

# APPLICATION FOR LEAVE FOR JUDICIAL REVIEW: A PRACTICAL NOTE



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As society progresses in terms of affluence, sophistication, legal and political awareness and expectation, it is inevitable that the number of challenges against government's decisions will increase. This trend is observable in Hong Kong, as witnessed by the rapid increase in number of applications for judicial review in recent years. Indeed, the right has been regarded as so important that it has found a place in the Basic Law.<sup>1</sup> Yet, interestingly, judicial supervision over executive decisions and actions was developed in a haphazard manner in the last 100 years, and a system of public law was said to have been introduced in English common law only in 1977 after the adoption of Order 53 of the Rules of the Supreme Court and firmly established after the celebrated decision of *O'Reilly v Mackman*.<sup>2</sup> They established the exclusive procedural rule that a person seeking relief against a public authority in relation to rights protected under public law must as a general rule proceed by way of an application for judicial review. Application for judicial review is a two stage process: a leave application followed by a substantive hearing. This article will focus on the leave application. It surveys recent development in this area and highlights some practical pitfalls. In so doing it also intends to establish a standard paradigm for any application for leave for judicial review.

## **A reminder**

Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'.

<sup>1</sup> Art 35 of the Basic Law provides that 'Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.'

<sup>2</sup> [1983] 2 AC 237.

In *R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society*,<sup>3</sup> Sir John Donaldson MR stated:

On the society's application for judicial review it is not for the court to consider whether the chief registrar's decisions were "right" or "wrong", or to entertain an appeal from them or to substitute the court's discretion for his. The role of the court is to consider whether the chief registrar has exceeded his powers.

The court cannot be the judge of the merits of government policies. Nor is the court concerned with technical procedural irregularity or breach of natural justice as such, but with actual injustice or a real risk of injustice. These may sound elementary, yet it is surprising to see how many cases were thrown out because of a failure to appreciate the true nature of an application for judicial review. In *Tong Pon Wah v Hong Kong Society of Accountants*,<sup>4</sup> it was held that it was not for the court to second guess the professional judgment of a disciplinary committee unless the decision was plainly wrong or contrary to evidence. In *Chim Shing Chung v Commissioner for Correctional Service*,<sup>5</sup> the applicant challenged the policy of the Commissioner for Correctional Services under which racing supplements to newspapers subscribed by prisoners were removed on racing days in order to curb illegal gambling in prison. It was argued that the application of the policy was arbitrary and unsuccessful. On appeal, Litton VP emphasised that 'success or failure of government policies is not the test of legality. Competing policy considerations are not matters which courts of law can properly weigh. These are matters of value judgment based on priorities which the decision-maker considers relevant.'

Judges could also be the prey of this principle. In *Secretary for Justice v Prudential Hotel (BVI)*,<sup>6</sup> the Secretary for Home Affairs, after renewing a licence under the Hotel and Guest House Accommodation Ordinance,

<sup>3</sup> [1984] QB 227 at 241-2. See also *Champion v Chief Constable of the Gwent Constabulary* [1990] 1 WLR 1 at 12.

<sup>4</sup> [1998] 3 HKC 82. See also *Tran Van Tien v Director of Immigration* [1997] HKLRD 183 at 189; *Ng Wai Sang v Secretary for Justice* [1998] 2 HKLRD L14; *Kwan Chee Keung v Medical Council of Hong Kong* [1999] 1 HKC 226.

<sup>5</sup> (1996) 6 HKPLR 313 at 320.

<sup>6</sup> [1997] 3 HKC 244 at 248.

issued a fire abatement notice under s 19 of the Fire Services Ordinance requiring the removal of false ceilings or re-installation of the sprinklers under the false-ceiling. The issue was whether the Secretary was entitled to change his mind by imposing an additional requirement after the licence has been granted. The trial judge compared the strength of the expert evidence produced by both parties and expressed a preference for one to the other in quashing the decision. In allowing the appeal, the Court of Appeal warned that this was an inappropriate approach. Godfrey JA stated:

[The trial judge] embarked on an evaluation of the evidence given by Mr Lam, Chief Fire Officer, for the Secretary, on the one hand, and by Dr Smith, a fire engineering consultant from London (who had not himself inspected the premises and who it appears may not have fully appreciated the configuration of the 16th floor), on the other hand. That was not, as it seems to me, an appropriate course for the judge to take. It was not for the judge to compare the evidence of Mr Lam and Dr Smith, and to express, not only a preference for the evidence of Dr Smith, but to conclude that the evidence of Mr Lam ought to be disregarded altogether. *It was not the function of the judge even to consider which of the two was to be preferred. The function of the judge was simply to see whether there was evidence before the Secretary upon which he could legitimately and rationally conclude, in giving the s 19 notice, that there was a need for the provision/extension of these sprinklers notwithstanding his original assessment that there was no such need.* (Emphasis mine)

### **The starting point**

The starting point for any application for leave for judicial review must be section 21K of the High Court Ordinance<sup>7</sup> and Order 53 of the Rules of the High Court, which set out the basic framework for an application for judicial review. The Practice Direction on the Constitutional and Administrative Law List covers matters such as the proper respondent,

<sup>7</sup> Cap 4, LHK.

the bundle, delay and so on, which provides excellent guidance on the practical aspects.<sup>8</sup>

The leave application must be commenced in the standard form (Form 86A), accompanied by a supporting affirmation. It is an *ex parte* application, which means that the potential respondent, even if he is put on notice, has no right to address the court without permission. As many leave applications involve issues of general public interest, the court may decide to deal with the applications in open court. Leave may be granted, and increasingly so, without a hearing. The test for granting leave is potential arguability, that is, whether the materials before the trial judge disclose matters which might, on further consideration, demonstrate an arguable case for the grant of the relief claimed.<sup>9</sup> It is not necessary to show an arguable case at the leave stage.

I have already referred to the rule of procedural exclusivity in *O'Reilly v Mackman* above. The rule has been rigidly applied so that a public law challenge commenced otherwise than by Order 53 will be dismissed. In *Polorace Investments Ltd v Director of Lands*,<sup>10</sup> it was held that a claim on legitimate expectation could not proceed by originating summons. In *Matteograssi SPA v Airport Authority*,<sup>11</sup> it was held that a private law claim for damages was not sustainable under Order 53.

Sometimes it is not easy to decide whether an action should proceed by way of judicial review. When the validity or constitutionality of an Ordinance is being challenged, the proper course is to apply for judicial review of the Chief Executive's decision to assent to the Ordinance and for a declaration that the Ordinance is of no effect.<sup>12</sup> In *Lau Wong Fat v Attorney General*,<sup>13</sup> the applicant challenged the constitutionality of the New Territories Land (Exemption) Ordinance, which altered the exclusive succession rights of male indigenous inhabitants of the New Territories, for being inconsistent with the Letters Patent, the Bill of Rights and the Basic Law. The proceeding was commenced by writ and the court held that this was the wrong procedure. It was held that where

<sup>8</sup> Practice Direction 26.1 [1999] HKLRD(PD) 188.

<sup>9</sup> *R v Director of Immigration, ex parte Ho Ming-sai* (1993) 3 HKPLR 157.

<sup>10</sup> [1997] 1 HKC 373 at 380, 384.

<sup>11</sup> [1998] 3 HKC 25 at 35.

<sup>12</sup> *Lee Miu Ling v Attorney General (No2)* (1995) 5 HKPLR 585 at 596: it was wrong to proceed by way of originating summons.

