《2009年村代表選舉法例（雜項修訂）條例草案》委員會

委員在二零零九年六月二十五日第二次會議上要求當局提供的資料

引言

在本年六月二十五日的《2009年村代表選舉法例（雜項修訂）條例草案》委員會會議上，委員要求當局提供有關青衣墟司法覆核個案的判決、當局不擬把福源禾寮和長洲納入《村代表選舉條例》（香港法例第576章）（下稱《條例》）附表內的理據，以及有關「鄉村」的定義的資料。本文件旨在提供有關資料。

青衣墟司法覆核個案

原訟法庭的判決

2. 黎德成先生（申請人）聲稱青衣墟是原居鄉村，而他是「青衣墟」的原居民。他因不滿民政事務局局長（局長）未有按他的要求，行使《條例》第67條[1]賦予的權力，把青衣墟加入《條例》的附表內，為青衣墟選出村代表，而於二零零三年八月向法庭申請司法覆核。原訟法庭在二零零五年五月裁定，青衣墟不是原居鄉村及申請人不是青衣的原居民。原訟法庭認為，由於青衣墟不是原居鄉村，因此局長拒絕把青衣墟加入《條例》的附表內的決定是正確的（見載於**附件一**的原訟法庭判決第40、45、46及53段）。

上訴法庭的判決

3. 申請人其後提出上訴，指《條例》第67條賦予局長酌情權，但局長錯誤地限制了行使該酌情權。上訴法庭法官於二零零六年十月的判決書中指出，局長修訂附表的權力包括刪除和增加鄉村，而局長沒有行使《條例》賦予他的酌情權。但由於原訟法庭已裁定青衣墟不是原居鄉村，上訴法庭法官認為即使他把個案發還局長重新考慮，局長仍然受原訟

[1] 《條例》第67條訂明，局長可藉在憲報刊登的命令修訂《條例》附表1、2或3。

法庭所作青衣墟不是原居鄉村的裁定約束。因此，把個案發還局長重新考慮也是徒然的。上訴法庭決定駁回有關上訴（見載於**附件二**的上訴法庭判決第 52 及 54 段）。

終審法院的判決

4. 申請人遂向終審法院提出上訴。終審法院在二零零七年十一月作出判決，終審法院認為立法機關通過《條例》時，不是打算透過《條例》第 67 條賦予局長不受限制地增加或刪減《條例》附表內的鄉村的權力。終審法院認為，《條例》第 67 條所賦予的修訂權力須在獲通過的立法原意和政策(即只有在一九九九年已有村代表制度的鄉村才可獲納入《條例》)的範圍內行使。當有需要或適宜增加或刪減《條例》附表內的原居鄉村或現有鄉村時，有關事宜應由立法機關（而非局長）處理。終審法院裁定，局長沒有權力把新的原居鄉村加入《條例》附表 2 內（見載於**附件三**終審法院判決第 40、47、51 及 53 段）。

福源禾寮

背景資料

5. 根據鄉議局及前規劃環境地政科於一九九一年編印的《新界原有鄉村名冊》所示，福源禾寮為元朗舊墟之分支。根據地政總署的資料，編製《新界原有鄉村名冊》的主要目的，是界定哪些新界原有鄉村的原居村民所擁有的物業或土地可獲地租優惠，並不表示名冊內的鄉村全是原居鄉村。事實上，在一八九九年至一九零四年期間測量制定的丈量約份地圖上和在一九零五年生效的「集體契約」內均沒有「福源禾寮」的登記。

6. 一直以來，政府或元朗地區的居民均未能確定福源禾寮的所在地。地政總署測繪處亦沒有福源禾寮的相關資料和紀錄；而其印製的地圖亦未有標示福源禾寮的位置。元朗地政處曾於一九九五年致函陳姓元朗居民，表示福源禾寮並非在一八九八年前確立的原有鄉村，而是從元朗舊墟分支出來，因此難以確立其鄉村範圍界址。

7. 一些擁有丈量約份第 120 約內部份土地的陳姓元朗居民聲稱福源禾寮始於一八五九年，位於現時十八鄉大旗嶺範圍內，現時有居民約二百人。該些元朗居民又表示其先祖曾於第 120 約第 1695 號建屋及在附近地段上耕作，其後於元朗舊墟營商。

8. 根據當局的紀錄，第 1695 號地段為政府土地上的農地，並於一九一零年六月十八日才由陳姓人士從公開拍賣中獲得。另外，包括第 120 約的「集體契約」內並沒有「福源禾寮」的村名。根據紀錄，第 120 約一帶的土地當時均登記為「稻田」，主要供元朗內其他村民到該處耕作。而第 120 約所有地段的業權人地址為十八鄉、屏山、錦田、廈村等地，而未有以福源禾寮為地址。

9. 另外，有陳姓元朗居民於過去兩年曾要求地政總署測繪處將福源禾寮標示於該處所印製的地圖上。惟該處進行實地視察後表示，該名居民所指出的地區範圍內的房屋門牌現時是以大旗嶺為根據地址，而改以福源禾寮為地名的建議並未得到地區團體及當地居民一致同意，因此難以接納有關要求。至於第 120 約部份土地的陳姓業權人指稱其物業所在地為福源禾寮，我們只能確定該些土地現時位於十八鄉大旗嶺範圍內，而其所指的位置顯示於**附件四**的地圖上。

10. 福源禾寮從沒有村代表制度。事實上，一些聲稱是福源禾寮的居民，於一九八七年至一九九九年期間已加入元朗大旗嶺的戶口名冊內參與村代表選舉。自一九八九年以來，十八鄉鄉事委員會先後多次拒絕福源禾寮加入該會的申請，理由是他們有村民早年已加入元朗大旗嶺的戶口名冊內。此外，該會亦認為福源禾寮並不是完整的村落。

當局不擬把福源禾寮納入《條例》附表的理據

11. 當局基於第 5-10 段所述的資料一直不承認福源禾寮為一原居鄉村或現有鄉村，而福源禾寮亦沒有村代表制度。因此，在制訂《條例》時，當局沒有把福源禾寮列入《條例》的附表內。

12. 《條例》生效後，有元朗居民堅稱福源禾寮為一條原居鄉村，並要求把福源禾寮加入《條例》附表內。民政事務總署在二零零七年十一月成立了「鄉郊選舉檢討工作小組」(下稱工作小組)，成員包括署方代表、鄉議局正、副主席和個別鄉事委員會主席等，負責全面檢討鄉郊選舉的安排。工作小組曾研究福源禾寮的建議。基於福源禾寮的背景，而它亦從沒有村代表制度，工作小組經討論後，同意不在是次檢討及修訂法例工作中跟進有關建議。當局亦不擬把福源禾寮納入《條例》附表內。

長洲

背景資料

13. 十九世紀中葉，長洲商貿發展蓬勃，島上最少有二百家店舖營業。一八九八年後，長洲島上居民除小部分從事農業之外，大多轉為發展商貿，包括售賣糧食、柴薪、雜貨、粗鹽、漁具，維修及建造船艇，亦有經營信用貸款等。

14. 一九四一年，日軍佔據了長洲，並以長洲官立中學校舍作為總部。當時，處理居民事務的街坊會被取消，由「長洲維持會」取代。戰後，逃難的居民陸續遷回，「長洲維持會」亦被取消，地方事務先後交由居民協會及華商會負責。至一九六零年代初，島上由街坊代表組成了長洲鄉事委員會。

15. 上文第5段提及的《新界原有鄉村名冊》包括長洲，並表示其為一「墟鎮」。然而，如上文第5段所述，名冊內的「鄉村」並不全是原居鄉村。根據新界小型屋宇政策，只有在地政總署編印的《新界小型屋宇政策認可鄉村名冊》內的鄉村的原居民，才符合資格申請批准建造小型屋宇，而該名冊並不包括長洲。

16. 此外，新界土地的「集體契約」一般除了登記有業權人的名字外，亦記有鄉村的名稱。長洲島的「集體契約」並未記有任何鄉村。而當局亦未收到能夠證明長洲有原居鄉村(即一八九八年已存在的鄉村)的文件或資料。

17. 長洲亦從來沒有村代表或村代表制度。有長洲居民曾提出一份一八九九年的憲報公告作為長洲是鄉村及曾有村代表的證明。當局已在六月二十五日的條例草案委員會上解釋，該份憲報公告是根據當年的「Local Communities Ordinance」作出。該條例旨在將新界劃分為若干區域和分區，以便當時的政府作出管理。該條例和憲報公告與村代表制度無關。此外，根據前立法局的紀錄，該條例因沒有任何實際效用而於一九一零年被廢除。

18. 有長洲居民指長洲鄉事委員會由居民代表組成，由長洲鄉事委員會處理原居民事務違反了《條例》所訂居民代表不得處理任何與原居民的合法傳統權益有關的事務的規定。當局已在六月二十五日的條例草案委員會上解釋，由於長洲從來沒有村代表或村代表制度，它沒有被列入《條例》附表內，因此《條例》不適用於長洲，而長洲亦沒有根據《條例》選出的原居民代表或居民代表。

19. 至於長洲鄉事委員會，它自成立至今歷任的會員均由街坊代表出任。街坊代表選舉是依據長洲鄉事委員會組織章程進行。鄉事委員會由島上居民（包括原居民及長期居於島上的人士）組成，有長久歷史，並熟悉地方、人脈及長洲社區的歷史。長洲鄉事委員會處理原居民事務時，其主席或副主席有需要時會參考居民提交的文件及證據，或諮詢有關的鄉紳或父老。鄉事委員會主席或副主席是否原居民並不影響其職能。

<u>當局不擬把長洲納入《條例》附表的理據</u>

20. 曾有長洲居民要求把長洲納入《條例》附表內。由於未能證明長洲有原居鄉村，而長洲亦從來沒有村代表或村代表制度，工作小組經討論後，同意不在是次檢討及修訂法例工作中跟進有關建議。當局亦不擬將長洲納入《條例》附表內。

有關「鄉村」定義的資料

21. 《條例》沒有就「鄉村」訂下定義。《條例》第 2 條只訂明「村」包括社區。一般而言，「村」指在鄉郊地方的

一小組住屋或一個小的居住區。每一個地方有其獨特的歷史背景及發展過程。在處理聲稱是原居鄉村的個案時，當局會仔細研究，包括翻查有關地區的丈量約份地圖及「集體契約」，以確定有否鄉村的村名及地段號碼等登記。當局亦會就該地方的歷史或氏族背景徵詢鄉議局及有關的鄉事委員會的意見。鄉議局是政府在新界事務上的法定諮詢機構，獲鄉郊社區認同。

民政事務總署
二零零九年七月

HCAL 82/2003

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW PROCEEDINGS
NO. 82 OF 2003

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BETWEEN

LAI TAK SHING Applicant

and

DIRECTOR OF HOME AFFAIRS Respondent

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Before: Hon Chung J in Court
Date of Hearing: 14 July 2004
Date of Handing Down Judgment: 24 May 2005

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J U D G M E N T

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Introduction

1. This application for judicial review seeks to challenge the manner in which the Secretary for Home Affairs ("*the Secy*") exercised his power conferred by s. 67(1), Village Representative Election Ordinance (Cap. 576) to amend Schedule 2 of Cap. 576. In terms of the facts of this application, the applicant contends the Secy is obliged under Cap. 576 to amend that schedule by adding "Tsing Yi Hui" (青衣墟) to the list of "Indigenous Villages" therein. This contention is disputed by the other parties to this application. Leave to apply for judicial review was given on 22 August 2003.

Background Facts

2. The background facts are largely undisputed.

3. The applicant is an indigenous inhabitant, that is, he is a descendant through the male line of a resident of an indigenous village who lived there in 1898. Before 4 November 2002, he (and his father) was recognised by the Lands Department to be an indigenous inhabitant of Tsing Yi. In a letter dated 4 November 2002, the Lands Department decided that the applicant (and his father) was an indigenous inhabitant of Ma Wan.

4. Cap. 576 was enacted in 2003. Its long title sets out the purpose of the enactment. In the context of this application, the relevant part is:-

> "to provide for the establishment of the office[s] of resident representative for an Existing Village … of indigenous inhabitant

> representative for an Indigenous Village or a Composite Indigenous Village; to provide for the elections of Resident Representatives and Indigenous Inhabitant Representatives … ".

5. Phrases such as "Indigenous Village", "Existing Village" and "Composite Indigenous Village" are defined in Cap. 576. In short, elections of village representatives are to be held only for those "Villages".

6. Schedule 1 thereof is a list of "Existing Villages" and Schedule 2 thereof is a list of "Indigenous Villages" (collectively "*the said schedules*"). "Tsing Yi Hui" is not included in the said schedules.

7. Between January and June 2003, there was correspondence passing between the applicant and the Home Affairs Department about adding "Tsing Yi Hui" to the said schedules as well as the indigenous inhabitant status of the applicant and his father.

