules, responsible to the Commissioner:

(a) Not simply for the conduct of prisoners but for their treatment too, which necessarily envisages fair treatment; and
(b) Importantly, for the conduct of prison officers under his control and for the due observance by those officers of prison rules and all orders issued by the Commissioner or on his behalf.[2]

[1] Livingstone, Owen and Macdonald, *Prison Law* (4th ed.) para.9.33.
[2] See rr.79, 81 to which Kwan JA refers at para.16 below.

6. I am otherwise fully in agreement with the judgment of Kwan JA and I agree with the orders proposed by her.

Kwan JA

Introduction

7. An inmate of Stanley Prison, Wong Tak Wai (the applicant), was determined to have committed offences against prison discipline in five cases between May 2007 and January 2008. A Superintendent of Stanley Prison made the determination in each case and the punishment imposed included forfeiture of remission of his sentence of imprisonment. The applicant appealed the determination and punishment in four of the cases to the Commissioner of Correctional Services (the Commissioner). The appeal was dismissed in each instance. The Commissioner rejected the notification of appeal in the remaining case as being out of time.

8. The applicant brought an application for judicial review against the determination of the Superintendent in each of the cases and the decisions of the Commissioner dismissing his appeal and rejecting his notification to appeal as out of time. He was largely successful before Fung J. On 31 August 2009, the Judge made an order quashing all the determinations and decisions, on two major grounds advanced by the applicant, namely, that there was absence of an independent and impartial tribunal and that the standard of proof applied in four of the cases being proof on the balance of probabilities was erroneous.

9. The Commissioner brought this appeal against the judgment of Fung J.

The main issues on appeal

10. The main issues in this appeal may be stated as follows:

(a) Whether there was basis to complain of bias on the part of the Superintendent who determined the cases;
(b) If the answer to (a) is yes, whether the whole determination process of prison disciplinary offences, including appeal to the Commissioner and judicial review, could nevertheless be regarded as fair; and
(c) Whether the standard of proof in prison disciplinary proceedings should be proof beyond reasonable doubt or proof on the balance of probabilities.

11. Fung J answered the issue in (a) in the affirmative.[3] He referred to the arguments of counsel on the issue in (b) but did not appear to have made a ruling on this.[4] On the issue in (c), he held that the standard of proof in prison disciplinary proceedings should be proof beyond reasonable doubt.[5]

12. There were other issues raised by the parties but they are not so important.

13. I will set out the relevant statutory provisions and give a summary of the five cases concerning the applicant before I turn to the main issues. The relatively unimportant issues would be dealt with at the end of this judgment.

The statutory provisions

14. The provisions governing offences against prison discipline are found in the Prison Rules (Cap.234A, Sub.Leg.), made pursuant to s.25(1) of the Prison Ordinance (Cap.234). The relevant provisions read as follows:

> **57. Power of Superintendent to deal with reports against prisoners**
>
> The Superintendent or in his absence, the officer appointed to act for him and no other, shall deal with a report made against a prisoner.
>
> **58. Segregation of a prisoner against whom a report has been made**
>
> A prisoner who has been reported for an offence shall be kept apart from other prisoners pending adjudication.
>
> **59. Duty of Principal Officer before he accepts a report against a prisoner**
>
> It shall be the duty of the Principal Officer on duty before he accepts a report made against a prisoner, to inform such prisoner of the facts alleged against him and to afford him an opportunity of making his reply.
>
> **60. Duty to report immediately offences against prison discipline**
>
> Every offence against prison discipline shall be reported immediately and it shall be the duty of the Superintendent to investigate such

[3] para.63 of the judgment.
[4] paras.47–49 of the judgment.
[5] paras.70, 80 of the judgment.

reports not later than the following day, unless that day is a general holiday.

61. Offences against prison discipline

Every prisoner shall be guilty of an offence against prison discipline if he:

…

(d) uses threatening, abusive or insulting words or behaves in a manner that expresses a threat, abuse or an insult;

…

(k) has in his possession:

(i) any article that he is not authorized to have; or

(ii) a greater quantity of any article than that he is authorized to have; …

62. Power of Superintendent as to offences against prison discipline

The Superintendent may interrogate any person touching any alleged offence against prison discipline and determine thereupon and punish the offender.

63. Punishment which may be imposed by the Superintendent

(1) The Superintendent may order a prisoner, who commits any of the offences enumerated in r.61, to be punished by any one or more of the following punishments:

…

(c) forfeiture of remission not exceeding 1 month but if the Superintendent considers that his power of punishment is insufficient, he shall refer the case to the Commissioner who may order forfeiture of remission not exceeding 3 months;

…

(e) deprivation of earnings or part thereof;

…

(2) Any prisoner who considers himself aggrieved by any order made by the Superintendent under this rule may, within 48 hours after the issue of such order, notify the Superintendent that he wishes to appeal to the

Commissioner against such order, and the Superintendent shall forthwith notify the Commissioner accordingly and shall stay execution of the order pending the hearing of the appeal.

(2A) An appeal under para.(2) may include an appeal in respect of the determination, on which the order that is being appealed under this rule is based, that an offence was committed.

(3) Upon hearing the appeal, either by the prisoner in person or by him in writing, the Commissioner shall determine the appeal and may cancel, vary or confirm the order against which the appeal is made or may substitute therefor any other order which the Superintendent was competent to make under para.(1):

Provided that the Commissioner shall not substitute a greater punishment for a lesser punishment without first giving the prisoner to be punished an opportunity of showing cause why such punishment should not be increased.

15. For remission of sentence, the relevant provision is r.69 and this reads as follows:

69. Remission of sentence

(1) A prisoner serving a sentence of imprisonment for an actual term of more than 1 month may, on the ground of his industry and good conduct, be granted remission in accordance with the provisions of this rule …

(2) The remission granted under this rule shall not exceed one-third of the total of the actual term and any period spent in custody taken into account under s.67A of the Criminal Procedure Ordinance (Cap.221) (which relates to the computation of a sentence of imprisonment).

…

(4) This rule shall have effect subject to any disciplinary award or forfeiture of remission, and shall not apply to a prisoner serving a sentence of imprisonment for life …

16. A superintendent is defined in s.2 of Cap.234 to mean "a senior officer of the Correctional Services Department holding the rank of superintendent". The statutory duties of a superintendent are set out in Part I(5)(b)(iii) of the Prison Rules and include the following:

79. Duty to supervise matters connected with prison

The Superintendent (or other officer in charge of a prison, whatever his or her rank may be) shall supervise and control all matters in connection with the prison of which he or she may be in charge and shall be responsible to the Commissioner for the conduct and treatment of the officers of the Correctional Services Department and prisoners under his control and for the due observance by such officers and prisoners of the provisions of these rules and of all orders issued thereunder.

…

81. Duty to maintain discipline

The Superintendent shall observe the conduct of the subordinate officers and other persons employed in the prisons and shall be responsible for the maintenance of strict discipline throughout the prison.

…

83. Duty to transmit complaints

The Superintendent shall transmit to the Commissioner without delay any report or complaint which any subordinate officer or other person employed in the prisons may make to him. He shall on no account suppress it, but he may make such explanation as may appear to him to be necessary.

…

94. Duty to inspect prison and prisoners

The Superintendent shall:

(a) exercise a close and constant personal supervision of the whole prison;
(b) visit and inspect daily every part of the prison where prisoners are employed or confined;
(c) visit the prison by night at least twice a fortnight;
(d) give special attention to every prisoner who for any reason is confined to his cell.

95. Duty as to reports and complaints

(1) The Superintendent shall hear daily all reports at such hours as may be most convenient.
(2) The Superintendent shall ensure that every prisoner having a complaint to make or a request to prefer to him shall have ample facilities for so doing, and he shall take all the necessary steps to redress all grievances so far as is possible.

The five cases concerning the applicant

Case No 288/07 (Case 1)

17. On 22 May 2007, the applicant was reported to be in possession of unauthorised articles, namely, 12 pills in the nature of painkillers and gastrointestinal drugs, three handwritten notes and one piece of chalk, in contravention of r.61(k)(i) of the Prison Rules. He pleaded not guilty. The report was dealt with by Superintendent Siu Chi Wing (Superintendent Siu) of Stanley Prison as the adjudicating officer on 25 May 2007. The proceedings were completed after five hearings, the last of which was on 30 May 2007.

18. The applicant cross-examined two of the officers of the Correctional Services Department (CSD officers) who gave evidence against him. He admitted possession of all the articles. In defence, he alleged that the pills were prescribed by a medical officer but he was too ill to take them, that he got the three notes a long time ago when he was in Lai Chi Kok Reception Centre, and that the piece of chalk was lent to him by a fellow inmate whom he wished to call as a witness. The inmate was summoned by Superintendent Siu to the hearing on 28 May 2007 but said he was unwilling to testify. The Superintendent directed the inmate to leave the adjudication room. On 30 May 2007, the Superintendent convicted the applicant. He considered the applicant's explanation for possession of the articles unacceptable and the evidence overwhelming. He sentenced the applicant to forfeiture of remission of 21 days and deprivation of earnings of 21 days.

19. The applicant lodged an appeal to the Commissioner on 14 June 2007 and set out his submissions in writing. Superintendent Siu did not comment on the appeal. On 22 June 2007, the Commissioner dismissed the appeal without a hearing, having considered the record of the proceedings kept by the Superintendent and the applicant's grounds of appeal.

Case No 469/07 (Case 2)

20. On 24 August 2007, the applicant was reported to be in possession of unauthorised articles, namely, seven-and-a-half pills in the nature of painkillers and gastrointestinal drugs, and one tube of glue, in contravention of r.61(k)(i). He pleaded not guilty. The adjudicating officer was Superintendent Ng Hon Yin (Superintendent Ng) of Stanley Prison. The first hearing was on 25 August 2007. The adjudication was completed after four hearings, the last of which was on 31 August 2007.

