International Labour Convention . . . 7.05, 15.27, 15.28
art 6 . . . . . 15.71
art 6(1) 15.69
United Nations Convention relating to the Status of Refugees 1951 . . . . 12.88, 12.103, 15.29

South Africa
Constitution of South Africa
s 9 . . . . . 7.76

United Kingdom
Human Rights Act 1998 . . . 4.93, 6.80
s 8 . . . . . 6.91

United States
Religious Freedom Restoration Act 7.66

Vienna
Convention on the Law of Treaties
art 80(1) 6.43

CHAPTER 1

Judicial Review – Nature and Scope of Judicial Review in Hong Kong and The Parties to Judicial Review Proceedings

WHAT IS JUDICIAL REVIEW?

1.01 Most developed legal systems seek to control the actions of public bodies by some form of judicial review by which superior courts (in Hong Kong the Court of First Instance) exercise a supervisory jurisdiction over inferior courts, tribunals or other public bodies.

1.02 For this purpose, many jurisdictions – including Hong Kong – have evolved a distinction between public and private law with specialised courts and a separate corpus of legal principles to cope with alleged misuse of public power.

1.03 The distinction between public and private law is not easy to draw. Many have doubted the utility or even substantive existence of such a distinction. There remain, nonetheless, broad considerations of policy (with certain procedural advantages and differences from normal civil procedure claims) justifying the creation of a separate regime for ventilating particular grievances against public bodies.[1] These include, notably, provisions addressing undue delay and filtering out unmeritorious applications.

1.04 In reviewing a particular decision, or other public law default, the court is concerned to evaluate the legality, rationality and fairness of the decision-making process rather than the merits. In one case it was put thus:

> '*... in an application for judicial review, the court is not so much concerned with the wisdom of a decision but with the propriety of the decision-making process. Lord Brightman said in Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155 that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. It is not the function of this Court to conduct a detailed analysis of the minutiae of the evidence presented and the findings made by the Investigation Thus,*

1 For further discussion on the public/private law distinction see Chapter 3.

> *unless the finding of the Investigation Committee is wholly unsupported by the evidence, it is not the function of this Court to interfere merely because it would have formed a different view as to credibility of the witnesses or would have drawn a different inference on the evidence.'*[2]

1.05 This approach has been echoed in other Hong Kong cases. For example, in *Chu Hoi Dick and Others v Secretary of State for Home Affairs*[3] Lam J (as he then was) stated:

> *'In judicial review, the court is concerned with the legality of administrative decisions. The court can examine whether an administrative decision has been made in accordance with the relevant legislative provisions and other common law principles securing the procedural and substantive fairness of the process. However, the court cannot substitute its own view as regards what decision should be made. Provided that the administrative decision is one a minister or an executive body can lawfully make, the court cannot interfere.'*

THE DEVELOPMENT OF JUDICIAL REVIEW IN HONG KONG

1.06 The principles and procedure relating to judicial review in Hong Kong were originally derived from English law. However, the Hong Kong courts have proved extremely receptive to the case-law of other jurisdictions with some emphasis, in particular, on Australian case-law.[4]

1.07 As a result, Hong Kong judicial review contains a discrete body of legal rules and principles which have been adapted by the courts by reference to different jurisdictions.

1.08 The judicial review regime in Hong Kong has also been developed by reference to two further distinct sources of legal obligation. These are:

(i) The Hong Kong Bill of Rights Ordinance (Cap 383); and

(ii) The Basic Law.

1.09 These instruments which are examined in more detail in Chapters 6–8, are the source of an extended judicial review jurisdiction with particular principles of law and of statutory interpretation for, most materially, the protection of fundamental rights.

2 *Yeung Cheong Fat v An investigation Committee appointed pursuant to section 6 of the Public Service (Discipline) Regulation and section 10 of the Public Service (Administration) Order 1997*, [2005] HKCU 62 (unreported, HCAL 93/2003, 13 April 2004). See also, *Secretary for Justice v Cheung Chung Chit* [2003] 4 HKC 49.

3 [2007] HKCU 1370 (unreported, HCAL 87/2007, 10 August 2007). See judgment at para 1.

4 To take but one example, the Hong Kong Courts have frequently relied on the seminal Australian decision in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 in the context of relevant and irrelevant considerations which a public law decision-maker may/may not take into account. See, eg: *Lao Kong Yung and Others v The Director of Immigration* [1999] 3 HKLRD 778.

1.10 However, the Basic Law which came into effect on the Handover on July 1, 1997, is also a constitutional document. It guarantees continuity of the common law of Hong Kong, including judicial independence, and provides (see art 11) that no law enacted by the Hong Kong Special Administrative Region shall offend against the Basic Law.

1.11 One of the most important prohibitions in the Basic Law is contained in art 39. This provides that the fundamental rights and freedoms enjoyed by Hong Kong residents – chiefly under the International Covenant on Civil and Political Rights (ICCPR) *as applied to Hong Kong*[5] – shall not be restricted in a manner contrary to law or to the ICCPR as applied to Hong Kong.

1.12 The Hong Kong courts possess, therefore, a constitutional jurisdiction largely exercisable in judicial review proceedings (that goes well beyond any jurisdiction arising at common law) to declare *legislation* invalid insofar as it is contrary to the Basic Law. Indeed, as foreshadowed earlier, art 11(2) of the Basic Law expressly provides that no law enacted by the Hong Kong legislature shall contravene the Basic Law.

1.13 Jurisdiction to interpret the Basic Law is, however, tempered by the overarching jurisdiction of the Standing Committee of the National People's Congress of the PRC. Article 158 of the Basic Law thus provides:

> *'The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.*
>
> *The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.*
>
> *The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.*

5 The phrase *'as applied to Hong Kong'* has been clarified by the Court of Final Appeal in *Ubamaka Edward Wilson v Secretary for Security and Director of Immigration* [2012] HKCU 2610 (unreported, FACV 15/2011, 21 December 2012).

> *The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.'*

1.14 In short, the Standing Committee of the National People's Congress reserves to itself the interpretation of the Basic Law but has delegated the interpretation of its provisions to the Hong Kong courts. However where a provision is political in the sense identified in art 158, the ultimate (and authoritative) interpretation is for the Standing Committee.