<sup>13</sup> [1997] HKLRD A15; (1997) 7 HKPLR 307 (CA).

a person seeks to establish that the decision of a person or body infringes rights which are entitled to protection under public law, he must, as a general rule, proceed by way of judicial review and not by way of an ordinary action, whether for a declaration or an injunction or otherwise. Otherwise it is contrary to public policy and an abuse of court process. There are, however, cases in which it might be permissible to litigate public law issues in private law proceedings, such as where the invalidity of the decision of the public authority arises as a collateral issue in a claim for infringement of a private right.<sup>14</sup>

Under Order 53 r 9(5), an action which is erroneously commenced by way of judicial review may be deemed to have been commenced by writ and be permitted to continue as such. However, this is a one-way process so that an action erroneously commenced by writ or originating summons cannot be treated as having begun by way of judicial review. There is also the time factor, as an application for judicial review must be commenced within 3 months after the decision which is sought to be challenged is made. Thus, it is always advisable to commence an action by way of judicial review whenever it is doubtful of the correct procedure. As Lord Woolf put it in *Trustees of the Dennis Rye Pension fund v Sheffield City Council*:<sup>15</sup>

If it is not clear whether judicial review or an ordinary action is the correct procedure it will be safer to make an application for judicial review than commence an ordinary action since there then should be no question of being treated as abusing the process of the court by avoiding the protection provided by judicial review. In the majority of cases it should not be necessary for purely procedural reasons to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue). If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office list.

<sup>14</sup> *Ibid.*, at 311. See also *Pawlowski (Collector of Taxes) v Dunnington* (1999) 11 Admin LR 565 and below.

<sup>15</sup> [1997] 4 ALL ER 747 at 755a-c.

However, conversion is not always possible. In *Sit Ka Yin Priscilla v Equal Opportunities Commission*,<sup>16</sup> the applicant alleged that her dismissal from the Equal Opportunities Commissioner was not made in accordance with the *Disciplinary Policy and Procedures* which the Commission had circulated to all members of staff. The court dismissed her claim on the ground that wrongful termination of employment was essentially a private law claim in contract and it was inappropriate to invoke the procedure for judicial review. Mere employment by a public authority did not per se inject any element of public law. It only made it more likely that there would be special statutory restrictions on dismissal or other statutory underpinning of the employment. On the other hand, the application could not continue as if it were begun by writ because it was not properly pleaded why the terms of the *Disciplinary Policy and Procedures* formed part of her contract of employment.

If proceedings were properly commenced by way of judicial review and therefore parts of the proceedings were ordered to be proceeded by way of writs for certain purposes, the latter proceedings are still to be regarded as judicial review proceedings and therefore no third parties can be joined at this stage of the proceedings. In *Nguyen Tuan Cuong v Secretary for Justice*,<sup>17</sup> the applicants succeeded in their application for judicial review and claimed damages for false imprisonment. The court ordered that assessment of damages be proceeded as if the same had been begun by writ. Subsequently, the court allowed a joinder of 64 additional parties who had never applied for judicial review but with similar claims. On appeal by the Secretary for Justice, the Court of Appeal held that Order 53 r 9(5) could not be construed to allow parties who had never applied for leave to be joined in judicial review proceedings. The proceedings remained judicial review proceedings but procedurally thereafter were treated as a writ action for various purposes. That did not mean that the proceedings had been begun by writ, nor was there some hypothetical writ in existence. Thus, the additional parties who wished to claim for damages for false imprisonment must either bring judicial review proceedings themselves, and add to that a claim for damages, or

<sup>16</sup> [1998] 1 HKC 278 at 283.

<sup>17</sup> [1999] 1 HKC 242 at 244, 246, 247 (CA). See also *Tong Tim Nui v Hong Kong Housing Authority* [1991] 4 HKC 466 at 482B-C, 484D(CA).

bring a private law claim for damages in an action commenced by writ. They could not short-circuit the O53 procedure.

### **A decision to be reviewed**

It is important to identify the decision that is sought to be challenged. A decision can take many forms and may not be described as such. It may take the form of a letter, a circular, a memo, minutes of a meeting, a ruling, an order, etc. It is necessary to particularise the decision with a fair degree of details: who made the decision? When was it made? What was the gist of the decision? How was it related to the Applicant? What was the statutory basis of the decision? In most cases this is rather straight forward. Complications may arise in a number of situations:

- (1) Further negotiations take place with a view to change the original decision, resulting in further rulings from the decision maker or his superior affirming the original decision, or when the applicant appeals to a higher body when there is no statutory procedure for appeal or when there is only an appeal to the Chief Executive in Council. In *Hong Kong and China Gas Co Ltd v Director of Lands*,<sup>18</sup> the applicant was granted a lease in 1963 for storing and supplying liquid petroleum gas, which was replaced by town gas in 1975. In 1987, the Government adopted a policy that leases for special purposes, which included the lease in question, would be extended for 50 years upon renewal unless the land was no longer used for the purpose for which the lease was originally granted. In 1996, the Re-grants Unit decided not to extend the lease of the applicant upon expiry. The applicant did not challenge the decision within 3 months, and subsequently requested the Director of Lands to reconsider the decision upon request, who confirmed the decision 6 months later. The applicant then commenced judicial review proceedings challenging the latter decision, and a preliminary issue was whether the application was made within time. It was held that although the later decision had the effect of confirming the

<sup>18</sup> [1997] 3 HKC 520 at 524.

earlier decision, it could properly be said to have superseded and replaced it. That was because it followed a reconsideration of the issue by the Director of Lands (rather than by the officer who made the earlier decision who was a subordinate officer in the Regrant Unit) after the views of officials both within the Lands Department and in the Electrical and Mechanical Services Department had been sought. This decision suggests that the time limit can be enlarged in appropriate circumstances. If a public officer decides to reconsider an earlier decision made by him or his subordinate, the decision made following that reconsideration is amenable to judicial review even if it is a confirmation of the earlier decision. However, mere request for reconsideration is insufficient, for otherwise it will defeat the purpose of the time limit. It is necessary to introduce new arguments, new facts, or even a new proposal.<sup>19</sup>

- (2) A decision is in a form of a proposal which is subject to confirmation or approval. In general, a mere proposal is not susceptible to judicial review. On the other hand, recent cases suggested that the court is prepared to make a declaration when there is a concluded government stance which, if correct, is likely to infringe an applicant's rights, even when there is no decision as such. In *R v Secretary of State for Employment, ex parte Equal Opportunities Commission*,<sup>20</sup> upon an enquiry from the Equal Opportunities Commission ('EOC') whether the Secretary for State was willing to introduce legislation to remove certain law which the EOC considered discriminatory, the Secretary replied that the law was not discriminatory and the provisions were justified. The EOC then applied for judicial review and sought for a declaration. The House of Lords held that there was no decision which could form the subject of a challenge by way of judicial review. Nonetheless, the court had jurisdiction to declare whether the existing legislation was discriminatory and

<sup>19</sup> Note that when there is a statutory appeal procedure, the question is then whether the alternative remedy should first be pursued: see below. Note also the time limit and the requirement of O 53 r 3(8).

<sup>20</sup> [1995] 1 AC 1.



judicial review was the appropriate procedure for the determination of that issue. Lord Keith stated:<sup>21</sup>

It is argued for the Secretary of State that O 53 r 1(2), which gives the court power to make declarations in judicial review proceedings, is only applicable where one of the prerogative orders would be available under rule 1(1), and if there is no decision in respect of which one of these writs might be issued a declaration cannot be made. I consider that to be too narrow an interpretation of the court's powers.

