HCAL 167/2013

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

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 167 OF 2013

NG SHEK WAI Applicant

and

THE MEDICAL COUNCIL OF HONG KONG Respondent

Before: Hon G Lam J in Court
Date of Hearing: 20 January 2015
Date of Judgment: 18 February 2015

J U D G M E N T

Introduction

1. This application for judicial review has arisen out of a request made by the applicant, as a member of the public, to the Medical Council of Hong Kong, for information concerning a disciplinary inquiry held by the Council. The applicant initially enquired of the identity of defence counsel, and later expanded his request to the identity of the members sitting at the inquiry and of the Legal Adviser of the Medical

Council. The issues raised include, among others, the applicability of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO") as well as the the scope of the open justice principle as applied to a disciplinary inquiry conducted by the Medical Council.

Facts

2. The disciplinary inquiry in question was held in relation to two medical practitioners, one of whom was Dr Wong Tak Lun. Dr Wong was a general practitioner. He was charged with professional misconduct for failing to exercise due care in issuing medical documents: in particular, in having issued two sets of receipts (without marking on the second set that they were copies or duplicates) for a single set of consultations, medicines and operations, to a patient on five different occasions between 26 April and 20 May 2010.

3. At the inquiry held on 28 February 2013 pursuant to section 21 of the Medical Registration Ordinance (Cap. 161) ("MRO"), Dr Wong admitted the facts alleged against him and the Council found him guilty of professional misconduct. Under the misapprehension that Dr Wong had a clear record, the Council decided that the appropriate sentence was a warning letter to him.

4. On the same day, after the conclusion of the hearing, the Council was alerted by members of the media that Dr Wong did not in fact have a clear record but had on 14 October 2009 been convicted of professional misconduct in respect of more serious misconduct (namely, 3 counts of conspiracy with patients to defraud the patients' insurer), for

which he had been ordered to be removed from the General Register for a period of 6 months. That removal order was suspended for two years.

5. Pursuant to section 21(4B) of the MRO, the Council immediately initiated a review of its decision earlier that day. After hearing submissions from Dr Wong's counsel, the Council revoked the original order for a warning letter to be served on Dr Wong and substituted an order that Dr Wong's name be removed from the General Register for a period of 1 month. The Council further decided to activate the prior suspended removal order and that 3 months of the 6-month removal order should be activated, to run consecutively with the new 1-month removal order.

6. In the written decision given by the Council on the same day, the Council stated that defence counsel owed an overriding duty to the tribunal and that the Council would in future expect legal representatives of a defendant to be frank with the Council in respect of the defendant's disciplinary record.

7. On the next day, 1 March 2013, a local newspaper's internet website carried a report of the case, describing it as a blunder on the part of the Medical Council. It stated that the chairman of the Council had at the review hearing questioned why defence counsel did not disabuse the Council and that defence counsel responded that it was not within his professional duty to do so.

8. Mr Ng, the applicant in these proceedings, is a member of the public unconnected in any way with the case. He read the press

report and was, he says, infuriated because he was convinced that Dr Wong's counsel owed a professional duty to disabuse the Council. He was determined to find out who that counsel was. However, none of the media reports he could locate contained that information; nor did the written decision of the Council he found on the Council's website a month later. Accordingly, on 27 April 2013, he wrote to the Council as follows to ask for the name of defence counsel:

> "According to the news report, the solicitor or barrister for Wong Tak Lun had said in the hearing, 'Do not have the duty to provide the information concerned.' This is not true. A solicitor or barrister is an officer of the court, who bears the duty of candour. Since it was an open hearing, the public have the right to know the name of that solicitor or barrister. Therefore I request to be told of the name of that solicitor or barrister."

9. On 13 June 2013, not having received any response, he complained to the Council as follows:

> "Up to now, I have not received from you the name of that solicitor/barrister, nor have you provided any reasonable explanation as to why it has taken such a long time. The public and I have reason to suspect that some of you have deliberately shielded that solicitor/barrister. Such unreasonable delay has also made your mistake at the trial on that day even more suspicious.
>
> I now set a reasonable time limit. If you still fail to provide the name of that solicitor/barrister within one month without any reasonable explanation, I will seek legal advice to challenge your conduct which is ridiculous and obviously a violation of public justice. This is the final warning. There will be no further warning before I take any action after one month."

10. In view of what he regarded as the "unreasonable behaviour" of the Council in not responding to his earlier request, on 17 June 2013, the applicant wrote to the Council with an additional demand for the

identity of the panel members and the Legal Adviser to the Council at the inquiry.

11. On 19 June 2013, the Council replied to the applicant that it had a duty to ensure that any information supplied by the Council would only be used for lawful and proper purpose. As will be seen, the Council believed that the duty referred to arose under the PDPO. The Council asked the applicant to reveal his purpose of making the inquiry and his intended use of the information, and also to provide his full name and identity, for its consideration.

12. On the same day, the applicant replied:

> "Firstly, the public have the right to know, making enquiries about all publicly accessible data related to open trials. Any subsequent use of the information for any unlawful purpose would be dealt with by law enforcement institutions. It would be for the court to determine if it is unlawful. You do not have the power to control or speculate the uses.
>
> If you exercise any statutory power to refuse to make the information publicly accessible, you have to provide a reasonable explanation which goes in line with the legislative intent, and have the duty to provide such explanation within a reasonable period of time. Unreasonable delay is by itself improper conduct."

