LETTERHEAD OF HIGH COURT

本署檔號 OUR REF: A.L.No.90/97

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電話 TEL: 28254522

3rd April 1998

Dear Sirs,

Re: A.L. No.90 of 1997

I forward herewith one copy of the written judgment in respect of the above-mentioned case for your kind retention.

Yours faithfully,

(Y.S. TANG)
for Registrar, High Court

TO:

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1997 A.L.No. 90

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

BETWEEN

THE ASSOCIATION OF EXPATRIATE CIVIL SERVANTS OF HONG KONG — Applicant

and

THE CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION — Respondent

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Before: The Hon. Mr. Justice Keith in Court
Dates of Hearing: 24th and 25th February 1998
Date of Handing Down of Judgment: 3rd April 1998

[(1) The phrase "legal procedures" in Art. 48(7) of the Basic Law has to be construed with Art. 103 of the Basic Law in mind. Accordingly, it is to be construed as meaning "such procedures as are lawfully established to maintain Hong Kong's previous system of recruitment and discipline for the public service". Such procedures do not require the approval of the Legislative Council.

(2) Section 17 of the Public Service (Administration) Order 1997, which prohibits a public officer under interdiction from leaving Hong Kong without permission, is a restriction on his freedom, protected by Art. 8(2) of the Bill of Rights, to leave Hong Kong. Since the restriction was not "provided by law" within the meaning of Art. 8(3) of the Bill of Rights, section 17 contravened Art. 8(2) of the Bill of Rights, and the court declared that public officers were not bound by its terms.

(3) The effect of reg. 8(3)(a) of the Public Service (Disciplinary) Regulation is to prohibit a public officer from being legally represented at a disciplinary hearing unless the Chief Executive permits. Although other groups of public officers (police officers of certain ranks and judicial officers) are permitted to be legally represented, the prohibition in reg. 8(3)(a) is not incompatible with Art. 21(c) of the Bill of Rights, because the restriction on the right of access of the general body of public officers to terms and conditions of service enjoyed by police and judicial officers is not unreasonable in the circumstances.]

JUDGMENT

Introduction

This is an application by the Association of Expatriate Civil Servants of Hong Kong ("the A.E.C.S.") for judicial review of (a) the decision of the Chief Executive to promulgate two instruments and (b) various provisions in those instruments. The two instruments are the Public Service
(Administration) Order 1997 (E.O.NO.1 of 1997) ("the Executive Order") and

the Public Service (Disciplinary) Regulation ("the Regulation"). The grounds on which the legality of the two instruments are challenged are that (a) they provide for the appointment and removal of holders of public office contrary to the provisions of the Basic Law, and (b) they are retrospective in operation.

The two instruments

The Executive Order provides for the appointment, dismissal, suspension and discipline of public servants. It was promulgated by the Chief Executive on 9th July 1997, though it was deemed to have come into operation on 1st July 1997. The Chief Executive's power to promulgate executive orders, and to appoint and remove holders of public office, is derived from Art. 48 of the Basic Law, which provides, so far as is material:

> "The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions: ...
>
> (4) To decide on government policies and to issue executive orders...
>
> (7) To appoint or remove holders of public office in accordance with legal procedures..."

The Regulation establishes a disciplinary procedure for the investigation and adjudication of disciplinary offences committed by public servants. It was published in the Government Gazette on 11th July 1997, though it too was deemed to have come into operation on 1st July 1997. The Chief Executive's power to issue the Regulation is derived from section 21(1) of the Executive Order, which provides, so far as is material:

> "...the Chief Executive may make regulations...(b)...for regulating practice and procedure, under this Order."

The background to their promulgation

Prior to 1st July 1997, the overall authority for the administration of the public service was provided for in various colonial instruments. Their application to Hong Kong lapsed on 1st July 1997 on the establishment of the Hong Kong Special Administrative Region. To provide continuity in the administration of the public service, it was necessary to replace the provisions in those instruments relating to the appointment and removal of public servants and to a disciplinary procedure for the investigation and adjudication of disciplinary offences.