The *ex parte* EOC case was considered in *R v Secretary for Civil Service and the Attorney General, ex parte Association of Expatriate Civil Servants*.<sup>22</sup> The applicant challenged various aspects of the localisation policy, one aspect of which was the uniform terms scheme which required, inter alia, a pass in Chinese in the Certificate exam or a basic Chinese language proficiency test as a pre-requisite for transfer to permanent and pensionable terms. The Government argued that the uniform terms scheme was only a proposal for consultation. It was held that the scheme was not amenable to judicial review because (1) there was a possibility of the proposal not been put into effect; and (2) no one had standing to challenge the proposal because no one would be affected by the proposal until it was put into effect. Keith J distinguished the *ex parte* EOC case on the basis that the statement of the Secretary of State amounted to a decision not to introduce amending legislation and held that there must have been a concluded government stance which was sufficient for the purpose of judicial review.<sup>23</sup> However, Keith J accepted that the mere fact that an issue was hypothetical did not mean that the court did not have jurisdiction to determine it; it only went to whether the court in its discretion should grant declaratory relief. He declined to do so as a declaratory relief in the particular circumstances of the case was too close to the court giving an

<sup>21</sup> *Ibid.*, at 26.

<sup>22</sup> (1995) 5 HKPLR 490 at 565-566 (HCt); (1996) 6 HKPLR 333 at 370-371 (CA).

<sup>23</sup> *Supra*, at 566.

advisory opinion. The Court of Appeal affirmed that mere proposal was not susceptible to judicial review. Bokhary JA held that the real object in the *ex parte* EOC case was a declaration that certain primary UK legislation was incompatible with European Community law and so searching for a reviewable decision by the Secretary would be barking up the wrong tree.<sup>24</sup>

In contrast, the *ex parte* EOC case was followed in *Wharf Cable Ltd v Attorney General*.<sup>25</sup> HKTel carried out a trial run of its new service of Video on Demand (VOD) during the exclusive licence period of Wharf Cable Ltd. When Wharf protested that this would constitute an infringement of its exclusive right to operate subscription television service, the Government expressed the view that VOD was outside the Television Ordinance and therefore no licence was required. The Government further expressed its intention to introduce VOD service. On judicial review, a preliminary issue was whether the Government's stated and continuously held view that the provision of VOD did not require a licence under the Television Ordinance was a justiciable issue. The court, relying on the *ex parte* EOC case, held that it had jurisdiction to make a declaration on the issue. Sears J held that the justiciable issue in this case was the government's stated and continuously held view of the law that the provision of VOD did not require a licence under the Television Ordinance. If this view of the law was wrong, then Wharf's legal rights would be infringed.

Two further cases are worth mentioning here. In *Director of Legal Aid v Van Can On*,<sup>26</sup> the applicant was refused legal aid. On his appeal to the Registrar, he requested the Director of Legal Aid to supply him with the papers released to the Director of Legal Aid by the Director of Immigration. The Director of Legal Aid refused to do so on the ground that the papers were released to him for considering legal aid only, and he was bound by an

<sup>24</sup> In *R v Electricity Commissioner, ex parte London Electricity Joint Committee* [1924] 1 KB 171, the court was prepared to grant a declaration in relation to an proposed electricity scheme which had still had to be approved by the Transport Committee and endorsed by both Houses of Parliament.

<sup>25</sup> [1996] 1 HKLR 156 at 160-1.

<sup>26</sup> [1997] HKLRD 635 at 647 (CA).

undertaking to the Director of Immigration not to release the papers for other purposes. The Registrar, who was supplied with the papers, recommended the Director of Immigration to disclose the papers to the Applicant. The Director of Immigration refused to do so. The applicant sought judicial review of the decision of the Director of Immigration on the ground that it would deny him a fair hearing before the Registrar. The court held that the application was premature, but accepted that in exceptional cases the High Court may intervene to regulate unfair procedure in advance of a substantive decision.

In another case, the court refused to make a pre-emptive strike to disqualify a member of a tribunal before the hearing. In *R v Chairman of the Town Planning Board, ex parte Mutual Luck Investment Ltd*,<sup>27</sup> the applicant attempted to disqualify Litton VP as the chair of the Town Planning Appeal Board in relation to an appeal relating to land situated in Yuen Long on the ground that he was a member of the Board of Governors of Friends of the Earth, an environmental pressure group which had commented on the environmental impact of development in that area. The court held that the application was premature. It was generally undesirable to apply for judicial review in order to affect the composition of a judicial or quasi-judicial body which was to adjudicate in a dispute, as it was purely speculative at that stage whether the appeal might go against the applicant and whether the applicant would not have a fair hearing.<sup>28</sup> This reason is difficult to follow, as whether there is an appearance of bias because of the chair being a member of the Board of Governors of Friends of the Earth would not have been changed by the outcome of the appeal. The decision of the case may be better supported by the alternative ground that since Litton VP had not himself expressed any adverse view on the matter to be

<sup>27</sup> (1995) 5 HKPLR 328 at 337.

<sup>28</sup> At 337-338. In coming to this decision the Court distinguished *R v Kent Police Authority, ex parte Godden* [1971] 2 QB 662 on the ground that the doctor appointed to the compulsory retirement board to determine whether the applicant was suffering from mental disorder of a paranoid type was the same doctor who was appointed to determine if he was permanently disabled and had expressed an adverse view on the condition of the applicant.

adjudicated, the mere fact that he was once a governor was insufficient to show a real possibility of bias.

- (3) There are numerous exchanges between different government departments and it becomes unclear who is making which decision, or when there are multiple decision-makers.<sup>29</sup> There is no hard and fast rule when an applicant was caught in the impenetrable bureaucracy, though it is perhaps safe in most cases to name the responsible secretary as the respondent.<sup>30</sup>
- (4) If the applicant intends to challenge the constitutionality of a statutory provision, the proper decision to be challenged would be the decision of the Chief Executive to give assent to the legislation.<sup>31</sup> It is possible to challenge a bill.<sup>32</sup> However, given that the Legislative Council these days consists largely of elected members who are more active, and that in any controversial bill there are almost invariably major amendments proposed by private members which may change the fundamental features of the bill, it is better to wait until the bill has been passed by the Legislative Council.

It is always a good practice to send a pre-action letter requesting the decision maker to re-consider his decision or to give reasons for his decision. While this is not strictly necessary, it helps formulating the grounds for judicial review and may have costs implications.

### The decision is amenable to judicial review

The rule of procedural exclusivity means that only a decision exercising a public law power is amenable to judicial review. Unfortunately, the

<sup>29</sup> See, for example, *Khan v Attorney General* [1986] HKLR 972.

<sup>30</sup> In *Pang Hon Wah v Attorney General* [1997] 2 HKLRD 177 (CA), it was held that it was wrong to name the Attorney General as the respondent when the applicant wished to challenge the decision of the Investigative Committee of the Housing Department. The proper respondents should be the Investigative Committee (but application was already out of time) and the Director of Housing (leave was granted).

<sup>31</sup> *Lee Mau Ling v Attorney General (No2)* (1995) 5 HKPLR 585 at 596; *Lau Wong Fat v Attorney General* [1997] HKLRD 533 at 536; (1997) 7 HKPLR 307 at 310

<sup>32</sup> *Rediffusion (Hong Kong) Ltd v Attorney General* [1970] AC 1136; *R v Electricity Commissioner, ex parte London Electricity Joint Committee* ([1924] 1 KB 171).

distinction between public law and private law is most artificial and difficult to apply, and some judicial decisions cannot be reconciled with one another.<sup>33</sup>

The starting point is that a contractual claim is a private law claim. Thus, it was held in *Sit Ka Yin Priscilla v Equal Opportunities Commission* that it was inappropriate to commence judicial review proceedings for a claim for damages for wrongful termination of employment.<sup>34</sup> Employment by a public authority did not per se inject an element of public law.