21. The applicant cross-examined the CSD officers who gave evidence against him. He denied possession of the articles and alleged

that they did not belong to him and that one of the officers who testified threatened the applicant if he should complain, that officer would search the applicant every month.

22. Superintendent Ng found the allegation of the applicant not credible and accepted the evidence of the CSD officers. He adopted the standard of proof on the balance of probabilities. The applicant was found guilty as charged and sentenced to forfeiture of remission of 21 days and deprivation of earnings of 21 days.

23. On 4 September 2007, the applicant lodged an application for extension of time to appeal, as he was outside the 48-hour period for bringing an appeal provided for in r.63. He was informed on 5 September 2007 that his application was refused.

Case No 505/07 (Case 3)

24. On 8 September 2007, the applicant was reported to be in possession of unauthorised articles, namely, eight pills in the nature of painkillers and gastrointestinal drugs, and one piece of metal from a battery cell, in breach of r.61(k)(i). He pleaded not guilty. Superintendent Ng adjudicated at the three hearings, which began on 10 September and completed on 18 September 2007.

25. The applicant requested the proceedings to be audio-recorded at the second hearing. The Superintendent asked him the reason for his request. The applicant did not give any and his request was refused. The Superintendent then asked him if he would wish to be supplied with pen and paper to make his own record. He informed the Superintendent that would not be necessary.

26. The applicant denied possession of the articles seized and alleged that what was found during the search was just the bed sheet on his bed. He did not cross-examine the CSD officers. Superintendent Ng accepted the evidence of the officers and found the charge established on the balance of probabilities. The applicant was sentenced to forfeiture of remission of 21 days and deprivation of earnings of 21 days.

27. The applicant lodged an appeal to the Commissioner on the ground that the record of proceedings was inaccurate in that the Superintendent did not ask him the reason for his request of audio recording and he did not answer there was no reason for the request. Superintendent Ng did not comment on the appeal. On 10 October 2007, the Commissioner dismissed the appeal without a hearing, having perused the record of the proceedings kept by the Superintendent and the applicant's grounds of appeal.

Case No 669/07 (Case 4)

28. On 14 December 2007, the applicant was reported to be in possession of unauthorised articles, namely, 41 packets of cigarettes,

one vial of correction fluid and two pieces of paper, in breach of r.61(k)(i). He pleaded not guilty. Superintendent Siu was the adjudicating officer. There were five hearings, the first was on 17 December and the last on 31 December 2007.

29. The applicant cross-examined the CSD officers. He admitted possession of the articles but alleged that the officers also found 58 unfinished Government envelopes, which were not the subject of the charge, and that this rendered the proceedings incomplete and faulty. The officers accepted that the envelopes were found. According to the penal record of the applicant, it was stated that no disciplinary action would be taken in respect of the envelopes found and a caution would be issued to him for failing to hand out the envelopes on time. Superintendent Siu considered the evidence of the officers sufficient to support the charge on the balance of probabilities and found him guilty. He sentenced the applicant to forfeiture of remission of 28 days.

30. The applicant appealed on the ground he was not charged with unauthorised possession of the envelopes. He challenged the accuracy of the record of proceedings kept by the Superintendent. He alleged he had applied for audio recording of the proceedings before the hearing but his application was not approved and this was not recorded. He also alleged among other things he had applied for his penal record to be admitted as evidence before the hearing but his application was not approved and recorded, and this rendered the hearing unfair. Superintendent Siu made no comment on the appeal.

31. The Commissioner dismissed the appeal on 10 January 2008 without holding a hearing, having considered the record of proceedings of Superintendent Siu and the applicant's grounds of appeal. He found that the proceedings were properly conducted and the Superintendent's determination was justified.

Case No 21/08 (Case 5)

32. On 18 January 2008, the applicant was reported to have used abusive language to another inmate, in breach of r.61(d). He pleaded not guilty. Superintendent Siu also adjudicated at the six hearings, which commenced on 19 January and completed on 30 January 2008.

33. The applicant did not cross-examine the CSD officers who gave evidence against him. He denied using foul language. The Superintendent came to the view that the evidence of the officers was credible and found the evidence adequate to support the charge on the balance of probabilities. He sentenced the applicant to forfeiture of remission of seven days.

34. The applicant appealed to the Commissioner on the ground that the other inmate did not testify at the hearing, nor was he provided with any statement of this inmate. He also alleged that before the hearing he had applied to the Superintendent for audio recording of the proceedings, but this was not approved and his application was not recorded. Superintendent Siu did not comment on the appeal.

35. The Commissioner dismissed the appeal on 6 February 2008 without holding a hearing, having considered the record of proceedings of the Superintendent and the applicant's grounds of appeal. He took the view that the applicant had been given sufficient opportunities to cross-examine the CSD officers and to summon other persons for his defence, but had not exercised such rights at the hearing.

Fair hearing before an independent and impartial tribunal

36. Article 10 of the Hong Kong Bill of Rights (HKBOR), which relates to equality before courts and the right to fair and public hearing, reads as follows:

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

37. It is not necessary for present purposes to determine whether prison disciplinary proceedings would involve the determination of the "rights and obligations in a suit at law" of a prisoner. I will come back to the question whether such proceedings could be regarded as the "determination of any criminal charge" to give rise to the entitlement under art.10 to a fair hearing by a competent, independent and impartial tribunal, when I consider the issue of the appropriate standard of proof in prison disciplinary proceedings. For present purpose, it is not necessary to rule on this question, as it was common ground that the standard of fair hearing by an independent and impartial tribunal under art.10 (identical to art.14(1)

of the International Covenant on Civil and Political Rights (ICCPR) and in very similar terms to art.6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)) is the same at common law.[6]

38. For the connotation of an independent tribunal under art.6(1) of the ECHR, see *Whitfield v United Kingdom*:[7] "The Court recalls that in order to establish whether a tribunal can be considered 'independent' — notably of the executive and of the parties to the case, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence."

39. For the requirement of an impartial tribunal under art.14(1) of the ICCPR, I refer to General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial (UN Doc/CCPR/C/GC/32), paras.34, 35: "The requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial."

40. The applicant did not complain of actual bias of the adjudicating officer in any of the five cases. The only question is whether there was apparent bias for a superintendent to adjudicate in disciplinary offences committed in his own penal institution. The applicant contended there was, and Mr Kwok Sui Hay submitted on his behalf the cases should have been adjudicated by a superintendent who was not in the same penal institution as the applicant and the CSD officers who gave evidence. Mr Kwok did not challenge the constitutionality of r.57, which provides that a superintendent or the officer appointed to act for him in his absence shall deal with a report against prison discipline.

41. The test for apparent bias is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there is a reasonable apprehension of bias.[8] This is the test endorsed by the House of Lords in *Porter v Magill*,[9] which modified slightly the formulation for apparent bias in *R v Gough*[10]

[6] See also *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187, para.14 *per* Lord Steyn.
[7] (2005) 41 EHRR 44, para.43.
[8] *Deacons v White & Case Ltd Liability Partnership* (2003) 6 HKCFAR 322, paras.21, 30 *per* Ribeiro PJ.
[9] [2002] 2 AC 357, paras.102, 103 *per* Lord Hope of Craighead.
[10] [1993] AC 646, 670 *per* Lord Goff of Chieveley.

and moved away from the test of "real danger of bias" from the reviewing court's own view to that of "reasonable apprehension of bias" or "a real possibility of bias" from the perception of a fair-minded and informed observer, to bring the common law rule into line with the Strasbourg jurisprudence.

42. Before I turn to the arguments advanced on apparent bias, I should first mention two matters that were not in issue.

43. First, it was acknowledged that in the present situation there is no structural independence between those charged with the roles of prosecution and adjudication of prison disciplinary offences.[11] Various officers of the Correctional Services Department handled the reporting of the disciplinary offence, the drafting and laying of the charge, the determination of the charge and punishment, and all of them were responsible ultimately to the Commissioner.

44. Secondly, it was accepted that reports against prison discipline are suitably adjudicated by an officer within the Correctional Services Department, as one who would have knowledge of the field. It is important to bear in mind the maintenance of order and discipline in an environment where a high degree of security is required, and that factors which have to be considered in upholding order within a prison are not likely to be fully appreciated by those who are not within the system. In the overseas jurisdictions covered by the Commissioner's investigation,[12] none of them has gone so far to divorce altogether the adjudication of disciplinary offences from prison officers, although in some jurisdictions a visiting tribunal would handle more serious breaches of discipline.[13] Hence, Mr Kwok would raise no objection to the adjudication of charges by an outside Superintendent.

The Commissioner's argument

45. Mr Anderson Chow SC referred the Court to the evidence on the hierarchy of officers in the Correctional Services Department. At the top are directorate officers of the following ranking: the Commissioner, Deputy Commissioner, Assistant Commissioner and Chief Superintendent. In the middle are senior officers, made up of Senior Superintendent, Superintendent and Chief Officer. Subordinate officers are at the bottom and their ranks in order of seniority are: Principal Officer, Officer, Officer (on probation), Assistant Officer I and Assistant Officer II.

46. Assistant Officers I and II, who are responsible for carrying out frontline duties and have frequent contact with prisoners, are

[11] As in *Whitfield v United Kingdom*, para.45; *Young v United Kingdom* (2007) 45 EHRR 29 , paras.43, 44.

[12] The United Kingdom, Singapore, states in Australia being South Australia, Northern Territory and Tasmania, and Arizona in the United States.

[13] As in the United Kingdom, Singapore and South Australia.

usually those who would report on or witness disciplinary offences. They are under the direct supervision of Officers who are the appraising officers of their yearly performance appraisals, which would be counter-signed by Principal Officers. It is seldom that officers in the rank of Chief Officer or above would become reporting officers or witnesses to disciplinary offences of prisoners, as they are mainly responsible for the management and control of the prison institution and would have relatively limited chances in the direct supervision of prisoners.