It was plainly not possible for instruments to be promulgated which were identical in nature to the colonial instruments which they were replacing. What the Government sought to achieve was to replace the relevant provisions in those instruments with provisions which

(a) were as similar as possible to the provisions in the colonial instruments, and

(b) were to be included in instruments which, from the constitutional point of view, approximated as closely as possible to the colonial instruments in which the corresponding provisions had been included.

The challenge to the instruments

The provisions in the two instruments establish the procedures by which public servants will in future be appointed and dismissed. There is no significant difference between those provisions and the provisions in the colonial instruments which they replaced. The argument of Mr. Michael Scott, the Vice-President of the A.E.C.S., is that the procedures by which public servants would in future be appointed and dismissed had to be established

either by legislation or with legislative approval. Those procedures could not lawfully be established by executive order only. Establishing them by executive order only, without the approval of the legislature, is said to infringe the Basic Law in two respects:

(i) Art. 103 of the Basic Law provides:

> "The appointment and promotion of public servants shall be on the basis of their qualifications, experience and ability. Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained, except for any provisions for privileged treatment of foreign nationals."

It is said that Hong Kong's previous system for the appointment and removal of public servants amounted to "legislation independent of and binding on the Executive". Accordingly, to replace that system with a system introduced by executive order only without the approval of the Legislature meant that Hong Kong's previous system was not being maintained.

(ii) Procedures for the appointment and dismissal of public servants which had been established by executive order only did not amount to "legal" procedures of the kind contemplated by Art. 48(7).

(i) "***Hong Kong's previous system"***. In order to evaluate the A.E.C.S.'s argument on Art. 103, it is necessary to identify the instruments by which "Hong Kong's previous system of recruitment [and]...discipline...for the public service" was established and their legal status. Those instruments were

(a) the Letters Patent,

(b) the Colonial Regulations,

(c) the Disciplinary Proceedings (Colonial Regulations) Regulations and directions given by the Governor under them, and

(d) the Civil Service (Disciplinary) Regulations.

The Letters Patent were the principal instrument by which the prerogative powers of the Crown over Hong Kong were delegated to the Governor of Hong Kong. Thus, Arts. XIV and XVI of the Letters Patent gave the Governor of Hong Kong the power to appoint, dismiss, suspend and discipline public servants. However, the Letters Patent did not identify how these powers should be exercised or what procedure for their exercise should be adopted. The principal instrument which established the manner in which these powers should be exercised and the procedures which should be adopted were the Colonial Regulations. The Colonial Regulations were directions to colonial governors given by the Crown, again by virtue of its prerogative, through the Secretary of State for Foreign and Commonwealth Affairs. The Court of Appeal in ***Lam Yuk Ming v. The Attorney General*** [1980] HKLR 815 held that the Governor of Hong Kong was obliged to give effect to them. The relevant articles of the Letters Patent and relevant provisions in the Colonial Regulations have been reproduced in the Executive Order.

The Disciplinary Proceedings (Colonial Regulations) Regulations and the Civil Service (Disciplinary) Regulations were made by the Governor. The former required the approval of the Secretary of State. The latter did not. The power of the Governor to make both sets of Regulations derived from those of the Colonial Regulations which applied to Hong Kong. The power to

make the former was given to the Governor by regs. 56(1) and 57(1) of the Colonial Regulations. The power to make the latter was given to him by reg. 54(2) of the Colonial Regulations. The relevant provisions of these Regulations, and the directions made by the Governor under the former, have been reproduced in the Regulation.

