



## “The Recent Reform of the Application for Judicial Review in England: Lessons for Hong Kong?”

Date: 27 October 2015

Time: 5:00 pm – 6:00 pm

Venue: Alumni Room 901, Cheng Yu Tung Tower, HKU

Professor Forsyth discussed the reform on application of judicial review (JR) in England, which was driven by Lord Chancellor Grayling. He also noted that the current Lord Chancellor Michael Gove is more concerned about human rights, so the reform has abated.

Professor Forsyth first went through some important statistics. He stated that Hong Kong (HK) has a relatively modest amount of JR applications, compared to the United Kingdom (UK). In the UK, the number of applications has risen from three to four thousand to fifteen thousand per year in the past fifteen years. This is one of the major reasons for Lord Chancellor Grayling to reform as he believed many applications are unmeritorious. However, Professor Forsyth argued that we must look deep into the rising numbers, as much of the increase is brought by the surging number of immigration cases, where the applicants are about to be deported and use JR as the last resort. He believed this is understandable as it is the only way those applicants can stay in the UK. He also pointed out the dilemma that in the UK, JR in theory is only concerned with the process but not the merits. Therefore, for immigration cases, the applicants are often trying to rebut the merits of the decision to remove them, but present to the court as a procedural problem.

In view of this situation, the reform shifts all immigration cases to another tribunal, which has the power of a high court, including jurisdiction for JR. There are still three to four thousand cases per year left to the high court. Professor Forsyth noted that the numbers of judges sitting for these cases remain the same over the whole ten or more years, so the way out is either to delay the cases, or making it more difficult to obtain a leave. In reality the judges adopt a changing attitude to granting leaves, which is becoming difficult, though it is not a formatted and formal policy made by the judges.

Professor Forsyth first explored the reform on Civil Procedure Rule 54.12(7). In Hong Kong, the judges decide the leave application on an *ex parte* basis, but in the UK the respondents can file an “acknowledgement of service” to strike out the application, in which the respondents can argue for why leave should not be granted. Hong Kong has considered this procedure before but decided not to adopt. Professor Forsyth believes the acknowledgement step is helpful as the court can see the other side’s case. He spoke from his experience sitting as a Deputy Judge in the Administrative Court. A further reform is that when the first judge decide not to grant leave to “totally without merits” cases, no more oral hearings will be granted, even though the applicants can make written submission to appeal. Professor Forsyth thought that actually this rule will have minimal impact, as many cases may have at least some weak merits, but not “totally without merits”.

Professor Forsyth then explored section 84 of the 2015 Act, which target cases where the applicants argue that they should have been consulted but were not before a decision was made. The government believes that these cases should not be granted leaves if their opinion has already been raised by others. The reform is that when there is no substantially different

outcome, leaves will not be granted. Professor Forsyth stated that he is not clear about the impact brought by this reform, and he wondered whether it will make the leave application process more complicated, as the court now need to consider more things to determine whether there will be any substantial effect in the leave application stage.

The third aspects of reform explored by Professor Forsyth was section 85-90 of the 2015 Act. A recent HK-related case *Plantagenet Alliance* [2014] EWHC 1662 concerned the remains of King Richard III. The claimants set up a shell company called Plantagenet Alliance to apply for JR and finally lost. By setting a shell company, the actual claimants avoided the burden of a large cost order against them if they lose the trial. Lord Chancellor Grayling wanted to tackle this problem, so section 85 requires financial information of JR applicants be available, and section 86 allows the court to consider costs against actual backers of the JR application. Professor Forsyth was of the view that this reform will not have much impact as a lot of JR cases are financed by legal aid already. He also thought that it is fair to require the true applicants to bear the adverse cost order. For the concerns over people not seeking JR due to fear of cost, he thought that the costs capping orders reform is also relevant.