The applicant provided his name and status (namely, as a member of the general public) to the Council, stating:

> "However, I must also emphasize that this is relevant to the public's right to know. Everyone, regardless of his identity, is entitled to such right. You simply do not have any reasonable ground or statutory power to request the identity of the enquirer. Therefore, even if I myself, or any enquirer in future, provide my personal identity voluntarily, such data remain subject to privacy. You, having collected personal data, have the duty to comply with the Personal Data (Privacy) Ordinance in dealing with such data."

13. On 13 August 2013, the Council again requested the applicant to state his purpose of seeking the requested information and his intended use of such information. The applicant replied by reiterating what he had stated on 19 June 2013.

14. On 21 August 2013, the Council responded to a letter written by the applicant to all members of the Council, as follows.

> "According to Data Protection Principle 3 under the Personal Data (Privacy) Ordinance, personal data shall not, without the prescribed consent of the data subject, be used for 'a new purpose'. 'New purpose', in relation to the use of personal data, means any purpose other than the purpose for which the data was originally collected or a purpose directly related. 'Use', in relation to personal data, includes disclose or transfer the data. The Office of the Privacy Commissioner for Personal Data has also pointed out that all personal data, regardless of having been made publicly accessible or existing in the public domain, are protected by the Ordinance. For complying with the requirements, the Secretariat is obliged to understand from the enquirer the purpose for which the relevant data are collected and used, and therefore, the Secretariat would request you to explain the use of and the purpose for which the data concerned are to be used."

15. There was no further correspondence between the parties. On 7 November 2013, the applicant filed an application for leave to apply for judicial review. The decision he seeks to challenge is that of the Council in its response dated 21 August 2013. As stated in the Form 86, the applicant asks for an order to quash the Council's decision, and an order that the Council do disclose to him the requested information.

Subsequent revelation of counsel's name

16. I should mention that, on 21 February 2014, on appeal by Dr Wong, the Court of Appeal[1], for reasons not relevant to the present proceedings, allowed Dr Wong's appeal in part and imposed a 1-month removal order for the new offence and ordered 1 month of the previously suspended removal order to be served consecutively, so that his name would be removed from the General Register for a total period of 2 months. Incidentally, the identity of Dr Wong's counsel at the inquiry was revealed publicly in the Court of Appeal's judgment in *Dr Wong Tak Lun v. The Medical Council of Hong Kong* (CACV 57/2013; 21 February 2014) at §§31-32.

17. Despite this, on 30 July 2014, the Court of Appeal[2] granted the applicant leave to apply for judicial review of the Council's decision dated 21 August 2013. Since the applicant seeks also the names of the members of the Council sitting in the inquiry and the name of the Council's Legal Adviser, which have still not been revealed, the application is not academic. But even if the applicant has since learnt from other avenues all the information sought, I would nevertheless have proceeded, on the basis of the principles set out in *Chit Fai Motors Company Limited v Commissioner for Transport* [2004] 1 HKC 465, to hear and determine the questions raised.

The Medical Council

18. The Medical Council is a statutory body established by section 3(1) of the MRO. The Medical Council is made up of

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[1] Lam VP, Barma JA and McWalters J

[2] Cheung CJHC, Lam VP and Cheung JA

28 members, 14 of whom are appointed by the Chief Executive, and the remaining 14 elected through various elections. Broadly speaking, the Council's duties cover registration of medical practitioners, education and accreditation, medical ethics and professional conduct.

19. In particular, by virtue of Part IV of the MRO, disciplinary functions and powers in respect of registered medical practitioners are entrusted to the Medical Council. Section 21(1)(b) provides that if, after "due inquiry" into a case referred to it by a relevant committee, the Council is satisfied that any registered medical practitioner has been guilty of misconduct in any professional respect, the Council may impose a number of sanctions on the practitioner.

20. Section 21B(1) sets out the statutory requirements on the composition of a meeting of the Council held for the purpose of a disciplinary inquiry. The quorum consists of either 5 members of the Medical Council, or not less than 3 members of the Council and 2 assessors. Section 21B(3) provides that an inquiry conducted by members of the Council and assessors forming the requisite quorum is as valid and effectual as an inquiry conducted by 5 members of the Council forming a quorum.

21. By section 3B of the MRO, the Medical Council has a Legal Adviser appointed by the Chief Executive. Section 6(1) of the Medical Registration (Miscellaneous Provisions) Regulation (Cap. 161D) requires the Legal Adviser to be present at every inquiry held by the Council under section 21. Section 32 of the Medical Practitioners (Registration

and Disciplinary Procedure) Regulation (Cap. 161E)[3] ("the Regulation") provides that no person other than members and assessors of the Council and the Legal Adviser may be present when the Council votes on any matter.

22. Section 24 expressly provides that both the complainant and the respondent in an inquiry are entitled to legal representation.

23. The MRO and the Regulation both make provisions regarding access to the inquiry. Section 22(1)(c) and (d) of the MRO allow the Council to admit or exclude the public or any member of the public or the press from the inquiry. Section 19 of the Regulation provides that the Council has a discretion whether to open an inquiry to the public, or to hold the inquiry partly in public and partly in camera.

