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CONTEMPORARY ISSUES IN PUBLIC LAW: THE CONSTITUTONAL RIGHTS OF PRISONERS AND THE IMPLICATIONS OF THE *CARLTONA* PRINCIPLE

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INTRODUCTION

1. I have been asked by the Department of Justice to speak about two rather different issues today: the constitutional rights of prisoners and the implications of the ***Carltona*** principle. I appreciate that these two topics are not closely connected, but they do raise a number of important legal issues which require close consideration..

THE CONSTITUTIONAL RIGHTS OF PRISONERS

2. My researches have indicated that there have been a number of important challenges made in Hong Kong, but the number of judicial review cases is, in fact, comparatively rare.

3. The number of cases brought by prisoners appear to be rather less than we have experienced in the UK. For example, from January to July 2017 the UK courts heard nine judicial review cases have been heard on a wide variety of topics:
    - A decision of the Scottish Court of Appeal[1] where which upheld a decision that a local authority owed no duty to a prisoner under the ECHR Art 5, in light of the Supreme Court decision in ***R(Kaiyam) v Secretary of State for Justice*** to provide a reasonable opportunity for rehabilitation as it was not responsible for the prisoner's detention or release.[2]
    - Another Scottish case where a prisoner sought a declaration that his restraint in handcuffs while he was in custody outside prison at hospitals was an unlawful infringement of his residual liberty and breached his rights under ECHR arts 3 and 8.[3]
    - A complaint that a prisoner transferred to a challenging behaviour unit within a prison, with limited association with other prisoners, had not been removed from association under the Prison Rules.[4]
    - A decision that the conclusion of the majority in Supreme Court decision that a prisoner lawfully sentenced to a determinate term of imprisonment by a competent court was unable to challenge their loss of liberty during that term on the ground that it infringed ECHR art 5(4)[5] should be regarded as binding on all inferior courts, notwithstanding the fact that it was *obiter*.[6]
    - The decision of the Court of Appeal to rule against removing legal aid for pre-tariff Parole Board reviews, categorisation reviews of Category A prisoners, decisions on placement in close supervision centres, decisions about offending behaviour programmes and disciplinary proceedings which were said to result in inherent or systemic unfairness because of the position of prisoners who were vulnerable, had learning and general communication difficulties and mental health problems.[7]
    - Whether a prisoner's ECHR art.8 rights and common law right to access to justice had been breached by repeated interferences with his legally privileged and Confidential Access mail, as a result of systemic failures by several prisons in which he had served

[1] ***Ansari v Aberdeen City Council*** [2017] CSIH 5
[2] [2015] A.C. 1344
[3] ***Campbell v Scottish Ministers*** [2017] CSOH 35
[4] ***R(Syed) v Secretary of State for Justice*** [2017] 4 W.L.R. 101;
[5] ***R(Whiston) v Secretary of State for Justice*** [2015] A.C. 176
[6] ***R(Youngsam) v Parole Board*** [2017] 1 W.L.R. 2848;
[7] ***R(Howard League for Penal Reform) v Lord Chancellor*** [2017] 4 W.L.R. 92

time, with inadequate staff training and ignorance of the rules regarding Confidential Access.[8]

- The Court of Appeal rejected two long-term Category A prisoners appealed against refusals to allow them oral hearings regarding determination of their categorisation status.[9]
- Relatives of prisoners who had committed suicide in HMP Woodhill seeking a declaration that the prison governor and the Secretary of State for Justice had breached their public law, common law and ECHR art 2 duties to protect prisoners from suicide;[10] and
- Refusal of compassionate leave.[11]

4. Nevertheless, the case law of Hong Kong has covered a rather diverse range of topics to which I shall now turn.

Discrimination claims ***Leung Kwok Hung*** (2017)

5. In ***Leung Kwok Hung v Commissioner of Correctional Services*** the well-known politician in Hong Kong known as "Long Hair" (because of his "iconic" long hair) was held in the Lai Chi Kok Reception Centre- after his conviction on a number of criminal charges, which were upheld on appeal with a sentence of four weeks imprisonment.[12] While in custody at the Centre, he was required by the prison officer to have his hair cut. The decision to cut his hair was made pursuant to Standing Order 41-05. SO 41-05 issued by the Commissioner of Correctional Services, which requires all male prisoners to have their hair cut "*sufficiently close, but not close clipped*" but allows female prisoners to have a choice to keep their hair unless they request to have them cut.

6. The applicant's case on direct discrimination is a simple one. The test to identify direct discrimination is the familiar "*but for*" test, ie there is direct discrimination if there is less favourable treatment on the ground of sex, in that, if the relevant girl or girls would have received the same treatment as the boys but for the sex. It is an objective test and the court is to ask the simple question: would the complainant have received the same treatment from the defendant but for his or her sex.[13] There is no question of justification as the SDO does not provide for that.[14] The intention, motive, reason or purpose in treating another person less favourably on a protected ground is also irrelevant.[15] SO 41-05 requires male prisoners'

