OLQE Examiners' Comments 2023

Head VI: Hong Kong Constitutional Law

Question 1

This question was the second most popular, being attempted by 117 of the 124 candidates who sat the exam. However it had the second lowest pass rate, at 70%.

The question asked candidates to draft a memo for their supervising partner's approval to advise the client on issues concerning the relationship between the HKSAR and the Central Authorities, and particularly the powers of the Central Authorities over HKSAR. The purpose of this question was to test to what extent candidates have an overall and balanced understanding of these issues and the legal basis for the powers exercised by the Central Authorities.

In general, candidates demonstrated an acceptable understanding of these issues and provided fairly good answers. However there were also some notable shortcomings.

Part I (carrying 15 marks) asked candidates to identify the circumstances under which the Central Authorities are allowed to intervene in the HKSAR's affairs, with reference to specific provisions in both the Basic Law of the HKSAR and the Law on Safeguarding National Security in the HKSAR. This aimed at testing candidates' understanding of the various state institutions that have authority over the HKSAR as well as their ability to identify and apply relevant provisions in the Basic Law.

However many candidates did not have a clear understanding of the Central Authorities as well as their functions and powers and therefore could not identify the circumstances under which they are allowed to intervene in the HKSAR's affairs. In addition, many failed to cite the relevant articles in the Basic Law.

Part II (carrying 10 marks) dealt with the constitutional basis under which the Central Authorities exercise authority over the HKSAR with reference to specific examples of such events since the establishment of the HKSAR. Candidates were expected to explain the rationale for such interventions and further elaborate by reference to actual examples and events.

The difficulty candidates met was that they could not provide a theoretical explanation for such interventions because of their lack of knowledge of constitutional law under one country two systems and the Basic Law. A good number failed to cite sufficient examples and/or events as required.

In general, candidates are advised to pay attention to recent and current events in Hong Kong which may be relevant in answering such questions.

Question 2

This question was the most popular, being attempted by 124 out of the 128 candidates who sat the exam. It also had the highest pass rate, at 87%.

Parts 1 and 2 were answered well by most candidates who attempted this question.

Part 1 (carrying 15 marks) asked candidates to draft a memo to Bob explaining in detail the differences in the respective powers of the NPCSC and the HKSAR courts to interpret the Basic Law. Many candidates rightly detailed the mechanics of Article 158 of the Basic Law, strengthening their answers by reference to (other) relevant articles of the Basic Law and the PRC Constitution. Authorities such as *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 and *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45 were often well incorporated into answers. One of the more common errors was that candidates failed to discuss the actual mechanisms of Article 158 of the Basic Law which are key to describing and explaining the respective powers of interpretation of the NPCSC and the HKSAR courts. These answers tended to focus on such differences as NPCSC interpretations being more in the character of political, legislative glosses and not being fully reasoned, in contrast to HKSAR court interpretations as reasoned aspects of binding court judgments; while this is important, it does not directly address the question which specifically asked about their respective institutional powers (for example, which articles of the Basic Law can be interpreted by which body and in what circumstances). Nevertheless, most candidates did not commit this error and described well the mechanisms of Article 158.

Part 2 (carrying 10 marks) asked candidates to explain to Bob, with examples, the different mechanisms for obtaining an interpretation from the NPCSC. It was expected that three avenues would be discussed: (i) an own-motion interpretation by the NPCSC, (ii) a request by the Chief Executive and/or HKSAR Government for an NPCSC interpretation, and (iii) a judicial referral by the Court of Final Appeal. A relatively common error was merely to comment on a judicial referral by the Court of Final Appeal - the question did not only ask about judicial referral. Another common error, which was easily avoidable, was a failure to mention examples of each mechanism, for example a failure to mention the *Congo* case when discussing judicial referral. The question clearly asked for examples to be given and candidates who failed to do so threw away some of the easiest marks available in the question. Nevertheless, most candidates did not commit these errors and the question was often well answered.

Question 3

This question was relatively less popular, being attempted by 84 out of the 128 candidates who sat the exam. It also had a relatively low pass rate, at 71%.

This question was about the Sex Discrimination Ordinance and, more tangentially, the Family Status Discrimination Ordinance. It was gratifying to ascertain that most candidates had learnt their lesson from last year's question on anti-discrimination legislation, and correctly identified that Yamato, which is not a public body, was not amenable to judicial review. Once that initial hurdle was overcome, and most candidates correctly spotted the point, the pass rate was adequate. Most candidates correctly identified that AA had likely been subjected to discrimination on account of her sex and/or being pregnant. A fair number of solid candidates also spotted that as there are currently no protections for sexual orientation in Hong Kong's anti-discrimination legislation, that was not an avenue AA could pursue, at least legally. Better scripts subjected Yamato's justifications to critical scrutiny, with most serious attempts concluding (likely correctly) that its proffered explanations for not appointing AA to the Post and for moving her out of her old office were spurious. The very best candidates offered sensible, practical advice by identifying what AA most likely wanted out of any Equal Opportunities Commission/District Court proceedings against Yamato (i.e., appointment to the Post and/or restoration of her old office) and focusing on legal paths that were most appropriate for obtaining those remedies.