47. A superintendent is usually the head of an institution, except in Stanley Prison and six penal institutions. In Stanley Prison, the head of institution holds the rank of Chief Superintendent and there are two superintendents who are the deputy heads of institution. Due to the chain of command in the hierarchy of officers, a superintendent would normally have limited direct contact at work with the reporting officers and the officers who witnessed disciplinary offences of prisoners. There is a Senior Officer Mess exclusively for officers at or above the rank of Chief Officers.

48. If a prisoner during adjudication requests to change the adjudicating officer, he would be asked to give justification for his request. The adjudicating officer would decide whether to accede to the request. If the adjudicating officer considers it inappropriate for him to hear the case, the hearing would be adjourned and arrangement would be made for a superintendent from another penal institution to be the adjudicating officer. Any prisoner whose request for change of adjudicating officer was refused could appeal to the Commissioner under r.63 after the adjudication.

49. Mr Chow submitted that by virtue of the above, an informed and fair-minded observer would have regard to the fact that the Superintendent had no involvement in the events leading to the charges against prisoners. This observer would draw a distinction between knowledge of the particular facts and knowledge of the subject matter,[14] and would not be inclined to think that the Superintendent's substantial experience in the field and familiarity with the background issues would preclude him from reaching an independent and impartial determination.[15] Such an observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that are capable of being known by members of the public generally,[16] and would not conclude that simply by reason

[14] *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, 795D para.45 *per* Baroness Hale of Richmond

[15] See also *R v Board of Visitors of Franklin Prison* [1986] 1 WLR 130, 135A–F, in which the adjudicating body was a board of visitors and objection was taken against the chairman; *R v Her Majesty's Prison Service, ex p Hibbert* (unrep., 16 January 1997), Latham J, in which the Governor of the same prison was the adjudicator.

[16] *Gillies v Secretary of State for Work and Pensions*, 787F–G para.17 *per* Lord Hope; 793F–G para.39 *per* Baroness Hale.

of his position and responsibilities, the Superintendent would be predisposed to believe or protect his subordinates.

50. Mr Chow prayed in aid the *dictum* of Lord Rodger of Earlsferry in *R (Al-Hasan) v Secretary of State for the Home Department*[17] that "an informed and fair-minded observer would regard prison governors, or their deputies, as being quite capable of interpreting and applying the prison rules fairly and independently, even though they are obviously committed to upholding them."

The applicant's argument

51. Mr Kwok emphasised other duties imposed on a superintendent under the Prison Rules apart from adjudicating reports against prison discipline. The superintendent is to supervise and control all matters in connection with the prison of which he is in charge; he is responsible for the conduct and treatment of the officers of the Correctional Services Department and prisoners under his control; he is responsible for the due observance by such officers and prisoners of the Prison Rules and of all orders issued thereunder; he is responsible for the maintenance of strict discipline throughout the prison; he has the duty to exercise a close and constant personal supervision of the whole prison. As the head of institution or the deputy head of institution, he would be familiar with the Head of Institution Orders, which set out the rules which prisoners have to obey and may vary from one penal institution to another. In the course of discharging his various duties, he would have acquired some knowledge about his subordinate officers and the prisoners under his control. He would have a stake or interest of his own to see to it that everything runs smoothly in his prison.

52. The problems that may arise when a prison officer decides the guilt or innocence of prisoners charged with breaching the rules of his own penal institution are described in the judgment of Marceau J of the Court of Queen's Bench of Alberta in *Currie v Alberta (Edmonton Remand Centre)*,[18] where the Judge set out the problems he perceived in this way:

> (1) Senior staff at prisons have long worked in an environment where maintenance of order is a high priority, along with the safety of prison staff and safety of the prisoners;
> (2) Many of the charges directly impact upon the ability of the correctional officers to maintain authority over the prisoners. Charges such as refusing to obey an order that is 47(1)(a) in Correctional Regulations or being disrespectful to an employee 47(1)(c) Correctional Regulations come to mind. In these situations any failure to convict will reflect badly

[17] [2005] 1 WLR 688, 693E para.11.
[18] (2006) 276 DLR (4th) 143, para.96.

> on the correctional officer who laid the charge. Moreover, if the prisoner denies the refusal or the insult as the case may be, then the credibility of the officer is in question. In these circumstances, the staff persons on the Board [ie the disciplinary board] have an impossible conflict of interest:
>
> (a) If they dismiss the charge the prisoner may be regarded by other inmates as having beat the system, thus encouraging lawlessness and breaches of discipline;
> (b) If the charge is dismissed on a minor ground … there may be little harm done but if the dismissal is on the ground that the officer is not believed one would expect (i) that the disciplinary tribunal would be viewed as … not maintaining solidarity with the rest of the staff; or (ii) it would be a terrible blow to that officer's morale and could lead to his dismissal, if the officer is not believed by his own superior officers.

53. Marceau J concluded there was a clear conflict between the duty of staff members of a disciplinary board in Alberta's correctional centres to maintain discipline and staff morale, and the right of the prisoner to have his charges dealt with before a tribunal with a sufficient degree of independence and impartiality, such that there is a reasonable apprehension of bias.[19]

54. Mr Kwok submitted further that the concepts of structural independence and objective impartiality are closely linked and should be considered together, citing the judgment of the European Court of Human Rights in *Whitfield v United Kingdom*[20] in which art.6(1) of the ECHR was considered with regard to the right to an independent and impartial tribunal in the context of prison disciplinary proceedings. As mentioned in the judgment, what is at stake is the confidence which such tribunals in a democratic society must inspire in the public and in the accused. The court went on to state as follows:

> In deciding whether there is a legitimate reason to fear that a particular court lacked independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified. It is further recalled that there are two aspects to the question of "impartiality": the tribunal must be subjectively free of personal prejudice or bias and must also be impartial from an objective

[19] At para.196.
[20] See paras.43–46; the judgment was given two months after the decision of the House of Lords in *R (Al-Hasan) v Secretary of State for the Home Department*.

viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect.

55. Having regard to its conclusion that there was no structural independence between those with prosecuting and adjudicating roles in the impugned proceedings, the European Court considered it evident that the misgivings about the independence and impartiality of the adjudicating tribunal were objectively justified and consequently unfair. It held therefore there had been a violation of art.6(1). Likewise, in *Young v United Kingdom*,[21] also a case involving prison disciplinary proceedings, the European Court came to the same conclusion for the same reason.

56. As mentioned earlier, it was common ground there is no structural independence when a superintendent is to adjudicate at prison disciplinary proceedings. Mr Kwok submitted that the necessary guarantee to exclude any legitimate doubt on the lack of impartiality should be provided by having a superintendent from another penal institution to adjudicate at the hearing, as an outside superintendent would not have knowledge of the officers and prisoners in the prison, he is not responsible for the conduct and discipline of the prison, and does not have to handle complaints of the officers and prisoners in the prison. Although he is an officer of the Correctional Services Department, and has knowledge in the field, he does not have any interest of his own in the sense that he is not the person responsible for that prison.

57. Mr Chow acknowledged it is possible to bring in a superintendent from another penal institution to adjudicate, and this has been done in cases where it was considered appropriate, such as where the superintendent of the same institution had prior knowledge or involvement in a case. However, to arrange for an outside Superintendent to adjudicate in every hearing would cause difficulty in operations. On average, there is nearly one report per weekday of disciplinary offences by prisoners in the 23 penal institutions in Hong Kong. There are currently 27 officers in the rank of superintendent or above who may serve as adjudicating officers. There is also the need to dispose of disciplinary matters quickly in a correctional setting, as a prisoner who has been reported for an offence must be segregated pending adjudication pursuant to r.58, and under r.60 the superintendent has a duty to investigate a report of an offence not later than the following day of the report, unless that day is a general holiday. It would be undesirable for a superintendent, who is usually the head of an institution, to be away from his institution on a frequent basis to adjudicate in disciplinary offences in other institutions.

[21] See paras.43, 44.

If there was apparent bias

58. One starts by identifying the circumstances which are said to give rise to bias. To recap, these are the circumstances:

(a) The dual responsibility of the superintendent — his administrative duties in the maintenance of discipline in the penal institution in which he serves as head or deputy head of institution, and his adjudicative duty in dealing with reports of offences against discipline made against prisoners of the same institution;
(b) The essential conflict that may arise between the dual responsibility of the superintendent as disciplinarian and adjudicator, in the manner as described in *Currie v Alberta (Edmonton Remand Centre)*;
(c) The lack of independence on a structural or institutional level between the roles of prosecution and adjudication of offences against prison discipline, undertaken by officers working in the same penal institution; and
(d) The interest of the superintendent as head or deputy head of institution in maintaining discipline in the institution of which he is in charge.

59. The attack here is on the system. The Court must focus on the systemic challenge and apply a principled approach. The principle to be applied is the test for apparent bias: whether a fair-minded and informed observer, having considered the relevant facts, would conclude there was a real possibility that the adjudicating superintendent might be subconsciously biased?

60. The European Court in *Whitfield v United Kingdom* did not elaborate when it stated that structural independence and objective impartiality are closely linked and should be considered together. How these two concepts relate to apparent bias was discussed by the House of Lords in *Gillies v Secretary of State for Work and Pensions*.

61. Lord Hope said at para.23:

> The purpose of disqualification on the ground of apparent bias is to preserve the administration of justice from anything that might detract from the basic rules of fairness. One guiding principle is to be found in the concept of independence. No one can be a judge in his own cause. That principle is, of course, applied much more widely today than a literal interpretation of these words might suggest. It is not confined to cases where the judge is a party to the proceedings. It applies also to cases where he has even the slightest personal or pecuniary interest in their outcome. … The other principle is to be found in the concept of impartiality that

justice must not only be done: it must be seen to be done. This too has at its heart the need to maintain public confidence in the integrity of the administration of justice. Impartiality consists in the absence of a predisposition to favour the interests of either side in the dispute. Therein lies the integrity of the adjudication system.

