CACV 80/2014

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO. 80 OF 2014
(ON APPEAL FROM HCAL NO. 113 OF 2013)

Re: WONG CHI KIN (黃志堅) Applicant

Before : Hon Lam VP, Cheung and Yuen JJA in Court

Date of Hearing : 25 September 2014

Date of Judgment : 26 September 2014

JUDGMENT

Hon Lam VP (giving the Reasons for Judgment of the Court):

1. This is an appeal against the decision of Au J of 1 April 2014 refusing to grant leave to the Applicant to apply for judicial review in respect of the Report of the Commission of Inquiry into the Collision of Vessels near Lamma Island on 1 October 2012 ["the Report"]. The Report was published on 30 April 2013 and the Form 86 was filed by the Applicant on 23 July 2013.

2. Though the Applicant used Chinese in making his application and in this appeal, we would give our judgment in English. We believe the Applicant is conversant in English (as he referred to English materials in his appeal bundle). However, if he needs translation service, he can contact the clerk of Lam V-P for an appointment to have this judgment translated to him orally.

3. The Applicant used to work in the Marine Department. He was involved in the matter because he was the officer who approved the drawings for the vessel Lamma IV which sank after the collision and resulted in the tragic loss of 39 lives (including 8 children). He gave evidence in the Inquiry. He was named and criticised by the Commission specifically at para 294 of the Report.

4. In the Form 86, the Applicant levelled quite a number of criticisms against the Commission and he sought an order from the court to quash several parts of the report which he said to be erroneous and misleading.

5. Au J had called for initial response from the putative respondent and on 13 December 2013, the Department of Justice acting for the Secretary for Transport and Housing filed an initial response. After considering the materials filed by the Applicant and the initial response, Au J refused leave on paper on the following bases：

> "(1) 法庭在行使司法覆核的權力時，並不是如同作為上訴法庭一樣，一般是不會對相關委員會或審裁處的事實裁定的是非曲直(merits)作出干預，除非該裁定是犯有法律上的錯誤，包括在程序上的不公義或錯誤，又或其事實裁定是完全沒有證據支持或是極度不合理(*Wednesbury* unreasonable)或非常理的(Irrational)。

(2) 申請人有責任證明他擬提出的司法覆該的理據，是合理可爭辯性而有真實勝訴機會的(*Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676，第14-17段)。

(3) 申請人就有關委員會報告的相關結論作出眾多挑戰，但作為擬提出司法覆核的理據，可歸納為：

(a) 報告中的某一些結論是沒有證據基礎或明顯地的錯誤理解一些證據及證供。

(b) 委員會不應拒絕容許一些遲了遞交的證據。

(c) 其中一些結論是明顯極不合理性的(*Wednesbury* unreasonable)。

(4) 法庭認為，在已存檔的證據下，及參閱報告書後，申請人並未能證明其上述的理據有合理爭辯性：

(a) 法庭看不到在相關被挑戰的某些結論上，委員會是在完全沒有證據基礎下作出的。法庭亦認為，該些結論並不是任何一個合理的委員會都不會作出的結論。

(b) 申請人在本申請中提出一些沒有在委員會聆訊中提出的證據去支持本申請（見其附加誓詞附件2-5至2-10，14-1至14-3，19-4至19-13，及22-1至22-3）。這是在司法覆核中一般不容許的。此外，申請人說由於他在有關日子未能出席聆訊而所以未能提出在本申請中才依賴的證據，是不能成為合理覆核報告內容的理由。

(c) 法庭亦看不到任何可爭辯的程序不公：委員會是有權及合理地不准許遲了提出的證據在聆訊中提出（如申請人所說英國海事處及海洋救援局2013年3月9日的電郵）。

(d) 申請人在擬提出之司法覆核中所列出的挑戰，實質上是他不滿意委員會對證據的最終斷定而作出有關的結論，而要求法庭重新審理，如上述(1)所說，這並不是支持司法覆的合理理據 。”

6. The Applicant lodged his Notice of Appeal on 11 April 2014.

7. After hearing the Applicant, we propose to allow the appeal to a limited extent: we shall grant leave to the Applicant to apply for judicial

review in respect of paras 229, 287, 291 and 294 of the Report by relying on the grounds set out at paras 17 to 25 of the Form 86.

8. We shall not delve into the details at this stage. Suffice to say that we consider there is sufficient materials brought to our attention that raise a reasonably arguable case of procedural unfairness which resulted in material matters not being considered by the Commission or misunderstanding of the evidence when it made its Report. Thus, in this respect, the Applicant has satisfied the *Chan Po Fun* threshold.

9. Since para 294 is a specific criticism against the Applicant personally and paras 229, 287 and 291 are related, he has a sufficient interest and standing in seeking judicial review.

10. The position is different in respect of the other paragraphs in the Report attacked by the Applicant: paras 210 to 216, 295 to 297, 395, 413. Paragraphs 210 to 216 summarized the evidence of Dr Armstrong, the naval architect engaged by the Commission as an expert witness. Paras 295 to 297 referred to the inspection of the vessel by other staff of the Marine Department. Para 395 is a conclusion drawn by the Commission about the effect of the failure of the attachments of the seating to the upper deck of Lamma IV. Para 413 is the conclusion of the Commission in respect of the lack of child lifejackets. These are not criticism directed against the Applicant personally. Though one can say that some of these may include imputations against the Marine Department or some identified officers of the department, neither that department nor those officers had seen fit to challenge those paragraphs by way of judicial review.

