

Johnny Mok SC is one of the leading members of the Bar in Hong Kong. Both are to be congratulated for being authors of a book that surely ought to be on the shelves of every law library.

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A v The Independent Commissioner Against Corruption (2012) 15 HKCFAR 362	7.146
A Solicitor v Law Society of Hong Kong (unreported, CACV 302/2002, February 18 2004)	6.101
A Solicitor v Law Society of Hong Kong [2006] 2 HKLRD 116	7.168
A (Torture Claimant) v Director of Immigration [2008] 4 HKLRD 752	7.103, 12.121
AECS & Ors v Secretary for the Civil Service HCMP 3037/1994	2.56
Ai Kheng Jasmine v Master M Yuen & Anor [2004] HKCU 742 (unreported, HCMP 1153/2004, 29 June 2004)	2.53
Air Canada v Secretary of State for Trade (No 2) [1983] 2 AC 394	3.51
Airedale NHS Trust v Bland [1993] AC 789	5.38
Aita Bahadur Limbu v Director of Immigration [1999] HKCU 1474 (unreported, HCAL 133/1999)	12.57
Allenet de Ribemont v France (1995) 20 EHRR 557	8.55
Allied Group Ltd v A-G [1993] 2 HKLR 419	2.51
Alwyn Jones v Motor Insurers' Bureau of Hong Kong [2005] HKCU 1780 (unreported, HCAL 139/2005)	2.82
AM v Director of Immigration and Anor [2013] 1 HKC 256	6.48
American Cyanamid Co v Ethicon Ltd [1975] AC 396	2.96, 2.97, 2.98, 2.100, 5.14
An Banne Bord Bainne Cooperative Ltd (Irish Dairy Board) v Milk Marketing Board [1984] 2 CMLR 584	3.23
Anderson Asphalt Limited and Others v The Secretary for Justice (HCAL 28/2006 and HCAL 98/2007)	11.97
Anderson Asphalt Limited and Others v The Secretary for Justice [2009] 3 HKLRD 215, upheld on appeal to the Court of Appeal in [2010] 5 HKLRD 490	1.61, 3.12, 11.107, 11.111, 11.114, 13.35