CACV 49/2011

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 49 OF 2011
(ON APPEAL FROM HCAL NO. 40 OF 2008)

BETWEEN

LEE YEE SHING JACKY	1st Applicant
YEUNG YUK CHING	2nd Applicant

and

BOARD OF REVIEW (INLAND REVENUE ORDINANCE)	1st Respondnet
COMMISSIONER OF INLAND REVENUE	2nd Respondent

Before: Hon Tang VP, Hartmann JA and McWalters J in Court
Date of Hearing: 14 March 2012
Date of Judgment: 30 March 2012

J U D G M E N T

Hon Tang VP:

1. The Applicants are husband and wife. For the years of assessment 1993/94 to 1997/98, they jointly elected for personal assessment in relation to their salaries income. They claimed that the husband's losses on dealings in securities and futures had been

incurred in the carrying on by him of a trade or business and should therefore be deducted when computing their total income.

2. Their claim was rejected by the Commissioner and they appealed to the Board of Review, which dismissed their appeal by its decision of 6 December 2004.

3. The applicants then appealed by way of case stated pursuant to section 69 of the Inland Revenue Ordinance (Cap 112). The questions of law for the opinion of the court stated on 29 September 2005 were:

> ' (i) Whether, as a matter of law, and on the facts found, it was open to conclude that personal assessments under appeal for the years of assessment 1993/94, 1994/95, 1995/96, 1996/97 and 1997/98 were not excessive or incorrect.
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> (ii) Whether, as a matter of law, and on the facts found, we are entitled to reject the Taxpayers' contention that Mr Lee Yee-Shing Jacky was carrying on business and trading in his securities and future index activities within the meaning of Section 14 of the Inland Revenue Ordinance and that therefore the losses sustained by such business and trade carried on by Mr Lee during each of the years of assessment from 1993/94 to 1997/98 were properly deductible in the computation of the tax liabilities of the Appellant under Personal Assessment for the relevant years.'

4. They failed before the Court of First Instance and the Court of Appeal. Their appeal to the Court of Final Appeal was also dismissed: *Lee Yee Shing v Commissioner of Inland Revenue* (2008) 11 HKCFAR 6 (31 January 2008). In the judgment of McHugh NPJ, the learned judge expressed the view, shared by the other members of the court, that:

> "109. The circumstances surrounding this Case Stated raise the question whether cost, efficiency and the interests of justice would not be better served by abandoning the Case Stated procedure and substituting an appeal on questions of law. The Case Stated procedure arose out of circumstances that have long gone. It is now easily overlooked that appeal was not a common law remedy: *Commissioner for Railways (New South Wales) v. Cavanough* (1935) 53 CLR 220 at p.225. It is the product of statute. Under the common law, legal defects in the conduct of cases had to be remedied by the writ of error or the bill of exceptions or motions for a new trial or arrest of judgment (*Conway v. The Queen* (2002) 209 CLR 203 at p.209; *Australian Iron and Steel Ltd v. Greenwood* (1962) 107 CLR 308 at pp.315-317) and later by the Case Stated procedure. That procedure probably had its origins in the practice of *nisi prius* judges referring disputed questions of law to their brethren at Westminster for informal discussion and advice: see *Conway v. The Queen* (2002) 209 CLR 203 at pp.209-210. In days when tribunals and

> courts seldom had access to transcripts, where there were no appeals and where lay tribunals needed advice on questions of law, the Case Stated procedure no doubt served a useful purpose. But times and circumstances change. The Case Stated procedure now seems an anachronism. Certainly, it creates delay, takes up the time of tribunals and parties and increases the expense of conducting litigation. Often enough, dissatisfaction with the contents of the Case leads to interlocutory litigation. An appeal, limited to questions of law, avoids these delays, expense and potential for interlocutory litigation. The chief downsides of an appeal, as opposed to the Case Stated procedure, are the cost of providing a transcript to the appellate court and the time that is often wasted by that court in determining what facts were found. However, these downsides are present in the appeal system generally. Despite their presence, an appeal, limited to questions of law, seems more likely to further the administration of justice than the Case Stated procedure."

