Judicial Review Of Housing Authority Decisions

AAC readers will know that LegCo has recently begun what is currently one of at least four separate inquiries that are taking place with regard to public housing. The courts have also begun to play a larger role lately, in particular focusing upon somewhat technical questions that pertain in determining the availability of judicial review of public bodies. Now, several cases are beginning to show just how difficult it will be to overturn Housing Authority (HA) decisions in this area. Dr Arthur McInnis looks at the trend.

Suspension

In *Ngo Kee Construction Co. Ltd v. The Hong Kong Housing Authority* (January 8, 2001) No. 1927 the HA had taken a decision to suspend Ngo Kee from their building contractors' list for 24 months. Unhappy with this decision Ngo Kee sought judicial review. The issue for the High Court was whether the HA were justified in doing so and the Court held that they were. In its reasons, the Court noted that the Housing Authority decision was a private commercial decision, not involving any element of fraud, corruption or bad faith.

Exceptional Facts

The Court said that the facts were exceptional in the sense that they involved a 'scandal' and were 'extremely serious'. Given this background the Court felt there was a real public interest to be served in preventing Ngo Kee from bidding on future public housing projects. The Court went further than this though and couched its reasons on other bases in the event that the judgment were appealed and thus added that even if the suspension had been amenable to judicial review, the application still would have been refused given a justifiable lack of trust and confidence in Ngo Kee and its associated corporations. It was also noted that there was a significant public interest involved.

Cases in the Trend

While the *Ngo* Kee case is an authority in its own right it should also be read with at least two other cases which were considered by Justice Cheung in the Court of First Instance: *Kwok & Chu (a firm) v. The Hong Kong Housing Authority* (March 11, 1997) No. 4346; and *Woo Cheng Mechanical Engineering Factory Limited v. Director of Marine* (November 24, 2000) No. 1008.

Kwok & Chu

Kwok & Chu provides another example of a rejected application for judicial review of a Hong Kong Housing Authority decision while the *Woo Cheng* case involved a similar application for judicial review of a decision made by the Director of the Marine Department. In *Kwok & Chu* the decision was not amenable to judicial review on the ground that the Housing Authority decision involved a mere administrative step and not a public function while in *Woo Cheng* the application was refused on the basis that the Director was carrying out a commercial and not public function.

In *Kwok & Chu* the applicant was a firm of solicitors ('the firm') who challenged the Housing Authority's refusal to include them on a panel of solicitors eligible to undertake conveyancing under the Authority's Home Ownership Scheme. The reason for the refusal was that the firm did not satisfy one of the fixed selection criteria for inclusion on the panel established by the Housing Authority. In challenging the decision, the firm argued that the Housing Authority's decision to apply the criteria without exception amounted to the adoption of an inflexible rule, which prevented it from properly exercising its discretion in individual cases, and thus rendered the decision amenable to judicial review. It was held that judicial review did not apply, even though the Housing Authority was clearly a public body, because the decision to engage solicitors under the Home Ownership Scheme was not a public function but a mere administrative step. Further, the court held that the Housing Authority decision to engage solicitors was a commercial decision, and did not become part of its public function simply because the provision of public housing was one of its public functions.

Woo Cheng

With regard to the *Woo Cheng* case decision, by the Director of the Marine Department it pertained to eligibility to carry out repair and maintenance work to vessels. Here, once again, a decision adverse to the applicant had been made, and it was sought unsuccessfully to be overturned. *Woo Cheng* provides a good example of the balancing process that occurs on a case-by-case basis in order to determine whether, in making a given decision, a public actor/body is carrying out a public function and is therefore subject to judicial review. In determining whether the Director of Marine was carrying out a public function, the court considered whether the scheme in question was both intended to be and was in truth commercial rather than public in nature and concluded that the scheme was in fact commercial and thus judicial review would not lie.

In summing up it can be expected that judicial review will be unlikely to go away at anytime in the near future. However, for aggrieved applicants to make the most of the potential remedy they will have to offer more in the way of grounds than we have seen in these cases.

Postscript on the Agreement on Government Procurement

The Court of First Instance decision in *Ngo Kee Construction Co Ltd v Hong Kong Housing Authority* (2001) 1 HKC 493 is of interest in one further respect in that it considers the applicability of judicial review to a Housing Authority decision in terms of the Agreement on Government Procurement. In this vein Ngo Kee argued that the tendering process was subject to the terms of the Agreement and as such that the Housing Authority was engaged in a regulated, public function. Once again the court rejected this argument and stated that the Agreement was not yet part of domestic legislation in Hong Kong and thus no individual rights or obligations could be derived from the treaty. This will not be available as a defence in future though! ■AC

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