1.15 As will be seen in Chapter 6, art 158 is a provision which could have given rise to conflict, at least in theory, between the Hong Kong courts and the PRC. In practice however, where an interpretation has been rendered by the Standing Committee under art 158, that interpretation is accepted by the courts to be determinative of the law. The interpretation from the Standing Committee thus operates to alter the effect of any previous inconsistent decisions of the courts, albeit without affecting the rights of the parties to those previous rulings.

1.16 Applications for judicial review are brought under the Constitutional and Administrative Law List.[6] Judicial review is governed by a specific procedure under Order 53 of the Rules of the High Court (Cap 4A) and the court's jurisdiction is derived from s 21I, J and K of the High Court Ordinance (Cap 4).

1.17 Part 1 of this book addresses procedure, grounds and remedies. The relevant procedure is examined in some detail in Chapter 2 and grounds and remedies are examined in Chapters 4 and 5. Procedural exclusivity is the second important aspect of the scope of judicial review procedure and this is outlined in Chapter 3.

1.18 Part 2 deals with constitutional and fundamental rights aspects of judicial review which have become increasingly important in Hong Kong. Part 3 addresses key areas of public law practice.

PARTIES TO JUDICIAL REVIEW PROCEEDINGS

Applicants and standing

1.19 Applicants in judicial review proceedings must have a sufficient interest in the matter to which the application relates. This threshold standing requirement has occasionally caused difficulty but has generally been interpreted broadly by the courts so as to permit most public interest claims to be admitted even where the interest of the particular applicant

6 The List extends to applications for *habeas corpus*, election petitions, appeals from the Obscene Articles Tribunal and other cases involving the Basic Law or Bill of Rights if transferred to the list by a judge. See generally, Practice Direction No 26.1 'Constitutional and Administrative Law List.' Directions regulating applications under the List (Practice Direction SL3) have been issued and are considered in more detail in Chapter 2. They are reproduced at Appendix C.

may be somewhat tenuous. It is said that public law is concerned not with private rights but public wrongs; and thus the Courts will be inclined towards intervening where a manifest unlawfulness is exposed in an application.

1.20 The English law on standing in judicial review was authoritatively set out by the House of Lords in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses*.[7] That decision was based on a close reading of the former procedural rules in England which are in this respect, similar to the current Civil Procedure Rules in England and the prevailing procedural rules in Hong Kong (which are unaffected by the recent CJR reforms). It has frequently been cited with approval in the Hong Kong case law.

Standing at the leave stage and the test for leave to apply for judicial review

1.21 The correct test for the grant of leave to apply for judicial review has now been authoritatively resolved by the Court of Final Appeal (see below) as one of whether the case is arguable. However, until this recent decision, the courts in Hong Kong (and formerly in England) had evinced uncertainty as to the correct approach.

1.22 In England, initially a test of potential arguability was recognised in the *IRC* case. According to this approach, a court might be justified in granting leave to apply for judicial review even if in the full hearing, it was held that the applicant did not possess requisite standing.

1.23 The correct approach to standing at the leave stage that prevailed in English law was succinctly set out in the speech of Lord Diplock. He observed (assimilating the correct approach to standing to the correct test for whether leave should be granted to apply for judicial review) thus:

> *' ... So this is a "threshold" question in the sense that the court must direct its mind to it and form a prima facie view about it on the material that is available at the first stage. The prima facie view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself.* [8]

1.24 In respect of both standing at the threshold stage and the test for leave more generally, this potential arguability test necessarily involved the court, at the leave stage, engaging in a largely impressionistic exercise. As explained by Lord Diplock:

> *'[i]f on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as*

7 [1982] AC 617.
8 Fn 7 above at 642F–642H.

liability (save for committing contempt of court for acting in breach of a court declaration).[123]

5.97 Finally, in *W v Registrar of Marriages* the CFA made declarations to the effect that the words *'woman'* and *'female'* in s 20(1)(d) of the Matrimonial Causes Ordinance and section 40 of the Marriage Ordinance include *'a post-operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery'*, and that the appellant was in law entitled to be included as *'a woman'* within the meaning of and is accordingly eligible to marry a man. It however ordered that these declarations *'shall not come into effect until the expiry of 12 months from the date of this Order'*, with liberty to apply in relation to the period of suspension.[124] The court explained:

> *'We accept that the suspended Declarations have ramifications going beyond the specific circumstances of the appellant, making it desirable that the Government and Legislature be afforded a proper opportunity to put in place a constitutionally compliant scheme capable of addressing the position of broader classes of persons potentially affected. We consider the 12-month suspension appropriate. While we are prepared to grant the parties liberty to apply in relation to that period, we should make it clear that it must not be assumed that any application for an extension would be viewed favourably in the absence of compelling reasons.'*[125]

123 [2010] HKCU 1344 (unreported, HCAL 69/2009) para 138; decision affirmed on appeal: CACV 153/2010.

124 [2013] HKCU 1597 (unreported, FACV 4/2012 (16 July 2013)) paras 2, 6.

125 At para 7.

CHAPTER 6

Legal Foundations of Fundamental Rights and Other Constitutional Protections in Hong Kong – The Bill of Rights and The Basic Law

ROLE OF THE COURT IN CONSTITUTIONAL LITIGATION

6.01 The Basic Law contains in Chapter 3 (Arts 24 to 42) a comprehensive, although not exhaustive, charter of rights and duties. The legislature may not enact any law that contravenes these provisions by virtue of arts 8, 11, 39 and 73(1). As explained below, the crucial task of interpreting the Basic Law, including the scope of these fundamental rights, falls to the courts[1]. It is this constitutional responsibility that has engendered, and will continue to engender, 'constitutional review' in Hong Kong.

6.02 Although superficially and procedurally similar,[2] constitutional litigation is very different from conventional judicial review at a juridical level, and also distinct from the constitutional justification for conventional judicial review.[3] As explained elsewhere, traditional judicial review is concerned not with merits but rather with legality. That leaves the courts with a limited, albeit important, review function. Quite simply: Governments determine policy; courts determine legality.[4]

6.03 However in constitutional challenges the position is different. The right of access to the courts, which is guaranteed by art 35 of the Basic Law, applies in a particular way to legal challenges in the Hong Kong courts that are brought to ensure protection of the constitutional guarantees

1 Note though, the significant (and primary) power of interpretation of the Basic Law vested in in the Standing Committee of the National People's Congress under art 158 of the Basic Law: see below at paras 6.49–6.72.

