HCAL 63/2016
[2018] HKCFI 839

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 63 OF 2016

BETWEEN

CHAN TSUI YAN	Applicant
and	
SOCIAL WORKERS REGISTRATION BOARD	Respondent
CHAU SHUI HOI MALINA	1st Interested Party
NG WANG TSANG	2nd Interested Party
NG YUEN CHING WILLIS	3rd Interested Party

Before: Hon Lok J in Court
Date of Hearing: 25 July 2017
Date of Supplemental Written Submissions: 28 July & 1 August 2017
Date of Judgment: 19 April 2018

JUDGMENT

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1. This is an unusual judicial review case. The Applicant made complaints against certain social workers to the Respondent, i.e. the Social

Workers Registration Board ("the Board"). The Board appointed a disciplinary committee ("the Disciplinary Committee") to investigate the complaints. There was then a lengthy hearing for the inquiry lasting for 5 days ("the Inquiry"), and all the major parties, including the Applicant, were legally represented in the Inquiry. The Board endorsed the findings made by the Disciplinary Committee that the complaints were unsubstantiated. The Applicant was not satisfied with the decision made by the Board ("the Decision") and sought to challenge the Decision by way of judicial review.

BACKGROUND

2. The Applicant was at the material time a "peer" of the Society of Rehabilitation and Crime Prevention ("SRCP") and was stationed at the Kowloon South Centre ("the Centre").

3. On 1 September 2014, the Applicant made various complaints against the 1st Interested Party who was then a registered social worker at the SRCP. The complaints can be summarized as follows:

(i) The 1st Interested Party had told the Applicant that he could not stay at the Centre during the lunch hour, and only official employees were permitted to. He subsequently discovered through other sources that there was no such policy or rule ("the Lunchtime Arrangement Complaint").

(ii) The 1st Interested Party had wrongfully asked the Applicant to gift her a considerable amount of aged "chenpi" (sun-dried tangerine peel) which was valued at around $10,000. Later,

when she had used up the chenpi, she asked him for more ("the Receipt of Advantage Complaint").

(iii) The 1st Interested Party had wrongfully asked him to shred confidential documents, such as old case files, on several occasions. When the Applicant continuously refused to do so, the 1st Interested Party asked other persons to do the same ("the Paper Shredder Complaint").

4. Upon receiving the complaints, the Board appointed the Disciplinary Committee to conduct a disciplinary inquiry as required under s 27(1) of the Social Workers Registration Ordinance, Cap 505 ("SWRO").

5. The Applicant's complaint form filed on 1 September 2014 had only identified the Lunchtime Arrangement Complaint and the Receipt of Advantage Complaint as distinct complaints against the 1st Interested Party. Though the paper shredder incident was also mentioned, it did not appear to the Board members to be a distinct complaint at the time. On 9 December 2014, the Board sent a letter to the Applicant, enclosing a copy of the draft complaints on which the disciplinary hearing would be based. On 15 December 2014, the Applicant returned the draft without any proposal for amendment. Nor was there any suggestion that the Paper Shredder Complaint should be put forward as a separate complaint.

6. The Applicant had, prior to his filing of the complaints to the Board, made complaints directly to the SRCP. The SRCP conducted an internal investigation into these complaints and found that the allegations were unsubstantiated. The Applicant did not accept such conclusion, and on 14 November 2014 filed a supplemental complaint against other social

workers, the 2nd and 3rd Interested Parties, for "harbouring" the 1st Interested Party and failing to carry out their investigation dutifully. The Applicant had also informed the SRCP that he would settle the case on the conditions that: (i) the SRCP paid him $200,000 in compensation; (ii) the SRCP demoted the 1st Interested Party; and (iii) the SRCP issued a public apology in a newspaper.

7. The 1st Interested Party retired as a social worker in late 2014.

8. The Applicant's complaints were heard by the Disciplinary Committee in the Inquiry held on 11 & 19 June, 18 and 21 August and 30 September 2015. All parties including the Applicant were legally represented in the Inquiry.

9. After considering all the submissions and evidence, the Disciplinary Committee came to the conclusion that the Applicant's complaints were not established. A written decision and recommendation dated 30 September 2015 was prepared for the Board's consideration ("the Recommendation Report").

10. As contained in the Recommendation Report, the reasons for rejecting the complaints can be summarized as follows:

(i) The Applicant's allegations as to the Lunchtime Arrangement Complaint were uncorroborated and discredited even by other independent witnesses. The 1st Interested Party was an experienced social worker who had ample experience in dealing with clients. They preferred the 1st Interested Party's evidence on the issue.

(ii) The Applicant's allegations as to the Receipt of Advantage Complaint were also unsubstantiated and uncorroborated because no one else had heard the 1st Interested Party making such alleged requests. Further, when the 2nd Interested Party went to the Centre to investigate the complaints, the chenpi was placed in a conspicuous space accessible to all social workers. The 1st Interested Party also immediately handed the chenpi to the 2nd Interested Party. The Disciplinary Committee did not accept that the 1st Interested Party had intended to keep the chenpi for her own benefit.

11. On 22 October 2015, the Board notified the Applicant that the Disciplinary Committee had recommended that the Applicant's complaints were not established, and that no disciplinary action be taken against the 1st Interested Party. The Board also enclosed a copy of the Recommendation Report.

12. On 9 December 2015, the Board held a meeting to consider the Applicant's complaints. Prior to the meeting, on 1 December 2015, the Board members were provided with a bundle of documents including: (i) a background information paper; (ii) the Recommendation Report; and (iii) the hearing bundle for the Inquiry. The Decision was made by the Board to endorse the Recommendation Report.

13. On 18 December 2015, the Board notified the Applicant of the Decision to endorse the Disciplinary Committee's recommendation enclosing the Recommendation Report.

14. The Applicant was not satisfied with the Decision in relation to the 1st Interested Party and lodged the present application for judicial review. The relief sought is, *inter alia*, an order of *certiorari* to quash the Decision and for the case be remitted back to the Board for re-consideration.