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[8] ***Bruton v Governor of Swaleside Prison*** [2017] EWHC 704 (Admin)
[9] ***R(Hassett) v Secretary of State for Justice*** [2017] EWCA Civ 331
[10] ***R(Scarfe) v Governor of Woodhill Prison*** [2017] EWHC 1194 (Admin)
[11] ***R (Bruton) v Secretary of State for Justice*** [2017] EWHC 1967 (Admin);
[12] [2017] HKCFI 65; [2017] 1 HKLRD 1041; HCAL 109/2014 (17 January 2017)
[13] See: ***Secretary for Justice v Chan Wah*** (2000) 3 HKCFAR 459 at 476B-E, per Li CJ; ***Equal Opportunities Commission v Director of Education*** [2001] HKCFI 880; [2001] 2 HKLRD 690 at paragraphs 10 - 12, per Hartmann J (as he then was) (adopting ***R v Birmingham City Council, ex p Equal Opportunities Commissio***n [1989] 1 AC 1155 and ***James v Eastleigh Borough Council*** [1990] UKHL 6; [1990] 2 AC 751 at 774).
[14] See also ***R(E) v Governing Body of JFS*** [2010] 3 AC 728 at paragraphs 20 - 22, 57, 61 - 62, 64, 69 - 70, 143 - 145, and 195 - 196.
[15] ***R v Birmingham City Council***, supra, at 1194A-C, per Lord Goff; ***Nagarajan v London Regional Transport*** [1999] UKHL 36; [2000] 1 AC 501 at 511C-D, per Lord Nicholls

hair to be cut short but not female prisoners. The male prisoners were, therefore, treated less favourably than the female prisoners by the Commissioner since they were not given a choice about having their hair cut.

7. Au J rejected the Commissioner's reasons which he held were all based on stereotyped or generalised assumptions referable to the purported risks associated with male prisoners as a gender as a whole. In other words, these grounds were generally applicable to all male prisoners (when compared with female prisoners): and were not based on individual circumstances referable and peculiar to each male prisoner.

The right to vote

8. Long Hair also was one of the applicants in the judicial review claim concerning the rights of prisoners to vote, ***Chan Kim Sung v Minister of Justice***.[16] The first applicant was an adult serving a term of imprisonment in Stanley Prison having been convicted of robbery. He was not entitled to register as an elector in the Legislative Council elections by reason of s 31(1)(b) of the Legislative Council Ordinance and thus not entitled to vote by reason of s 48(1). The third applicant was an adult serving a term of imprisonment who had registered as an elector before he was sentenced to imprisonment, but was disqualified from voting pursuant to s 53(5)(b) as he would be serving a sentence of imprisonment on election day. Long Hair brought a claim in relation to prisoners who complained of their inability to vote as a serving prisoner released on bail pending appeal, or as a person remanded in custody awaiting trial. All three were subject to legislation which disqualified individual from being registered as electors, and electors from voting at an election, if they been sentenced to imprisonment and had not either served the sentence or undergone such other punishment as a competent authority may have substituted for the sentence or received a free pardon. They each complained that these were unreasonable restrictions of the right to vote guaranteed under Art 26 of the Basic Law and Art 21 of the Hong Kong Bill of Rights.

9. Cheung J decided that Art 26 must be read together with Art 21 to guarantee the right to vote and that only a proportionate restriction could be justified. He held that arrangements should be made to enable prisoners to vote on election day by applying the relevant international prisoner voting cases from the ECtHR,[17] Canada,[18] Australia [19]and South Africa.[20] He went on to find that the lack of special arrangements enabling those on remand to vote on election day was indefensible.

Prison adjudications

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[16] 2008] 6 HKC 486
[17] ***Hirst v United Kingdom*** (No 2) (2006) 42 EHRR 849
[18] ***Belczowski v R*** (1992) 90 DLR (4th) 330; ***Sauvé v Canada (Chief Electoral Officer)*** [2002] 3 SCR 519;
[19] ***Roach v Electoral Commissioner*** (2007) 81 ALJR 1830
[20] ***Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (Nicro)*** 2005 (3) SA 280

10. In the important case of ***Wong Tak Wai v Commissioner of Correctional Services*** the Court of Appeal had to consider the following:
    - whether there was basis to complain of bias on the part of the Superintendent who determined the cases;
    - whether the whole determination process of prison disciplinary offences, including appeal to the Commissioner and judicial review, could, nevertheless, be regarded as fair; and
    - whether the standard of proof in prison disciplinary proceedings should be proof beyond reasonable doubt or proof on the balance of probabilities.[21]

11. The question of bias in prison adjudications has been considered in the UK by the House of Lords but in a much narrower basis than the issues which arose before the Hong Kong Courts. In ***R(Al-Hasan) v Secretary of State for the Home Department*** the prison governor ordered a search of prisoners where the principal officer directed a strip search involving the requirement to squat. [22] They refused, were charged with a disciplinary and the deputy governor, who conducted the adjudication, had been present when the governor approved the decision to require prisoners to squat as part of the search. The House of Lords there was a real possibility of bias since the deputy governor had been present when the squat search order was approved, and had not dissented from that approval. A fair-minded observer might infer that he had tacitly accepted that the order was lawful, so that, when it was disobeyed and the deputy governor subsequently came to rule upon its lawfulness, there was a real possibility that he might be predisposed to find it lawful; that therefore, in all the circumstances of the case, the deputy governor appeared to lack the degree of objective impartiality necessary for a tribunal adjudicating on the disciplinary charges against the prisoners.

12. In ***Wong Tak Wai*** the Court of Appeal had to consider Article 10 of HKBOR states:

> *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

13. Stock VP and Kwan JA applied the test for ascertaining an "*independent tribunal*" under article 6(1) of the ECHR, see ***Whitfield v. United Kingdom***:[23] "*The Court recalls that in order to establish whether a tribunal can be considered 'independent' – notably of the executive and of the parties to the case, regard must be had, inter alia, to the manner of appointment of its*

[21] [2010] HKCA 217; [2010] 4 HKLRD 409; [2010] 6 HKC 58; CACV 231/2009 (21 July 2010)
[22] [2005] 1 W.L.R. 688
[23] (2005) 41 EHRR 44, para. 43

members and their term of office, the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence."

14. The applicant contended that the disciplinary cases should have been adjudicated by a Superintendent who was not in the same penal institution as the applicant and the CSD officers who gave evidence, but no challenge was made to the constitutionality of rule 57, which provides that a Superintendent or the officer appointed to act for him in his absence shall deal with a report against prison discipline.