24. According to the evidence, at a disciplinary inquiry of the Council, name-plates would be placed in front of each member of the adjudicating panel, stating the name of each panel member. The name-plates placed in front of the Legal Adviser to the Medical Council and the legal representative of the defendant concerned, however, would only state "Legal Adviser" and "Lawyer" respectively.

25. Under section 22(4) of the MRO:

> "If it appears to the Council or the Health Committee that it is necessary to do so in the interests of the complainant, the registered medical practitioner concerned in the inquiry or the hearing, or any witness concerned, the Council or the Health

[3] By virtue of s. 21(2), a disciplinary inquiry by the Council must be conducted substantially in accordance with the procedure prescribed by the Regulations.

> Committee may order that all or any information relating to the inquiry or hearing shall not be disclosed."

26. Section 21(5) of the MRO makes provision relating to the publication of a disciplinary order in the Gazette. Section 21(6) provides that where an order is published in the Gazette, the Council

> "(a) shall publish with such order sufficient particulars to acquaint the public with the nature of the matter to which the order relates; and
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> (b) may publish with such order an account of the proceedings at the inquiry at which the order was made."

Applicant's grounds

27. The applicant founds his application on four grounds. They are, as stated in his Form 86, as follows: (1) that the public interest in upholding the principle of open justice overrides any privacy that may exist in the information sought; (2) that Data Protection Principle 3 is not applicable; (3) that the Medical Council's decision infringes the applicant's freedom of expression; and (4) that the Medical Council has discriminated against the applicant, contrary to Art. 25 of the Basic Law.

Respondent's stance

28. The respondent traverses the grounds relied upon by the applicant. In addition, it raises a preliminary objection, namely, that the applicant's challenge is premature and should be dismissed on that ground, because the Medical Council has only asked the applicant to state his purpose of seeking and the intended use of the information, and has not yet reached an ultimate decision not to disclose the information to him.

29. Since the applicant has acted in person, Mr Derek C L Chan of counsel has been requested to appear as *amicus curiae*. I am indebted to Mr Chan for his careful analysis of the issues and his most able submissions. I am also grateful for the assistance given by Mr Jonathan Chang for the respondent and by the applicant, Mr Ng, who, despite being unrepresented, has made his written and oral submissions clearly and succinctly.

Issues

30. Having regard to the submissions presented, the issues that arise on this application may be summarised as follows:

(1) Is there a substantive decision amenable to judicial review?

(2) Is the PDPO applicable and what is its relevant effect?

(3) What are the principles governing access to information relating to Medical Council inquiries both at common law and under Art. 16 of the Hong Kong Bill of Rights or Art. 19 of the International Covenant on Civil and Political Rights ("ICCPR")?

(4) Applying those principles, should the information requested be disclosed?

(5) Has the applicant been discriminated against contrary to Art. 25 of the Basic Law?

I deal with these matters in turn below.

Whether there is a substantive decision amenable to judicial review

31. The first point taken by Mr Jonathan Chang on behalf of the Medical Council is that the application for judicial review is premature. He says that the Council has not finally refused to provide the information sought; it has simply asked the applicant to state his purpose and the intended use of the information. Citing the decision of Au J in *Television Broadcast Ltd v Communications Authority* (HCAL 3/2013; 13 May 2013) at §25, he argues that there is no decision "with substantive legal consequences and a decisive or determinative effect" to the applicant that is susceptible to the court's supervisory jurisdiction by way of judicial review.

32. In my judgment, this preliminary objection fails. The situation is quite different from that in *Television Broadcast Ltd*. In that case, complaints were raised about the process leading to the recommendation made by the Communications Authority to the Chief Executive in Council concerning three applications for domestic free-to-air television broadcasting licences. The applicant there sought orders of *certiorari* to quash the Communications Authority's "decisions" and a prohibition to prevent the Chief Executive in Council from making a decision based on the recommendation. The court held that the challenge was premature, since the Communications Authority's recommendation was merely advisory in nature, and the Chief Executive in Council had an unfettered discretion to come to a decision he thought fit. There was no exceptional circumstance to justify permitting an intermediary or preparatory step to be challenged by way of judicial review.

33. Here, according to Mr Chang, the Council has decided not to consider whether to provide the information sought, unless the applicant first answers the Council's questions about his purpose and the intended use of the information. Only then will the Council consider his request. The applicant, in contrast, takes the position that he has said enough and is entitled to be given the information sought. He has refused, as a matter of principle, to answer the Council's queries any further. The parties have obviously reached an impasse. The result is that the Medical Council has effectively decided thus far, based on what the applicant has stated, not to provide the information sought. The applicant has not obtained what he requested and, as matters stand, no further decision of the Council is pending. In these circumstances, there is, in my view, a decision with sufficient finality and substantive effect to engage the court's supervisory jurisdiction.

Applicability and effect of the Personal Data (Privacy) Ordinance

34. As can be seen from the decision under challenge, the Medical Council founds its decision on Data Protection Principle 3 of the PDPO.

35. Section 4 of the PDPO provides:

> "A data user shall not do an act, or engage in a practice, that contravenes a data protection principle unless the act or practice, as the case may be, is required or permitted under this Ordinance."

36. Section 2 defines "data user" as follows:

> "in relation to personal data, means a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data"

37. Under section 2, "personal data" means any data:

> "(a) relating directly or indirectly to a living individual;
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> (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
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> (c) in a form in which access to or processing of the data is practicable".