15. The Applicant was legally represented when he made the application for leave to apply for judicial review. The grounds of review put forward by the Applicants are as follows:

(i) The Board failed to inquire into how the Disciplinary Committee made its recommendation and was therefore in breach of *Tameside* duty.

(ii) The Board failed to give adequate reasons in rejecting the complaints.

16. On 6 June 2017, the Applicant filed the Notice to Act in Person in these proceedings.

LEGAL FRAMEWORK FOR THE HEARING OF COMPLAINTS AGAINST REGISTERED SOCIAL WORKERS

17. The Board is a body corporate constituted under s 4 of the SWRO.

18. The functions of the Board are set out in s 7 of the SWRO which provides, *inter alia*, that the Board shall "*deal with disciplinary offences in accordance with this Ordinance*".

19. The powers of the Board are set out in s 8:

> *"(1) The Board may do all such things as are necessary for, or incidental or conducive to, the better performance of its functions and in particular but without prejudice to the generality of the foregoing, may—*
>
> *(a) establish committees to advise the Board on the performance of its functions and the exercise of its powers (including committees which have members who are not members of the Board);*
>
> ... ...
>
> *(e) exercise such other powers as are conferred on it under this Ordinance..."*

20. The Board may approve codes of practice under s 10 of the SWRO. Under s 11, the codes of practice may be taken into account by the Board or the Disciplinary Committee when deciding whether a social worker has committed a disciplinary offence.[1] However, failure to observe any provision of an approved code of practice does not by itself amount to a disciplinary offence.[2]

21. The disciplinary committee panel is constituted under s 26 of the SWRO, where it provides that:

> *"(1) The Board shall appoint persons (not being members of the Board) to be members of a disciplinary committee panel in accordance with the following numbers and categories—*
>
> *(a) not less than 12 registered social workers (category 1) who each hold a recognized degree in social work;*

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[1] see: s.11(1)
[2] see: s.11(2)

(b) not less than 12 registered social workers (category 1) who each hold a recognized diploma in social work; and

(c) not less than 10 persons who are not registered social workers.

... ..."

22. The disciplinary offences are found under s 25 of the SWRO, which provides that a registered social worker commits a disciplinary offence if he, *inter alia*, is "*guilty of misconduct or neglect in any professional respect*".[3]

23. Further, in relation to the procedure of the making of a complaint, ss 25(3) and (4) of the SWRO provide that:

"(3) Any complaint concerning any disciplinary offence shall be made in the specified form to the Registrar who shall, in accordance with rules made by the Board under section 9, submit the form to 2 members of the Board appointed by the Board for the purpose, and the members, in accordance with such rules, shall refer the complaint to the Board unless—

(a) the members are satisfied that—

(i) the complainant has had actual knowledge of the disciplinary offence complained of for more than 2 years immediately preceding the date on which the Registrar received the complaint; and

(ii) there are no special circumstances which explain the delay in making the complaint;

(b) the complaint is made anonymously;

(c) the complainant cannot be identified or traced;

[3] see s 25(2)(a)

(d) the social worker the subject of the complaint has ceased to be a registered social worker;

(e) the complaint, or a complaint of a substantially similar nature, has previously been inquired into by a disciplinary committee and the Board decided that the disciplinary offence complained of was not committed;

(f) the members are satisfied that the disciplinary offence complained of is trivial;

(g) the members are satisfied that the complaint is frivolous or vexatious or is not made in good faith; or

(h) the members are satisfied for any other reason that referring the complaint to the Board is unnecessary.

(4) Where a complaint has been referred to the Board under subsection (3), the Board shall, before reaching a decision in relation to the complaint or making a disciplinary order, appoint a disciplinary committee to inquire into the complaint, to advise it whether the disciplinary offence complained of has been committed and, if so, to recommend an appropriate disciplinary order."

24. As to the procedures before the Disciplinary Committee and Board, s 27 provides that:

"(1) The Board shall, not later than 30 days after a complaint is referred to it under section 25(3), appoint the disciplinary committee required by section 25(4) in relation to the complaint.

... ...

(5) The disciplinary committee shall not proceed to hear evidence of a complaint concerning a disciplinary offence unless the registered social worker in respect of whom the complaint is made is given 28 days' notice of the complaint and the date, time and place of the hearing.

... ...

(7) After the disciplinary committee has reached a decision on the advice to be given to the Board as to whether the disciplinary offence complained of has been committed and any appropriate disciplinary order that it would recommend in respect of the complaint, it shall report to the Board accordingly.

(8) The Board shall, after considering the disciplinary committee's decision or recommendation, the reasons in support thereof, any evidence and findings in respect thereof and all relevant circumstances relating thereto, decide whether the disciplinary offence complained of has been committed and notify the complainant concerned of the decision and the reasons therefor.

(9) Where the Board, after consideration of the advice of the disciplinary committee that a disciplinary offence has been committed or the recommendation that a certain disciplinary order should be made, is of the opinion that the complaint concerned or the recommended disciplinary order requires further investigation, it may refer the complaint back to the disciplinary committee which has reported thereon or to another disciplinary committee which the Board may appoint for further investigation, and may at the time of making such reference or thereafter give directions on matters relating to the complaint or the recommended disciplinary order on which such further investigation should be conducted..."

25. The Board may, upon a finding that a registered social worker has committed a disciplinary offence, make any of the following disciplinary orders under s 30 of the SWRO:

"(1) Where the Board has decided that a registered social worker has committed a disciplinary offence, it shall—

(a) order the Registrar to remove the name of the social worker from the Registrar permanently;

(b) order the Registrar to remove the name of the social worker from the Registrar for such period (not being more than 5 years) as the Board thinks fit;

(c) reprimand the social worker in writing and order the Registrar to record the reprimand on the Register; or

(d) order that the Chairperson of the Board admonish the social worker orally.

(2) Where the disciplinary offence referred to in subsection (1) is a disciplinary offence under section 25(1)(f), the Board shall exercise its power under subsection (1)(a)."