This analysis shows that "Hong Kong's previous system of recruitment [and] ... discipline ... for the public service" was established neither by the Legislature nor with legislative approval. It was established by the Crown under the Letters Patent and the Colonial Regulations in the exercise of its prerogative, and by the Governor in the exercise of powers expressly conferred upon him by the Colonial Regulations. The suggestion, therefore, that Hong Kong's previous system could only be maintained if the system which replaced it had the approval of the Legislature is not borne out. I note that in ***Lam Yuk Ming*** the Letters Patent were described as an exercise of the Crown's legislative power, and the Colonial Regulations were said to constitute a form of subordinate legislation, but since the Letters Patent and the Colonial Regulations were prerogative instruments, these descriptions did not mean that the approval of the Legislature was required for them. Indeed, none of the instruments by which the previous system was established in Hong Kong required the approval of either Parliament in the U.K. or the Legislative Council in Hong Kong.

In summary, while there are undoubtedly constitutional differences between "Hong Kong's previous system of recruitment [and]...discipline... for the public service" and the current system established by the Executive Order and the Regulation, the maintenance of the previous system did not require the current system to have the approval of the Legislature. The

hallmark of the previous system was that, where procedures were to be established locally, they were established by the Governor by the Governor by executive action. It follows that Art. 103 of the Basic Law did not require any system which replaced the previous system to have the approval of the Legislative Council.

(ii) "**L*egal" procedures.*** The argument of the A.E.C.S. is that the reference to "legal" procedures in Art. 48(7) means that such procedures as are to be established for the appointment and removal of holders of public office have to have received legislative approval. Otherwise, the procedures will not have been "prescribed by law", which is the meaning to be attributed to the word "legal" in this context. Since the Basic Law conferred law-making powers on the Legislative Council by Art. 73(1), and since the Basic Law has conferred such powers on no other body or person (certainly not on the Chief Executive), only the Legislative Council had the power to enact the procedures by which the Chief Executive was to appoint and remove holders of public office.

Mr. Joseph Fok for the Chief Executive, with his usual thoroughness and clarity, took me through the various provisions in the Basic Law in which the phrase "in accordance with legal procedures" appears (Arts. 30, 48(6), 73(1) and 74), as well as those provisions in the Basic Law in which similar phrases appear ("in accordance with law", "according to law", "in accordance with the laws of the Region", and "in accordance with the laws applicable in the Region"). On the whole, I have not been assisted by these provisions. The meaning of a particular provision, whether in an ordinance or in a constitutional instrument such as the Basic Law, depends very much on its context, and I have not discerned a clear pattern as to the rationale behind the use of one phrase and not another in the Basic Law.

However, since the A.E.C.S. contends that the word “legal” in Art. 48(7) means “prescribed by law”, it is important to note that the phrase “prescribed by law” is itself used in a number of provisions in the Basic Law (Arts. 39, 83, 98, 99,110 and 111). Accordingly, when the Basic Law contemplates that a particular course of action has to be prescribed by law, the Basic Law says so. The fact that Art. 48(7) speaks of “legal” procedures, rather than of procedures “prescribed by law”, is some indication that a meaning other than “prescribed by law” was intended.

I should add that even if a course of action must be prescribed by law, that does not mean that it has to be sanctioned by legislation. Art. 39, for instance, provides that the rights and freedoms enjoyed by Hong Kong residents “shall not be restricted unless as prescribed by law”. The right of freedom of expression is, of course, restricted by laws other than legislation-for example, by the common law of defamation. Moreover, Art. 8 provides that the laws of Hong Kong include the common law, rules of equity and customary law as well.

Chapter IV of the Basic Law concerns Hong Kong’s political structure. Section 6 of Chapter IV relates to public servants. Accordingly, the power conferred on the Chief Executive by Art. 48(7) to appoint and remove holders of public office has to be construed in the light of the provisions in Section 6. The article in Section 6 which addresses the appointment and removal of public servants is Art. 103. Accordingly, Art. 48(7) has to be construed with Art. 103 in mind. In my judgment, the construction of the words “in accordance with legal procedures”, which takes into account (a) the provisions of Art. 103, and (b) the fact that the phrase used in Art. 48(7) is not “in accordance with procedures prescribed by law”, is “in accordance with

such procedures as are lawfully established to maintain Hong Kong's previous system of recruitment and discipline for the public service". Since the procedures laid down by the Chief Executive by the Executive Order maintain Hong Kong's previous system of recruitment and discipline in the public service and were therefore lawfully established, it follows that those procedures fall within the phrase "legal procedures" in Art. 48(7).

