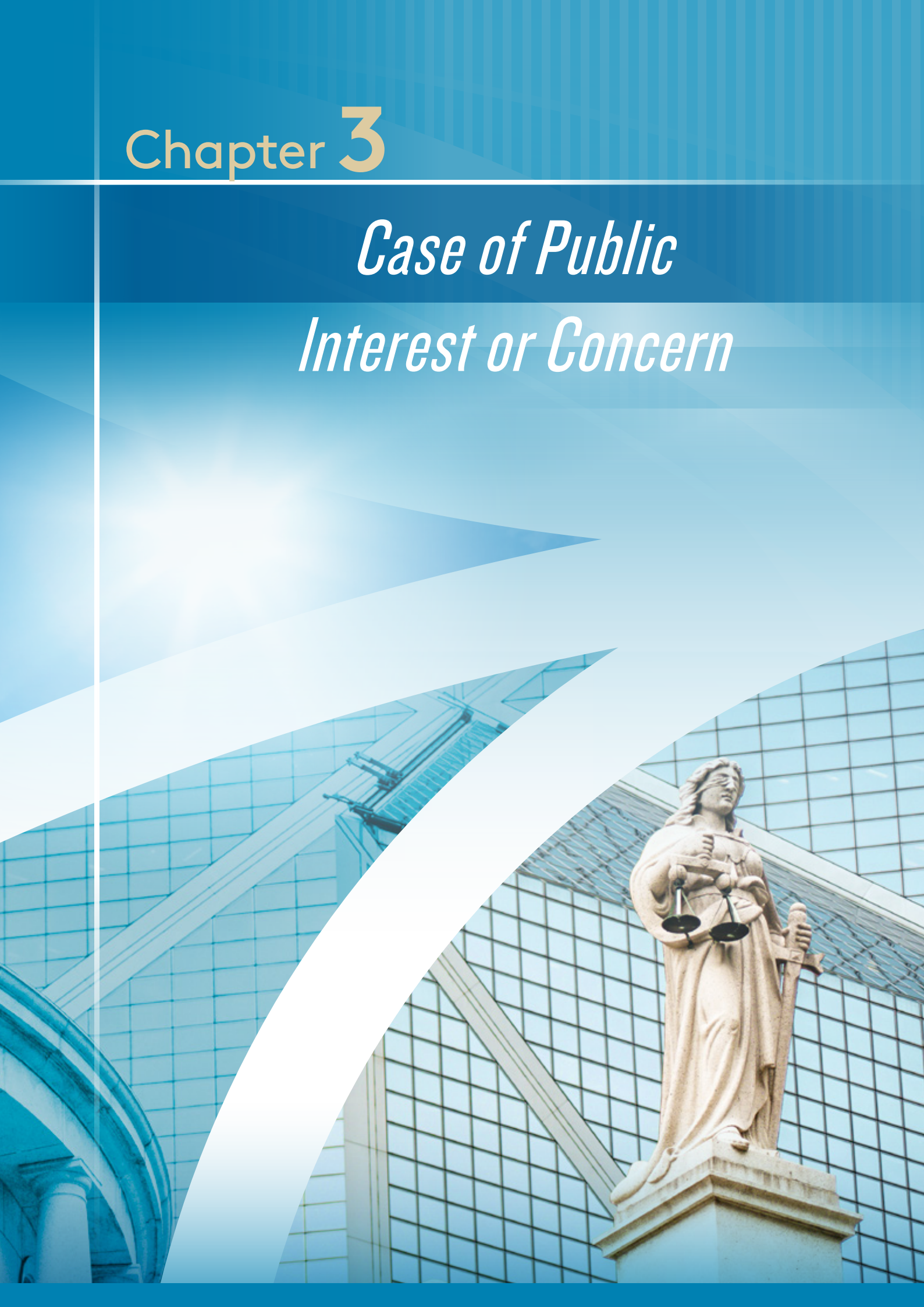
Chapter 3

Case of Public Interest or Concern



Kwok Cheuk Kin (1st Applicant) & Another v. Director of Lands & Others (FACV 2, 3 & 4/2021)

With the assistance of legal aid, the 1st Applicant challenged the constitutionality of the New Territories Small House Policy ("the Policy") and brought the matter to the Court of Final Appeal.

The Policy, operated by the Lands Department and formalized in 1972, provides that a male New Territories Indigenous Inhabitant ("NTII") may apply for permission, once in his lifetime, to erect a small house on a suitable site within his own village. Under the Policy, three kinds of grant are available for application: free building licenses, private treaty grants and exchanges. The rights or interests enjoyed by male NTIIs under the Policy is commonly known as the Ding Rights (丁權).

Proceedings below

The 1st Applicant, initially legally-aided, sought judicial review of the Policy on the ground that it is unconstitutional for being discriminatory on the basis of birth, sex and social origin (HCAL 260/2015). The 2nd Applicant was subsequently granted legal aid to join in the judicial review proceedings after the legal aid certificate issued to the 1st Applicant was revoked (see Kwok Cheuk Kin v. The Registrar of the High Court & Anor [2018] HKCFI 2442).

In the judicial review proceedings in the Court of First Instance, it was not disputed by the Government and Heung Yee Kuk that the Policy is, on its face, discriminatory and inconsistent with the anti-discrimination provisions of the Basic Law and Hong Kong Bills of Rights which provide that all Hong Kong residents shall be equal

before the law and that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground including sex, social origin, birth or other status.

Article 40 of the Basic Law

The central issue before the Court of First Instance was thus whether the Policy is protected by Article 40 of the Basic Law ("BL40"), which provides that: "The lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administrative Region".

The Court of First Instance held that the Ding rights were "lawful" ones within the meaning of BL40 and "lawful" in the present context is merely descriptive of those traditional rights and interest which were enjoyed by the NTIIs, and it would not be consistent with the purpose of BL40 to allow such rights or interest to be challenged on the ground of discrimination, or other grounds of unlawfulness. However, only free building licenses are "traditional" rights for the purposes of BL40 because they are so traceable to the rights and interests enjoyed by NTIIs prior to the New Territories lease in 1898. The Policy was held to be unconstitutional to the extent of private treaty grants and exchanges. The Court of First Instance also ruled in favour of the Applicants on the issues of their standing to challenge the Policy, and also whether there was delay in making the application for judicial review.

All the parties including the legally aided 2nd Applicant appealed to the Court of Appeal (CACV 234, 317 & 319/2019). The Court of Appeal overturned the Judgment of the Court of First Instance and held that the Policy is constitutional in its entirety. A right or interest is "traditional" under BL40 if it was recognized as such by the Basic Law drafters at the time of its promulgation in April 1990. As at that date, all

Ding rights were so recognized. Alternatively, the rights are "traceable" to 1898 as they originated from, and retained the essence of, the NTIIs' pre-1898 custom of building a house for their own occupation on village land. The Court of Appeal agreed with the Court of First Instance on the meaning of "lawful". Ding rights are accordingly protected under BL40. Lastly, the Court of Appeal disagreed with the Court of First Instance on the issues of standing and delay and refused to grant relief on these grounds.

The Applicants including the legally aided 2nd Applicant applied for and were granted leave by the Court of Appeal to appeal to the Court of Final Appeal on questions of great and general or public importance including whether the Ding rights under the Policy is a lawful traditional right or interest within the meaning of BL40, an applicant's standing to challenge an ongoing discriminatory government policy by way of judicial review and whether the Court should refuse the relief on the ground of delay. Only the 1st Applicant, who was then granted legal aid again, proceeded with the appeal in the Court of Final Appeal.

Right or Interest

The Court of Final Appeal held that the "right" or "interest" which an applicant under the Policy may be said to have is a right to have one's application dealt with in accordance with the criteria laid down in the government's statements of current policy, subject to the lawfully exercised discretion of the Lands Department. It thus falls within "rights and interests" in BL40.

Lawful

As to whether the Policy is "lawful", the Court of Final Appeal rejected the 1st Applicant's arguments that "lawful" means the scope of BL40 is qualified by,

and ought to be interpreted in line with, the anti-discrimination provisions in the Basic Law and Hong Kong Bills of Rights. The Court ruled that the word "lawful" in the context of BL40 went to the lawfulness in the way the discretion of the Lands Department with respect to an application under the Policy was exercised as a matter of public law. It follows that there is no question of the express exclusion of the Policy from the ambit of the Sex Discrimination Ordinance being unconstitutional.

