

CJRS 18/2008

**Subcommittee on Draft Subsidiary Legislation
Relating to the Civil Justice Reform**

Revised Part 23 – Judicial Review

Purpose

On behalf of the Judiciary, the Judiciary Administration presents this paper, which introduces the proposed amendments in the revised Part 23 – Judicial Review in the latest draft Rules of the High Court (Amendment) Rules 2008 (“Draft RHC”). It must be emphasised that where views on the law are expressed herein, such views are not to be taken as statements of law by the courts. Judicial determinations or statements of law may only be made in actual cases that come before the courts after hearing argument.

Background

2. At the meeting on 26.3.2008, the Subcommittee supported the revised proposal for amendments to Order 53 – Applications for Judicial Review as set out in **CJRS 4/2008**, i.e. removing the service requirement at the leave application stage.

Revised Part 23 – Judicial Review

3. Part 23 of the latest Draft Rules has been revised accordingly as attached at **Annex A**. The marked-up version of Order 53 is at **Annex B**. The amendments seek to implement Recommendations 144¹, 145² and 148³ of the Final Report.

**Annex A
Annex B**

¹ Rules along the lines of CPR 54.1 to 54.3, suitably adapted, retaining the present terminology, should be adopted for defining the scope of judicial review proceedings in Hong Kong.

² Provision should be made to enable persons wishing to be heard at the substantive hearing, subject to the court’s discretion, to be heard in support of, as well as in opposition to, an application for judicial review.

³ If leave is granted, the order granting leave and any case management directions should be required to be served by the applicant on the respondent (whether or not he has acknowledged service) and on all interested parties who have acknowledged service, such persons then becoming entitled, if they so wish, to file grounds and evidence to contest or to support on additional grounds, the claim for judicial review.

4. Specifically, -
- (a) the ambit of “judicial review” is better defined rather than by a remedy-based approach (rr.1A & 1);
 - (b) an application for leave must be made by filing a new **Form 85B** with more particulars as to the respondent(s) and/or interested party(ies). Appeal against refusal of leave is still as of right but the time is extended from 10 to 14 days to bring it in line with other interlocutory appeals (r. 3);
 - (c) Where leave is granted, the Court may also give case management directions (r.4A);
 - (e) a provision modeled on CPR 54.16 is added to regulate affidavit evidence (r.5A);
 - (f) any person may (so long as he does so promptly) apply for leave to file evidence or make representations but such leave may only be granted if the court is satisfied that such person is a proper person to be heard (r.5B);
 - (g) persons in support of, as well as in opposition to, an application for judicial review may be heard at the substantive hearing (r.9(1)); and
 - (h) a transitional provision is added to provide that Part 23 does not apply to pending applications for (i) leave and (ii) judicial review before the commencement of the Rules (r.15).

Judiciary Administration
May 2008

PART 23 - JUDICIAL REVIEW

Recommendations 144, 145 and 148

248. Rule added

Order 53 is amended by adding immediately before rule 1 –

"1A. Interpretation (O. 53, r. 1A)

In this Order –

"application for judicial review" () includes an application in accordance with this Order for a review of the lawfulness of –

- (a) an enactment; or
- (b) a decision, action or failure to act in relation to the exercise of a public function;

"interested party" (), in relation to an application for judicial review, means any person (other than the applicant and respondent) who is directly affected by the application."

249. Rule substituted

Order 53, rule 1 is repealed and the following substituted -

"1. Cases appropriate for application for judicial review (O. 53, r. 1)

(1) An application for judicial review must be made if the applicant is seeking –

- (a) an order for mandamus, prohibition or certiorari; or
- (b) an injunction under section 21J of the Ordinance restraining a person from acting in any office in which he is not entitled to act.

(2) An application for judicial review may be made if the applicant is seeking –

- (a) a declaration; or
- (b) an injunction (not being an injunction mentioned in paragraph (1)(b)).

(3) An application for judicial review may include an application for an award of damages, restitution or the recovery of a sum due but may not seek such a remedy alone."

251. Grant of leave to apply for judicial review

Order 53, rule 3 is amended –

(a) in paragraph (2), by repealing sub-paragraph (a) and substituting –

"(a) a notice in Form No. 85B in Appendix A containing a statement of –

- (i) the name and description of the applicant;
- (ii) the name and description of the respondent;

- (iii) the relief sought and the grounds on which it is sought;
 - (iv) the name and description of all interested parties (if any);
 - (v) the name and address of the applicant's solicitors (if any); and
 - (vi) if no solicitor acts for the applicant, the applicant's address for service; and";
- (b) in paragraph (3), by adding "for leave" after "the application";
 - (c) in paragraph (4), by repealing "10 days" and substituting "14 days".

253. Rule added

Order 53 is amended by adding –

"4A. Service of order granting leave

(O. 53, r. 4A)

(1) Where leave to make an application for judicial review is granted, the Court may also give directions as to the management of the case.

