ROWSE v SECRETARY FOR THE CIVIL SERVICE & ORS

COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 41 OF 2007
HARTMANN J
25-29 FEBRUARY, 4 JULY 2008

Administrative Law – Civil service – Discipline – Investigation by inquiry Committee – Decision by Secretary for Administration – Apparent bias – Dual advisory role performed by Law Officer of the Department of Justice – Standard of proof – Irrationality – Whether requirement to afford legal representation – Prejudice to applicant – Extent to which applicant had to be given opportunity to comment on material – Appeal procedures – Scope for delegation by Chief Executive – Whether reasons had to be given on appeal

行政法 – 公務員事務 – 紀律 – 由調查委員會作出調查 – 由政務司司長作出裁決 – 表面的偏頗 – 律政司律政專員作出雙重的諮詢角色 – 舉證準則 – 不理性 – 是否需要提供法律代表 – 對上訴人構成不利 – 至甚麼程度上訴人才獲機會就關鍵事件作出評論 – 上訴程序 – 行政長官授權的範圍 – 上訴時是否要提供理由

The applicant was a senior civil servant who had been involved in organising 'Harbour Fest' in late 2003. The event, which was designed to promote Hong Kong in the wake of the SARS epidemic, had not lived up to expectations. Recriminations had followed regarding the standard of the administration of the event. The applicant was ultimately the subject of disciplinary proceedings for misconduct. The proceedings were conducted in three stages under the Public Service (Administration) Order (the Order). First, there was an inquiry by an Inquiry Committee (the Committee) under s 10 of the Order. Second, the Secretary for the Civil Service (the Secretary) would decide on the Committee's findings. Lastly, there was scope to appeal against the decision of the Secretary to the Chief Executive under s 20 of the Order. The Chief Executive had delegated this function to the Chief Secretary for Administration (the Chief Secretary).

In the applicant's case, the Secretary denied the applicant legal representation before the Committee. The Committee subsequently made findings adverse to the applicant. The Secretary accepted those findings and punished the applicant. In the course of deciding the applicant's case, the Secretary received advice from a Law Officer of the Department of Justice (the Law Officer), both prior to the commencement of disciplinary proceedings and in light of the conclusions reached by the Committee. The Secretary had also, without informing the applicant, received advice from the Civil Service Bureau as to the case against the applicant. An appeal by the applicant to the Chief Secretary was rejected. The applicant applied to the Court of First Instance for judicial review against the Committee, the Secretary and the Chief Secretary.

Held, allowing the application:

(1) There was no apparent bias in relation to the members of the Committee. *Deacons v White & Case LLP* [2003] 3 HKC 374, (2003) 6 HKCFAR 322 applied (paras 62, 69).

(2) At the time of its deliberations, a stringent standard of proof to a high degree of probability applied. The Committee had not understood and observed that standard and its conclusions were thus wrongly relied upon by the Secretary. *Tse Lo Hong v Attorney General* [1995] 3 HKC 428; *Lai King Shing v Medical Council of Hong Kong* [1996] 1 HKC 24 applied. *Re H & Ors (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563; *A Solicitor v The Law Society of Hong Kong* [2008] 2 HKC 1 considered (paras 80-82, 100).

(3) The law on the issue of legal representation before administrative tribunals remained a matter of what, in each and every case, fairness required. This operated as a discretion vested in a tribunal and required the weighing of all relevant factors. The Secretary had not properly exercised the discretion in the present case, as he had fettered his discretion by adopting a policy of denying legal representation unless compelling circumstances were demonstrated. In this respect, the rationality of the policy was not relevant. There can be no threshold test of 'exceptionality'. Further, the Secretary's approach to legal representation may well have materially prejudiced the applicant. Lastly, the applicant's challenge on this issue was not stale; judicial review was a remedy of last resort. *Re Fong Hin Wah* [1985] HKLR 332; *R (Mahfouz) v Professional Conduct Committee of the General Medical Council* [2003] EWCA Civ 233; *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors* [2006] 2 HKC 533, (2006) 9 HKCFAR 234 applied; *Bushell v Secretary of State for the Environment* [1981] AC 75 considered (paras 127-129, 133, 141, 142).

(4) There had been apparent bias flowing from the dual advisory role performed by the Law Officer (prior to the commencement of the disciplinary proceedings and in light of the conclusions reached by the committee), which had manifestly influenced the respondent in making his decision to some material extent. *Ch'ng Poh v The Chief Executive of the HKSAR* [2003] HKEC 1441 applied; *Cheng Chui Ping v The Chief Executive of the HKSAR and the United States of America* [2002] HKCU 5 (HCAL 1366/2001, Hartmann J, 7 January 2002, unreported) distinguished (paras 167-169).

(5) The Secretary constituted the tribunal. It was unfair for the Secretary to receive advice from the Civil Service Bureau without giving the applicant the opportunity to see that advice and comment on it. *Dato Tan Leong Min v Insider Dealing Tribunal* [1999] 2 HKC 83 applied (para 172).

(6) The decision of the Committee was not irrational. Whilst the logic was questionable and the evidence was thin, it was open to the committee to come to the conclusions that it did (paras 200-201, 206).

(7) The Chief Executive had acted ultra vires in delegating to the Chief Secretary under s 20 of the Order. S 20 did not imply any sort of power to delegate. It merely enabled the Chief Executive to balance justice to the individual public servant with what is fit and appropriate in the public interest. As a result, the Chief Secretary's decision, having been made pursuant to the delegation, was also ultra vires (paras 227, 232).

(8) The Chief Secretary had not been under a duty to give reasons. *So Chung v Commissioner of Correctional Services* [2001] HKCU 53 (HCAL 2438/2000, Hartmann J, 31 January 2001, unreported) applied (para 239).

Cases referred to

Solicitor v The Law Society of Hong Kong, A [2008] 2 HKC 1 (CFA)

A *Bushell v Secretary of State for the Environment* [1981] AC 75, [1980] 2 All ER 608, [1980] 3 WLR 22 (HL)
Cheng Chui Ping v The Chief Executive of the HKSAR and the United States of America [2002] HKCU 5 (HCAL 1366/2001, Hartmann J, 7 January 2002, unreported) (CFI)
B *Ch'ng Poh v The Chief Executive of the HKSAR* [2003] HKEC 1441 (CFI)
Dato Tan Leong Min v Insider Dealing Tribunal [1999] 2 HKC 83, (1999) 8 HKPLR 883 (CA)
Deacons v White & Case LLP [2003] 3 HKC 374, (2003) 10 HKPLR 760, [2004] 1 HKLRD 291, (2003) 6 HKCFAR 322 (CFA)
Fong Hin Wah, Re [1985] HKLR 332 (HC)
C *H & Ors (Minors) (Sexual Abuse: Standard of Proof), Re* [1996] AC 563, [1996] 1 All ER 1, [1996] 1 FCR 509, [1996] 1 FLR 80, [1996] 2 WLR 8 (HL)
Lai King Shing v Medical Council of Hong Kong [1996] 1 HKC 24 (CA)
Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors [1996] 185
D CLR 259 (Aus HC)
R (Mahfouz) v Professional Conduct Committee of the General Medical Council [2003] EWCA Civ 23380 BMLR 113 (CA)
So Chung v Commissioner of Correctional Services [2001] HKCU 53 (HCAL 2438/2000, Hartmann J, 31 January 2001, unreported) (CFI)
E *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors* [2006] 2 HKC 533, (2006) 9 HKCFAR 234 (CFA)
Tong Pon Wah v Hong Kong Society of Accountants [1998] 3 HKC 82, (1998) 8 HKPLR 585, [1998] 2 HKLRD 427 (CA)
Tse Lo Hong v Attorney General [1995] 3 HKC 428, (1995) 5 HKPLR 613 (CA)
F

Legislation referred to

Basic Law art 48
Interpretation and General Clauses Ordinance (Cap 1) s 63
Public Service (Administration) Order ss 10, 19, 20
G Public Service (Administration) Regulations s 8(5)

Other sources referred to

De Smith's Judicial Review (6th Ed) 5-140
Guide for Inquiry Officers, Inquiring Committees, Assisting Officers and Accused Officers involved in Disciplinary Inquiries under PS(A)O s 9 or 10
H

[*Editorial note*: For breach of natural justice generally, see *Halsbury's Laws of Hong Kong*, Vol 1(1) (2003 reissue), LexisNexis [10.083]-[10.100].]

I **Application**

This was an application for judicial review of disciplinary proceedings against a civil servant.

Richard Gordon QC and Alexander Stock (Herbert Smith), for the applicant.
Joseph Fok SC and Daniel Wan (Department of Justice), for the respondents.

Hartmann J: *Introduction*

1. This is an application for judicial review arising out of proceedings instituted against the applicant pursuant to s 10 of the Public Service (Administration) Order, an executive order which provides for the disciplining of civil servants.

2. The applicant is a senior civil servant. He was informed in October 2004 that he was to be the subject of disciplinary proceedings pursuant to s 10 of the Administration Order, as I will call it. The allegation made was that the applicant had been guilty of 'misconduct' in the discharge of his duties. Proceedings under s 10 allege a level of misconduct sufficiently serious to warrant (potentially at least) an officer's dismissal from public service or his compulsory retirement from it.

3. At the time that he was informed of the disciplinary proceedings, the applicant could boast some 30 years service in the civil service.

4. The misconduct alleged against the applicant related to his involvement in a festival of popular music staged in October and November 2003 called the Harbour Fest. The festival had been promoted and staged by the Hong Kong American Chamber of Commerce (AmCham) with the Government acting as sponsor up to a maximum sum of HK$100 million. The applicant had been the senior controlling officer representing the interests of Government. The festival — for reasons to which I shall come shortly — was an event of the highest profile, promoted in the expectation that it would attract international publicity of the most positive kind. Regrettably, in this particular regard, it failed. It was in the wake of that failure that the applicant was charged with five 'charges' of misconduct.

5. What constitutes 'misconduct' on the part of a civil servant is not defined in the Administration Order. However, guidance is given in a document called the *Guide for Inquiry Officers, Inquiring Committees, Assisting Officers and Accused Officers involved in Disciplinary Inquiries under PS(A)O, section 9 or 10*. In the Disciplinary Guide, the following is said:

> 'In general, any act, conduct and behaviour of a civil servant, which contravenes any government rules, instructions, codes or departmental practices, may be regarded as misconduct. Where no specific rules or instructions may be applicable in a particular case, conduct which falls short of the standard expected of an officer, or which is considered improper, by his supervisor or the management may be regarded as misconduct. The more senior a civil servant the more we would expect him/her not to rely only on written rules when discharging their duties. They are expected at all times to exercise due diligence in carrying out their duties and to demonstrate a good sense of responsibility, a positive attitude, and a standard of performance commensurate

A with their rank and experience. Any negligence or failure to perform duties required or normally expected of an officer at that level and experience may constitute a misconduct.'

6. Disciplinary proceedings under s 10 of the Administration Order involve, first, a process of inquiry conducted by a committee which hears B evidence and listens to submissions. That process took place between early November 2004 and 22 January 2005, consisting of a series of hearings. The Inquiry Committee, as it was called, consisted of two civil servants. The hearings were informal and inquisitorial in nature, there being no obligation to comply with formal rules of evidence. In this regard, s 8(4) C of the Regulations made under the Order directs that:

'The ⋯ inquiry committee may enquire into any matter and admit and take into account any evidence or information which the ⋯ inquiry committee considers relevant, and shall not be bound by any rules of evidence.'

D 7. At the end of the inquiry process, the committee drew up a report. That report was submitted to the Secretary for the Civil Service in early February 2005. The report concluded that the first charge against the applicant had been substantiated and the remaining four charges partially substantiated.

E 8. The Secretary for the Civil Service accepted the Inquiry Committee's findings in full and, having considered representations as to penalty, imposed a severe reprimand together with a fine equivalent to reduction in salary by two increments for 12 months. The applicant was further given a caution that, in the event of further misconduct, serious F consideration would be given to removing him from the Civil Service.

9. Thereafter, in March 2005, the applicant sought to appeal the decision of the Secretary for the Civil Service by way of making representations to the Chief Executive pursuant to s 20 of the Administration Order. G

10. In January 2007, the applicant was informed that the Chief Executive had delegate his authority to consider the representations to the third respondent, the Chief Secretary for Administration — the Chief Secretary — and that the Chief Secretary had rejected those H representations.

11. The applicant seeks to judicially review three of the decisions which marked out the course of the disciplinary proceedings taken against him. The decisions may be described as follows:

(i) The decision of the Secretary for the Civil Service, communicated I to the applicant in May 2005, to accept the findings of the Inquiry Committee.

(ii) The subsequent decision of the Chief Executive to delegate to the Chief Secretary the power to consider and determine the applicant's appeal made pursuant to s 20 of the Administration Order.

(iii) The decision of the Chief Secretary, communicated to the applicant in January 2007, to uphold the decisions of the Secretary for the Civil Service thereby dismissing the applicant's appeal.

12. As to the grounds of review, numerous grounds are advanced. I shall come to each in turn during the course of this judgment.