62. And Baroness Hale made this observation at para.38:

Impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal approach to deciding the cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public. The public are now represented by the fair-minded and informed observer. The approach to be adopted was explained by Lord Phillips of Worth Matravers MR in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, para.85, and adopted (with the deletion of the words "or a real danger") by Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357, para.103:

> The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased.

63. As stated by Lord Steyn in *Lawal v Northern Spirit Ltd*, para.14, "Public perception of the possibility of unconscious bias is the key". This perception must be a perception of "whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees."[22] The fair-minded and informed observer will adopt a balanced approach.

64. Challenges based on a lack of independence and impartiality may be brought on an institutional level. If the system is structured in a way that creates a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met.[23] Considering the circumstances which are said to give rise to bias where a superintendent acts as adjudicating officer in disciplinary proceedings of a prisoner of the same prison, there is legitimate doubt if the essential objective conditions or guarantees of judicial independence are met. As independence provides the structural framework which secures impartiality, legitimate doubts over the

[22] *R v Valente (No 2)* [1985] 2 SCR 673 (Supreme Court of Canada), 689, quoted in *Currie v Alberta (Edmonton Remand Centre)*, para.170.

[23] *R v Lippé* [1991] 2 SCR 114 (Supreme Court of Canada), paras.50–53 *per* Lamer CJ, quoted in *Currie v Alberta (Edmonton Remand Centre)* , paras.169, 170.

lack of independence could lead to reasonable misgivings over impartiality, whether the adjudicating Superintendent would be free of a predisposition to favour the interests of either side. Public perception from an objective viewpoint would conclude there was a real possibility that the adjudicating Superintendent might be subconsciously biased.

65. I am in agreement with Fung J on this issue. I hold that a case of apparent bias was established.

The curative principle

66. The next question is whether the determination process as a whole removes that element of unfairness at the level of hearings conducted by a superintendent. This is where the curative principle comes in.

67. Simply stated, this principle means that decisions which do not comply fully with procedural fairness requirements can be cured, if the person affected has recourse to a further hearing or appeal which itself provides fairness. It is well established in the case law of the European Court of Human Rights that the requirements of art.6(1) of the ECHR are satisfied if either the initial decision-making body is independent and impartial, or it is subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of art.6.[24]

68. The expression "full jurisdiction" does not mean full decision-making power. It means "full jurisdiction to deal with the case as the nature of the decision requires".[25] **In *Lam Siu Po v Commissioner of Police*,**[26] **Ribeiro PJ said this about a "court of full jurisdiction" in viewing the entire determination process in assessing compliance with art.10 of the HKBOR:**

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

[24] *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, para.29.
[25] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para.87 *per* Lord Hoffmann
[26] (2009) 12 HKCFAR 237, para.118.

nature of the challenged decision requires, there is compliance with art.10's requirements.

69. The common law has developed a similar doctrine in that the courts have declined to intervene on grounds of procedural unfairness where the impugned decision is subject to correction by a procedure which has proper procedural safeguards.[27] This approach is based in large part on an assessment if, in all the circumstances of the original hearing and subsequent appeal, the procedure as a whole would satisfy the requirements of fairness. "Of particular importance are (a) the gravity of the error committed at first instance, (b) the likelihood that the prejudicial effects of the error may also have permeated the rehearing, (c) the seriousness of the consequences for the individual, (d) the width of the powers of the appellate body and (e) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of fresh hearing, or rehearing de novo".[28] I do not propose to deal with the common law position separately, as there is no substantial difference with the approach in the case law discussed below in assessing the compatibility of the composite procedure with art.10 of the HKBOR.

70. I turn to consider if there is compliance with the requirements of procedural fairness through the appeal to the Commissioner under r.63 and through recourse to judicial review. I shall deal with the latter aspect first.

If there is compliance through judicial review

71. In *Lam Siu Po v Commissioner of Police*,[29] Ribeiro PJ opined that in Hong Kong, a court exercising its judicial review jurisdiction without statutory interference is likely to qualify for most purposes as a court of "full jurisdiction" for compliance with the art.10 requirements.

72. Although the court does not conduct afresh any fact-finding exercise on a judicial review, and must accept apparently tenable conclusions on credibility, it has substantial powers to intervene where there was unsatisfactory treatment of facts by the decision maker, as in these situations: where the finding of fact was irrational or perverse; where the finding was unsupported by evidence or was

[27] Examples are *Calvin v Carr* [1980] AC 574 (a procedurally defective decision of race stewards was cured by an appeal to the committee of the Australian Jockey Club); *Lloyd v McMahon* [1987] AC 625 (the decision of a district auditor to surcharge councillors for failure to set a valid rate, had it been procedurally defective, would have been cured by the statutory appeal to the Divisional Court; the appeal mechanism enabled the Divisional Court in its discretion to inquire into the merits of the case by a rehearing and draw its own conclusion from the evidence before it, and a further appeal lies from the Divisional Court on a question of law).

[28] *De Smith's Judicial Review* (6th ed., 2007) para.8-025.

[29] paras.126, 133.

plainly untenable; where irrelevant factors were taken into consideration; or where relevant factors were not considered or were misunderstood. These powers are not very different from the limitations to the powers of an appellate court with full jurisdiction in dealing with an appeal on a finding of fact without hearing oral evidence.[30]

73. In assessing the sufficiency of judicial review to remedy an initial decision-making process which has not been compliant with art.10, it is necessary to have regard to matters such as these: the subject matter of the decision appealed against, the manner in which that decision was arrived at, the content of the dispute, the proposed grounds of challenge of the decision.[31] **Baroness Hale summarised the position in this way in *R (Wright) v Secretary of State for Health*:**[32]

> What amounts to "full jurisdiction" varies according to the nature of the decision being made. It does not always require access to a court or tribunal even for the determination of disputed issues of fact. Much depends upon the subject matter of the decision and the quality of the initial decision-making process. If there is a "classic exercise of administrative discretion", even though determinative of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, then judicial review may be adequate to supply the necessary access to a court, even if there is no jurisdiction to examine the factual merits of the case. The planning system is a classic example (*Alconbury*); so too, it has been held, is the allocation of "suitable" housing to the homeless (*Runa Begum*); but allowing councillors to decide whether there was a good excuse for a late claim to housing benefit was not: *Tsfayo v United Kingdom* (2009) 48 EHRR 457.

74. *Tsfayo v United Kingdom* (2009) 48 EHRR 18 was much relied on by Mr Kwok in this hearing. The applicant in *Tsfayo v United Kingdom* had successfully applied to the local authority for housing and council tax benefit but had failed to renew her application the following year, as was required by law. She later submitted both a prospective and back-dated claim for the benefit. Her back-dated claim was refused by officials of the local authority on the basis she had failed to show "good cause" for failing to renew her claim earlier. The refusal was upheld by the authority on a request for reconsideration. On appeal by the applicant, the review

[30] *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430, 439G–440C paras.7, 8 *per* Lord Bingham of Cornhill; 462G–463A para.99 *per* Lord Millett.

[31] *Bryan v United Kingdom* (1996) 21 EHRR 342, para.45; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*, para.116 *per* Lord Hoffmann; *Lam Siu Po v Commissioner of Police*, para.131 *per* Ribeiro PJ.

[32] [2009] 1 AC 739 750E–G para.23.

board rejected the appeal, on the basis she did not have "good cause" for failing to renew earlier and she was not a credible witness. As the three members on the review board were councillors from the local authority and it was advised by a barrister from the authority's legal department, the board did not satisfy the requirement of an independent and impartial tribunal under art.6(1) of the ECHR. It was contended by the Government that the High Court had sufficient jurisdiction by way of judicial review to ensure that the proceedings as a whole complied with art.6(1).

75. The European Court of Human Rights held that judicial review could not provide the curative effect in this situation for these reasons: (a) the decision of the review board was based on a simple issue of fact, namely, whether there had been good cause for the applicant's delay in making a claim. No specialist expertise was required to determine that issue; (b) this simple factual finding could not be said to be merely incidental to the reaching of broader judgments of policy or expediency; (c) the review board was not merely lacking in independence from the executive, but was directly connected with one of the parties to the dispute. The connection of the councillors to the local authority might infect the independence of judgment in relation to the finding of primary fact in a manner which could not be adequately scrutinised or rectified by judicial review; (d) although the High Court on judicial review had power to quash the decision of the review board if there was no evidence to support the factual finding or where the finding was plainly untenable or where relevant factors had not been taken into account, the High Court did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility; (e) hence, there had never been the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute.

76. Drawing on *Tsfayo v United Kingdom* by analogy, no specialist expertise was required to determine the disciplinary offences in the five cases involving the applicant here. The factual findings of the Superintendent cannot be said to be merely incidental to the reaching of broader judgments of policy or expediency. In four of the cases, the Superintendent was deciding a simple question of fact involving the credibility of the applicant: whether he had good reason for possession of unauthorised articles (Case 1); whether he was in possession of unauthorised articles (Cases 2 and 3); whether the applicant used abusive language to another inmate (Case 5). There was no real dispute of facts in Case 4, the applicant admitted he was in possession of the unauthorised articles and merely queried why he was not also charged with unauthorised possession of some envelopes.

77. Mr Kwok submitted that where the core issue before the Superintendent was a dispute as to primary fact, the apparent bias of the tribunal would not be cured by judicial review, as the lack of independence on an institutional level might infect the independence of judgment in the finding of primary fact in an imperceptible manner which could not be adequately scrutinised or rectified by judicial review. The High Court on a judicial review has no jurisdiction to reach its own conclusion on the primary facts, as it does not have power to rehear or weigh the evidence, or substitute its own views as to the applicant's credibility.