38. Mr Chang and Mr Chan both submit that the names of the individuals sought by the applicant are personal data within the meaning of the PDPO and that the Medical Council is a data user in relation to these names. For present purposes, I shall proceed on this assumption, even though the applicant does not entirely agree with it.

39. Data Protection Principle 3 in Schedule 1 to the PDPO provides:

> "(1) Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose."

40. Section 2 of the PDPO provides that in relation to personal data, "use" includes disclose or transfer the data.

41. "New purpose" is defined in section 3(4) of Schedule 1 as follows:

> "***new purpose***, in relation to the use of personal data, means any purpose other than—
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> (a) the purpose for which the data was to be used at the time of the collection of the data; or
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> (b) a purpose directly related to the purpose referred to in paragraph (a)."

42. The Medical Council contends that (1) Data Protection Principle 3, found in Schedule 1 to the PDPO, applies to restrict disclosure to the applicant, and (2) none of the statutory exemptions from the Data Protection Principles applies. In my judgment, both contentions are flawed.

Exemptions

43. I take the question of exemptions first. Three provisions of the PDPO have been mentioned in argument, namely, sections 20(1)(b), 58(2)(b) and 60B(a). Of these, section 20(1)(b) can be immediately dismissed since it is clear that the applicant's request to the Council is not a "data access request" made under section 18. A data access request relates to personal data of which the individual making the request is the data subject. Here, the data requested by the applicant is unrelated to himself.

44. Section 60B provides as follows:

> "Personal data is exempt from the provisions of data protection principle 3 if the use of the data is—
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> (a) required or authorized by or under any enactment, by any rule of law or by an order of a court in Hong Kong;
>
> (b) required in connection with any legal proceedings in Hong Kong; or
>
> (c) required for establishing, exercising or defending legal rights in Hong Kong."

45. The phrase "rule of law" in section 60B(a) is defined in section 2 to mean:

> "(a) a rule of common law or a rule of equity; or
>
> (b) customary law"

46. Mr Derek Chan submits that section 60B(a) applies because whether or not the information is to be disclosed is governed by the common law principle of open justice (discussed below). If the information requested ought to be disclosed pursuant to that principle, then the "use" (in the form of disclosure to the applicant) of that information would be "authorised" or "required" by that principle, which is a "rule of law".

47. Mr Jonathan Chang argues that the common law principle does not give an absolute right of access to the information requested. Even if it applies, the Council may still ascertain the purpose for which the applicant has sought the information before deciding whether to supply it. With respect, this argument does not detract from the applicability of the exemption. Once it is recognised that the request is to be considered under the principle of open justice, it is that rule of law that is determinative of the proper response to the request. If disclosure is required or authorised by that principle (even if subject to qualification), Data Protection Principle 3 poses no obstacle because the exemption in section 60B(a) applies. I therefore accept Mr Chan's submission that by virtue of the exemption in section 60B(a), Data Protection Principle 3 is irrelevant.

48. It is therefore unnecessary to consider whether the exemption in section 58(2)(b) applies.

49. It should be remembered, however, that as provided in section 51 of the PDPO, the effect of the exemption in section 60B(a) is simply that Data Protection Principle 3 does not prevent or restrict the

disclosure of the information in question; the fact that the exemption applies does not imply that the Council is required to make disclosure and does not confer an entitlement on the applicant to the information sought.

Whether new purpose within the meaning of Data Protection Principle 3

50. It is strictly unnecessary but since the matter has been argued before me, I shall express my view on whether or not, irrespective of any exemption, Data Protection Principle 3 on its own terms applies to the applicant's request.

51. The question that arises in this context is whether disclosure to the applicant is a "new purpose". On behalf of the Council, it is contended that the original purpose when the names were collected was for disclosure and use *at the disciplinary inquiry*, and did not encompass disclosure pursuant to a *subsequent* enquiry, such as that made by the applicant.

52. This is in my opinion too narrow a view of the purpose for which the names were collected. Clearly the Council asked for the names of those attending for use at the hearing, so that, for example, the participants could properly address one another. It is to be recalled that the inquiry was conducted in public. The names of the members of the Council sitting on that day were disclosed on name plates placed in front of them, so that everyone who was in attendance could know their identity. But it seems to me that the names must also have been collected for publication subsequently pursuant to the Council's power to publish information about the disciplinary inquiries it has conducted, should the Council decide to disclose such information, either generally or pursuant

to individual requests. There is nothing to suggest that the purpose was expressly limited in the way contended for when the names were collected. The Council has not put in evidence any statement of the purpose for collecting the personal data, if such statement existed, pursuant to Data Protection Principle 1(3)(b)(i)(A). In these circumstances, in ascertaining the original purpose, or any directly related purpose, it is in my view legitimate to have regard to "the reasonable expectations of the data subject": *Annotated Ordinances of Hong Kong (Cap 486) (2012 Reissue)*, p. 6; *Berthold and Wacks, Hong Kong Data Privacy Law (2nd ed)*, §10.23.