Looking briefly to the nature of the disciplinary proceedings

13. As I have said earlier, the Administration Order, in terms of which the disciplinary proceedings were conducted against the applicant, is an executive order. It is not legislation. It is an order made by the Chief Executive pursuant to his 'powers and functions' under art 48 of the Basic Law, art 48(4) giving him the power to 'decide on government policies and to issue executive orders'.

14. Regulations have been made under the Administrative Order. Section 8(5) of the Regulations speaks to the general nature of disciplinary inquiries:

> 'The enquiries should not be conducted with undue formality and while there is no standard practice which would be applicable to every case, it is emphasised that the ···inquiry committee is not exercising a legal function, but rather ascertaining the facts.'

15. But that being said, all Inquiry Committees are obliged to consider the facts in the light of the charges and to submit a comprehensive report. They are required therefore to submit a 'judgment' in the sense that they must, in the light of the facts found by them, come to an opinion as to whether those facts, in whole or part, substantiate the charges.

16. It is also to be noted that witnesses who speak to the matters in issue do so on oath. Those witnesses may be cross-examined.

17. Nor may the potential powers of an Inquiry Committee be overlooked. When discharging its responsibilities pursuant to s 10 of the Order — as in the present case — an Inquiry Committee may come to findings that, if accepted, will lead to dismissal from the public service.

18. Accordingly, any person who is the subject of disciplinary proceedings under s 10 is entitled, first, to have those proceedings conducted in accordance with the Administration Order and its Regulations and, second, to have those proceedings conducted in accordance with what used to be called the principles of natural justice but today are more commonly called the rules of procedural fairness.

Remembering the nature of judicial review

19. Of course, it must at all times be borne in mind that judicial review involves a challenge to legal validity. It does not permit the court to

examine the evidence to form its own view as to the merits. This judgment, therefore, does not seek to discover whether the applicant was correctly found guilty of misconduct. It seeks only to discover whether he was found guilty in accordance with law.

20. It must also be remembered that the persons who played a role in the disciplinary proceedings were not judicial officers. They were public servants. It is not the function of this court to second-guess the professional judgment of those persons who were judging one of their colleagues in the context of the conduct to be expected of a public servant. As Liu JA expressed it in his judgment in *Tong Pon Wah v Hong Kong Society of Accountants* [1998] 3 HKC 82 at 97, 98, [1998] 2 HKLRD 427, at 443:

> 'It must be recognised that over-legalising informal disciplinary proceedings is undesirable. Most disciplinary tribunals are presided over by men or women with no legal qualifications. Even solicitors chairing the Law Society Disciplinary Committee hearings are not professional judges. I do not doubt that they are able to and can return correct verdicts, but these proceedings are often distressfully flawed in the courts by a fault-finding expedition in which non-professional judges are clearly more vulnerable.'

Putting the applicant's challenges into a more detailed factual context

21. It would not be an exaggeration to say that the disciplinary proceedings against the applicant arose out of a unique set of circumstances. Harbour Fest had been promoted as an entertainment event of international significance. However, while there were those who praised the festival and many who enjoyed the individual concerts, the overwhelming media reaction was negative. By way of example, the *Standard* newspaper, in its edition of 10 November 2003, commented:

> 'Harbour Fest has come to an end not in the blaze of triumphant positive publicity that had been hoped for ··· Unfortunately, the event has been overshadowed by lamentable organisation steeming from over-ambition, and resulted in arrangements being made by people who had no idea what they were getting into. Stories of fumbling and bungling have gone across the world.'

22. The failure of Harbour Fest not only gave rise to media criticism, it became the subject of two public reports, one commissioned by the Chief Executive, one by the Legislative Council. The public, naturally enough, demanded accountability. But, of course, the disciplinary proceedings were not brought against the applicant to determine whether he should in any 'political' sense be held accountable for the failure. They were brought to determine whether, in his capacity as a civil servant, he had been guilty of misconduct as I have earlier spoken of that term.

23. Harbour Fest itself had been staged to herald Hong Kong's recovery from the SARS epidemic. The epidemic had struck down its first

victims in Hong Kong in February 2003. It was a significant blow to the economy of Hong Kong and the morale of its residents. However, by April 2003, with Hong Kong now free of the virus, the Chief Executive announced a campaign to restore the reputation of the Territory and boost the morale of its residents. A

24. Out of a total budget for relief measures of some HK$11.8 billion, a sum of HK$1 billion was set aside for publicity and promotional activities and in respect of this latter sum, an amount of HK$200 million was set aside to finance what were described as 'mega events'. B

25. To oversee the campaign, the Financial Secretary set up two *ad hoc* bodies. They were the Economic Relaunch Working Group and the Economic Relaunch Strategy Group. C

26. The applicant at that time headed a department of Government called Invest HK, his formal post, as I understand it, being the Director-General of Investment Promotion. The applicant was appointed to be the Secretary of both the Economic Relaunch Working Group (the ERWG) and the Economic Relaunch Strategy Group (the ERSG). In addition, the HK$1 billion budgeted for publicity and promotional activities was placed under the control of his department, Invest HK. D

27. In June 2003, the applicant was approached by Mr James Thompson, Chairman of AmCham. Mr Thompson proposed that, as part of the relaunch campaign, an international entertainment festival should be held. E

28. Following on this, in early July 2003, AmCham made a formal presentation to ERWG, the relaunch working group. The festival was to consist of a number of pop concerts featuring internationally known acts. At one time, something like 17 concerts were considered. Whatever the exact number, it was to be an endeavour of considerable magnitude. Performers who were originally contemplated included such internationally recognised stars as Bruce Springsteen, Sting, Santana and Kylie Minogue. F G

29. The ERWG approved AmCham's proposal in principle subject to Invest HK's scrutiny of, and satisfaction with, AmCham's detailed budget. H

30. In the days that followed, the applicant's department — Invest HK — reviewed the proposed budget. At that stage, the budget was, of necessity, very roughly drawn, especially in respect of 'talent' costs which were estimated to make up some 70% of the budget. While certain performers were listed, it appears that few, if any, negotiations had been concluded. The list was therefore essentially aspirational and the costs, at best, broadly indicative. For example, Bruce Springsteen and his band headed the list, the anticipated cost being US$1,900,000. But Bruce Springsteen did not in the end result come to Hong Kong to perform. I

During the hearing before this court, it was said on behalf of the applicant that the artist line-up had remained until very late in the day 'a moving target'.

31. The ERWG, however, was prepared to work with the initial proposed budget and on 12 July 2003 it approved a maximum of HK$100 million for the underwriting of the festival. The minutes of the meeting record the Chairman, the then Financial Secretary, Mr Leung, emphasising that —

> '··· the Government would act as the sponsor only. AmCham had to plan, organise, and implement the whole event.'

32. The Harbour Fest, if it was to achieve its objective of helping to 'relaunch' Hong Kong, had to be held within a short time span. Delay would defeat its purpose. October 2003 was chosen, less than 100 days ahead. Time, therefore, was always going to be a critical factor.

33. The contract setting out the respective obligations of the Government and AmCham was only signed on 10 October 2003, just a week or so before the commencement of the Harbour Fest. In the preparation and drafting of the contract the applicant was assisted by a lawyer from the Department of Justice.

34. It should be noted that, prior to the signing of the contract, sponsorship monies had been advanced to AmCham pursuant to a series of memoranda of understanding.

35. AmCham's principal obligation under the contract was to —

> '··· use its best endeavours to manage the organisation, operation and implementation of the 2003 Festival [Harbour Fest] in accordance with the intended objectives, event mission, rationale and tentative calendar of events for the 2003 Festival set out in the indicative proposal by the Sports and Entertainment Committee of AmCham ···'

36. The Government's principal obligation under the contract was to pay the sponsorship money. In this regard the contract provided that:

> 'In consideration of AmCham's agreement to manage the organisation, operation and implementation of the Festival to fulfil its obligations stated herein, the Government shall (subject to the matters set out below) pay to AmCham the Sponsorship Fee.
>
> The Sponsorship Fee shall be HK$100 million but shall be reduced (upon finalisation of the 2003 Festival Accounts) to the extent that the Net Deficit is less than that account ···'

37. As to the staging of the Harbour Fest itself, as I have said earlier, the general consensus was that it fell far short of expectations. Media comment was generally negative. To this was added expressions of

concern by members of the Legislative Council. It is the applicant's assertion that, as the public pressure grew, a self-serving atmosphere, one of recrimination, became apparent in the ranks of certain of those in Government who were responsible for the festival.

38. In this regard, for example, I was referred to a e-mail dated 15 October 2003 sent by the applicant to the then Financial Secretary, Mr Tang, who had taken up the post on 4 August 2003. In part, it read:

> 'There are already mutterings in the media and elsewhere about 'Who is the Minister for HarbourFest'. The fact is this is an official government-backed economic relaunch event. An accountable politically appointed official needs to stand up to support it, and be seen to do so, not just the civil servant implementing the project.
>
> I see no harm in a simple message, in your capacity as chairman of the ERWG, in urging colleagues to participate along the lines of
>
> 'Now that the controversy over the Rolling Stones has been settled. I hope we can all focus our efforts on making HarbourFest a spectacular success for Hong Kong. Full details of the talent line-up are in the attachment.
>
> As Chairman of the Economic Relaunch Working Group, which approved the project, I urge everyone to participate and have a good time.''

39. The e-mail response was, on one view, ominous in its implications:

> 'Stop dreaming! The only way you are going to save your skin is to sell tickets and make the event a success.
>
> We are all helping to corral our contacts to distribute the tickets for this event, and I suggest you get cracking on it.'

40. During the course of the hearing, the applicant also made mention of a meeting of the ERWG held on 31 October 2003. During that meeting, the then Financial Secretary was recorded as saying:

> '··· with hindsight, all parties concerned might have underestimated the complexity involved, and it was a very ambitious attempt in putting together the event within such a short time span.'

41. The Financial Secretary was also recorded as saying that he:

> 'did not observe any trace of irregularity in the organisation and implementation process.'

42. This, it was submitted, was an indication that — at that time — the Financial Secretary had not himself identified any form of misconduct. The evidence shows, however, that in August 2004, some ten months after that meeting and only two months before the applicant was made the

A subject of disciplinary proceedings, a request was received from Finance Branch to delete these words from the minutes, at face value a strange request to come at such a time.

43. It is not for this court to say whether the rebuke given by the Financial Secretary to the applicant was or was not justified. Nor is it for B this court to question the good faith of those who brought about the amendment to the minutes. The matters have been raised in this judgment for the single reason that it was always, as I understand it, an essential part of the applicant's case that, in light of the public disappointment with the C outcome of Harbour Fest and the unfortunate self-serving atmosphere prevailing in certain Government ranks, it was critical for the Inquiry Committee to draw a bright line between the concepts of 'accountability' and 'misconduct' and to do so by having regard to the uniquely challenging conditions under which the festival had to be monitored by the D applicant and those who worked with him.

44. That this issue was fundamental to the applicant was acknowledged by the Inquiry Committee itself when it said the following in its report (para 123):

E 'The Defence had spent quite of bit of effort in linking the inquiry to the accountability system of Government, drawing on PW4's [the Financial Secretary's] opinion that the political environment could have put pressure on Government to take disciplinary action. The Committee would like to state that other than being conscious of the fact that our findings and conclusions should be able to withstand public scrutiny, we have taken no notice of any F expectations from any political angle and have not investigated into the operation of the accountability system, which is outside our remit to do.'

45. Returning to the chronology of events, it was in October 2003 that the Audit Commission commenced its review, examining Government's G role in planning, monitoring and implementing the festival.

46. In its report, the Audit Commission observed that many of the problems had arisen because 'too little time was available to do too many things'. It observed that the Government itself had admitted that the parties concerned might have underestimated the complexity involved in H the organisation of the Harbour Fest. Under the heading of 'Important lessons to be learned', the Commission said:

I 'In a dynamic city like Hong Kong, and in order to meet increasing public expectation and demand, there will continue to be a need for the Government to embark on innovative projects similar to the Harbour Fest. Many of these innovative projects may involve some degree of private-sector involvement. When substantial public money is involved, the Government should, in all circumstances (even if there is an extreme urgency to proceed with a project), critically assess the project feasibility at the conceptualisation stage. In assessing the project feasibility, the Government needs to thoroughly consider,

among other things, the concept viability, the timeframe for project implementation, and the capability of the private-sector entities involved.'

47. In November 2003, the Chief Executive appointed an Independent Panel to inquire into the handling of the festival. In its report, the Independent Panel said that it was mindful of the exceptional circumstances surrounding the approval of the festival and its promotion. The Government had been eager to do as much as it could, as quickly as it could, to 'relaunch Hong Kong': hence the commitment to a delivery timetable of 'less than 100 days' for an event of such ambitious proportions. The Panel further said that, in considering questions of responsibility, it was mindful 'that, to varying degrees, most of the parties involved were hostage to the exceptional circumstances surrounding the approval and organisation of the event'. The Independent Panel was, however, critical of the applicant himself, finding that, as Government's controlling officer, he had not adequately discharged his responsibilities.