GROUNDS TO CHALLENGE THE DECISION

26. The Applicant puts forward 2 grounds to challenge the Decision. Firstly, the Applicant complains that the Board had erred in wholly adopting the Recommendation Report without making further inquiry. This argument is based on the premise that the Recommendation Report contains "grossly inadequate reasons". If the reasons given by the Disciplinary Committee are adequate, it would be extremely difficult for the Applicant to argue that the Board was in breach of *Tameside* duty in failing to conduct further inquiry, which is the second ground for the challenge.

(i) Are the reasons given by the Disciplinary Committee inadequate?

27. Firstly, I do not accept that the reasons given by the Disciplinary Committee are inadequate, whether for the Applicant to know why his complaints were found unsubstantiated or for the Board in making the Decision.

28. In my judgment, the reasons provided in the Recommendation Report are plainly sufficient for informing the Applicant the strengths and weaknesses of his case and why his complaints were found unsubstantiated. The complaints basically involved a "one-to-one" scenario, and one single factor may explain why the Disciplinary Committee preferred to accept the

evidence of the 1st Interested Party. Further, as the complaints involved allegations of professional misconduct which would have serious consequences for the 1st Interested Party, it would have been prudent for the Disciplinary Committee not to make any adverse findings against the 1st Interested Party in the absence of corroboration evidence.

29. Further, as emphasised in *Marta Stefan v General Medical Council*[4], the obligation to give reasons only extends to a short statement of reasons for its decisions in order to inform the parties in broad terms why the decision was made. The extent and substance of the reasons would depend upon the circumstances. The Privy Council said:[5]

> *"Their Lordships now turn to the alternative approach, that of the common law. In its most general form the argument proposes that there should be a general obligation on all decision-makers to give reasons for their decisions. The advantages of the provision of reasons have been often rehearsed. They relate to the decision-making process, in strengthening that process itself, in increasing the public confidence in it, and in the desirability of the disclosure of error where error exists. They relate also to the parties immediately affected by the decision, in enabling them to know the strengths and weaknesses of their respective cases, and to facilitate appeal where that course is appropriate. But there are also dangers and disadvantages in a universal requirement for reasons. It may impose an undesirable legalism into areas where a high degree of informality is appropriate and add to delay and expense."*

30. The principles governing the assessment of whether adequate reasons have been given are also set out in the Court of Final Appeal's judgment in *Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority*[6] :

> *"First, the reasons given should show that the tribunal has addressed the substantial issues before it and show why the tribunal has come to*

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[4] [1999] 1 WLR 1293
[5] at p 300D - 1301G
[6] [1998] 1 HKLRD 253, at p 291C-H

its decision. There may not be any need however to address every single issue. But the reasons should show that the issues that arise for serious consideration have been considered.

Secondly, when deciding on questions of indecency or obscenity, there may be cases where the contents of the articles in question would virtually speak for themselves. In these instances, the duty to give reasons could be discharged by describing the contents without much more. Apart from cases of this kind, a decision on indecency or obscenity which merely recites the statutory guidelines in s.10 would not normally be adequate. Such statements would in effect assert conclusions and would not reveal why the tribunal has come to such conclusions.

Thirdly, the reasons may not require great elaboration and they may be brief. It is only when they are defective in substance that they should be considered inadequate. Ultimately, what are adequate reasons in the circumstances of a particular case has to be approached sensibly.

Fourthly, where a point of law is raised the point has to be decided by the presiding magistrate and the statute expressly requires reasons to be given in writing. See s.7(3). Reasons for a decision on a point of law should usually set out the findings of fact, the point of law at issue and the process of reasoning leading to the conclusion."

31. Hence, it was not necessary for the Disciplinary Committee to address every single issue that arose in the case. The Disciplinary Committee need only demonstrate that the most substantial issues had been considered. Further, in view of the clear statutory scheme of the disciplinary offences set out under s 25 of SWRO, the matters required to be proved in the present case are self-explanatory. There were also no particular points of law that arose in the course of the Inquiry, and the key issue involved in the Inquiry was one of factual findings and credibility which was adequately addressed in the Recommendation Report.

32. Sufficiency of the reasons also depends on the context of each individual case. As mentioned in *Marta Stefan*[7], the obligation to give reasons relates to the parties immediately affected by the decision, in enabling them to know the strengths and weaknesses of their respective cases, and to facilitate appeal where that course is appropriate. In the present case, the Decision arose in context of a finding that there was no professional misconduct committed by a registered social worker. This is quite different from the usual cases involving professional misconduct, where the challenge is brought by a registered professional who has been found guilty of professional misconduct. In those circumstances, it is of greater importance that detailed reasons be given for a finding of guilt as penalty may be imposed upon such finding.

33. By contrast, the Applicant was not directly affected by the Decision. In such case, the Disciplinary Committee should be entitled to give a brief statement of reasons as to why it considered the Applicant's bare allegations to be unsubstantiated. It cannot be right that the Board was required to give extensive and detailed reasons in respect of every complaint and allegation that had been made, even if the complaint was trivial in nature and unsupported by any independent evidence. The reasons set out in the Recommendation Report (as endorsed by the Board) have adequately informed the Applicant, as complainant, as to why his complaints were considered unfounded.

34. By endorsing the Recommendation Report, the Board has clearly adopted the reasons given by the Disciplinary Committee. In so doing, adequate reasons had been given by the Board to the Applicant, and

[7] see §29 and footnote 4 above

his challenge based on the ground of inadequacy of reasons cannot possibly succeed.

(ii) Whether the Board was in breach of Tameside duty?

35. As I find that the reasons given by the Disciplinary Committee are adequate, it would be extremely difficult for the Applicant to argue that the Board had failed to take reasonable steps to acquaint itself with the relevant information of the case so as to enable it to make the Decision to endorse the Recommendation Report submitted by the Disciplinary Committee.