(2) The applicant for judicial review shall, within 14 days after the leave was granted, serve the order granting leave and any directions given under paragraph (1) on –

- (a) the respondent; and
- (b) all interested parties."

254. Rules added

Order 53 is amended by adding –

"5A. Affidavit evidence (O. 53, r. 5A)

At the hearing of the application for judicial review, no affidavit may be relied on unless –

- (a) rule 6(3), (4) or (5), as the case may be, has been complied with as regards the use of affidavits;
- (b) the affidavit has been served in accordance with any direction of the Court; or
- (c) the Court grants leave.

5B. Court's powers to hear any person

(O. 53, r. 5B)

(1) Any person may apply for leave to –

- (a) file evidence; or
- (b) make representations at the hearing of the application for judicial review.

(2) An application under paragraph (1) must be made promptly.

(3) The Court shall not grant leave under paragraph (1) unless the applicant appears to the Court to be a proper person to be heard at the hearing of the application for judicial review."

255. Statements and affidavits

Order 53, rule 6 is amended by adding –

"(6) A reference to a party in paragraphs (3) and (5) includes a reference to an interested party named in the notice of application for leave."

257. Hearing of application for judicial review

Order 53, rule 9(1) is amended by adding "or in support of" after "in opposition to".

258. Rule added

Order 53 is amended by adding –

"15. Transitional provision relating to Part 23 of the Amendment Rules 2008 (O. 53, r. 15)

(1) Where, immediately before the commencement of Part 23 of the Amendment Rules 2008, an application for leave to apply for judicial review is pending, then nothing in that Part applies in relation to the application and (if leave is granted) the subsequent application for judicial review, and this Order as in force immediately before the commencement continues to apply as if that Part had not been made.

(2) Where, immediately before the commencement of Part 23 of the Amendment Rules 2008, an application for judicial review is pending, then nothing in that Part applies in relation to the application, and this Order as in force immediately before the commencement continues to apply as if that Part had not been made."

259. Forms

Appendix A is amended –

(a) by adding –

"No. 85B
**Notice of application for leave to
 apply for Judicial Review**

(O. 53 r. 3(2))

No.....

IN THE HIGH COURT OF HONG KONG
 COURT OF FIRST INSTANCE

Applicant

Notice of Application for leave to
 apply for Judicial Review (O. 53 r. 3(2))

This form must be read together with Notes for Guidance obtainable from the Registry.

To the Registrar, High Court, Hong Kong.

Name, description and address of applicant	
Name and description of proposed respondent	
Judgment, order, decision or other proceeding in respect of which relief is sought	

Relief Sought

Name, description and address of all interested parties, if any	
Name and address of applicant's solicitors, or, if no solicitors acting, the address for service of the applicant	
Signed	Dated

Grounds On Which Relief is Sought
 (If there has been any delay, include reasons here).

Note : — Grounds must be supported by an affidavit which verifies the facts relied on.";

(b) by repealing Form No. 86A.

Rules of the High Court (Amendment) Rules 2008

The Rules of the High Court (Cap. 4A)

Order 53 - APPLICATIONS FOR JUDICIAL REVIEW

Remarks:

Adaptation amendments retroactively made - see 25 of 1998 s. 2

Remarks

1A. Interpretation (O. 53, r. 1A)

Rule 248
Rec 144

In this Order –
“application for judicial review” () includes an application in accordance with this Order for a review of the lawfulness of –

(a) an enactment; or

(b) a decision, action or failure to act in relation to the exercise of a public function;

“interested party” (), in relation to an application for judicial review, means any person (other than the applicant and respondent) who is directly affected by the application.

1. — Cases appropriate for application for judicial review (O. 53, r. 1)

Rule 249
Rec 144

~~(1) — An application for-~~

~~(a) — an order of mandamus, prohibition or certiorari, or~~

~~(b) — an injunction under section 21J of the Ordinance restraining a person from acting in any office in which he is not entitled to act,~~

~~shall be made by way of an application for judicial review in accordance with the provisions of this Order.~~

~~(2) — An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b)) may be made by way of an application for judicial review, and on such an application a judge may grant the declaration or injunction claimed if he considers that, having regard to-~~

~~(a) — the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,~~

~~(b) — the nature of the persons and bodies against whom relief may be granted by way of such an order, and~~

~~(c) — all the circumstances of the case,~~

~~it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.~~

1. Cases appropriate for application for judicial review (O. 53, r. 1)

(1) An application for judicial review must be made if the applicant is seeking –

- (a) an order for mandamus, prohibition or certiorari; or
- (b) an injunction under section 21J of the Ordinance restraining a person from acting in any office in which he is not entitled to act.