8. In about March 2003, the applicant applied to register as an elector of "Tsing Yi Hui". His application was refused in April 2003 on the ground that "Tsing Yi Hui" was not included in Schedule 2, Cap. 576.

9. The decision under challenge in this application was the one contained in a letter dated 18 July 2003 from the Secy where he informed the applicant "Tsing Yi Hui" was not eligible to be included in the said schedules.

The Applicant's Case

10. The applicant contends that the Secy is obliged to exercise his power of amendment in his favour because whether "Tsing Yi Hui" was an indigenous village is a question of fact. Since, so the applicant argues, that fact is indisputable, the Secy should exercise his power accordingly. Instead, the Secy erred in failing to do so and in taking into consideration irrelevant matters, namely, the refusal of the Tsing Yi Rural Committee ("*the Committee*") to recognise "Tsing Yi Hui" as an indigenous village and that there has not been any village election there from 1950 onwards.

11. As explained in para. 52 to 53 below, there may be a further or alternative complaint that the Secy has wrongfully delegated his power under s. 67(1), Cap. 576 to the Committee by allowing the Committee in effect to determine the status of "Tsing Yi Hui".

12. As will be set out below, both the respondent and the Committee contend that the Secy's decision is correct mainly because "Tsing Yi Hui" was not an indigenous village. As regards this contention, the applicant says there is no need for him to prove that matter conclusively. All he needs to do is to satisfy the court it is proper for the matter to be investigated by the Secy. As a result, he no longer pursues the relief sought at para. 3 of this application (under the heading "Relief Sought") but merely seeks an order in terms of para. 1 and 2 thereof.

The Respondent's Case

13. The respondent argues that the mischief of Cap. 576 must be looked at, and, if that is taken into consideration, the decision of 18 July

2003 was correctly made. This is because Cap. 576 was enacted to redress the matters set out in the Court of Final Appeal's decision in two appeals. I understand that to refer to the decision in *Secretary for Justice and others v. Chan Wah and others* [2000] 4 HKC 428. *Chan Wah* was a decision about the need to conduct the election of village representatives in an open, fair and honest manner and in a way consistent with the Hong Kong Bill of Rights Ordinance (Cap. 383) and the Sex Discrimination Ordinance (Cap. 480).

14. In any event, the applicant has totally failed to prove that "Tsing Yi Hui" was an indigenous village.

The Tsing Yi Rural Committee's Stance

15. The Committee asks by way of summons (taken out on 13 July 2004) to be joined as a proper party to be heard herein. There is power for such joinder under RHC Ord. 53 r. 9(1): *Hong Kong Civil Procedure 2004*, para. 53/14/57.

16. The joinder application was made on several bases. Originally, the Committee sought to be joined in order to oppose the part of this application which asked for a declaration that the applicant is an indigenous inhabitant of "Tsing Yi Hui" within the meaning of s. 2, Cap. 576. As stated above (at para. 12), the applicant no longer pursues that relief.

17. Despite that change, the Committee still wants to be heard about the correctness of the Secy's decision. This is because, first, the

Committee has been the body which the Government has consulted regarding village representative election matters. Also, the Committee will be affected by the outcome of this application because, if the applicant is successful, "Tsing Yi Hui" village representative(s) will become member(s) of the Committee.

18. The joinder application was unopposed by any of the parties herein. I agree it is appropriate for the Committee to be heard as a proper party in this application.

19. The Committee supports the respondent's case as regards "Tsing Yi Hui" not being an indigenous village. Further, it contends that the applicant is not an indigenous villager of Tsing Yi District.

Issue 1: Was "Tsing Yi Hui" an Indigenous Village?

20. This is essentially a factual issue. I note the applicant's argument set out above (at para. 12) to the effect that if I find the matter to be arguable, it should be sent back to the Secy for consideration.

(a) Relevant Factual Materials

21. The applicant relies on a document headed "List of Villages recorded in the Block Lease — Kwai Tsing District" (在集體契約內登記之鄉村名册 — 葵青區）("*the 1991 List*"). The following particulars are relevant:-

TSING YI TOWN	TSING YI	Old market town, known as TSING YI in BL, resited in 87 & 90 to FUNG SHUN WO VILLAGE RESITE

青衣墟	青衣	舊墟鎮，集體契約中稱作青衣，１９８７年與９０年搬村於楓樹窩村

22. The applicant also relies on the minutes of a special meeting of the Committee on 16 August 2002 ("*2002 meeting of the Committee*"). The 2002 meeting of the Committee was held for discussing a request to "reinstate" the village representative of the indigenous inhabitants of "Tsing Yi Hui". During that meeting, Mr Lau Wong Fat (劉皇發) (chairman of the "Heung Yee Kuk") was recorded as having said:-

> "我在鄉議局工作有廿多年，亦是在鄉村中長大。關於９１年編的鄉村名册，事出中、英談判基本法直至落實，有關基本法第四十條的權利，怎樣令到"四十條"內，居住在新界的居民享受到權利。到９１年，我們要求政府將鄉村和村民辨別，那條鄉村是原居民村？ …
>
> 確認原居民村的工作較容易處理，因在１８９８年，英國向中國租借新界時 … 已將原居民村落的位置從***空中拍攝***下，又在***地圖上有屋位***的框圈出，我們便可從地圖上可輕易找出原居民村。到１９９１年編製時，我們便依據地圖定出的村落位置，再翻查１９００年，新界租予英國後，把土地由紅契變為集體官批 … 政府須要進行登記，確認業權擁有人 … 登記在***集體官批*** (Block Lease) 內***作為一個標準***，從而引證 … 村的身份。大家同意這方針後，便製定了***新界原居民村名錄名册***，作為***政府的一個指引*** …
>
> 凡有人士提出認為是原居民村，政府便會***依據名册***翻查，又會在田土廳翻查***集體官批***，有該村的村名、地段號碼等，如確定該村為原居民村，***加上該編號已在１８９８年之前的地段***，便享有基本法第４０條 … [的權利] … " (emphasis supplied).

Article 40 of the Basic Law is about the protection of the lawful traditional rights and interests of the indigenous inhabitants of the "New Territories".

23. An executive member of the "Heung Yee Kuk" was recorded as having also said during the 2002 meeting of the Committee:-

> "… 在座大家不會反對，在１９９１年新界鄉議局原有原居民村名册內有記載的就是原居民村 …. ".

The reference therein to "the list of indigenous villages" compiled in 1991 was a reference to the 1991 List.

24. Reliance is also placed on the preface of Mr Lau Wong Fat to the version of the 1991 List reproduced by the "Heung Yee Kuk". He said (among other things) a committee has been checking and reviewing the 1991 List during the 3 years since its publication. That committee consisted of representatives from the "Heung Yee Kuk" and the Lands Department.

25. Further, the applicant relies on written confirmations of Mr Chan Tin Sung (陳天送) respectively dated 8 February 1988 and 17 October 1998 of his indigenous inhabitant status.

26. Finally, the applicant relies on the statement of the Deputy Secretary for Home Affairs made during the meeting of the Working Group on Village Representative Election (on 4 June 2002):-

> "[大埔鄉事委員會主席]張學明主席表示，方案內尚有數點內容，他擔心因理解不同而產生誤會，因此提出來，請余副局長作出確認。首先是將會舉行原居民代表選舉的鄉村，是***根據１９９２年鄉議局與規劃地政局共同制訂的認可鄉村名册作準，余副局長表示正確***" (emphasis supplied).

The applicant says this shows the Government regarded the 1991 List as conclusive.

27. On the other hand, the respondent relies on the affirmation of Mr Chow Shou Shun (District Officer, Kwai Tsing). Mr Chow again refers to the 2002 meeting of the Committee where several members of the Committee said the following:-

> "… 青衣墟是否原居民村？… 我曾徵詢過三位曾擔任青衣鄉事委員會主席的意見及過往資料。三位前任主席分別是：***陳世龍先生(93 歲)***、***鄧立泰先生(87 歲)***、***陳天送先生***。陳世龍先生在任主席年份始於 1956 年，當年正是製定鄉村名册時期，將青衣大街改稱青衣墟，該時期涉及搬村，而陳乾德先生也是該搬村(青衣街)管理委員會委員之一，請陳乾德先生簡述";
>
> "青衣墟***前稱青衣大街***，所有門牌均以「青衣大街 x 號」編定便以郵遞。青衣墟此名的來歷，乃當時搬遷青衣大街時，為方便統稱，因此組成了"青衣墟搬村委員會"。何解青衣墟成為原居民村落？***昔日居住該地帶的居民有水上人、戰前居民，亦有原居民擁有物業***，由於人流暢旺，原居民都喜歡於此從商開店舖。到後期遷入現址，建牌樓稱叫青衣墟，這是我所知的實情" (陳乾德);
>
> "多謝陳乾德先生。***陳世龍先生***在任青衣鄉事委員會主席期間，以及在***青衣大街居住過***，我請教陳先生，青衣大街是否一個原著民村落？" (主席);
>
> "(由陳天送先生以客家話翻釋問題及轉述陳世龍先生的話，***稱它不是村落，是街名***。)";
>
> "… 我約在十八、九歲時，該處***只有幾間商店***經營生意,商號有：同利、三合、天祥等，我家族亦在此營商。當時青衣大街之稱仍未有，***我們通常叫去舖頭（商店）***，後來，入住的居民漸多，加上多了小販擺賣，到了 1959 年政府有所管制，於是便出現了臨時街市，自此人人稱該處叫青衣大街' (陳世龍);
>
> "… 在 1987 年，青衣大街受到政府發展進行大清拆，我正擔任鄉事會主席，我全心全力幫助鄉民爭取補償，當時也盡力***協助黎志謀先生***向政府爭取。在***英國治港時期***，地政署曾查核他的身份，都不作承認，故此***他不能以原居民的補償方法***。但到 1999 年，政府突然間改變，還核實他是原居民。為何前朝政府下了不少工夫都不能確立身份，甚至我們三位前任主席十分清楚他的來歷，今日能夠成為原居民，我也不

> 思其解。從陳廣全先生證明黎榮先生馬灣原居民，我們經幾拾年來甚至百年來，***只知道他們是水上人***，何解可證明是原居民呢？在港英政府時代，他們沒法提供足夠資料核實，搬遷時同樣以原居民補償法。如果他們所說是青衣原居民，我們真的無法接納" (陳天送)

(emphasis supplied).

28. The respondent also refers me to another meeting of the Committee held on 10 December 2002 where the Committee maintained the applicant was not an indigenous inhabitant of Tsing Yi. The Committee opined that the Lands Department was correct in concluding the applicant was an indigenous inhabitant of Ma Wan.

29. The respondent further relies on the affirmation of Mr Tang Kwok Kong (Chairman of the Committee) ("*Tang*"). The respondent points out, according to him:-

(a) members of the Committee do not include those from "Tsing Yi Hui";

(b) the villages recognised by the Committee are those which existed since at least 1898 and:-

(1) consisted of villagers with the same family name traceable to a genealogy;

(2) maintained a "Tsz Tong" (祠堂), or ancestral graves;

(3) identifiable physically by a demarcation by way of walls or field lines;

(c) no villages (other than those already members of the Committee) possess the characteristics set out in sub-para. (b) above;

(d) "Tsing Yi Hui" was not a village, let alone an indigenous village. It was only "Tsing Yi Main Street" (青衣大街) which was a market street with shops and restaurants. The residents there came from different places and settled there only in (relatively) recent times;

(e) the applicant's father only purchased a shop there in 1964;

(f) the Block Lease did not show the applicant's ancestors owned any land in Tsing Yi

(para. 5 to 6, 11 to 15 and 19 to 22 thereof).

30. As stated above, the Committee adopts a similar stance as the respondent. The Committee basically also relies on the same materials relied upon by the respondent. It asks the court to note the applicant has not provided any evidence to show that the above criteria for recognising a village are applicable to "Tsing Yi Hui".

(b) Parties' Arguments

31. The applicant contends I should find "Tsing Yi Hui" was (or, at least arguably was) an indigenous village. The reasons put forth in support include:-

(1) the statement of the Deputy Secretary for Home Affairs made during the meeting of the Working Group on Village

Representative Election (on 4 June 2002) (see para. 26 above) shows that the Government regarded the 1991 List as conclusive of the status of a village;

(2) the Committee's view, in particular the statements made by the individuals at the 2002 meeting of the Committee, should not be accepted (or should at least be viewed with suspect) because there is a conflict of interest between them and that the village representative(s) from "Tsing Yi Hui";

(3) even if "Tsing Yi Hui" was a market place as the Committee asserts, it is still a "village" within the wide meaning given to that word by Cap. 576.

32. In relation to sub-para. (3) above, the word "village" is defined by Cap. 576 to "[include] a community": s. 2, Cap. 576. The applicant therefore argues that, irrespective of whether "Tsing Yi Hui" used to be a market place, market street, or a village (in the ordinary sense of the word), once it is accepted (which the respondent and the Committee have) that place has its own residents, "Tsing Yi Hui" is a "village" within the meaning of s. 2, Cap. 576.