11. Notwithstanding the Applicant's previous role in the Marine Department, he has no locus to represent either the Marine Department or

those named officers to challenge those findings by way of judicial review. Though the requirement of standing in public law is a liberal one, an applicant must still have some interest in the matter to warrant leave being granted to him to challenge a public decision. Leave would not be granted to a meddlesome busybody, see *R v Monopolies and Mergers Commission, ex p Argyll Group Plc* [1986] 1 WLR 763 at p.773. The relevant principles about standing in bringing an application for judicial review were considered by Rose LJ in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement* [1995] 1 WLR 386. Standing goes to jurisdiction and it has to be considered in the legal and factual context of the whole case. Merits are important. But there are other factors as well: the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who have a greater interest in the matter, the nature of the breach of duty against which relief is sought.

12. In *R (Feakins) v Secretary of State for Environment* [2004] 1 WLR 1761, Dyson LJ (as he then was) said at para 23,

> "In my judgment, if a claimant has no sufficient private interest to support a claim to standing, then he should not be accorded standing *merely* because he raises an issue in which there is, objectively speaking, a public interest. As Sedley J said in *R v Somerset County Council, Ex p Dixon* [1997] JPL 1030, when considering the issue of standing, the court had to ensure that the claimant was not prompted by an ill motive, and was not a mere busybody or a trouble-maker. Thus, if a claimant seeks to challenge a decision in which he has no private law interest, it is difficult to conceive of circumstances in which the court will accord him standing, even where there is a public interest in testing the lawfulness of the decision, if the claimant is acting out of ill-will or for some other improper purpose. It is an abuse of process to permit a claimant to bring a claim in such circumstances. If the real reason why a claimant wishes to challenge a decision in which, objectively, there is a public interest is not that he has a genuine concern about the decision, but some other reason, then that is material to the question whether he should be accorded standing."

13. We are not suggesting for one moment that the Applicant in the present case is acting out of ill-will or improper purpose. However, it does seem to us that a substantial part of his grievance stems from the criticism levelled against him in the Report. Thus, we are prepared to grant him leave to the extent as set out in para 7 above.

14. In the more recent judgment of the Supreme Court of the United Kingdom in *AXA General Insurance Ltd v HM Advocate* [2012] AC 868, Lord Hope DPSC said at para 63,

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

15. In the same case, Lord Reed said at para 170,

> "For the reasons I have explained, such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say 'might', because the protection of the rule of law does not require that every allegation of unlawful conduct by

> a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in f a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context."

16. An example where the context of the matter and the existence of other parties more suitable to challenge the relevant decision point against standing being given to another party can be found in *R (Bulger) v Secretary of State* [2001] 3 All ER 449.

17. In the present case, we do not regard the Applicant as being directly affected by those other paragraphs in the Report. If there were any procedural injustice leading to the conclusions in those paragraphs, the Marine Department and the named officers are in a better position than the Applicant to lodge a challenge by way of judicial review. It must be remembered that the Marine Department was legally represented before the Commission. The department and those officers may have their reasons for not seeking to re-open the matter by way of judicial review. As we said, the Applicant cannot hold himself out as representing the Marine Department or his former colleagues without their consent.

18. Bearing in mind the nature of the Report and its public impact, we do not think this is a case where the context of the matter requires the court to give leave to the Applicant to challenge those other paragraphs in the Report in order to uphold the rule of law.

19. Moreover, though the Report has been published, we are aware that there are criminal proceedings on foot in which some of these

issues may be raised. Probably there will also be civil proceedings touching on such issues. There may even be disciplinary proceedings. It seems to us that it is much better for such issues to be canvassed in the context of those proceedings between parties who have direct interests in the matters than allowing the Applicant to raise challenges on his own by way of judicial review proceedings.

20. The Applicant also sought to challenge para 391. In that paragraph the Commission rejected the evidence of the Applicant (summarized at para 334). The assessment of evidence is a matter for the Commission and the rejection of the Applicant's evidence has not been demonstrated to be unfair or *Wednesbury* unreasonable. We do not see any reasonably arguable ground for the court to intervene by way of judicial review.

21. For these reasons, we refuse to grant leave in respect of the challenge to the other parts of the Report and the other grounds set out in the Form 86 and the supplementary grounds set out in his affirmation of 16 September 2013 (viz other than those identified by us at para 7 above). That part of the appeal was dismissed.

22. The Applicant also sought an order that he should not be liable for the costs of the putative respondent in this appeal. Since the putative respondent did not appear in the appeal, we made no order as to costs in respect of the appeal.

23. As regards his application for a protective costs order in respect of the application for judicial review, this should be dealt with by the court below with opportunity afforded to the respondent to address the court on the issue.

24. We make an order as per paras 7, 21 and 22 above.

25. The Applicant must now issue an originating summons in accordance with Order 53 rule 5 which should be confined to the matters for which leave was granted by us. If he wishes to pursue his application for a protective costs order, he should take out a summons returnable before a judge of the Court of First Instance for that purpose after he issues the originating summons.

26. The Applicant has concerns about the proper respondent to the application for judicial review. As mentioned, the Secretary for Transport and Housing has, through the Department of Justice, filed an initial response. A copy of this judgment will also be given to the putative respondent and Department of Justice as the legal representative for the Secretary for Transport and Housing. We do not know whether the Secretary will seek to be joined as an Interested Party. The Applicant may take out a summons seeking directions from the court below on the proper parties to the judicial review.

(M H Lam)	(Peter Cheung)	(Maria Yuen)
Vice President	Justice of Appeal	Justice of Appeal

The Applicant appeared in person