15. Stock VP and Kwan JA took the view that the test for apparent bias is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there is a reasonable apprehension of bias, the test applied by the House of Lords in ***Porter v Magill***,[24] which modified slightly the formulation for apparent bias in ***R v Gough***[25] and moved away from the test of "real danger of bias" from the reviewing court's own view to that of "*reasonable apprehension of* bias" or "*a real possibility of bias*" from the perception of a fair-minded and informed observer, to bring the common law rule into line with the Strasbourg jurisprudence.

16. Stock VP and Kwan JA then identified the relevant circumstances to be considered:

> (1) the dual responsibility of the Superintendent – his administrative duties in the maintenance of discipline in the penal institution in which he serves as head or deputy head of institution, and his adjudicative duty in dealing with reports of offences against discipline made against prisoners of the same institution;
> (2) the essential conflict that may arise between the dual responsibility of the Superintendent as disciplinarian and adjudicator, in the manner as described in ***Currie v. Alberta (Edmonton Remand Centre***) where it was said;[26]
>
> > *1. Senior staff at prisons have long worked in an environment where maintenance of order is a high priority, along with the safety of prison staff and safety of the prisoners;*
> > *2. Many of the charges directly impact upon the ability of the correctional officers to maintain authority over the prisoners. Charges such as refusing to obey an order that is 47(1)(a) in Correctional Regulations or being disrespectful to an employee 47(1)(c) Correctional Regulations come to mind. In these situations any failure to convict will reflect badly on the correctional officer who laid the charge. Moreover, if the prisoner denies the refusal or the insult as the case may be, then the credibility of the officer is in question. In these circumstances, the staff persons on the Board [i.e. the disciplinary board] have an impossible conflict of interest:*

[24] [2001] UKHL 67, paras. 102 and 103, per Lord Hope
[25] [1993] UKHL 1; [1993] AC 646 at 670, per Lord Goff
[26] 2006 ABQB 858,

> *a. If they dismiss the charge the prisoner may be regarded by other inmates as having beat the system, thus encouraging lawlessness and breaches of discipline;*
> *b. If the charge is dismissed on a minor ground … there may be little harm done but if the dismissal is on the ground that the officer is not believed one would expect (i) that the disciplinary tribunal would be viewed as … not maintaining solidarity with the rest of the staff; or (ii) it would be a terrible blow to that officer's morale and could lead to his dismissal, if the officer is not believed by his own superior officers."*

(3) the lack of independence on a structural or institutional level between the roles of prosecution and adjudication of offences against prison discipline, undertaken by officers working in the same penal institution; and
(4) the interest of the Superintendent as head or deputy head of institution in maintaining discipline in the institution of which he is in charge.

17. Stock VP and Kwan JA observed that in ***Whitfield*** the ECtHR stated that structural independence and objective impartiality are closely linked and should be considered together. How these two concepts relate to apparent bias was discussed by the House of Lords in ***Gillies v. Secretary of State for Work and Pensions*** where Lord Hope said:[27]

> *The purpose of disqualification on the ground of apparent bias is to preserve the administration of justice from anything that might detract from the basic rules of fairness. One guiding principle is to be found in the concept of independence. No one can be a judge in his own cause. That principle is, of course, applied much more widely today than a literal interpretation of these words might suggest. It is not confined to cases where the judge is a party to the proceedings. It applies also to cases where he has even the slightest personal or pecuniary interest in their outcome. … The other principle is to be found in the concept of impartiality that justice must not only be done: it must be seen to be done. This too has at its heart the need to maintain public confidence in the integrity of the administration of justice. Impartiality consists in the absence of a predisposition to favour the interests of either side in the dispute. Therein lies the integrity of the adjudication system.*

Baroness Hale made this observation:[28]

> *Impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal approach to deciding the cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also in the perception of the public. The public are now represented by the fair-minded and informed observer. The approach to be adopted was explained by Lord Phillips MR in* ***In re Medicaments and Related Classes***

[27] [2006] 1 W.L.R. 781 at [23]
[28] Above, at para. 38

of Goods (No 2),[29] *and adopted (with the deletion of the words "or a real danger") by Lord Hope in* ***Porter v Magill****:*[30]

> '*The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased*.' "

18. As stated by Lord Steyn in ***Lawal v. Northern Spirit Ltd***,[31] "*Public perception of the possibility of unconscious bias is the k*ey". This perception must be a perception of "*whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees*."

19. Stock VP and Kwan JA agreed that when considering the circumstances which are said to give rise to bias where a Superintendent acts as adjudicating officer in disciplinary proceedings of a prisoner of the same prison, there is legitimate doubt if the essential objective conditions or guarantees of judicial independence are met. As independence provides the structural framework which secures impartiality, legitimate doubts over the lack of independence could lead to reasonable misgivings over impartiality, whether the adjudicating Superintendent would be free of a predisposition to favour the interests of either side. Public perception from an objective viewpoint would conclude there was a real possibility that the adjudicating Superintendent might be subconsciously biased.

20. The next question the Court of Appeal addressed (and all three judges agreed) upon was whether the determination process as a whole removes that element of unfairness at the level of hearings conducted by a Superintendent, the curative principle ie that decisions which do not comply fully with procedural fairness requirements can be cured, if the person affected has recourse to a further hearing or appeal which itself provides fairness. It is well established in the case law of the European Court of Human Rights that the requirements of article 6(1) of the ECHR are satisfied if either the initial decision-making body is independent and impartial, or it is subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6. The expression "*full jurisdiction*" does not mean full decision-making power. It means "*full jurisdiction to deal with the case as the nature of the decision requires*".

21. In ***Lam Siu Po v. Commissioner of Police*** Ribeiro PJ said this about a "*court of full jurisdiction*" in viewing the entire determination process in assessing compliance with article 10 of the HKBOR:[32]

> *A court of full jurisdiction may deal with the case in the manner required in at least two different ways. It may do so by supplying one or more of the protections mandated*

[29] [2000] EWCA Civ 350; [2001] 1 WLR 700, para. 85
[30] [2001] UKHL 67; [2002] 2 AC 357, para. 103
[31] [2003] I.C.R. 856 at para. 14
[32] [2009] 4 HKLRD 575, para. 118

> *by Article 10 which were missing below, for instance, by assuming the role of the necessary independent tribunal or by giving the individual concerned the needed public hearing. Or it may do so by exercising its supervisory jurisdiction so as to correct or quash some non-compliant aspect of the determination by the authority or tribunal concerned, for instance, where there has been a want of impartiality or some unfairness in the original process. If in assuming such a role, the court is armed with full jurisdiction to deal with the case as the nature of the challenged decision requires, there is compliance with Article 10's requirements*

22. In assessing the sufficiency of judicial review to remedy an initial decision-making process which has not been compliant with article 10, it is necessary to have regard to matters such as these: the subject matter of the decision appealed against, the manner in which that decision was arrived at, the content of the dispute, the proposed grounds of challenge of the decision.[33] Baroness Hale summarised the position in this way in ***R (Wright) v. Secretary of State for Health***:[34]

> *What amounts to "full jurisdiction" varies according to the nature of the decision being made. It does not always require access to a court or tribunal even for the determination of disputed issues of fact. Much depends upon the subject matter of the decision and the quality of the initial decision-making process. If there is a "classic exercise of administrative discretion", even though determinative of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, then judicial review may be adequate to supply the necessary access to a court, even if there is no jurisdiction to examine the factual merits of the case. The planning system is a classic example (**Alconbury**); so too, it has been held, is the allocation of "suitable" housing to the homeless (**Runa Begum**); but allowing councillors to decide whether there was a good excuse for a late claim to housing benefit was not: **Tsfayo v. United Kingdom**."*[35]

23. The applicant relied heavily on ***Tsfayo v. United Kingdom***, submitted that where the core issue before the Superintendent was a dispute as to primary fact, the apparent bias of the tribunal would not be cured by judicial review, as the lack of independence on an institutional level might infect the independence of judgment in the finding of primary fact in an imperceptible manner which could not be adequately scrutinised or rectified by judicial review. The High Court on a judicial review has no jurisdiction to reach its own conclusion on the primary facts, as it does not have power to rehear or weigh the evidence, or substitute its own views as to the applicant's credibility. Stock VP agreed.

24. However, he went on to consider whether an appeal to the Commissioner would provide the curative effect and held that, given the wide power of the Commissioner to enquire into the merits fully and to hold a rehearing where the justice of the matter requires, he had jurisdiction.

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[33] ***Bryan v. United Kingdom*** [1996) 21 EHRR 342, para. 45; ***R (Alconbury Developments Ltd.),*** supra., para. 116, per Lord Hoffmann; ***Lam Siu Po***, supra., para. 131, per Ribeiro PJ

[34] [2009] 1 AC 739 at 750E to G, para. 23

[35] (2006) 48 EHRR 457

25. When deciding the disciplinary case against the appellant the Superintendent had adopted the standard of proof on the balance of probabilities. The pertinent question is whether prison disciplinary proceedings could be regarded as *"the determination of any criminal charge*" for the purpose of article 10 of HKBOR, in view of the possible punishment to a prisoner of forfeiture of remission under rule 63(1)(c) of the Prison Rules.

26. For the purpose of determining whether there is a "*criminal charge*" within the meaning of article 10, the Hong Kong courts have applied the decisions of the European Court of Human Rights and the English decisions relating to article 6(1) of the ECHR.[36] The 3 criteria are: (1) the classification of the offence under domestic law; (2) the nature of the offence; and (3) the nature and severity of the potential sanction. In respect of (1), the classification of the proceedings under domestic law is no more than a starting point, otherwise a state would be at liberty to avoid the application of the article by transferring the decision in relation to what is in essence a criminal offence to administrative authorities. Thus, in a prison context, the classification of an offence as disciplinary rather than criminal is not decisive to exclude the operation of article 6(1)[36]. As for the criteria in (2) and (3), they carry substantially greater weight than (1), and (3) is the most important.

27. Stock V P was inclined to think forfeiture of remission imposed as punishment does constitute deprivation of liberty. It was immaterial whether this is, strictly speaking, a fresh deprivation of liberty, in the sense that it does not add anything to the original term of imprisonment. What matters is the effect of the forfeiture, which is to cause the detention to continue beyond the period corresponding to the legitimate expectation of release before the end of the term of imprisonment, applying the standard rules in calculating the period of remission. In the 5 cases involving the applicant, he was given a total loss of remission of 98 days. This could not be regarded as sufficiently unimportant or inconsequential or not appreciably detrimental so as to displace the presumed criminal nature of the charges against him.

28. The Court of Appeal therefore found that the wrong standard of proof was adopted for Cases 2, 3, 4 and 5 because prison disciplinary proceedings involve the determination of a criminal charge within the meaning of article 10 of the HKBOR so that the standard of proof should be proof beyond reasonable doubt as required by article 11(1) which states:

> *(1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*

29. However, the decision of the Court of Appeal in relation to the standard of proof to be applied may be open to question, although this depends upon whether article 11(1) of the UNDOCPAR is to be treated as being different from article 6.

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[36] **Koon Wing Yee v. Insider Dealing Tribunal** [2008] HKCFA 22; (2008) 11 HKCFAR 170 at paras. 31 and 32, per Sir Anthony Mason NPJ; ***Engel v. The Netherlands (No. 1)*** [1976] ECHR 3; (1979-80) 1 EHRR 647 at para. 82; ***Han & Ors. v. Customs and Excise Commissioners*** [2001] EWCA Civ 1040; [2001] 1 WLR 2253; ***R (McCann & Ors.) v. Manchester Crown Court & Anr***. [2002] UKHL 39; [2003] 1 AC 787

30. In its General Comment No. 32 on Article 14, published on 23 August 2007, the United Nations Human Rights Committee said, in respect of the presumption of innocence:

> *30. According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle ….*

31. However, this is not the position under the ECHR. Thus, in ***Miailhe v France (No. 2)*** the ECtHR stated that:[37]

> *It is not for the Court to substitute its view for that of the national courts which are primarily competent to determine the admissibility of evidence.[38] It must nevertheless satisfy itself that the proceedings as a whole were fair, having regard to any possible irregularities before the case was brought before the courts of trial and appeal and checking that those courts had been able to remedy them if there were any.[39]*

32. Furthermore, in ***Allen v United Kingdom*** the ECtHR rejected a submission that the applicant was entitled to compensation for a miscarriage of justice on the ground that the statutory scheme breached the presumption of innocence under article 6(2) because it did not impose the standard of proving guilt beyond reasonable doubt.[40]

Prison visits

33. In ***HKSAR v Wan Thomas*** the Court of Appeal considered convictions where some defendants were prosecuted for dishonestly misrepresenting to Correctional Services Department (CSD) officers at the Lai Chi Kok Reception Centre that they were friends of the prisoners whom they intended to visit, when in fact they were not, thereby inducing the CSD officers to allow them to visit the prisoners concerned.[41] An appeal to the Final Court of Appeal was dismissed on 24 January 2017.[42]

34. Under section 7 of the Prisons Ordinance , Cap 234 prisoners in Hong Kong are divided into three classes :

> (1) prisoners who are sentenced to imprisonment ("Convicted Prisoners");

[37] (1997) 23 E.H.R.R. 491 [43]
[38] See, among other authorities, ***Schenk v. Switzerland*** (1991) 13 E.H.R.R. 242 , para. 46.
[39] See ***Imbrioscia v. Switzerland (***1994) 17 E.H.R.R. 441 , para. 38.
[40] (2016) 63 E.H.R.R. 10
[41] [2016] HKCFI 1726; [2016] 5 HKLRD 656; HCMA 700/2013 (17 October 2016)
[42] [2017] HKCFI 103; HCMA 700/2013

(2) prisoners who are committed to prison on remand pending trial ("Unconvicted Prisoners"); and
(3) prisoners who are committed to prison on remand pending otherwise ("Other Remand Prisoners").

Whichever class they may belong to, prisoners are permitted to be visited under the relevant provisions of the Prison Rules.

35. The general provisions as to visits to prisoners are contained in Rule 48 of Part I of the Prison Rules, which states:

> *No persons, other than the relatives and friends of a prisoner, shall be allowed to visit him except by special authority. Such visits by relatives and friends shall, subject to such restrictions as may be imposed for the maintenance of discipline and order in the prison and for the prevention of crime, be allowed in the manner following –*

36. Under Rule 48, there are two ordinary categories of visitors allowed to visit a prisoner, that is, (1) his relatives and (2) his friends. There is no statutory definition for "*relatives*" or "*friends*" in either the Ordinance or the Prison Rules. When the visitor falls outside these two ordinary categories, he may only visit the prisoner by "*special authority*".

37. Pursuant to Rule 2, the general provisions as to visits under Rule 48 shall apply to all classes of prisoners except in so far as they may be inconsistent with the rules made to govern any particular class or classes of prisoners.

38. Special rules for particular classes of prisoners are contained in Part II of the Prison Rules. Division 1 of Part II applies to "prisoners awaiting trial" ("Prisoners Awaiting Trial"). Under Rule 188(1), they are two categories of Prisoners Awaiting Trial. The first class is "*prisoners committed for trial at different levels of courts*" that is, effectively, Unconvicted Prisoners. The second class is persons remanded under or for the purposes of various Ordinances, a particular category of Other Remand Prisoners. The specific provision on visits which are applicable to Prisoners Awaiting Trial under Division 1 of Part II is Rule 203. It reads :

> *(1) Every prisoner awaiting trial shall, subject to the order of the Superintendent, be permitted to be visited by one visitor, or if circumstances permit, by two at the same time, for a quarter of an hour on any week day, during such hour as may from time to time be appointed.*
>
> *(2) The Superintendent may, in special cases, permit the visit to be prolonged, and allow more than 2 visitors to visit such prisoner at one time.*

39. On its face, Rule 203 does not explicitly restrict the visitors who may visit Prisoners Awaiting Trial to any particular category as is the case under Rule 48.

40. The Appellants' primary submission was that taking into account the context and purposes of Rule 203, "*visitors*" in Rule 203 has a wider meaning than "*friend*s" and "*relatives*". It means any person who has a legitimate or bona fide reason to visit the prisoners. It includes relatives, friends, well-wishers, voluntary prison visitors from church, NGOs, or visitors whom the prisoners have a legitimate interest to meet.

41. Alternatively, it was submitted that if Rule 203 is subject to Rule 48 so that "*visitors*" has a more restricted meaning of "*friends*" and "*relatives*" then the combined effect of Rule 48 and Rule 203, taking together with Article 6(2)(a) of the Hong Kong Bill of Rights Ordinance, is that this phrase include the representatives or agents acting on behalf of friends and relatives for a bona fide purpose to provide help or support to the prisoners that the prisoners are entitled to om the following grounds:.

> (1) as a matter of plain and ordinary language by reading the Prison Rules as a whole and relying on the legislative history of the Prison Rules ;
> (2) by a purposive approach, taking into account the context and purpose of the Rules; and
> (3) consideration of the Articles 6(2)(a) and 14 of the HKBOR.

42. Poon JA rejected the two submissions involving construction.

43. The Court of Appeal next considered the constitutional question of whether Rule 203 was incompatible with Article 6(2)(a) which states:

> *Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.*

44. The Court of Appeal held that, while focusing on family and social visits, the entire treatment under Rule 203 must be considered as a whole to see if it is compatible with Article 6(a). There are four aspects to the treatment, namely, (a) the categories of visitors; (b) the frequency of visits; (c) the duration of visits; and (d) the number of visitors allowed at one visit. In considering compatibility with Article 6(2)(a), they did not consider it correct to single out just one particular aspect, such as the categories of visitors, without reference to the others or the overall effect of the entire treatment. Even for categories of visitors, one should not be blinkered by confining to a particular category without due regard to others in assessing the overall effect of the visit treatment in assessing compatibility. They went on to decided that their construction of Rule 203 is consistent with the legality principle as propounded in ***A v Commissioner of Independent Commission Against Corruption***,[43] as applied to subsidiary legislation : see ***R v Home Secretary, Ex p. Simms***, supra, per Lord Hoffmann.[44]

[43] [2012] HKCFA 79; (2012) 15 HKCFAR 362, at [68]-[69]
[44] at p 132C-D

45. The next issue the Court of Appeal considered was whether Rule 203 was incompatible with the right to private life under Article 14 of the HKBOR:[45] Poon JA observed that all leading authorities in major common law jurisdictions speak with one voice : under the common law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication and referred to ***Chan Kin Sum v Secretary for Justice*** where Cheung J (as the Chief Judge then was), after reviewing the international jurisprudence, said:[46]

> *93. It seems to me that prima facie, imprisonment does not go beyond forfeiture of the right to liberty guaranteed under art.28 of the Basic Law and art.5 of the Hong Kong Bill of Rights. The rights of a person deprived of his liberty are specifically protected in art.6 of the Hong Kong Bill of Rights. Imprisonment per se, therefore, does not involve deprivation of any other constitutional rights of the convicted person save where those other rights of their exercise or enjoyment is necessarily inconsistent with the person's imprisonment. Thus, for instance, the prisoner's liberty of movement, including his freedom to leave Hong Kong, guaranteed under art. 8(1) and (2) of the Hong Kong Bill of Rights are, by necessary implication, curtailed when the person's right to liberty is forfeited upon imprisonment.*

46. Poon JA noted the views of the South African Constitutional Court in ***August v Electoral Commission ,***[47] the ECtHR[48] and the UK courts under the HRA in ***R (Bary) v The Secretary of State for Justice*** where Aikens LJ said:[49]

> *40. As long ago as 1981, in the case of **McFeeley v UK**, the European Commission of Human Rights stated that the concept of private life under the Convention embraced, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field of the development of one's own personality. The Commission held that this element of the concept of privacy extended to the sphere of imprisonment and that the claimants' removal from association in prison in the case constituted an interference with their right to privacy in this respect.*

47. The Court of Appeal held that, in light of the comparable European jurisprudence and the universally recognized importance and benefits of visits to a prisoner, which is accepted in Hong Kong, his right to private life under Article 14 of the HKBOR is engaged by the restrictions on visits in Rule 203. This restriction needed to be justified by the well-established proportionality test :

> (1) Whether there are legitimate objectives for the restrictions to achieve;
> (2) Whether there is a rational connection between the objectives to be achieved and the means of restrictions employed; and

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[45] Article 14 states:
> *(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
> *(2) Everyone has the right to the protection of the law against such interference or attacks.*

[46] [2009] 2 HKLRD 166

[47] 1999 (3) SA 1

[48] ***Velyo Velev v Bulgaria***, Application No 16032/2007, 27 May 2014

[49] [2010] EWHC 587

(3) Whether the restrictions are proportionate responses to the achievement of the legitimate objectives.

See ***Chan Kin Sum v Secretary for Justice***, supra, at [93]; ***Hirst v Secretary of State for Justice*** [2002] EWHC 602; [2002] 1 WLR 2929, at [40].

48. The Commissioner provided four reasons to justify the restriction on social visits to friends and relatives:

- Maintenance of order and discipline in the prison & for Prevention of Crime
- Adjustment to Prison Life:
- Rehabilitation Needs:
- The value of limiting Visiting Facilities

49. The main thrust of the Appellants' submission in relation to proportionality was that the restriction is a blanket one, which impacts on the prisoners disproportionately. It deprives the prisoners their right to contact the outsider world if their friends and relatives are unable to visit them. It is unfair to the poor and the less resourceful whose relatives and friends may not be able to afford taking half a day off to visit them just for 15 minutes. It is also unfair to foreign prisoners who do not have relatives and friends to visit them when they very much need support for concerned interest groups or volunteers.

50. The Court of Appeal, therefore, decided that restricting "*friends*" to "*personal friends*" is a proportionate response to give the social visits the desired benefits. The answer to Mr Chan's compassionate plea again lies in the fact that all the persons identified by Mr Chan can apply as "*persons with special authority*" to visit the prisoners.

51. The Court concluded that the restriction on "*friends*" as "*personal friends*" as a category of visitors in Rule 203 passes muster Article 14 of the HKBOR

The prisoner's right to bring court proceedings

52. In ***Hall v Commissioner of Correctional Services*** the Applicant had been was declared by Hon Yam J to be a vexatious litigant, but wanted to challenge 74 sets of disciplinary proceedings instituted against him whilst in prison, as a result of which his entitlement to remission of sentence was forfeited.[50] Chan J decided to allow the Applicant to proceed in relation to cases which fell within the 3 month period of the s 27 application, on the ground that it is arguable that Hall was deprived of legal representation in the disciplinary proceedings concerned, and that the proceedings were not conducted fairly, such that there was, arguably, a breach of Articles 10 and/or 11.