33. On the other hand, the main argument of the respondent and the Committee is that, they have evidence (albeit hearsay in nature) from individuals who can claim to have personal knowledge of the origin of "Tsing Yi Hui". There is no evidence as to how the 1991 List was compiled. Further, the applicant has not put forth any direct evidence to refute what these individuals said.

34. They also argue that the real issue here is whether "Tsing Yi Hui" was an "Indigenous Village", not simply whether it was a "village".

35. In addition, there is nothing wrong with the Secy consulting the Committee before making a decision. After all, the Committee has been the body which has the greatest knowledge about factual matters relating to indigenous inhabitants and/or indigenous villages. The Government has therefore been correct to consult the Committee as regards the status of the applicant's father. It should be noted the applicant has not challenged the validity of that consultation.

(c) Conclusion regarding Issue 1

36. I agree with the respondent and the Committee. I do not accept the applicant's arguments (set out in para. 31(1) to 31(3) above).

37. The statement of the Deputy Secretary of Home Affairs (see para. 26 above) was made before the enactment of Cap. 576 (originally Ordinance No. 2 of 2003). Further, the fact that "Tsing Yi Hui" is (and was) not included in any of the said schedules in Cap. 576 shows that the applicant's argument at para. 31(1) above cannot be correct.

38. I do not accept that there is a conflict of interest between "Tsing Yi Hui" and the individuals who objected to the inclusion of "Tsing Yi Hui" into any of the said schedules in Cap. 576 (or, for that matter, a conflict of interest between "Tsing Yi Hui" and the Committee as a whole). Even if there should be some exclusivist feeling on the part of these

individuals, I do not find there is sufficient reason for doubting the truthfulness or reliability of these individuals.

39. The applicant relies on the meaning given to the word "village" by Cap. 576: see para. 31(3) and 32 above. It should be noted the words "village" and "Village" have been given different meanings. The former word has been defined to include a community whereas the latter word has been given a statutory meaning (of being an "Existing Village", an "Indigenous Village" or a "Composite Indigenous Village"). Hence, Cap. 576 was not intended to regulate the election of representatives of simply any community in the New Territories; its legislative intention is to regulate the election of representatives of "Indigenous Villages" (and the like) of the New Territories.

40. By virtue of the above matters, I am not satisfied that the applicant has established "Tsing Yi Hui" was an indigenous village. In fact, I find the evidence relied upon by the respondent and the Committee to be truthful and reliable. It is more probable than not "Tsing Yi Hui" was not an indigenous village.

Issue 2: Is the Applicant an Indigenous Inhabitant of Tsing Yi?

41. In view of the above conclusion, it is strictly unnecessary to deal with the other issues (including this one). This is because:-

(a) irrespective of whether the Secy's consideration was made in accordance with the provisions of Cap. 576, his conclusion is correct; and/or

(b) the applicant does not have sufficient interest to bring this application: RHC Ord. 53 r. 3(7).

42. The Committee further argues the applicant cannot be an indigenous inhabitant of Tsing Yi District. In this connection, the Committee relies on the affirmation of Mr Luk Cheung Chuen (Principal Land Executive, Lands Department) (confirmed by Tang in para. 9 of his affirmation) regarding the factors to be considered by the Director of Lands for verifying such status:-

(1) the property holding history of the individual in question and his family tracing back to the Block Government Lease;

(2) his genealogy;

(3) whether his family or clan has a "Tsz Tong" or ancestral graves in the village;

(4) that individual is required to be certified in writing by a village representative (or the chairman of the rural committee concerned);

(5) if the Director is in doubt, he will further investigate the matter and consult the village elders or require other proof

(para. 6 thereof).

43. The Committee contends the applicant has not provided evidence regarding the above matters. It also submits the materials relied upon by the applicant to establish his status are inadequate.

44. In relation to the written confirmations given by Mr Chan Tin Sung (and others), the Committee asks the court to note the background leading to those documents. When the Government resettled the residents and shop owners of "Tsing Yi Main Street" (that is, "Tsing Yi Hui"), the policy then was that only indigenous villagers could obtain compensation by way of resettlement (instead of monetary compensation). The applicant's father asked Chan to help him in his fight for resettlement compensation. As was stated on the face of the documents, Chan only gave him the written confirmation for such purpose. Further, insofar as primary facts are concerned, the written confirmations of Chan, Lau Wong Fat and others only confirmed the applicant's ancestors had come to reside in Tsing Yi before 1889. There was no confirmation of any fact showing that his ancestors were the indigenous inhabitants of Tsing Yi.

45. It was also disclosed in the affirmations of Tang that, subsequent to the production of the Block Government Lease by the Committee in 2002, the Lands Department changed its view regarding the locality of the applicant's indigenous inhabitant status (namely, an indigenous inhabitant of Ma Wan and not Tsing Yi).

46. In short, I agree with the Committee regarding this issue.

Issue 3: Cap. 576

47. The enactment of Cap. 576 has briefly been referred to above.

48. The applicant argues that, once Cap. 576 has been enacted, his political right to be elected as a village representative is to be ascertained

through the true construction of the provision thereof, and not by examining the background leading to its enactment. He further contends that:-

(1) insofar as the respondent should argue that the rights of "indigenous inhabitants" to vote and stand as candidates in village representative election are derived from Art. 40, Basic Law (which protects the "traditional rights and interests of indigenous inhabitants") and are rights to the exclusion of others, that argument has been rejected in the decision in *Chan Wah* (at pp. 446C-7E);

(2) in any event, such argument does not assist the respondent because, once it is ascertained that the applicant is also an "indigenous inhabitant" (as a matter of the proper construction of Cap. 576), the respondent's said argument applies equally to the applicant;

(3) the Legislative Council Brief relating to the Village Representative Bill shows that the proposed arrangement under Cap. 576 was not intended to be exhaustive. This is because para. 11(a) of the Brief did not say that village representative elections can only be held in accordance with the existing system.

49. I already found under the heading "Issue (1): Was 'Tsing Yi Hui' an Indigenous Village?" above, "Tsing Yi Hui" was not an "Indigenous Village" within the meaning of Cap. 576: see para. 40 above. Accordingly, the provisions of Cap. 576 relating to the election of village representatives do not apply to "Tsing Yi Hui".

50. Thus, irrespective of the correctness of the applicant's arguments (set out in para. 48 above), they cannot assist him. It is therefore unnecessary to consider those contentions.

Conclusion

51. By virtue of the above matters, this application is dismissed.

52. For completeness, it is unclear if the applicant has put forth an independent ground in support of this application by arguing that the Secy's consultation of the Committee before exercising his power conferred by s. 67, Cap. 576 is *per se* a sufficient ground for judicial review. Para. 48, Form 86A arguably can be so understood, although it also states:-

> "… The views of a rural committee may be sought by [the Secy] to help him decide whether a village was one in existence in 1898 and what its boundaries are for the purpose of … drawing maps under section 3 and keeping an Index under section 4 [of Cap. 576]".

53. Insofar as the applicant so argues, this has been dealt with in para. 35 and 36 above. Moreover, I already found that the Secy's decision was correctly made based purely on the fact that "Tsing Yi Hui" was not an indigenous village. Even if such an independent argument should warrant further consideration, I would in the exercise of my discretion have dismissed this application. This is because, even if there had been any procedural improprieties, no substantive unfairness was caused to the applicant: *Hong Kong Civil Procedure 2004*, para. 53/14/28 and *Leung Fuk Wah Oil v. Commissioner of Police* [2002] 3 HKLRD 653, para. 40-1 and 75-6.

Costs Order Nisi

54. There is no apparent reason to depart from the usual rule that costs should follow the event. There will accordingly be a costs order *nisi* pursuant to Ord 42 r 5B(6) that the costs of this application be paid by the applicant respectively to the respondent and the Committee to be taxed if not agreed.

(Andrew Chung)
Judge of the Court of First Instance
High Court

Mr Philip Dykes, SC leading Mr Stephen Yam, instructed by Messrs S Y Chu & Co., for the Applicant

Mr S H Kwok, instructed by Secretary for Justice, for the Respondent

Mr Jat Sew Tong, SC leading Mr Thomas Au, instructed by Messrs Cheung & Yip, for the Tsing Yi Rural Committee

附件 **2 / Annex 2**

CACV 201/2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 201 OF 2005
(ON APPEAL FROM HCAL 82 OF 2003)

BETWEEN

LAI TAK SHING	Applicant
and	
DIRECTOR OF HOME AFFAIRS	Respondent
TSING YI RURAL COMMITTEE	Intervener

Before : Hon Cheung JA, Hon Yam J and Hon Sakhrani J in Court
Date of Hearing : 12 September 2006
Date of Judgment : 9 October 2006

J U D G M E N T

Hon Cheung JA :

1. This is an appeal by the applicant against the judgment of Chung J dismissing his application for judicial review against the decision of the Secretary for Home Affairs ('the Secretary') made on 18 July 2003. The decision by the Secretary was to refuse the applicant's request to him to amend Schedule 2 to the *Village Representative Election Ordinance*, Cap. 576 ('the *Ordinance*') by adding the village of Tsing Yi Hui (青衣墟) to the list of indigenous villages in that Schedule.

2. In addition the applicant also appeals against a costs order made by the judge against him in favour of the intervener Tsing Yi Rural Committee ('the Committee').

Chan Wah and others

3. On 22 December 2000 the Court of Final Appeal in *Secretary for Justice and others v. Chan Wah and others* [2000] 3 HKCFAR 459 held that the system of village representative election in the New Territories which excluded a non-indigenous villager from standing as a candidate and as a voter was inconsistent with the *Bill of Rights*, the *Sex Discrimination Ordinance* and the *Basic Law*.

4. Following this decision, the Hong Kong government introduced the *Ordinance* in 2003.

The *Ordinance*

5. Without going into details, the *Ordinance* established three Schedules of villages. Schedule 1 deals with existing villages. Schedule 2 deals with indigenous villages. Schedule 3 deals with composite indigenous villages. Again for the purpose of this case one can ignore the composite villages and concentrate on the existing and indigenous villages. Under Schedule 1 there are 681 existing villages. Under Schedule 2 there are 586 indigenous villages. The significance is that an existing village and an indigenous village may overlap. Where a village whose name appeared both under Schedule 1 and Schedule 2 that village may elect resident representative and also indigenous inhabitant representative.

6. The function of a resident representative for an existing village is to reflect the views on the affairs of the village on behalf of the residents of the villages. A resident representative is not entitled to deal with any affair relating to the lawful traditional rights and interests of indigenous inhabitants. (See section 5(3).)

7. On the other hand the functions of an indigenous inhabitant representative for an indigenous village are :

(a) to reflect views on the affairs of the village on behalf of the indigenous inhabitants of the village; and

(b) to deal with all affairs relating to the lawful traditional rights and interests, and the traditional way of life of those indigenous inhabitants.

8. In other words within the same village there are two types of village representatives. The indigenous inhabitant representative will take care of the affairs of the indigenous inhabitants while the resident representative will take care of the affairs of the village other than those affecting the indigenous inhabitants. This measure overcomes the problem identified by the *Chan Wah* decision where non-indigenous inhabitants in an indigenous village were excluded as either voters or candidates in indigenous village elections.

The 1991 List

9. In March 1988 the Buildings and Lands Department prepared a list of established villages in Hong Kong. In 1991 the Heung Yee Kuk established a new list of established villages. Many of the villages which had been omitted or wrongly entered in the 1988 list had their entries rectified in the 1991 list. As announced by the Chairman of Heung Yee Kuk the origin of the 1991 list was to ensure that the rights of indigenous inhabitants of the New Territories would be protected by Article 40 of the Basic Law. Tsing Yi Hui appeared in the 1991 list.

The applicant's case

10. The applicant claimed to be an indigenous inhabitant which means that he is a descendant through the male line of a resident of an indigenous village who lived there in 1898. He claimed to be an indigenous inhabitant of Tsing Yi Hui in the Tsing Yi District. Tsing Yi Hui, however, is not one of the villages set out in Schedule 2 of the *Ordinance*.

11. In March 2003 the applicant applied to be registered as a voter of Tsing Yi Hui under the *Ordinance*. His application was refused in April 2003 on the ground that Tsing Yi Hui was not included in Schedule 2. He also asked the Home Affairs Department ('the Department') to add Tsing Yi Hui to the Schedule. There was also correspondence between him and the Department on the indigenous inhabitants' status of his father and himself.

