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The Government of the Hong Kong Special Administrative Region
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立法會教育事務委員會秘書
梁慶儀小姐

梁小姐:

**2008年4月28日立法會教育事務委員會特別會議
副學位課程的學術及專業評審**

在2008年4月28日的教育事務委員會特別會議上，委員得知一名就讀暨南大學與香港專業進修學院合辦的兼讀制中醫學位課程的學生，曾就中醫組拒絕認可該課程的決定提出司法覆核。余若薇議員表示希望知道有關案件的詳情。現謹隨函附上高等法院原訟法庭及上訴法庭就該司法覆核所作的判辭，供委員參閱。

食物及衛生局局長

(蕭子謙

代行)

二零零八年四月二十八日

副本送：教育局局長（經辦人：鄭鍾偉先生）

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HCAL41/2005

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO.41 OF 2005**

BETWEEN

LAW SZE YAN

Applicant

and

**THE CHINESE MEDICINE PRACTITIONERS BOARD Respondent
OF THE CHINESE MEDICINE COUNCIL
OF HONG KONG**

Before : Hon Chu J in Court

Date of Hearing : 12 December 2005

Date of Judgment : 26 June 2006

J U D G M E N T

1. The applicant applies to judicially review the decision of the Chinese Medicine Practitioners' Board ("the Board") of the Chinese Medicine Council of Hong Kong ("the Council") not to assess a part-time undergraduate degree course in Chinese medicine run by Jinan University of Guangzhou, PRC and the Hong Kong College of Technology

(“HKCT”). The decision was contained in two letters dated 2 December 2004 and 21 March 2005 from the Board to HKCT. In this application, the applicant, a student enrolled in the course, seeks to quash the decision and an order declaring the decision a nullity. He also seeks an order compelling the Board to assess the programme in question.

Background

2. On 14 July 1999, the Chinese Medicine Ordinance (“the Ordinance”) was enacted. It provides the statutory framework for regulating and controlling Chinese medicine practitioners and Chinese medicines in Hong Kong. Section 3 establishes the Council, which is an independent statutory body. In September 1999, the Board was set up under the Council. It is charged with the responsibility of, *inter alia*, conducting and regulating the examination, registration, regulation of practice, discipline and conduct of the Chinese medicine practitioners in Hong Kong. Under the Board, two committees were established. They are the Examination Committee and the Committee on Assessment of Chinese Medicine Degree Courses.

3. Under section 59(1) of the Ordinance, the Board is required to set and conduct the Licensing Examination. Under section 60, the Board shall determine the syllabus, format, standard of assessment and other related matters in respect of the Licensing Examination.

4. Under section 67(a) of the Ordinance, a person who wishes to apply to be registered as a registered Chinese medicine practitioner has to pass the Licensing Examination.

5. Section 61(1)(a) further provides that to be eligible to take the Licensing Examination, a person must satisfy the Board that he has satisfactorily completed such undergraduate degree course of training in Chinese medicine practice or its equivalent as is approved by the Board.

6. In short, in order to become a registered Chinese medicine practitioner and to practise Chinese medicine, a person must : (i) possess the academic qualifications that would entitle him to sit the Licensing Examination, and (ii) pass the Licensing Examination.

7. Further under the statutory scheme, the Board is charged with the power and duty to assess and approve undergraduate degree course of training in Chinese medicine practice for satisfying the entry condition for undertaking the Licensing Examination.

8. Assessment of courses to see whether they meet the basic requirements set by the Board is carried out by the Committee on Assessment of Chinese Medicine Degree Courses (“the Committee”). For courses conducted by universities and institutions in the Mainland, the Board has enlisted the support of the State Administration of Traditional Chinese Medicine to undertake the assessment and to make recommendations to the Board.

9. After deliberations in 2000, the Board resolved that the basic requirements of an approved undergraduate course (“the basic course requirements”) should be as follows :

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- (a) The course shall be a full-time on campus undergraduate degree course in Chinese medicine of no less than 5 years' duration, comprising not less than 30 weeks of internship, or its equivalent.
- (b) The course must include the 10 compulsory subjects prescribed by the Board.
- (c) The course must not be conducted, whether in part or in whole, by means of distance learning, such as correspondence course or on-line training programme.
- (d) The course should fulfil the basic requirements of university and clinical training in respect of, for instance, teaching quality, teaching/laboratory facilities, instructional management, library facilities, qualifications of the teaching staff, the standard of the student admission, clinical training and so on.

10. At the time, there were a total of six undergraduate degree courses on Chinese medicine that were conducted by the local universities. Four of these courses were full-time degree courses conducted by the University of Hong Kong ("HKU"), Chinese University of Hong Kong ("CUHK") and Baptist University of Hong Kong ("BUHK"). The remaining two were part-time degree courses run by HKU and BUHK, which commenced in 1998 and 2000 respectively.

11. Between September 2001 and April 2002, the Committee carried out an assessment of all these six local degree courses. In May 2002, the Committee submitted the assessment reports to the Board. It

recommended the approval of all the four full-time courses. As for the two part-time courses, the Committee considered they met the basic requirements in terms of the subjects offered and study hours, but the mode of study (i.e. part-time) was insufficient to ensure the quality of teaching and learning and the standard of clinical training. The Committee recommended an one-off exceptional arrangement for the students already enrolled in the courses in or before 2002 by allowing them to sit the Licensing Examination upon satisfactory completion of their courses.

12. After deliberation, the Board accepted the recommendations of the Committee. The decision was communicated to the universities in June 2002. In August 2002, the Board further provided to the universities a list of areas of concerns and recommendations on the degree courses for reference and follow-up.

13. On 5 September 2002, the Board made a press announcement of its approval of the full-time courses of the three local universities and the arrangement for the students enrolled in the two part-time courses of HKU and BUHK.