48. Following the publication of these reports, the Chief Executive directed that consideration be given to whether any civil servant should be made the subject of disciplinary action. In the result, the applicant only was informed that a formal disciplinary inquiry would be held into allegations of misconduct on his part.

49. An Inquiry Committee was appointed by the first respondent, the Secretary for the Civil Service, acting under delegated authority. The mandate of the Committee was to conduct the disciplinary inquiry and, in a reasoned report, to state whether, on the facts found proved, in its opinion, the applicant was guilty of misconduct.

50. There were two members of the Committee. The Chairman was Mr Wilfred Tsui, the Judiciary Administrator. The other member was Mr Lo Yiu Ching JP, the Permanent Secretary for the Environment Transport and Works (Works).

51. A Senior Principal Executive Officer (Disciplinary Secretariat) of the Secretariat on Civil Service Discipline was appointed to assist the Inquiry Committee, his primary function being to present the evidence against the applicant.

The charges brought against the applicant

52. No purpose is served in looking in detail at the charges brought against the applicant. In his written submissions, Mr Richard Gordon QC, the applicant's leading counsel, set out a brief overview of the five charges brought and the findings of the Inquiry Committee in respect of each. I can do no better, by way of putting matters into context, than to incorporate that overview.

(i) Charge (a) accused the applicant of failing to ensure that the budget proposed by AmCham was critically examined by Invest HK and

A that the ERWG was fully and adequately advised on the proposed budget. The Inquiry Committee found that Charge (a) was substantiated.

(ii) Charge (b) accused the applicant of failing to ensure that an effective mechanism was in place to enable the Government to B monitor the organisation of the Harbour Fest properly and to ensure that the Government's interest in the use of public funds allocated to the festival was adequately protected. Specifically, it accused the applicant of failing to ensure that three memoranda of understanding contained particular provisions and of failing to carry C out certain enquiries before the signing of these memoranda. The Inquiry Committee found that Charge (b) was partially substantiated.

(iii) Charge (c) accused the applicant of failing to ensure that the Government's interests were adequately protected in the D sponsorship contract. Specific complaints were levied in respect of the content of the contract and of the alleged failure of the applicant to carry out certain enquiries. The Inquiry Committee found that charge (c) was partially substantiated.

E (iv) Charge (d) accused the applicant of failing to ensure that a critical review of ticket pricing strategy was carried out thereby prejudicing the Government's position. The Inquiry Committee found that charge (c) was partially substantiated.

(v) Charge (e) accused the applicant of failing to establish procedures F and mechanisms whereby a detailed budget and all statements of account in relation to the festival would be subject to the scrutiny and approval by Invest HK prior to and during the course of the festival as a result of which the Government's interests in the proper monitoring of the festival were prejudiced. The Inquiry Committee G found that charge (e) was partially substantiated.

The substantive challenges

53. It is against this background that I turn now to the numerous challenges made on behalf of the applicant. For ease of reference, I shall H deal with them under three broad headings:

(i) issues going to the fairness of the disciplinary proceedings;

(ii) issues arising out of the findings of the Inquiry Committee, and

(iii) issues going to the lawfulness of the appeal process.

I

Looking to the fairness of the proceedings: the issue of apparent bias

54. It is one of the applicant's assertions that the impartiality of the Inquiry Committee was undermined by an appearance of bias on the part of one member.

55. In or about early February 2005, the applicant learnt that the Chairman of the Inquiry Committee, Mr Tsui, in anticipation of his retirement, had made an application for the waiver of the 'sanitisation' period; that is, the period during which, immediately following his retirement, he could not take up other work. The applicant also learnt that the other Committee member, Mr Lo, with his retirement also looming, was the subject of an application made by his department for his re-employment.

56. The Secretary for the Civil Service, who had appointed both Committee members, and to whom their report would be submitted, was, it seems, the person who would finally decide, or be materially instrumental in deciding, whether to grant the two applications.

57. That the two members of the Inquiry Committee should have made, or have been the subject of, applications in respect of which they stood to earn tangible benefits was of concern to the applicant. They were after all submitting a report in respect of his disciplinary proceedings to the same person who would decide, or be instrumental in deciding, those applications.

58. As it was, the applicant's concerns in respect of Mr Tsui were set to one side when, among other things, he learnt that Mr Tsui had delayed making his application for a waiver of his sanitisation period until after the report had been submitted and the Secretary for the Civil Service had accepted its findings.

59. However, the applicant's concerns in respect of Mr Lo were not set aside. The applicant, of course, could not say — and did not say — that Mr Lo had actually been influenced in making his report to the Secretary for the Civil Service by the fact that an application for the extension of his service was to be decided by the Secretary. The applicant's concern went to the issue of what is called apparent bias. He was concerned that a fair-minded and informed observer would have concluded that there was a real possibility that Mr Lo had been biased in submitting his report to the Secretary, that bias arising out of the fact that Mr Lo was seeking a benefit from the Secretary.

60. It may be said that the concerns encompassed the following:

(i) That the application to be re-employed, while it had been made by Mr Lo's department on the basis of operational need, must inevitably have been made with the consent of Mr Lo. Indeed, bearing in mind that Mr Lo was the Permanent Secretary, it is likely that he would have had some knowledge — if only in the very broadest sense — of when the application was to be made.

(ii) That, as it was, the application was made on 24 December 2004 at a time when the disciplinary hearing was still taking place. The application was not deferred until after the submission of the report,

A as Mr Tsui's had been, to avoid any possible sense of uneasiness that the report may be influenced by the desire for re-employment.

(iii) That the application, if granted, would give tangible benefits to Mr Lo. But it was, however, an unusual application in the sense that it was rarely granted. As it was put by the then Secretary for the Civil Service, in his affirmation of 18 June 2007:

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> 'Under the established policy, an officer employed on pensionable terms retires from the civil service upon reaching the prescribed retirement age. Only in very exceptional circumstances will the Government consider extending the service of an officer beyond the prescribed retirement age. Such exceptional circumstances are primarily related to compelling operational needs and the non-availability of suitable replacement officers at the time.'

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(iv) That, if Mr Lo's application had been determined before the report was submitted that may have altered the complexion of matters. But the application remained under consideration when the report was being written and when it was submitted.

E 61. It is, of course, fundamental in our law that a public tribunal which has the power to discipline an individual, perhaps to make findings which will strip him of his livelihood, must be seen to be impartial. The old principle that justice must be seen to be done gives rise to the demand for objective impartiality.

F 62. The test for apparent bias is now well settled: see, in this regard, the judgment of the Court of Final Appeal in *Deacons v White & Case Ltd Liability Partnership* [2003] 3 HKC 374, (2003) 6 HKCFAR 322. The Court must first ascertain all the relevant circumstances and then ask whether those circumstances would lead a fair-minded and informed observer to conclude there was a real possibility that the tribunal was biased.

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63. An informed observer would, of course, have been aware of the fact that Mr Lo had been appointed to the Inquiry Committee as far back as late September 2004, some three months before the application for his re-employment. An informed observer would also have been aware of the process by which all applications of the kind made by Mr Lo were processed; namely:

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I (i) The application would only have been made by the Bureau itself on the basis of operational need.

(ii) The application would have been referred to the Public Service Commission, an independent statutory body, which would have considered the application on the merits.

(iii) Any decision made by the Secretary for the Civil Service to re-employ Mr Lo would only have been made if the Public Service Commission — as it did in the present case — had given its approval.

64. On behalf of the respondents, it was submitted that, although the Secretary for the Civil Service was ultimately responsible for deciding whether to grant Mr Lo's application, that decision had to be looked at in the context that I have outlined. First, the application had not been made by Mr Lo but by his department of Government based on operational needs. Second, Mr Lo's re-employment 'could simply not have happened' without the Public Service Commission, an independent statutory body, giving its effective approval.

65. In response, on behalf of the applicant, it was acknowledged that the Public Service Commission is of course an independent body. But the real concern on the part of a fair-minded observer, it was said, would have been directed to the powers still vested in the ultimate decision-maker, the Secretary for the Civil Service. If he wished, the Secretary could decline the application for re-employment despite the fact that the Public Service Commission had given its approval in principle. That would have been well known to Mr Lo. As it was put in counsel's skeleton argument: 'As is uncontroversial, the consideration of Mr Lo's application did not depend upon the decision of the PSC [the Public Service Commission] however independent that body might be. The decision-maker was the Secretary for the Civil Service and in the climate of blame that lurked in the background to this whole case a fair-minded and informed observer would not, it is submitted, have his or her uneasiness dispelled by the single fact that the PSC was an independent body.'

66. On behalf of the applicant, the contrast was made between the fact that Mr Tsui waited until the day after the release of the report to make his application while this was not done in respect of Mr Lo's application. The timing of Mr Tsui's application, it was said, could not have been a coincidence. It had clearly been delayed because it was appreciated that otherwise there would be an entirely reasonable perception of apparent bias. Mr Lo's department could not have been ignorant of the fact that he was sitting on the Inquiry Committee. The affair was notorious. Yet it did not defer its application, one that stood to confer material benefits on Mr Lo if accepted by the Secretary for the Civil Service.

67. There is no doubt in my mind that Mr Tsui acted prudently in holding back his application. But it is to be remembered that Mr Tsui, in his application, was seeking an entirely personal benefit to enable him to pursue a career after retirement without delay. His application was not subject to scrutiny by some third party. His future, in the context of his application, lay in the hands of the Secretary for the Civil Service.

A 68. Mr Lo's position was somewhat different. The application was made not by him but by his Bureau. Although, of course, the application stood to benefit him, that was essentially incidental. The application was made for the benefit of the Bureau to meet its operational needs. More than that, the application was first subject to the scrutiny of an independent B statutory body which itself, while it would have looked to Mr Lo's personal experience and ability, would have been concerned solely with operational needs and succession planning. Those matters not only made Mr Lo's application qualitatively different from that of Mr Tsui but, in my view, would have placed constraints on the final decision-making C discretion of the Secretary for the Civil Service. Put bluntly, it would have been one matter for Mr Tsui to be concerned as to how the report may affect his application for a purely personal dispensation, it would have been another matter, however, for Mr Lo who would have known that the application concerning him was for the benefit of the public service and D that the existence of this benefit being confirmed by the Public Service Commission.

69. In the result, while the application made on behalf of Mr Lo was made at an unfortunate time, I do not believe that it would have given rise in the mind of a fair-minded, independent observer to a real possibility that E Mr Lo, and through him the Committee itself, may have been biased.

Looking to the fairness of the proceedings: the issue of the standard of proof

F 70. It is the applicant's assertion that the Inquiry Committee, in considering the evidence and drawing up its report, failed to identify and apply the correct standard of proof.

71. The Government having brought the charges of serious misconduct against the applicant, it was, of course, for the Government to prove those G charges. But that did not end Government's responsibility. I say that because, if it was to prove the charges, it had to present evidence that, in the opinion of the Inquiry Committee, was sufficiently compelling. The measure by which the strength of the evidence was to be judged was always, therefore, of profound importance. If the Inquiry Committee failed H to identify and adopt the correct measure then it was at real risk of finding that a charge had been substantiated when, in fact, the evidence had not been strong enough.

72. A disciplinary tribunal — such as the Inquiry Committee — is not under any obligation to expressly state what standard of proof it has I applied in assessing the case against a person who has appeared before it. But, while there is no obligation to cite 'chapter and verse', it does not exonerate a tribunal from understanding the correct standard of proof to be applied and actually applying that standard. As I have indicated, in our system of justice the standard of proof is a critical tool of measurement. It

is not something to which mere lip service is paid. It plays a determining role in all cases, civil and commercial.

73. That being so, if a disciplinary tribunal chooses to give some indication of the standard of proof it has adopted — as the Inquiry Committee did in the present case — it should do so in terms that make it clear it has adopted the correct standard. A failure to do so may indicate that the Tribunal has not fully understood the correct test to be applied and that it could not therefore, in the systematic manner demanded, have applied the correct test.

74. In the present case, the applicant was not charged with misconduct of such a serious nature that, in substance, it constituted criminal conduct. The standard of proof to be applied was therefore the civil standard; that is, proof on the balance of probabilities.

75. Nevertheless, the Inquiry Committee was aware that the man they were judging, who had 30 years of unblemished service, was facing charges so serious that they could possibly bring about the end of his career by way of dismissal. It would not distort matters to say that, by the nature of the charges brought, the applicant faced ruin: ruin of his career, with its financial consequences, and ruin of his reputation.

76. It is now accepted jurisprudence in Hong Kong that the balance of probability standard of proof is a single standard. It means that a tribunal may be satisfied as to an evidential matter if it considers, on all the evidence, that it was more likely than not. However, while the standard is a single standard, the tribunal must have in mind as a factor — to whatever extent is appropriate in the particular case — that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the tribunal concludes that the matter has been established on the balance of probability: see *Re H & Ors (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 adopted by the Court of Final Appeal in *A Solicitor v The Law Society of Hong Kong* [2008] 2 HKC 1, FACV 24/2007, dated 13 March 2008.