36. The classic test giving rise to *Tameside* duty is set out in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*:[8]

> *"...the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"*

37. It is well established that it is not the role of a court in a judicial review to decide upon the manner and intensity of inquiry to be undertaken in considering matters such as factual disputes and credibility. A court should not be invited to intervene on such disciplinary decisions made by specialist tribunals, merely because certain further inquiries are considered by the applicant to be sensible or desirable. An applicant is required to establish that "*no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient*".[9]

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[8] [1977] AC 1014 at p 1065

[9] *R (Khatun) v Newham London Borough Council* [2005] QB 37 at §35; adopted in Hong Kong in *Hysan Development Co. Ltd v Town Planning Board*, unreported, CACV 232 & 233/2012 (13 November 2014) at §§90-93, and *Smart Gain Investment Ltd v Town Planning Board*, unreported, HCAL 12/2006 (6

38. As mentioned in *Dr Chan Sze Lai Jacqueline v Dental Council of Hong Kong*[10], judicial restraint should be exercised against reviewing a public body for its conclusion of fact or fact and degree. It should avoid substitution of its own findings of fact, and give appropriate weight and measure of respect to the fact that the specialist tribunal has applied its own knowledge and expertise in assessing the evidence and making factual findings.

39. The Applicant is plainly inviting the court to embark on what has repeatedly been considered to be an impermissible inquiry as mentioned in the authorities above. The Applicant just complains that certain facts were not given adequate weight, and yet he has not identified any particular matters that the Disciplinary Committee had wrongfully failed to take into account. The Disciplinary Committee had, after a lengthy inquiry consisting of up to 4 days of evidence, found that the Applicant's complaint was unsubstantiated as uncorroborated and discredited allegations. The reasons for such findings had been adequately set out in the Recommendation Report.

40. The Board had properly considered the Recommendation Report and all underlying materials before it decided to endorse the views set out in such report.[11] There were sufficient materials before the Board to make the Decision. A reasonable tribunal possessing these materials would easily come to the conclusion that it had sufficient materials to make the Decision and that no further inquiry need to be made. In such circumstances, there is simply no room for the Applicant to argue that the

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November 2017) at §87, and *Deng, Suet Yan v Hong Kong Housing Authority & Anor*, unreported, CACV 4/2017 (7 July 2017) at §19

[10] [2014] 1 HKLRD 77 at §§22-29

[11] see: Affidavit of Kwan Yui-huen dated 25 August 2016 at §§10-15 and the Board's meeting minutes exhibited at "KYH-3"

Board was in breach of *Tameside* duty in failing to acquaint itself with the information or to conduct further inquiry before making the Decision.

41. Finally, as to the alleged failure to make findings on the Paper Shredder Complaint, the Applicant's initial complaint form did not specifically identify the Paper Shredder Complaint as a distinct complaint. The Board had in any event sent a letter to the Applicant on 9 December 2014 enclosing a copy of the draft complaints (with no mention of the Paper Shredder Complaint as a separate complaint), which was confirmed in writing by the Applicant. Further, no request was made for the Paper Shredder Complaint to be added in the hearing, even though the Applicant was legally represented throughout the process. Again there is no merit in such complaint.

REMITTING THE CASE BACK TO THE BOARD IS AN ACADEMIC EXERCISE

42. Further, even if there is some merit in the grounds to challenge the Decision, the court should not grant the relief as sought by the Applicant, namely an order of *certiorari* to quash the Decision and to remit the case back to the Board for re-consideration.

43. Under s 2 of the SWRO, "registered social worker" means a person whose name is currently entered in the register of registered social worker ("the Register"). The Board is established under the SWRO[12] to deal with, *inter alia*, the registration of social workers and disciplinary offences in accordance with the provisions in the SWRO.[13]

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[12] s.4 of the Ordinance
[13] s.7(1)(g) of the Ordinance

44. S 25 sets out the disciplinary offences which can be committed by a registered social worker. On the other hand, s 30 specifies the kinds of disciplinary orders that can be made if the registered social worker is found by the Board to have committed a disciplinary offence.

45. The clear intention of these provisions is that the disciplinary jurisdiction can only be exercised against "registered social workers" within the meaning of the SWRO. There is no express statutory power for the Board (or the Disciplinary Committee) to receive complaints, investigate or impose disciplinary orders on non-registered social workers. This is contrary to the practice of some other professional bodies which their regulatory provisions may retain a power to deal with disciplinary matters in relation to non-current members.[14]

46. Such construction of the Board's disciplinary jurisdiction under the SWRO may hamper its powers to properly investigate and punish disciplinary offences. The authors of *Disciplinary and Regulatory Proceedings*[15] commented that such situations may be "*destructive of regulation not least because most regulators give weight to the disciplinary findings of other regulators, if sufficiently serious, as cause for ejection from membership...*", and had identified that this is often avoided by two possible means, namely: (i) by taking powers to retain in membership or authorization any member or authorised person against

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[14] see, for example, the Bar Code of Conduct, at §4.1, "*It is the duty of every barrister (whether or not he is in practice and whether or not he is admitted to practise generally or on an ad hoc basis for the purposes of a specific case or cases) ...*"; and the Solicitor's Guide at Chapter 15, §1 "*Article 18(d) of the Articles of Association of the Law Society empowers the Law Society to investigate any charge of misconduct against any solicitor (whether a member or not) or employee of a solicitor and to institute and (if the Council thinks fit) prosecute any disciplinary proceedings.*"

[15] Gregory Treverton-Jones QC, "*Disciplinary and Regulatory Proceedings*", 8th edition, Jordan Publishing, 2015, at §§5.91-5.92.

whom an investigation has begun; or (ii) by providing that the regulator's jurisdiction extends to former members or authorised persons.

47. In the present case, the 1st Interested Party retired in December 2014 and she did not renew her registration which had expired on 31st December 2014. Notwithstanding the expiry of the 1st Interested Party's registration, the Board decided not to remove her name from the Register because of the complaints that had been made against her by the Applicant.[16] In the circumstances, at the time of the Inquiry, the 1st Interested Party was a registered social worker since her name was then in the Register. Consequentially, the Board had disciplinary jurisdiction over her by that time.

48. This is the practice adopted by other regulators, by refusing to accept resignations which are made in an attempt to frustrate disciplinary proceedings, so that disciplinary jurisdiction can be retained over them.[17]

49. However, the 1st Interested Party's name was removed from the Register by the Board on 4th August 2016 with retrospective effect from 1st January 2015.[18] Since the 1st Interested Party is no longer a "registered social worker" within the meaning of the SWRO as her name is not currently entered in the Register, the Board does not have any more disciplinary jurisdiction over the 1st Interested Party.