14. In November 2002, acting on the recommendations of the State Administration of Traditional Chinese Medicine, the Board also recognized and approved the full-time undergraduate degree courses in Chinese medicine conducted by 27 higher education institutions in Chinese medicine in the Mainland.

15. In December 2002, the Council published the 2003 Licensing Examination Candidate Handbook (“2003 Handbook”) setting out the information on the Licensing Examination. Among the information promulgated in the Handbook were the basic course requirements and the list of the 30 universities and institutions (3 from local and 27 from Mainland) whose courses on Chinese medicine were approved by the Board for the purpose of the Licensing Examination.

The facts leading to the judicial review

16. HKCT is not a university or institute of higher education. It is a local organisation involved in the provision of education and training. Jinan University is a Mainland university. Neither of them is on the list of universities and institutions promulgated in the 2003 Handbook.

17. HKCT and Jinan University together offered a part-time undergraduate degree programme in Chinese medicine (“the Program”). There were four intakes of students in March and September of 2001 and 2002 respectively. The applicant enrolled in the Program in September 2001. The course is for seven years. Satisfactory completion of it leads to an award of a professional degree by Jinan University. When the Program commenced, it adopted a mixed correspondence and classroom teaching mode. The clinical training is carried out at Jinan University while classroom teaching is conducted on the premises of HKCT.

18. By letter dated 31 May 2002, HKCT first enquired with the Board whether the Program would be recognized by the Council and whether the graduates would be eligible to sit the Licensing Examination.

19. In November 2002, the Board deliberated on the Program as well as two other part-time courses. The first of which was jointly run by BUHK and the RMIT University in Australia. The second one was jointly run by the Open University of Hong Kong ("OUHK") and Xiamen University in the Mainland. The Board concluded that all three courses did not meet the basic course requirements and they were not accredited courses for undertaking the Licensing Examination.

20. Thereafter until March 2004, there was extensive exchange of correspondence in connection with the request to approve the Program involving not only the Board and HKCT, but also Legislative councillors and the LegCo Secretariate, from whom HKCT and the students enrolled in the Program had sought assistance. Specifically by letters dated 13 June and 9 October 2003, the Council explained to the LegCo Secretariate its decision not to approve the Program. In summary, the Board pointed out that the Program did not meet the basic course requirements in that it only had total learning hours of about 1,000 hours, with less than 1,000 hours on Chinese medicine subjects, and six months of clinical training. Further, the mode of teaching was by both correspondence and classroom teaching. In the letters, the Board also emphasized that unlike in the case of Chinese medicine practitioners, the Ordinance has not provided for transitional arrangements for students undertaking professional training in Chinese medicine. The decision to

permit students enrolled in the two part-time courses of HKU and BUHK to sit the Licensing Examination upon completion of their courses was because of the historical circumstances of Chinese medicine education in Hong Kong universities. Hence, it was inappropriate to extend the arrangement to courses of universities outside Hong Kong.

21. Then on 12 October 2004, HKCT wrote to inform the Board that Jinan University had substantially reformed the Program to meet the basic course requirements prescribed by the Board. In the letter, HKCT requested the Board for the first time to assess the Program. By letter dated 2 December 2004, the Board informed HKCT that it had decided not to assess the Program as reformed because it was a part-time course and did not meet the basic course requirements of a full-time undergraduate course of not less than five years.

22. By another letter dated 3 January 2005, HKCT again requested the Board to assess the Program. The Board replied by letter dated 21 March 2005, reiterating that the Program was a part-time course, hence did not satisfy the basic course requirements. The Board stated that it would not recognize the Program or conduct an assessment of it.

23. On 4 May 2005, the applicant commenced these proceedings. Leave to apply for judicial review was granted on 9 May 2005.

The application for judicial review

24. In the Form 86A, two grounds were set out in support of the judicial review application. They are :

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(1) The Board's decision was *Wednesbury* unreasonable in that it failed to accord equal treatment to the Program.

(2) The Board's decision was *Wednesbury* unreasonable in that it is unduly oppressive, subjecting the applicant to excessive hardship, and/or the applicant had a legitimate expectation that he would be treated equally with other students who were enrolled in part-time courses in or before 2002.

25. At the hearing, Mr Ng, who appeared for the applicant, summarized the grounds as : (1) irrationality and (2) legitimate expectation or oppression. He further confirmed that no challenge is made to the Board's decision in June 2002 to make an one-off exceptional arrangement in connection with the part-time courses conducted by HKU and BUHK. Indeed, no leave has been given to argue this and the Form 86A would have to be amended before the applicant can launch any challenge to the 2002 decision.

The Board's decision

26. Before analysing the two grounds of challenge, it is necessary to understand the deliberations and reasons underlying the Board's decision not to assess and approve the Program. As a matter of principle, the Board considered that the basic course requirements, including a full-time undergraduate degree course, are necessary to maintain the long term development and standards of the Chinese medicine training and of the profession. The Board took the view that the maintenance of the

standards is important to protect public health and safety as well as to maintain public confidence in Chinese medicine and its practice.

27. In respect of the two local part-time degree courses run by HKU and BUHK, the Board was prepared to make an exceptional arrangement for the students enrolled in the courses in or before 2002. The Board came to this decision after considering the historical circumstances that these courses already commenced in 1998 and 2000 and that they were assessed by the Committee to have met the basic course requirement save with regard to its mode of study (i.e. part-time). As the Board's concern was directed at professional education in Chinese medicine provided by local universities before the provisions in the Ordinance on registration and examination of Chinese medicine practitioners came into effect, it was not prepared to assess or approve part-time Chinese medicine degree courses run by non-local universities or institutes of higher education.