77. On this basis therefore it would have been incumbent on the Inquiry Committee, to the extent appropriate, to be guided by the acknowledgement that, the charges against the applicant being so serious in nature, the stronger must be the evidence of his alleged misconduct. On this basis, by way illustration only, the Committee may have directed itself as follows: 'The accused officer [the applicant] has a long and unblemished record. He has held positions of considerable responsibility. The charges against him are serious. They allege misconduct on his part by way of a failure to discharge his duties to the standard expected of an officer of his rank. Having regard to his history of service, his alleged misconduct must be improbable. That being the case, the more compelling must be the evidence needed to satisfy us on the preponderance of probability that, instead of striving to do his best in circumstances of

A extreme difficulty, the applicant was guilty of oversight and neglect and was therefore guilty of misconduct.'

78. As Lord Nicholls observed in *Re H*, there is a generous degree of flexibility built into the preponderance of probability standard. Lord Nicholls went on to point out that the standard of proof itself does not
B change, it is the strength of the required evidence that varies:

> 'Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken
C into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.'

79. However, although in practical terms the result is invariably the
D same, at the time when the Inquiry Committee made its report, the prevailing jurisprudence was to the effect that the balance of probability standard was itself variable. That being so, the more serious the charges the higher the degree of probability that had to be proved.

80. The applicant was not permitted to be legally represented during
E the hearings before the Inquiry Committee. A request had been made by him but refused. He was therefore represented by a non-legally qualified representative, Ms Christine Loh. Ms Loh was aware of the importance of applying the correct standard of proof, as it was understood at the time, and, in the course of submissions, urged the Inquiry Committee to adopt
F the more stringent standard of proof of 'to a high degree of probability'.

81. There was at that time a body of authority to support Ms Loh's submission. In *Tse Lo Hong v Attorney General* [1995] 3 HKC 428, Litton VP (at 440) had said:

G > 'To categorize the proceedings as 'civil' does not end the matter. The standard of proof must be commensurate with the gravity of the charge. Here, the tribunal seems to have required the prosecution to prove the case on a mere 'balance of probabilities' which in my judgment is plainly unacceptable.'

82. Later in *Dr Lai King Shing v Medical Council of Hong Kon* [1996]
H 1 HKC 24 (at 27), Keith J (as he then was) had looked to the approach of applying a standard of proof commensurate with the gravity of the case and had said:

I > 'I agree entirely with this approach. It has the inestimable advantage of flexibility, and does not tie the hands of the disciplinary tribunal to a particular standard of proof, whatever the nature of the allegations and whatever the consequences for the person facing the disciplinary action. The more serious the complaint, and the more dire its consequences, the greater the degree of proof required to prove it, even though the degree of proof required falls short of proof beyond reasonable doubt.'

83. Nor can it be said that the application of the correct standard of proof was not integral to the workings of the Inquiry Committee. In this regard, the disciplinary guide — which as its name states, was intended to give guidance to the Inquiry Committee — gave detailed advice:

> 'The Inquiry Committee must be satisfied on the evidence that the particulars of the charge have been proved. In assessing the evidence, the Inquiry Committee should have regard to the gravity of the matter and the seriousness of the possible consequence for the accused officer. **The standard of proof is therefore commensurate with the gravity of the charges.** Where the alleged offence is of a minor nature, the Inquiry Committee may, on the basis of belief, accept the testimony of a single witness. Where the alleged offence is serious and could result in serious consequences for the officer, such as dismissal, it is advisable for the Inquiry Committee to require supporting testimony or other corroboration.'

84. In accordance with the disciplinary guide and existing jurisprudence in Hong Kong at the time, it was therefore incumbent on the Inquiry Committee — having regard to the gravity of the charges against the applicant and the possible gravity of their consequences — to adopt a standard of proof commensurate with that gravity. The disciplinary guide emphasised the principle in bold type.

85. As it was, however, the Inquiry Committee chose not to follow the recommendation of the disciplinary guide, that being the most obvious course open to it. Nor indeed did it direct itself in specific terms at all as to the strength of the evidence demanded by the gravity of the charges. Instead, the Committee chose to direct itself as follows:

> 'The Defence advocated a higher standard of proof than 'a mere balance of probability', at least to 'a high degree of probability'.
>
> This Committee does not want to get involved in legalistic definition of what the two terms mean. What the Committee can confirm is that it was relied only on the documentary evidence submitted by the parties and oral testimony of the witnesses. The onus of proof is on the Assisting Officer to produce evidence to substantiate the Charges. Where there is no documentary evidence and the oral evidence by witnesses are in conflict, the benefit will go the Accused Officer.'

86. It was, in my judgment, a puzzling direction. The Inquiry Committee said that it did not wish to involve itself in drafting legalistic definitions but, with respect, it was not required to do so. The disciplinary guide, for example, spoke in plain enough terms. The Inquiry Committee was not required to debate legalistic matters. But it *was* required to comprehend and apply nuances of approach. If it did not do so — and do so correctly — it fell into the danger of coming to incorrect determinations and thereby denying justice to the applicant.

87. The Committee went on to say that it had only relied on certain evidence; namely, the documentary evidence submitted by the parties and

A the oral testimony of the witnesses. But that went to the issue of relevance; that is, to identifying what evidence the Committee thought it proper to take into account.

88. The Committee then directed itself not to standard but to the onus of proof, correctly directing itself that the onus of proof lay on the B prosecution; that is, the body that had brought the charges.

89. It was only in the last sentence that the Committee gave any indication of the standard of proof it had adopted. To state it again, the sentence read: 'Where there is no documentary evidence and the oral evidence by witnesses are in conflict, the benefit will go to the Accused C Officer.'

90. But that direction, it seems to me, is fundamentally lacking. More especially, it fails to take into account what any standard of proof demands; that is, a review of the strength of the evidence. Even when there is no conflict, the evidence simply may not be cogent enough. It seems to D me that certain of the core issues that fell for determination by the Inquiry Committee demanded not only an accurate assessment of what it was that the evidence was intended to proof but whether understood in context, it was compelling enough to do so.

E 91. That the Inquiry Committee's direction to itself as to the standard of proof was of concern to those advising the Secretary for the Civil Service is evident from a letter dated 12 April 2005 sent to the Chairman of the Inquiry Committee. In that letter, the Civil Service Bureau noted that the Inquiry Committee had declined to specify a standard of proof 'in legal terms'. It went on to observe that, in respect of the directions that the F Inquiry Committee had chosen to give to itself, these could be seen 'at play', where the benefit of the doubt had been given to the applicant in respect of charge (b)(2)(i) and charge (d). But the Bureau went on to ask:

G > 'The IC is invited to confirm whether or not it also gave the benefit of doubt to the Accused Officer in situations where there was a conflict between documentary evidence on the one hand and oral evidence on the other. If it did, please provide examples of that principle being applied.'

92. In response, the Chairman of the Inquiry Committee wrote:

H > 'The standard and onus of proof were dealt with in paragraph 71 of the Report. The Committee does not recall any documentary evidence being challenged orally in the proceedings.'

93. But that exchange of correspondence, in my judgment, also misses I the fundamental point that the Inquiry Committee was under a duty to assess the strength of the prosecution evidence even when there was no direct conflict.

94. To illustrate the point, I go to one part of the Inquiry Committee's report, that part which commences in para 78:

'The responsibility of the Accused Officer to critically examine the budget was not in doubt. The ERWG meeting of 2 July 2003 supported the Event proposed by AmCham in principle subject to InvestHK's scrutiny and satisfaction with the detailed budget.'

The Committee went on to accept that the budget, certainly in the earlier stages, could only be indicative. But, in para 80 it came to the finding that:

'Even if assumptions had to be made, the basis of the assumptions and quantification of the related items in the budget should be studied. There is evidence that the operating expenditure part of the budget had been subjected to such process, but the talent costs, TV production and marketing costs (comprising some 73% of the total budget) had not.'

The Committee went on to say:

'The Accused Officer had overlooked the importance of providing a properly scrutinized budget to ERWG, as he kept on emphasizing that it could only be indicative. He had given no instruction on how the budget should be examined, leaving it to his staff to use their common sense. He had not drawn ERWG's attention to the limitations in the budget submitted, hence leaving ERWG to approve the proposal without adequate and proper advice.'

95. Implicit in the issues raised in this part of the Committee's report is the strength of the evidence required to support culpability. By way of illustration, the question may be asked: why would an officer of such seniority and expertise neglect the need to critically examine AmCham's budget? That, it may be said, would be an improbable action on the applicant's part. What evidence was there, therefore, that the 'talent costs' — some 70% or more of the budget — were even capable, until late in the day, of any kind of rational scrutiny and how strong was that evidence? If the intention of Government, as sponsor only, was to maintain an overview of AmCham's preparation of Harbour Fest to ensure that the objectives were met but not to micro-manage AmCham's preparations, and if AmCham's negotiations for stars were in constant flux, what evidence was there that, in that context, the applicant had not acted competently in recognition of the realities but had, to the contrary, been guilty of neglect? And, importantly, how compelling was that evidence?

96. I have not raised these matters — purely illustrative in nature — to suggest that the conclusions reached by the Inquiry Committee were wrong. That is not my function. I have raised them because, as I have said, they show that implicit in the resolution of the several, interlocking issues of fact was the constant requirement to bear in mind the necessary cogency of evidence to prove the allegations made.

97. The Inquiry Committee was specifically asked to take into account the strength of the evidence against the applicant. A higher standard of proof was sought than 'a mere balance of probability'. However, in my

A view, insofar as the Committee condescended to meet the request, it did so in a manner which indicated that it did not appreciate that the standard of proof related not simply to whether evidence was contested or not but to whether even uncontested evidence, considered in context, was of sufficient cogency? That failure, I believe, indicated a fundamental
B misunderstanding of the concept of the standard of proof and the importance of correctly applying the standard.

98. During the course of the hearing, I was urged to go through the report, bearing in mind that the applicant was on occasions given the benefit of the doubt, so that I could see that the correct burden of proof was
C in fact applied. I went through the report but many of the issues that fell — or should have fallen — for determination were subtle in scope and meaning and I regret to say that, upon reading the report, I was unable to say that, in respect of all material matters, it was clear that the correct standard had been applied. In this regard, I agree with the submission
D made by Mr Richard Gordon, QC, leading counsel for the applicant, that, read as a whole, the report of the Inquiry Committee does not demonstrate how the burden of proof, in a legally nuanced way, was played out in the resolution of matters.

E 99. I would add that this was not a case where the facts were simple and spoke for themselves. A clear understanding of the correct standard of proof and its application was therefore fundamental to the assurance that the hearings before the Inquiry Committee were fair, and that the Committee's report in that respect, did justice to the applicant's case.

F 100. For the reasons given, I have grave doubts that the Inquiry Committee understood and applied the correct standard. This failure, in my view, meant that the Committee's report did not do justice to the applicant and could not, nor should it have been, relied upon by the Secretary for the Civil Service. For this reason alone — the matter being
G so fundamental — the decision of the Secretary to accept the report must be quashed.

Looking to the fairness of the proceedings: the issue of denial of legal representation

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101. On 20 October 2004, the applicant's solicitors wrote to the Chief Executive asking that the applicant be permitted to have legal representation when the forthcoming disciplinary hearings commenced.

102. The Regulations do not deal specifically with the question of legal
I representation but s 8(3), in my view, clearly makes provision for it if the Chief Executive, in the exercise of his discretion, considers it appropriate. Section 8(3) is to the following effect:

'The officer may be assisted in his defence by-

(a) another public servant, other than a legally qualified officer, who may be a representative member of a staff association represented on the Senior Civil Service Council; or

(b) *such other person* as the Chief Executive may authorise.'

[my emphasis]

103. Section 8(3)(b) is expressed in permissive not restrictive language. If the Chief Executive has the discretion to authorise representation of an officer by 'such other person' as the officer may choose, that 'other person', in my opinion, must include a lawyer.

104. In my view, the Regulations therefore mirror the position in common law; namely, that there is no absolute right to be legally represented before an administrative tribunal, even one which has the power to impose disciplinary penalties, but that there is a discretion to permit such representation.

105. During the course of the hearing before me, some emphasis was laid on the 1985 judgment of Mayo J, as he then was, in *Re Fong Hin Wah* [1985] HKLR 332. In that judgment, Mayo J rejected the submission that a denial of legal representation before an Investigating Committee appointed under the Disciplinary Proceedings (Colonial Regulations) Regulations had been in breach of the rules of natural justice. In his judgment, Mayo J looked to the nature of the proceedings and said:

'I am of the opinion that the presence of lawyer would have been incongruous in the context of the disciplinary hearing. The proceedings were of an informal nature and the Committee was not equipped to deal with legal submissions or arguments.'

106. I have not read those words as indicating that legal representation was not lawfully permitted before the Investigating Committee. Indeed, Mayo J was at pains to consider authorities which spoke of a discretion to permit legal representations if the circumstances were appropriate.

107. In my judgment, the law today – more than 20 years since the judgment of Mayo J — is clear. It is a matter, in each and every case, of what fairness requires.

108. As it was, the Secretary for the Civil Service, acting under delegated authority, refused permission for the applicant to be legally represented, allowing the applicant instead to be represented by a 'friend' from outside of the Civil Service. That 'friend' was Ms Christine Loh, a person well known and highly respected in Hong Kong public affairs.