53. It seems to me that the relevant members of the Council (or assessors), the Legal Adviser and counsel for the defendant would reasonably expect that the Council could disclose, in relation to the inquiry, either in its written decision or otherwise, their names and the capacity in which they attended. There could have been no expectation of secrecy or privacy in that regard. I would therefore hold that giving such information upon a subsequent enquiry such as that made by the applicant was either part of the original purpose, or a directly related purpose within the meaning of Data Protection Principle 3. It would follow that Data Protection Principle 3 does not prevent disclosure because disclosing the names to the applicant would not constitute a "new purpose" as defined in section 3(4) of Schedule 1.

Conclusions on PDPO

54. In short, I conclude that Data Protection Principle 3 of the PDPO does not restrict disclosure in this case, either because the request

for information is exempted from that principle or because the principle on its own terms does not restrict disclosure to the applicant.

55. It follows that the Medical Council has misdirected itself in law in thinking that the applicant's request is governed by the PDPO. It has taken into account an irrelevant consideration, namely, the restriction in Data Protection Principle 3, and failed to take into account a relevant consideration, namely, the requirements of the principle of open justice. The decision must therefore be quashed on this ground alone.

56. To determine whether the relief of *mandamus* should be granted by this court to require disclosure to the applicant, however, it is necessary to consider the other points raised.

Principles governing access to information relating to disciplinary inquiries of the Medical Council

57. In contrast to the position in Australia[4], New Zealand[5], the United Kingdom[6] and the United States[7] and many member states of the European Union, there is no freedom of information legislation in Hong Kong. Accordingly, one must exercise caution in examining foreign jurisprudence developed under such legislation, including in particular the jurisprudence on whether or not an applicant's motives in making a request for information are relevant: c.f. *Coppel, Information Rights: Law and Practice* (4th ed, 2014), §9-017.

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4 Freedom of Information Act 1982
5 Official Information Act 1982
6 Freedom of Information Act 2000
7 Freedom of Information Act 1966

58. Because the information sought in this case concerns a disciplinary inquiry in respect of which the Medical Council effectively acted judicially as a tribunal, the applicant has prayed in aid the principle of open justice as the source of a duty on the part of the Medical Council to make available relevant information. In addition, the applicant contends that Art. 16 of the Hong Kong Bill of Rights and Art. 19 of the ICCPR require that the information be supplied to him. I shall first deal with the principle of open justice at common law.

Common law principle of open justice

59. The principle of open justice is a cardinal principle of the common law central to the working of the judicial system. Open justice is a concept that manifests itself in different aspects: *TCWF v LKKS* (CACV 154 & 166/2012; 29 July 2013) at §30. In its most ancient form it embodies the fundamental tenet that cases are heard and determined openly in the courts to which everyone may have access. In *Yip Ku v Kwan Kuk Lin* (HCMC 5/1997; 22 December 1998), Waung J said:

> "The concept of open justice is embedded in the common law and was described in Coke:-
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> > '.... All causes ought to be heard, ordered and determined before the judges of the king's courts openly in the king's courts, whither all persons may resort; and in no chambers or other private places; for the judges are not judges of chambers but of courts' (2 Co. Inst. 103)"

60. In the leading English case of *Scott v Scott* [1913] AC 417 at 477, Lord Shaw said:

> "It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as

> publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' 'The security of securities is publicity.' But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: 'Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.' "

61. While the principle has always been expressed in strong terms, it is not an absolute rule. An exception to this principle is allowed, and the public may be excluded from a judicial hearing, where it is necessary to do so for the paramount object of doing justice: *Scott v Scott*, *supra*, at p 437; *Asia Television Ltd v Communications Authority* [2013] 2 HKLRD 354 at §§26-30.

62. The principle of open justice is not limited to physical access to the court room where a judicial hearing is taking place. With the decline of the tradition of orality and growing reliance on written material in judicial hearings, at least in civil cases, it has been recognised that the principle extends to access to documents used in a court hearing. Lord Bingham CJ described the changes in forensic practices and their implications for the concept of open justice in *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498 as follows:

> "For reasons which are very familiar, it is no longer the practice for counsel to read documents aloud in open court or to lead the judge, document by document, through the evidence. The practice is, instead, to invite the judge to familiarise himself with material out of court to which, in open court, economical reference, falling far short of verbatim citation, is made. In this new context, the important private rights of the litigant must command continuing respect. But so too must the no less important value that justice is administered in public and is the subject of proper public scrutiny." (p. 509a)
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> "… As the court's practice develops it will be necessary to give appropriate weight to both efficiency and openness of justice, with Lord Scarman's warning[8] in mind. Public access to documents referred to in open court (but not in fact read aloud and comprehensibly in open court) may be necessary, with suitable safeguards, to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain. …" (p. 512d)

63. In the practical application of the principle in the context of different forensic practices, however, there may be different views on the extent to which access should be granted to specific documents. Thus in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618 at §85, in an appeal arising from an application by a newspaper for access to counsel's skeleton arguments, affidavits and witness statements used and referred to (but not read out) in a public extradition hearing, Toulson LJ (as he then was) set out the approach applicable in the United Kingdom as follows:

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[8] This refers to what Lord Scarman said in *Harman v Home Office* [1983] 1 AC 280 at 316, quoted by Lord Bingham CJ in *SmithKline* at p. 506e, as follows:

> "Whether or not judicial virtue needs such a spur, there is also another important public interest involved in justice done openly, namely, that the evidence and argument should be publicly known, so that society may judge for itself the quality of justice administered in its name, and whether the law requires modification. When public policy in the administration of justice is considered, public knowledge of the evidence and arguments of the parties is certainly as important as expedition: and, if the price of expedition is to be the silent reading by the judge before or at trial of relevant documents, it is arguable that expedition will not always be consistent with justice being seen to be done."