5. Thereafter, the Applicants applied for leave to apply for judicial review to challenge the constitutionality of section 69 which required an appeal from the Board of Review to proceed by way of case stated. Leave was granted by A Cheung J (as he then was) on 20 April 2009. The matter was heard by Lam J on 18 January 2011. By judgment dated 22 February 2011, the application was dismissed.

6. This is the Applicants' appeal.

7. In this appeal, the Applicants are represented by Mr John J E Swaine (leading Mr Anthony Wu). In their helpful skeleton arguments, we are told:

> "… We do not suggest that the Board of Review's decision in the tax appeal itself should be treated as invalid. Rather, what is sought is a mean by which the Appellants can be afforded a proper (Basic Law compliant) appeal from the Board's decision. If mandamus will not achieve this, then we seek a remedial interpretation of Section 69 the Inland Revenue Ordinance so that it is read as allowing an appeal from the Board of Review to the CFI on law and fact, with directions as to how that appeal is to be implemented in this case. This does least violence in the achievement of the object. Alternatively, we would seek a ruling that, absent an appeal procedure, judicial review of the Board's decision on merits is available."

8. The Basic Law provision relied on is article 35 ("BL35") which provides:

> "Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies."

9. Before dealing with BL35, it is relevant to note Article 10 of the Hong Kong Bill of Rights ("Article 10"), which provides:

> "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. …"

10. Article 10 is not materially distinguishable from Article 6 of the European Convention ("Article 6"). As *De Smith*[1] observed in para 7-119 at 433:

> "A number of rights are contained within ECHR Art.6. The right to a fair hearing, the right to a public hearing, and the right to a hearing within a reasonable time are separate and distinct rights from the right to a hearing before an independent and impartial tribunal established by law."

11. We do not have to decide whether the proceedings under the Inland Revenue Ordinance is "a suit at law"[2]. The parties have proceeded on the basis that Article 10 applies to the proceedings before the Board of Review, and that the Board of Review is an administrative tribunal[3].

12. The parties accept that:

> "It is well-established in the case law of the ECtHR that the requirements of Art.6 are satisfied if either (a) the initial decision-maker is independent and impartial or (b) there is control by a judicial body with full jurisdiction, which does satisfy the Art.6 requirements. In other words, the question is whether the composite procedure satisfies Art.6. …"[4]

13. Or, in the words of the learned editors of *The Law of Human Rights*, 2nd edn (Clayton QC and Tomlinson QC):

> "11.415 When decisions are taken by administrative bodies which affect a person's civil rights, he is entitled to a hearing which satisfies the conditions of Article 6. This can be done in two ways:

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1 *De Smith's Judicial Review*, 6th edn

2 See the comments of Lord Walker of Gestingthorpe in *Runa Begum v Tower Hamlets LBC (HL(E))* [2003] 2 AC 430 at page 464H

3 Lam J pointed out at para 100 of his judgment and I respectfully agree: "[The Board of Review] exercises a function which is recognisably a judicial function, and does so in the public interest. It acts in accordance with detailed procedural rules which have close similarities to those followed in courts of law. Nevertheless it is not part of the judicial system of the state. Instead it is exercising (albeit with statutory sanction) [an administrative appeal function in aid of the duty of the Commissioner in tax assessment]."

4 *De Smith* para 8-029

- the decision-making body must itself comply with the requirements of Article 6 (internal Article 6 compliance) or

- the decision-making body must be subject to control by a judicial body which provides Article 6 guarantees (external Article 6 compliance).

There will be sufficient 'access to the court' where the decision-making body does not comply with Article 6(1) in some respects *provided* that the body exercising judicial control 'has full jurisdiction and does provide the guarantees of Article 6(1)'. In assessing the sufficiency of the review, it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which it was arrived at and the content of the dispute."