109. The October letter from the applicant's solicitors set out three reasons why, in the applicant's case, legal representation should be permitted.

110. First, it was said that cross-examination of a number of 'very senior civil servants', including the Financial Secretary, was anticipated.

A These were civil servants of higher rank than the applicant. Bearing in mind that issues of some considerable sensitivity would have to be canvassed in the context of a highly charged political background, it was said that it would be invidious to expect a civil servant to effectively represent the applicant. In the result, of course, although the applicant was B refused legal representation, he was permitted to be represented by Ms Christine Loh.

111. Second, it was said that legal arguments of some complexity were anticipated. A number of the potential arguments were described. They included the framing and particularity of the very lengthy charges and C issues going to the weight that should be given to certain evidence. The issue of weight, of course, was directly related to the issue of cogency which was integral to identifying and applying the correct standard of proof.

D 112. Third, it was emphasised that, for the applicant, the charges were particularly grave, the potential penalty being dismissal from the Civil Service in circumstances of notoriety.

113. One of the strongest points made was made by way of general comment only and that was to emphasise the unique circumstances in E which the disciplinary proceedings had arisen.

114. During the course of submissions, Mr Gordon made a point which I believe must have been appreciated at the time when the decision to refuse legal representation was made. It was not that the disciplinary charges were brought for political reasons, said Mr Gordon, but that the F charges were brought against a 'political' background of public concern which had already resulted in public findings. This removed the applicant's case well outside of the context of a routine internal disciplinary inquiry. The reality of the situation was that the applicant had from the very beginning — from the time when he was first instructed by G the ERWG – been embroiled in matters that were not simply administrative but were coloured by broader 'political' considerations. That should, as a simple matter of fairness, have been central to any consideration of what the requirements of natural justice demanded. As Mr Gordon emphasised, the real issue was what the principle of fairness H required of this particular applicant in this particular case.

115. Senior civil servants, of course, are routinely tasked to implement political decisions. That is their job. The execution of those decisions will, in each case, throw up their own particular challenges. But, as in all such matters, it is not necessarily sufficient to dismiss Mr Gordon's point on the I basis that it was for the applicant, simply 'business as usual'. The circumstances were unique, the challenges grave, both arising out of a political decision. The public disappointment at the outcome of Harbour Fest led to a demand for accountability, undoubtedly, in my view, giving a 'political' colouring to the applicant's disciplinary proceedings.

116. The refusal to permit legal representation was contained in a letter from the Secretary for the Civil Service dated 3 November 2004. In the letter, the following was said:

> 'In arriving at the above decision, the Secretary for the Civil Service has considered the arguments presented in your letter of 20 October 2004 and the added commentary furnished in your letter of 1 November 2004 on issues of public interest immunity.
>
> Other factors that the Secretary for the Civil Service has taken in account include (a) whether your client has the capacity to present his case before the inquiry committee; (b) whether your point about cross-examination of witnesses at the disciplinary hearing could be adequately addressed by the appointment of someone from outside the public service who is not legally qualified, to assist your client; and (c) the fact that neither the members of the inquiry committee nor the Assisting Officer in this case are legally qualified.
>
> Having taken all the matters referred to into consideration, the Secretary for the Civil Service has concluded that in the circumstances fairness does not require your client to be assisted by a legally qualified person in the presentation of his case.'

117. As I see it, the letter gave just two reasons for the refusal. First, that representation by a person from outside of the Civil Service would avoid the invidiousness of somebody from within the Service having to cross-examine and perhaps criticise civil servants of the highest rank. Second, that, as neither the two members of the Inquiry Committee nor the Assisting Officer were legally qualified, the applicant would be neither advantaged nor disadvantaged by being refused legal representation.

118. In respect of the second reason, I have difficulty understanding the relevance in this particular case. The letter made no mention of the issue of difficult legal arguments arising in the course of the hearings but, whether the Inquiry Committee members were or were not legally qualified, should not, in the appropriate circumstances, have operated so as to deprive the applicant of the opportunity of having such points argued on his behalf by somebody who was legally qualified. In any event, the Inquiry Committee did have the benefit of legal guidance in respect of its findings. In this regard, in his affirmation of 18 June 2007, the Secretary for the Civil Service said:

> 'On points of law, the Inquiry Committee is responsible to ensure that the accused officer is given a full and fair hearing. As a matter of established practice, advice will be obtained on the Inquiry Committee's report from the Department of Justice before it is submitted to the disciplinary authority for a decision. If, in the course of the disciplinary proceedings, a point of law should have arisen which is considered to have caused unfairness to the accused officer,

A but which was not adequately addressed, this would be drawn to the attention of the Civil Service Bureau by the Department of Justice before the case is taken any further.'

119. But that being said, the Department of Justice was there to advise B those responsible for taking forward the applicant's prosecution. It was not there to advise the applicant, certainly not as to how best to advocate difficult legal points.

120. Nor was the Department of Justice there to fulfil the role of legal adviser to the Inquiry Committee. It gave no advice to that Committee. It C could not therefore ensure that the Committee dealt adequately and correctly with points of law raised by the applicant.

121. During the course of the submissions before this court, Mr Gordon said that, if the applicant had been permitted legal representation, the D Inquiry Committee may have been persuaded to adopt the correct standard of proof. There is, in my view, a certain ironic force in that comment.

122. In his affirmation of 18 June 2007, the then Secretary for the Civil Service, Mr Wong Wing Ping, qualified (at some length) the original reasons given to the applicant for refusing him legal representation. These E qualifications or explanations given after the event must, in my view, be approached with caution because there is always, even if unwittingly, a temptation to fall into the trap of *ex post facto* rationalisation.

123. In his affirmation, Mr Wong said that his decision was, in part, F influenced by the nature of the proceedings. He took into account that the Inquiry Committee was not 'exercising a legal function but rather ascertaining the facts'. That may be an accurate description of the great majority of disciplinary hearings but, in my view, it must have been evident that it was not going to be an accurate description of the G applicant's proceedings. As I said earlier in this judgment, all Inquiry Committees are obliged to consider the facts in the light of the charges and to submit a comprehensive report. They are required therefore to submit a 'judgment' in the sense that they must, in the light of the facts found by them, come to an opinion as to whether those facts, in whole or part, H substantiate the charges. In the present case the Inquiry Committee's report was more than 60 pages long and, of course, contained a good many findings based on analysis of evidence.

124. In his affirmation, Mr Wong accepted that legal representation I may be allowed but said that, as a matter of 'established policy', that would only be so if there was 'a compelling reason for so doing'. He said that, in light of s 8(5) of the Regulations, a discretion to permit legal representation would not be 'exercised lightly'. Section 8(5) is to the following effect:

'The enquiries should not be conducted with undue formality and while there is no standard practice which would be applicable to every case, it is emphasized that the inquiry officer or inquiry committee is not exercising a legal function, but rather ascertaining the facts.'

125. Mr Wong also made the point that —

'A disciplinary inquiry under the [order and the Regulations] is not a judicial process. The hearing is meant to be an internal staff inquiry to ascertain the facts relating to an officer's alleged misconduct …'

126. For my part, Mr Wong's affirmation must be read to mean that, while all relevant considerations would be taken into account, it was (at the time) a matter of policy that legal representation would only be permitted for compelling reasons. On behalf of the applicant, it was argued that this policy was an unlawful policy.

127. As to the position in law, as I have said earlier, the Regulations mirror the common law. What then is the position in common law? In its judgment in *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors* [2006] 2 HKC 533, (2006) 9 HKCFAR 234, the Court of Final Appeal held that while there is no absolute right to be legally represented before an administrative tribunal, even a tribunal with the power to impose swingeing penalties, there is a discretion vested in the tribunal to permit legal representation if fairness requires it.

128. How the discretion is properly to be exercised will vary according to the circumstances of each case. As Ribeiro PJ said in the *Stock Exchange of Hong Kong* case to which I have just referred:

'The common law principles of fairness operate flexibly, requiring the tribunal to respond reasonably to the requirements of fairness arising in each case, balancing any competing interests and considering what, if any, limits may proportionately be imposed on legal representation in consequence.' (p 270)

129. In light of this jurisprudence, I am of the view that the approach adopted by the Secretary for the Civil Service was erroneous. His function was simply to weigh all the factors relevant to the applicant's application and to come to a judgment as to what fairness required in his case. Instead, it seems that he approached the matter on the basis that he must adhere to a policy, seemingly well established, to the effect that legal representation would not be permitted unless compelling circumstances were demonstrated. In so doing, the Secretary was fettering his discretion. For him the threshold test was not based on a reasonable response to the requirements of fairness, it was instead one of attempting to identify compelling circumstances or, to put it another way, of attempting to determine whether, on consideration of all relevant factors, an exception should be made to the general rule laid down by the policy. But, in my opinion, what fairness dictates in determining whether legal representation

should or should not be granted is not to be constrained by the shackles of some set policy, still less a policy that puts the bar as high as the requirement to show compelling circumstances. As Mr Gordon put it, there can be no threshold test of 'exceptionality'.

130. But, having come to this conclusion, it would be a fundamental misreading of my words to think that somehow they constitute of themselves any form of policy, specifically an 'open gate' policy, in respect of legal representation. That would not only be to misread my words but would, I am satisfied, constitute an impermissible expansion on the very clear jurisprudence contained in the judgment of Ribeiro PJ to which I have made reference. It may well be, having regard to the nature and jurisdiction of many administrative tribunals, that legal representation will be rare. Indeed, there may never be such representation. But that will not be because there is any threshold test of exceptionality. It will be because, each case being considered in the light of its own circumstances, those tribunals have come to the determination that fairness does not require legal representation.

131. I would add, for the sake of caution, that, of course in determining the requirements of fairness, it is necessary, in weighing all relevant factors, to have regard to the nature of the proceedings being conducted. There is, therefore, no criticism *per se* of the fact that, among the factors taken into account by the Secretary for Civil Service, he took into account the nature of the proceedings before the Inquiry Committee: their inherent informality and absence of standard procedures.

132. During the course of submissions, it was argued on behalf of the Secretary that, having regard to the nature of the disciplinary proceedings to which the applicant was made subject, the 'policy' adopted by the Secretary for the Civil Service was rational and was justified. Accordingly, the policy was lawful. For the reasons given, I do not accept that submission.

133. But if I am wrong in that regard, I must move briefly to consider the consequent submission of Mr Joseph Fok SC, leading counsel for the respondents. Mr Fok submitted that, if the policy was lawful, then the appropriate test for deciding whether it had been exercised lawfully was the test of rationality; in short, whether it could be said that the Secretary for the Civil Service had come to a decision which no reasonable decision-maker could have reached.

134. Again, I do not agree. The court remains obliged to apply the fairness test rather than the rationality test. The requirement of fairness is fundamental and our courts have long exercised a supervisory jurisdiction to ensure that administrative hearings are conducted fairly. It has been said that the duty to act fairly is so fundamental that it amounts to a 'constitutional duty' — see *Bushell v Secretary of State for the Environment* [1981] AC 75, 95B — and I do not see how courts can ensure

that duty is met by considering matters on the basis of whether the decisions of a tribunal were or were not within the bounds of rationality.

135. This leads me to consider whether, despite its shortcomings, the decision made by the Secretary for the Civil Service in fact prejudiced the applicant in any material way. It is well established that a breach of the rules of fairness will not inevitably lead to an administrative decision being quashed.

136. On behalf of the respondents, it was said that the applicant had been more than adequately represented by Ms Loh who had discharged her responsibilities in an articulate and responsible manner. Ms Loh, it was noted, had been trained in law. But that being said, Ms Loh was not a practicing lawyer of experience and that, in my opinion — in this particular case — may have made all the difference.

137. I have spoken 'of this particular case' because it must be emphasised that, in my opinion, the applicant's case was in a great many respects exceptional. I am not to be taken, therefore, as somehow attempting to sweep aside previous authority concerning whether it is or is not appropriate for an officer to have legal representation when facing disciplinary proceedings pursuant to s 10 of the Order.

138. As to the exceptional circumstances of the applicant's case, as I have said earlier, I fail to see how those circumstances could not have been appreciated at the time when the applicant was denied legal representation. In my view, it was untenable to think that the proceedings could be shepherded through as just another set of 'everyday' disciplinary proceedings. The proceedings were anything but 'everyday'. I confess to being concerned that, if the Secretary for the Civil Service had not been constrained in coming to his decision by an exclusionary policy but had instead looked simply to the requirements of fairness, he may well have come to a different conclusion on the issue of legal representation.

139. In responding reasonably to the requirements of fairness, it was incumbent on the Secretary for the Civil Service to take into account not only the matters raised in the letter from the applicant's solicitors but all other relevant matters which would have been evident at the time. I believe that the following would have been evident:

(i) Bearing in mind the public disquiet and the content of two official reports, the applicant would certainly be concerned that the Inquiry Committee should strive to ensure that it did not confuse issues of 'political' accountability – put bluntly, as I have said before, the requirement that somebody must to some extent be held to blame – with what was an entirely different concept, that of misconduct.