28. With specific regard to the Program, the Board's reasons not to assess it are twofold. Firstly, the Program was not a five-year full-time degree course and did not meet the basic course requirements. Secondly, there was no justification to make exceptional arrangement for students enrolled in the Program. The special consideration given to part-time courses run by local universities does not apply in that HKCT is not a university and Jinan University is not a local university.

Ground 1 : Unequal treatment

29. The first ground of the applicant's challenge is that the Board did not accord equal treatment to the Program. The applicant's case is that the Program stands in the same or similar position as that of the part-time degree courses of HKU and BUHK. Accordingly, the Board ought to carry out an assessment of the Program as it had done in relation to the courses of HKU and BUHK. The refusal to assess the Program is therefore irrational.

30. In *New Territories Cargo Transport Association Ltd v. Director of Marine* (unreported) CACV14/1997, the Court of Appeal held that where an administrative decision involves treating a particular group of persons differently from everybody else who appear to be like them and the decision is challenged on the basis that it is irrational by reason of such difference in treatment, the test as to the lawfulness or otherwise of the decision is whether there is a rational basis for the difference in treatment.

31. In *Association of Expatriate Civil Servants of Hong Kong v. Secretary for the Civil Service* (1996) 6 HKPLR 333, 352A-B, Bokhary JA citing his earlier decisions in *R. v. Man Wai Keung (No.2)* (1992) 2 HKPLR 165, 179 and *Lee Miu Ling v. AG (No.2)* (1995) 5 HKPLR 585, 591E-C, held that to justify a departure from the requirement of identical treatment, it must be shown that : (i) sensible and fair-minded people would recognize a genuine need for some difference of treatment; (ii) the difference embodied in the particular departure selected to meet that need is itself rational; and (iii) such departure is proportionate to such need.

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32. There are two issues under the first ground of challenge. The first is whether as a matter of fact, the Program stands in the same or similar position as that of the two part-time courses run by HKU and BUHK. The second issue is, if the position is the same or similar and there had been difference in the Board's treatment of the Program and the other two courses, whether there is a rational basis for it.

33. Factually speaking, both the Program and the courses of HKU and BUHK are part-time courses. In this respect, they all fail to meet one of the basic course requirements, namely, a full-time undergraduate course of not less than 5 years. However, it does not follow that the Program stands in the same or similar position as that of the courses of HKU and BUHK. It is the Board's case that there are important differences between them. I agree.

34. Firstly, the courses of HKU and BUHK commenced in 1998 and 2000, before the statutory provisions on registration and examination of Chinese medicine practitioners came into effect. By contrast, the Program only commenced in 2001. Secondly, unlike the courses of HKU and BUHK, the Program is not an undergraduate degree course of a local university. HKCT is not a university or an institute of higher education. The Program is in substance an undergraduate course of Jinan University of Guangzhou, a non-local university.

35. These are material differences. In the first place, the Board's decision in 2002 to make an one-off exceptional arrangement for the students enrolled in the part-time courses of HKU and BUHK is a

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recognition of the fact that a number of undergraduate courses on Chinese medicine, including part-time courses of HKU and BUHK, were already conducted by the local universities when the Ordinance came into effect and when the Board formulated the basic course requirements. The Board's 2002 decision is to accommodate the situation caused by the historical legacy of local university education in Chinese medicine. Plainly the rationale underlying the exceptional arrangement has no application to courses of a non-local university, such as the Program.

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36. Secondly, the applicant argues that it is immaterial that HKCT is not a university or institute of higher education because the respective part-time courses that BUHK and OUHK jointly organized with overseas universities were not included in the one-off exceptional arrangement. I am unable to agree with this argument. These courses were not assessed or approved because they were not full-time on-campus degree courses of not less than five years. It must be trite that the mere fact of being a course delivered by a university will not entitle the course to be assessed and approved by the Board. This however does not lead to the conclusion that whether the course is delivered by a university is of no significance. On the contrary, it is a statutory requirement under section 61(1)(a) of the Ordinance that a person must have satisfactorily completed an undergraduate degree course approved by the Board or its equivalent in order to be eligible to take the Licensing Examination. Therefore, whether the course is run by an university must be a highly relevant consideration.

37. Thirdly, the Program is in substance an undergraduate programme of Jinan University that is provided in Hong Kong through HKCT's assistance. Although classroom teaching is conducted on the premises of HKCT, clinical training is carried out in Jinan University. Indeed, HKCT has no laboratory or other facilities for the clinical aspect of the teaching and training. Unlike HKU and BUHK, Jinan University, being a non-local university, is not subject to the supervision of Hong Kong education authority. More importantly, as the Board emphasizes, there are practical difficulties and resources constraints for the Board to conduct proper assessments and monitor courses run by non-local universities and institutes of higher education. In the case of mainland universities and institutes, the Board had to enlist the assistance of the State Administration of Traditional Chinese medicine. Given that the Board had set full-time undergraduate degree course as one of the basic course requirements, it is unrealistic to expect the Board to incur resources to assess part-time courses of non-local universities. Even in the context of considering exceptional arrangement for existing part-time undergraduate courses of local universities, the Board cannot reasonably be expected to assess part-time courses of non-local universities or institutes that are being delivered in Hong Kong through Hong Kong institutes.

38. As the evidence shows, the Board's stance with regard to part-time courses offered jointly by local and non-local universities had been consistent throughout. Just as it had declined to assess the Program, it had also declined to assess the joint course of BUHK and RMIT

University of Australia and that of OUHK and Xiamen University in the Mainland.

39. It is also worth noting that Jinan University had not requested the Board to assess the Program or its 5-year full-time programme. It was only subsequently in 2005 that Jinan University requested an assessment of the full-time programme and the Board's approval was given in late 2005.