Transferring prisoners back to Hong Kong from overseas

[50] [2013] HKCFI 654; HCAL 161/2012 (26 April 2013)

53. ***Ng King Tat Phillip v Post-Release Supervision Board*** concerned the about the power of the Board to make a supervision order against a transferred prisoner ie a person who is sentenced in a place outside Hong Kong and has been transferred to Hong Kong in order to serve the sentence imposed on him and the conditions that may be imposed by way of supervision.[51] He was convicted in sentenced by the United States District Court to 14 years' imprisonment.

54. In 2005 he applied for transfer to Hong Kong pursuant to the Agreement for the Transfer of Sentenced Persons between the Government of Hong Kong and the Government of the United States of America with the view to serving the remainder of his sentence in Hong Kong.

55. In 2009 the Board made a supervision order in respect of the applicant pursuant to the Post-Release Supervision of Prisoners Ordinance. He argued that the Board has no power under the Ordinance to make a supervision order in respect of a transferred prisoner, but Lam J and Andrew Cheung held that as a matter of construction, the Board had such a power.

56. He also argued that several conditions in the supervision order infringe his right to emigrate and to leave Hong Kong guaranteed by article 31 of the Basic Law and article 8(2) of the Hong Kong Bill of Rights. The Court was prepared to proceed on the assumption that the conditions in question do amount to a restriction on the relevant rights, but the important question was whether the restrictions can be justified in terms of having a legitimate aim; a rational connection between the legitimate aim and the restriction in question; and whether the restriction is no more than is necessary to achieve the legitimate aim. The claim was rejected on the facts. For example, on the evidence, the supervising officer had to be informed of the details of the supervisee's plans to travel outside Hong Kong because he has to ascertain whether the supervisee's intended travel outside Hong Kong or emigration plan is genuine or is merely a way to evade supervision. There is no power to stop a supervisee from leaving Hong Kong or from emigrating to other places if the supervising officer is properly informed of such plans and no power to recall the supervisee solely on the ground of his departure from Hong Kong.

57. The Superintendent had adopted the standard of proof on the balance of probabilities. The pertinent question is whether prison disciplinary proceedings could be regarded as "the determination of any criminal charge" for the purpose of article 10 of HKBOR, in view of the possible punishment to a prisoner of forfeiture of remission under rule 63(1)(c) of the Prison Rules. Mr. Chow contended that they do not, and as such the applicable standard of proof is the civil standard of a preponderance of probability as explained in ***Solicitor (24/07) v. Law Society of Hong Kong***.

THE IMPLICATIONS OF THE CARLTONA PRINCIPLE

58. In ***HKSAR v Lee Ming Tee*** the Defendants were directors, who were charged with conspiracy to defraud and publishing a false statement of account.[52] At trial the Judge ordered that the

[51] [2010] HKCFI 2044; [2011] 1 HKC 34; HCAL 47/2010 (23 August 2010)
[52] [2001] 1 HKLRD 599

proceedings be permanently stayed on the grounds that handing over the materials to the police was an abuse of the Financial Secretary and the Inspector's statutory powers and a violation of Ds' rights, that there had been official misconduct; and there had been prejudicial pre-trial publicity. The Secretary for Justice appealed and the Court of Appeal held that on a true construction of the Companies Ordinance, the Financial Secretary was entitled to hand over compulsorily obtained material and the prosecution entitled to make derivative use of these materials by using them to acquire evidence from other sources. However, the CFA reversed the Court of Appeal allowing the appeal and remitting the case back to the Court of First Instance for Ds to be tried before a different judge.

59. During the course of his judgment Ribeiro PJ commented upon a submission by the Defendants' counsel to the effect that they were taking no point on the fact that the police had been dealing with a representative of the Financial Secretary when gaining access to the disclosed material. Ribeiro PJ held that: the concession was rightly made:[53]

> *Under what has become known as the **Carltona** principle, the courts have recognised that:*
>
> > *… the duties imposed on ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. (**Carltona Ltd v Commissioner of Works**).*[54]
> >
> > *This is applicable to a Secretary in the HKSAR Government and the principle has been adopted in Hong Kong: **Commissioner for Labour v Jetex HVAC Equipments Ltd**.*[55] *It follows that insofar as Pang J's conclusion rested on the narrow ground that the Inspector had impermissibly handed documents and information directly to the police, that conclusion is contrary to the evidence or based upon a misconception of the capacity in which the Inspector provided the police with the materials and cannot be sustained.*

60. This principle concerned with the delegation of administrative power is the topic I shall now discuss. My researches indicate that the ***Carltona*** principle has been applied in Hong Kong a few times.

61. In ***HKSAR v Liu Wing-Cheung*** an Assistant Officer of the Correctional Services Department was convicted of introducing unauthorized articles into prison, possession of prohibited articles by a prison officer and one charge of possession of poison.[56] The Magistrate hat the Appellant had been authorised by his former superior to use painkillers within Tung Tau Correctional Institute.

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53 Ibid, 617 C-F
54 [1943] 2 All ER 560 at p.563
55 [1994] 3 HKC 42
56 [2009] HKCFI 616; HCMA 623/2008 (4 May 2009)

62. Wright J found that satisfied that at no stage did the appellant seek, and thus obtain, authority from any of his superior officers to possess the substances referred to in the charges and that this finding renders unnecessary ton consider whether or not the ***Carltona*** principle would have applied to the appellant's superior is irrelevant in the absence of any authority having been sought from him.

63. In ***Hong Kong Aircrew Officers v Director of Civil Aviation*** the applicant bought judicial review proceedings to challenge a decision to authorise a flight from Melbourne, Australia to Hong Kong with only two flight crew members (instead of three).[57] A captain was asked by the aircraft operator to authorise this but Cheung J decided that the statutory scheme did not permit such an authorisation.