Request to amend

12. By a letter dated 3 July 2003 the applicant's solicitors wrote to the Secretary. The letter stated that despite repeated requests made by the villagers of Tsing Yi the Department has failed to include Tsing Yi Village in the Schedules of the *Ordinance*. The letter further stated that

> 'Having regard to the above, we are of the view that Tsing Yi Village should have been included in the list of Schedule 1 to 3 of the said Ordinance. According to section 67 of the said Ordinance, the Secretary may, by order published in the Gazette, amend Schedule 1, 2

or 3. You are kindly invited to re-consider to include Tsing Yi Village in the Schedule and exercise your power to make the necessary amendment soonest.'

Letter of 18 July 2003

13. The response of the Secretary came by way of a letter dated 18 July 2003. In view of the importance of the letter I will set out in full the relevant part of the reply:

' Villages included in the 2003 Village Representative election are listed in Schedules I, II and III of the Village Representative Election Ordinance (the Ordinance) (Cap. 576). The Schedules were compiled upon extensive consultation with Rural Committees and the Heung Yee Kuk. **The basic principles are that villages eligible for inclusion in the 2003 Village Representative election should be those currently under the Village Representative system in the New Territories and those that are recognised by the respective Rural Committees.**

Tsing Yi Hui （青衣墟）, though contained in the "List of Established Villages" issued in 1991, is not a village recognized by Tsing Yi Rural Committee and village representative election has not been held there since the establishment of Tsing Yi Rural Committee in the 1950s. In the circumstances, Tsing Yi Hui is not in the Schedules of the Ordinance and is not included in the Village Representative election in 2003.

Mr LAI Tak-shing's status as an indigenous villager of Tsing Yi was confirmed by Lands Department in 1999. But in 2002, in its letter of 4 November 2002 to Tsing Yi Rural Committee, at Annex I, Lands Department stated categorically that LAI's ancestor was from Ma Wan. Furthermore, the Director of Home Affairs has written to Mr. LAI on 28 February 2003, at Annex II, to explain to him the reasons for not including Tsing Yi Hui in the Village Representative Election in 2003. Then, in the light of section 7 of the Ordinance, Mr LAI made a claim to the Revising Officer on 2 May 2003 that he was eligible to

be registered as a voter in Tsing Yi Hui for the Village Representative election in 2003. His claim was heard on 12 May 2003 at Fanling Magistracy, but was rejected.

Regarding your suggestion of including Tsing Yi Hui to the Village Representative Election system, we would relay your proposal to the Tsing Yi Rural Committee for consideration.

We are grateful to your client for his continuing interest in the village representative elections.' (emphasis added)

The decision under challenge

14. The decision which was being challenged in the judicial review was the decision of the Secretary as contained in the letter of 18 July 2003 refusing to amend Schedule 2 so as to include Tsing Yi Hui to be one of the indigenous villages in that Schedule.

Section 67

15. Section 67 of the *Ordinance* provides that

'**67. Secretary may amend Schedule 1, 2 or 3**

(1) The Secretary may, by order published in the Gazette, amend Schedule 1,2 or 3.

(2) An order under this section may contain such incidental, consequential, supplemental, transitional or saving provisions as may be necessary or expedient in consequence of the order.'

The applicant's case

16. The gist of the applicant's case is that section 67 confers a discretion on the Secretary to amend the Schedule. The Secretary had wrongly fettered his discretion by allowing a question of policy endorsed by the legislature to conclusively determine the exercise of that discretion.

17. The wrongful fettering of a discretion by a decision maker is clearly a public law issue. Mr Dykes S.C., appearing together with Mr Kenneth Lee as counsel for the applicant, informed the court that it was an issue that had been raised by the applicant before the judge. Mr Kwok, counsel for the Secretary, and Mr. Jat S.C., appearing together with Mr Thomas Au as counsel for the Committee, did not disagree with Mr Dykes' statement. However the judge had not addressed this issue in his judgment. This may well have been due to the approach taken by the parties below in which they asked the judge to address certain evidential issues.

No decision been taken?

18. Before I deal with this issue, I will first of all deal with a point now taken by Mr Kwok who argued that no decision had in fact been taken by the Secretary.

19. I have to say that I am surprised by this submission. In the hearing below this point was simply not taken either in the

evidence adduced by the Secretary or in the submission of Mr Kwok. Form 86A of the application clearly identified the decision under challenge was the decision by the Secretary to refuse to amend the Schedule as set out in the letter of 18 July 2003. If it had been argued that no decision in fact had been taken by the Secretary, it is inconceivable that the court would have granted leave to the applicant to apply for judicial review and then proceeded to determine the case.

20. Mr Dykes submitted that the letter of 18 July 2003 had been treated as a decision of the Secretary. In my view this must be so considering the way the parties conducted their case.

21. In any event, according to the terms of the letter which first of all, maintained that villages included in the Schedule should only be those under the current village representative system and so recognized by the rural committees and secondly in referring the request to amend to the Committee lent support to the applicant's case that the Secretary had in effect refused his request to amend the Schedule.

22. Further on any reading of the evidence filed by the Secretary his case was that the decision not to amend the Schedule was a correct one. There can be no question that the Secretary had in fact made a decision refusing to amend the Schedule. Nor can it be realistically said that the only decision made by the Secretary was to refer the matter to the Committee and that it had not yet made a decision on the request.

Principles on fettering of discretion

23. Turning to the fettering of discretion issue, the principle is that a body entrusted with duties or with discretionary powers for the public benefit effectively may not avoid its duties or fetter itself in the discharge of its powers (including duties to exercise its powers free from extraneous impediments). Such fettering of discretion may be by way of a fixed rule of policy. A body that does fetter its discretion in that way may offend against either or both of two grounds of judicial review: legality and procedural propriety. The rationale of the principle is to ensure that two perfectly legitimate administrative values, those of legal certainty and consistency, may be counteracted by another equally legitimate administrative value, namely, that of responsiveness. While allowing rules and policies to promote the former values, it insists that the full rigour of certainty and consistency be tempered by the willingness to make exceptions, to respond flexibly to unusual situations, and to apply justice in the individual case (See de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th Edition Paras 13–028, 11–001 and 11–004).

24. Thus Lord Browne-Wilkinson in *R. v. Secretary of State for the Home Department, Ex p. Venables* (1998) AC 407 stated that :

> 'When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person

> on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future. He cannot exercise the power nunc pro tunc (meaning 'now for then'). By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise.
>
> These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases: see *Rex v. Port of London Authority, Ex parte Kynoch Ltd.* [1919] 1 K.B. 176; *British Oxygen Co. Ltd. v. Board of Trade* [1971] 1 A.C. 610. But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful: see generally *de Smith, Woolf and Jowell, Judicial Review of Administrative Action*, 5th ed. (1995), pp. 506 et seq., paras. 11—004 et seq.'

25. See also *Lavender and Son v. Minister of Housing and Local Government* [1970] 1 WLR 1231, *Re Hong Kong Hunters' Association Ltd* [1980] HKC 8, *R. v. Rochdale Metropolitan Borough Counsel Ex p. Cromer Ring Mill Ltd* [1982] 3 All ER 761, *Vu Ngoc Dung v. Criminal Law Injuries Compensation Appeal Board* [1996] 3 HKC 346 and also *R. v. Environment Secretary, Ex p. Brent L.B.C.* [1982] Q.B. 593.

26. In *Ex p. Brent L.B.C.* the Divisional Court in England expressly rejected an argument that where a discretionary power is given by the legislature to pursue a policy on a general basis

for the public benefit generally, so that the Secretary of State has a choice solely of whether or not to exercise the power, he is entitled to implement the policy of which parliament has approved without listening to any representations.

Legislative intent

27. In answer, Mr Kwok argued that the legislative intent and not merely the policy behind the *Ordinance* is to include only those villages that had taken part in the 1999 village representative election. He relied on the evidence of Mr Stephen Fisher, the Deputy Secretary for Home Affairs in the Home Affairs Bureau who was responsible for processing the village representative election bill and steering it through the legislative process. Mr Fisher stated in his affidavit filed in opposition to the applicant's case that

> '9. the government recognised the need for legislation to provide for electoral arrangements for VR (i.e. village representative) elections to ensure that they are conducted in an open, fair and honest manner and that they are consistent with the rulings of the Court of Final Appeal. With these considerations in mind, it was decided that village representative elections should be put under a statutory framework.
>
> 10. Against this background, extensive consultations with the HYK (i.e. Heung Yee Kuk) and the 27 RCs (i.e. rural committees) were conducted. Several meetings were held between HAB (Home Affairs Bureau), HAD (Home Affairs Department) and HYK between April and July 2002 to discuss the proposed arrangements.
>
> 11. An underlying principle for the proposed legislation was that the 2003 VR election should

> be held for indigenous villages (Indigenous Villages or Composite Indigenous Villages) and existing village settlements (Existing Villages) which were included in the village representation system in the New Territories and in the VR election in 1999.'

28. Mr Fisher referred to the Legislative Council Brief for the village representative election bill issued by the Home Affairs Bureau ('the Bureau') to Legislative Council in late September 2002 which stated that

> 'Village Representative elections should be held for indigenous villages (Indigenous Villages or Composite Indigenous Villages) and existing village settlements (Existing Villages) now included in the village representation system in the New Territories.'

29. Mr Fisher stated that

> '13. .....
>
> The legislative intent of the bill was that the village representative elections should be held for villages then included in the village representation system only.'

30. Mr Fisher concluded by stating that :

> '18. Tsing Yi Hui was not included as an indigenous village in the 1999 VR election and had not been recognized by the relevant RC as a village under the village representation system. Accordingly, the Secretary had not included it in either the "Existing Village", "Indigenous Village" or "Composite Indigenous Village" list for the 2003 VR election.'

Matter of construction

31. While I accept that the evidence showed that the policy behind the *Ordinance* is to have village representative elections held for those villages which were already included in the village representation system in the New Territories in 1999, I do not accept that the wording of the *Ordinance* showed that must be the legislative intent as well.

The approach

32. To start with, *Bennion's Statutory Interpretation* 4th edition, section 228 states that

> '**Use as an indication of Parliament's intention**
>
> (1) Parliament's overall intention is to be gathered from the words of the Act. These are to be given an informed interpretation however, and enacting history is an important element here.
>
> (2) The nature of the remedy provided by the enactment to counter the mischief is of the essence of its meaning. Here above all the Act should speak for itself, and be interpreted directly by the court. The court will look with caution and reserve at any outside statement which purports to lay down the legal meaning of a remedial provision in an Act.
>
> (3) Care must always be taken to guard against the possibility that an intention suggested by the legislative history was in the end departed from by Parliament.'

33. Lord Steyn in *R.* (*on the application of Edison First Power Ltd*) *v. Central Valuation Officer and another* [2003] 4 All ER 209 deals with the question of statutory construction as

follows:

> ‘In the end the problem before the House is one of vires. The text of the statute must be the starting point. The question is how far, on a contextual reading of the statute, the language is capable of stretching. While I accept that all relevant contextual material must be taken into account, not all the material deployed by the Secretary of State can affect the point of statutory construction. Thus while I accept that the consultation process in this case is admissible, it ultimately does not warrant an interpretation which attributes to the language used by Parliament a meaning which displaces the presumption. The objective setting of the statute does not in logic and common sense reveal a Parliamentary intent to override the presumption.’ (emphasis added)

The present case

34. The words used in section 67 are simple words, namely ‘the Secretary may amend the schedule’. There is no qualification imposed in section 67 itself that the amendment should only be made by reference to the then existing village representative system.

35. Likewise looking at the *Ordinance* as a whole there is no provision whatsoever that election could only be held for those villages which had already been included in the then election system. If that was the case the *Ordinance* could easily have included such provisions in its content. While no doubt the *Ordinance* was enacted to overcome the problems identified by the Court of Final Appeal in *Chan Wah*, the wording of the *Ordinance* itself does not show that that was the *sole* purpose. I

have to reject Mr Kwok's argument that the *Ordinance* is intended to deal only with the issue of 'franchise' and not 'constituency'.

Consultation with others

36. Mr Kwok argued that there is nothing in the *Ordinance* which prohibits the respondent from seeking views, including views from the rural committee on a suggestion to amend the schedule. I have no difficulty with this approach. However, what is being complained of is that the discretion to amend lies with the Secretary and the view of the rural committee is only one of the many factors he should have taken into account in considering whether to amend or not. As the matter now stands the Secretary has entirely given up his discretionary power to consider the application to amend.

Method of amendment

37. Mr Kwok in his written submission stated that the power to amend would only be exercised when an existing village ceased to exist and hence should be deleted from the schedule. I disagree. Absent any express provision that the scheduled villages should only be confined to those that had taken part in the village election in 1999, there may well be circumstances in which additional villages should be included in the schedule as well. The power to amend is a wide one including both deletion and addition of villages.

Exercise of statutory power

38. Mr Kwok argued that section 67 is not concerned with a discretion but the exercise of a statutory power and that the Court when deciding the lawfulness of an exercise of a statutory power, should consider the reasonableness of the decision in light of the terms of the statutory power in context, the circumstances leading to the enactment and the fairness of the outcome. He relied on the case of *R* (*on the application of Edison First Power Ltd*) *v. Central Valuation Officer and another* UKHL 20 [2003] 4 All ER 209.