> "In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit, and the Constitutional Court of South Africa, I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others."

64. In contrast, in *HKSAR v Hui Rafael Jnr* [2014] 5 HKLRD 15 at §11, when disposing of an application by the press for access to two "fund flow charts" given by the prosecution to the jury, Macrae JA (sitting as an additional Judge of the Court of First Instance) took the view that in Hong Kong, at least in the context of a criminal trial,

> "… the default position is that the press are not entitled to look at exhibits or other material which have been referred to but not read out in full in open court, unless there are compelling reasons for a judge to exercise his discretion in favour of a press application to see the material …"

65. It is unnecessary for me to express any view on the difference in approach. The applicant's request here is not one for access to the documents used at the disciplinary inquiry. He has merely asked for the names of certain persons who played a part in the inquiry. The question is whether the principle of open justice encompasses access to such information.

66. As Toulson LJ held in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court*, *supra*, at §70, "the requirements of open justice apply to all tribunals exercising the judicial power of the state" (see also *Kennedy v Charity Commission* [2014] UKSC 20; [2014] 2 WLR 808 at §124). Mr Chang does not dispute that, as far as its disciplinary functions are concerned, the Medical Council is a tribunal to which the principle applies. He accepts also that the principle is engaged in the present case in relation to the applicant's request for information. He contends however that open justice does not confer on the applicant an absolute entitlement to the information sought, and that it is permissible for the Council to insist on knowing the applicant's purpose and intended use of the information.

67. It seems to me significant in the present exercise to focus on the nature of the information sought. Here, what the applicant seeks is basic information about an inquiry which was held in public. He simply wants to know who the adjudicators, the adjudicators' legal adviser, and defence counsel were. In my view it is a key requirement of open justice that the identity of those sitting in judgment should normally be revealed. Trials by anonymous judges are no more tolerable than secret trials. The panel was properly identified at the hearing of the inquiry on 28 February 2013. Every member (or assessor) sitting at the inquiry had his or her name printed on a name plate placed in front of him or her. I was somewhat surprised that the written decision of the Council (expressed in the first person plural) only stated the name of the Chairman. Neither counsel could think of any other judicial tribunal in Hong Kong that issues written decisions without identifying the members who are party to those decisions. Whether the Council's practice regarding written

decisions should be changed is of course not a matter before me. But given that the members are not identified in any written material accessible to the public, it seems to me that in the interests of open justice, a subsequent enquiry as to their identity made reasonably close to the conclusion of the inquiry should ordinarily be acceded to.

68. The Legal Adviser stands in no different position. He is an integral part of the statutory machinery of the inquiry. By law, the Council cannot commence an inquiry without his presence (see paragraph 21 above). Although he does not take part in the decision, his advice will obviously be influential to the outcome. The law requires that where the Council does not accept the advice of the Legal Adviser on any question of law as to evidence, procedure or any other matter, every party has to be informed of this fact (see section 8 of the Medical Registration (Miscellaneous Provisions) Regulation). As I understand the position, there is in fact only one Legal Adviser to the Medical Council at any one time, whose identity is a matter of public record.

69. The identity of defence counsel in a public judicial hearing, likewise, is not normally regarded as confidential. An advocate does not usually expect or require anonymity. In the best traditions of the Bar, a barrister should, subject to his duties to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any unpleasant consequences to himself: *Boulton, A Guide to Conduct and Etiquette at the Bar* (5th ed 1971), p.7. The advocates' identity, again, could and should normally be disclosed upon enquiry made reasonably close to the hearing.

70. Such basic information about the identities of the key persons who have taken part in a public judicial hearing should, in my view, normally be published. The public interest in the administration of justice and the accountability of the judicial process requires it. If the information is not disclosed in the written decision of the tribunal, then it should be disclosed upon inquiry made at a time reasonably close to the hearing.

71. I pause to note that in the United Kingdom, as far as criminal cases are concerned, rules 5.8(4) & (6) of the Criminal Procedure Rules mean that certain basic information about a case, including the identity of the prosecutor, the defendant, the parties' representatives, the judge, magistrate, or justices' legal adviser, must be supplied to anyone who asks for such information, even orally, giving no reasons, provided the trial has not yet concluded or the verdict was not more than 6 months ago. There are of course no equivalent rules in Hong Kong, but what they illustrate is that an enquiry about the identities of the principal characters in a judicial hearing can properly be regarded as so straightforward and prosaic as to require no reason to be given for the request at all.

72. I have limited the discussion above to a request for information about a specific inquiry made reasonably close to the conclusion of the case. It seems to me that different considerations may apply if historical or statistical data are sought from a judicial body. I have also confined the discussion to a hearing held in public. If a hearing has properly been directed to be held in camera, there cannot be the same expectation of access to information about it.

Art. 16 of the Bill of Rights and Art. 19 of the ICCPR

73. The applicant relies in addition on his freedom of expression under human rights provisions in the law, including Art. 16 of the Hong Kong Bill of Rights and Art. 19 of the ICCPR.