(ii) Issues going to the management of Harbour Fest had become not merely a matter of public interest but had become notorious. Even though the disciplinary proceedings would be held in private, notoriety would nevertheless add an important extra dynamic and

could, in all manner of ways, direct and indirect, conscious and unconscious, work to the detriment of the applicant, the witnesses and even the Inquiry Committee itself which was made up of the applicant's peers and not professional judges. In his affirmation Mr Wong Wing Ping spoke of the issue of publicity in the following terms:

> 'As regards the concern arising form the publicity surrounding Harbour Fest and the applicant's role in that event, I did not consider that this justified the applicant's request for legal counsel at the hearing. The inquiry would be conducted on the basis of the evidence adduced at the hearing, rather than allegations contained in press reports.'

With respect, that explanation, while it must be correct to a limited extent, turns a blind eye to the real problem; namely, the perhaps insidious effect that the pressures of past publicity, including two public reports, may bring into the disciplinary proceedings themselves.

(iii) In light of these matters, with five relatively complex charges being brought against the applicant, it must have been evident that there was very likely to be refined and sophisticated arguments as to the context in which — in this particular case — evidence would have to be considered. Public reports had already recognised that, to a greater or lesser extent, those engaged in the staging of Harbour Fest had been hostages to fortune, attempting to stage a major entertainment event against the backdrop of arguably wholly unrealistic expectations.

140. In my judgment, these circumstances created a complex scenario. As it was put on behalf of the applicant, the difficulties and the nuances of explaining to the Inquiry Committee the unique problems faced in that situation plainly required the services of a legally qualified advocate trained to separate out the relevant from the irrelevant and to express in the clearest manner possible the subtle and complex difficulties that would have arisen in undertaking the Harbour Fest.

141. In all the circumstances, I am satisfied that the decision to deny the applicant legal representation, having regard to the exceptional circumstances of his case, may well have materially prejudiced him in the presentation of his case. In short, the decision denied him natural justice.

142. In respect of this matter, I turn to one last point which was made by Mr Fok on behalf of the respondents. It was suggested that the decision of the Secretary for the Civil Service to deny the applicant legal representation was a decision which, if it was to be challenged by way of judicial review, should have been challenged at the time and not after the conclusion of the disciplinary proceedings. As Mr Fok put it, by the time

it came before this court, it was a stale challenge. I do not agree. Judicial review is a remedy of last resort. If the applicant's disciplinary proceedings had resulted in his exoneration there would have been no need to bring judicial review proceedings at all. As it was, this challenge was incorporated with other challenges so that all matters could be dealt with together. Although each case must depend on its own circumstances, as was said in *R (Mahfouz) v Professional Conduct Committee of the General Medical Council* [2003] EWCA Civ 233, 5 March 2004:

> '··· in general it is preferable for [disciplinary] proceedings to be allowed to take their course and a challenge to their validity to be taken by way of appeal.'

143. In respect of criminal cases, it has in recent years been the approach of the Court of Appeal that satellite litigation by way of judicial review challenges to on-going criminal proceedings should only be permitted in rare cases. In my view, in the present case, which goes to disciplinary proceedings, the same principle has application. Nor do I see that the applicant's decision in the present case to hold over his challenge until after the completion of the disciplinary proceedings has in any way prejudiced good administration.

Looking to the fairness of the proceedings: the issue of the dual role played by the Department of Justice

144. On behalf of the applicant, it is asserted that the dual advisory roles played by the Department of Justice in the applicant's prosecution for breach of discipline resulted, first, in an appearance of bias and, second, in an unfairness caused to the applicant by the non-disclosure to him of advice given to the Secretary for the Civil Service

145. The Department of Justice acts as a legal adviser to Government in respect of disciplinary proceedings brought against civil servants. Such proceedings are 'internal' in the sense that those who determine whether proceeding should be instituted, those who conduct the inquiry process and those who determine whether there has been a breach of discipline are all members of the Public Service. Members of the Department of Justice are public servants too.

146. All those involved in carrying forward disciplinary proceedings instituted under the Administration Order are entitled to seek legal advice. How else are those responsible for commencing proceedings to be satisfied that, in law, they are entitled to do so; for example, that there exists a *prima facie* case? How else are those responsible for the on-going conduct of the proceedings to be sure that they are complying with the provisions of the Administration Order, its Regulations and the requirements of common law? Once an Inquiry Committee has submitted its report, how else is the decision-maker (in the present case, the Secretary for the Civil Service) to be assured that, in law, he may place

reliance on the contents of the report? Finally, if an appeal is made, how else is the officer appointed to determine the appeal (in the present case, the Chief Secretary) to be guided as to matters legal?

147. It will be readily seen, of course, that, if the Department of Justice is to render advice in respect of all the matters I have outlined, it may well be faced with one or more conflicts of interest. Such conflicts, unless resolved, may give rise to an appearance of partiality. Put another way, what may arise is an appearance of bias.

148. This danger may be avoided if different divisions within the Department of Justice deal with different areas of advice. In *Cheng Chui Ping v The Chief Executive of the HKSAR and the United States of America* [2002] HKCU 5 (HCAL 1366/2001, 7 January 2002, unreported), I spoke of this system of creating 'fire walls' by saying that:

> '… different divisions within the Department had acted in their respective roles entirely independently of each other; the role of the Prosecutions Division being to pursue a judicial remedy, the role of the Legal Policy Division being to advise in respect of the discharge by the Chief Executive of an administrative responsibility …'

149. However, this must be read together with the qualification that I made in a later judgment, that of *Ch'ng Poh v The Chief Executive of the HKSAR* [2003] HKEC 1441, (HCAL 182/2002, 3 December 2003) at para 87, in which I said that —

> '… there may be cases where the allegations … are so profound that the independent roles of the divisions within the Department cannot constitute a sufficiently impervious 'China wall' or 'fire wall'.'

150. As to the first issue raised on behalf of the applicant, that of apparent bias, this arises primarily out of the advisory roles performed by Mr Wingfield, a Law Officer in the Department of Justice. In his affirmation dated 15 June 2007, Mr Wingfield gave a detailed chronology of his advisory role.

151. In the initial instance, that role involved giving advice concerning the institution of the disciplinary proceedings. It included —

(i) advising whether there was a *prima facie* case against the applicant;

(ii) considering the draft charges, and

(iii) giving advice concerning the applicant's request for legal representation (which was refused).

152. During the course of the hearings before the Inquiry Committee, Mr Wingfield also gave advice to those responsible for the prosecution of the proceedings.

153. When the Inquiry Committee submitted its report, Mr Wingfield had the task of considering the report to advise whether the proceedings

were in order and whether the findings of the Inquiry Committee were supported by evidence presented during the hearings.

154. He further gave advice concerning a letter to be sent to the Inquiry Committee to clarify its position concerning a number of issues under s 9(b) of the Regulations.

155. Up to that point, no criticism is made of Mr Wingfield's role. Nor, in my view, is any criticism justified. Mr Wingfield advised on whether the disciplinary proceedings should be instituted; he advised on the management of those proceedings and, when the report from the Inquiry Committee was received, he rendered advice on its viability in law.

156. Thereafter, however, difficulties arise. I say that because, having advised on the prosecution process up to and including the collection of evidence by the Inquiry Committee, Mr Wingfield then played a role in advising the Secretary for the Civil Service whether to accept the findings of the report. Put more directly, having advised on the prosecution of the applicant and the viability of the evidence gained in respect of that prosecution, Mr Wingfield was then involved in giving advice to the person who would decide whether the applicant was or was not guilty of any breach of discipline. More than that, he would later advise on the appropriate penalty to be given.

157. As Mr Wingfield made clear, the nature of any advice given by him is covered by legal professional privilege. However, as to his role in advising the decision-maker; that is, the Secretary for the Civil Service, he said the following in his affirmation:

> 'On 30 April 2005, Mr Christopher Wong requested me to advise on a draft submission to the Secretary for the Civil Service. I gave my advice on 4 May 2005. Mr Christopher Wong sent me a revised draft submission on 6 May 2005 and I advised later that day.'

158. As to the imposition of a penalty, Mr Wingfield said:

> 'On 28 September 2005, Mr Rupert Cheung wrote to me seeking advice on whether a draft punishment order was legally in order. I advised the same day.'

159. On behalf of the applicant, it is said that, when the Secretary for Civil Service was called upon to consider the findings of the Inquiry Committee and thereby to determine the culpability of the applicant, it was imperative that the advice he received be impartial. That being the case, it was not possible for Mr Wingfield to advise the Secretary on the matter without giving the appearance of partiality. Clearly, in my view, there was an inherent conflict in playing an integral advisory role in the prosecution of the applicant for breach of discipline and thereafter playing an integral role in advising the Secretary for the Civil Service whether to find the applicant guilty of any such breach. But did that conflict undermine the fairness of the proceedings?

A 160. The test is whether a fair-minded and informed observer, having considered the facts, would have concluded that there was a real possibility of bias on the part of Mr Wingfield.

161. On behalf of the applicant, it was said that a real possibility of bias would have arisen out of the following two factors, certainly when those B factors were taken together:

(i) The Department of Justice had itself played a role in bringing about Harbour Fest. One of its officers had advised on the sponsorship agreement and it so happens that the starting point for drafting the C sponsorship agreement had been some earlier agreement which the Department of Justice had approved. Yet the applicant now faced charges that encompassed not including sufficient safety mechanisms in the sponsorship agreement. Plainly, therefore, the Department had an interest in avoiding criticism itself, letting the D applicant bear the brunt.

(ii) To this had to be added the fact that playing an integral role in the prosecution process would, for the most obvious of reasons, tend to colour Mr Wingfield's approach.

E 162. I am not convinced by the first factor. The evidence shows that the officer who advised on the sponsorship agreement was in a different division to Mr Wingfield and that both acted independently of each other. What I have described as the 'fire wall' or 'China wall' effect would therefore have avoided any danger of conflict.

F 163. As for the contention that the Department of Justice as a whole had an interest in avoiding criticism in respect of the sponsorship agreement, I find nothing of substance in that. If the Department had such an interest, why recommend that charges concerning the sponsorship agreement be preferred at all?

G 164. For me, the more difficult issue is to be found in the second factor, the assertion effectively that one person cannot, with impartiality, be both prosecutor and judge.

165. Legal professional privilege guards against knowing the exact nature of the advice given by Mr Wingfield. I believe I can take it, H however, that the advice went, first, to whether the disciplinary hearings had accorded with law and, second, whether the findings of the Inquiry Committee were themselves in accordance with law, more particularly by being supported by relevant evidence.

I 166. No suggestion is made that Mr Wingfield's advice would have — in any direct way — advocated the merits. But that being said, his advice as to what, for want of a better description, I will call 'the viability' of the Inquiry Committee's report must have carried considerable weight. Indeed, in this regard, in the hearing before myself, the skeleton argument of Mr Fok, for the respondents, contains the statement that 'the outcome

of the disciplinary proceedings depended on the findings of the Inquiry Committee, to which Mr Wingfield gave no advice at all'. A

167. But the real difficulty that must be faced is that it was Mr Wingfield who originally advised on the merits of instituting the disciplinary proceedings. He was the one who advised that there was a *prima facie* case for the applicant to answer. In light of that, the question may be asked: 'How likely would it be therefore that, when the disciplinary hearings were completed, he would advise the Secretary for the Civil Service that the findings made by the Inquiry Committee were not, and perhaps could not be, supported by the evidence?' But of course that very matter was of critical importance. I say that because it was a primary defence of the applicant that, when the factual situation was truly understood, it did not, nor was it capable of, supporting the charges brought against him. B C

168. For the reasons given, I have, albeit with reluctance, come to the determination that a fair-minded and informed observer, having considered the facts, would have concluded that there was a real possibility of bias on the part of Mr Wingfield arising out of his dual advisory role. D

169. If there was such a real possibility, I do not see how the decision of the Secretary for the Civil Service to support the findings in full can stand. Manifestly, to some material extent, the Secretary would have been influenced by the advice he received concerning the viability of the report. E

170. I come now to the second challenge raised by the applicant arising out of the multiple roles played by the Department of Justice. It concerns the non-disclosure to the applicant of the advice given to the Secretary for the Civil Service concerning the findings of the Inquiry Committee and the viability of those findings. It is a challenge which I can deal with in relatively brief terms. F G

171. It is now well established, certainly in respect of disciplinary proceedings, that it is unfair for a tribunal to receive evidence or submissions from one of the parties without the other parties having the opportunity to comment on them. The principle is well stated in the headnote to *Dato Tan Leong Min v Insider Dealing Tribunal* [1999] 2 HKC 83: H

> 'Apart from the public hearings, the Tribunal was receiving submissions summarising and evaluating the evidence from counsel in parallel private proceedings. The other parties had no opportunity to answer or be heard upon these submissions which almost certainly influenced the Tribunal's decisions. The procedure was unfair. Private submissions to the decision-makers by counsel, who had the role of presenting evidence of wrong-doing, during and after the hearing on the draft report were unfair and in breach of the rules of nature justice.' I

A 172. In the present case, it must be understood that the ultimate judge of the applicant's culpability was the Secretary for the Civil Service. In that sense, he constituted 'the tribunal'. It is true that hearings were held before the Inquiry Committee and, as I have said earlier, that the Committee was obliged effectively to render a 'judgment' in the form of
B its report. But the decision as to whether the applicant was or was not guilty of misconduct lay not with the Inquiry Committee, it lay with the Secretary for the Civil Service. All that came before constituted the gathering of evidence and the rendering of advice so that the Secretary could make his decision. As such, in my opinion, it was quite clearly a
C breach of the rule of fairness for the Civil Service Bureau, on the advice of the Department of Justice, to give advice to the Secretary concerning the decision to be made by him without giving the applicant the opportunity to see that advice and, if he wished, to comment on it.