39. I do not see how the case relied upon by Mr Kwok would assist him. The statutory power in this case is in the nature of a discretion. This discretion has to be exercised in accordance with recognised principles. The mere fact that you call this discretion a statutory power is no answer to the complaint raised by the applicant.

Discretion not exercised

40. In my view the Secretary had not exercised the discretion that was conferred on him.

Inevitable decision?

41. Mr Kwok argued that the evidence showed that Tsing Yi Hui was a Hui (i.e. market) and not a village and it is not disputed that there was never any village representative election

at Tsing Yi Hui. He submitted that on the evidence the inevitable decision by the respondent would be a refusal to amend the Schedule as suggested by the applicant.

42. As I understand, this argument is not directed towards to the primary question of whether the Secretary had exercised the discretion in the first place. This is relevant only as far as whether relief should be granted the applicant bearing in mind that judicial review is ultimately a discretionary remedy.

43. Subject to one matter which I will deal with, I am not convinced with the inevitable decision argument. If the discretion is to be properly exercised one has to ask whether the decision to limit the scheduled villages to those that had previously held an election was a rational decision. However, it is premature at this stage to talk about inevitable decision when it is plain that the discretion whether to amend the Schedule or not had not even been exercised by the Secretary. It is plain that the Secretary treated the 'basic principles' referred to in the letter 18 July 2003 as the complete answer to the applicant's request to amend the Schedule. There was no independent evaluation of the applicant's case. His decision to refer the matter of amendment to the rural committee further lent support to the applicant's case that he had fettered the exercise of his discretion.

Findings of fact by the judge

44. However, what is unusual in this case is that the judge had made specific findings that

1. Tsing Yi Hui was not an indigenous village and

2. The applicant is not an indigenous inhabitant of Tsing Yi Hui.

45. Originally in Form 86A, the applicant sought a declaration that he is an indigenous inhabitant of Tsing Yi Hui within the meaning of section 2 of the *Ordinance*. This relief was not pursued by him at the hearing. Nonetheless the Committee still wanted to be heard on the correctness of the Secretary's decision. As stated in paragraph 19 of the judgment of Chung J the Committee supported the Secretary's case that Tsing Yi Hui was not an indigenous village and that it contended that the applicant is not an indigenous villager of Tsing Yi District. The judge proceeded to make the findings. The applicant did not challenge the finding in the appeal.

The arguments

46. The Court invited the applicant and respondent to lodge further written submissions on the significance of the findings of fact by the judge because this point was not addressed in their

oral arguments but obviously it has an important bearing on the relief sought.

47. Mr Dykes submitted that he did not challenge the finding of facts because they were not relevant to the only issue of the appeal, namely, fettering of discretion. In essence Mr Dykes submitted that it was the Secretary who could decide whether a place is a village within the meaning of section 2 of the *Ordinance*. The role of Chung J who heard the judicial review was only to supervise the Secretary's decision making by applying relevant public law principles. The two roles (administrative/judicial) are mutually exclusive. He referred to *Heptulla Brothers Ltd v. Thakore* [1956] 1 WLR 289 and *Sanders v Sanders* [1952] 2 All ER 767 on the scope of jurisdiction of a tribunal in terms of making findings on facts. He submitted that the material relied upon by the judge in the form of evidence from the Committee was not before the Secretary and did not come within any of the recognized exceptions concerning fresh materials. The material was not relevant except possibly to the limited issue of standing by the applicant to apply for judicial review. In *Judicial Review* by Supperstone and Goudie at paragraph 19.9.4 it is stated that

> 'There are some long accepted and uncontroversial exceptions to the exclusion of evidence that was not before the defendant public authority. The court will generally allow fresh evidence in at least the following four circumstances:
>
> (1) the court will receive evidence to show the nature and details of the material that was before the defendant public body at the relevant time;

> (2) a court will consider evidence to determine a question of fact where the jurisdiction of a public body depends on that fact. In that situation, the court is entitled to look at new evidence as its role goes beyond that of reviewing the decision. It must instead make up its own mind as to the 'jurisdictional fact';
>
> (3) similarly to (2) above, a court can consider additional evidence to determine whether procedural requirements were observed. Where the challenge is on the basis of failure to consider a relevant consideration, this might include evidence to assess the significance of the alleged failure;
>
> (4) the court can consider evidence where the challenged act or decision is alleged to have been tainted by misconduct. Examples of such misconduct include bias or fraud. Fresh evidence is admissible to prove the particular misconduct alleged.'

See also '*Fresh Evidence in Judicial Review*' by *M Fordham* [2000] JR 18. Mr Dykes submitted the exception does not exist in the present case.

48. He further submitted that the Secretary has a continuing duty to consider revising Schedule 2. As such there can be no question of the Secretary saying that the judge's findings bind him and the Applicant. A decision-maker who is under a continuing duty to monitor a state of affairs cannot disable himself from making a decision by regarding himself bound by a third party's view of matters. He must keep up to date with matters. See *E v. Home Secretary* [2004] Q.B. 1044 at [68]-[75].

The reality of the situation

49. The principles relied upon by Mr Dykes are recognized. However it is clear that by now the Court is not concerned with a hypothetical situation before Chung J where objections were taken to the admission of fresh evidence not previously before the Secretary. The judge admitted the evidence and then proceeded to make findings. Nor was the finding limited to the scope of standing of the applicant. In the light of the statement at paragraph 19 of the judgment, it is clear that the findings applied to all the parties to the judicial review.

50. The starting point in judicial review is that it is unsuitable for resolving facts : see *Judicial Review Handbook* by *M. Fordham* (4th Ed) para. 17.3. But as the author recongized

> 'Nevertheless, *it may well be appropriate* in judicial review for the Court to make findings of fact (with or without oral evidence), especially if crucial to whether a ground for intervention is made out.'

51. As there is no challenge to the findings the Court is not concerned with whether the step taken is appropriate or not. It is only concerned with the effect of the findings. Certainly as illustrated by *R (A and others) v Lord Saville of Newdigate and others* [2002] 1 WLR 1249 an appellate court did recognise the binding nature of the judgment of the judicial review court when it remitted a matter under challenge to the decision maker for consideration.

Whether relief should be granted

52. As the matter now stands this Court has to take into account the findings by the judge in deciding whether the applicant is entitled to relief even if a case on fettering of discretion has been made out. In my view even if the matter is to be remitted to the Secretary for reconsideration, he will be bound by the findings of the judge. After all both he and the applicant were parties to the judgment of Chung J. Where the underlying factual basis for the exercise of the discretion has been effectively determined against the applicant by the court, it will be futile to remit the matter to the Secretary even if he had not exercised the discretion in the first place. Notwithstanding the continuing duty of the Secretary I just cannot see how it can realistically be said that he is not bound by the specific findings of the Court.

Standing

53. The issue of standing of the applicant to bring the judicial review was no longer an issue between the parties. I do not need to address it.

Conclusion

54. For the reason I have given I will dismiss the appeal by the applicant in respect of his challenge of the Secretary's decision.

Costs between the applicant and the Committee

55. The second appeal concerns the applicant's appeal against the costs order made by the judge in favour of the Committee. The Committee was not an original party to the application. It applied to be joined as an intervener in these proceedings.

56. It is not necessary for me to go into procedural arguments whether the applicant is entitled to appeal against the costs order because he had not previously challenged the costs order *nisi* imposed by the judge. On the merits I found the judge was correct in ordering costs to be paid by the applicant in favour of the Committee.

The principles

57. The general rule is that where an application for judicial review is dismissed, the unsuccessful applicant will not be required to pay more than one set of costs if there are two or more respondents appearing. Special circumstances may sometimes warrant the court ordering the unsuccessful applicant to pay two sets of costs (See *Hong Kong Civil Procedure 2006* Vol. 1 at para 53/14/59). Where a party can show that there is a separate issue on which he was entitled to be heard, being an issue not covered by the other party or parties in the proceedings he would be entitled to his costs (See *Shiu Wing Steel Ltd. v. Director of Environmental Protection and another* CACV 350 of 2003).

58. As pointed out earlier one of the original reliefs sought by the applicant was a declaration that he is an indigenous inhabitant of Tsing Yi Hui within the meaning of section 2 the *Ordinance* which was abandoned by him on the day of the hearing before the judge. I accept, as submitted by Mr Jat, that the applicant's alleged status had serious implications for the Committee. The Committee is a consultative body to the government in relation to the affairs and administration of the Tsing Yi district. Village representatives of the villages of Tsing Yi district elected under the *Ordinance* are members of the Committee. The relief sought by the applicant would have an impact on the membership of the Committee and its functions including the management and administration of the affairs of the villages undertaking in the district. The applicant's claim would also have a serious impact on whether he or other potential applicants which he claimed to be 700 in number would be entitled to enjoy the benefits of the indigenous villages and communal holdings. This interest of the Committee is quite distinct from the interest of the Secretary.

59. By the time the hearing took place the costs relating to the Committee's preparation and attendance of trial had already been incurred. It would make no difference to the costs even if the applicant abandoned this particular aspect of his case. It is true that despite the change of stand taken by the applicant the Committee still wished the matter to be dealt with by the judge. However, this would make no impact on the costs that had already been occurred since the hearing concluded on the same day. In

the circumstances the costs order made by the judge in favour of the Committee is a correct one. I will dismiss the applicant's appeal on costs.

Costs of the appeal

60. In the light of my judgment I will make an order *nisi* that

1) there will be no order as to the costs of appeal between the applicant and the Secretary.

2) the applicant is to pay the Committee the costs of his appeal against the Committee on costs.

Hon Yam J :

61. I agree.

Hon Sakhrani J :

62. I agree with the judgment of Cheung JA.

(Peter Cheung) Justice of Appeal	(D. Yam) Judge of the Court of First Instance	(Arjan H Sakhrani) Judge of the Court of First Instance

Mr. Philip Dykes, S.C. and Mr. Kenneth K. H. Lee instructed by Messrs Chan & Associates, for the Applicant

Mr. S. H. Kwok, instructed by Department of Justice, for the Respondent

Mr. Jat Sew Tong, S.C. and Mr. Thomas Au, instructed by Messrs Cheung & Yip, for Tsing Yi Rural Committee

FACV No. 5 of 2007

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 5 OF 2007 (CIVIL)
(ON APPEAL FROM CACV NO. 201 OF 2005)

Between

LAI TAK SHING	**Applicant (Appellant)**
and	
THE SECRETARY FOR HOME AFFAIRS	**Respondent (1st Respondent)**
TSING YI RURAL COMMITTEE	**Intervener (2nd Respondent)**

Court:	Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Lord Woolf NPJ
Date of Hearing:	8 October 2007
Date of Judgment:	5 November 2007

J U D G M E N T

Chief Justice Li:

1. I agree with the judgment of Mr Justice Chan PJ and that of Mr Justice Ribeiro PJ.

Mr Justice Bokhary PJ:

2. I entirely agree with the judgment of Mr Justice Chan PJ. The following is contributed purely by way of respectful emphasis. Settling the list of indigenous villages cannot have been an easy task. It is plainly a major feature of the legislature's achievement in passing the Village Representative Election Ordinance, Cap.576. Adding any indigenous village to the list could – and probably would – have a very considerable impact on the position so achieved. The courts will not lightly ascribe to the legislature an intention to leave a major feature of primary legislation exposed to what could prove to be a very considerable impact by way of delegated legislation. It is also to be observed that there would still be substantial content in the Secretary for Home Affairs' power under s.67 to amend Schedule 2 even if the power did not extend to such addition. These are fundamental considerations. They constitute my primary reasons for holding that the Secretary is not empowered to add indigenous villages. On that interpretation, the appellant's judicial review challenge to the Secretary's refusal to add such a village necessarily fails.

Mr Justice Chan PJ:

3. At the centre of this appeal is the construction of s.67 of the Village Representative Election Ordinance, Cap 576 ("the Ordinance") – what is the scope of the power conferred by this section upon the Secretary for Home Affairs ("the Secretary") to amend the three schedules of the Ordinance? In the circumstances of this case, the specific question to be decided by the Court is whether the Secretary has the power to add to the list of indigenous villages in Schedule 2 of the Ordinance. If the Secretary does not have such power, his decision not to do so as requested by the appellant ("Mr Lai") was right and should be upheld. If, on the other hand, he has such

power, it would then be necessary to consider whether he had properly exercised that power and if he had not done so, whether Mr Lai is entitled to any relief, having regard to the findings of fact made by the judge at first instance at the request of the parties.