40. The foregoing analyses demonstrate that the Program does not stand in the same or similar position with the part-time undergraduate degree courses of HKU and BUHK. As they are not the like, there is no basis for contending that there were unequal treatments. Even if there are differences in treatment, which I do not accept, there are proper and rational basis for the Board not to assess the Program or to consider exceptional arrangement for students enrolled in the Program.

41. The applicant argues that the Board acts unfairly in giving preference to local universities and local qualifications. It is also said that the Mainland has a longer history of Chinese medicine studies than Hong Kong and the quality of Chinese medicine education in the Mainland may be much better than that in Hong Kong. In my view, these arguments are misplaced and have overlooked the overall picture underlying the Board's decision.

42. As noted above, when the Board resolved to require Chinese medicine courses to be full-time courses of not less than 5 years, there were already the two part-time courses of HKU and BUHK. However,

A the Ordinance has made no transitional provision for students already
B undertaking professional training in Chinese medicine in Hong Kong. It
C is against these circumstances that the Board decided to make exceptional
D arrangement to students enrolled in the two part-time courses of HKU and
E BUHK. Thus viewed, it is not a matter of affording preferential treatment
F to local universities. Rather as the Board has been at pain to emphasize,
G it is to take note of the historical development in Chinese medicine
H education in Hong Kong. In other words, the Board was giving a
I practical solution to a problem in the local university education on Chinese
J medicine brought about by its decision to require full-time Chinese
K medicine training. Thus analyzed, fairness does not require the Board to
L have regard to or to accommodate part-time Chinese medicine courses
M conducted by non-local universities or institutes of higher education.
N There is no unfairness in not making exceptional arrangement for students
O in part-time courses of non-local universities or institutes of higher
P education.

43. At any rate, it must be remembered that the applicant has not
challenged the Board's decision in 2002 to make an one-off exceptional
arrangement for the students enrolled in the part-time courses of HKU and
BUHK. The decision in 2005 not to assess or to make exceptional
arrangement for the Program is the result of the 2002 decision. Given
that there is no challenge to the 2002 decision, it is not open to the
applicant to argue that the Board's decision in 2005 was unfair in that it
had preferred local universities to non-local universities.

44. Before leaving the first ground of challenge, I will deal briefly with the applicant's argument that the exceptional arrangement was not "one-off" because it had been applied to certificate or diploma courses. This argument is based on a mis-reading of the evidence.

45. What happened was in May 2003, the Department of Health submitted a paper to the LegCo Panel on Health Services (Ref. No. CB(2) 2012/02-03 (05)) to report on the updated development of the work on registration of Chinese medicine practitioners under the Ordinance. At paragraph 15, it reported that the Board had approved the full-time courses of the three local universities and 27 Mainland universities and institutes of higher education. At paragraph 16, the paper stated that the Board after careful deliberations had decided to permit the students enrolled before 2002 in the part-time courses of HKU and BUHK to sit the Licensing Examination upon their satisfactory completion of the courses. The paper went on to state that to take care of the students currently enrolled in the part-time diploma or certificate courses of HKU and BUHK, the Board had resolved that these students, upon their transferring to and satisfactorily completing the relevant bridging courses and part-time or full-time courses on Chinese medicine, may be eligible for sitting the Licensing Examination.

46. It is therefore not the case that the Board had extended the exceptional arrangement to students in the diploma/certificate courses of HKU and BUHK. The students in the diploma/certificate courses upon completion of their courses are not eligible to sit the Licensing Examinations. They only become eligible after completing the bridging

courses and the undergraduate degree courses on Chinese medicine. The exceptional arrangement for the students already enrolled in the part-time degree courses of HKU and BUHK is indeed one-off since there was no further intake for the courses after 2002.

47. For the above reasons, the first ground of challenge fails.

Ground 2 : Legitimate expectation

48. The applicant's second ground of challenge is that he has a substantive legitimate expectation that he would be accorded equal treatment as students enrolled in the part-time courses of HKU and BUHK.

49. In *Ng Siu Tung v. Director of Immigration* (2002) 5 HKCFAR 1, the Court of Final Appeal held that the doctrine of substantive legitimate expectation is part of the administrative law of Hong Kong. Under the doctrine, a failure to honour a legitimate expectation of a substantive outcome or benefit might, in the absence of an overriding reason of law or policy excluding its operation, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court. One of the necessary elements of the doctrine is that the legitimate expectation has to arise from a promise or representation, the expectation being that the promise or representation would be honoured : at para. 94. Generally speaking, the representation relied upon to support a legitimate expectation must be clear and unambiguous. Where a representation is reasonably susceptible of competing constructions, the correct approach is to adopt the interpretation applied by the public

authority, subject to the application of the *Wednesbury* reasonableness test :
at para. 104.

50. In the present case, the applicant bases his legitimate
expectation claim on the press announcement of the Board on 5 September
2002. The part of the announcement relied by the applicant reads :

“.....中醫組已完成評審本地三間大學，即香港大學、中文大
學和浸會大學，所舉辦的中醫本科學位課程，其中全日制課
程已獲中醫組接納為可參加執業資格試的認可課程。於 2002
年或以前已經入讀上述三所大學所舉辦的中醫兼讀制學位課
程的學生，在圓滿地完成課程後，亦可參加執業資格試。”

51. Three points were made in this part of the press announcement.
Firstly, the Board had assessed the undergraduate degree courses on
Chinese medicine run by the three local universities, viz. HKU, CUHK and
BUHK. Secondly, all the full-time courses had been approved for the
purpose of the Licensing Examination. Thirdly, students enrolled in the
part-time Chinese medicine undergraduate courses of these universities in
or before 2002 may, upon satisfactory completion of the courses, be
eligible to sit the Licensing Examination.