78. I would agree that in this situation, judicial review, without more, does not afford full jurisdiction and does not cure the breach of art.10 or the lack of independence and impartiality at the first stage of the process before the Superintendent. There is still the question whether an appeal to the Commissioner would provide the curative effect.

If there is compliance through the appeal to the Commissioner

79. Under r.63(2), 63(2A) and 63(3) of the Prison Rules, where an appeal is made to the Commissioner, he is empowered to investigate the merits of the case fully and de novo, unlike the High Court on a judicial review. The Commissioner has power to conduct an oral hearing where the justice of the case demands. He has power to cancel, vary or confirm the Superintendent's decision and the punishment imposed. He is in a position to conduct a full review on the merits.

80. There was no complaint of bias as against the Commissioner in his determination of the appeals. Mr Kwok submitted that an appeal to the Commissioner is lacking in structural independence, as the Commissioner is the head of the same department. This would appear to be inconsistent with the applicant's stance that he would find it acceptable to have a superintendent from another penal institution to act as the adjudicating officer.

81. In each of the four cases where the applicant lodged an appeal, the Commissioner was provided with the record of proceedings kept by the Commissioner, the grounds of appeal of the applicant, and the comments if any of the Superintendent on the grounds of appeal. The Commissioner made his decision on his perusal of the materials provided without an oral hearing. Mr Kwok submitted that it is insufficient to rely on the statutory power given to the Commissioner to hold a rehearing, the safeguard provided must be a real one, and it must be shown there would be a realistic prospect of holding a rehearing, citing *dicta* from *R (West) v Parole Board*[33] on how an oral hearing may assist the task of a tribunal.

[33] [2005] 1 WLR 350, 362, paras.34, 35, *per* Lord Bingham of Cornhill.

82. That case was an application for judicial review of the decision of a parole board declining to hold an oral hearing when deciding not to recommend a prisoner's re-release. The decision not to hold an oral hearing was made at the first tier, and no oral hearing was ever held at any stage as a result of the refusal. What was said about the desirability of holding an oral hearing in that context would not apply to a rehearing on review or appeal, when an oral hearing had already been held at an earlier stage.

83. We are here concerned with a scrutiny of the system. The challenge mounted is whether there are adequate safeguards under the system that may cure the procedural unfairness at the stage of the initial hearing, rather than the actual manner in which those safeguards were deployed. Unlike the claimants in *R (West) v Parole Board*, the applicant did not rely on the fact that no oral hearing was held by the Commissioner on appeal as a ground in his re-amended notice of application for leave to apply for judicial review. On the materials before the court, there was nothing to indicate that the prospect of the Commissioner holding a rehearing was unrealistic. In any event, Mr Kwok did not contend there must be a rehearing by the Commissioner in every case, only that there should be a rehearing unless it was otiose.

84. I wish to reiterate that under the existing practice, if a superintendent should consider it inappropriate for him to adjudicate at a disciplinary hearing whether at the request of the prisoner or of his own initiative, he would arrange for an outside Superintendent to take his place as the adjudicating officer. In the materials given to prisoners explaining the procedure at the hearing of a disciplinary charge and of an appeal, it should be stated that they may request a change of the adjudicating officer and they may request the Commissioner to hold an oral hearing on appeal, and that they should give reasons so that their request may be properly considered by the Superintendent or the Commissioner.

85. Given the wide power of the Commissioner to enquire into the merits fully and to hold a rehearing where the justice of the matter requires, he is armed with full jurisdiction to deal with the case as the nature of the challenged decision requires. I am inclined to think that the safeguards for a fair adjudication are met and that the process overall is compliant with the requirements for a fair hearing. I would answer the second main issue in this appeal in favour of the Commissioner.

The standard of proof

86. In finding the charges proved in four of the cases (Cases 2, 3, 4 and 5), the Superintendent had adopted the standard of proof on the balance of probabilities. The pertinent question is whether prison

disciplinary proceedings could be regarded as "the determination of any criminal charge" for the purpose of art.10 of the HKBOR, in view of the possible punishment to a prisoner of forfeiture of remission under r.63(1)(c) of the Prison Rules. Mr Chow contended that they do not, and as such the applicable standard of proof is the civil standard of a preponderance of probability as explained in *Solicitor (24/07) v Law Society of Hong Kong*.[34]

87. For the purpose of determining whether there is a "criminal charge" within the meaning of art.10, the Hong Kong courts have applied the decisions of the European Court of Human Rights and the English decisions relating to art.6(1) of the ECHR.[35] The three criteria are: (a) the classification of the offence under domestic law; (b) the nature of the offence; and (c) the nature and severity of the potential sanction. In respect of (a), the classification of the proceedings under domestic law is no more than a starting point, otherwise a state would be at liberty to avoid the application of the article by transferring the decision in relation to what is in essence a criminal offence to administrative authorities. Thus, in a prison context, the classification of an offence as disciplinary rather than criminal is not decisive to exclude the operation of art.6(1).[36] As for the criteria in (b) and (c), they carry substantially greater weight than (a), and (c) is the most important.

88. The three criteria are alternative and not necessarily cumulative.[37] In respect of the proceedings here, it is clear that the criteria in (a) and (b) are not met, as the offences are classified as disciplinary under domestic law and, although misconduct by a prisoner may take different forms, the misconduct complained of against the applicant — the possession of unauthorised articles and the use of abusive words — are not criminal in nature. The only issue is whether the criterion in (c) is satisfied, as the "criminal" nature of the alleged "offence" could, in principle, be determined solely on the basis of the nature and severity of the potential sanction.

89. Under r.63(1)(c) of the Prison Rules, the maximum period of forfeiture of remission that may be imposed by a superintendent is 1 month and if he considers that his power of punishment is insufficient, the superintendent shall refer the case to the Commissioner who may order forfeiture up to 3 months. For Cases 1–5, the applicant was sentenced to a total period of forfeiture of remission of 98 days.

[34] (2008) 11 HKCFAR 117.

[35] *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170, paras.31, 32, *per* Sir Anthony Mason NPJ; *Engel v The Netherlands (No 1)* (1979–80) 1 EHRR 647, para.82; *Han v Customs and Excise Commissioners* [2001] 1 WLR 2253; *R (McCann) v Manchester Crown Court* [2003] 1 AC 787.

[36] *Campbell and Fell v United Kingdom* (1985) 7 EHRR 165, paras.68–69.

[37] *Lutz v Germany* (1988) 10 EHRR 182, para.55; *Ezeh and Connors v United Kingdom* (2004) 39 EHRR 1, para.86.

90. Rule 69(1) provides that a prisoner serving a sentence of imprisonment for an actual term of more than 1 month may, on the ground of his industry and good conduct, be granted remission in accordance with r.69. By r.69(2), the remission granted shall not exceed one-third of the total of the actual term. It is provided in r.69(4) that remission of sentence under this rule is subject to any disciplinary award or forfeiture of remission. Remission under r.69 is set in discretionary terms, it does not confer on the prisoner any legal right or entitlement,[38] and it is similar to the former discretionary measure under the Prison Act and the Rules in the United Kingdom before this was replaced by s.33(1) and 33(2) of the Criminal Justice Act 1991 and the system of awarding "additional days" to a prisoner found guilty of disciplinary offences under s.42 of the Act.

91. In practice, on arrival in prison, a prisoner will be informed of his earliest date of discharge, which is remission up to one-third of his sentence, and the latest date of his discharge, which is the term of his sentence, and these dates are written on his identity tag. The rules for calculating remission of sentence are invariably applied, subject to forfeiture being ordered as a result of a disciplinary offence, so a prisoner can expect his release on his earliest date of discharge. This was the same practice in the United Kingdom under the old system.[39]

92. Mr Chow contended that forfeiture of remission does not amount to a penalty. He reasoned that the label of "forfeiture of remission" should not disguise the true nature of the situation. As there is no legal right or entitlement to remission, a disciplinary award of forfeiture of remission does not bring about a forfeiture or deprivation in the true sense. What really happens is that the prisoner is unable to earn part or all of the remission up to one-third of the actual term, as he has failed to meet the requirements of industry and good conduct.

93. He further submitted Fung J was wrong to conclude that there is no real difference between forfeiture of remission in Hong Kong and the present "additional days" system in the United Kingdom,[40] as under s.33(1) and 33(2) of the Criminal Justice Act 1991 the Secretary of State is under a legal duty to release prisoners on licence as soon as a long-term prisoner has served two-thirds of his sentence and a short-term prisoner has served half of his sentence, in the absence of an adjudication to impose additional days as a result of a disciplinary offence. He contended that the Judge's reliance on *Ezeh and Connors v United Kingdom* and *Young v United Kingdom* was misplaced.[41] In *Ezeh and Connors v United*

[38] *Lui Tat Hang Louis v Post-Release Supervision Board* [2010] 1 HKC 297, para.28.
[39] *Campbell and Fell v United Kingdom*, para.29.
[40] para.61 of the judgment.
[41] paras.24, 25 of the judgment.

Kingdom, the Grand Chamber of the European Court held by 11 votes to six that art.6 of the ECHR applied to the prison disciplinary proceedings as the awards of additional days constituted fresh deprivations of liberty imposed for punitive reasons after a finding of culpability.[42] Mr Chow submitted the legal basis of forfeiture of remission is different and there is no fresh deprivation of liberty here.

94. Mr Chow relied also on the decision of the House of Lords in *R (West) v Parole Board*,[43] in which it was held that art.6 of the ECHR did not apply to the procedure of revocation of licence of a prisoner in that the determination of the parole board did not involve "the determination of any criminal charge". The primary purpose of the recall of a prisoner in that situation was not punitive but rehabilitative and for the protection of the public. Hence, notwithstanding the severity of the potential sanction being the loss of liberty, the procedure was held not to involve the determination of any criminal charge.