Background

4. Mr Lai claims to be an indigenous inhabitant of Tsing Yi Hui (青衣墟). The basis of his claim is that Tsing Yi Hui is an indigenous village which existed in Tsing Yi in 1898 and that his grandfather was a resident of that village at that time. The status of Tsing Yi Hui as an indigenous village and Mr Lai's status as an indigenous inhabitant are not recognized by the Tsing Yi Rural Committee ("TYRC").

5. The dispute in the present case is not concerned with the lawful traditional rights and interests of indigenous inhabitants which are preserved under art. 40 of the Basic Law. It is concerned with the entitlement of indigenous inhabitants to participate in public affairs through village representative elections. A village representative is automatically a member of the rural committee in the district in which the village is situated. See s.61 of the Ordinance. The chairmen and vice chairmen of rural committees are ex officio members of the Full Council of the Heung Yee Kuk ("HYK"). See s. 3(2)(a)(i) of the Heung Yee Kuk Ordinance, Cap 1097. Members of the Full Council form a functional constituency from which a candidate can be returned as a member of the Legislative Council. See s.20A of the Legislative Council Ordinance, Cap 542. In addition, the chairmen of rural committees are ex officio members of the relevant District Councils. See s.9(1) of the District Councils Ordinance, Cap 547.

6. There is no definition of “indigenous inhabitants” in the Basic Law. Nor was it defined in any statute until the enactment of the Ordinance (although similar terms such as “New Territories residents” and “indigenous villagers” are defined in the Government Rent (Assessment and Collection) Ordinance, Cap 515 (s.5), and the Rating Ordinance Cap 116 (s.36) by reference to “established villages”). The term “indigenous inhabitants” has been commonly understood to refer to persons who in 1898 were residents of villages which existed in the New Territories at that time and to persons who are their male descendants. Not all villages in the New Territories are indigenous villages. For decades, the practice has been that to qualify as an indigenous village, a village in the New Territories must not only have been in existence in 1898 but must also have been recognized as such by the Secretary (or the relevant official). The Secretary normally consults the HYK and the relevant rural committees because the members or chairmen of these organizations are usually village elders and long time residents of the relevant parts of the New Territories who are in a position to confirm the existence or otherwise of the relevant facts.

7. The village representation system in the New Territories which existed prior to 2003 only came into existence during the Japanese occupation. In the early years, a village representative to deal with the Government was elected or chosen by the heads of households in a village from among themselves. This was not surprising in view of the fact that members of the village were usually of the same surname, shared a common ancestor and jointly owned family property in the same village. The arrangements for such election changed over time due to changes in the circumstances including the emigration overseas of the indigenous inhabitants and the settlement of non-indigenous residents in many indigenous villages.

8. In August 1994, a set of Model Rules for the Conduct of Village Representative Elections was introduced by the HYK and adopted by a large number of indigenous villages in the village representative election held in 1999. It is to be noted that under the previous provisions of the Heung Yee Kuk Ordinance (s.3(3)), an elected person required the approval of the Secretary before he could become a village representative.

9. In December 2000, this Court in *The Secretary for Justice & Others v Chan Wah & Others* (2000) 3 HKCFAR 459 held, among other things, that certain arrangements adopted for the 1999 village representative election were unconstitutional. First, the exclusion of non-indigenous villagers from voting and standing as a candidate in the election was inconsistent with art. 21 of the Hong Kong Bill of Rights (the right to participate in public life). Secondly, the exclusion of non-indigenous men married to indigenous women from voting in such election while allowing non-indigenous women married to indigenous men to do so contravened s.35 of the Sex Discrimination Ordinance, Cap 480.

10. Following this decision, it was considered by the Government that the village representation system existing then should be put under a proper statutory framework and that village representative elections must be conducted in an open, fair and honest manner and must be consistent with art. 21 of the Hong Kong Bill of Rights and s.35 of the Sex Discrimination Ordinance. A working group was set up to review the procedure and arrangements for rural elections. Extensive consultation with the HYK and all 27 rural committees in the New Territories was conducted with a view to introducing legislation for regulating village representative elections in 2003 ("the 2003 VR Election") as well as in subsequent years. The underlying principle for the proposed legislation, according to Mr Fisher, the then Deputy

Secretary for Home Affairs, was that the 2003 VR Election should be held for indigenous villages and existing village settlements which were included in the village representation system in the New Territories and in the VR election in 1999.

Events leading to judicial review

11. Between April and July 2002, the Home Affairs Bureau ("HAB"), the HYK and the rural committees in the New Territories reached an agreement after extensive consultation to maintain the then current number of indigenous villages and village representatives in the forthcoming election in 2003.

12. In July and August 2002, in preparation for the 2003 VR Election, the proposed boundaries of Existing Villages under the TYRC were published for public inspection and comments. Tsing Yi Hui was not included as an Existing Village since it was not recognized as an Indigenous Village by the TYRC.

13. On 2 August 2002, Mr Lai wrote to the Secretary requesting the recognition of Tsing Yi Hui as an Indigenous Village and the delineation of a boundary for Tsing Yi Hui as an Existing Village in the 2003 VR Election. This matter was discussed at length at a meeting of the TYRC held on 16 August 2002 in which representatives of the HYK and the Secretary were present. On 23 August 2002, the Secretary turned down Mr Lai's request but indicated that the TYRC would reflect its opinion to the HYK and that the matter would be further considered after a "consensus had been reached" between the HYK and the TYRC.

14. On 23 September 2002, Mr Lai made a second and similar request to the Secretary. On 4 November 2002, the Director of Lands ("the

Director") informed the TYRC that Mr Lai's ancestors were considered by the Director as originating from Ma Wan and not Tsing Yi. At a meeting held on 10 December 2002, the TYRC took the view that Mr Lai was not an indigenous inhabitant of Tsing Yi. On 27 December 2002, the Director of Home Affairs on behalf of the Secretary replied to Mr Lai explaining further why Tsing Yi Hui was not accepted as an indigenous village.

15. In February 2003, the Ordinance was passed into law. Tsing Yi Hui was not included in the Schedules.

16. On 19 and 20 March 2003, Mr Lai filed two applications for registration as an elector of the 2003 VR Election in the Tsing Yi Hui Existing Village and Indigenous Village constituencies under the TYRC. On 7 April 2003, the Electoral Registration Officer of Kwai Tsing rejected his applications on the ground that Tsing Yi Hui was not listed as an Indigenous Village in Schedule 2 of the Ordinance. In May 2003, Mr Lai challenged this refusal under ss.24 and 25 of the Electoral Affairs Commission (Registration of Electors) (Village Representative Election) Regulation, Cap 541K. This was dismissed by the Revising Officer on 12 May 2003.

17. By a letter dated 3 July 2003, Mr Lai's solicitors wrote to the Secretary re-iterating that Tsing Yi Hui should have been included as an Indigenous Village and inviting the Secretary to exercise his power under s.67 of the Ordinance to make amendments to the Schedules to that effect. In a reply dated 18 July 2003, the Director of Home Affairs explained that the Schedules were compiled after extensive consultation with the rural committees and the HYK; that the basic principles were that villages eligible for inclusion in the 2003 VR Election should be those under the current village representative system in the New Territories and recognized by the respective rural committees; and that Tsing Yi Hui was not included in the

Schedules because it was not recognized by the TYRC and no village representative election had been held there since the establishment of the TYRC in the 1950s. The reply ended by undertaking to relay Mr Lai's proposal to the TYRC for consideration.

18. On 18 August 2003, Mr Lai commenced the present proceedings against the Secretary's decision as contained in this reply.

The relevant provisions of the Ordinance

19. Before going into the details of the proceedings, it is appropriate to set out the relevant provisions of the Ordinance. As mentioned above, it was prompted by the judgment of this Court in *Chan Wah*. It maps out a comprehensive scheme for village representative elections: establishing three types of village representative, setting out the qualifications for voting and standing as candidates in such elections and making provisions for the conduct of such elections.

20. In s.2, the Ordinance first identifies three types of village: (1) Existing Villages, (2) Indigenous Villages, and (3) Composite Indigenous Villages. We are not concerned with the last type of village. Existing Villages are defined by reference to a list of villages in Schedule 1 of the Ordinance and the designated areas on a specific map. Indigenous Villages are defined by reference to a list of villages in Schedule 2 and the particulars shown or contained in a specific Index. Both the map and the Index are kept in the office of the Director of Home Affairs and are available for public inspection. Corrections can be made to the Index but there is no express provision for the correction of any details on the map. (See ss.2, 3 and 4.)

21. The Ordinance further establishes the offices of Resident Representatives for Existing Villages ("Resident Representatives") and

Indigenous Inhabitant Representatives for Indigenous Villages (and Composite Indigenous Villages) ("Indigenous Inhabitant Representatives"). A Resident Representative is elected from among residents of an Existing Village; he is to reflect views on the affairs of that Village on behalf of the residents in that Village, but shall not deal with any affair relating to the lawful traditional rights and interests of indigenous inhabitants. (See s.5.) An Indigenous Inhabitant Representative is elected from among indigenous inhabitants of an Indigenous Village; he is to reflect views on the affairs of that Village on behalf of the indigenous inhabitants of that Village and to deal with all affairs relating to the lawful traditional rights and interests, and the traditional way of life, of the indigenous inhabitants in that Indigenous Village. (See s.6.)

22. It is possible for a village to be both an Existing Village and an Indigenous Village and hence possible to have both a Resident Representative and an Indigenous Inhabitant Representative in the same village. An elected village representative no longer requires the approval of the Secretary before he can take office. He is however still an ex officio member of the relevant rural committee as specified in the Schedules. (See s.61.)

23. The Ordinance also makes provisions for the eligibility for registration as an elector in a village election and for nomination as a candidate. Hong Kong permanent residents who have resided in an Existing Village for three years or more are eligible for registration as an elector in that Existing Village. (See s.15(4).) Indigenous inhabitants or the spouses or surviving spouses of indigenous inhabitants holding an identity document are eligible for registration as an elector in that Indigenous Village. (See s.15(5).) Residence is not required for an elector in an Indigenous Village. A person is eligible for nomination as a candidate in an Existing Village election if that

person is over 21 years of age, has been a resident of that Village for 6 years immediately before nomination, is a registered elector and is not disqualified. (See s.22.)

24. The lists of villages set out in the three Schedules are central to the whole village representative election scheme. Only villages listed in the Schedules can hold elections. Section 67 confers upon the Secretary a power to amend the Schedules. It provides:

> "(1) The Secretary may, by order published in the Gazette, amend Schedule 1, 2 or 3.
>
> (2) An order under this section may contain such incidental, consequential, supplemental, transitional or saving provisions as may be necessary or expedient in consequence of the order."

25. The scope of this power is the bone of contention in this case. What sorts of amendments can be made by the Secretary to the Schedules under this section? Can he add to the list of indigenous villages to Schedule 2? Unfortunately, due to the manner in which the case was conducted before the judge as discussed below, this issue was not dealt with by him.

Proceedings before the Court of First Instance

26. Mr Lai's case before the judge was that Tsing Yi Hui was an indigenous village within the definition of s.2 of the Ordinance but was omitted from the Schedules. The Secretary had the power and discretion to rectify this omission pursuant to s.67, but did not do so on the ground that Tsing Yi Hui was not recognized by the TYRC and no village representative election was held there in the 1999 village representative election and no election had ever been held for Tsing Yi Hui. It was contended that this was an improper exercise the Secretary's power and discretion in that the Secretary had deferred his decision to the views of the TYRC.

27. Mr Lai initially sought three heads of relief: (1) an order of certiorari to quash the Secretary's decision as set out in his letter dated 18 July 2003; (2) an order remitting to the Secretary the question whether the Schedule 2 of the Ordinance should be amended by adding the name of Tsing Yi Hui to it; and (3) a declaration that Mr Lai is an indigenous inhabitant of Tsing Yi Hui within the meaning of s.2 of the Ordinance.

28. In view of the third relief sought by Mr Lai, the TYRC applied to be joined as the 2nd respondent to these proceedings. The basis for doing so was that according to s.61 of the Ordinance, a village representative for an Existing Village or Indigenous Village is an ex officio member of the relevant rural committee. Should Tsing Yi Hui be declared an Existing Village or Indigenous Village, its village representative would be a member of the TYRC. Hence the TYRC was clearly interested to be heard on this issue. The application for joinder was not opposed.

29. The Secretary's case was that he had consulted the HYK and the TYRC and had taken their views among other matters into consideration before deciding not to include Tsing Yi Hui in the Schedules. He had not fettered his discretion by relying exclusively on the views of the HYK and the TYRC. In any event, on the evidence adduced before the court, Mr Lai had failed to prove that Tsing Yi Hui was an indigenous village and the decision was correct. The TYRC supported the Secretary's case. It maintained its position that Tsing Yi Hui was not recognized as an indigenous village and that Mr Lai was not an indigenous inhabitant.

30. On the first day of the trial, counsel for Mr Lai indicated that he was not pursuing the third relief. With the permission of the judge, the TYRC continued to take part in the proceedings. No issue was taken as to whether

Mr Lai has sufficient standing to institute these judicial review proceedings (although the judge later questioned this in his findings).