74. Art. 10 of Hong Kong Bill of Rights (set out in s. 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383)) reads as follows:

> "Article 16
>
> Freedom of opinion and expression
>
> (1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> (3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary-
>
> (a) for respect of the rights or reputations of others; or
>
> (b) for the protection of national security or of public order (ordre public), or of public health or morals."

75. Except that the word "or" at the end of para (3)(a) is omitted, Art. 19 of the ICCPR is in identical terms.[9]

76. Because of the conclusion I have reached above based on the common law principle of open justice, it is unnecessary for me to decide whether the applicant may claim a right to obtain the information under those human rights provisions. In deference to the industry of counsel, I

[9] Except that in Art 19 of the ICCPR

would nevertheless set out a brief discussion below without deciding the point.

77. Whether such provisions on freedom of expression can be read as conferring an enforceable right to obtain information from governmental or public bodies is a question on which there is a division in judicial opinion. A number of European decisions have been cited to me, decided under Art. 10 of the European Convention on Human Rights ("ECHR"), including *Társaság A Szabadságjogokért v Hungary* (2011) 53 EHRR 3, *Youth Initiative for Human Rights v Serbia*, Application no. 48135/06 (final judgment date 25 September 2013) and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria*, Application no. 39534/07 (final judgment date 28 February 2014), which appear to suggest that Art. 10 confers a right of access to information. Thus, in *Társaság*, at §35, the Second Section of the European Court of Human Rights stated:

> "the Court has recently advanced towards a broader interpretation of the notion of 'freedom to receive information' (see Sdružení Jihočeské Matky c. la République tchèque (dec.), no. 19101/03, 10 July 2006) and thereby towards the recognition of a right of access to information".

Similarly, in *Youth Initiative for Human Rights*, at §20, the Second Section of the European Court of Human Rights states that the notion of "freedom to receive information" "embraces a right of access to information".

78. However, in *Kennedy v Charity Commission*, *supra*, Lord Mance JSC refused to follow these Section decisions, taking the view that they are inconsistent with earlier statements by the Grand Chamber in

decisions such as *Leander v Sweden* (1987) 9 EHRR 433, where the European Court had said, at §74:

> "The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual."

79. In *Kennedy* at §94, Lord Mance said:

> "Had it been decisive for the outcome of this appeal, I would have considered that, in the present unsatisfactory state of the Strasbourg case law, the Grand Chamber statements on article 10 should continue to be regarded as reflecting a valid general principle, applicable at least in cases where the relevant public authority is under no domestic duty of disclosure. The Grand Chamber statements are underpinned not only by the way in which article 10(1) is worded, but by the consideration that the contrary view – that article 10(1) contains a prima facie duty of disclosure of all matters of public interest – leads to a proposition that no national regulation of such disclosure is required at all, before such a duty arises. Article 10 would itself become a European-wide Freedom of Information law. But it would be a law lacking the specific provisions and qualifications which are in practice debated and fashioned by national legislatures according to national conditions and are set out in national Freedom of Information statutes."

80. Similar concerns were echoed by Lord Toulson JSC in the same case at §145:

> "What is so far lacking from the more recent Strasbourg decisions, with respect, is a consistent and clearly reasoned analysis of the 'right to receive and impart information' within the meaning of article 10, particularly in the light of the earlier Grand Chamber decisions. Mr Coppel submits that the court's 'direction of travel' is clear, but the metaphor suggests that the route and destination are undetermined. If article 10 is to be understood as founding a right of access to information held by a public body, which the public body is neither required to

> provide under its domestic law nor is willing to provide, there is a clear need to determine the principle or principles by reference to which a court is to decide whether such a right exists in a particular case and what are its limits."

81. It may be argued that Art. 10 of the ECHR in its wording has a more limited scope than Art. 16 of the Hong Kong Bill of Rights or Art. 19 of the ICCPR. Art. 10 of ECHR reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

82. It will be noted that the words "to seek", which appear in Art. 16(2) of BOR and Art. 19(2) of ICCPR, are omitted from Art. 10(1) of the ECHR. While Lord Mance took the view in *Kennedy* at §98 that the difference in wording is of some significance, there are commentators who have suggested that the difference is immaterial.

83. A decision under the ICCPR may be found in *Toktakunov v Kyrgyzstan*, Communication No. 1470/2006 (28 March 2011). There, a human rights group for which the complainant worked requested the Ministry of Justice of Kyrgyzstan to provide it with information on the number of individuals sentenced to death in Kyrgyzstan as of a specified

date, as well as on the number of individuals sentenced to death and currently detained. The request was made pursuant to article 17.8 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (29 June 1990), according to which the participating States have agreed to make available to the public information regarding the use of the death penalty. The Ministry of Justice refused to provide the information sought, due to its classification as 'confidential' and 'top secret'.

84. The Human Rights Committee under the Optional Protocol to the ICCPR to which the complaint was made, took the view that there was a violation by the State party of Art. 19(2) of the ICCPR, stating:

> "In this regard, the Committee recalls its position in relation to press and media freedom that the right of access to information includes a right of the media to have access to information on public affairs and the right of the general public to receive media output. The Committee considers that the realisation of these functions is not limited to the media or professional journalists, and that they can also be exercised by public associations or private individuals (see paragraph 6.3). When, in the exercise of such 'watchdog' functions on matters of legitimate public concern, associations or private individuals need to access State-held information, as in the present case, such requests for information warrant similar protection by the Covenant to that afforded to the press. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State. In these circumstances, the Committee is of the opinion that the State party had an obligation either to provide the author with the requested information or to justify any restrictions of the right to receive State-held information under article 19, paragraph 3, of the Covenant."