14. Mr Swaine does not dispute that the requirement that the Applicants' objection to the Commissioner's decision should be determined by the Board of Review is constitutional. Moreover, he accepted, as he must, the Board of Review is an independent and impartial tribunal. Nor are any other of the Article 10 rights in issue. Thus, BORO Article 10 is not in issue.

15. What is in issue is the Applicants' right "to … access to the courts …" under BL35.

16. In this context, I note that although Article 6 does not expressly mention "access to the courts", in *Golder v United Kingdom* [1975] 1 EHRR 524 the European Court of Human Rights ("ECtHR") "recognized the existence of an implied right of access to the court"[5].

17. *Golder* concerned a complaint by a prisoner that he had been denied access to a solicitor with a view to instituting libel proceedings against a prison officer. There, an issue was whether Article 6 was

"25(i) … limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined?" page 530

18. In that context, the ECtHR said although Article 6(1):

"28 … does not state a right of access to the courts or tribunals in express terms …

[5] *The Law of Human Rights*, 2nd edn, Clayton Tomlinson at page 844, para 11-372.

……

31 The terms of Article 6(1) … taken in their context, provide reason to think that this right is included among the guarantees set forth."

19. The ECtHR went on to consider the English text of Article 6(1) and said:

"32 … it too would then imply the right to have the determination of disputes relating to civil rights and obligations made by a court or 'tribunal'."

20. The ECtHR then concluded:

"35 … It would be inconceivable, in the opinion of the Court, that Article 6(1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

36 … The Court thus reaches the conclusion … that Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6(1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. …"

21. It is clear from the above that *Golder* decided that the right to access conferred by Article 6(1) was a right of access to a "court or tribunal". Thus, the right of access to the Board of Review satisfies the requirements of Article 10.

22. Counsel have referred us to important decisions both in Europe as well as in United Kingdom on Article 6. These cases mainly concerned situations where there had not been a hearing by an independent and impartial tribunal, thus, the courts had to consider whether, nevertheless, there was sufficient judicial oversight such that the composite procedure satisfied Article 6. That in turn depended on whether there was control by a judicial body with full jurisdiction[6]. It is in such context that according to *De Smith*:

"… an important jurisprudence has evolved regarding the extent to which judicial review can remedy the absence of institutional or structural independence on the part of the decision-maker."[7]

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6 See para 12 above.

7 *De Smith* 6-048 at page 345.

23. But before considering what control by a judicial body with full jurisdiction entails, it is useful to bear in mind that these authorities are concerned with how Article 6(1) might be satisfied. It could be satisfied by a tribunal which satisfies Article 6(1). As Lord Millett said in *Runa Begum*:

> "106 … The question in every case is whether the claimant's Convention rights have been satisfied by giving him or her access to the system of decision-making which Parliament has established. …"[8]

24. A determination by such a tribunal may involve questions of fact, questions of law and/or the exercise of discretion. If the designated tribunal satisfies Article 6, no further access to court may be required. But if the tribunal does not satisfy Article 6, one has to consider whether there was "external Article 6 compliance"[9]. External Article 6 compliance requires supervision by a court with full jurisdiction. Hence, the question is often whether Article 6 can be satisfied if the supervising court is limited in its power because it cannot fully review findings of fact.

25. *Bryan v United Kingdom* (1995) 21 EHRR 341 is an important decision of the ECtHR. It concerned planning permissions and decisions on appeal by an inspector appointed to conduct an enquiry and determine the appeal. The ECtHR took the view that the proceedings before the inspector did not comply with Article 6 because of his lack of independence[10]. It went on to consider whether the appeal to the High Court by way of judicial review was sufficient external Article 6 compliance.

26. After noting that:

> "47 … while the High Court could not have substituted its own findings of fact for those of the Inspector, it would have had the power to satisfy itself that the Inspector's findings of fact or the inferences based on them were neither perverse nor irrational ... ",

the ECtHR decided that the scope of review was sufficient to comply with Article 6.

27. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at 330 Lord Hoffmann explained:

> "87. The reference to 'full jurisdiction' has been frequently cited … as if it were authority for saying that (decision which does not comply with article 6(1)) has to be reviewable on its merits by an independent and impartial tribunal. … But subsequent European authority shows that 'full

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8 *Runa Begum* at para 106.
9 See *The Law of Human Rights*, para 13 above.
10 page 358, para 38

jurisdiction' does not mean full decision-making power. It means full jurisdiction to deal with the case as the nature of the decision requires."

28. In *Runa Begum*, Lord Hoffmann returned to the subject and said:

> "51 … The great principle which *Bryan* decided, 21 EHRR 342, 360, para 45, was that
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> > ' in assessing the sufficiency of the review … it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.'"

29. Lord Hoffman went on to say that where one is concerned with what he called a "classic exercise of an administrative decision":

> "53 In my opinion the Strasbourg court has accepted, on the basis of general state practice and for the reasons of good administration which I have discussed, that in such cases a limited right of review on questions of fact is sufficient. In *Bryan*, at p 361, para 47, the court said:
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> > ' Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by article 6(1). It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member states.'"

30. *Runa Begum* was concerned with the provision of accommodation to the applicant by a local authority. The statutory regime permitted an appeal to the county court on law only, which "is in substance the same as that of the High Court in judicial review …"[11]. The headnotes stated that *Runa Begum* decided that:

> "… having regard to the scope of article 6(1) as extended to administrative decisions which were determinative of civil rights, such a decision might properly be made by a tribunal which did not itself possess the necessary independence to satisfy the requirements of article 6(1) so long as measures were in place to safeguard the fairness of the proceedings and the decision was subject to ultimate judicial control by a court with jurisdiction to deal with the case as its nature required".

[11] per Lord Bingham of Cornhill at 439

31. I would note the following observations by Lord Millett in *Runa Begum*:

> "103 In *Bryan* the Strasbourg court held that in assessing the adequacy of the appellate procedure which was available to the claimant, regard must be paid to the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal. The court noted the extensive jurisdiction of the High Court and that, while it could not substitute its own conclusion for that of the inspector, it was bound to satisfy itself that his conclusion was neither perverse nor irrational. The court observed that such an approach to questions of fact was a feature of the systems of judicial control of administrative decisions found throughout the member states of the Council of Europe; and held that such an approach could reasonably be expected 'in specialised areas of the law' such as the one at issue.
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> 104 Given the context in which these words were used, the Strasbourg court can hardly have meant areas of specialised law such as patent or trade mark law. It must have meant areas which called for some special knowledge or experience on the part of the decision-maker. In *Edwards v Bairstow* [1956] AC 14, which was a tax case, Lord Radcliffe explained that the reservation of the fact-finding process to the exclusive jurisdiction of the special commissioners was not based on the specialised nature of tax law but was necessary in the interests of the efficient administration of justice.
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> 105 In the present case the subject-matter of the decision was the distribution of welfare benefits in kind, and critically depended upon local conditions and the quality and extent of available housing stock. The content of the dispute related to the reasonableness of the claimant's behaviour in refusing an offer made to her which, if refused by her, would have to be offered to others on the homeless register. Any factual issue arising in the course of the dispute, even if critical to the outcome, would be incidental to the final decision. In my opinion the subject matter of the decision and the content of the dispute demanded that the decision be made by an administrative officer with experience of local housing conditions, subject to a proper degree of judicial control; and that a right of appeal to the court on law only was sufficient for this purpose."

32. I acknowledge that *Bryan*, *Alconbury Development*, and *Runa Begum* all turned on their own facts. Nor are we concerned with "classic exercise of an administrative decision" here.

33. Given the subject matter involved in tax cases, if the Board of Review lacked any of the essential attributes under Article 10, I would be receptive to the plea that to remedy the defect, there must also be available the possibility of a full merits review of the

facts by a court. Otherwise there would not have been a full determination by an Article 10 compliant tribunal because the factual determination would have been made by a non-compliant tribunal. