

**2023 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Tuesday, 31 October 2023



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Question 1 (25 marks)

Your firm's client is a foreign lawyer who is considering setting up an office in Hong Kong and, as part of his due diligence, is seeking more information on the status of the Hong Kong Special Administrative Region (the "HKSAR") within the People's Republic of China (the "PRC"). His attention has been drawn to the following remarks by Deng Xiaoping which have been cited in explaining the role of the Central Authorities under one country, two systems:

'Don't think that all of Hong Kong's affairs will be managed by Hong Kong with the central government sitting by idly, and everything will be just fine. This is not acceptable. This type of attitude is not practical. The central government indeed will not meddle in the SAR's specific affairs; it will not need to meddle. However, what if something occurs within the SAR, which threatens the nation's basic interests? Can you say that such a situation could not arise? At that time, shouldn't Beijing concern itself with the matter? Can you say that no events will arise in Hong Kong, which may be harmful to Hong Kong's own basic interests? Can you imagine that there will be no obstructions or destructive forces in Hong Kong? I see no grounds for such self-consolation. If the central government abdicates all power over Hong Kong, then chaos may ensue, damaging Hong Kong's interests. Therefore, preserving certain powers for the central government is beneficial, not harmful, to Hong Kong. For instance, after 1997 if someone in Hong Kong condemns the Communist Party and condemns China, we will still allow him to speak; but if the words become actions and he wants to turn Hong Kong into a 'democracy' and set up a base to oppose the mainland, what then? If we cannot intervene at that time, it would not be acceptable. Intervention would first

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be by Hong Kong administrative organs; it is not at all certain that mainland troops stationed in Hong Kong would take any action. If there is disturbance or great turmoil, only then will the forces stationed in Hong Kong act; but in such circumstances they must always be able to intervene!'

(Deng Xiaoping, "Speech at a Meeting with the Members of the Committee for Drafting the Basic Law of the HKSAR", April 1987.)

Questions:

Draft a memo for your supervising partner's approval to advise the client on the following issues:

(1) 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.

(15 marks)

(2) The constitutional basis under which the Central Authorities exercise authority over the HKSAR, with reference to specific examples of events since the establishment of the HKSAR.

(10 marks)

Question 2 (25 marks)

You are a newly qualified solicitor in Hong Kong who is seconded to the legal department of the Shanghai headquarters of Zhang Global Aerospace Operations (“Zhang”), a multinational company specialising in the leasing and operation of commercial aircraft. Zhang has been attempting to launch a new airline based in Hong Kong and has been unsuccessful in obtaining the necessary air transport licences from the Department of Aviation of the Hong Kong Special Administrative Region (the “Department”) to operate a new airline. Your supervisor in Zhang’s legal department, Bob, suspects that the Department has misinterpreted the statutory requirements for the issuance of new air transport licences and sends you an email, part of which is extracted below:

‘The Department of Aviation has clearly got this wrong. I found Article 128 of the Basic Law which states that “The Government of the Hong Kong Special Administrative Region shall provide conditions and take measures for the maintenance of the status of Hong Kong as a centre of international and regional aviation.” We are launching a new airline in Hong Kong which will be very competitive and the Department’s decision to refuse our air transport licences must be unconstitutional under Article 128 of the Basic Law.

The Department’s attitude has been terrible. I think they just don’t want us to enter the Hong Kong market and that’s the end of it. We should take them to the courts in Hong Kong and appeal all the way. Drag them through the whole system. How do we escalate this case to the attention of the Standing Committee of the National People’s Congress? Surely they would put the Department back in its place and apply the law correctly.’

(See over the page for a continuation of Question 2)

Questions:

(1) Draft a memo to Bob explaining in detail the differences between the respective powers of the Standing Committee of the National People's Congress (the "NPCSC") and the courts of the Hong Kong Special Administrative Region to interpret the Basic Law.

(15 marks)

(2) Explain to Bob, with examples, the different mechanisms for obtaining an interpretation of the Basic Law from the NPCSC.

(10 marks)

(Note: Specific knowledge of Article 128 of the Basic Law is neither expected nor required in answer to either question (1) or question (2).)

Question 3 (25 marks)

Yamato Corporation (“Yamato”) is a company incorporated in Japan with a dual listing on the Tokyo and Hong Kong Stock Exchanges. It carries on its business in Hong Kong through a local branch (the “Branch Office”). As part of a broader development in its Greater China business, Yamato decided to set up a new regional strategic planning unit in the Branch Office. It then went about interviewing a number of current employees of the Branch Office with a view to identifying a suitable candidate to head that new business division (the “Post”).

One of the candidates, Audrey Au (“Audrey”), had an outstanding record in employment and had recently married. During her internal interview, Audrey was asked whether she intended to have children. Audrey replied that she was pregnant and hoped to have a large family. Shortly thereafter, she was notified that she had not been selected for the Post, and that this had been assigned to a man, Balthazar Bai (“Balthazar”), who was (and remains) unmarried and whose performance record in employment was not as strong as Audrey’s. When Audrey’s line manager notified her of his decision not to appoint her to the Post, he emphasised that Yamato was grateful for all her hard work, but that the Post would involve long hours and a high degree of mental stress, and that it would perhaps be best for her to spend more time with her family. He also spoke in a disapproving tone about the fact that Audrey had married another woman. Finally, he emphasised that the Post would require travel to areas in the East Asia region with very challenging working conditions, including a high risk of tropical disease.

(See over the page for a continuation of Question 3)

Shortly after being notified that she had not been given the Post, Audrey went on maternity leave. When she returned from maternity leave, she found that the spacious corner office with a sea view that had previously been hers had been permanently re-assigned to Balthazar and that she had instead been allocated an interior, window-less office on another floor. When Audrey inquired as to why her office had been changed, she was informed by her line manager that as she had written him an e-mail stating that she intended to breastfeed in the office, this would be ‘upsetting’ to other employees and accordingly she had to be moved to a more ‘discreet’ location.

Audrey was dissatisfied both with being turned down from the Post and losing her old office. She accordingly decided to instruct a firm of solicitors to ascertain whether she has any remedies available to her to address those two complaints.

You are a newly qualified associate at the boutique litigation firm, Dobermann & Rottweiler and have been asked by your principal to prepare a memorandum of advice on Audrey’s legal position.

Question:

Draft, for your supervising partner’s approval, a memorandum of advice in the matter of Audrey being denied the Post and being moved to a different office, and outlining any remedies that may be available to her. You should support your analysis by referring to any applicable statutory provisions and/or case law on point.

(25 marks)

Question 4 (25 marks)

In *Ng Ka Ling & Others v. Director of Immigration*, (1999) 2 HKCFAR 4, 25GI, the Court of Final Appeal (“CFA”) defined the jurisdiction of the courts over legislative and executive branches of the government of the Hong Kong Special Administrative Region (“HKSAR”) in the following terms:

“They [the courts] undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency.”

In *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409, the CFA articulated a variable standard of review:

“The proposition that the courts will allow more leeway when socio-economic policies are involved, does not lead to the consequence that they will not be vigilant when it is appropriate to do so or that the authorities have some sort of carte blanche. After all, the courts have the ultimate responsibility of determining whether acts are constitutional or lawful. It would be appropriate for the courts to intervene (indeed they would be duty-bound to do so) where, even in the area of socio-economic or other government policies, there has been any disregard for core-values. This requires a little elaboration. Where, for example, the reason for unequal treatment strikes at the heart of core-values relating to personal or human characteristics (such as race, colour, gender, sexual orientation, religion, politics, or social origin), the courts would extremely rarely (if at all) find this acceptable. These characteristics involve the respect

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and dignity that society accords to a human being. They are fundamental societal values. On the other hand, where other characteristics or status which do not relate to such notions or values are involved, and here I would include residence status, the courts will hesitate much more before interfering; in other words, more leeway is given to the executive, legislature or other authorities.”

Questions:

You are a newly qualified solicitor in a law firm in Hong Kong which is organising in-house training on the practice of constitutional judicial review. You have been asked to prepare a briefing for those who will attend on this topic. **Based on the abovementioned CFA cases as well as other relevant case law, and with reference to specific provisions in the Basic Law:**

- (1) Explain the remedies which may be granted by the court in the event that legislation is found to be inconsistent with the Basic Law, with reference to examples for each type of remedy.**

(15 marks)

- (2) Explain the variable standard of review with reference to examples, and the extent to which it may affect a client’s ability to obtain a remedy by way of constitutional judicial review.**

(10 marks)

Question 5 (25 marks)

Albert and Bert are foreign nationals who have been living and working in Hong Kong continuously since June 2016. Both own properties in Happy Valley, Hong Kong. In June 2022, Albert and Bert were arrested and charged with assault following a drunken brawl in a nightclub. Albert and Bert were initially denied bail during their first court appearance, after they drunkenly shouted at the magistrate in the courtroom. However, after being detained overnight, Albert and Bert both apologised when the court hearing resumed the next morning and were released on bail. Albert was subsequently found not guilty of all charges while Bert was convicted of assault and served a two-week prison sentence in December 2022.

In July 2023, Albert and Bert applied to the Immigration Department for right of abode in Hong Kong by reference to Article 24(2)(4) of the Hong Kong Basic Law which states that the permanent residents of the Hong Kong Special Administrative Region shall include:

“Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;”

However, the Immigration Department rejected Albert and Bert’s applications for right of abode in Hong Kong by reference to Section 2(4)(b) of the Immigration Ordinance (Cap. 115) which states that a person shall not be treated as ordinarily resident in Hong Kong:

“during any period, whether before or after the commencement of this Ordinance, of imprisonment or detention pursuant to the sentence or order of any court.”

(See over the page for a continuation of Question 5)

Albert and Bert wish to challenge the Immigration Department's rejection of their application for right of abode via judicial review and approach you for advice.

Question:

By reference to relevant case law(s), advise Albert and Bert on their likely prospects of success, by reference to both the general principles that the Hong Kong courts have adopted in interpreting the Hong Kong Basic Law, and also by reference to how these principles may apply in deciding their proposed judicial review application.

(Note: You are neither expected nor required to advise on the procedural steps required to lodge such an application for judicial review.)

(25 marks)

END OF TEST PAPER