Professor Forsyth then discussed the costs capping orders reform. He thought that it seems to be fair for the interveners to get costs, noting that there are also concerns on encouraging too many professional interveners. He discussed that the HK situation is unclear since a HK case on protective costs order is on appeal. He believed that the reform is useful in the UK. Bearing in mind the austerity environment, not every public authority who act as the respondents in JR cases are resourceful. It was also noted that the applicants will bear a lot of burden as the costs order are made after leave is obtained, but now much cost is already involved in the leave stage with the requirement of the “acknowledgement of service”.

Finally, Professor Forsyth concluded by exploring the UK reform’s lesson to HK. He thought that HK has no plan to change the leave stage into an inter parte process, but he thought the HK court should recognize the real benefits of having “acknowledgment of service”, as there is no use to let a case which is doomed to fail to proceed beyond the leave application stage. He suggested that the HK court does not need to adopt the “substantial difference” requirement as it already lies in the common law. He also saw some sense in the rules on shell companies acting as claimants because the real applicants should not be able to avoid responsibility. He noted that there is no case on protective costs orders in HK so far, but Lam J has listed three requirements. It is also unlikely that HK will weaken requirement of litigants.

### Q & A Session

**Question 1:** *What is the rationale that there is no security for JR application?*

**Answer:** Professor Forsyth saw it as mainly that the claimants are not well off and would not be able to provide security for costs. Companies may be able to afford this, but individuals would be unlikely to be in a position to do so. To his knowledge, security had never been granted in an application for judicial review.

**Question 2:** *What is the point of JR if so many applications are barred by the reform, and only big developers in HK can afford to apply for JR? The purpose of JR should be to achieve the rule of law.*

Answer: Professor Forsyth recognized the importance of the rule of law, but stated that it is not to allow everyone who wants to apply for JR to do so. The Rule of law will be harmed if litigations in public interest are not allowed, but he could see benefits in HK to limit JR cases.

**Question 3:** *Is it common for the UK government to condemn JR as harming the efficiency on infrastructure projects?*

**Answer:** Professor Forsyth believed it to be one reason motivating Lord Chancellor Grayling to reform. However, he was of the view that the delays were relatively caused by JR, and more were caused by the delay in policy process. He thought that it is the very reason why leave is required within a relatively short period of time (3 months), so as to determine whether public interest is involved quickly. If the applicants succeed in obtaining a leave, then it must be an arguable case and public interest is justified to intervene. There are also rules that can fasten the whole process. He recognized that delays may be caused by appeals to the higher courts. The current reform requiring financial information of the applicants may also prolong the process.

**Question 4:** *Is the impositions of rules from the administration caused by the court's approach to expand substantial review, such as legitimate expectations and proportionality?*

**Answer:** Professor Forsyth said that formally the reform was justified only on procedural grounds. Nevertheless, undeniably the court is expanding to substantial reviews and more grounds are available for the applicants. Consequentially growth of number of JR cases is an inevitable result. Judges are sometimes accused of judicial overreach. One example is a case on the Freedom of Information Act in the UK, on whether the executive has the power to override the classification of qualified information. In that case it was correspondence between Prince Charles and some ministers. The upper tribunal ruled that they should be disclosed, while the Attorney General changed and stated that it is in the public interest not to disclose. The Supreme Court ruled that there is no ground for the Attorney General to change the upper tribunal's decision. Bearing in mind the doctrine of parliamentary sovereignty, it is reasonable to expect some legislative response to this judicial approach.

**Question 5:** *What are the responses from pressure groups in the UK towards the reform? In HK, many are concerned about how to keep privacy for funders.*

**Answer:** Professor Forsyth acknowledged that it is a concern of the UK pressure groups. However, he provided an argument for the reform, stating that we ought to know who stands for the JR, and there is no reason for NGOs to keep those information in privacy. One participant that raised the idea that some donors want to keep their anonymity, and in HK there is perfectly legitimate reasons to keep those information confidential, including review by the Inland Revenue. Professor Forsyth stated that it is also more difficult for charities in the UK now. Another participant stated that at least in the UK, there is no fear to challenge the government, but there is a political dimension of JR in HK. Professor Forsyth added that there is also a political dimension of JR in the UK, where the opposition party rallies against the JR reform.