64. It therefore appears that the Hong Kong Courts have had to address the application of the principle, albeit that it was not held to apply in the cases I have mentioned. However, the UK courts have considered this principle rather more frequently. There is a presumption in favour of the ***Carltona*** principle, although there are certain limited and especially sensitive cases which require a Minister to act personally.[58]

65. The scope of and rationale for the ***Carltona*** principle has very recently been considered by the UK Supreme Court in ***R(Bourgass) v Secretary of State for Justice***, which decided that the Carltona principle is not a principle of delegation, but reflects that practical constitutional reality that Ministers cannot take all decision and power has been devolved.[59] Prisoners, following an incident with another prisoner, were segregated by order of the prison governor under the Prison Rules for reasons of good order and discipline. After 72 hours each claimant's segregation was reviewed by a segregation review board established pursuant to Prison Service Order, a non-statutory document issued by the Secretary of State which provided for internal reviews by a committee chaired by a senior officer within the prison to whom the Secretary of State purported to delegate his power under the Rules so as to authorise continued segregation for more than 72 hours.

66. The Supreme Court held that prison governors were holders of an independent statutory office; and that, unlike the Secretary of State, prison governors had custody of the prisoners held in their prisons and, together with their officers, as powers of constables. They exercised powers over prisoners under the Prison Rules and within that framework, the powers of the Secretary of State and those of governors and prison officers were distinctly demarcated. By contrast with an official in a government department who as a servant of the Crown took decisions on behalf of the minister for which the minister was constitutionally responsible, the holder of a statutory office was personally responsible by virtue of his office for exercise of the powers vested in him; and that, therefore, the arrangements governing the relationship between the Secretary of State and governors and senior prison officers established by the

[57] [2009] HKCFI 527; HCAL 96/2008 (6 July 2009)
[58] Eg ***R v Chiswick Police Superintendent ex p Sacksteder*** [1918) 1 KB 584, 585-586; ***Liversidge v Anderson*** [1942] AC 206 at 224
[59] [2016] A.C. 384

1952 Act and the 1999 Rules were wholly different from those governing the relationship between a minister and his departmental officials.

67. Lord Reed held that the ***Carltona*** principle:

> *is not one of agency as understood in private law. Nor is it strictly one of delegation, since a delegate would normally be understood as someone who exercises the powers delegated to him in his own name. Rather, the principle is that a decision made on behalf of a minister by one of his officials is constitutionally the decision of the minister himself. As Jenkins J stated in* ***Lewisham Metropolitan Borough Council v Roberts****, when rejecting an argument that the principle was one of delegation:*[60]
>
> > *"I think this contention is based on a misconception of the relationship between a minister and the officials in his department. A minister must perforce, from the necessity of the case, act through his departmental officials, and where as in the Defence Regulations now under consideration functions are expressed to be committed to a minister, those functions must, as a matter of necessary implication, be exercisable by the minister either personally or through his departmental officials; and acts done in exercise of those functions are equally acts of the minister whether they are done by him personally, or through his departmental officials, as in practice, except in matters of the very first importance, they almost invariably would be done. No question of agency or delegation … seems to me to arise at all."*

68. Lord Reed stated that it is possible that a departmental official may also be assigned specific statutory duties. In that situation, it was accepted ***in R v Secretary of State for the Home Department ex Oladehinde*** that the official remained able to exercise the powers of the Secretary of State in accordance with the ***Carltona*** principle.[61] It is also possible that the performance of statutory ministerial functions by officials, or by particular officials, may be inconsistent with the intention of Parliament as evinced by the relevant provisions. In such circumstances, the operation of the ***Carltona*** principle will be impliedly excluded or limited: see ***Oladehinde***.[62]

69. Although ***Carltona*** case originally emphasied that Parliament and not the courts were the forum for scrutinising a minister's decision, the courts will examine the devolution of authority by way of judicial review. As Lord Phillips MR observed in ***DPP v Haw***:[63]

> *There is a case for saying … that the devolution of a minister's powers should be subject to a requirement that the seniority of the official exercising a power should be of an appropriate level having regard to the nature of the power in question.*

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[60] [1949] 2 KB 608 , 629
[61] [1991] 1 AC 254
[62] Ibid, at p 303
[63] [2008] 1 W.L.R. 379 para 29

70. Furthermore, it seems that an official must satisfy a rationality test and demonstrate that he is not so junior that no reasonable minister would allow him to exercise the power in question. As Lord Griffiths observed in ***Oladehinde*** it was necessary to see if examine the official's position to see if "*the decisions are suitable to their grading and experience*" [64]

71. There may also be some tasks which, by their nature, ought not to allow for devolution such as disciplinary decisions.[65]

72. However, the knowledge within a government department cannot in law be imputed to a minister. ***In R(National Association of Health Stores) v Secretary of State for Health*** the Court of Appeal held that knowledge of civil servants who briefed or advised a minister was not to be imputed to the minister if the civil servants did not impart that knowledge.[66] The Medicines for Human Use (Kava-kava) (Prohibition) Order 2002 was lawfully made because, although further information could have been put before the minister who signed it, he knew enough to enable him to make an informed judgment and no legally relevant material was left out of account. In other words, the ***Carltona*** principle does not allow the ignorance of a Minister to be remedied by the knowledge of his civil servants who advised him, Sedley L.J expressed the view that it:[67]

> *would be an embarrassment both for government and for the courts if we were to hold that a minister or a civil servant could lawfully take a decision on a matter he or she knew nothing about because one or more officials in the department knew all about it.*

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[64] Above at 305
[65] ***R v North Thames Regional Health Authority ex p L*** (1996) 7 BMLR 385
[66] [2005] EWCA Civ 154
[67] Ibid, para 26