Lec1  
Lec2

Purpose of leave of JR

* Limited judicial resources
* Filter unmeritorious claim
* Public interest is correlated
* Every public decision is potentially subject to JR, 1 to many(numerous people can commence JR against one decision).

Threshold of leave for JR.

* ~~Potentially arguable.~~ Criticism ->potential arguability is too low.
* A reasonably arguable claim which enjoyed realistic prospects of success. OR reasonably arguable.

Timing(O.53, r.4)

* Promptly
* In any event within 3 months.

Calculation: From the date when grounds for the application first arose.

* Subjective understanding is not relevant when calculating time, but may be relevant when pursuing extension of the period.

Extension(viewed comprehensively in the discretion of the court):

* Good reason(2 considerations)
  + Length of the delay
  + Reasons for the delay
    - Delayed legal aid with proactive follow-up
    - Elderly
    - Extenuating reasons
    - Financial hardship
    - Etc..
  + The merits of the intended challenge
  + Prejudice to the parties and good administration
    - Milk quota, see R v Dairy Tribunal ex p Caswell [1990] 2 AC 738.
  + Points of general public importance
    - Legal importance
    - Impact of the concrete result of the decision
  + Whether the challenge is against a continuing policy

Delay still matters even the case pass the leave threshold(in relief stage). See High Court Ordinance(Cap.4) 21K(6) and R v Dairy Tribunal ex p Caswell [1990] 2 AC 738.

Standing & Sufficient interest

Lec3

***3. R v Secretary of State, ex p Bugdaycay AC 514***:

**Page 531 F to G**: "Within those limitations, the court must I think be entitled subject in this position to the **more rigorous examination more rigorous examination to ensure that it no way flawed. according to gravity of the issue which the decision determines. The more the most fundamental of all human rights is the individual's right to life. And when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.**"

**Lord Templeman at 537 F**: "In my opinion, **where the result of a flawed decision may imperil life or liberty, a special responsibility lies on the court in examination of the decision-making process.**"

***4. R v Ministry of Defence, ex p Smith and Ors QB 517***:

**Page 554 D to G**: "The court may not interfere with the exercise of an administrative discretion on substantive grounds saved where the court is satisfied that the position is unreasonable in the sense that is beyond the range of response open to reasonable decision maker. But in judging whether the decision maker has exceeded this margin of appreciation, the **human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.**"

**Page 556 B to E**: This section emphasizes that **the issue of human rights makes the case justiciable for the courts** and highlights the court's fundamental duty to determine the law and protect fundamental rights.

**Page 558 B**: The result at the English court level was that **the ministry's policy was upheld**, with the court giving deference to the government's judgment on matters within its expertise like the organization of the army and defense of the realm.

***5. Pagtama v Director of Immigration, HCAL 132014 (unrep., 12 January 2016)***:

**Paragraph 58 to 106**: These paragraphs explain why **neither the Bill of Rights nor the Basic Law was engaged** in this case for the applicants (who were not Hong Kong residents) regarding their right to family. Section 11 of the Bill of Rights and the construction of Article 37 and Article 41 of the Basic Law were discussed.

**Paragraph 200**: This paragraph explains the **sliding scale of review at common law in Hong Kong**. It notes three categories: proportionality for rights under the Basic Law/Bill of Rights, anxious scrutiny for important rights not underpinned by those instruments, and conventional Wednesbury for cases with no human rights involved.

***6. Pham v Secretary of State for the Home Department UKSC 19***:

**Paragraph 104**: This paragraph in *R v Council of Civil Service Unions v Minister for the Civil Service AC 374* is referred to, noting Lord Diplock's envisioning the possible adoption of proportionality in English public law. However, the court notes that **proportionality is only applied at the ECHR and Basic Law/Bill of Rights levels in the UK and Hong Kong respectively, and not generally at common law.**

**Paragraphs 105 to 106**: These paragraphs explain the **common law's "stumbling towards" a concept similar to proportionality through anxious scrutiny**, particularly in cases involving fundamental rights, using a sliding scale of review intensity.