52. Mr Ng argues that as a matter of necessary implication, this part
of the press announcement had given rise to a legitimate expectation that
the applicant, who was enrolled in a part-time course before 2002, would
be treated fairly and equally by the Board when it considered whether to
assess and approve part-time courses on Chinese medicine. It is said that
since the Board had announced in its 2003 Handbook (published in
December 2002, at para. 4(a)) that for the purpose of section 61(1)(a) of

the Ordinance, it is a basic requirement that the course is a full-time undergraduate programme of not less than 5 years, the question of how to deal with part-time courses would necessarily arise. It is on this basis that the applicant's claim of legitimate expectation is said to have arisen.

53. In my view, the press announcement whether on its own or read in conjunction with the subsequent 2003 Handbook cannot give rise to any express or implied promise or representation of the kind argued by the applicant, or at all. The very basic requirement for a legitimate expectation is therefore absent. Students on other part-time courses, like the applicant, might, upon reading the announcement, hope that they would also be permitted to sit the Licensing Examination upon satisfactory completion of their courses. However, a mere hope is not enough. The announcement is completely silent on undergraduate degree courses not run by the three local universities, HKU, CUHK and BUHK. Neither has it made any mention of undergraduate degree courses of non-local universities or institutes of education. It cannot give rise to any promise or representation with regard to part-time undergraduate courses of universities and institutes other than HKU, CUHK and BUHK.

54. Mr Ng refers to the judgment in *Ng Siu Tung v. Director of Immigration* at para. 92 which states : "Generally speaking, a legitimate expectation arises as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority." He submits that a policy can also provide the basis for a legitimate expectation to arise. The submission cannot assist the applicant. The press announcement cannot reasonably be read as

announcing or conveying any general or specific policy with regard to part-time undergraduate degree courses of universities and institutes other than the three local universities or at all.

55. Further, when the press announcement was made in September 2002, the applicant was already enrolled in the Program. His decision to take the course could not be related to the announcement. He had not shown how he had acted in reliance on the announcement, irrespective of whether the announcement amounts to a promise or representation or statement of policy.

56. Given that the press announcement does not give rise to any promise or representation or statement of policy, there is no case of a failure to honour a promise or representation or to take into consideration a promise, representation or stated policy. There is accordingly no unfairness that can justify the intervention of the court. The challenge based on legitimate expectation therefore fails.

The standing of the applicant

57. The applicant has sought a *certiorari* to quash the Board's decision not to assess the Program as well as an order compelling the Board to undertake an assessment of the course.

58. It is the respondent's argument that the applicant lacks the necessary standing for the grant of the relief. I agree.

59. As Mr Kwok, who appeared for the respondent, rightly argues, the proper party to challenge a refusal to assess a course and to seek an order compelling assessment is the education institute that operates the course, and not a student currently taking the course. The assessment of a course requires the agreement and co-operation of the institution conducting it. Neither HKCT nor Jinan University has joined in the present challenge to the Board's decision or has sought to compel an assessment by the Board. Further, as the applicant has yet to complete the course, it is too early for him to say that he is affected by the Board's decision.

60. In *R v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte World Development Movement Ltd* [1995] 1 WLR 386 at 395G-H, Rose LJ observed :

“ Furthermore, the merits of the challenge are an important, if not dominant, factor when considering standing. In Professor Sir William Wade's words in *Administrative Law* (7th edn, 1994) P 712: ‘... the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved.’

Leaving merits aside for a moment, there seem to me to be a number of factors of significance in the present case: the importance of vindicating the rule of law, as Lord Diplock emphasized in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 at 107, [1982] AC 617 at 644; the importance of the issue raised, as in *Ex p Child Poverty Action Group*; the likely absence of any other responsible challenger, as in *Ex p Child Poverty Action Group and Ex p Greenpeace Ltd*; the nature of the breach of duty against which relief is sought (see *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 at 96, [1982] AC 617 at 630 per Lord Wilberforce); and the prominent role of these applicants in giving advice, guidance and assistance with regard to aid (see *Ex p Child Poverty Action*

Group [1989] 1 All ER 1047 at 1048, [1990] 2 QB 540 at 546).”
[Emphasis added]

61. The applicant has not been able to show any substantial default or abuse on the part of the Board as to justify him in bringing judicial review.

62. Additionally, given that HKCT and Jinan University is not a party to these proceedings, it is impossible and amounts to a futile exercise of the court’s discretion to grant the relief of compelling the Board to assess the Program.

Conclusion

63. For the above reasons, the application for judicial review fails. Accordingly, I dismiss the application. Applying the normal rule of costs follow event, there is an order *nisi* that the applicant pays the costs of the respondent, to be taxed if not agreed. The applicant’s own costs be taxed under the Legal Aid Regulations.

(C. Chu)
Judge of the Court of First Instance,
High Court

Mr Kenneth W.H. Ng, instructed by Messrs Tang Lai & Leung,
for the Applicant

Mr Kwok Sui Hay, instructed by Messrs Lo & Lo, for the Respondent

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CACV 268/2006

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

**CIVIL APPEAL NO. 268 OF 2006
(ON APPEAL FROM HCAL NO. 41 OF 2005)**

BETWEEN

LAW SZE YAN **Applicant**

and

**THE CHINESE MEDICINE Respondent
PRACTITIONERS BOARD OF THE
CHINESE MEDICINE COUNCIL OF
HONG KONG**

Before : Hon Ma CJHC, Le Pichon JA & Chung J in Court

Date of Hearing : 22 March 2007

Date of Handing Down Judgment : 30 March 2007

J U D G M E N T

A Hon Ma CJHC :

B 1. Under challenge in the present judicial review proceedings is
C the decision of the Chinese Medicine Practitioners Board of the Chinese
D Medicine Council of Hong Kong (the Respondent) made in about
E December 2004 and March 2005, whereby the Respondent declined to
F assess a part-time undergraduate course run jointly by the Hong Kong
G College of Technology ("the HKCT") and Jinan University (of
H Guangzhou). It was said essentially that the decision was an unreasonable
I one since the Respondent had accorded unequal treatment in relation to
J this degree course compared with its approach with other part-time degree
K courses which it had assessed and approved. This was the main issue in
L the appeal. There was also a question raised regarding the Applicant's
M standing in the judicial review proceedings. Chu J in the court below had
N held he had insufficient standing.