D *Looking to the findings of the Inquiry Committee: issues of rationality*

173. On behalf of the applicant, it is asserted that in many instances the findings of the Inquiry Committee were findings which no reasonable decision-maker could make. This was either because, upon examination,
E the reasoning simply falls apart or because findings lack any evidential basis.

174. For the applicant, Mr Gordon said that the argument in this respect would be short and would not depend upon a detailed analysis of the evidence. In reply, for the respondents, Mr Fok said that the Inquiry
F Committee was fully entitled to come to the conclusions it did on the various charges in light of the totality of the evidence before it. Mr Fok emphasised that the Committee had fully set out its reasons for each of its findings, describing in particular the responsibilities expected of the applicant.

G 175. In the event, a detailed analysis of the evidence *was* required and, in considering the various submissions of Mr Gordon and Mr Fok I have found it difficult not to embark on an exercise of evaluation of the inherent merits of the evidence in contention.

176. It is not, however, for this court to examine the merits of the
H Inquiry Committee's findings. This court's jurisdiction is restricted to a review of the lawfulness of the decision-making process and in that regard I have already found that, in several material respects, the decision-making process was unlawful. That finding has vitiated the integrity of the disciplinary proceedings and the decision of the Secretary for the Civil
I Service made pursuant to those proceedings. Little purpose is served, therefore, in conducting a lengthy, detailed analysis of the asserted inadequacies of the Inquiry Committee's individual findings.

177. In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* [1996] 185 CLR 259, the High Court of Australia made a number

of valuable observations in respect of the limitations of judicial review. In particular, at 272, the High Court said: A

> 'These propositions are well settled. They recognize the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinized upon overzealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed. In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision. This has been made clear many times in this Court …' B C

178. An illustration of the difficulties I have faced arises out of argument as to the Inquiry Committee's reliance on the evidence given by Mr Tang, the Financial Secretary.

179. When Mr Tang testified before the Inquiry Committee, the following exchange took place during the course of his cross-examination by Ms Loh, the applicant's 'friend': D

> 'Ms Loh: In reply to Civil Service Bureau, why did you not give your own opinion? You kept referring to what was in the Independent Panel report. E
>
> Mr Tang: Because the Government, the Chief Executive had invited the Panel to look into the Harbour Fest affair, and they have produced a report, and the Government has accepted the findings of the report. So, as a member of the Government, I am bound by — the Government has accepted the findings of the report.' F

180. Putting it as directly as I can, in light of that statement, Mr Gordon's submission, as I understood it, was that no reliance could be placed on Mr Tang's evidence because it was impossible to know what was his personal view and what was the official Government position, a position that he felt constrained to adopt. It hardly needs to be said, of course, that the conduct of a civil servant is to be judged by the personal observations of individual witnesses not by adherence to some official position. G

181. As Mr Gordon expressed it, Mr Tang accepted that he had, in some measure, felt constrained to adopt the findings of the Independent Panel because the Government had done so. That, said Mr Gordon, 'tainted' all his evidence, not only before the Inquiry Committee but evidence given earlier in written form. H

182. Integral to Mr Gordon's submission was the fact that, as the Inquiry Committee was considering issues of misconduct under the Administration Order, it directed itself that it would not simply adopt the findings of earlier public reports, one of those reports being the report by the Independent Panel, which, of course, had dealt with far wider issues. But, in accepting the evidence of Mr Tang, said Mr Gordon, the I

A Committee was effectively accepting the findings of the earlier report by the Independent Panel, or at least could not be certain whether it was or was not doing so. That is because Mr Tang's evidence was, on his own admission, in part at least constrained by the fact that he felt obliged to adopt the findings of the Independent Panel.

B 183. Mr Fok, however, contended that this assertion went too far. It was for the Inquiry committee to consider Mr Tang's evidence in the broader context and as a whole.

184. Mr Fok pointed to the following statement made by Mr Tang in writing in response to questions put to him at an earlier stage:

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> '··· the Harbour Fest has been the subject of study by the Director of Audit, the Public Accounts Committee, as well as an Independent Panel of Inquiry (the Panel) set up by the Chief Executive. Most of the answers to this set of questions can readily be found from the Director of Audit's Report, the Panel's Report, as well as my written response to the questions posed by the Panel. I shall therefore refer to these sources, copies of which are attached for easy reference, as and when appropriate ···'

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185. As Mr Fok put it, this statement was simply stating matters of uncontroversial fact. It was not an indication that Mr Tang was avoiding

E having to answer the questions posed to him but simply a convenient way for him to cross-reference his answers to matters already contained in the other materials. Mr Tang was perfectly entitled to give answers to the questions posed to him based on those other earlier materials if he was satisfied they were responsive to those questions.

F 186. Mr Fok went on to say that in its report the Inquiry Committee had taken note of the fact that Mr Tang had 'confirmed that the interview notes with the Independent Panel and the written response to the Secretary for Civil Service were his views on the questions asked' and that 'he stood by them for the purpose of inquiry by the Committee'.

G 187. In my judgment, while obviously the Inquiry Committee would have been obliged to determine what weight to give to Mr Tang's evidence with caution, it was not obliged to disregard it entirely. It was therefore open to the Committee, as it did, to accept part of that evidence. Whether, on the merits, it was correct to do so is another matter, one that this court

H has no competence to determine.

188. I would add, albeit with the benefit of hindsight, that the opposing contentions in respect of Mr Tang's evidence point to the several nuanced and complex issues concerning the context in which evidence was to be considered that fell for determination by the Inquiry Committee. They

I were issues — in this exceptional case — which a practicing lawyer may well have been able to articulate not only for the benefit of the applicant but the Inquiry Committee too.

189. The difficulties I have faced are further illustrated by examining the arguments made in respect of charge (a). As the Inquiry Committee put

it, this charge raised the question of whether the applicant had failed to ensure that the budget proposed by AmCham for Harbour Fest had been critically examined by Invest HK and whether the ERWG had been fully and adequately advised on the proposed budget when funding approval was considered at the meeting of the ERWG held on 12 July 2003.

190. The Inquiry Committee reported that, in its opinion, charge (a) was substantiated.

191. In respect of charge (a), the submissions made on behalf of the applicant were to the following effect. The Inquiry Committee found that the talent costs, TV production costs and marketing costs had not been subject to critical examination by Invest HK. But there was unchallenged evidence that the budget was understood to be indicative only and that those costs that were capable of verification had been verified. Had the Inquiry Committee taken this evidence into account in its reasoning it could not have reached the conclusion that it did. In addition, the Inquiry Committee made no reference in its report to the 14 page breakdown of operating costs provided by AmCham to Invest HK, which was produced to the Inquiry Committee for the first time and which had not been before the Independent Panel or the Public Accounts Committee when they made their earlier reports.

192. Mr Gordon said that the core question was to ask: how could a critical budget scrutiny be undertaken in a situation in which, not only had no contract been negotiated with particular artists, but, having regard to the tentative calendar, there was no reasonable prospect — at that stage — of any particular artist appearing at all.

193. As Mr Gordon put it, the artist line-up was itself a moving target. The fact that it was a moving target was the underlying reason why it was not possible, for example, to verify a 'proposed fee' by comparison with a 'reasonable fee'. It was simply not comparing like with like. By way of illustration, to find out that Santana's agent or Santana's website contained X million pounds for an hour of his time would say nothing about what a completely different artist would charge.

194. In its report, however, the Inquiry Committee said the following (at para 79):

> 'Given the magnitude of the Event and the fact that almost all of the talent line up were indicative at that stage, it is accepted that a comprehensive feasibility study and cost-benefit analysis were not possible. Nonetheless, the Committee considers InvestHK, and the Accused Officer, as its Director-General, should have drawn such limitations to the attention of the ERWG, in order not to give the perception that the budget had been scrutinized carefully as instructed. Such reporting would alert ERWG to the desirability of seeking more frequent updates than what actually took place, or mobilize other Government agencies like LCSD to be involved at an early stage.'

195. The Committee continued by saying the following (at para 81):

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> 'Having a properly formulated budget is not as insignificant as the Accused Officer seemed to imply. It actually can force all parties to focus and crystallize conceptual thoughts into specific plans, not so much for the purpose of control at the initial stage, but for the purpose of communicating among parties responsible for funding, monitoring and organization of the Event right from the start.'

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196. I confess to having considerable sympathy for the applicant's contention: what could be verified *was* verified; what was purely indicative, essentially an estimate based on an educated guess, was not the subject of scrutiny because such scrutiny, at that time, would have had no

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value.

197. But what must be remembered is that the applicant was being judged by his peers, by civil servants of high rank and considerable experience who were entitled to employ their experience in determining what reasonably should have been done and the nature of any culpability

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arising out of a failure to follow that course.

198. There may not have been direct evidence of the consequences of any failure — if it be such — on the part of the applicant. But the Committee was entitled to consider all the relevant circumstances at the time and to come to a finding as to the standard of performance to be

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expected of an officer of the applicant's rank and experience. This court must be slow to interfere with a judgment to that end.

199. It is to be remembered that 'misconduct', as it is defined in the Disciplinary Guide, is a broad concept, one that can best be understood by

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civil servants who are bound by that concept.

200. Was the decision nevertheless irrational? Another Inquiry Committee may well have come to a different conclusion — I may have done so — but that is not to the point. In my judgment, whether the determination was right or wrong, I do not see how it can be described as

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a decision which no reasonable Inquiry Committee could have reached.

201. My analysis of the competing arguments in respect of charge (a) has been made for illustrative purposes. I do not intend to set out in this judgment my analysis of the competing arguments in respect of each and every charge. It suffices to say that, in respect of each, I have been drawn

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to the same conclusion; namely, that, right or wrong, it was open to the Inquiry Committee to come to the findings it did. In a number of instances the logic employed may have been questionable and the evidential basis thin. But these matters, at least as I have assessed them, have gone to the merits of the findings made.

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202. Before concluding, something briefly should be said of charge (d); namely, whether the applicant had failed to ensure that a critical review of the ticket pricing strategy had been conducted, including the policy on the issue of free and concessionary tickets, thereby prejudicing the Government's position.

203. In its report, the Inquiry Committee found this charge to be partially substantiated, the identified culpability of the applicant being related to the finding that he had not ensured that the ticket pricing review included the issue of free tickets. In this regard, the Committee said, in para 114:

> 'The Committee accepts the Accused Officer's assertion that there was a review of ticket pricing strategy including concessionary tickets, but the Accused Officer did not ensure that the review covers the distribution of free tickets, thereby prejudicing Government position in terms of minimizing the amount Government had to underwrite.'

204. Evidence of prejudice to the Government was an integral element of the charge. But, in Mr Gordon's submission, there was no evidence that Government interests had been prejudiced. It was a flawed assumption, he said, to proceed on a simplistic basis that the distribution of one free ticket meant a consequential loss of the price of one ticket. The distribution of free tickets, he said, was for an accepted and entirely legitimate marketing tool. Its purpose was to maximise revenue by filling seats rather than, in the end result, reducing revenue.

205. Mr Gordon, in my judgment, is correct. Clearly, the decision to issue free tickets was made in order to boost the appeal generally of the Harbour Fest. An analogy illustrates my point. An empty restaurant attracts few patrons while a restaurant with almost every table full may well have patrons queuing.

206. However, it seems to me that it was open to the Inquiry Committee to come to a finding that a prudent, tightly controlled policy concerning the issue of free tickets may have resulted in the same benefits with the need to give away fewer tickets. It does not seem to me that the report is based on the simplistic mathematical formula that I have set out above but goes again to issues of ensuring tight management controls in order to best protect Government's interests. As such, I am of the view that the finding made by the Inquiry Committee in respect of charge (d) was a finding open to a reasonable decision-maker. Again, let me emphasise that, whether the finding, on the merits, was correct, is not a matter for this court.

Looking to the appeal process: whether the Chief Executive acted ultra vires in delegating his powers under s 20 of the Administration Order

207. The applicant sought to appeal the findings made against him by the Secretary for the Civil Service.

208. By letter dated 17 June 2005, the applicant was informed that representations by way of appeal, as provided for under s 20 of the Administration Order, should by forwarded to the office of the Chief Executive for consideration by him.

209. Accordingly, by letter dated 13 October 2005, the applicant made his representations under s 20 of the Administration Order to the Chief Executive.

210. On 26 January 2007, some 15 months later, the applicant was informed that the Chief Executive had delegated to the Chief Secretary the authority to determine the applicant's appeal and that the Chief Secretary, having carefully considered the case, had decided to uphold the findings as to culpability and penalty.