In the interests of completeness, I should add that Mr. Fok also relied on Art. 56 of the Basic Law, which provides, so far as is material:

> "Except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council."

Mr. Fok argued that if the Chief Executive was to be solely responsible for the appointment and removal of public servants, it was unlikely that legislation was necessary for the regulation of the public service. I cannot go along with that argument. In my view, the Chief Executive's power in Art. 56 to dispense with consulting the Executive Council relates to decisions of the Chief Executive to appoint and remove particular public servants. The procedures by which such decisions should be taken could only be established once the Executive Council had been consulted (provided that their establishment could properly be characterised as an important policy decision).

Retrospectivity

Both the Executive Order and the Regulation were retrospective in operation. The argument that their retrospectivity renders them unlawful is that the Basic Law does not permit executive orders made by the Chief Executive under Art. 48(4) to have retrospective effect. Alternatively, if the Executive Order and the Regulation are properly to be regarded as subordinate

legislation, their retrospectivity still renders them unlawful because subordinate legislation cannot be retrospective in operation unless the enabling legislation authorises it.

I reject these arguments. There is no legal principle which prevents subordinate legislation or administrative action from being valid merely because of its retrospectivity. Retrospective subordinate legislation may be struck down as *ultra* vires the enabling legislation if the enabling legislation expressly or impliedly prevents the subordinate legislation from having retrospective effect. Similarly, the retrospectivity of administrative action may render the action susceptible to challenge on orthodox public law grounds. But the fact is that there is nothing in the Basic Law-or in the relevant provision in the Reunification Ordinance (No. 110 of 1997), namely section 23(3)-which even impliedly prevents the Chief Executive's executive orders taking effect retrospectively.

As it is, there is no suggestion in the present case that it was ***Wednesbury*** unreasonable for the Chief Executive to make the Executive Order and the Regulation retrospective to 1st July 1997. Indeed, it could legitimately be said that he had little alternative but to make them retrospective. The Chief Executive could reasonably regard the establishment of procedures for the appointment and removal of holders of public office as an important policy decision, requiring him to consult the Executive Council. The first meeting of the Executive Council after the establishment of the Hong Kong Special Administrative Region was on 8th July 1997. Accordingly, unless the Executive Order and the Regulation were made retrospective to 1st July 1997, there would have been a serious lack of continuity in the administration of the business of government. It was entirely rational for the Executive Order and

the Regulation to be expressed to have come into operation on 1st July 1997, so as to prevent the lapsing of the colonial instruments creating an undesirable lacuna in the management of the public service.

The challenge to particular provisions in the two instruments

The A.E.C.S. originally applied for leave to challenge a number of provisions in the two instruments. However, leave to apply for judicial review was granted in respect of two sets of provisions only: (i) section 17 of the Executive Order, and (ii) reg. 8(3)(a) of the Regulation, and paras. 3(b)(i) in Parts A and B of the Schedule to the Regulation.

(i) ***Section 17 of the Executive Order***. Section 17 of the Executive Order provides:

> "An officer who is under interdiction may not, without the permission of the Chief Executive, leave HKSAR during the interval before he is reinstated or dismissed."

This provision is said to be incompatible with Art. 8(2) of the Bill of Rights, which provides:

> "Every one shall be free to leave Hong Kong."

Art. 8(3) of the Bill of Rights provides that this right

> "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Bill of Rights."

The A.E.C.S.'s argument is that (a) to prevent an officer under interdiction from leaving Hong Kong without permission is a restriction on his right to be free to leave Hong Kong, and (b) the restriction does not come within the exceptions.