50. Further, the disciplinary orders under s 30 of the SWRO would be nugatory unless made against a registered social worker. Hence,

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[16] see: §§22 -23 of Affidavit of Kwan Yui-huen

[17] see: *Woodman-smith v Architcts Registration Board* [2014] EWHC 3639 (Admin), at §§12-22, and *R (Birks) v Commissioner of Police of the Metropolis* [2014] EWHC 3041 (Admin), at §§29-33,71

[18] see: "§24 and "KYH-6" of the Affidavit of Kwan Yu-huen

even if the Board has disciplinary jurisdiction over the 1st Interested Party, it does not have any power to make disciplinary order against her.

51. Finally, as the complaints are trivial in nature, there is minimal public interest in re-investigating the complaints or imposing any disciplinary orders on the 1st Interested Party. Hence, even if there is any merit in the grounds of challenge, which I do not accept it to be the case, the court should not grant the relief as sought by the Applicants.

52. For the above reasons, I dismiss the Applicant's application for judicial review. I also make a costs order *nisi* that the costs of this application be paid by the Applicant to the Respondent and the 1st Interested Party, which shall be made absolute 14 days after the date of the handing down of this Judgment.

(David Lok)
Judge of the Court of First Instance
High Court

The Applicant, in person, present

Ms Denise Souza, instructed by Chan & Cheng, for the Respondent

Ms Monica Chow, instructed by Ellen Au & Co, for the 1st Interested Party

The 2nd Interested Party, absent

The 3rd Interested Party, absent

CACV 123/2018
[2019] HKCA 279

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO 123 OF 2018
(ON APPEAL FROM HCAL 63 OF 2016)

BETWEEN

CHAN TSUI YAN	Applicant
and	
SOCIAL WORKERS REGISTRATION BOARD	Respondent
CHAU SHUI HOI MALINA	1st Interested Party
NG WANG TSANG	2nd Interested Party
NG YUEN CHING WILLIS	3rd Interested Party

Before: Hon Cheung, Yuen and Kwan JJA in Court
Date of Hearing: 27 February 2019
Date of Judgment: 11 March 2019

JUDGMENT

Hon Yuen JA (giving the judgment of the court):

1.1. This is the Applicant Chan Tsui Yan's appeal from the Judgment of Lok J ("**the judge**") given on 19 April 2018 ("**the Judgment**") dismissing his application for judicial review against the decision of the Social Workers Registration Board ("**the Board**") of 9 December 2015 ("**the Decision**").

1.2. As the Judgment the subject-matter of the appeal was in English, this Judgment is written in the same language. A translation of this Judgment will be provided if the Applicant requires it.

2. We shall first deal with 3 summonses[1] which had been issued by the Applicant prior to the hearing of the appeal.

3.1. First, the summons of 25 June 2018. As the Applicant acknowledged, this has been dealt with by the amendment of the Notice of Appeal, so no order needs to be made.

3.2. Second, the summons of 8 November 2018. Again, as the Applicant acknowledged, this has been dealt with by the inclusion of the transcript of the hearing before the judge ("**the Transcript**") in the bundles before this court, so no order needs to be made either.

4.1. Third, the summons of 12 December 2018. In this summons, the Applicant requested this court to play a *video recording* of the hearing before the judge. The reason for his request was because he disputes the accuracy of the Transcript. As an example, he disputes the time indicated in the Transcript of a pause of 30 seconds for him to drink water.

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[1] Filed on 25 June 2018, 8 November 2018 and 12 December 2018 respectively.

4.2. In our view, the summons is misconceived for the following reasons. First, the court only has *audio recording* facilities and does not have *video recording* facilities. Secondly, in accordance with most judicial review hearings, no oral evidence was given in court before the judge. Therefore, the rules of the court[2] do not provide for an official note or transcript to be supplied to any of the parties. It would appear that in this case, a transcript was provided because of the Applicant's persistent requests to the judge. Thirdly, and most importantly, the Transcript is irrelevant to the substantive grounds of appeal arising from the Judgment. The Applicant's dissatisfaction with other matters, eg the judge's conduct of the hearing in not permitting him to read out written documents, or concluding the hearing earlier than the 2 days for which it was listed, or inaccuracies in the Transcript (assuming there to be any), are irrelevant to the material issues arising from the Judgment which this court has to decide on appeal.

4.3 For the reasons above, the summons of 12 December 2018 is dismissed with costs.

Background

5.1. The background of the application for judicial review is as follows.

5.2. The Applicant had made certain complaints about a social worker Madam Chau ("**the 1st Interested Party**" or "**IP1**") to the Board[3]. On 9 December 2014, the Board provided a draft of the complaints to the

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2 Order 68 rule 1 Rules of the High Court.

3 The 2nd and 3rd Interested Parties were involved only at the stage of investigation of the complaint, and did not appear before the judge or on this appeal.

Applicant for his comment. On 15 December 2014, the Applicant signed the draft without making any amendments or additions. The document signed by the Applicant contained only 2 complaints.

5.3. These 2 complaints have been referred to as:

(1) the "**Lunchtime Arrangement Complaint**"– the complaint being that IP1 had falsely told the Applicant[4] that the policy of the centre was that only official employees were allowed to stay during the lunch hour because people who were not official employees were troublemakers; this was denied by IP1 who said that as an experienced social worker, she would never have referred to anyone as troublemakers; and

(2) the **"Receipt of Advantage Complaint"** – the complaint being that IP1 had asked the Applicant to make a gift to her of some dried tangerine peel worth $10,000, and asked for more later; this was denied by IP1 who said the Applicant had voluntarily brought some bags of dried tangerine peel to the centre which had been placed on her desk, and she had moved them to a shelf accessible to all colleagues.

5.4. Although an allegation that IP1 had asked the Applicant to shred confidential documents (**"the Paper Shredding Allegation"**) had been referred to in the Applicant's complaint form of 1 September 2014[5], this was *not* in the draft of the complaints sent to the Applicant for his

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4 Who was a "peer" (and not an official employee) at a centre run by the Society of Rehabilitation and Crime Prevention.