O 2. In order to understand these issues in context, it is first
P necessary to set out the statutory scheme and the background facts.

Q *The Chinese Medicine Ordinance, Cap.549*

R 3. The practice of Chinese medicine has a long and venerable
S history in Hong Kong but only recently has there been any statutory
T regulation of this. In August 1989, the Government set up a Working
U Party on Chinese Medicine to see whether the regulation of Chinese
medicine practitioners should be introduced. The Secretary for Health and
Welfare appointed the Preparatory Committee on Chinese Medicine in
March 1995 to make recommendations regarding the registration of
practitioners, the licensing of traders in Chinese medicine and other
matters. From November to December 1997, a public consultation took

place. All this eventually led to the passing of the Chinese Medicine Ordinance, Cap.549 on 14 July 1999.

4. Broadly, we are concerned in this appeal with the qualifications necessary for a person to be licensed to practise Chinese medicine in Hong Kong. The relevant scheme in the Ordinance can be briefly described (here I am grateful for the detailed analysis contained in the judgment of Chu J) : -

(1) A person may practise as a Chinese medicine practitioner only if he or she is registered as such and in possession of a practising certificate (sections 75 and 76).

(2) In order to be registered in the Register of Chinese Medicine Practitioners (section 52), a person must pass an examination known as the Chinese Medicine Practitioners Licensing Examination (section 67(a)), unless he falls under one of the exemptions referred to in section 92 (this latter situation has no relevance in the present case.)

(3) The Licensing Examination is set by the Respondent (section 59) which is a statutory body set up under sections 12 and 13. It is this Board that has overall responsibility in relation to this examination (section 60).

(4) A person will be eligible to take the Licensing Examination if he has satisfactorily completed an

undergraduate degree course of training in Chinese medicine practice or its equivalent which has been approved by the Respondent (section 61(1)(a)). It is this approval responsibility that was engaged in the present proceedings.

(5) These provisions governing the registration of Chinese medicine practitioners and the Licensing Examination came into effect on 16 August 2000.

5. There was set up in 2001 under the auspices of the Respondent, the Committee on Assessment of Chinese Medicine Degree Courses ("the Committee"), which had the responsibility of making recommendations to the Respondent regarding the approval of degree courses in Chinese medicine (these being the courses that had to be undertaken as required by section 61(1)(a) of the Ordinance). Ultimately, however, the approval of any course would have to be made by the Respondent. The Respondent assesses and approves the suitability of courses from educational institutions both in Hong Kong and outside Hong Kong. For courses in Chinese medicine in universities and other institutions in the Mainland, the Respondent enlists the assistance of the State Administration of Traditional Chinese Medicine ("SATCM").

6. It was the decision of the Respondent made in the exercise of its functions under sections 60 and 61 of the Ordinance in refusing to assess (and therefore perhaps ultimately approve) the course in Chinese medicine jointly run by HKCT and Jinan University that has led to the present judicial review proceedings.

Background facts leading up to the relevant decision

7. After deliberations on the applicable criteria to approve degree courses in Chinese medicine for the purposes of eligibility under section 61(1)(a) of the Ordinance to take the Licensing Examination, the Respondent identified the basic requirements of an approved course. These requirements were described in an affirmation of Ms Connie Lau, the Secretary to the Respondent : -

“19. The basic requirements of an approved course as determined by the Board are listed as follows:-

- (a) the course shall be a full-time on campus undergraduate degree course in Chinese medicine of no less than 5 years' duration, comprising not less than 30 weeks of internship, or its equivalent;
- (b) such course must include the following 10 compulsory subjects:-
 - (i) Basic Theories of Chinese Medicine
 - (ii) Diagnostics of Chinese Medicine
 - (iii) Chinese Materia Medica
 - (iv) Chinese Medicinal Formulary
 - (v) Internal Medicine of Chinese Medicine
 - (vi) External Medicine of Chinese Medicine
 - (vii) Gynaecology of Chinese Medicine
 - (viii) Paediatrics of Chinese Medicine
 - (ix) Orthopaedics and Traumatology of Chinese Medicine
 - (x) Acupuncture and Moxibustion of Chinese Medicine
- (c) the course should not be conducted, whether in whole or in part, by means of distance learning (such as correspondence course or on-line training program).

The course should also fulfill the basic requirements of university and clinical training, including teaching quality, teaching/laboratory facilities, instructional management, library facilities, teachers' qualifications, standards of student admission and clinical training, etc."

8. There followed the actual assessment exercise. Between September 2001 and April 2002, the Respondent looked into the courses, both full-time and part-time, offered by universities in Hong Kong. Altogether, there were six courses : four full-time courses offered in the Hong Kong University ("HKU"), the Chinese University of Hong Kong ("CUHK") and Hong Kong Baptist University ("HKBU"); two part-time courses in HKU and HKBU.

9. In May 2002, the Committee recommended to the Respondent that the four full-time courses offered at HKU, CUHK and HKBU could be approved. It was also recommended on an exceptional basis that approval could be given to the part-time courses at HKU and HKBU (notwithstanding the fact that they were part-time and therefore did not come within the criterion identified in paragraph 7 above at sub-paragraph (a)). It is this latter recommendation regarding part-time courses, later adopted by the Respondent, that became the basis for the Applicant's complaint in the present proceedings.