2 Both forms of review are brought under RHC O 53.

3 Conventional judicial review can be characterised as being concerned with principally public wrongs rather than private rights. The converse is typically true of constitutional judicial review. See also Chapter 1.

4 *Kong Yun Ming v Director of Social Welfare* (unreported) CACV 185/2009 & 153/2010, 17 February 2012 (para. 102) *per* Stock VP.

embedded in the Basic Law and in the Hong Kong Bill of Rights Ordinance.

6.04 In such cases, the court must ensure that power is exercised constitutionally. This is achieved both by applying special principles and where necessary, by granting appropriate remedies.

6.05 In the exercise of its constitutional functions the court's role is far more intrusive than that in ordinary judicial review. It is, nonetheless, the position that constitutional litigation is almost exclusively conducted through the procedure of judicial review. Although historically Hong Kong was a constitutional legal order during the Colonial period under the Royal Instructions and Letters Patent, the breadth and specificity of the Basic Law has led not merely to a quantitative change but to a qualitatively new form of constitutional litigation. Reflecting this shift the procedure, grounds and remedies available through the court's judicial review jurisdiction have therefore been expanded and applied more generously so as to accommodate the demands this new and type of litigation, and in order that the courts are properly equipped to discharge their constitutional function.

6.06 The growing influence of constitutional litigation in judicial review cases in Hong Kong has resulted in many more challenges being brought, including cases that excite strong political sentiments. The number of judicial review cases has steadily increased over the last few years, rising to 522 such applications in 2010, 551 in 2011 and 576 in 2012, up from around 150 applications per year in the early 2000s.[5] The increasing range of recent public interest-type challenges is noticeable.[6]

SOURCES OF CONSTITUTIONAL PROTECTIONS

6.07 Constitutional protection was maintained in Hong Kong once the People's Republic of China resumed sovereignty on July 1 1997 and Hong Kong constituted a Special Administrative Region of China ('HKSAR').

6.08 Fundamental rights in Hong Kong are protected both by the Basic Law[7] and by the Hong Kong Bill of Rights.[8] Art 39 of the Basic Law provides that:

> *'(1) The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the [HKSAR].*
>
> *(2) The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.'*

5 See the statistics published on the website of the Department of Justice, http://www.doj.gov.hk/eng/about/stat.html, viewed 15 November 2012.

6 See eg: *Chu Hoi Dick and Another v Secretary for Home Affairs* (No 1) [2007] 4 HKC 263; *Cho Man Kit v Broadcasting Authority* [2007] HKCU 1694 (unreported, HCAL 69/2007).

7 The Basic Law was adopted in 1990 and came into effect on 1 July 1997.

8 The 'Bill of Rights' is set out in s 8 of the Hong Kong Bill of Rights Ordinance (Cap 383), which came into force on June 8 1991.

6.09 The courts have consistently held that the Bill of Rights instantiates the International Covenant on Civil and Political Rights ('ICCPR') as applied to Hong Kong.[9] This is unsurprising, since the Bill of Rights replicates the relevant articles of the ICCPR almost verbatim.[10] However it should be noted that the Bill of Rights does not cover every single provision of the ICCPR that applies to Hong Kong (e.g. ICCPR art 20 which prohibits propaganda for war and requires States parties to outlaw advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence) and it is therefore suggested that the Bill does not give an exhaustive account of what is contemplated in Art 39(1) of the Basic Law.

6.10 The phrase 'prescribed by law' in art 39 of the Basic Law is important. There are two cases in which the Court of Final Appeal has held legal certainty (as reflected in that provision) to be a constitutional imperative.[11]

6.11 First in *Shum Kwok Sher v HKSAR*[12] Sir Anthony Mason NPJ held that the principle of legal certainty is incorporated in art 39 of the Basic Law (and in art 11(1) of the Bill of Rights). However in recognising the constitutional significance of the principle, his Lordship made it clear that the precision needed to avoid the striking down of an impugned provision 'will necessarily vary according to the subject matter'.[13]

6.12 Then in *Lau Wai Wo v HKSAR*[14] Lord Scott of Foscote NPJ expressed the principle of legal certainty as follows:

> *'The principle of legal certainty requires that a law must be sufficiently precise to enable a citizen to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail.'*

6.13 Legal certainty does not refer merely to the lack of any domestic provision of law in Hong Kong but rather, requires scrutiny by the court of the quality of any legislative provisions that may exist so as to determine their constitutionality. Thus the requirement of legal certainty

9 See *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 at 455.

10 *Cf.* the Basic Law which contains certain rights that are not to be found in the ICCPR (see below).

11 The notion of 'prescribed by law' and analogous concepts (eg, 'in accordance with law') are used throughout the European Convention on Human Rights ('ECHR'). As with the ECHR so too the Basic Law uses analagous concepts (eg, 'legal procedures' in art 30).

12 (2002) 5 HKCFAR 381.

13 See fn 14 at p 410–411. The citation, endorsed by Sir Antony Mason NPJ, is from Lord Hope of Craighead in *Sabapathee v Mauritius* [1999] 1 WLR 1836 at 1843.

14 [2004] 1 HKLRD 372, 388.

in the first sentence of art 39(2) of the Basic Law is a separate head of potential unconstitutionality and must be distinguished (the more usual case) where the second sentence of art 39(2) is operative. In the latter case the meaning and effect of the law is clear but the law provides for an impermissible restriction on the rights guaranteed in the ICCPR as applied to Hong Kong. An example of the latter type of constitutional review is seen in *Secretary for Justice & Others v Chan Wah & Others*.[15] There, the Court of Final Appeal held that arrangements adopted for the 1999 village representative elections contravened were unconstitutional insofar as they excluded non-indigenous villagers from voting and standing as candidates; this measure was incompatible art 21 of the Hong Kong Bill of Rights (the right to participate in public life).[16] Many other examples of constitutional violations of these kinds are considered in Chapter 7 and Chapter 8.

RELATIONSHIP BETWEEN THE BASIC LAW AND BILL OF RIGHTS

6.14 There is a substantial overlap between the scope of many of the fundamental rights contained in the Bill of Rights and those in the Basic Law. For example, protection against arbitrary detention and/or imprisonment is the subject matter of art 28 of the Basic Law and art 5(1) of the Bill of Rights. Similarly, equality before the law is protected both by art 25 of the Basic Law and by art 10 of the Bill of Rights.