Similarly, it was held in *Matteograssi SPA v Airport Authority* that the nature of tender was contractual and therefore the decision of a public authority to handle tender was not amenable to judicial review.<sup>35</sup> In this case, the applicant submitted the lowest tender to provide seating at Chek Lap Kok, but the contract was awarded to another contractor. Section 6 of the Airport Authority Ordinance provides that the Airport Authority should conduct its business according to 'prudent commercial principles' and to have regard to 'economy'. The Court of Appeal held that a public authority exercising its capacity to contract was carrying out a purely commercial function. Such decisions were private law matters and were not amenable to judicial review in the absence of fraud, corruption or bad faith. The trial judge should have treated the application as begun by writ but he did not do so, hence the application was incompetent. The court further added that there was no universal test to determine whether a decision by a public body was amenable to judicial review. The answer was one of overall impression and degree.<sup>36</sup>

In *Polorace Investments Ltd v Director of Lands*,<sup>37</sup> the applicant argued that it had suffered detriment in reliance on the government's land

<sup>33</sup> See, for example, *Hang Wah Chong Investment Co Ltd v Attorney General* [1981] HKLR 336; *Benbecula Ltd v Attorney General* [1994] 3 HKC 23. Cf. *Canadian Overseas Development Co Ltd v Attorney General* (1994) Hct, MP No 3637 of 1991. See also Johannes Chan, 'The Rule of Law and Access to Court: Some Thoughts on Judicial Review in Hong Kong' *Law Working Paper Series No 13*, Faculty of Law, University of Hong Kong (1996).

<sup>34</sup> [1998] 1 HKC 278. See also *Dlugash v Mayers* [1997] 2 HKC 814 at 820 (expert's determination made under private contract not susceptible to judicial review, for example, for failing to comply with the rules of natural justice).

<sup>35</sup> [1998] 3 HKC 25; [1998] 2 HKLRD 213 (CA). The applicant claimed for damages (unparticularised), certiorari and mandamus, but the prerogative reliefs were abandoned subsequently because the contract was nearly completed at the time of the court hearing.

<sup>36</sup> [1998] 3 HKC 25 at 31.

<sup>37</sup> [1997] 1 HKC 373 at 380, 384.

administration policy, as affirmed in a letter from the respondent, that it would not charge a premium for granting approval under the design, disposition and height restriction clause, although the respondent had reserved his right to review the policy in the future. The court held that in dealing with the Applicant, the Respondent acted as a private landlord. The matter of charging premium under covenants in the lease was governed by private and not public law, and was not susceptible to judicial review.<sup>38</sup>

In contrast, in *Attorney General v Odelon Ltd*,<sup>39</sup> the applicant submitted the highest tender (by way of premium) for the grant of land for the construction of the Tuen Mun River Trade Terminal. The contract was awarded to another bidder. In spite of the tendering procedure being in the form of a grant of land for a premium and hence contractual, the Court of Appeal was prepared to assume without deciding that the exercise was in substance an exercise of governmental function with a clear public element and therefore amenable to judicial review.

The court reached a similar conclusion in *Wong Pei Chun v Hong Kong Housing Authority*,<sup>40</sup> which involved the resettlement of the residents at Rennie's Mill. In challenging the propriety of certain notices to quit served on the applicants, they relied on the promise made to them in 1961 by the Home Secretary not to evict them for life. Although the issue of notices to quit was normally one of private law, Sears J held that the promise was made by a public official prior to the village becoming a cottage resettlement area. It was given not by the government as landlord, but as a solemn assurance from the Hong Kong Government, and most probably the Governor. Hence, the conduct of serving the notices to quit without either the acknowledgement of the promises, or the offer of damages for the breaking of the promise amounted to an abuse of power and hence amenable to judicial review.

In *Hong Kong and China Gas Co Ltd v Director of Lands*,<sup>41</sup> it was held that the crucial question was the nature of the function to be performed.

<sup>38</sup> See below. The application also failed on the ground that the applicant could not proceed with its claim on 'legitimate expectation' by originating summons.

<sup>39</sup> [1996] 1 HKLR 190 at 191 (CA).

<sup>40</sup> [1996] 2 HKLR 293 at 300.

<sup>41</sup> [1997] 3 HKC 520 at 526. (Not to extend special lease upon expiry – legitimate expectation based on 1987 policy statement that special lease will normally be extended to 2047)

The mere fact that the decision being challenged was related to a Crown lease, which was governed by the law of contract, was not decisive. The true question was whether the making of the particular decision in question relating to a Crown lease amounted to the performance of a function within the public domain. The true demarcation between public and private law depended on whether the decision-making body took the decision challenged in the course of its public functions. In this particular case, in deciding whether to extend the special lease for storage of town gas, the Director of Lands had to have regard to a host of competing interests, such as the interest of the community at large in having an emergency, the maintenance of gas depot in Tsuen Wan, the disadvantage of the site being unavailable to other potential lessees at a significant premium in the event of the lease being extended, and whether these considerations justified a departure from the general policy in the policy statement which would normally be applied to public utility companies. It was held that this was an exercise of public function and the decision was therefore amenable to judicial review.

In contrast, in *Kam Lau Koon v Secretary for Justice*,<sup>42</sup> the applicant applied for judicial review to challenge a decision not to renew its special purpose lease, which was to use the land as an ancestral temple, when the land was used as a Taoist temple for public worship. It was argued that the decision was unreasonable as there was no breach of special condition; that Taoist temple was an ancestral temple and had in any event been in existence since 1970 and there was a presumption of compliance with the terms of the lease and decision partly based on policy statement, applying *Hong Kong and China Gas Co Ltd* case. Yeung J accepted that in determining whether the lease should be extended under the 1987 policy statement, the Director of Lands may have to perform a function within the public domain, particularly when the question of whether the land was likely to be required for a public purpose arose or when the decision involved the balancing of the interests of the community at large. However, in this case what the Director had to decide was whether there had been any breach of the special conditions and whether the land was being used for the purposes for which the lease was originally granted.

<sup>42</sup> [1998] 2 HKLRD 876 at 882, but compare *Canadian Overseas Development Co Ltd v Attorney General* [1991] 1 HKC 288.

Such decision did not involve or affect the public, and therefore judicial review was misconceived.

These decisions are not easily reconcilable. The test of the true nature of the function to be performed is hard to apply in practice.<sup>43</sup> It is not always clear what criteria are relevant to that test. It can easily be said that the Airport Authority might also have to balance a whole range of conflicting interest in awarding the contract in *Matteograssi SPA v Airport Authority*, and so can be said of the Government in awarding the contract for Tuen Mun River Trade Terminal in *Attorney General v Odelon Ltd*. It is difficult to draw the line.