(2) An application for judicial review may be made if the applicant is seeking –

- (a) a declaration; or
- (b) an injunction (not being an injunction mentioned in paragraph (1)(b)).

(3) An application for judicial review may include an application for an award of damages, restitution or the recovery of a sum due but may not seek such a remedy alone.

2. Joinder of claims for relief (O. 53, r. 2)

On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.

3. Grant of leave to apply for judicial review (O. 53, r. 3)

(1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave must be made ex parte by filing in the Registry-

- ~~(a) a notice in Form 86A containing a statement of~~
 - ~~(i) the name and description of the applicant,~~
 - ~~(ii) the relief sought and the grounds upon which it is sought,~~
 - ~~(iii) the name and address of the applicant's solicitors (if any), and~~
 - ~~(iv) the applicant's address for service; and~~
- (a) a notice in Form No. 85B in Appendix A containing a statement of

- =
- (i) the name and description of the applicant;
- (ii) the name and description of the respondent;
- (iii) the relief sought and the grounds on which it is sought;
- (iv) the name and description of all interested parties (if any);
- (v) the name and address of the applicant's solicitors (if any); and
- (vi) if no solicitor acts for the applicant, the applicant's address for service; and

(b) an affidavit verifying the facts relied on.

Rule 251
Rec 145 & 148

(3) The judge may determine the application **for leave** without a hearing, unless a hearing is requested in the notice of application, and need not sit in open court; and in any case the Registrar shall serve a copy of the judge's order on the applicant.

(HK)(4) Where an application for leave is refused by a judge or is granted on terms, the applicant may appeal against the judge's order to the Court of Appeal within ~~10~~ **days 14 days** after such order.

(6) Without prejudice to its powers conferred by Order 20, rule 8, the Court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as the Court thinks fit.

(7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(8) Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceeding which is subject to appeal and a time is limited 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.

(9) If the Court grants leave it may impose such terms as to costs and as to giving security as it thinks fit.

(10) Where leave to apply for judicial review is granted, then-

- (a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;
- (b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

4. Delay in applying for relief (O. 53, r. 4)

(1) An application for leave to apply 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. (L.N. 356 of 1988)

(2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.

(3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

4A. Service of order granting leave (O. 53, r. 4A)

Rule 253
Rec 148

(1) Where leave to make an application for judicial review is granted, the Court may also give directions as to the management of the case.

(2) The applicant for judicial review shall, within 14 days after the leave was granted, serve the order granting leave and any directions given under paragraph (1) on –

- (a) the respondent; and**
- (b) all interested parties.**

5. Mode of applying for judicial review (O. 53, r. 5)

~~(HK)(1) When leave has been granted to make an application for judicial review, the application shall be made by originating motion to a judge sitting in open court or, if the judge granting leave has so ordered, by originating summons, to a judge in chambers.~~

Rule 43
Rec 14

(1) When leave has been granted to make an application for judicial review, the application must be made by originating summons in Form No. 86 in Appendix A to a judge sitting in open court or, if the judge granting leave has so ordered, to a judge in chambers.

(3) The ~~notice of motion or summons~~ **originating summons** must be served on all persons directly affected and, where it relates to any proceedings in or before a court and the object of the application is either to compel the court or an officer of the court to do any act in relation to the proceedings or to quash them or any order made therein, the ~~notice of summons~~ **originating summons** must also be served on the clerk or registrar of the court and, where any objection to the conduct of the judge is to be made, on that judge.

(4) Unless the Court granting leave has otherwise directed, there must be at least 10 days between the service of the ~~notice of motion or summons~~ **originating summons** and the day named therein for the hearing.

(5) ~~A motion must be entered~~ **An originating summons must be issued** for hearing within 14 days after the grant of leave.

(6) An affidavit giving the names and addresses of, and the places and dates of service on, all persons who have been served with the ~~notice of motion~~ **originating summons** must be filed ~~before the motion is entered for hearing~~ **within 7 days of such service** and, if any person who ought to be served under this rule has not been

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served, the affidavit must state that fact and the reason for it; and the affidavit shall be before the Court on the hearing ~~of the motion~~ of the originating summons.

(7) If on the hearing of the ~~motion~~ originating summons the Court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms (if any) as it may direct in order that the ~~notice~~ originating summons may be served on that person.

5A. Affidavit evidence (O. 53, r. 5A)

Rule 254
148

At the hearing of the application for judicial review, no affidavit may be relied on unless –

- (a) rule 6(3), (4) or (5), as the case may be, has been complied with as regards the use of affidavits;
- (b) the affidavit has been served in accordance with any direction of the Court; or
- (c) the Court grants leave.

5B. Court's powers to hear any person (O. 53, r. 5B)

Rule 254
Rec 148

(1) Any person may apply for leave to –

- (a) file evidence; or
- (b) make representations at the hearing of the application for judicial review.