5 §18, Affidavit of Kwan Yiu Huen.

comment on 9 December 2014, which he signed on 15 December 2014 without making any amendments or additions thereto.

6. The 2 complaints were dealt with in accordance with the Social Workers Registration Ordinance Cap. 505 ("**the Ordinance**"). Under the Ordinance, a registered social worker commits a disciplinary offence if he "commits misconduct or neglect in any professional respect"[6].

7. In accordance with the Ordinance and the Disciplinary Procedures for Handling Complaints against Registered Social Workers, the Board appointed a Disciplinary Committee ("**DC**")[7] to investigate the complaints.

8.1. The DC inquiry started in June 2015. It took a total of 5 days and finished in September 2015. All parties, including the Applicant, were legally represented at the inquiry. There was no suggestion on behalf of the Applicant at any stage of the inquiry that the Paper Shredder Allegation should be added as a separate item of complaint for determination by the DC.

8.2. The Applicant, IP1 and other witnesses including Wong Yee Nok, Lau Mo Yin and Yeung Cham Ming gave oral evidence and were cross-examined.

8.3. In the course of the Applicant's cross-examination by counsel for IP1, counsel referred to the Paper Shredding Allegation. The chairman referred counsel expressly to the "2 complaints" and questioned

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6 Section 25(1)(a) of the Ordinance.

7 Pursuant to s.27(1) of the Ordinance.

counsel on the relevance of the line of questioning regarding the Paper Shredding Allegation[8]. Counsel's reply was that the allegations regarding the dried tangerine peel and the paper shredding had appeared in the complaint form after the Applicant had failed in his complaint against IP1 for discrimination, and so it was relevant to the Applicant's credibility[9]. The chairman then said while he understood that, he requested that counsel's questioning be more focused[10]. Clearly in accepting that the line of questioning was relevant to *credibility*, but in asking counsel to be more focused, the understanding of the DC as expressed by the chairman was that the Paper Shredding Allegation was *not* itself a separate item of complaint.

8.4. That this was the understanding of all the parties as well was shown by the fact that in the final submissions before the DC, none of the legal representatives treated the Paper Shredder Allegation as a separate item of complaint[11].

9. On 30 September 2015, the DC found that no complaint was substantiated (for reasons briefly summarized by the judge in §10 of the Judgment) and sent a Recommendation Report ("**the Report**") to the Board recommending that the complaints be dismissed. On 22 October 2015, the Applicant was notified and he was also provided with a copy of the Report.

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8 T/26, Counter 1065.

9 T/26, Counter 1066.

10 T/26, Counter 1067.

11 Acknowledged in §29 and §69.5, Form 86.

10. The matter then went to the Board. On 1 December 2015, the members of the Board were provided in advance with material documents including, in addition to the Report, a background information paper and the hearing bundle used at the inquiry.

11. At a meeting on 9 December 2015, the Board heard a presentation by the chairman of the DC who had presided over the inquiry. After consideration by its members, the Board decided to endorse the DC's recommendation and dismissed the complaints.

12. This Decision led to the Applicant's application for leave to apply for judicial review on 17 March 2016.

13.1. The Form 86 was drafted by counsel and the grounds of review were set out as follows:

> "(A) the Board failed to inquire into how the DC had made its recommendation, in particular, on the basis on which the DC rejected and/or failed to deal with crucial evidence given by the Applicant[12];
>
> (B) the Board failed to give adequate reasons as to its Decision[13]".

13.2. There was a reference in the Form 86 to the fact that the Paper Shredder Allegation had not been dealt with by the DC, but this was used as support for the first ground that the Board should have realized that further inquiry was necessary[14].

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[12] Page 25, Form 86.

[13] Page 35, Form 86.

[14] §69.6, Form 86.

14. Leave was given by the judge on 20 June 2016. In the originating summons filed on the Applicant's behalf (Form 86A), it was stated that "the grounds of the application are those set out in the Form no. 86 dated 17th March 2016 used on the application for leave to apply for such order". The affirmations filed by the respective parties were duly prepared on the basis of those grounds only.

15. The application for judicial review was heard on 25 July 2017. The Applicant was not legally represented at the date of the hearing[15]. Supplemental written submissions were provided on 28 July 2017 and 1 August 2017.

The judge's Judgment

16.1. In the Judgment, the judge first dealt with the Applicant's challenge to the Board's Decision on the ground that the DC had failed to give adequate reasons, and the Board therefore should have made further inquiry, but failed to do so[16].

16.2. The judge considered whether the DC had given adequate reasons in the Report. After referring to various authorities, the judge held that it was not necessary for the DC to address every single issue at the inquiry, only the most substantial ones, and the Report had adequately informed the complainant Applicant why his complaints were considered unfounded[17].

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15 He had filed a notice to act in person on 6 June 2017.

16 §26, Judgment.

17 §33, Judgment.

16.3. The judge noted that the Applicant did not identify any particularly crucial evidence that the DC had failed to take into account, and his arguments that the DC should have given weight to the evidence of certain witnesses were not permissible at an application for judicial review[18].

16.4. As for the Board, the judge referred to the affidavit of Kwan Yiu Huen, the Chairperson of the Board dealing with the complaints. In Mr Kwan's affidavit, he had set out (a) what materials had been sent to the members of the Board prior to the meeting, (b) the presentation given by Teddy Tang Chun Keung who had presided over the DC, and (c) the Board's deliberations. Mr Kwan said that "the Board, in coming to its Decision, took into account the reasons given by the [DC], as well as the available evidence, and were satisfied that the [DC] had duly considered all evidence and submissions before them".

16.5. The judge held that there were sufficient materials before the Board which its members had considered, and that it had not failed to acquaint itself with relevant information, nor was there a need to conduct further inquiry. In light of the above, it was not necessary for the Board to give further reasons for its Decision.

17. The application for judicial review was therefore dismissed.

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[18] §39, Judgment.