Indeed, there is increasing judicial dissatisfaction of the artificial distinction between public law and private law. In *Roy v Kensington and Chelsea Family Practitioners Council*, Lord Lowry described the distinction as a 'procedural minefield'.<sup>44</sup> In *Mercury Communications Ltd v Director General of Telecommunication*, Lord Slynn stated obiter that the distinction was unsatisfactory.<sup>45</sup> Lord Woolf said that the procedural exclusivity rule has led to wholly undesirable procedural wrangles and suggested that it be emasculated altogether.<sup>46</sup> In a number of recent cases, the court held that public law remedies may be available in private law action.<sup>47</sup> Thus, the defence of *Wednesbury* unreasonableness was held to be available against an claim for an outrageous increase in rent by the local authority.<sup>48</sup> In *Lau Wong Fat v Attorney General*,<sup>49</sup> Godfrey JA stated:

There are cases in which it might be permissible to litigate public law issues in private law proceedings, eg, where the invalidity of the decision of the public authority arises as a collateral issue in a claim for infringement of a private right — still a matter of debates — *R v*

<sup>43</sup> See also *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] 1 QB 815, *R v Criminal Injuries Compensation Board, ex parte Lam* [1967] 2 QB 864; *R v Jockey Club, ex parte RAM Racecourses Ltd* [1990] 2 All ER 225; *R v London Beth Din (Court of Chief Rabbi), ex parte Bloom* [1998] COD 131. See also David Pannick, 'Who is Subject to Judicial review and in Respect of What?' [1992] PL 1, N Bamforth, 'The Scope of Judicial Review: Still Uncertain' [1993] PL 239.

<sup>44</sup> [1992] 1 AC 624 at 635.

<sup>45</sup> [1996] 1 WLR 48 at 57. See also *British Steel plc v Customs & Excise Commissioners* [1996] 1 All ER 1002 (Laws J); [1997] 2 All ER 366 (CA).

<sup>46</sup> Woolf Report, *Access to Justice* (1996), at p 250.

<sup>47</sup> See, for example, *Pawlowska (Collector of Taxes) v Dunnington* (1999) 11 Admin LR 565.

<sup>48</sup> *Wandsworth LBC v Winder* [1985] AC 461.

<sup>49</sup> (1997) 7 HKPLR at 311.



*Secretary of State for Employment, ex p EOC* [1995] 1 AC 1 at 34, Lord Lowry said that he had never been entirely happy with the tight procedural restriction under *O'Reilly v Mackman*, and Lord Browne-Wilkinson said (at 34) that as early as 1911 it was established that, in a civil action brought by a competent plaintiff, the court could grant declaratory relief against the Crown as to the legality of actions which the Crown proposed to take: *Dyson v AG* [1911] 1 KB 410.

Finally, in *Trustees of the Dennis Rye Pension Fund v Sheffield City Council*, Lord Woolf summed up the judicial sentiment as follows:<sup>50</sup>

[These cases] do involve not only considering the technical questions of the distinction between public and private rights and bodies but also looking at the practical consequences of the choice of procedure which has been made. If the choice has no significant disadvantages for the parties, the public or the court, then it should not normally be regarded as constituting an abuse.

It is perhaps high time to revisit the procedural exclusivity rule.

Before I leave this topic, it should be mentioned that the procedure of certain public bodies or disciplinary bodies may contain an ouster clause which purports to exclude any judicial review. Such ouster clauses or clauses conferring absolute discretion on the decision making bodies are highly dubious and the court is generally hostile to such clauses.<sup>51</sup>

## The respondent

It is usually uncontroversial as to who the proper respondent should be. Identifying the decision to be challenged will also help identifying the proper respondent. In this regard neither the Chief Executive in Council nor the Chief Executive himself is immune from judicial review.<sup>52</sup> If the application for judicial review seeks to impugn a decision of a judge, it is

<sup>50</sup> [1998] 1 WLR 840.

<sup>51</sup> *Chan Yik-tung v Hong Kong Housing Authority* (1989) HCT, MP No 2111 of 1989 (s 19(3) of the Housing Ordinance); *Re Medical Defence Union Ltd and Bascombe* [1991] 1 HKLR 429 at 452 (no such thing as 'absolute discretion')

<sup>52</sup> *Caltex Oil v Governor Executive in Council* [1995] 1 HKC 80; *Ma Wan Farming Ltd v Chief Executive in Council* [1998] 2 HKC 190; *R v Governor, ex parte Reid* (1994) 4 HKPLR 18 (exercise of prerogative of mercy is subject to judicial review).

unnecessary (and inappropriate) to name the judge as a party to the proceedings. It should also be noted that the Secretary for Justice representing a statutory body is not the same as the Secretary for Justice representing the Government or public interest.<sup>53</sup> This may have a bearing on the arguments that can be put forward to the court and the remedies the Secretary for Justice can seek.<sup>54</sup>

When should the respondent be put on notice? It will be a good practice to do so if interim relief or when a pre-emptive order is sought.<sup>55</sup> However, even if the respondent appears at the leave application, he has no right of audience unless specifically granted by the court. The court is mindful to avoid turning the leave application into a substantive hearing.

### **The applicant must have sufficient interest in taking out judicial review**

The applicant must show that he has sufficient interest in taking out judicial review proceeding.<sup>56</sup> Thus, in *Lee Miu Ling v Attorney General (No 2)*,<sup>57</sup> the Court of Appeal held that the applicant, not being a member of any functional constituency, had no locus standi to challenge the disparity in the voting power among various functional constituencies.

On the other hand, the modern judicial trend is to move away from deciding on the application for judicial review on technical issues such as locus standi. Indeed, the court has been adopting a fairly liberal approach to locus standi. In *IRC v National Federation of Self-Employed and Small Business*, Lord Diplock stated that:<sup>58</sup>

It would, in my view, be a grave lacuna in our system of public law if a pressure group like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi

<sup>53</sup> *Pang Hon Wah v Attorney General* [1997] 2 HKLRD 177 (proper respondents should be the investigating committees and the Director of Housing rather than the Attorney General).

<sup>54</sup> See *To Kan Chi v Pui Man Yau* [1998] 3 HKC 371 at 385.

<sup>55</sup> *Nguyen Phong v Director of Immigration* [1997] 2 HKLRD 168 (restraint order sought before leave was granted).

<sup>56</sup> Section 21K(4), High Court Ordinance (Cap 4); O 53 r 3(7), Rules of the High Court (Cap 4, sub leg).

<sup>57</sup> (1995) 5 HKPLR 585 at 595-596.

<sup>58</sup> [1982] AC 617 at 644.

from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

In the case of a representative action, it was held that a trade union has locus if there is at least one member who is or is likely to be affected by the decision and who is willing to have the decision challenged on his behalf.<sup>59</sup> In the case of challenging a proposal, the court seems to be accepting that potential interest is sufficient.<sup>60</sup>

In some cases, judicial review can be carefully planned, including the identity of the applicant. For example, should a test case or a representative applicant be considered? Should a trade union or a corporation be included as an applicant? How about the financial means of the applicant? It is always possible to choose an applicant whose financial means is such that he would be eligible for legal aid.<sup>61</sup>

### **Time limit: the application must be made promptly.**

Section 21K(6) of the High Court Ordinance provides that where there has been undue delay in making an application for judicial review, the court may refuse to grant leave for the making of the application or any relief sought, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration. Order 53 r 4 provides that an application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made. The interaction of these two provisions has given rise to the question whether the court may revisit the issue of delay at the substantive hearing after leave has been granted despite delay in making the leave application.

<sup>59</sup> *R v Secretary for Civil Service and the Attorney General, ex parte Association of Expatriate Civil Servants* (1996) 6 HKPLR 333 at 368, followed in *Association of Expatriate Civil Servants v Chief Executive of the HKSAR* [1998] 2 HKC 137 at 154.

<sup>60</sup> *Wharf Cable Ltd v Attorney General* [1996] 1 HKLR 156 at 160-1 ('if this view of the law [that the provision of VOD does not require a licence under the Television Ordinance] is wrong, then Wharf's legal rights would be infringed.')