6.15 However, it cannot necessarily be assumed that the overlap between fundamental rights protected under the Basic Law and under the Bill of Rights will inevitably lead to the same result. This is because the precise wording between the two sets of provisions is often subtly different.

6.16 The contrast is discussed more fully in Chapter 7, where it is observed that, on the one hand, the Basic Law confers certain economic and social rights not found in the ICCPR, while on the other hand, the Bill of Rights contains additional civil and political rights beyond those contained in the Basic Law. As an example of the latter, in.*Gurung Kesh Bahadur v Director of Immigration*[17] the Court of Final Appeal held that art 31 of the Basic Law conferred rights that were additional to those conferred by the Bill of Rights enacted before the handover. As Li CJ pointed out (see paras 25–26 of the judgment):

> *'...The ICCPR as applied to Hong Kong as incorporated by the Bill only provides for minimum standards for rights which are internationally recognised. The Basic Law can provide for rights additional to such minimum standards.*

15 [2003] 3 HKLRD 641; (2000) 3 HKCFAR 459.

16 For the fate of subsequent legislative efforts to comply with the requirements of s 39, see *Lai Tak Shing v The Secretary for Home Affairs and Another* (2007) 10 HKCFAR 655.

17 [2002] 2 HKLRD 775.

> *... A right may be provided for (i) in both the Basic Law and the Bill; or (ii) only in the Basic Law and not in the Bill; or (iii) only in the Bill but not in the Basic Law. An example of (i) is the freedom of speech or the freedom of expression. It is to be found both in the Basic Law (art.27) and in the Bill (art.16). Here, one is concerned with the right to travel and the right to enter conferred on non-permanent residents. These rights are an example of (ii) above. They are not provided for and are additional to those in the Bill. They are created by the Basic Law and are only provided for therein.'*

6.17 Read literally, art 39(2) of the Basic Law (set out in para 6.08 above), which requires the prescription in law of any restrictions on the rights and freedoms enjoyed by Hong Kong residents, would (materially) have the effect only of limiting restrictions on rights conferred by the Basic Law alone to the extent that the restrictions did not meet the requirements of legal certainty.

6.18 This would be a surprising result given that the combination of arts 39(1) and 39(2) prevents even restrictions that are prescribed by law from contravening the ICCPR. Such a reading would mean that minimum ICCPR rights were automatically protected whether or not such restrictions were prescribed by law but that additional, constitutional rights conferred by the Basic Law were not so protected.

6.19 However, in *Gurung Kesh Bahadur*, the CFA held that this was not the proper interpretation of art 39(2) of the Basic Law. At paras 28–29 of its judgment, the court stated:

> *'28. ... where as in the present case, one is concerned with rights conferred by the Basic Law, which are not found in and are additional to those provided for by the ICCPR as applied to Hong Kong, art.39(2) does not imply that such rights may be freely qualified or limited simply by restrictions which are prescribed by law. In the context of rights contained the second requirement in art.39(2), which any purported restriction must satisfy, has no application because the rights in question are conferred by the Basic Law and not by the ICCPR as applied to Hong Kong. But it does not follow that rights found only in the Basic Law can be restricted without limitation provided the restrictions are prescribed by law. The question of whether rights found only in the Basic Law can be restricted and if so the test for judging permissible restrictions would depend on the nature and subject matter of the rights in issue. This would turn on the proper interpretation of the Basic Law and is ultimately a matter for the courts.*
>
> *29. If it were otherwise and the Director's primary submission were correct, it would mean that where the Basic Law has chosen to confer rights additional to the minimum guarantees provided for in the ICCPR as applied to Hong Kong incorporated by the Bill, these additional rights could be swept away by domestic legislation and would therefore be much less secure than the rights in the Bill, whether or not they are also provided for in the Basic Law. This could not have been the intention of the Basic Law. The intention of the Basic Law was to entrench constitutionally the rights and freedoms in Chapter III, rights and freedoms which are essential to Hong*

the scheme has crystallised a set of accessible and predictable eligibility rules, those rules may properly be regarded as embodying a right existing *'in accordance with law'*, qualifying for art 36 protection. However, by reason of art 145, the relevant right protected by art 36 is the right defined by the eligibility rules for CSSA derived from the previous system of social welfare and in existence as at 1 July 1997, which laid down a one-year, and not a seven-year, residence requirement as a condition of eligibility for CSSA.

8.91 While the government was entitled to change its policy and to impose the seven-year requirement, such modification is subject to constitutional review. For this purpose, his Lordship applied the test in *Fok Chun Wah*, namely, where the disputed measure involves implementation of the Government's socio-economic policy choices regarding the allocation of limited public funds without impinging upon fundamental rights or involving possible discrimination on inherently suspect grounds, the courts would intervene only where the impugned measure is *'manifestly without reasonable justification'*.

8.92 Applying such a test, his Lordship held that, while it may be that the one-year residence requirement has to be accepted as the basic right to social welfare historically defined, it would be wholly irrational, when viewed from the perspective of the government's one-way permit ('OWP') scheme, which provides orderly admission of mainland spouses into Hong Kong to be reunited with their families, to raise it to a seven-year requirement. This is because, where the reunited family is poor, one would expect the social security scheme to operate in harmony with the OWP scheme and so make CSSA benefits available. While the Government sought to justify the seven-year rule by reference to the steeply rising expenditure on social welfare, his Lordship held that there was no rational connection between this problem (which was addressed by other measures aimed at safeguarding its sustainability) and the seven-year eligibility requirement, because of the relatively insignificant level of savings achievable by implementing such rule. Other justifications put forward to justify the rule were similarly rejected either as being not legitimate or as providing no rational connection with the seven-year restriction. Thus, while the Government has a wide margin of discretion, both in defining the conditions and level of the benefit in the first place, and in making any changes pursuant to policies developed in accordance with art 145, such changes are subject to constitutional review in the manner described above.