(2) An application under paragraph (1) must be made promptly.

(3) The Court shall not grant leave under paragraph (1) unless the applicant appears to the Court to be a proper person to be heard at the hearing of the application for judicial review.

6. Statements and affidavits (O. 53, r. 6)

(1) Copies of the statement in support of an application for leave under rule 3 must be served with the ~~notice of motion or summons~~ originating summons and, subject to paragraph (2), no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement.

Rule 43A
Rec 14

(2) The Court may on the hearing of the ~~motion or summons~~ originating summons allow the applicant to amend his statement, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used by him. (L.N. 223 of 1995)

(3) Where the applicant intends to ask to be allowed to amend his statement or to use further affidavits, he shall give notice of his intention and of any proposed amendment to every other party.

(4) Any respondent who intends to use an affidavit at the hearing shall file it in the Registry as soon as practicable and in any event, unless the Court otherwise directs, within 56 days after service upon him of the documents required to be served by paragraph (1). (L.N. 404 of 1991)

(5) Each party to the application must supply to every other party copies of every affidavit which he proposes to use at the hearing, including, in the case of the applicant, the affidavit in support of the application for leave under rule 3.

(6) A reference to a party in paragraphs (3) and (5) includes a reference to an interested party named in the notice of application for leave.

Rule 255
Rec 145 & 148

7. Claim for damages (O. 53, r. 7)

(1) On an application for judicial review the judge may, subject to paragraph (2), award damages to the applicant if-

- (a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates, and
- (b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, it could have been awarded damages.

(2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading.

8. Application for discovery, interrogatories, cross-examination, etc. (O. 53, r. 8)

(1) Unless the judge otherwise directs, any interlocutory application in proceedings on an application for judicial review may be made to any judge in chambers or a master.

(2) In this paragraph “interlocutory application” (非正審申請) includes an application for an order under Order 24 or 26 or Order 38, rule 2(3), or for an order dismissing the proceedings by consent of the parties.

(3) This rule is without prejudice to any statutory provision or rule of law restricting the making of an order against the Crown.

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9. Hearing of application for judicial review (O. 53, r. 9)

(1) On the hearing of any ~~motion or~~ **originating** summons under rule 5, any person who desires to be heard in opposition to **or in support of** the ~~motion or~~ **originating** summons, and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with ~~notice of the~~ **motion or the** **the originating** summons.

Rule 44
Rec 14
Rule 257
Rec 145

(2) Where the relief sought is or includes an order of certiorari to remove any proceedings for the purpose of quashing them, the applicant may not question the validity of any order, warrant, commitment, conviction, inquisition or record unless before the hearing of the ~~motion or~~ **originating** summons he has lodged with the Registrar a copy thereof verified by affidavit or accounts for his failure to do so to the satisfaction of the Court hearing the ~~motion or~~ **originating** summons.

Rule 44
Rec 14

(3) Where an order of certiorari is made in any such case as is referred to in paragraph (2), the order shall, subject to paragraph (4), direct that the proceedings shall be quashed forthwith on their removal into the Court of First Instance. (25 of 1998 s. 2)

(4) Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court.

(5) Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ; and Order 28, rule 8, shall apply ~~as if the application had been made by~~ **summons**.

Rule 44
Consequential
Amendment

10. Saving for person acting in obedience to mandamus (O. 53, r. 10)

No action or proceeding shall be begun or prosecuted against any person in respect of anything done in obedience to an order of mandamus.

12. Consolidation of applications (O. 53, r. 12)

Where there is more than one application pending under section 21K of the Ordinance against several persons in respect of the same office, and on the same grounds, the Court may order the applications to be consolidated.

13. Order made by judge may be set aside, etc. (O. 53, r. 13)

(HK) An appeal shall lie, from an order of a judge granting or refusing an application for judicial review, to the Court of Appeal, which may set aside or confirm any such order or substitute such order as ought to have been made.

14. Meaning of “Court” (O. 53, r. 14)

In relation to the hearing by a judge of an application for leave under rule 3 or of an application for judicial review, any reference in this Order to “the Court” (法庭) shall, unless the context otherwise requires, be construed as a reference to the judge.

(Enacted 1988)

15. Transitional provision relating to Part 23 of the Amendment Rules 2008 (O. 53, r. 15)

Rule 258
Transitional

(1) Where, immediately before the commencement of Part 23 of the Amendment Rules 2008, an application for leave to apply for judicial review is pending, then nothing in that Part applies in relation to the application and (if leave is granted) the subsequent application for judicial review, and this Order as in force immediately before the commencement continues to apply as if that Part had not been made.

(2) Where, immediately before the commencement of Part 23 of the Amendment Rules 2008, an application for judicial review is pending, then nothing in that Part applies in relation to the application, and this Order as in force immediately before the commencement continues to apply as if that Part had not been made.