Mr. Fok pointed out that section 17 is a straightforward adaptation of reg. 64 of the Colonial Regulations, which provided:

> "An officer who is under interdiction may not, without the permission of the Governor, leave the Territory during the interval before he is reinstated or dismissed."

Accordingly, the prohibition on an interdicted officer leaving Hong Kong without permission has been susceptible to a challenge under the Bill of Rights since the enactment of the Hong Kong Bill of Rights Ordinance (Cap. 383) in 1991. However, the fact that the prohibition has not been challenged before now does not help on whether the prohibition should be regarded in law as contravening the Bill of Rights. Similarly, I note that prior to 20th January 1998 the Chief Executive had received 20 applications under section 17 for permission to leave Hong Kong, and none had been refused. However, that does not affect the legality of any refusal of permission in the future. To be fair, Mr. Fok accepted that these points did not affect the ultimate issue which I have to decide.

Mr. Fok's principal argument is that section 17 does not amount to a restriction on an officer's right to leave Hong Kong. Although expressed as a prohibition, it merely requires him to obtain permission before he leaves Hong Kong. If he leaves Hong Kong without obtaining permission, he commits a disciplinary offence, and may be subject to disciplinary action at a later time. But if he has not obtained permission, he will not be prevented from leaving Hong Kong, and that is consistent with the fact that no steps are taken to notify the Immigration Department that the officer has not obtained permission to leave Hong Kong.

I cannot go along with this argument. In my view, the right protected by Art. 8(2) is a right to leave Hong Kong *without suffering any disadvantage as a result of exercising that right*. If an officer under interdiction exercises his right to leave Hong Kong without having first obtained permission to leave, the disadvantage he suffers is the possibility of having to face disciplinary action as a result of the disciplinary offence he has committed. If that disciplinary action results in his dismissal, the officer forfeits all claims to any pension or gratuity. I cannot say, therefore, that section 17 does not amount to a restriction on an officer's right to leave Hong Kong.

I turn to whether the restriction on that right which section 17 imposes is justified. No one would argue that a number of restrictions on the right to leave Hong Kong may be justified. Persons serving sentences of imprisonment and persons granted bail on condition that they do not leave Hong Kong are obvious examples. Less obvious, but no less restrictions on the unconditional right to leave Hong Kong, are the restrictions on persons leaving Hong Kong without passing through a recognised immigration control point, or (if they leave Hong Kong by air) without paying the appropriate airport tax. But these restrictions on the right to leave Hong Kong all come within the exceptions provided for by Art. 8(3). The issue in the present case is whether the restriction in section 17 of the Executive Order comes within Art. 8(3), since in my view Art. 8(3) identifies the only permissible circumstances in which the right protected by Art. 8(2) to leave Hong Kong may be restricted.

I should add that I construe Art. 8(3) as requiring that *all* the exceptions provided for in Art. 8(3) have to apply before Art. 8(3) can be successfully invoked. In other words, the restriction has to be

(a) provided by law, *and*

(b) necessary to protect *either* national security *or* public order *or* public health or morals *or* the rights and freedoms of others, *and*

(c) consistent with the other rights recognised in the Bill of Rights,

if the restriction is to be justified under Art. 8(3). Mr. Fok did not seek to argue otherwise.

I deal with (b) and (c) first. The rationale for the restriction in section 17 is that it ensures that the disciplinary proceedings, the criminal proceedings or the investigation into the officer's conduct, in respect of which the officer is under interdiction, will not be adversely affected or delayed by his absence from Hong Kong. Individual cases differ markedly from each other, and there may well be some cases in which requiring the officer to remain in Hong Kong will be necessary for the protection of the interests in (b) and will be consistent with the other rights recognised by the Bill of Rights. If permission to leave Hong Kong is not granted in a particular case, and it is alleged that requiring the officer to remain in Hong Kong is not necessary for the protection of any of the interests in (b), it will be open to the officer to challenge the decision made in his individual case on the basis that the restriction is not justified under Art. 8(3). It is not appropriate to mount a blanket challenge to section 17 when the circumstances of individual cases may justify a departure from Art. 8(2).