Despite the markedly superior quality of scripts relative to last year's answers on anti-discrimination, there remains a persistent problem of 'canned' answers. Several candidates failed because although their scripts contained a wealth of information, not much of it was relevant or properly applied to the facts. It is important for course providers and tutors to emphasise that a problem question requires proper application of the law to the facts, or at least an attempt to do so. Not much credit can be given for *verbatim* copying of notes in a vacuum. An erudite but general summary of anti-discrimination legislation in Hong Kong with no conclusion is like a gymnast who performs a strong technical routine and then fails to dismount. Weaker candidates also evidently did not read the question in sufficient detail, as they omitted vital nuances in the facts. It is vital that candidates take their reading time seriously and consider the question carefully. The facts are not for flavour, but to test the candidate's skills in applying the law to a given fact pattern, which may contain subtle clues that require deeper thought than a superficial first reading.

Another vital practical point that should be made is that some candidates, when writing their answer, did not start on the first page of the answer booklet, but on the second or third and, in some cases, well into the booklet. This is imprudent and confusing, as the examiner would thereby risk missing the answer. Candidates should be advised to start writing on the <u>first</u> page of the answer booklet to signal to the examiner that they have attempted the question.

Most scripts were in terms of handwriting and language skills intelligible; however, some evidenced a knowledge of the English language that is manifestly inadequate for a practising solicitor. Evidently, candidates were not penalised for spelling, grammar, and/or syntax errors as such, but scripts that were drafted in garbled, confused terms suffered.

Question 4

This question was relatively popular, being attempted by 110 of the 128 candidates who sat the exam. It also had the second highest pass rate, at 77%.

The question asked candidates to prepare a briefing note explaining two features of constitutional judicial review, namely the scope and nature of remedies, and the variable standard of review.

Part 1 (carrying 15 marks) was generally well answered by most candidates. Candidates had to identify and evaluate, with examples, remedies available in constitutional judicial review, explaining their scope/triggers of application: (i) declaration of invalidity; (ii) remedial interpretation; (iii) temporary suspension and temporary validity; (iv) damages. Declaration of invalidity is the traditional approach and alluded to in the above quote in *Ng Ka Ling*. Candidates had to engage with this case and explain the legal effect of invalidity. However, candidates should also identify the existence of alternative constitutional remedies and note the considerations and possible triggers for these alternatives. Most candidates did so.

Part 2 (carrying 10 marks) was also, as a general matter, adequately answered. Most candidates identified what the sliding scale of review is, although a minority missed the point of the question and instead addressed issues such as the judicial non-intervention principle exclusively or even addressed a different issue such as the relationship between the CFA and the NPCSC. At a minimum, candidates had to draw upon the CFA's statement in *Fok Chun Wa* and other cases to explain the variable/sliding scale standard of review. In particular, they had to note the later elucidation of this standard in *Hysan* and other cases, where the competing standards of 'reasonable necessity' and 'manifestly without reasonable foundation' had been articulated. Alongside this explanation, the candidates are expected to explain the application of this variable standard of review according to the legislative/executive act under challenge, from acts that implicate 'core values' to those concerned with 'socio-economic policy'. As already noted, most candidates adequately covered these various issues.

Question 5

This question was the least popular, being attempted by 72 of the 128 candidates who sat the exam. It also had the lowest pass rate, at 65%.

Candidates were required to advise two clients who wished to challenge the Immigration Department's rejection of their application for right of abode via judicial review. The question was modelled on the Court of Final Appeal decision in *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26. However it was not necessary to be aware of this case in order to obtain a good mark and, indeed, only a minority of candidates cited this precedent.

The question asked candidates to begin by advising on the general principles that the Hong Kong courts have adopted in interpreting the Hong Kong Basic Law. Candidates in general performed satisfactorily in answering this part of the question, often citing seminal precedents such as *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 and *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 as authority for general principles such as the courts' adoption of a purposive approach toward interpreting the Hong Kong Basic Law by reference to context and purpose, and the courts' constitutional jurisdiction to invalidate any Hong Kong ordinances which are inconsistent with the Hong Kong Basic Law.

However in many cases this constituted the entirety of some candidates (often very brief) answers which made no attempt to continue on to address the fact pattern stated in the question, even though the question specifically required candidates to consider how these general principles might be applied in deciding a judicial review application based on that fact pattern. As a result these candidates did not answer enough of the question to enable them to pass.

Those candidates who did continue on to address the judicial review issue generally did so through a proportionality analysis. Although not the approach adopted by the Court of Final Appeal in either Prem Singh or *Fateh Mohammad v Commissioner of Registration* (2001) 4 HKCFAR 278 (which is another highly relevant precedent), this was nonetheless an acceptable approach and many candidates were able to score good marks by an intelligent application of proportionality analysis to the facts stated in the question. However in a significant number of cases, this part of the answer consisted almost entirely of reciting the different parts of the proportionality test with little or no attempt to actually apply them to the facts stated in the question so once making it difficult to secure a pass mark.

While there were some good answers, there does seem a tendency among many candidates to throw everything in the same broad subject area into their answers (ranging from the use of extrinsic materials to interpret the Hong Kong Basic Law to the immigration reservation under the International Covenant on Civil and Political Rights) with little or no consideration of how far these are directly relevant to the specific question they are being asked to answer.

However good candidates did correctly distinguish between the question of the constitutionality (or otherwise) of the S2(4)(b) Immigration Ordinance exclusion of the periods of detention from the definition of ordinary residence for the purposes of

qualifying for right of abode under the Hong Kong Basic Law, and the separate issue of whether Bert and (especially) Albert's periods of detention were so short as to call for the application of a *de minimis* principle even if S2(4)(b) is constitutional.

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