**Paragraph 107**: This paragraph explains the **differences between proportionality and anxious scrutiny**, noting that proportionality may require the court to form its own view of the balance and consider the relative weight of competing interests, which is not necessarily the case with anxious scrutiny.

***7.A Town Planning Board v Society for Protection of Harbour Ltd (2004) 7 HKCFAR 1***:

**Paragraph 58**: This paragraph raises the question of **whether a more intensive standard of review than the traditional standard of irrationality should apply** to decisions concerning the harbour, given its unique legal status, even though no fundamental or constitutional right was directly involved. This question was left open for future consideration.

***8. Society for Protection of the Harbour Ltd v Chief Executive-in-Council & Ors (No 2) 2 HKLRD 902***:

**Paragraphs 78 to 79**: These paragraphs describe **anxious scrutiny** being applied to the Chief Executive-in-Council's decision due to the unique legal status of the harbour as a natural heritage, requiring something more rigorous than the standard Wednesbury test but less stringent than in cases of substantial interference with fundamental human rights.

***9. Fok Chun Wa v Hospital Authority (2012) 15 HKCFAR 409***

Article 25 of the Basic Law and Article 22 of the Hong Kong Bill of Rights. The case involved a challenge to the Hospital Authority's policy on charging higher obstetric service fees to non-eligible persons (NEPs), which included Mainland women married to Hong Kong residents. Right to social welfare is a non-fundamental right.

Two-stage approach to equality:

* First stage involved identifying the comparators.
* Second stage involved deciding whether the differences in treatment were justified. To be justified, the differential treatment must:
  + Pursue a legitimate aim.
  + Be rationally connected to the legitimate aim.
  + Be no more than necessary to accomplish the legitimate aim (the justification test)

Comparison with fundamental rights: The Court in Kong Yunming v Director of Social Welfare distinguished the right to social welfare (which is not a fundamental right) from fundamental rights, noting that the standard of review would be different. For non-fundamental rights involving socio-economic policy, the "manifestly without reasonable foundation" test was deemed appropriate.

***10. MA v Director of Immigration HCAL 10/2010, (unrep., 6 January 2011)***

HKBOR s.11 and BL art.37

"Uh the next case uh ***Pagtama*** gives you the answer as to why it is still necessary in at the Hong Kong level that we need to think about anxious scrutiny and you need to be very clear in your mind that these are all different concepts and when to apply uh uh these concepts.

A challenge against the director of immigration's decision to refuse the applicant's application to remain in Hong Kong to take care of their children. So they applied for permission to stay. They have no right of abode. They applied for permission to stay in Hong Kong. At the ground of that I want to take care of my children. Um if you look at the judge uh paragraphs 80 uh sorry paragraphs 58 to 106 of the judgment. So pages 19 to 36 you see that the court said that neither the bill of rights nor the basic law uh was engaged.

1. Bill of Rights section 11. “as regards to persons not having the right to enter and remain in Hong Kong, this ordinance does not affect any immigration legislation governing entry into stay in and departure from Hong Kong or the application of any such legislation.” What this provision provides is that for immigration matters, for persons not having a right to enter and remain in in Hong Kong, the Bill of Rights is not applicable to them.

2. Basic Law article 41. Applicant invoke art.37 of BL ‘freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by uh the law.' The court in ***Pagtama*** said that well article 37 on a proper construction is only concerned with the rights to procreate and foster children conferred on parents. And it's not a right to foster children in a particular manner or place. Nor is it about a right to family.

So the applicants cannot rely on article 37 to say look I have a right to family. That's the first point. And the second point that the court relied on article 41 “persons in Hong Kong Special Administrative Region other than Hong Kong residents shall, **in accordance with law**, enjoy the rights and freedoms of Hong Kong residents prescribed in this chapter.”

So, in other words, the applicants, they were not Hong Kong residents. So therefore BL41 applies and they do not enjoy all rights and freedoms of Hong Kong residents prescribed uh in this particular chapter(in accordance with law restriction). So in other words, even if basic law 37 is about right to family (which it isn't) the applicants cannot rely on article 37+41.