95. *R (West) v Parole Board* clearly did not involve the imposition of criminal penalty. The sole remit of the parole board was to protect the public. The recall of a prisoner is not a punishment. It is primarily to protect the public against further offences and to enable the prisoner to integrate more readily into the community on his subsequent release. Similarly, in *Lui Tat Hang Louis v Post-Release Supervision Board*,[44] Stock J (as he then was) stated that the recall of a prisoner on breach of a supervision order imposed under the Post-Release Supervision of Prisoners Ordinance (Cap.475) is part and parcel of the rehabilitation exercise and not a penalty for the original offence. In clear contrast, the distinguishing feature of a criminal penalty is its punitive character. Criminal penalties have been customarily recognised as comprising the twin objectives of punishment and deterrence[45]. As was held in *Ezeh and Connors v United Kingdom* the awards of additional days were imposed for punitive reasons after a finding of culpability. There is a substantial difference.

96. Leaving aside whether forfeiture of remission would amount to fresh deprivation of liberty, I see no reason to think this is not imposed for punitive reasons after a finding of culpability. As stated by Megaw LJ in *R v Board of Visitors of Hull Prison, ex p St Germain*,[46] "an award of loss of remission is also properly to be regarded as a punishment, even though the prisoner may have no legal right to the remission, and may have no legal remedy for a failure to grant the remission".

[42] para.124.
[43] paras.38–40, 56.
[44] paras.38, 42.
[45] *Ezeh and Connors v United Kingdom*, para.102.
[46] [1979] QB 425, 443A.

97. Before the new regime was introduced in 1991, the English courts had rejected the notion that remission was a privilege and that prisoners who had lost remission had not lost anything to which they were entitled. The courts considered that prisoners had at least a legitimate expectation of release before the end of his term of imprisonment, on the expiry of the relevant period applying the standardised rules for calculating remission.[47] Forfeiture of remission has the effect of causing the detention to continue beyond the period corresponding to such legitimate expectation.

98. In *Engel v The Netherlands (No 1)*,[48] the European Court observed that in a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. Given the deprivation of liberty, there is a presumption that the offence in issue is criminal within the meaning of art.6 of the ECHR, and this presumption could be rebutted "entirely exceptionally" and only if those deprivations of liberty could not be considered "appreciably detrimental" given their nature, duration or manner of execution.[49]

99. Looking at the realities of the situation, I am inclined to think forfeiture of remission imposed as punishment does constitute deprivation of liberty. It is immaterial whether this is, strictly speaking, a fresh deprivation of liberty, in the sense that it does not add anything to the original term of imprisonment. What matters is the effect of the forfeiture, which is to cause the detention to continue beyond the period corresponding to the legitimate expectation of release before the end of the term of imprisonment, applying the standard rules in calculating the period of remission[50]. In the five cases involving the applicant, he was given a total loss of remission of 98 days. This could not be regarded as sufficiently unimportant or inconsequential or not appreciably detrimental so as to displace the presumed criminal nature of the charges against him.

100. On the third main issue in this appeal, I am in agreement with the Judge that the wrong standard of proof was adopted for Cases 2, 3, 4 and 5. On the basis of the nature and severity of the sanction, I hold that prison disciplinary proceedings would involve the determination of a criminal charge within the meaning of art.10 of the HKBOR so that the standard of proof should be proof beyond reasonable doubt as required by art.11(1).[51] I would uphold the

[47] *Campbell and Fell v United Kingdom* para.72, citing Waller LJ in *R v Board of Visitors of Hull Prison, ex p St Germain*, 464C–E; *Ezeh and Connors v United Kingdom*, paras.42, 121.
[48] para.82.
[49] *Ezeh and Connors v United Kingdom*, para.126; *Young v United Kingdom*, para.37.
[50] *Campbell and Fell v United Kingdom* , para.72.
[51] *Koon Wing Yee v Insider Dealing Tribunal*, paras.102–103; General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, para.56.

order that the decisions and punishment in respect of Cases 2, 3, 4 and 5 be quashed.

101. I turn to consider the subsidiary issues raised in this appeal.

Section 9 of the Hong Kong Bill of Rights Ordinance

102. Section 2(2) of the Hong Kong Bill of Rights Ordinance (Cap.383) makes the HKBOR subject to Part III of the Ordinance, which is headed "Exceptions and Savings". Section 9, which appears in Part III and is derived from the reservation entered by the United Kingdom upon ratification of the ICCPR, provides, *inter alia*, that "persons lawfully detained in penal establishments of whatever character are subject to such restrictions as may from time to time be authorised by law for the preservation of ... custodial discipline". It was contended on behalf of the Commissioner before Fung J that this section provides an exception for persons in penal institutions so that the entitlement to a fair hearing by a competent, independent and impartial tribunal under art.10 of the HKBOR is not applicable. This was rejected by the Judge.[52]

103. This issue is academic in view of the treatment and conclusion of the main issues in this appeal. For the first main issue, it was not necessary to rule whether art.10 should apply as the common law requirement of procedural fairness is the same. For the second main issue, I have held that the determination process as a whole is compliant with the requirements of procedural fairness. As for the third main issue, the standard of proof in prison disciplinary proceedings is not a "restriction" authorised by law for the preservation of custodial discipline, so it is unnecessary to consider whether the exception in s.9 should apply.

104. In the absence of full analysis by the Judge for his conclusion that s.9 does not provide an exception to the guarantee in art.10 of an independent and impartial tribunal in prison disciplinary proceedings, and as we did not hear full argument on this issue which is unnecessary for this appeal, I would merely register my reservation that the ruling of the Judge on this point should be treated with a degree of caution.

Mechanical recording of proceedings

105. Among other reasons for the applicant's claim that the prison disciplinary proceedings did not meet the minimum standard of fairness was the absence of mechanical recording of the proceedings. Mr Kwok submitted that an accurate record of proceedings is essential for a review or appeal by a higher tribunal and there is no reason why mechanical recording should not be made available. Further, open justice is essential to the administration of justice. For

[52] para.64 of the judgment.

security reasons, there is no public hearing for prison disciplinary proceedings. To make up for this deficiency, mechanical recording of the proceedings should be provided to meet the open justice requirement.

106. The Judge was satisfied there was no prejudice to the applicant in the five cases before the Court due to the absence of mechanical recording, and given his decision on the main grounds (the first and third main issues in this appeal), he declined to exercise his discretion to grant relief on this ground.[53]

107. There is no reason to interfere with the exercise of discretion by the Judge.

Compellability of witnesses

108. This is the remaining ground for the applicant's complaint that the prison disciplinary proceedings did not meet the minimum standard of fairness and relates to Case 1. An inmate whom the applicant wished to call as a witness was summoned to the hearing but indicated he was unwilling to testify. The inmate was directed to leave without giving evidence. Mr Kwok submitted that a fair procedure for prison disciplinary proceedings should require witnesses called by the prisoner to be compellable.

109. The Judge rejected this submission, on the ground that the evidence of the inmate would not have afforded any possible defence to the applicant on the charge of possession of a piece of chalk without authorisation and was irrelevant to the case.[54] He also declined to exercise his discretion to grant relief on the ground of non-compellability of witnesses, as the applicant had suffered no prejudice.[55]

110. There is no basis for interference with the decision in this respect. I wish also to say in addition it would be better to approach this kind of complaint on a case by case basis, with due regard to the specific circumstances of the case, instead of making it an inflexible requirement that witnesses called by prisoners must be compellable, as inmates summoned by prisoners to testify may refuse to do so for a variety of reasons.

Complaint of irrationality of punishment

111. This relates to the punishment imposed for Cases 2 and 3, in each of them the applicant was given forfeiture of remission of 21 days and deprivation of earnings for 21 days, primarily for possession of a quantity of pills without authorisation. In the reasons for sentence, the Superintendent stated that he had reason to believe

[53] para.97 of the judgment.
[54] paras.101, 102 of the judgment.
[55] para.105 of the judgment.

the possession of the pills was for "illegal purpose". Mr Kwok submitted that the purpose of the possession of the pills had not been made an issue at the hearings, as the applicant's defence was denial of possession of the articles, so the element of illegal purpose had yet to be proved and the punishment imposed based on the finding of illegal purpose was irrational.

112. This submission was rightly rejected by the Judge.[56] The Superintendent was entitled to draw the inference that the drugs were for illegal purposes. Besides, the punishment imposed for Cases 2 and 3 was the same as that in Case 1, which involved a similar charge and for which the applicant made no complaint.

Exclusion of medical evidence

113. At the hearing before Fung J, the applicant sought to adduce medical evidence to establish that the quantities of pills in the applicant's possession in Cases 2 and 3 were not liable to misuse or cause serious consequence if taken by other inmates, to rebut the inference drawn by the Superintendent that the possession of the pills was for illegal purpose. The Judge refused to admit such evidence and awarded costs against the applicant in respect of that application.[57]

114. I agree with the Judge the expert evidence on the pharmaceutical effect of the drugs should not be admitted as it was irrelevant to the present proceedings. Whether the quantities of pills could lead to overdose or abuse was immaterial. Pills stored secretly by a prisoner could be transferred privately to other inmates, in exchange for other articles, favours or services and could adversely affect the security within the prison. The Superintendent was justified in coming to the view that the drugs were for illegal purpose.

Conclusion and orders

115. I would allow the appeal to the extent that the order quashing the decisions and punishment in respect of Case 1 be set aside, in view of the decision I reach on the second main issue. The cross-appeal of the applicant against the order that there be no order as to costs for Grounds 2 and 4 (absence of mechanical recording of proceedings and non-compellability of witnesses) is dismissed.

Andrew Cheung J

116. I agree with the judgment of Kwan JA save in relation to the first question identified in her judgment, namely, whether there

[56] paras.109, 110 of the judgment.
[57] paras.110, 111 of the judgment.

is basis to complain of (apparent) bias on the part of the Superintendents who determined the relevant cases.