CHAPTER 9

Telecommunications and Competition

BACKGROUND

9.1 Telecommunications in Hong Kong is governed by the Telecommunications Ordinance (Cap 106) ('the TO').[1] On 30 June 2000, the TO was amended by incorporating into the statute terms prohibiting anti-competitive conduct and abusing of dominant position which had first appeared in the Fixed Telecommunications Network Services Licences ('FTNS Licences') granted in 1995.[2] The newly-introduced provisions (ss 7K, 7L and 7N),[3] which expanded on the scope of FTNS Licence conditions, was an integral part of the Government's long term policy for deregulation and the opening up of the telecommunications industry to market forces.[4] In 2003, the TO was further amended by the addition of s 7P.

9.2 Sections 7K, 7L and 7N contain various prohibitions against anti-competitive and discriminatory practices, as well as abuse of the dominant position and are binding on all licensees under the TO ('telecommunications licensees').[5] Section 7P regulates the competition impact of mergers and acquisitions of 'carrier licensees'.[6]

1 Cap 106.
2 FTNS Licences, Conditions 15 & 16.
3 Similar sector-specific provisions are contained in ss 13, 14 and 15 of the Broadcasting Ordinance (Chapter 562 of the Laws of Hong Kong).
4 Telecommunications Authority, 'Draft Competition Guidelines',para 1.5.
5 Section 2(1) defines 'licensee' as meaning (a) 'the holder of a licence under [the TO] and including (b) 'the holder of a licence (other than a programme service licence) – (i) granted under the Ordinance repealed by s 44(1) of the Broadcasting Ordinance (Cap 562); (ii) in force immediately before that repeal; and (iii) deemed to be a licence granted under this Ordinance by virtue of Schedule 8 to the Broadcasting Ordinance (Cap 562)'.
6 Section 2(1) defines a 'carrier licence' as meaning 'a licence issued for the establishment or maintenance of a telecommunications network for carrying communications to or from the public between fixed locations, between moving locations or between fixed locations and moving locations, within Hong Kong,

9.3 In June 2006, the Competition Policy Review Committee[7] recommended that the Government introduce a cross-sector competition law and establish an independent Competition Commission. On 6 May 2008 the Government issued a consultation paper setting out the proposed major provisions of a Competition Bill and invited the public to comment ('the 2008 Paper').[8] Following the consultation exercise, the Government reported in September that 'there is general support for most of the proposals in the consultation paper'.[9] The Bill was originally expected to be introduced into the Legislative Council ('LegCo') in the 2008/2009 legislative session.[10]

9.4 The Bill was eventually presented to the LegCo on 14 July 2010. The Bill has however been controversial. Concerns were expressed by the business community and in particular small and medium sized enterprises that its provisions were too onerous, the penalties too harsh and that it was too vague for a small organisation to judge whether it was in compliance or not. The Government put forward amendments in a number of areas and issued Guidelines on a number of aspects of the Bill. On 14 June 2012 LegCo voted to enact Hong Kong's first cross-sector competition law, the Competition Ordinance which was published on 22 June 2012.

9.5 The Ordinance has three main areas of focus: the First Conduct Rule (regulating agreements, wherever executed, that restrict competition in Hong Kong, the Second Conduct Rule (prohibiting the abuse of a substantial degree of market power to restrict competition in Hong Kong and the Merger Rule which will, at least initially, be limited only to those mergers, acquisitions and joint ventures affecting the telecommunications sector in Hong Kong. The prohibitions in the law are expected to come into effect after the establishment of the new Competition Commission and Tribunal. On 23 November 2012 the Government published in the Official Gazette a Notice dated 12 November 2012 concerning the entry into force of the Ordinance. The provisions instituting the Competition Commission and those empowering the Commission to issue implementing guidelines would come into force on 18 January 2013. The institutional provisions relating to the Tribunal would enter into force on 1 August 2013. The phased implementation strategy would

or between Hong Kong and places outside Hong Kong, on a point-to-point, point-to-multipoint or broadcasting basis, such locations within Hong Kong being separated by un-leased Government land, but does not include the licences listed in Schedule 1'.

7 This was appointed in June 2005 by the Competition Policy Advisory Group (established by the Government in December 1997) to review the effectiveness of Hong Kong's competition policy.

8 Commerce and Economic Development Bureau ('CEDB'), 'Detailed Proposals for a Competition Law' (May 2008).

9 CEDB, 'Report on Public Consultation on the Detailed Proposals for a Competition Law' (Sept 2008), Ch. 4, para 2.

10 Chief Executive, 'The 2007–08 Policy Address: a New Direction for Hong Kong', para 33.

see the substantive conduct rules come into force only at a later date (possibly not before late 2013 or 2014) by which time guidelines are to have been finalised.

9.6 Under s 6D of the TO, the Communications Authority,[11] formerly known as the Telecommunications Authority[12] ('the Authority'),[13] may issue guidelines for the purpose of providing practical guidance in respect of the TO. In May 2004, the Authority issued the Guidelines on 'Merger and Acquisitions in Hong Kong Telecommunications Market'. However, in January 2005, the Authority granted PCCW-HKT Telephone Limited a new form of fixed carrier licence without provisions relating to presumed dominance. With the migration from an *ex ante* to an *ex post* regulatory regime for the local fixed telecommunications services, the competition landscape of the telecommunications sector underwent a fundamental change. In view of this, the Authority considered that the 2004 guidelines required substantial adaptation. Accordingly, in May 2007 he issued a second consultation paper in relation to the prohibitions under ss 7K, 7L and 7N, together with revised Draft Competition Guidelines ('2007 Draft Guidelines'). Further developments since May 2007 such as the rapid rollout of mobile broadband services have impacted on the competition scene of the sector. Having regard to those and to the submissions in response to the 2007 consultation the Authority considered it necessary in 2010 to revise the 2007 Draft Guidelines and conduct another round of consultation before the Guidelines were finalised and issued. The consultation period was extended until 26 May 2010. The Guidelines to Assist Licensees to Comply with the Competition Provisions under the Telecommunications Ordinance were published under s 6D(1) of the TO on 30 December 2010 ('2010 Guidelines').[14]

9.7 Concern was expressed at the time the Government was in the process of planning for the introduction of cross-sector competition law in Hong Kong about the position of the competition provisions under the TO following the enactment of the cross-sector law and consistency between the two. In response, in the 2010 consultation, the Authority confirmed the Government's proposal that the Competition Ordinance would apply to all sectors of the economy including the telecommunications sector and the duplicate competition provisions in the TO would be repealed. The Authority would share concurrent jurisdiction with the Competition Commission to enforce the Competition Ordinance in

11 Established by s 3 of the Communications Authority Ordinance (Cap 106).

12 The Office of the Telecommunications Authority was dissolved on 1 April 2012 and superseded by the Office of the Communications Authority.