<sup>61</sup> For instance, *Ng King Luen v Rita Fan* (1997) 7 HKPLR 281.

In *Attorney General v Tran Quoc Cuong*,<sup>62</sup> it was held that relief would not be refused solely on the ground of delay, unless the granting of the relief would cause substantial prejudice or hardship to any person or would be detrimental to good administration. The court is entitled to revisit the question of delay at the substantive hearing even if leave for application has been granted. Therefore, it is unnecessary to apply to set aside leave on the ground of delay.<sup>63</sup>

If the application is not (or cannot be) made promptly or within three months from the date of the decision sought to be challenged, the solicitors should ensure that there are sufficient grounds for an application for an extension of time. Reasons for delay should be set out in the application and an extension of time should be expressly asked for.<sup>64</sup> An extension of time is likely to be granted if important principles of law are involved. In *Nguyen Tuan Cuong v Director of Immigration*,<sup>65</sup> the court took into account that limited legal advice was available in closed camps. In *R v Secretary for the Civil Service and the Attorney General, ex parte the Association of Expatriate Civil Servants of Hong Kong*, when the decisions challenged were all made in a continuing process by the Government to revise its employment policies, the court considered it reasonable for the applicants to delay their challenge to individual components of the Government's revised employment policies until they could see the final form which the implementation of those policies was to take.<sup>66</sup>

Under Order 53 r 3(8), where leave is sought to apply for an order of certiorari to quash any judgment, order, conviction or other proceeding which is subject to appeal and a time limit is set for the bringing of the appeal, the court may adjourn the application for leave until the appeal is determined or the time for appealing has expired. This power is useful in such case where it is necessary to comply with the time limit before an appeal is determined, eg, review a deportation order of the Secretary for Security by the Chief Executive in Council.<sup>67</sup>

<sup>62</sup> (1995) 5 HKPLR 208 at 211.

<sup>63</sup> Practice Direction, para 1.4. *R v Criminal Injuries Compensation Board, ex parte A* [1997] 3 WLR 776; but compare *Sy Chok Luen v Director of Environmental Protection* [1998] 1 HKC 474 at 480 where a more lenient approach has been adopted in Hong Kong. See also *Lau Wong Fat v Attorney General* [1997] HKLRD 533 at 536.

<sup>64</sup> *R v Secretary for the Civil Service and the Attorney General, ex parte the Association of Expatriate Civil Servants of Hong Kong* (1995) 5 HKPLR 490 at 512-3.

<sup>65</sup> (1996) 6 HKPLR 62 at 82.

<sup>66</sup> (1995) 5 HKPLR 490 at 513.

<sup>67</sup> *Singh v Secretary for Security* (1996) 6 HKPLR 440.

If a public officer decides to reconsider his decision, time begins to run from the date of the re-consideration even if, upon re-consideration, he merely affirms his previous decision.<sup>68</sup>

### Existence of alternative remedies

The mere existence of an alternative remedy is not an automatic bar to judicial review. It depends on whether the alternative remedy is an equally effective remedy in the circumstances of the case, and the burden is on the Applicant to show that the alternative remedy is not suitable or effective.<sup>69</sup> The reasons are that judicial review is a discretionary remedy, and an applicant should be encouraged to use the court as a last resort, not as the first resort. Thus, where alternative remedy is available, judicial review is only granted in exceptional circumstances, eg, when there is an abuse of process.<sup>70</sup> The test is whether it is in the interest of justice for the court to intervene at that stage of the dispute when alternative remedies have not been exhausted.<sup>71</sup> A few recent cases illustrate how this test is applied.

In *Harvest Sheen v Commissioner of Inland Revenue*,<sup>72</sup> in considering whether the appeal procedure was suitable to determine the issue in question, the court took into account the desire to avoid multiplicity of proceedings, that there was a real danger of failure to meet the time limit for appeal to the District Court which had no power to extend the time limit, and that the point in issue (misdirection in law) was relatively short and straight forward.

<sup>68</sup> *Hong Kong and China Gas Co Ltd v Director of Lands* [1997] 3 HKC 520.

<sup>69</sup> *Harley Development Inc v Commissioner of Inland Revenue* [1996] 2 HKLR 147 at 154 (PC); *Stock Exchange of Hong Kong Ltd v Onshme Securities Ltd* [1994] 1 HKC 319; *Re an application by the Attorney General* [1972] HKLR 336 at 347.

<sup>70</sup> *Stock Exchange of Hong Kong Ltd v Onshme Securities Ltd* [1994] 1 HKC 319. In *Director of Legal Aid v Van Can On* [1997] HKLRD 635, it was held that an appeal against refusal to grant legal aid could be considered an alternative remedy.

<sup>71</sup> *Nam Pei Hong (Holding) Ltd v Stock Exchange of Hong Kong* [1998] 2 HKLRD 910 (dealing was suspended because of unusual market activities. Minutes were sent to all members of the Listing Committee. Disciplinary proceedings were taken out and the applicant was found guilty. The applicant applied for judicial review on the ground that the disciplinary tribunal was biased. The respondent counter-argued that the appeal procedure should be pursued. The court held that as there was no real danger of bias, no intervention was required. Cf. *R v Chairman of the Town Planning Board, ex parte Mutual Luck Investment Ltd* (1995) 5 HKPLR 328.

<sup>72</sup> [1997] 2 HKC 380 at 385-7 (payment of tax before appeal; appeal to District Court, held that the alternative remedy did not prevent judicial review).

In *Re Super Mate Ltd*,<sup>73</sup> the court considered that the nature of relief was more suitable for judicial review than appeal under the Building Ordinance. This was an application for an order of mandamus directing the Building Authority to consider a building application in light of an earlier outline zoning plan when rejection of the application by the Building Authority was admitted to be an error and by the time the application was reconsidered, the earlier outline zoning plan was superseded. The court held that judicial review would be appropriate notwithstanding the existence of an appeal under the Building Ordinance.

In *Oriental Daily Publisher Ltd v Commissioner of Television and Entertainment Licensing Authority*,<sup>74</sup> it was held that judicial review was appropriate if the grounds of statutory appeal were more circumscribed than that under judicial review, for example, an appeal on a point of law decided by the Obscene Articles Tribunal did not include a review on the ground of *Wednesbury* unreasonableness.

In *R v Hallstrom, ex parte Waldron*, Glidewell LJ summarised the judicial discretion as follows:<sup>75</sup>

Whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than procedure by way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body; these are amongst the matters which a court should take into account when deciding whether to grant relief by way of judicial review when an alternative remedy is available.

Other factors may include whether a speedy decision is desirable, whether the challenge is one on the merits or one going to jurisdiction,<sup>76</sup> and whether the alternative remedy is equally effective, convenient, beneficial and effectual.

<sup>73</sup> [1995] 1 HKLR 287 at 296.

<sup>74</sup> [1998] 2 HKLRD 857 at 870-1.

<sup>75</sup> [1986] 1 QB 824 at 852.

<sup>76</sup> The court is more ready to proceed with judicial review if the issue is one of jurisdictional error: *R v Currency Broker (HK) Ltd* [1987] HKLR 1136 at 1140 (CA).