117. What is in issue is the impartiality, rather than the independence, of the adjudicating tribunal, although I readily accept that the two are interlinked. As regards independence, I also agree that the requirement of independence under art.10 of the Hong Kong Bill of Rights is not met at the level of the Superintendent in that there is no structural independence between those charged with the roles of prosecution and adjudication of prison disciplinary offences. As has been pointed out by Kwan JA, various officers of the Correctional Services Department handle the reporting of a disciplinary offence, the drafting and laying of the charge, the determination of the charge and punishment, and all of them are responsible ultimately to the Commissioner.

118. Indeed, the lack of structural independence does not stop at the level of the Superintendent. It also affects the Commissioner, when he hears an appeal from a decision of the Superintendent. However, as Kwan JA has held, and I fully agree, the lack of structural independence is fully cured by the prisoner's access to the court, which is fully independent, through judicial review.

119. This is significant for two reasons. First, the lack of structural independence at the level of the Superintendent is equally not fatal in itself; it is similarly cured by the access to the court. Indeed, the first question identified by Kwan JA does not concern lack of independence as such.

120. Secondly and more importantly, the example of the Commissioner who is not structurally independent but is, nonetheless, accepted to be impartial, demonstrates very clearly that whilst the two concepts are interlinked, they do not always go hand in hand. One can have an impartial tribunal, even though it is not structurally independent. It all depends on the facts.

121. The difference between a superintendent and the Commissioner hearing a disciplinary matter/appeal is merely a difference in degree, rather than in kind. Both are not structurally independent. Both are dealing with charges or decisions made by subordinate officers under their supervision within the Correctional Services Department. The Commissioner is certainly as committed to upholding prison discipline in penal institutions as the various Superintendents are regarding the individual institutions under their responsibility. The Commissioner is, for instance, as concerned about the morale of junior prison officers as the individual Superintendents are.

122. In the present context, the difference between the Commissioner and an individual Superintendent is really a matter of degree. Ultimately, it boils down to the perception of a fair-minded and informed observer.

123. For my part, therefore, whilst I accept that such a fair-minded and well-informed observer would, in considering whether there is a reasonable apprehension of bias on a superintendent's part when adjudicating on disciplinary charges in his own institution, bear in mind that the Superintendent is not structurally independent and would give it its due weight, it is by no means a conclusive consideration.

124. It is for this reason that I find the decision of the European Court of Human Rights in *Whitfield v United Kingdom* (2005) 41 EHRR 44 (p.967) of limited assistance only. In that case, one of the complaints made was that the prisoners concerned did not have the disciplinary charges made against them heard by an independent and impartial tribunal, in breach of art.6(1) of the European Convention on Human Rights. On the facts of that case, the European Court essentially treated the two questions of independence and impartiality as if they were one (pp.978–979):

> In deciding whether there is a legitimate reason to fear that a particular court lacked independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified. It is further recalled that there are two aspects to the question of "impartiality": the tribunal must be subjectively free of personal prejudice or bias and must also be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect.
>
> The Court notes that the present applicants do not suggest that anyone involved in their adjudications was subjectively biased against him. Since the concepts of structural independence and objective impartiality are closely linked, the Court will consider them together in the present case.
>
> The Court observes that persons answerable to the Home Office (whether as prison officer, governor or controller in the applicants' prisons) drafted and laid the charges against the applicants, investigated and prosecuted those charges and determined the applicants' guilt or innocence together with their sentences. It cannot therefore be said that there was any structural independence between those with the prosecuting and adjudicating roles and the Government did not suggest that there was.
>
> Accordingly, the Court considers it evident that the misgivings of Messrs Whitfield, Pewter and Gaskin about the independence and impartiality of their adjudications were objectively justified and, further, that their adjudications were consequently unfair.

125. The subsequent case of *Young v United Kingdom* (2007) 45 EHRR 29 simply followed the decision of *Whitfield v United Kingdom* in this regard without further discussion: see paras.42–44.

In particular, there was no differentiation between independence and impartiality.

126. As mentioned, I accept that there is a certain interrelationship between the two concepts, but as a matter of first principles, neither one is conclusive of the other. Whether, in a particular case, a lack of structural independence can be translated to a lack of impartiality must be a fact-sensitive question.

127. In some cases, such as the Canadian case referred to by Mr Kwok, *Currie v Alberta (Edmonton Remand Centre)* (2006) 276 DLR (4th) 143, there may be very substantial evidence available before the court to help the hypothetical fair-minded and informed observer decide for himself whether there is a reasonable apprehension of bias. Thus in *Currie v Alberta (Edmonton Remand Centre)*, the Court of Queen's Bench of Alberta actually heard and received evidence from many who were involved in the relevant disciplinary hearings, including evidence of the senior staff who sat or had sat on the disciplinary boards, as well as expert evidence of Professor Jackson of the Faculty of Law at the University of British Columbia. In such a case, the fair-minded and informed observer would be well fed with information that was specific to the case when considering whether there was a reasonable apprehension of bias. On the facts, and particularly on the evidence adduced, the Canadian Provincial Court concluded that the disciplinary boards involved failed to meet the requirements of independence and of impartiality mandated by the Canadian Charter of Rights and Freedoms.

128. We do not have any such evidence in the present case. For that reason alone, the actual conclusion drawn by the Canadian Court in *Currie v Alberta (Edmonton Remand Centre)* is of very little assistance. In particular, the concern of the Judge, Marceau J, expressed in para.96 of his lengthy judgment, which has been quoted by Kwan JA in her judgment, must be read in the context of the actual evidence heard by the Court in that case.

129. Absent evidence of the quantity and quality of the kind available in *Currie v Alberta (Edmonton Remand Centre)*, one is back to a more general plane. Everything turns on what a fair-minded and informed observer, having considered the relevant facts known generally and evidence actually available in the present case, would conclude in terms of a reasonable apprehension of bias.

130. In this regard, the Court is not left without guidance from the past. As has been pointed out by Marceau J in *Currie v Alberta (Edmonton Remand Centre)* itself (paras.89–93), the US Supreme Court has heard and specifically rejected a complaint that a hearing process similar to Alberta's faced by the Court in *Currie v Alberta (Edmonton Remand Centre)* was not impartial or was unfair: *Wolff*

v McDonnell **418 US 539 (1974). Writing the judgment for the majority, White J said (at pp.555–556, 561–563):**

> Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." *Price v Johnston*, 334 US 266, 334 US 285 (1948). But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. …
>
> Of course, as we have indicated, the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. … Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. *Cf Morrissey v Brewer*, 408 US at 488. In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.
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> …
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> Prison disciplinary proceedings, … take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that, in many of them, the inmates are closely supervised, and their activities controlled around the clock. Guards and inmates coexist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex, and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.
>
> It is against this background that disciplinary proceedings must be structured by prison authorities; and it is against this background that we must make our constitutional judgments, realizing that we are dealing with the maximum security institution as well as those where security considerations are not paramount. The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and

> unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonisms on the important aims of the correctional process.
>
> … In any event, it is argued, there would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate, and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution. This consideration, along with the necessity to maintain an acceptable level of personal security in the institution, must be taken into account as we now examine in more detail the Nebraska procedures that the Court of Appeals found wanting.

131. On the facts of that case, the majority of the Supreme Court declined to rule that the Adjustment Committee (made up of the Associate Warden Custody as chairman, the Correctional Industries Superintendent and the Reception Center Director) charged with the responsibility of hearing disciplinary matters in the prison concerned was not sufficiently impartial (pp.570–571). Marshall J, with whom Brennan J joined, concurring in part and dissenting in part in respect of the majority's judgment, had this to say about the need for an impartial tribunal to hear prison disciplanary cases (pp.592–593):

> Finally, the Court addresses the question of the need for an impartial tribunal to hear these prison disciplinary cases. We have recognized that an impartial decisionmaker is a fundamental requirement of due process in a variety of relevant situations, see, eg *Morrissey v Brewer* 408 US at 485–486; *Goldberg v Kelly* 397 US at 271, and I would hold this requirement fully applicable here. But, in my view, there is no constitutional impediment to a disciplinary board composed of responsible prison officials like those on the Adjustment Committee here. While it might well be desirable to have persons from outside the prison system sitting on disciplinary panels, so as to eliminate any possibility that subtle institutional pressures may affect the outcome of disciplinary cases and to avoid any appearance of unfairness, in my view, due process is satisfied as long as no member of the disciplinary board has been involved in the investigation or prosecution of the particular case, or has had any other form of personal involvement in the case. *See Clutchette v Procunier* 497 F 2d 820; *United States ex rel Miller v Twomey* 479 F 2d 701, 716, 718 (CA7 1973); *Landman v Royster* 333 F Supp at 653. I find it impossible to determine on the present record whether this standard of impartiality has been met, and I

would leave this question open for the District Court's consideration on remand.

132. In *R v Board of Visitors of Franklin Prison* [1986] 1 WLR 130, Woolf J (as he then was) was concerned with the impartiality of the chairman of a board of prison visitors hearing a prison disciplinary matter as the chairman had been a member of the local review committee which, three weeks earlier, had considered the concerned prisoner's application for release on licence under the parole system. The issue involved was therefore slightly different from the one faced in the present case. Nonetheless, in the course of his judgment, Woolf J observed (p.135D–F):

> … Parliament through the Prison Act 1952, and the Secretary of State through the Prison Rules 1964, have concluded that [the board of prison visitors] is the most appropriate body to deal with offences of that sort. This is because they are offences which are primarily against discipline and in order to deal with those kinds of offences, it is important that those who adjudicate upon them should have knowledge of the workings of prisons in general and the particular prison of which the prisoner concerned is an inmate. With regard to the second principle, as I have described it, the board of visitors should not be too ready to regard a general background knowledge of a particular prisoner as being something which makes it desirable for it not to continue with the adjudication on a particular disciplinary charge. In deciding whether or not it is possible for a particular member of a board to adjudicate fairly upon disciplinary offences, the reasonable and fair-minded bystander would have to take into account the nature of the proceedings and the nature of the duties which the board has to perform.