Appeal

18. The Applicant's grounds of appeal can be categorized as follows:

(1) the judge had failed to consider that the DC did not accept evidence from some witnesses[19] which evidence was in favour of the Applicant's version of events;

(2) there were procedural errors in the cross-examination at the inquiry before the DC;

(3) the DC did not deal with the Paper Shredder Allegation which he regarded as a complaint.

Discussion

19.1. In relation to ground (1), as we sought to explain to the Applicant during the hearing of this appeal, the powers of a court in judicial review proceedings are limited, particularly in respect of the fact-finding exercise. The law is well-established[20] that in judicial review proceedings, it is not for the court to determine and evaluate the evidence with a view to testing findings of fact made by a public body tribunal (in this case, the DC). A court would only interfere with the tribunal's fact-finding decision if the decision had been predicated upon a factual error, upon it being shown by the applicant that:

- there was simply no evidence at all for the finding, or

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19 Wong Yee Nok, Lau Mo Yin and Yeung Cham Ming.

20 Summarized in *Dr Chan Sze Lai Jacqueline v Dental Council of Hong Kong* [2014] 1 HKLRD 77, §§23-29.

- the evidence taken as a whole was not reasonably capable of supporting the finding of fact.

19.2. At the inquiry, there was evidence from IP1 denying the 2 complaints. The DC also took into account IP1's experience and the unlikelihood that she would have done the things of which she was accused. The DC also took into account the fact that the bags of tangerine peel were found in a place accessible by everyone, and not in IP1's exclusive possession. The DC was well aware of the other witnesses' evidence. In the Report, the DC had referred to the three witnesses Mr Wong, Madam Lau and Mr Yeung[21] and part of their evidence, eg at §3(A)(1)(b)(ii).

19.3. As with all fact-finding tribunals, it was open to the DC to accept all or part of a witness' evidence, and to give more weight to one part of his/her evidence or another. Any issues as to the importance or weight of any particular piece of evidence from any of the witnesses which the tribunal saw and heard are for the DC, not the court.

19.4. Accordingly, this ground of appeal should be rejected.

20.1. In relation to ground (2), it would appear that the Applicant's objection is that IP2 and IP3 only put forward their "defence" after the witnesses had given evidence. It would appear that this was not an argument that had been advanced before the DC, or to which the Board was alerted.

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[21] §3, Report.

20.2. More importantly, it was not a ground in the Form 86, or in the Originating Summons for judicial review (Form 86A). The Applicant did not apply to the judge for leave to amend the grounds.

20.3. Even if the Applicant had applied for amendment, the judge should not have acceded to it. The importance of the grounds specified in the application for judicial review has been stressed by the courts. In *Lau Kong Yung & Others v Director of Immigration*[22], Litton PJ emphasized the discipline of law and of legal procedures, saying:

> "Once leave to apply for judicial review is granted, amendment of the grounds should rarely occur. All too often applications are made for amendment after leave to issue proceedings has been granted, as if O.53 r.3 were simply the portals to a playground of infinite possibilities where the administrators could then be made to leap through more and more hoops of fire. It is up to the Judges of the High Court to stop this kind of extravaganza".

More recently, in *Tang Suk Chun and Director of Food and Environmental Hygiene*[23], Lam VP also said:

> "This Court should not allow new grounds to be run lightly as the running of such new points would, in effect, circumvent the duty of an applicant to proceed with promptitude. Relaxation of such an approach without good and exceptional reason is not conducive to good public administration".

The Applicant was legally represented (i) at the DC inquiry, (ii) when he applied for leave to apply for judicial review, (iii) when the Originating Summons for judicial review was issued, and (iv) when the affirmation in support was prepared. This new ground was never raised. There is no

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22 (1999) 2 HKCFAR 300, 340.

23 CACV5 of 2016, 17 November 2017.

good reason why he should be permitted to run a new ground now. This ground of appeal should also be rejected.

21.1. In relation to ground (3):

- the Paper Shredder Allegation was not a distinct complaint put forward by the Applicant in the complaint document he signed;
- it was not made a separate item of complaint at the inquiry before the DC;
- IP1's counsel was only allowed to question the Applicant about it at the inquiry for the purposes of credibility only; this was not disputed on behalf of the Applicant;
- none of the legal representatives made submissions to the DC on the Allegation as if it were a separate item of complaint.

21.2 It was by reason of the Applicant's conduct that the Board and IP1 had proceeded on the basis that the Paper Shredder Allegation was not a separate complaint. Accordingly, the judge was correct and this ground of appeal should also be rejected.

22.1. As a matter of completeness, we would also mention that the Applicant sought to introduce even more new grounds in his written submissions, eg his allegation that the Board had presented "false documents" because a copy of the Report had not been signed.

22.2. Again this was a new ground, which has never been foreshadowed. In any event, since there was no suggestion that, apart

from the absence of signatures, there were any differences in any copies of the Report, this is immaterial.

23.1. Also as a matter of completeness, we would deal with one particular submission of Miss Chow, counsel for IP1.

23.2. This submission arises from the fact that after the Applicant made his complaints in December 2014, IP1 did not apply to renew her registration as a registered social worker on its expiration on 31 December 2014.

23.3. Although the Board has a power to remove a registered social worker's name from the register under s.22(1)(d) of the Ordinance if she has failed to renew her registration, the Board did not do so as its policy was not to exercise that power while disciplinary proceedings were extant. According to the Chairperson of the Board,

> "The Board does so in order to ensure that it may exercise its disciplinary jurisdiction over the social worker, in the event that a disciplinary order is made against him/her".[24]

23.4. The disciplinary orders include removal of the social worker's name (whether permanently or for a period), reprimand and oral admonition.

23.5. IP1's name therefore remained on the register until 4 August 2016, when the removal of her name was made retrospective to 1 January 2015. It would be noted that leave to apply for judicial review was given on 20 June 2016.

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[24] §23, Affidavit of Kwan Yiu Huen.

23.6. Miss Chow's submission was that in view of the fact that IP1 was no longer a registered social worker because her name was not "currently entered in the Register", the court should not grant the relief sought by the Applicant. This was accepted by the judge as a secondary reason to dismiss the Originating Summons[25].