## Grounds for judicial review

It is not the focus of this article to discuss the grounds for judicial review, apart from making a few general observations relevant to the application for leave. The principal grounds for judicial review are laid down in the classic speech of Lord Diplock in *CCSU v Minister for Civil Service*, namely, illegality, procedural impropriety, and irrationality.<sup>77</sup> It has been argued without success that proportionality as developed under the European Convention on Human Rights should become the fourth ground for judicial review,<sup>78</sup> but the position may be changed when the Human Rights Act (which basically incorporates the European Convention into English domestic law) comes into effect in England in the year 2000. Indeed, given the rapid development in administrative law, the enumerated grounds for judicial review should not be considered as exhaustive.

Those who advise on applying for leave for judicial review must be satisfied that there is at least one arguable ground. It is unnecessary and perhaps undesirable to overload the leave application with a long list of grounds. It will require an excessively sympathetic court to accept that the administration can make, say, 26 mistakes, in a single decision each of which mistakes gives rise to a distinct ground for judicial review! Once leave has been granted and after the Respondent has filed its affirmation, it is necessary to reconsider the strength of the case and whether further grounds may be introduced.<sup>79</sup> Leave is required to introduce further grounds.

If *Wednesbury* unreasonableness is alleged, the factual supporting grounds must be sufficiently particularised. Mere allegation that a decision is *Wednesbury* unreasonable is insufficient.<sup>80</sup> In this regard, in reviewing the decision of an administrative tribunal or disciplinary proceedings where members of the tribunal usually possess no legal qualifications, the approach of the court is not to subject the decisions and the reasoning of the disciplinary tribunal to the 'lawyer's relentless

<sup>77</sup> [1985] 1 AC 374.

<sup>78</sup> *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

<sup>79</sup> Practice Direction 26.1, SL-3, para 1.8 [1999] HKLRD (PD) at 194.

<sup>80</sup> *Chan Sau Mui v Director of Immigration* (1996) 6 HKPLR 479 at 484.

knife in a judicial surgical dissection.<sup>81</sup> What the court is looking for is the tribunal's finding of facts and a brief reason explaining how the decision was reached.

The application for leave is not to be used as a fishing expedition. In *Chan Sau Mui v Director of Immigration*,<sup>82</sup> the applicant sought judicial review of the decision of the Director of Immigration to refuse to exercise his discretion under s 13 of the Immigration Ordinance to allow her to remain in Hong Kong to take care of her children. Two weeks before the hearing, the applicant sought discovery and inspection of all documents in the possession of the Director of Immigration which were related to the family. On the date of the hearing, she further applied, inter alia, for leave to cross examine the Deputy Director of Immigration, which was granted. On appeal and cross-appeal, the Court of Appeal held that the effect of granting discovery, leave to file further evidence and leave to cross-examine could only be to further the usurpation of the role of the decision maker by the court and to turn an administrative function of the decision maker into a judicial one of the court. In order to bring judicial review on the basis of a mistake of fact, the mistake must be obvious and the fact was of such importance that the decision might well have gone the other way if the decision maker had not been mistaken about it. It is not a justifiable approach to make use of discovery and cross examination with a view that they may reveal something which suggests an error of facts.

### Supporting documents

All factual allegations in Form 86A must be verified. It is, however, unnecessary to repeat or reproduce those factual allegations in the supporting affirmation. It suffices to confirm those factual allegations in the supporting affirmation.

Evidence in support of any factual allegation has to be exhibited. Hearsay evidence is admissible at the leave stage (but not at the substantive hearing). Being an *ex parte* application, the Applicant is under a duty to make full and frank disclosure of all relevant material,

<sup>81</sup> *Tse Lo Hong v Attorney General* (1995) 5 HKPLR 112 at 117C, per J Chan J; *Tong Pon Wah v Hong Kong Society of Accountants* [1998] 3 HKC 82 at 97, per Liu JA.

<sup>82</sup> (1996) 6 HKPLR 479 at 485.



whether they are in his favour or not. Failing to do so may result in the leave being set aside in due course; the application may even constitute an abuse of process.<sup>83</sup> On the other hand, the court should not be overloaded with extraneous and unnecessary materials. Solicitors should guard against unnecessary production of papers and repetition of the same documents.<sup>84</sup> Preparation of bundles should not simply be a mechanical reproduction of materials. Solicitors should also be careful of who should be the proper deponent. While a solicitor is able to depose on the conduct of the proceedings, he is usually not in a position to depose on the facts of the dispute.

The court is primarily concerned with matters which were before the decision-maker. Thus, fresh evidence is not to be admitted save in exceptional circumstances, for otherwise every judicial review would be turned into a *de novo* re-hearing.<sup>85</sup>

## Relief and directions

Relief sought should be clearly set out in the notice of application. The court has from time to time criticised that insufficient thought has been given to the relief sought.<sup>86</sup> The usual relief includes the orders of certiorari, mandamus, prohibition, declaration, injunction, damages, and stay of proceedings. Prerogative relief is discretionary.

Unlike prerogative remedies which are only available in public law, declaration straddles public private divide and may be sought as a conjunctive or an alternative remedy.<sup>87</sup> It has been pointed out above that the court may be prepared to grant declaratory relief even when no decision can be identified. On the other hand, the declaratory jurisdiction of the court is limited to justiciable matters, that is, legal and equitable

<sup>83</sup> *Jiang Enzhu v Emily Lau* [1999] 3 HKC 8 at 27-28.

<sup>84</sup> *Singh v Secretary for Security* (1996) 6 HKPLR 440 at 456-7 (bundles of 733 pages; a report by DI to SS exhibited 7 times; summary of facts of trial at DCt exhibited 4 times; deportation order, letters exhibited 3 times). The papers should be placed in a bundle that complies with the requirements of the Practice Direction. See also *Bahadur v Secretary for Security*, HCAL No 18/1999, where Stock J remarked that costs may be ordered against solicitors personally for failing to comply with the Practice Direction in preparing the bundle.

<sup>85</sup> *Cong Van Ha v Director of Immigration* [1997] 2 HKLRD 179.

<sup>86</sup> See, for example, *Lee Miu Ling v Attorney General* (1995) 5 HKPLR 585 at 596-7; *Kwan Kong Co Ltd v Town Planning Board* (1996) 6 HKPLR 237 at 250-1.

<sup>87</sup> *Attorney General v George Tan* [1985] HKLR 87 at 91; *Re Medical Defence Union Ltd v Bascombe* [1991] 1 HKLR 439 at 442; *Aik San Realty Ltd v Attorney General* [1980] HKLR 927.

rights but not moral, social or political matters.<sup>88</sup> There must be a legal right before declaratory relief can be granted. In *Gouriet v Union of Post Office Workers*,<sup>89</sup> Lord Diplock set out the principle in these terms:

The only kinds of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event.

This passage was followed by Litton VP in *Lau Wong Fat v Attorney General*.<sup>90</sup> The applicant attempted to challenge the constitutionality of the New Territories Land (Exemption) Ordinance (Cap 452) by way of a writ. The court held that it was essentially a public law challenge howsoever the plaintiff's grievance was dressed up. On the face of the statement of claim, there were no legal rights protected by law which had been allegedly violated by the Hong Kong Government. There was no averment of a private right for which relief might be claimed. What the court was asked in effect to do was to take one side in the political dispute, aligning itself on the plaintiff's side of the argument, and the declaratory relief was hence rejected.

In *Attorney General v Lui Kin Hong Jerry*,<sup>91</sup> the applicant sought a declaration that the affirmation of a deponent who had since passed away was inadmissible evidence in extradition proceedings. The court held that this was governed by the US law and should be determined by the US court. The court also refused to grant declaratory relief as the

<sup>88</sup> *Dicks v Easy Finder Ltd* [1996] 2 HKC 65 (HCt); *Lee Miu Ling v Attorney General (No 2)* (1995) 5 HKPLR 585 at 596-7 (no declaration in the absence of a right).