However, the requirement in (a) that the restriction has to be provided by law is another matter altogether. Art. 8(3) follows the language of Art. 12(3) of the International Covenant on Civil and Political Rights. In

particular, Art. 12(3) provides that the right to be free to leave a country "shall not be subject to any restrictions except those which are provided by law". A distinguished commentator on the Covenent has written:

> "... [These] restrictions ... must be set down by the legislature itself. Therefore, ... the term 'law' ... is to be understood in the strict sense of a general-abstract parliamentary act or an equivalent unwritten norm of common law, which must be *accessible* to all those subject to the law. Mere administrative provisions are insufficient." (Novak, *Commentary on the U.N. Covenant on Civil and Political Rights*, pp.208-209).

I entirely agree with these remarks, and I propose to apply them to the phrase "provided by law" in Art. 8(3).

What is the law in Hong Kong which is said to provide for the restriction in section 17 on the right protected by Art. 8(2)? Mr. Fok's original answer was section 17 itself. That cannot be correct: section 17 is no more than an administrative provision, and there is no principle of common law equivalent to it. Mr. Fok's more compelling answer was Art. 103 of the Basic Law. Since the restriction formed part of "Hong Kong's previous system of ... discipline ... for the public service", the restriction had to be kept to ensure that, in compliance with Art. 103, Hong Kong's previous system was maintained. I cannot go along with this argument either: Art. 103 could not have contemplated the maintenance of a system which contravened the Bill of Rights.

It follows that until an ordinance has been enacted which provides for what section 17 purports to provide, section 17 is incompatible with Art. 8(2) of the Bill of Rights because the restriction in it is not provided by law.

(ii) *Reg. 8(3)(a) of the Regulation, and paras. 3(b)(i) in Parts A and B of the Schedule to the Regulation.* Reg. 8(3)(a) of the Regulation provides:

> "The officer may be assisted in his defence by -
>
> (a) another public servant, other than a legally qualified officer, who may be a representative member of a staff association represented on the Senior Civil Service Council; or
>
> (b) such other person as the Chief Executive may authorize."

The effect of this provision (to which paras. 3(b)(i) in Parts A and B of the Schedule to the Regulation add nothing of substance) is to prevent an officer from being legally represented at a disciplinary hearing, unless the Chief Executive permits. The rationale is that a disciplinary hearing to which the Regulation relates is an informal staff inquiry to ascertain the facts relating to an officer's alleged misconduct. The investigating officer or the members of the Investigating Committee, as the case may be, are not lawyers, and are not exercising a legal function. They are enjoined not to conduct their inquires with undue formality. All of this is apparent from reg. 8(5) of the Regulation.

This provision is said to be incompatible with Art. 21(c) of the Bill of Rights which provides, so far as is material:

> "Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions, ... to have access, on general terms of equality, to public service in Hong Kong."

The right of access to public service which Art. 21(c) protects includes access to the terms and conditions of service enjoyed by other officers. And a restriction on the right of access amounts to an infringement of Art. 21(c) if that restriction is unreasonable. That is what was held in *R. v. Secretary for the Civil Service ex p. A.E.C.S.* (1995) 5 HKPLR 490 ("the previous A.E.C.S. case") at pp.516I-517H. Judicial officers and police officers in most ranks are allowed to be legally represented in disciplinary proceedings. It is said that

denying to other officers that right is an unreasonable restriction on the right protected by Art. 21(c).