‘Construing the Basic Law and the provisions therein as a whole, and having regard to the theme of continuity underlying the Basic Law, it is difficult to see how the very general provisions in article 41 can have the effect of giving non-residents the right to take up employment in Hong Kong, as if they were local residents. This would defeat the obvious intention behind article 154(2) and amount to a drastic departure from the pre-1997 position.’

p.s. Court discuss 33+41 and not 37+41 explicitly, but the same ratio applies. (para.73-75)

Impact of the case: because there are instances where the basic law and the bill of rights do not come in to help you. Therefore, apart from proportionality, we have to uh remember anxious scrutiny.

***11. Kong Yunming v Director of Social Welfare (2013) 16 HKCFAR 950***:

**Paragraph 36**: "Social welfare rights which qualify as rights protected by art.36 are subject to modification pursuant to policies generated by the Government in accordance with art.145, as that article plainly envisages. The importance of a right being recognized as a social welfare right protected by art.36 is that any restriction subsequently placed on that right is **subject to constitutional review by the Courts on the basis of a proportionality analysis** ... The Government was therefore entitled to change its policy and to impose the seven-year requirement in place of the one-year requirement. But it is also clear that such modification is subject to constitutional review."

***12. Hysan Development Co Ltd v Town Planning Board (2016) 19 HKCFAR 372***:

The audio recording highlighted paragraphs related to the introduction of the four-stage proportionality test (though the specific paragraph numbers were not clearly stated). **Paragraph 134 and 135** of the judgment detail the adoption of the four-step analysis in Hong Kong, adding the fourth step of balancing societal benefits against inroads into individual rights.

***13. Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs (2017) HKCFAR 353***:

The audio did not specifically highlight a content essence in this case beyond it being a constitutional challenge where proportionality would apply.

***14. Tam Sze Leung v Commissioner of Police 1 HKLRD 480***:

The audio did not specifically highlight a content essence in this case beyond discussing the standard of review.

The audio also referred to paragraphs concerning the **choice between the "no more than necessary" test and the "manifestly without reasonable foundation" test** at the third stage of proportionality, depending on the margin of discretion. This discussion occurs between paragraphs **83 and 123**.

***17. Secretary for Justice v Persons Conducting Themselves in any of the Acts Prohibited under Paragraph 1(a), (b), (c) or (d) of… HKCA 442***:

The audio did not specifically highlight a content essence in this case beyond discussing the standard of review in national security cases.

**Paragraphs 40 to 41**: These paragraphs explain the **two levels of scrutiny under proportionality**: the more stringent "no more than necessary" test for fundamental rights/discrimination and the less stringent "manifestly without reasonable justification" test for socio-economic policies.

Reading: N5. Para 121-122, N3.p.560.D-G,

Why both common law and constitutional document contains protection of fairness. – There are people excluded from the HKBoR(Art.3).

Right to be informed and to be heard

Right to be informed of charges

Disclosure of materials relied upon before decision is made N5.p.5 64.A-E, N6.para.58-60

Material of the other side and what the judge referring to when making the decision

Not entitled to be disclosed to each and every document.

2stages:

1.whether it’s a matter of justice

2. considering whether to exercise its **discretion** to quash the decision of the decision-making body below or grant some other appropriate relief, if any.

Considerations: breach of procedural fairness, absence of prejudice…

Right to be heard vs right to oral hearing

Anxious scrutiny test – 4. R v Ministry of Defence, ex p Smith and Ors [1996] QB 517 File , 55 E-G

lEC8

zenith -> 46:00

two major takeaway of Begbie -> 46:00

case of Coughlan . IMPORTANT -> 51:50

bibi -> 1:03:00

leading hk case on LE Ng Siu Tung – 2.9:55

11. para 72.

1. Is there a promise?

2. express words, orally, writing ,past practice, focus on the capacity of the representation makers.

3. is the expectation reasonable and lawful?