31. However, although Mr Lai was no longer seeking a declaration that he was an indigenous inhabitant, his counsel submitted that this was one of the issues before the court. Extensive submissions were made on the evidence adduced on this issue. It was contended that the Secretary had ignored the evidence showing that Tsing Yi Hui existed in 1898 and that Mr Lai's ancestor was living there then, and had instead acted on irrelevant considerations. It is only fair to say that the other parties to the case also addressed the court on the facts in dispute. Those being the submissions made by the parties, the judge was in effect invited to rule on these factual issues.

32. Having considered the evidence and the parties' submissions, the judge made the following findings:

(1) that Mr Lai had failed to establish that Tsing Yi Hui was an indigenous village and that "more probable than not" it was not;

(2) that it was not necessary to decide whether Mr Lai was an indigenous inhabitant because irrespective of whether the Secretary's consideration was made in accordance with the provisions of the Ordinance, "his conclusion is correct";

(3) that Mr Lai did not have sufficient interest to bring this application; and

(4) that since Tsing Yi Hui was not an indigenous village, the provisions of the Ordinance relating to the election of village representatives do not apply to Tsing Yi Hui.

33. These findings related to the merits of the Secretary's decision and in making them, the judge was said to have referred to evidence which

was not before the Secretary. These findings led, justifiably in my view, to the criticism that he had usurped the function of the Secretary, albeit what he did was merely acceding to the request of the parties. These findings also gave rise to the dispute (which was raised on appeal before the Court of Appeal and this Court) as to whether they are binding on the parties and whether any useful purpose can be served by remitting the case to the Secretary for re-consideration. In any event, having come to these conclusions, the judge did not think it was necessary to deal with the construction of s.67 of the Ordinance, although quite clearly this is an essential issue in the resolution of this case.

34. Mr Lai's application for judicial review was dismissed with costs to the Secretary and the TYRC. He appealed to the Court of Appeal against both the dismissal of his application and the costs order made against him in favour of the TYRC.

Decision of the Court of Appeal

35. On appeal, the Court of Appeal (Cheung JA, Yam and Sakhrani JJ) grasped the nettle and ruled on the construction of s.67 of the Ordinance. They took the view that while it was accepted that the policy behind the Ordinance was to have village representative elections only for those villages which were already included in the then current village representation system and which had held an election in 1999, the legislative intent was not to confine the village representation system only to these villages. The court accepted the suggestion that there could be circumstances in which additional villages should be included in the Schedules. In their opinion, the power to amend under s.67 was a wide power which allowed for the amendment of the Schedules by addition and deletion. The court concluded that the Secretary

had failed to exercise this power in that he had made no independent evaluation of Mr Lai's case.

36. The court then dealt with the question whether any relief should be granted to Mr Lai. On that issue, it held that it was premature to consider whether on the evidence, a decision refusing amendment was inevitable when the Secretary had not even exercised his statutory discretion. However, as Mr Lai did not challenge the findings of fact made by the judge, the court was not concerned with the appropriateness of those findings but with their effect; and even if the matter was to be remitted to the Secretary, he would be bound by those findings and it would be futile to remit the matter to him for re-consideration. Mr Lai's appeal was therefore dismissed with no order as to costs between Mr Lai and the Secretary but costs to the TYRC.

The present appeal

37. In the appeal before this Court, Mr Philip Dykes SC, leading Mr Kenneth K H Lee for Mr Lai, supports the construction given by the Court of Appeal to s.67 of the Ordinance but complains that the court was wrong to hold that the judge's findings of fact which went beyond the proper functions of a judge in judicial review proceedings are binding on the parties. It was also wrong to hold that Mr Lai was not entitled to any relief even though it was held that the Secretary had failed to exercise his power under that provision.

38. Mr John Bleach SC, leading Mr S H Kwok for the Secretary, submits that the underlying legislative intention of and the resulting legislative scheme under the Ordinance was that village representative elections should only be held for those indigenous villages and existing village settlements which had been included in the village representation

system in the New Territories and in the village representative election held in 1999. It is also his contention that the judge was asked by Mr Lai to make those findings which are proper and binding on the parties; alternatively, it would be irrational not to follow those findings.

The construction of s.67

39. Mr Dykes' arguments can be summarized as follows. "Indigenous Village", "Existing Village" and "Composite Indigenous Village" are terms which are "invented" by the Ordinance and are defined by reference to the Schedules. The inclusion of a village (which is defined in s.2 as including a community of people) in the Schedules involves a value judgment. This judgment was exercised by the Legislature when the Schedules were first compiled and may be exercised by the Secretary under the power to amend in s.67 if and when the situation arises. It is possible, counsel argues, that "communities coming into existence after 1898 by branching off from 1898 villages, or being otherwise established by indigenous inhabitants of communities in existence in 1898 or by non-indigenous persons establishing a village community" may fall within the definitions of Indigenous Village, Existing Village or Composite Indigenous Village and should be included in the Schedules. The power under s.67 is not restricted by any policy, requirements or pre-conditions and may thus be exercised "from time to time as the occasion requires" as permitted by s.39 (1) of the Interpretation and General Clauses Ordinance, Cap 1. It is a wide power since "amend" includes "repeal, add to or vary and the doing of all or any of such things simultaneously or by the same Ordinance or instrument". See s. 3 of Cap 1. Such a construction, counsel submits, is consistent with the purposes of the Ordinance.

40. With respect, I do not think this submission can be sustained. It is clearly not the intention of the Legislature to confer such a wide power on the Secretary. This is plain from the context which includes the legislative history, the mischief which the Ordinance was aimed at rectifying and the provisions of the Ordinance. On a true construction of s.67, I do not think it empowers the Secretary to add or delete any indigenous or existing village to and from the Schedules.

41. In *Chan Wah*, two aspects of the previous village representation system were found to be unconstitutional: the exclusion of non-indigenous residents and the spouses of indigenous women from village representative elections. The Ordinance was passed with a view to rectify the "mischief" identified by this Court in that case. It was sought to achieve this by introducing the "dual representation" model and making provision for the eligibility of electors and candidates in future village representative elections. The Ordinance was not intended to make any change to the then current delineation of boundaries of each constituency. The number and names of indigenous villages where village representative elections had previously been held had already been identified and recorded in an existing Index; and the number and distribution of existing village settlements were also well known and recorded in an existing map. These were not matters which needed to be addressed by enacting new legislation.

42. Extensive consultation for several months with the HYK and the 27 rural committees in the New Territories was conducted on the basis that there was to be no change to the then current number of indigenous villages and existing village settlements or for that matter, the identity of these villages. This is clear from the records and documentation of the consultation. It was also the basis of an agreement reached between the Government and

the HYK and the rural committees as to how to proceed with future elections. More importantly, it was the basis on which the Schedules were prepared and published for public inspection and comments in July 2002 and it was these Schedules which were subsequently incorporated in the Ordinance.

43. That there was to be no change to the then current number of indigenous villages and existing village settlements and only those villages in which election had been held in 1999 are to be included was also made amply clear in a Brief submitted in September 2002 by the HAB to the Legislative Council during the introduction of the Village Representative Election Bill. The Bureau explained the reasons behind the Bill, the purposes it was sought to achieve and the proposed changes. Among other things, the Legislative Council Brief stated:

> (i) that Village Representative elections should be held for indigenous villages (Indigenous Villages or Composite Indigenous Villages) and existing village settlements (Existing Villages) *now included* in the village representation system in the New Territories (paragraph 11(a)); *and*
>
> (ii) that the *current number* of Indigenous Inhabitant Representatives (ranging from 1 to 5) for an Indigenous Village or a Composite Indigenous Village *would be retained*. (paragraph 11(o)) (emphasis added)

44. The number, descriptions and locations of these villages were listed in the Schedules which formed part of the proposed legislation and were tabled before the Legislative Council. In passing the Bill in that form, it must be taken that the Legislative Council, having been informed of what was proposed and what was intended to be achieved by the Bill, made a conscious decision to adopt such an approach.

45. What Mr Lai appears to be doing in this case is that having failed to lobby the Secretary to have Tsing Yi Hui included as an indigenous village (and for that matter, also as an existing village) in the list of villages to be presented for incorporation in the proposed legislation, he now makes another attempt at it by urging the Secretary to invoke the power under s.67 in his favour after the enactment of the legislation.

46. So much for the legislative history and background to this piece of legislation. In my view, the wording of the relevant provisions of the Ordinance does not support Mr Dykes' submission either.

47. It is true that s.67(1) is in open terms and that no criterion is expressed in the Ordinance as to how and under what circumstances this power is to be exercised. But it does not follow that the power can be exercised in any way the Secretary wishes, even to the extent of defeating the intent and purpose of the Ordinance or changing the village representation scheme. I do not believe Mr Dykes goes so far as to submit that the exercise of this power is completely unrestricted. But once that is accepted, it must, in my view, follow that the power must be exercised only within the confines of the declared legislative policy and must not be exercised in such a way which is inconsistent with the legislative intent.

48. It is important to note that "Indigenous Villages" and "Existing Villages" are not defined in a descriptive way but by reference to the Schedules and to a specific Index or a specific map which were already in existence before the enactment of the Ordinance. The Schedules form part of the Ordinance. If the s.67 power were to be as wide as is submitted by counsel, this would mean that the Secretary has the power to redefine the constituencies by making changes to these definitions or even to overturn the whole village representation system by amending the Schedules. This is

tantamount to giving a power to the Secretary to amend primary legislation. Although any change to the Schedules is, we are told, subject to negative vetting by the Legislative Council, I do not think the abovementioned consequence could have been intended by the Legislature.

49. In my view, s.67(1) must be construed in a way which is consonant with the declared policy and legislative intent. It is aimed at giving power to the Secretary to correct errors and mistakes in matters of detail appearing in the Schedules which may be discovered subsequent to the enactment of the Ordinance and from time to time. Such power is necessary given the tremendous amount of details contained in these Schedules which in relation to no less than 693 Existing Villages, 586 Indigenous Villages and 15 Composite Indigenous Villages, set out the names, both in Chinese and English, of the villages and the rural committees of the districts in which the villages are situated, the number of village representative to be elected, and in the case of an Existing Village, also the reference to the map on which the area of the village is delineated.

50. I am therefore in no doubt that it was the clear intention of the Legislature to confine future village representative elections to those villages already on the list where elections had been held in 1999. I would respectfully disagree with the Court of Appeal that this was merely a policy and not the legislative intent.

51. Mr Dykes submits in his argument (which was apparently accepted by the Court of Appeal) that it is possible for new indigenous villages to be discovered and new existing villages to emerge and that the Secretary should have the power to add or remove villages to or from the Schedules. In answer to this, I would only say that if and when it is deemed necessary or appropriate to add or delete any indigenous or existing village to

or from the Schedules, it is, I think, properly a matter for the Legislature and not the Secretary.

52. In view of my conclusion on the construction of s.67, the other matters do not arise for consideration. However, I must in particular note that the judge's view that Mr Lai did not have sufficient interest to institute judicial review proceedings should not necessarily be taken as correct.

Conclusion

53. For the reasons which I have given above, I am of the opinion that the Secretary has no power to add any new indigenous village to Schedule 2. He could not have acceded to Mr Lai's request. I would therefore dismiss the appeal with costs to the Secretary.

Costs orders in favour of TYRC

54. The judge awarded costs to the TYRC against Mr Lai. That order was appealed to the Court of Appeal. It was upheld by the Court of Appeal for the reasons given in paragraphs 55 to 59 of its judgment. Basically, the court considered that the TYRC had a separate interest to be heard which was distinct from that of the Secretary and that it had already incurred substantial costs before Mr Lai indicated to the judge that he would not seek a declaration of status. The Court of Appeal further ordered Mr Lai to pay the TYRC's costs of the appeal.

55. Before the hearing of the present appeal, Mr Lai's solicitors had indicated to the solicitors for the TYRC that Mr Lai would be seeking "to set aside the costs orders below and that the Committee (the TYRC) should bear its own costs". In view of this indication, the TYRC attended by counsel, Mr Victor Dawes, at the hearing in the present appeal, indicating at the outset that

he would like to be heard on the costs orders concerning the TYRC in the courts below and the costs in this Court.

56. For the reasons given by the Court of Appeal, I would agree that this is a proper case in which Mr Lai should bear the costs of the TYRC in the courts below. The costs orders made by the judge and the Court of Appeal should stand. Further, I think it is appropriate for the TYRC to attend this hearing by solicitors and counsel. I would therefore make an order for costs in favour of the TYRC against Mr Lai in relation to the arguments before this Court on the costs orders in the courts below and in this Court.

Mr Justice Ribeiro PJ:

57. I have had the advantage of reading in draft the judgment of Mr Justice Chan PJ. I respectfully agree with his reasoning and conclusion and would like to add a few observations of my own, gratefully adopting his Lordship's statement of the facts and the abbreviations used.