13 For convenience, both the Telecommunications Authority and the Communications Authority will be abbreviated as 'the Authority'.

14 See also the first edition of Guidelines on Practice and Procedure promulgated by the Telecommunications (Competition Provisions) Appeal Board on 8 November 2010 and 14 March 2012 separate Guides on how the Office of the Telecommunications Authority handled complaints relating to conduct prohibited under s 7M and the prohibitions in ss 7K , 7L and 7N.

the telecommunications sector. The Government's intention was that a new set of competition guidelines would be formulated under the new Ordinance. The publication of a set of formal guidelines reflecting how the Authority may interpret and enforce the three competition provisions should provide a more certain regulatory environment for the industry, pending the new law coming into force. Thus the decisions of the Telecommunications (Competition Provisions) Appeal Board ('the Competition Appeal Board') will therefore continue to be of relevance after the introduction of cross-sector regulations by way of the new Competition Ordinance.

ROLE OF THE AUTHORITY

9.8 The Authority is a body corporate with perpetual succession, and may sue and be sued, under its corporate name. It is not a servant or an agent of the Government nor does it enjoy any status, immunity or privilege of the Government.[15] It consists of no fewer than 5 and no more than 10 persons appointed by the Chief Executive, one public officer appointed by him and the Director-General of Communications ('Director-General').[16] One of the said 5 to 10 persons is to be appointed the chairperson and any member of the Authority to be the vice-chairperson.[17] Every question to be determined by the Authority shall be by way of a majority of votes of members present at a meeting with a quorum comprising a majority of the members for the time being in office, or a resolution in writing and signed by a majority of such members (one of whom is the chairperson, vice-chairperson or Director-General).[18]

9.9 Subject to written policy directions which may be issued by the relevant policy bureau Secretary, the Authority may do all things necessary to be done to perform his functions under the TO.[19]

9.10 The Authority may issue telecommunications licences other than those granted on an exclusive basis, and may determine the conditions of such licences.[20] It may also cancel or withdraw any licences, or suspend the same, in the event of any contravention by the licensees in question, but it must do so in a manner which, in all the circumstances of the case, is proportionate and reasonable in relation to the contravention concerned.[21]

9.11 Besides issuing guidelines under s 6D of the TO, the Authority may make a determination of the terms and conditions of interconnection between

15 CAO, s 3.
16 CAO, s 8(1).
17 CAO, s 9(1).
18 CAO, ss 20(4), 11(2).
19 TO, s 6A(1) and (2).
20 TO, ss 2, 7(5), (6) and (7). 'Exclusive licences' may be granted by the Chief Executive in Council: TO, s 7(1).
21 TO, s 34(4)–(4A).

telecommunications systems or services.[22] It may also direct a licensee to coordinate and cooperate with another licensee in the public interest to share the use of any facility owned or used by it,[23] or issue directions in writing to a licensee requiring it to take such action as the Authority considers necessary in order for the licensee to comply with any of the terms or conditions of its licence; or comply with any provision of the TO or any regulation made thereunder; or secure the connection of its services with other telecommunications systems and services.[24]

9.12 Before performing any function or exercising any power under the TO, the Authority may consult with the affected persons or members of the public.[25] It must, however, carry out such consultation before issuing any guidelines relating to the matters specified under s 6D(2) and (4), such as guidelines indicating the manner in which it proposes to perform his function of determining applications for licences.[26]

9.13 On receipt of a complaint from an affected party, or where the Office of the Communications Authority ('OFCA') otherwise comes into possession of relevant information, in relation to suspected contraventions or anti-competitive practices,[27] a decision will be made whether the situation merits a formal investigation. For the purposes of conducting an investigation, the Authority may exercise powers to require information from a telecommunications licensee,[28] enter the premises of a telecommunications licensee and inspect its documents and accounts[29] and request information from other persons relevant to such investigation.[30]

9.14 Where a contravention of the TO, or the terms and conditions of a telecommunications licence, is established, the Authority may:-

(i) issue a warning to the telecommunications licensee in question, where any other sanction is not justified by the circumstances of the case;[31]

(ii) issue directions in writing to a telecommunications licensee requiring it to take such action as the Authority considers necessary in order for the telecommunications licensee to comply with any of the terms or conditions of its licence, or the relevant statutory provisions;[32] or

22 TO, s 36A.
23 TO, s 36AA.
24 TO, s 36B.
25 TO, s 6C.
26 TO, s 6D(2A), (3) and (4).
27 2010 Guidelines, para 5.5.
28 TO, s 7I.
29 TO, s 35A.
30 TO, s 36D.
31 2010 Guidelines, paras 5.11–5.12.
32 TO, s 36B(1)(a)(i) and (ii). Such directions may require the licensee to modify an agreement or the manner of the exercise of contractual rights in contravention of

since the applicant is also claiming damages based on the breach of a contract between him and the Council in the judicial review proceedings, a declaration that the decisions were unlawfully made would go some way towards helping the applicant establish his claim; (2) the complaints underlying the challenges in that case were not 'one-off' complaints, since similar guidelines were commonly used by the Council in selection processes of various types; and (3) the grant of formal relief in favour of the applicant is the only solemn and formal way to highlight to the Council the importance of proper adherence to requirements of public law, and it is in the interest of the public as a whole that public bodies like the Council should perform its functions in a lawful and fair manner.

13.43 Another issue pertaining to remedies was discussed in *Matteograssi SpA v The Airport Authority*,[61] where the court cautioned that the judicial review procedure should not be used where no public law remedies are sought by the applicant. In that case, by the time the judicial review application was heard, the successful bidder in the relevant procurement had almost completed the contract. Feeling that the court would decline the discretionary remedies of certiorari or mandamus in this situation, the applicant abandoned its claim for such remedies so that the only relief left in the end was damages.