I am sceptical as to whether the right of access to the public service which Art. 21(c) protects includes access by *all* public servants to the particular terms and conditions of service enjoyed by two particular groups of public servants. The right of access to the public service which Art. 21(c) protects is on *general* terms of equality. Accordingly, to adapt what was said in the previous A.E.C.S. case at p.517D-E to apply to the present case, that means two things. First, *identical* treatment for all officers is not required. Secondly, equality of treatment for *all* officers is not required. Thus, if the vast majority of officers are treated equally with all but a few officers in certain identifiable groups, that does not necessarily mean that their right of access to the public service on *general* terms of equality has been restricted. However, I have put my scepticism to one side, and I am prepared to assume that denying to the overwhelming majority of public servants the right to be legally represented in disciplinary proceedings which police officers and judicial officers enjoy is a restriction on the right protected by Art. 21(c).

But is that restriction unreasonable? In the previous A.E.C.S. case, it was said at p.517G-H:

> "It is for the Government to determine what restrictions are reasonably necessary, and the court's powers of intervention are limited. That is because, to adopt a phrase used by European human rights lawyers, the Government has 'a margin of appreciation' in the determination of what is reasonable. Provided that the reasonableness of a restriction is within the range of reasonable views which the Government can form, the courts cannot substitute their own view for that of the Government."

That view was not said to be incorrect when the case got to the Court of Appeal (CA 260/95).

In my view, it was reasonably open to the Chief Executive to conclude that there were valid and rational grounds for treating police officers and judicial officers differently from other public servants. So far as judicial officers are concerned, the investigating tribunal may (a) request the Secretary for Justice to nominate a legal officer serving in the Department of Justice, or (b) employ a barrister or solicitor, to assist it. In these circumstances, it would be unfair not to permit the judicial officer being investigated to be legally represented. So far as police officers are concerned, the position is explained by the Secretary for the Civil Service in para. 40 of his affirmation as follows:

> "Police officers at Inspectorate ranks and below are not allowed legal representation (i.e. representation by a practising barrister or solicitor) at disciplinary hearings ... However, they may be assisted in their defence by legally qualified police officers of their choice ... [O]nly police officers are allowed to be present at the disciplinary hearings, and attendance at these hearings is therefore more restrictive than that allowed under disciplinary hearings conducted in accordance with the [Regulation]."

In these circumstances, it would be unfair not to permit police officers to be assisted by colleagues with legal qualifications, because the pool from which police officers can choose persons to assist them is far more limited than the pool available to other public officers. This feature might have justified other groups of officers (for example, Customs and Excise officers and members of the Government Flying Service) receiving similar preferential treatment, but the fact that they have not been accorded such preferential treatment does not make the restriction on legal representation imposed by the Regulation unreasonable.

I should add that, even if it was for the court to decide whether there were valid and rational grounds for treating judicial officers and police officers differently from other public servants (rather than for the court merely to decide

whether the Chief Executive could reasonably reach that view), I would have concluded, for the reasons I have already given, that there were valid and rational grounds for treating them differently.

Finally, Mr. Scott contended that in order to justify the preferential treatment accorded to judicial officers and police officers, it had to be shown that

(a) sensible and fair-minded people would recognise a genuine need for the preferential treatment,

(b) the preferential treatment had to be both rational and rationally connected to the need which justified it, and

(c) the preferential treatment was proportionate to that need, and was no more extensive than was necessary to achieve the objective which made the preferential treatment necessary.

These were the factors which the previous A.E.C.S. case at pp.517I-518H held had to be established before a departure from the rights protected by Art. 21(c) could be justified.

However, in the previous A.E.C.S. case, there had been a departure from the right protected by Art. 21(c): differences in the terms and conditions of service of local officers and overseas officers, which were said to constitute the restrictions on the access of overseas officers to public service in Hong Kong, were attributable to the national or social origins of overseas officers, which had caused them to be classified as overseas officers in the first place. For that reason, the restrictions on their access to the public service in Hong Kong were attributable to one of the distinctions mentioned in Art. 1(1). In the present case, it is not contended that the restriction on legal representation is

attributable to any of the distinctions mentioned in Art. 1(1). Since the restriction was a reasonable one, a departure from the right protected by Art. 21(c) has not been established, and the need to consider the three factors identified in the previous A.E.C.S. case has not been triggered.