10. The reason why the Respondent approved the part-time courses at HKU and HKBU was that these courses had already commenced in 1998 and 2000 respectively. This has been described in several documents and in the judgment in the court below as the 'historical factor'. The significant of this was presumably that these part-time courses offered by local Hong Kong universities commenced prior to the date that the relevant provisions in the Ordinance governing registration

A and the Licensing Examination had taken effect (that is 16 August 2000 – A
B paragraph 4(5) above) and of course prior to the Respondent's B
C determination of the relevant criteria for approval (see paragraph 7 above). C
D The Respondent's approval of these part-time courses was, however, D
restricted to students who had already enrolled in or before 2002.

E 11. On 5 September 2002, the Respondent made a press E
F announcement of its approval of the full-time courses offered by HKU, F
G CUHK and HKBU and of the two part-time courses. The relevant part of G
this announcement was in the following terms (as translated) : -

H "He [Dr Daniel Tse, the Chairman of the Chinese Medicine H
I Council of Hong Kong] said that the Board had conducted an I
J assessment of the undergraduate degree courses in Chinese J
K Medicine offered by three local universities, namely the University K
L of Hong Kong, the Chinese University of Hong Kong and Hong L
Kong Baptist University. Their full-time degree courses in Chinese
licensing examination."

M 12. I should perhaps interpose here to say that the contents of this M
N announcement had been relevant to the question of legitimate expectation N
O which was a live issue in the court below but not pursued on appeal (even O
P though it was one of the grounds of appeal contained in the Notice of P
Appeal).

Q 13. In November 2002, after consulting SATCM, the Respondent Q
R also recognized the 5-year full-time undergraduate courses in Chinese R
S medicine conducted in 27 Mainland higher education institutions. Details S
T of the courses from these institutions and the three universities in Hong T
U

Kong were first published in December 2002 in the 2003 Licensing Examination Candidate Handbook issued by the Respondent.

14. As far as HKCT was concerned, by a letter dated 31 May 2002 to the Respondent, HKCT first inquired whether the part-time undergraduate course in Chinese medicine jointly organized with Jinan University could be assessed and approved by the Respondent. Correspondence ensued in which the Respondent made plain its stance that only full-time courses would be recognized. In particular, I would draw attention to the letter dated 22 February 2003 from the Respondent to HKCT in which it was made clear to HKCT that assessments would only be made in respect of full-time undergraduate courses and that the limited exception to this was only in respect of the part-time courses offered by local universities, that is, HKU and HKBU. It was said also that the part-time courses offered by non-Hong Kong universities would not be acceptable.

15. In October 2004, HKCT wrote to the Respondent again requesting it to assess its part-time course (by now there had been substantial changes made to this course although it was still a part-time one). By a letter dated 2 December 2004, the Respondent informed HKCT that the joint programme with Jinan University would not be assessed again on the ground that it was only a part-time course. This position was reiterated in the Respondent's letter to HKCT dated 21 March 2005.

16. It was this refusal by the Respondent to assess the revamped joint programme offered by HKCT and Jinan University that constituted

A the relevant decision impugned by the Applicant in the present judicial
B review proceedings.

C 17. The Applicant was at the time the judicial review proceedings
D commenced, a student in the undergraduate programme jointly run by
E HKCT and Jinan University. He started the course in September 2001. If
F successful, he would be awarded a Bachelor of Professional Chinese
Medicine degree from Jinan University.

G *The Applicant's submissions on appeal*

H 18. Before us, Mr Phillip Ross (who appeared for the Applicant)
I submitted essentially that the Respondent's decision contained in the two
J said letters was unreasonable in the Wednesbury sense. While not
K impugning the Respondent's decision to afford an exception to the HKU
L and HKBU part-time courses, he submitted that the same exceptional
allowance ought to have been given to the part-time course offered by
M HKCT and Jinan University. They were, he submitted, after all the same :
N both were part-time courses run by universities and like the other part-time
O courses, the course run by HKCT and Jinan University was also in
existence at the time the Respondent made public its requirements to
P assess and approve Chinese medicine courses.

Q 19. In my view, the decision of the Respondent to treat the
R HKCT-Jinan University part-time course differently to the part-time
S courses run by HKU and HKBU could not be said to be an unequal
T treatment of persons or classes of persons in the same position. The
alternative way of putting the point is that even if the part-time course of
U HKCT and Jinan University can be said to be in the same position as those
of HKU and HKBU, the unequal treatment was justified (applying the test

in *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service & Anor* (1996) 6 HKPLR 333 at 352). Quite simply, the difference lay in the fact that while the approved part-time courses were from local universities (which are institutions that are subject to and governed by the laws in Hong Kong and indeed governed by their own individual Ordinances), the part-time course run by HKCT and Jinan University was one involving an institution that was not a university at all (HKCT) as well as one that was outside Hong Kong albeit it was a university (Jinan University). In respect of HKCT, as Chu J observed (and this is an observation with which I agree) the fact that a course is run by a university (as opposed to any other institution) is a relevant factor. HKCT was not even an institution of higher education : it was a local organized agent, registered as a private company, involved in the provision of other education and training. The fact that Jinan University was outside Hong Kong was certainly a factor that the Respondent took into account and this was implicitly (if not expressly) made known to HKCT in correspondence as well as to the Legislative Council. In its affirmation evidence, the Respondent stated that there was “no basis whatsoever” for the exceptional allowance given for the HKU and HKBU part-time courses to be extended to non-local universities or institutions of higher education. By a letter 13 June 2003 to the LegCo Secretariat, it was stated to be inappropriate to extend the exception to universities outside Hong Kong. Obviously, while the HKU and HKBU part-time courses were known to the Respondent, others involving non-Hong Kong institutions were not. As Ms Lau put it in her affirmation : -