13.44 Section 21K(4) of the High Court Ordinance permits the inclusion of a claim for damages with an application for judicial review, This provides:–

> *'On an application for judicial review the Court of First Instance may award damages to the applicant if –*
>
> *(a) he has joined with his application a claim for damages arising from any matter to which the application relates; and*
>
> *(b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages.'*

13.45 In *Matteograssi*, the court took the view that the proceedings as constituted were incompetent, since the claim for damages could be read as existing on its own and was unrelated to matters to which the judicial review application relates. Furthermore, once it had become apparent to the applicant that no relief by way of judicial review was being sought, the judicial review procedure should no longer be pursued and the proceedings should either have been withdrawn or, where necessary, continued as if they had been begun by writ pursuant to O 53 r 9(5). Thus, the court held:

> *'It seems to me that there is no justification for continuing to use the judicial review procedure when all that is being sought is damages, the right to which the appellant would have had to establish on the basis of contract or tort. The judicial review procedure is not as fitted for consideration of a claim for damages as a normal action'*[62]

61 [1998] 3 HKC 2.

62 [1998] 3 HKC 2, at 34–35.

CHAPTER 14

Financial Regulation and Other Licensing Decisions

INTRODUCTION

14.01 Financial regulatory and other licensing decisions are permitted under a variety of Ordinances. In each case it will, when considering judicial review, be important to have regard to the terminology of the relevant Ordinance as well as, in many instances, issues relating to the protection of fundamental rights which may have an impact on the legality of such decisions and, in particular, on the interpretation of statutory provisions relating to financial regulation and licensing more generally.

14.02 This Chapter outlines the main areas where judicial review is or is not likely to be appropriate for challenging decisions taken in financial regulation and licensing cases generally. As will be seen, consideration by the Hong Kong Court of judicial review challenges in these fields raise several points that occur in judicial review more generally including prematurity, alternative remedy, standing and the ambit of relief.

CHALLENGING THE ENFORCEMENT POWERS OF FINANCIAL REGULATORS

14.03 There have been several judicial review applications in respect of financial regulation enforcement. The cases can (aside from specific challenges on points of statutory construction) be divided into two (sometimes overlapping) categories. These are: (i) cases where fundamental rights issues are advanced, (ii) fairness and natural justice grounds.

14.04 An example of the raising (albeit unsuccessfully) of fundamental rights issues in this context arose in *Koon Wing Yee v Securities and Futures Commission*.[1] In that case, the applicant sought to challenge an SFC notice requiring him to attend an interview with the SFC to answer questions in respect of suspected market abuse.

1 [2008] HKCU 1673 (unreported, CACV 369/2007, 29 July 2008).

14.05 The question at issue was whether or not the removal of the right to silence in relation the requirement to answer questions pursuant to a Notice issued under s 183(1) of the Securities and Futures Ordinance[2] and in relation to proceedings before the Market Misconduct Tribunal, was in breach of art 11(2)(g) of the Bill of Rights[3] (breach of privilege of self-incrimination).

14.06 At first instance, Mr Koon's application for judicial review was refused. The Court of Appeal dismissed his appeal on two grounds. First, it was considered to be premature since there were no current proceedings before the Market Misconduct Tribunal. Secondly, it was held that there was no breach of the Bill of Rights in a mere exercise of statutory power by the SFC. The Court summarised the position thus:

> *'The SFC was using its statutory powers to conduct an investigation and that it was perfectly entitled to do. If and when any attempt were made to use material in a manner which the applicant considered would be in breach of the Bill of Rights, then that would be the time when some objection could be taken. Likewise, if it were considered that any future proceedings before the Market Misconduct Tribunal were criminal in nature by reason of the orders that could be made and that the proper safeguards for those subject to such proceedings were not in place, then, again, appropriate proceedings might be taken. But that is not the case here. It is no exaggeration to say that if the SFC were to be prevented from asking questions of the applicant, its role in an investigation might be stultified.'*

14.07 The CFA refused leave to appeal.[4] However, that Court held that the proceedings were *not* premature[5] because there was a broader privilege against self-incrimination as an integral part of a fair trial protected by art 10 of the Bill of Rights. If Mr. Koon was entitled in law to invoke this broader privilege, his application in relation to self-incrimination could, therefore, not be said to be factually premature. As was pointed out in *Lee Ming Tee*[6] '*...the essence of the privilege is the withholding of answers.*'

14.08 Crucially though, the CFA held in its judgment refusing leave to appeal, that the broader privilege could not be invoked by Mr Koon in proceedings before the Market Misconduct Tribunal. This was because the privilege could only be invoked in *criminal* proceedings and proceedings before the Market Misconduct Tribunal were *civil* in nature.[7]

2 Cap 571.
3 Set out in s 8 of Cap 383.
4 [2009] HKCU 225 (unreported, FAMV 53/2008, 17 February 2009).
5 For a case where prematurity was held by the CFA to be fatal to a challenge founded on alleged fundamental rights violations in a financial regulatory context see *The Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234; [2006] HKLRD 518.
6 *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133.
7 See also *Chau Chin Hung v Market Misconduct Tribunal* [2008] HKCU 1463 (unreported, HCAL 123/2007).

14.09 This was to be contrasted with procedure before the Insider Dealing Tribunal which was – by reason of the power to impose a penalty – in that respect *criminal* in nature. This had been established by Mr Koon in separate case stated proceedings against the Insider Dealing Tribunal alleging violations of fundamental rights which also reached the CFA.

14.10 In those proceedings, (*Koo Wing Yee v Insider Dealing Tribunal*)[8] the question at issue was whether arts 10–11 of the Bill of Rights apply to proceedings before the Insider Dealing Tribunal and, if so, whether the use by the Tribunal of incriminating answers compulsorily given to incriminating questions and the standard of proof applied by the Tribunal complied with these provisions.

14.11 The CFA held that despite their domestic classification as *civil*, hearings before the Insider Dealing Tribunal involved the determination of a *criminal* charge under the Bill of Rights. This was because of the power to impose a penalty under s 23(1)(c) of the Securities (Insider Dealing) Ordinance. On that basis, arts 10–11 of the Bill of Rights were engaged. Given the provisions of s 17 (requirement to attend and answer questions before the Tribunal) and s 33(4), (6) (compulsory attendance before investigator and answer questions) of the Ordinance, there was a breach of arts 10 and (in the case of s 17) art 11(2)(g) of the Bill of Rights. The Court also held that the correct standard of proof was beyond reasonable doubt and that the Tribunal had, in Mr Koon's case, failed to apply that standard.