85. In the present case, the information sought relates to a case heard and determined by the Medical Council as a judicial body. The question of the Council's obligation to provide the information sought may be gauged by reference to the principle of open justice. No one has suggested that Art. 16(2) of BOR and Art. 19(2) of ICCPR, assuming they confer a right to information, go further than the common law principle of open justice in the present context.

Should the information sought be disclosed?

86. Both Mr Chang and Mr Chan have submitted that, irrespective of the correct approach on the presumptive or default position, open justice does not automatically require access to be given to all documents and information used during a judicial hearing.

87. Further, Mr Chang submits that the Medical Council has a discretion to exercise in deciding whether to allow access and, in exercising that discretion, it may (not must) take into account the purpose of the request. He refers to the power to exclude the public and the press in section 22(1)(c) and (d) of the MRO and the power in section 22(4) to order any information not to be disclosed. However, the power for excluding the public and the press from a hearing was not exercised by the Council at the time and is no longer relevant. Nor is it clear that section 22(4) is intended to apply to a situation like the present. In any event, the power in section 22(4) to order information not to be disclosed only arises if it appears necessary to do so in the interests of the complainant, the doctor or any witness concerned. It is not intended to protect panel members from criticism or protest against their decision.

Accordingly it does not seem to me that the statutory provisions Mr Chang refers to have any application in this instance.

88. While I would readily accept that the principle of open justice does not automatically afford every member of the public an absolute right to have access to documents referred to (but not read out) in public judicial hearings and to all information concerning such hearings, I would hesitate to characterise the decision whether to allow access as a discretion. Open justice is generally regarded by the common law as a constitutional right. Whether to grant access is a question of what open justice requires in the circumstances of the particular case. It is a question of principle, not mere discretion: *Scott v Scott*, *supra*, at p. 438 *per* Viscount Haldane LC; at p. 477 *per* Lord Shaw. The determination may of course involve balancing competing considerations, as illustrated by Macrae JA's decision in *HKSAR v Hui Rafael Jnr*, *supra*, at §§18-21, but it is not one that turns on expedience or rests on the personal preferences of the particular tribunal.

89. Where a tribunal's or lower court's decision on access is challenged in the High Court, this court is entitled to come to its own judgment on whether the access should be granted. As Lord Toulson stated in *Kennedy v Charity Commission*, *supra*, at §132:

> "Given that a decision by a public authority about disclosure of information or documents regarding a statutory inquiry is capable of judicial review, what should be the standard of review? The normal standard applied by a court reviewing a decision of a statutory body is whether it was unreasonable in the *Wednesbury* sense (ie beyond rational justification), but we are not here concerned with a decision as to the outcome of the inquiry. We are concerned with its transparency. If there is a challenge to the High Court against a refusal of disclosure by a lower court or tribunal, the High Court would decide for itself

> the question whether the open justice principle required disclosure. *Guardian News* provides an example. I do not see a good reason for adopting a different approach in the case of a statutory inquiry, but the court should give due weight to the decision and, more particularly, the reasons given by the public authority (in the same way that it would to the decision and reasons of a lower court or tribunal). The reason for the High Court deciding itself whether the open justice principle requires disclosure of the relevant information is linked to the reason for the principle. It is in the interests of public confidence that the higher court should exercise its own judgment in the matter and that information which it considers ought to be disclosed is disclosed."

90. In the present case, the applicant has requested to be informed of the identities of certain individuals who played a crucial part in the disciplinary inquiry. The request was made not long after the conclusion of the inquiry, after the applicant failed to find the information in the written decision published by the Council. The applicant has disclosed his own name and capacity in making the request. He has, to an extent, explained his interest and why he wanted the information. In these circumstances, I consider that the basic information sought should be provided to the applicant in the interests of open justice.

91. It does not follow, however, that I should grant a *mandamus* to compel disclosure. There is nothing to indicate that, if the Medical Council had properly directed itself on the question of open justice instead of mistakenly focussing on the PDPO, it would not have made disclosure itself. Now that this court has given its decision, it seems to me I should simply quash the decision challenged and remit the matter to the Council for it to come to a decision in the light of this judgment.

Art. 25 of the Basic Law – discrimination

92. Finally, the applicant complains that he has been discriminated against on the ground that the information sought was accessible to those who attended the hearing of the inquiry but was refused to him. In light of the conclusion above it is unnecessary to deal with this ground, though I have to say I have great difficulty in seeing how the applicant could complain of inequality when his position was not quite the same as those members of the public who were present at the inquiry.

Conclusion and Orders

93. For the foregoing reasons, the application for judicial review succeeds. There will be an order of *certiorari* bringing up the decision of the Medical Council to this court and quashing it. The matter is remitted to the Council for its decision in the light of this judgment.

94. I also make an order *nisi* that the respondent do pay the applicant his costs of these proceedings.

(Godfrey Lam)
Judge of the Court of First Instance
High Court

The applicant appeared in person

Mr Jonathan Chang, instructed by the Department of Justice, for the respondent

Mr Derek C L Chan, *Amicus Curiae*