133. Whilst *R v Board of Visitors of Franklin Prison* was concerned with adjudication by a board of visitors, *R v Her Majesty's Prison Service, ex p Hibbert* (unrep., 16 January 1997), dealt directly with a Governor's adjudication. Applying the apparent bias test prevailing at the time, Latham J dismissed the suggestion of apparent bias on the part of the Governor in these terms:

> One can readily understand the views of prisoners in this regard. A Governor charged with security, such as Mr Nott, is undoubtedly going to have an intimate knowledge of what is happening within the prison and it is inevitable that prisoners may come to the conclusion that the Governor, if he comes to a finding adverse to the prisoner, is doing so because he is biased. I do not consider that the facts that I have pointed to, as being the reason why a prisoner may conclude that a Governor is biased, amount to sufficient justification for saying that there is any bias, in fact. Nor

do I consider that there is, in this situation, any likelihood of bias displayed by those facts alone.

134. In *R (Al-Hasan) v Secretary of State for the Home Department* [2005] 1 WLR 688, the House of Lords was concerned with whether a Deputy Governor was apparently biased against certain prisoners in finding them guilty for refusing to obey an order to squat. The Deputy Governor had been present when the Governor approved the decision to require prisoners to squat as part of a search of prisoners ordered by the Governor. At the disciplinary hearing, the prisoners did not dispute that they had disobeyed an order, but their defence was that the order to squat had not been lawful. On those very peculiar facts, the House of Lords found that the Deputy Governor was guilty of apparent bias. In his concurring judgment (with which Baroness Hale and Lord Carswell agreed), Lord Rodger explained the general position regarding adjudication of prison disciplinary charges as well as the peculiar problems faced by the Deputy Governor in the case:

> [9] As the facts of the present case demonstrate, however, people who are called on to adjudicate will often have substantial experience in the relevant field and will therefore be familiar with the background issues which they may have encountered previously in various roles. Indeed, the individuals concerned will often be particularly suited to adjudicate on the matter precisely because of the experience and wisdom on the topic which they have accumulated in those other roles. …
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> …
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> [11] Nor should it be supposed that only professional judges are capable of the necessary independence of approach. That would be to disregard the realities of life in many organisations today. For example, on a daily basis, head teachers have to apply school rules which they have helped to frame. By virtue of their knowledge of the way the school works and of its problems, they will often be best placed to apply the rules sensitively and appropriately in any given situation. Again, it is not to be assumed that the head teachers' mere involvement in shaping the rules means that a fair-minded observer who knew how schools worked would conclude that there was a real possibility that they would not be able to apply the rules fairly. The same goes for managers in businesses and for officers in the armed forces who are committed to upholding the edifice of lawful orders on which the services rest. Equally, I have no doubt that an informed and

> fair-minded observer would regard prison governors, or their deputies, as being quite capable of interpreting and applying the prison rules fairly and independently, even though they are obviously committed to upholding them. In all these situations, if things do go wrong, the decision can be judicially reviewed or challenged in an employment tribunal, as the case may be. The present case is an example of that safeguard in action.
>
> [12] Nothing in the decision of the House today casts any doubt on the validity of the decisions of such bodies taken in the ordinary way. The circumstances of the present case were most unusual, however. The appellants chose to challenge the lawfulness of the general order for a squat search which they had refused to obey. Since Mr Copple had been present when the governor approved that particular order, and had not dissented from that approval, an informed and fair-minded observer could infer that Mr Copple had thereby tacitly accepted that the order was lawful in the situation then facing the prison authorities. If so, that observer might further conclude that there was a real possibility that Mr Copple would be biased if he later had to adjudicate on the appellants' challenge to the validity of the self-same order. On this very limited ground, which is explained more fully by Lord Brown, I have come to the view that the appeal should be allowed.

135. In the same case, Baroness Hale observed (para.16) that "it is inherent in the system of prison discipline that it is administered by those with responsibility for managing the prison. Sometimes it will not be possible to keep the two functions distinct."

136. The two cases decided by the European Court of Human Rights, namely, *Whitfield v United Kingdom* and *Young v United Kingdom*, did not deal with what was said by the House of Lords in *R (Al-Hasan) v Secretary of State for the Home Department*.

137. A fair-minded and informed observer would, in my view, bear all the above observations in mind. Furthermore, he would not conclude that simply by reason of his position and responsibilities, or by reason of the fact they all worked in the same prison, the Superintendent would be predisposed to believe or protect his junior officers. Rather, he would proceed on the assumption, absent evidence to the contrary, that the Superintendent would consider that the fair and impartial adjudication of prison disciplinary matters would, in the long run, be conducive to the good and efficient management and control of the prison, to the mutual benefit of his officers and the prisoners alike.

138. In my view, a fair-minded and informed observer would also be a realistic and pragmatic person. He would not be idealistic or rigid in his approach. He would accept that we live in an imperfect world, and, as has been observed by Baroness Hale, it is inherent in the system of prison discipline that it is administered by those with responsibility for managing the prison. It is particularly noteworthy that in *R (Al-Hasan) v Secretary of State for the Home Department*, the House of Lords plainly did not regard the mere fact that it was the Deputy Governor of the prison concerned who heard the disciplinary charges as being sufficient in itself to found a case of apparent bias.

139. A fair-minded and informed observer would also recall that analogous situations exist in real life in many other organisations, such as schools and businesses. All this would help shape his perception of what would constitute a reasonable apprehension of bias.

140. On the other hand, he would bear in mind the unique situation concerning prisons and prison life, as has been described by White J in *Wolff v McDonnell*. He would attach importance to the Superintendent's specific knowledge of and familiarity with his prison and its rules to the proper and efficient adjudication of disciplinary charges, which require swift disposal. The fact that in some individual cases, such specific knowledge and familiarity may not make any real difference is neither here nor there, as one is concerned with a challenge against the system here.

141. A fair-minded and informed observer would also bear in mind that in the present case, the front-line officers are several rungs removed from the Superintendent, although they are stationed in the same prison. The Superintendent would normally have limited direct contact at work with the reporting officers and the other front-line officers. The Superintendent would not be involved in the direct supervision of prisoners.

142. Furthermore, a fair-minded and informed observer would bear in mind that he is not asked to consider a case where a particular reason giving rise to a suspicion of apparent bias existed, in which event the question of apparent bias would have to be determined in accordance with the facts and circumstances involved that gave rise to the specific reason for suspicion.

143. Absent that sort of situation, everything considered, I would conclude that a fair-minded and informed observer would not come to the automatic and sweeping conclusion that there is a reasonable apprehension of bias on the part of the Superintendent in each and every case he tries by the mere fact that he is also the Superintendent of the prison involved, and is either the Head or Deputy Head of the institution. Rather, he would place the Superintendent in the same category as the Commissioner and

conclude that there is no reasonable apprehension of bias, unless, on the facts of a particular case, something more is present to tip the scales.

144. As I said at the outset, save for this first question, I am in entire agreement with the judgment of Kwan JA and the orders she proposes.

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145. Accordingly, the appeal is allowed to the extent as indicated by Kwan JA and we make an order in these terms:

(a) The appeal of the respondent (the Commissioner) is allowed to the extent that the order of Fung J on 31 August 2009 quashing the following decisions be set aside:

  (i) The Determination and Punishment made by Superintendent Siu Chi Wing on 30 May 2007 in Case No 288/2007; and
  (ii) The Decision made by the Commissioner on 22 June 2007 confirming the Determination and Punishment in (a)(i);

(b) Otherwise the appeal of the respondent is dismissed and the said order of Fung J be affirmed in that the following decisions are quashed:

  (i) The Determination and Punishment made by Superintendent Ng Hon Yin on 31 August 2007 in Case No 469/2007;
  (ii) The Decision made by the Commissioner on or about 5 September 2007 rejecting the applicant's application for extension of time to appeal in Case No 469/2007;
  (iii) The Determination and Punishment made by Superintendent Ng Hon Yin on 18 September 2007 in Case No 505/2007;
  (iv) The Decision made by the Commissioner on 10 October 2007 confirming the Determination and Punishment in (b)(iii);
  (v) The Determination and Punishment made by Superintendent Siu Chi Wing on 31 December 2007 in Case No 669/2007;
  (vi) The Decision made by the Commissioner on 10 January 2008 confirming the Determination and Punishment in (b)(v);

(vi) The Determination and Punishment made by Superintendent Siu Chi Wing on 30 January 2008 in Case No 21/2008; and

(vii) The Decision made by the Commissioner on 6 February 2008 confirming the Determination and Punishment in (b)(vii); and

(c) The respondent's notice of the applicant to affirm the said order of Fung J on other grounds and to cross appeal the said Order that there be no order as to costs for Grounds 2 and 4 (absence of mechanical recording of proceedings and non-compellability of witnesses) be dismissed.

146. As to costs, the order in the Court below was expressed by reference to separate specific grounds and their success or failure. Such an approach would make the task of a taxing master most difficult and in any event the costs below should be varied to reflect the lack of success on the ground for relief premised on the absence of an independent and impartial tribunal. There will be an order *nisi* by which the order made by the Judge below be set aside and substituted by an order that the respondent (the Commissioner) pay to the applicant half of the costs of the application to the Court below.

147. In relation to the appeal, the Commissioner has been successful in relation to an issue that has occupied a material part of the argument, namely, the issue of impartiality. Accordingly, there will be an order *nisi* that the applicant shall pay to the Commissioner half the costs of the appeal. There is also an order *nisi* that the applicant shall pay the Commissioner the costs of and occasioned by his notice served pursuant to O.59 r.6(1)(b), 6(1)(c).

148. There will be a certificate for two counsel for the appearance of the Commissioner upon the appeal and an order that the applicant's own costs in the appeal and his cross-appeal are to be taxed in accordance with the Legal Aid Regulations.

Reported by Michael Ramsden