14.12 It then fell to the CFA to consider remedy. The CFA refused to declare the whole Insider Dealing regime to be in violation of Mr Koon's fundamental rights but, rather, limited its declaratory relief to holding that the imposition of penalty provision under s 23(1)(c) was in violation of arts 10 and (insofar as material) 11 of the Bill of Rights. The practical effect of limiting the declarations granted in that way was that the adverse findings (based on a civil standard of proof) against Mr Koon remained, now that the legal vice rendering the proceedings criminal in nature (s 23) had been removed.

14.13 Fairness and natural justice issues (usually in conjunction with fundamental rights) also frequently surface in the arena of financial regulatory enforcement. Thus, for example in *Sanyuan Group Ltd v Stock Exchange of Hong Kong Ltd*,[9] Sanyuan Group Ltd challenged, by judicial review, the fairness of proceedings before disciplinary decisions of the Listing Committee, the Listing Review Committee and the Listing Appeals Committee of the Hong Kong Stock Exchange in refusing to relist Sanyuan.

14.14 In an important statement of principle, Reyes J upheld the challenge. His lordship stated:

8 (2008) 11 HKCFAR 170; [2008] 3 HKLRD 372.
9 [2008] HKCU 850 (unreported, HCAL 25/2007).

> *'That the Exchange is a self-regulating body and the Exchange's Listing Committees are made up of experts in the market cannot by themselves override the need for fairness and transparency in the application of LR 13.24.*
>
> *An applicant must at least be entitled to know what standard of operation or what sort of asset base he is expected to have in order to qualify for re-listing. If his resumption proposal is rejected, an applicant cannot simply be told that his turnover, profit or assets are considered insufficient. That is tantamount to giving no reasons. The applicant further needs to be informed in what sense his financial numbers have been deemed to be insufficient. The applicant is entitled to know just what level of operation or asset base he has fallen below.'*

14.15 The decision was overturned by the Court of Appeal,[10] which unanimously rejected Reyes J's "benchmark" requirement. The court "*should hesitate long and hard before moving to interfere with the decision of a market regulator*", Stone J stated, and the requirement of providing a "benchmark" in the given circumstances was "*a case of judicial review exceeding appropriate bounds*". However, the Court did not reject the need for due process and procedural fairness; indeed it expressly concurred that the lack of it may render "*interference inevitable by way of judicial review*".

14.16 Ultimately, leave to appeal was refused by the CFA[11], accepting the Court of Appeal's reasons. The failure to provide standards or "benchmarks" was not, in the circumstances, a case of procedural unfairness. Per Ribeiro PJ:

> *"9. In our view, the nature and content of reasons which must be given to explain or justify a decision must vary depending on all the circumstances of the case, including the nature of the decision in question. In the present case, we are concerned with a particular company putting forward a proposal as to its intended business operations with a view to persuading the Exchange's monitoring committees that public trading in its shares ought to be resumed. Only those responsible for that company, knowing what financial, management, technological and other resources are available to them, are in a position to formulate such a proposal and to project the level of operations, of capital assets and of profitability considered to be within their reach. It is for the Exchange, through its committees, to examine that proposal and decide whether it is realistic, sustainable and of a scale and nature which justifies permitting resumption of the public listing. It is not the Exchange's role to propose an alternative business plan, or to specify alternative operating, capital or profitability levels to be achieved by the applicant as the basis for a re-listing. The premise of the present application is therefore unsound. It makes little sense for the Exchange to be required as a matter of law to lay down abstract "benchmarks" or standards not tied to the particular resources of the applicant company and a failure to do so cannot reasonably be regarded as procedural unfairness."*

10 [2009] HKCU 1057 (unreported, CACV 191/2008).
11 [2009] HKCU 1945 (unreported, FAMV 52/2009).

ALTERNATIVE REMEDY IN FINANCIAL REGULATION JUDICIAL REVIEW CASES

14.15 As in other public law contexts, the existence of an available appeal route will usually – though not invariably – preclude the use of judicial review unless and until that appeal route has been exhausted. This gives effect to the doctrine of alternative remedy as the basis for a discretionary refusal to hear judicial review proceedings or to grant relief in such proceedings.[12]

14.16 In financial regulation cases, there are usually prescribed routes for appeal and judicial review will often not be entertained unless those alternative remedies have been exhausted. Thus in *Sanyuan* (considered above), the applicants exhausted all routes of appeal/review before different Listing Committees of the Stock Exchange before ultimately seeking judicial review.

14.17 The normal position was articulated by Hartmann J in *Berich Broekerage Ltd v Securities and Futures Commission*[13] when refusing to grant leave to apply for judicial review to an applicant who was dissatisfied with the conduct of an investigation by the SFC but who had a statutory right of appeal to an Appeals Tribunal:

> *'As a factor to be taken into account in assessing whether to grant leave, the existence of an effective alternative remedy assumes even greater weight when — as in the present case — relevant legislation lays down a comprehensive system of appeals procedure guaranteeing that alternative remedy. In such cases, it has been observed that leave will only be granted in exceptional circumstances: see Harley Development Inc v Commissioner of Inland Revenue [1996] 1 WLR 727.'*

14.18 However a more generous approach was taken by the Court was the decision of Godfrey JA (sitting as an additional judge of the CFI) in *Nam Pei Hong (Holding) Ltd and Another v The Stock Exchange of Hong Kong Ltd.*[14] Although the judicial review challenge failed, Godfrey JA would not have declined jurisdiction on the ground of alternative remedy. His lordship stated:

> *'23. The second issue, alternative remedy, does not strictly speaking, arise. But since this issue was fully argued, I will briefly state my conclusions on this issue as well.*
>
> *24. I agree with Wade and Forsyth (see Administrative Law, 7th Edition, 1994, at p.721) that despite the wealth of dicta in the books (including pronouncements of the Privy Council, not to mention of this court: see*

12 For further examination of this discretionary principle, see paras 5.65–5.83. In judicial review challenges to licensing decisions following an appeal, it is often the practice to bring proceedings against both the original decision-maker and the appeal body. In many of the cases below, the relevant appeal body appeared as a second respondent.
13 [2005] 2 HKLRD 583.
14 [1998] 2 HKLRD 910.