“As a matter of policy, other than the relevant part-time degree courses organized by BUHK and HKU, the Board would not conduct assessment of any other part-time degree courses in Chinese medicine run by any other local or overseas/mainland

A	institutions. In practice, this is also not feasible and impracticable	A
B	given the limited resources and manpower of the Board and the	
	Committee.”	B
C	20. Two further points should be made in this context : -	C
D	(1) The joint programme run by HKCT and Jinan	D
E	University involved some classroom teaching at HKCT	E
F	but on the whole the main part of the training took place	F
G	at Jinan University. HKCT did not have any laboratory	G
H	or other facilities for the clinical part of the course	H
I	whereas Jinan University did. Further, as stated earlier	I
J	and as stated by the Applicant in the Form 86A	J
K	application, the satisfactory completion of the course	K
L	would result in a degree awarded by Jinan University.	L
M	As the Judge observed, this programme was “in	M
	substance an undergraduate programme of Jinan	
	University that is provided in Hong Kong through	
	HKCT’s assistance”. Jinan University was, as stated	
	above, a non-Hong Kong university.	
N	(2) The Respondent has been consistent in its approach.	N
O	There is no question of HKCT or Jinan University	O
P	having been singled out (to be fair, this was not a point	P
Q	that was maintained by the Applicant). Even in the case	Q
R	of Hong Kong universities, the Respondent has declined	R
S	to assess part-time courses where this also involved	S
T	non-Hong Kong entities (for example the joint course	T
U	offered by HKBU and RMIT University (of Australia)	U

and that offered by the Open University of Hong Kong and Xiamen University).

21. Mr Ross submitted at the hearing in further support of the contention that in substance the part-time course offered by HKCT and Jinan University was no different to those offered by HKU and HKBU, that the Respondent was quite wrong to have refused to make an assessment simply on the basis that Jinan University was a non-Hong Kong University. It was, he said, no different to HKU and HKBU afterall, (it was itself a university) and the Respondent could and should have taken the trouble to find out whether the quality of its part-time course matched that of the two Hong Kong universities. In other words, he did not accept the evidence of Ms Lau that it was “not feasible and impracticable” to conduct an assessment (see paragraph 19 above). He submitted that as in the case of the 27 Mainland institutions where full-time courses were eventually approved, the Respondent could have referred the matter to SATCM. He reminded us that in 2005, Jinan University’s full-time course in Chinese medicine was assessed and approved by the Respondent. Thus, it must have been possible and relatively easy to have undertaken the same exercise regarding the part-time course offered by HKCT and Jinan University. I find this point unattractive : -

(1) First, this was not a point that was properly raised either in the Form 86A or in the Applicant’s affirmation evidence in the court below. Instead of responding positively to the contention in Ms Lau’s affirmation set out in paragraph 19 above, the response from the Applicant (his second affirmation) simply contained no challenge to that paragraph. This court has had occasion

recently to reiterate the need timeously and fairly to raise factual points in judicial review proceedings so that matters can be properly dealt with by the court : - see *Cathay Pacific Airways Flight Attendants Union v The Director-General of Civil Aviation*, unreported, CACV 324/2005, 23 March 2007 at paragraphs 45 to 47. The point raised by Mr Ross, which became one of his main points, if not the principal one raised in this appeal, was barely mentioned by counsel in the court below; certainly, as I have mentioned, there was no inkling of this either in the Form 86A or in the Applicant's evidence before the court. What evidence there was before the court (see in particular Ms Lau's affirmation) pointed the other way.

(2) Secondly, even if this point had any validity, the Respondent's decision could not be faulted at the relevant time in making a limited exception only in respect of universities in Hong Kong. As we have seen, this factor was a legitimate one and the fact that Hong Kong universities were known quantities and indeed governed by the laws here, was a valid, rational and proportionate distinction.

22. I now deal with the question of the Applicant's standing in the present judicial review proceedings. In the court below, Chu J took the view that the Applicant had insufficient standing to launch the present proceedings. This was for three reasons : - first, the challenge brought by the Applicant should more properly be made by HKCT or Jinan University

(neither of which was a party to the present proceedings); secondly, the Applicant had not even completed his course so it was too early to have made a challenge; thirdly, the challenge was unmeritorious.

23. In view of my earlier conclusions on the merits, it is strictly speaking unnecessary to decide the point on standing. However, for my part, I would accept that the Applicant had sufficient standing to bring the present judicial review proceedings or rather, in the words of Order 53 rule 3(7), he has a “sufficient interest” in the matter to which the application for judicial review related. The Applicant was at the time the judicial review proceedings were launched, a student studying in the part-time course run by HKCT and Jinan University. He was directly affected by the decision not to assess the course : whereas he could look forward to being eligible for the Licensing Examination if he were to complete the course successfully, by contrast, if the decision were to stand, he would not be able to take the examination even if he completed the course successfully.

24. However, even if the Applicant had sufficient standing, this would get him nowhere in the present proceedings. For the reasons already gone into, I would dismiss the appeal. I would also make an order nisi as to costs that the Applicant do pay to the Respondent its costs, such costs to be taxed if not agreed, and that the Applicant’s own costs be taxed in accordance with the Legal Aid Regulations.

Hon Le Pichon JA :

25. I agree.

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Hon Chung J :

26. I agree.

(Geoffrey Ma)	(Doreen Le Pichon)	(Andrew Chung)
Chief Judge, High Court	Justice of Appeal	Judge of the
		Court of First Instance

Mr Phillip Ross, instructed by Messrs Reimer & Partners for the
Applicant/Appellant

Mr Kwok Sui Hay, instructed by Messrs Lo & Lo for the
Respondent/Respondent

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