However, despite that, I have considered the restriction on legal representation against the three factors identified in the previous A.E.C.S. case. The conclusion which I have reached is that the preferential treatment accorded to judicial officers and police officers was such that

(a) sensible and fair-minded people would recognise a genuine need for the preferential treatment,

(b) the preferential treatment was both rational and rationally connected to the need which justified it, and

(c) the preferential treatment was proportionate to that need, and was no more extensive than was necessary to achieve the objective which made the preferential treatment necessary.

Accordingly, the restriction on legal representation in reg. 8(3)(a) is not unreasonable, reg. 8(3)(a) is not incompatible with Art. 21(c) of the Bill of Rights, and the challenge to its legality fails.

Standing

The issues which the A.E.C.S. have raised in this case were important ones. For this reason, I was reluctant to permit technical arguments relating to standing to stand in the way of determining the issues on their merits. However, since I have reached the conclusion that section 17 of the Executive Order is incompatible with Art. 8(2) of the Bill of Rights (so long as there is no

ordinance which provides for what section 17 purported to provide), I must consider standing in relation to the challenge to the legality of section 17.

The issue of standing was addressed at the leave stage. In granting leave, the court said:

> "Mr. Michael Scott for the A.E.C.S. relied on the following passage in de Smith, Woolf & Jowell, *'Judicial Review of Administrative Action',* 5th ed., para. 2-041:
>
> > 'In summary, it can be said that today the court ought not to decline jurisdiction to hear an application for judicial review on the ground of lack of standing to any responsible person or group seeking, on reasonable grounds, to challenge the validity of governmental action.'
>
> This was said by Bokhary J.A. (as he then was), at p.51 of the transcript of the decision of the Court of Appeal in the previous challenge by the A.E.C.S. to the Government's attempt to localise the Public Service (CA 260/95), to be an accurate statement of the law. Mr. Fok forcefully argued that this statement cannot have been intended to be read literally, because otherwise a respectable body, with arguable merits, has standing irrespective of its interest in the subject-matter of the dispute. The statement relied upon was made in the context of a discussion about the standing not merely of representative bodies but also of amorphous pressure groups: it was not intended to apply to representative bodies, who only have standing if a person who it represents either has been, or could in the future be, affected by the decision challenged."

I do not need to resolve this interesting debate, because there is a narrow ground on which the A.E.C.S. can be said to have the standing to challenge the legality of section 17 of the Executive Order. It was held in the previous A.E.C.S. case at pp. 514G-515C that it was sufficient that the A.E.C.S. represented a class of officers, at least one of whom might possibly be affected by the decisions under challenge, and that it was possible that at least one of them wished the A.E.C.S. to challenge the relevant decision on his behalf. Applying that test, the A.E.C.S. undoubtedly has the standing to challenge the legality of section 17 of the Executive Order.

Conclusion

The grant of relief in applications for judicial review is discretionary, but I can discern no basis on which I could properly decline to grant the A.E.C.S. relief in relation to the one issue on which it has succeeded. Accordingly, I declare that section 17 of the Executive Order contravenes Art. 8(2) of the Bill of Rights, and that holders of public office to whom the Executive Order applies are not bound by the terms of section 17. Apart from that declaration, this application for judicial review must be dismissed. Since the Chief Executive has not been entirely victorious in the application, it would not be appropriate to order the A.E.C.S. to bear all his legal costs, and in view of the constitutional importance of many of the issues I have had to decide, I have reached the conclusion that the right course is for all parties to bear their own legal costs. The order *nisi* which I make, therefore, is that there be no order as to costs.

(Brian Keith)

Judge of the Court of First Instance

Mr. Michael Scott, Vice-President of the A.E.C.S., for the Applicant.

Mr. Joseph Fok, instructed by Messrs. Wilkinson & Grist, for the Respondent.