<sup>89</sup> [1978] AC 435 at 501D.

<sup>90</sup> (1997) 7 HKPLR at 313.

<sup>91</sup> (1996) 6 HKPLR 390 at 398.

declaration would serve no useful purpose because there was no reason why the US court should accept the declaration. Similarly, when a decision of a specialist tribunal such as the Refugee Status Review Board is quashed, a declaration determining the very facts which are solely within the province of the tribunal is hardly ever justified in the absence of an agreement by the tribunal that such a result is an inevitable result of the judge's decision to strike down its earlier decision.<sup>92</sup> On the other hand, if there is a violation of rights, damages would normally be available and it is unnecessary to resort to a declaration.

It is possible to pursue a claim for damages in judicial review,<sup>93</sup> but the claim must be sufficiently particularised. The court would be reluctant (if at all) to consider the question of damages in judicial review when this becomes the only claim and all other claims of public law relief have either been rejected or abandoned. In *Matteograssi SPA v Airport Authority*,<sup>94</sup> all the public law claims were abandoned because the relief became unrealistic as a result of the passage of time. Mortimer and Nazareth VPP held that it was open to the applicant to pursue a claim for damages if the statement bore out the claim, as this would avoid unnecessary expenses and delay to have the matter commenced afresh. Rogers JA, however, held that once it had become apparent that no relief by way of judicial review was being sought, judicial review procedure should not have been proceeded with. Judicial review was not suitable for determination of a claim for damages.

In *Nguyen Tuan Cuong v Secretary for Justice*,<sup>95</sup> it was held that the proper approach was first to determine the public law issues, and then order issues relating to tortious or other private law liability to proceed as if they were begun by writ. Alternatively, the court may award damages at the judicial review hearing, but leave quantum to be assessed by a Master. However, in that particular case, since there was no determination of public law issues, there was no peg to hang the claim for damages.

Any interim relief and directions sought should be specifically set out. They are only granted if leave to apply for judicial review is granted

<sup>92</sup> *Refugee Status Review Board v Bui Van Ao* [1997] 3 HKC 641 at 648, per Mortimer VP.

<sup>93</sup> Order 53, r 7(1).

<sup>94</sup> [1998] 3 HKC 25 at 33-34 and 38 (CA)(tender for contract of providing seating at the Airport).

<sup>95</sup> [1999] 1 HKC 242 at 246.

in the first place. Discovery is generally discouraged.<sup>96</sup> Discovery or application for cross-examination should not be made if the effect is to make the court usurping the functions of the executive.<sup>97</sup> A stay of a discovery order pending appeal would not be allowed simply because the parties consented, if the stay would result in delay of the substantive hearing.<sup>98</sup> On the other hand, a court might intervene where there were separate sets of concurrent proceedings arising out of the same facts or incidents to prevent injustice if the continuation of one set of proceedings might prejudice the fairness of the trial of the other set of proceedings. However, it will only intervene when the prejudice arising from parallel proceedings is so serious as would likely to lead to injustice.<sup>99</sup> Anonymity of an applicant can be ordered in exceptional cases. If an expedited hearing is sought, there should be an application for an order to abridge the time for filing respondent's reply.

In public law cases, legal cost is always a major concern to an applicant. In appropriate cases, it is possible to seek a pre-emption order that each party bears its own costs whatever be the outcome of the substantive application. The necessary conditions are that the public law issues raised are of general importance, that the applicant has no private interest in the outcome of the case, and that unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.<sup>100</sup> The court should also consider the relative financial strength of the parties and the amount of costs likely to be in issue.

### Service of application and order granting leave

Applications for leave are usually determined without a hearing these days, unless the applicant specifically requests a hearing in the notice of

<sup>96</sup> *Van Can On v Director of Immigration* [1997] HKLRD 89 at 96 (HCt)

<sup>97</sup> *Chan Sau Mui v Director of Immigration* (1996) 6 HKPLR 479; *Bui Thu Chin v Director of Legal Aid* [1994] 1 HKC 441, 457.

<sup>98</sup> *Lee Ming Tee v The Stock Exchange of Hong Kong Ltd* (1996) 6 HKPLR 272 at 275 (note Liu JA dissenting).

<sup>99</sup> *Securities and Futures Commission v Nomura International (Hong Kong) Ltd* [1998] 2 HKC 503.

<sup>100</sup> *R v Lord Chancellor, ex parte Child Poverty Action Group* [1998] 2 All ER 755 at 766. See also *New Zealand Maori Council v Attorney General of New Zealand* [1994] 1 AC 466, *Lavigne v Ontario Public Service Employees Union* (1987) 60 OR (2d) 486 at 528; *Harrison v University of British Columbia* [1986] 6 WWR 7, [1987] 2 WWR 378.

application, or the judge before whom the application is placed directed otherwise. Once leave is granted, the application for judicial review shall be made by originating motion to a judge sitting in open court. The court may impose such terms as to costs and security as it thinks fit,<sup>101</sup> though given the public nature of the proceedings, it is rare to order security for costs. The applicant shall serve all the papers on the respondent, who must file any affirmation in reply within 56 days, and leave to file affirmation out of time is granted only as an exception. Under Order 53 r 9, any person who desires to be heard in opposition to, but not in support of, the motion may be heard, notwithstanding that he has not been served with the notice of the motion.

A judge is functus once leave has been refused. There is no jurisdiction to extend time or allow an amendment to the notice of application after leave has been refused.<sup>102</sup> The only recourse is to appeal.

### A check list

It is hoped that the above may provide a check list for any applicant who intends to take out an application for leave for judicial review under Order 53 r 3. In summary, an applicant should ascertain that:<sup>103</sup>

1. There is a decision which is susceptible of judicial review;
2. The decision is at least arguably an exercise of public power;
3. There is at least one arguable ground;
4. The applicant has sufficient interest in making the application;
5. The application is made promptly within three months from the date of the decision sought to be impugned. If the application is not made promptly, there are grounds for extending the time to make the application;
6. There is no suitable or effective alternative remedy;
7. Where appropriate, a pre-action letter shall be sent requesting the decision maker to reconsider his decision or to give reasons for his decision;

<sup>101</sup> O 53, r 3(9).

<sup>102</sup> *Re Philip Nichols (A Firm)* (1995) 5 HKPLR 404.

<sup>103</sup> The list was first devised by Mr Philip Dykes SC in a Workshop on Application for Leave held by the Hong Kong Bar Association in February 1999. This is a modified version of the original list.

8. The notice of application has set out clearly the decisions to be challenged, the relief sought, and all necessary requests for appropriate directions, such as an extension of time, expedited hearing, interim relief, pre-emptive order for costs, and an oral hearing, if necessary;
9. The papers to be placed before the judge are in a bundle that complies with the Practice Direction for the Constitutional and Administrative law List, that they include a chronological table and that the essential documents have been identified;
10. There has been full and frank disclosure; and
11. Where appropriate, notice has been given to the proposed respondent or any third party who might be affected by the grant of leave.

At the substantive hearing, good skeleton arguments are essential. Comparative jurisprudence is helpful, and unlike other well established branches of law, the courts are likely to be more receptive to academic textbooks and journal articles. In general, the courts are in an expanding mood, as can be witnessed by the rapid development of new principles in this field. Thus, in arguing for or against an application for judicial review, one should not lose sight that the court may be prepared to develop new principles or bend old rules in appropriate cases. After all, the meaning of good administration may change with time and with increasing public expectation.