24.1. Miss Chow emphasized that she was not contending that this court does not have *jurisdiction* to deal with the appeal because IP1 was no longer a registered social worker. Miss Chow accepted that the case is distinguishable from *Surrey Police Authority v Beckett*[26] which she cited. In the UK case, the employment of the police officer was under contract, and the contract simply expired by effluxion of time. The UK Court of Appeal held that on the date of expiry of the contract, the officer ceased to be a police officer, and so proceedings which had started could not be continued. In our case, it is for the Board to exercise its power to remove from the register a social worker who has not applied to renew her registration.

24.2. Miss Chow's submission was rather, that her client's removal from the register rendered the appeal "moot" or academic. It is well-established that the grant of relief in judicial review proceedings is an exercise of discretion, and since the appeal has been dismissed on the primary grounds, it is not necessary for us to express a view on whether the judge's view on this secondary point is correct.

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[25] §§49-51, Judgment.

[26] [2002] ICR 257.

Order

25. The appeal is dismissed with costs to be paid by the Applicant to the Board and IP1, to be taxed if not agreed.

(Peter Cheung)	(Maria Yuen)	(Susan Kwan)
Justice of Appeal	Justice of Appeal	Justice of Appeal

The applicant unrepresented, acting in person

Ms Isabel Tam, instructed by Chan and Cheng, for the respondent

Ms Monica Chow, instructed by Ellen Au & Co, for the 1st interested party

CACV 123/2018
[2019] HKCA 605

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO 123 OF 2018
(ON APPEAL FROM HCAL 63 OF 2016)

BETWEEN

CHAN TSUI YAN	Applicant
and	
SOCIAL WORKERS REGISTRATION BOARD	Respondent
CHAU SHUI HOI MALINA	1st Interested Party
NG WANG TSANG	2nd Interested Party
NG YUEN CHING WILLIS	3rd Interested Party

Before: Hon Kwan VP, Hon Cheung and Yuen JJA in Court
Date of Written Submissions: 15 April 2019, 29 April 2019, 6 May 2019
Date of Judgment: 31 May 2019

JUDGMENT

Hon Yuen JA (giving the judgment of the court):

1. This court handed down judgment on 11 March 2019 ([2019] HKCA 279) dismissing the Applicant's appeal against the judgment of

Hon Lok J ("**the judge**") given on 19 April 2018 refusing his application for leave to apply for judicial review of the Respondent's decision of 9 December 2015. The issues in the appeal, as well as the court's reasons for dismissing it, have been set out in our judgment and will not be repeated here.

2. The Applicant applied by a Notice of Motion filed on 2 April 2019 for leave to appeal to the Court of Final Appeal. He lodged his written submissions on 15 April and 6 May 2019 while the Respondent filed its submissions in opposition on 29 April 2019. The 1st Interested Party ("**IP1**") did not file submissions.

3. The Registrar of Civil Appeals had directed on 4 April 2019 that the Notice of Motion shall be determined on paper only without an oral hearing. We agree it is appropriate to determine this application on paper.

4. The applicant set out 5 grounds in his Notice of Motion which are summarized as follows:

(1) If IP1 had not been guilty of misconduct, the organization (the Society of Rehabilitation and Crime Prevention) would not have apologized or issued an oral warning to her for which she was required to sign a written record ("**Ground (1)**")

(2) It was inappropriate for IP1's counsel to rely on the English authority of *Surrey Police Authority v Beckett* [2002] ICR 257) to contend that IP1 could not be "tried" after she had left employment ("**Ground (2)**")

(3) The Applicant gave examples of 3 government officials, viz. Donald Tsang, Rafael Hui, and Franklin Chu, who were tried after they left the government ("**Ground (3)**")

(4) The Respondent was wrong not to have considered the paper shredding allegation, and there were 2 copies of the Report which contained discrepancies and were false documents used to cover up IP1's misconduct. ("**Ground (4)**")

(5) The Applicant said he did not rely the false documents in his Form 86 because he received them from Li & Lai, his former solicitors, after he filed his Form 86. ("**Ground (5)**")

5. In the Applicant's written submissions, he submitted (among other things) that IP1's misconduct and that the false documents related to a question of great general or public importance, or gave rise to exceptional circumstances, such that leave should be granted under the "or otherwise" limb of s.22(1)(b) Hong Kong Court of Final Appeal Ordinance, Cap. 484.

6. Section 22(1)(b) provides that an appeal shall lie to the Court of Final Appeal at the discretion of the Court of Appeal or the Court of Final Appeal, from any judgment of the Court of Appeal in any civil cause or matter, whether final or interlocutory, if, in the opinion of the Court of Appeal or the Court of Final Appeal, as the case may be, the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court of Final Appeal for decision.

7. The Applicant's Grounds (1), (4) and (5) are fact-sensitive and do not raise any question of great general or public importance. As we explained in paragraph 19.1 of our Judgment, the powers of a court in

judicial review proceedings are limited, particularly in respect of the fact-finding exercise.

8. With respect to Grounds (2) and (3), Miss Chow had accepted at the hearing of the appeal that this case is distinguishable from the *Surrey Police Board* case (see paragraph 24.1 of our Judgment). The judge had discussed IP1's submission based on this case as a secondary point. This court did not think it necessary to express a view on whether the judge's view was correct (see paragraph 24.2 of our Judgment). As it did not form a part of our Judgment, leave should not be given either.

9. In conclusion, the Applicant fails on all grounds.

10. The Notice of Motion dated 2 April 2019 is accordingly dismissed with costs to be paid by the Applicant to the Respondent. The Respondent should file and serve on the Applicant a statement of costs within 7 days for the purpose of summary assessment of costs. If the Applicant has any objections, he should file and serve his objections within 14 days after receiving the statement. The court will then assess the costs on paper.

(Susan Kwan)	(Peter Cheung)	(Maria Yuen)
Vice President	Justice of Appeal	Justice of Appeal

The applicant, unrepresented, acting in person

Ms Isabel Tam, instructed by Chan and Cheng, for the respondent