211. In response, in a letter dated 1 February 2007, the applicant's solicitors made the following enquiries:

> 'It is stated in your letter that the Chief Executive delegated to you the authority to 'determine' our client's representations on his behalf. It would be helpful if you could explain the basis on which such authority was purportedly delegated, and the process by which you came to your determination.
>
> Without prejudice to the point raised above, we note that no reasons have been given for the determination made. We would be grateful if our client could be provided with full written reasons for the decision reached so that he can properly assess the basis of this finding.'

212. By letter dated 14 February 2007, the applicant's solicitors were informed that:

> 'It is an established arrangement for the Chief Executive to delegate some of his functions to senior officials as he sees fit. Delegation under section 20 of the Public Service (Administration) Order is not precluded by the Order itself or by any legal rule or principle. Delegation under section 20 is in line with the pre-1997 practice under the Colonial Regulations upon which the Order was based to ensure continuity. Delegation is also compatible with 'public expediency and justice' to individual public officers as referred to in section 20.'

213. It is the applicant's case that, whatever the 'established arrangement' may be, the Chief Executive had no power to delegate his responsibilities under s 20 of the Administration Order to another public officer. Accordingly, the Chief Executive acted *ultra vires* in making the delegation and any decision made pursuant to that purported delegation by the Chief Secretary was itself of no force or effect.

214. On behalf of the applicant, Mr Gordon emphasised that the Administration Order itself contains a comprehensive regime in respect of delegation, one that is clear and certain in its terms. In this regard, s 19 provides:

> '(1) Subject to subsection (2), the Chief Executive may delegate to any public servant or any other public officer any powers or duties conferred or imposed on him by sections 3 and 9 to 18.
>
> (2) The Chief Executive shall not delegate the power to make regulations under section 21(2).'

215. Mr Gordon submitted that, under s 19(1), it is plainly provided that the Chief Executive's powers of delegation extend only to his functions under s 3 of the Administration Order and those contained in s 9 through until s 18 (inclusive). The applicant's appeal, however, was — on the advice of Government itself — made pursuant to s 20 which is not included in s 19 as a section being subject to delegation.

216. Mr Gordon went on to say that the reason for this exclusion is made apparent on a reading of s 20 itself, more particularly s 20(2):

> '(1) Every officer who has any representations of a public or private nature to make to the Government of HKSAR should address them to the Chief Executive. The Chief Executive shall consider and act upon each representation as public expediency and justice to the individual may require.
>
> (2) The Chief Executive may appoint a review board to advise him on such representations addressed to him relating to appointment, dismissal and discipline of public servants as he things fit.'

217. Section 20(2), said Mr Gordon, specifically relates to disciplinary matters and enables the Chief Executive, if he thinks fit, to appoint a review board to advise him. The Chief Executive may not, therefore, have the power to delegate his determination of appeals but he does have the power to seek formal advice from a body of persons – a review board – as to matters pertaining to any appeal.

218. As to the powers of delegation given to the Chief Executive under s 63 of the Interpretation and General Clauses Ordinance (Cap 1), it was not disputed that this section relates only to delegation of statutory powers and was not therefore relevant to the delegation of power under an executive order.

219. On behalf of the respondents, Mr Fok emphasised that the Administration Order had been intended to replicate in so far as possible the old colonial regulations so as to maintain the same system for the discipline of civil servants pursuant to the requirements of art 103 of the Basic Law. He pointed to the fact that delegation had taken place under the old regime.

220. Mr Fok also pointed to the fact that there is no express prohibition contained in the Administration Order against the delegation of the Chief Executive's powers and functions under s 20. In the absence of that express prohibition, it was his submission, as I understood it, that the power to delegate must be implied.

221. In this regard, Mr Fok said that, given the very large number of civil servants who may seek to make representations under s 20 it was inconceivable that the power to delegate was not an implicit power.

222. In respect of s 20(2), Mr Fok said that this power to appoint a review board did not point to a lack of power to delegate. This additional

power was merely consistent with the notion that, in order to do justice to the individual, in some cases it may be necessary to seek formal advice from an experienced and qualified body of individuals.

223. While I accept Mr Fok's point that the Administration Order was made in order to maintain the system of discipline in force before the change of sovereignty, it must still be recognised that the Administration Order is a new instrument, not every provision in every respect being a mirror of the earlier provisions. As such, it must primarily be read as a new instrument, its terms being understood according to their ordinary meaning.

224. In reading the relevant provisions of the Administration Order in context, and giving to those provisions their ordinary English meaning, I confess that I have considerable difficulty with Mr Fok's contention that the power to delegate powers and functions under s 20 is implicit.

225. Section 19(1) provides that the Chief Executive's power to delegate is limited to certain specifically identified sections. If the Chief Executive's powers and functions under s 20 were always 'understood' to be subject to delegation, why was s 20 not included as a relevant section in s 19(1)? On any ordinary reading, its omission, it seems to me, must have been intended.

226. During the course of argument, some oblique use was made by Mr Fok of the provision contained in s 20(1) that the Chief Executive shall consider and act upon each representation 'as public expediency and justice to the individual may require'. Delegation, suggested Mr Fok, would in many cases be 'the most natural and common sense course of action' to take to advance the general public interest.

227. I regret that I do not read that second sentence in s 20(1) as implying any sort of power to delegate. To me the meaning is clear. It does no more than enable the Chief Executive, in his consideration of any representation, to balance justice to the individual civil servant with what is fit and appropriate in the public interest. In short the provision does not more than offer guidance as to how the Chief Executive may exercise his administrative discretion.

228. That being said, there are of course practical reasons for transfer of responsibility, especially by way of delegation, in Government. If it was otherwise it would be difficult for Government to function. But in looking to whether, as Mr Fok argued, the realities dictate that there must be an implied power to delegate the powers and functions of the Chief Executive under s 20, a number of factors need to be taken into account.

229. First, what is sought to be delegated is not an ancillary or peripheral power, one that is incidental. What is sought to be delegated is the power to determine appeals by civil servants. Second, the power relates to matters of discipline which can carry consequences of real seriousness. It is a power therefore of importance.

230. To the extent that the power goes to the determination of disciplinary appeals, it is a power which has many of the features of a judicial power. In this regard, the underlying principle speaks against implied delegation: see, for example, *De Smith's Judicial Review* (6th Ed), 5-140:

> 'Special tribunals and public bodies exercising functions broadly analogous to the judicial are also precluded from delegating their powers of decision unless there is express authority to that effect.'

231. In all the circumstances, I am unable to find any convincing grounds for concluding that, despite the apparent contrary intention appearing in the Administration Order, the Order is to be read as giving an implied power to the Chief Executive to delegate his powers and functions under s 20.

232. That being so, I must conclude that the Chief Executive acted outside of the powers given to him in the Administration Order when he purported to delegate the determination of the applicant's s 20 appeal. The delegation being invalid, so too was the Chief Secretary's decision made pursuant to that delegation.

The failure of the Chief Secretary to give reasons why he had rejected the applicant's appeal

233. As I have said earlier, the decision of the Chief Secretary that the applicant's appeal should be dismissed was conveyed to the applicant by letter dated 26 January 2007. No reasons for the decision were given. The applicant sought reasons and, in a response dated 14 February 2007, the following was said:

> 'The Chief Secretary has considered the case and other relevant information and factors (including the Inquiry Committee's report, Mr Rowse's representations, the comments of the Civil Service Bureau (CSB) on the points raised in Mr Rowse's representations and Mr Rowse's further submission in response to CSB's comments). The Chief Secretary was satisfied that each of the findings of the Inquiry Committee, accepted by the Secretary for the Civil Service (SCS), should be upheld and that the punishment imposed by SCS should also be upheld.'

234. On behalf of the applicant, it was said that there was a duty to give reasons in his case for the following reasons:

(i) That, without reasons, the applicant could not properly identify how, if at all, the Chief Secretary had grappled with his representations. In the result, if he was to seek judicial review, he would be unable to identify flaws in the decision-making process, such flaws being a legitimate subject for judicial review.

A (ii) That in any event, in the present case, the basis of the Inquiry Committee's reasoning called out for a stated analysis.

(iii) That the charges faced by the applicant were serious and the potential penalties severe.

B 235. In my judgment, s 20 of the Administration Order does not impose a general duty to give reasons. Section 20 directs only that 'the Chief Executive shall consider and act upon each representation as public expediency and justice to the individual may require.'

C 236. It may be that 'justice to the individual' in any given case requires the giving of reasons. If so, that obligation is subsumed into the common law rule that reasons should be given when fairness requires it.

237. As to the common law position, in an earlier judgment, that of *So Chung v Commissioner of Correctional Services* [2001] HKCU 53, unreported, HCAL 2438/2000 I said the following:

D '… this is not to say that there now exists any rule of common law to the effect that a public authority must always give reasons for its decisions. Nor, as I understand it, does there exist a duty generally to give reasons subject only to reasonable exceptions that have evolved by way of empirical experience. The English Court of Appeal in *R v Royal Borough of Kensington and Chelsea ex parte Grillo* (1995) 28 HLR 94 found that it was *not* a correct statement of the E law to state, as Sir Louis Blom-Cooper QC had said in *R v Lambeth London Council ex parte Walters*, that English law had 'now arrived at the point where there is at least a general duty to give reasons whenever the statutorily impregnated administrative process is infused with the concept of fair treatment to those potentially affected by administrative action.'

F I went on to say:

'… what will be implied by our courts is only so much as is necessary by way of procedural safeguards to ensure fairness. But the standards of fairness are not immutable. Lord Mustill noted in *R v Home Secretary ex parte Doody* [1994] G 1 AC 531 (at page 560) that what fairness demands is not to be applied by rote identically in every situation; it is dependent on the context of the decision.'

238. In the light of those principles, I concluded that it was necessary in each case to conduct an analysis of 'the character of the decision H making body, the kind of decision it has to make and the statutory or other framework in which it operates.'

239. Conducting a similar analysis in the present case, and leaving aside any issue of the lawfulness of his delegated power, I am satisfied that the Chief Secretary had no duty in law to give reasons in the present case. I I say so for the following reasons:

(i) As I have said, s 20 of the Administration Order imposes no general duty to give reasons.

(ii) The appeal was not to an outside body; for example, to a division of the High Court, which, as a stranger to the disciplinary code

contained in the Administration Order, may be expected to give reasons to explain its approach. The appeal remained within the Civil Service.

(iii) The Chief Secretary did not assume any form of inquisitorial role. The Inquiry Committee had already heard the relevant evidence, made its findings of fact and submitted a detailed report. The Chief Secretary was required to do no more than review the contents of the report and the applicant's representations and to assess them in light of his own knowledge and experience as a civil servant.

(iv) There was no appeal to any higher body and no need therefore to supply reasons for the benefit of that body. As I said in *So Chung v Commissioner of Correctional Services*: 'While [the Chief Secretary's] review of any appeal to him may be subject to review by this court, this court is not an appellate court looking at the merits; it considers rather the lawfulness of the process.'

It follows, of course, that, if no reasons are given, a person in the position of the applicant is denied the opportunity to identify any material flaws in reasoning. But what must be remembered is that the entire process is administrative. The Chief Secretary is not a judge. Again, as I said in *So Chung* in respect of the Commissioner of Correctional Services:

> 'As the statutory head of the Department, aware of the often subtle dimensions of the disciplinary code which ensures the efficient working of the Department, the Commissioner may be called upon to articulate sometimes inexpressible value judgments in reviewing appeal papers placed before him. Expressed plainly, the Commissioner may intuitively be sure that the proceedings are fair and the findings right within the context of the disciplinary code but find it difficult to articulate that knowledge. Indeed, it may be argued that if the Commissioner had to give reasons in such circumstances he may be forced to resort to legalism …'

(v) Reasons may be required in a case when the interest at issue is highly regarded by the law; for example, when the issue is dismissed from service. In the present case, however, no such punishment was at risk on appeal. The penalty imposed on the applicant, while obviously a blow for him personally, did not threaten his continued service at his attained rank.

(vi) On behalf of the applicant, it was argued that in this particular case the basis of the Inquiry Committee's findings called out for a stated analysis. I accept that there may be occasions when, for example, a first instance decision on its face is so aberrant that any review of such a decision demands communicated reasoning. But, whatever the merits, I do not see that, on its face, any finding of the Inquiry Committee was so aberrant as to demand some explanation for its

A acceptance. Yes, the issues in dispute were complex and, as I have said on several occasions, they arose in a highly unusual set of circumstances in which the applicant, together with many others, was forced to work under considerable pressure. But these factors on their own will not on all occasions act as a trigger and I do not
B see that they did so in the present case.

Conclusion

240. For the reasons given, I am satisfied that each of the three decisions
C described in para 11 of this judgment must be quashed. There will be orders of *certiorari* to this effect.

241. In respect of costs, bearing in mind that the applicant was successful in the great majority of the challenges made by him and was successful in having all three decisions quashed, I am satisfied that he is
D entitled to his costs. Costs are therefore awarded to him.

Reported by Oliver Jones

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