58. Mr Lai's challenge is to the Secretary's refusal to exercise the powers of amendment contained in section 27 of the Ordinance to add what is said to be an indigenous village to the electoral scheme there laid down. The Secretary is alleged to have unlawfully fettered his discretion under that section and wrongly delegated its exercise to the TYRC.

59. The assumption which necessarily underlies that challenge is that section 27 does indeed confer a discretion on the Secretary to make such an amendment. The first question which therefore arises is whether that assumption is correct. If it is not, the challenge must fail. The question is one of statutory construction. It requires section 27 to be construed in the context of the Ordinance as a whole and in the light of its origins and purpose.

The origins and scheme of the Ordinance

60. In December 2000, the Court handed down its decision in *Secretary for Justice v Chan Wah*,[1] holding that the 1999 arrangements for electing village representatives were unconstitutional. It was with a view to complying with the constitutional requirements identified that, after extensive consultations with the Heung Yee Kuk and various rural committees, the Ordinance was enacted. It lays down a scheme for elections whereby residents and indigenous inhabitants of villages elect their representatives to deal with village affairs. As the Court held in *Chan Wah*, such an electoral scheme engages the right to participate in public life protected by Article 21 of the Bill of Rights.

61. The Ordinance identifies three types of village: "Existing Villages", "Indigenous Villages" and "Composite Indigenous Villages".[2] Such villages are not identified by any specified criteria but by being individually listed in the Schedules to the Ordinance[3] and designated on related maps.[4] The last "Composite" category does not require further mention for present purposes.

62. If a village is listed as an Indigenous Village, the Ordinance provides for election of an "indigenous inhabitant representative" for the village.[5] If it is an Existing Village, the election is of a "resident representative" for the village.[6] A village may come within both categories.

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1 (2000) 3 HKCFAR 459.

2 Section 2.

3 Schedules 1, 2 and 3.

4 Section 3.

5 Section 6.

6 Section 5.

63. A resident representative represents the village's residents generally and deals with village affairs except for matters relating to the lawful traditional rights and interests of indigenous inhabitants.[7] It is for an indigenous inhabitant representative to deal with those matters and to reflect the views of indigenous inhabitants.[8]

64. To be eligible to vote in a village election, one must be a registered elector.[9] In the case of an Existing Village, this requires one to be a permanent Hong Kong resident who has resided in the listed village for at least three years.[10] And in the case of an Indigenous Village, one must meet the requirements specified for indigenous inhabitants and their spouses.[11] To be eligible for nomination as a candidate for an Existing Village, one must have resided in the village for six years.[12]

65. It follows that the lists of villages in the Schedules are fundamental to the scheme. Inclusion in the Schedules makes a named village an electoral constituency. The particular Schedule in which it is listed determines whether the election is for a resident representative or for an indigenous inhabitant representative. The listing also determines the conditions of eligibility to be an elector and to be nominated as a candidate.

66. Section 67, which is central to this appeal, provides for amendments to be made to these Schedules. It states:

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7 Section 5(3).

8 Section 6(4).

9 Section 13.

10 Section 15(4).

11 Section 15(5).

12 Section 22(1). Residency requirements for candidates at elections for Indigenous Villages are set out in s 22(2).

> "(1) The Secretary may, by order published in the Gazette, amend Schedule 1, 2 or 3.
>
> (2) An order under this section may contain such incidental, consequential, supplemental, transitional or saving provisions as may be necessary or expedient in consequence of the order."

The applicant's case

67. The applicant claims to be an indigenous inhabitant of a place called "Tsing Yi Hui" (青衣墟) which, he argues, should be, but is not, listed as an Indigenous Village in Schedule 2 of the Ordinance. He relies principally on the fact that Tsing Yi Hui was included as an Indigenous Village in a list prepared by the Heung Yee Kuk in 1991 in anticipation of steps to be taken to implement Art 40 of the Basic Law which provides for protection of the lawful traditional rights and interests of the indigenous inhabitants of the New Territories (which are presently not engaged and not in issue). However, Tsing Yi Hui was subsequently omitted from the 1999 electoral process and left out of the Schedules.

68. The applicant pressed the Secretary to add Tsing Yi Hui to Schedule 2 by exercising his powers under section 67. The TYRC objected, contending that Tsing Yi Hui is not an Indigenous Village. The Secretary declined to amend the Schedule as requested. In earlier correspondence, the Secretary had explained how the Schedules were compiled as follows:

> "The Schedules were compiled upon extensive consultation with Rural Committees and the Heung Yee Kuk. The basic principles are that villages eligible for inclusion in the 2003 Village Representative election should be those currently under the Village Representative system in the New Territories and those that are recognised by the respective Rural Committees.
>
> Tsing Yi Hui (青衣墟), though contained in the 'List of Established Villages' issued in 1991, is not a village recognized by Tsing Yi Rural Committee and village representative election has not been held there since the establishment of Tsing Yi Rural Committee in the 1950s. In the

> circumstances, Tsing Yi Hui is not in the Schedules of the Ordinance and is not included in the Village Representative election in 2003."

69. Evidence was filed by the government in the proceedings, explaining that after extensive consultations with NT interests, it was decided that:

> "An underlying principle for the proposed legislation was that the 2003 VR election should be held for indigenous villages (Indigenous Villages or Composite Indigenous Villages) and existing village settlements (Existing Villages) which were included in the village representation system in the New Territories and in the VR election in 1999."

The scope of the Secretary's power under s 67

70. It is evident that the legislature decided to adopt the abovementioned principle by listing in the Schedules only those villages that were included as constituencies for the 1999 elections. It was a decision embodied in primary legislation enacted after an extensive consultation process involving entities generally regarded as having authoritative views on New Territories' affairs.

71. The appellant's argument requires section 67 to be construed as containing a power enabling the Secretary to remove a 1999 village from, and to add a non-1999 village to, the Schedules. The section would accordingly have to be read as empowering him to redefine the electoral constituencies laid down in the Ordinance in a manner departing from the principle arrived at by the consultation process. It would mean that the Secretary could decide whether any particular village settlement is or is not eligible to form an electorate as an indigenous or existing village and to provide nominees for election. He would be regarded as empowered, by removing a village removed from the Schedules, to deprive residents of electoral rights which had been conferred by primary legislation and which engage protections under Article 21 of the Bill of Rights. I am wholly unable to accept that the

legislative intent is to confer such powers on the Secretary. This is particularly so since no criteria for removing a 1999 village from the Schedule or for adding a non-1999 village are mentioned in the Ordinance.

72. In my view, the power of amendment given by section 67 must be understood to be exercisable only within the confines of the enacted legislative policy of including only the 1999 villages in the electoral scheme. It may be exercisable if, for instance, certain particulars set out in a Schedule are found to be incorrect, a power which the legislature might well have considered necessary given that the Schedules list 693 Existing Villages, 586 Indigenous Villages and 15 Composite Indigenous Villages, with five columns setting out details in respect of each.

73. It is true that section 67(1) is in wide and unqualified terms. However, adoption of a narrow interpretation is consonant with the plain legislative intent and involves a well-established approach to statutory construction. In *R (Edison First Power Limited) v Central Valuation Officer* [2003] 4 All ER 209, Lord Hoffmann (with whom Lord Millett and Lord Scott of Foscote agreed) described it as a:

> "...common sense principle of the construction of statutes by which courts will often imply qualifications into the literal meaning of wide and general words in order to prevent them from having some unreasonable consequence which it is considered that Parliament could not have intended: see *Stradling v Morgan* (1560) 1 Pl 199 and, for a more recent example, *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299. The strength of the presumption depends upon the degree to which the consequences are unreasonable, the general scheme of the legislation and the background against which it was enacted." (§25)

74. In my view, section 67 should be construed as aforesaid to give effect to the clear objectives and intent of the Ordinance. It follows that the appellant's challenge necessarily fails. It therefore becomes unnecessary to consider the status of the findings made by the judge at first instance. I would

accordingly also dismiss the appeal and concur with the orders as to costs referred to by Mr Justice Chan PJ.

Lord Woolf NPJ:

75. I agree with the judgment of Mr Justice Chan PJ and the judgment of Mr Justice Ribeiro PJ.

Chief Justice Li:

76. The Court unanimously dismisses the appeal with costs to the Secretary. Further, the Court makes an order for costs in favour of the TYRC against Mr Lai in relation to the arguments before this Court on the costs orders in the courts below and in this Court.

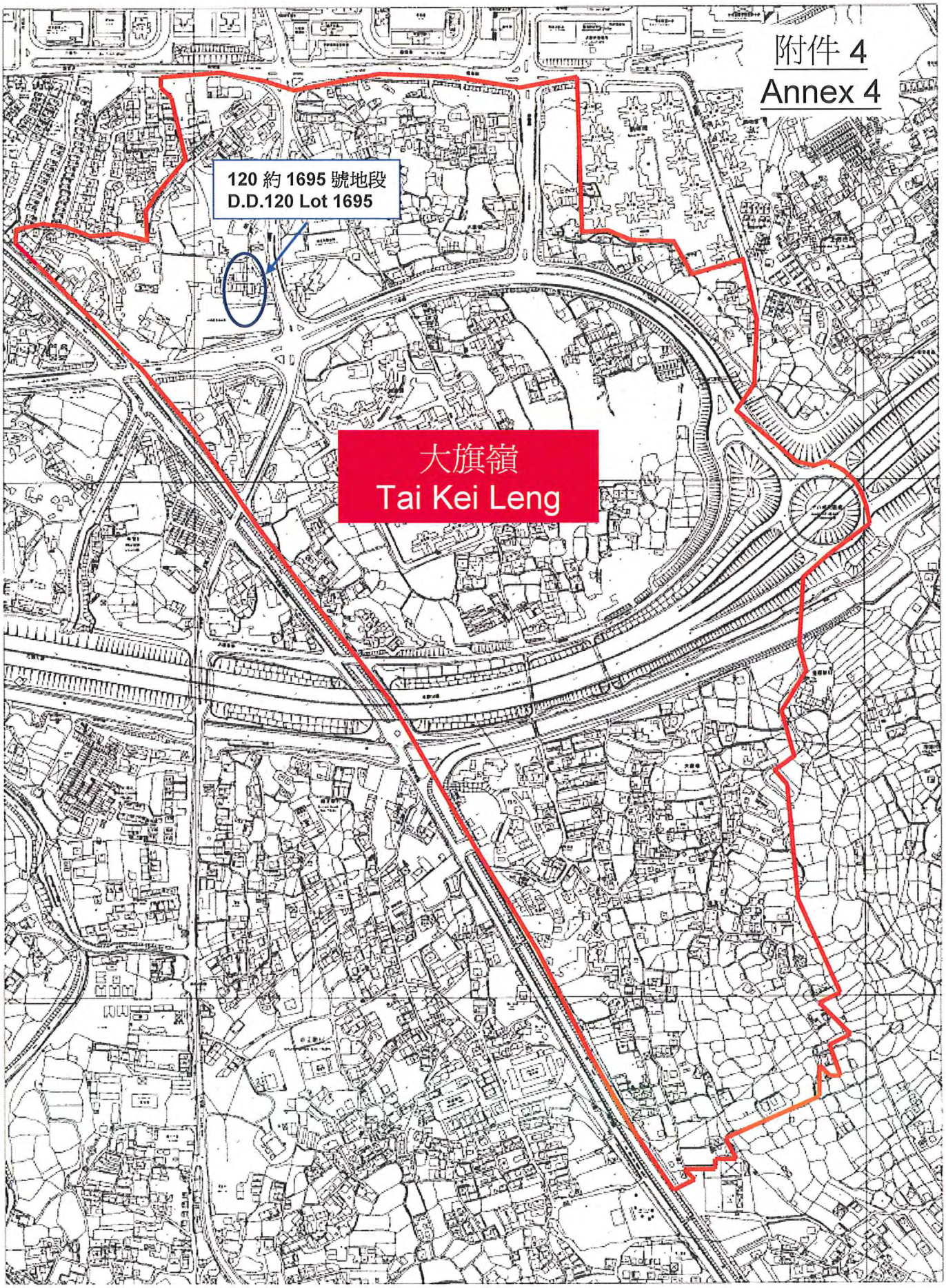
(Andrew Li)	(Kemal Bokhary)	(Patrick Chan)
Chief Justice	Permanent Judge	Permanent Judge

(R A V Ribeiro)	(Lord Woolf)
Permanent Judge	Non-Permanent Judge

Mr Philip Dykes SC and Mr Kenneth K H Lee (instructed by Messrs K L Leung & Co) for the appellant

Mr John Bleach SC and Mr S H Kwok (instructed by the Department of Justice) for the 1st respondent

Mr Victor Dawes (instructed by Messrs Cheung & Yip) for the 2nd respondent on costs only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