Tradition

The Court also rejected the 1st Applicant's argument that "traditional" means the Ding rights have to be traceable to 1898 and upheld the Court of Appeal's finding that the word "traditional" in BL40 is to be determined by reference to the state of affairs in April 1990, and does not require that a protected right or interest be traceable to the period before 1898. There is nothing in BL40 which requires a protected right or interest to be traceable to the period before 1898. The principle of traceability cannot be implied as it is not implicit in the concept of tradition as a matter of language. It is also consistent with the purpose of BL40 when, firstly, the Policy did not replicate the essence of the old pre-1898 system. The Policy has acquired a life of its own and the rights arising under it were new rights originally conferred by the colonial administration in the first decade after the inception of the New Territories lease of 1898, and maintained in various iterations and with some modifications thereafter. By 1990, they had become a tradition of the colonial administration. They were traditional in 1990 not because they are traceable to 1898. Further, there was no rational reason why the Basic Law, which is to address to the problem of continuity between the colonial regime and the system which would follow it, should wish to make the preservation of indigenous rights which they would inherit from the colonial regime dependant on their similarity to rights which had existed before 1898.

Delay and standing

The Court differed from the Court of Appeal on the issues of delay and standing. On delay, the Court considered that the present proceedings concern a controversial constitutional issue of considerable public importance. Only declaratory reliefs are sought and there is no claim to quash past decisions made under the Policy. It would be surprising for a Court to refuse to grant reliefs, if the Court was satisfied that they were justified in principle, for it would have meant that the Court was disabled from intervening the unlawful discrimination by the executive on the basis of sex and social originally from day to day.

For the issue of standing, the Court held that the critical question in a public interest case is whether the purpose of judicial review, and in particular the rule of law, will be best served by allowing the applicant to proceed. The Court agreed with the Court of First Instance to accept that the 1st Applicant had standing. The decisive consideration was that only people who can be said to have a manifestly greater interest in the constitutionality of the Policy are beneficiaries of the Policy with no interest in challenging it. Other people may have a direct personal interest in other aspects of the Policy but not in its constitutionality. Given the significance and controversial character of the issue, that state of affairs would mean that the Policy would in practice be beyond challenge even if unconstitutional. This would do no service to the rule of law.

Disposition

The 1st Applicant's appeal was dismissed unanimously.

HKSAR v. Tong Ying Kit (HCCC 280/2020)

On 23 June 2021, the first criminal trial in HK involving the National Security Law ("NSL") and a trial without a jury took place before a panel of three judges at the Court of First Instance ("HCCC 280/2020"). The defendant, Tong Ying Kit ("Tong") was charged with (i) one count of incitement to secession, contrary to Article 20 & 21 of NSL and (ii) one count of terrorist activities, contrary to Article 24 of NSL.

Tong was granted legal aid in December 2020 to defend HCCC 280/2020. Since this was the first case in HK involving NSL, therefore there was no precedent and the Court had to deal with a number of issues prior to the criminal trial. One of those issues was the decision by the Secretary for Justice to issue a certificate under Article 46(1) of the NSL for the trial to be conducted by a panel of three judges without a jury ("the decision"). As explained by the Secretary for Justice, the certificate was issued on the grounds of (1) protection of personal safety of jurors and their family members; and / or (2) if the trial is to be conducted with a jury, there is a real risk that due administration of justice might be impaired.

In April 2021, Tong was granted legal aid to apply for leave to judicial review of the decision on the ground that it engaged the principle of legality and procedural safeguards which the Secretary for Justice had failed to observe. Leave was refused. Tong subsequently appealed to the Court of Appeal without legal aid (CACV 293/2021) and the appeal was dismissed. The Court of Appeal held that Article 46(1) does not admit of a conventional judicial review as contended by Tong. The decision of the Secretary of Justice to issue a certificate under Article 46(1) is a prosecutorial decision protected by Article 63 of the Basic Law and is

only amenable to judicial review on the limited grounds of dishonesty, bad faith and exceptional circumstances as explained in the case law.

Further, the parties in the criminal trial also could not agree as to the elements involved in each of the offences and thus this issue also needed to be resolved before the trial actually commenced.

In the course of the trial, experts from both sides gave evidence as to the meaning of the slogan printed on the flag which was hoisted at the back of the motorcycle Tong was driving at the time of the offence. After a trial which lasted for 15 days, Tong was convicted of both counts on 27 July 2021. With delivery of verdict, mitigation and sentencing on another three separate days, the whole case was concluded in 18 days. Tong was sentenced to an overall term of 9 years' imprisonment and a disqualification order of 10 years.

Back to top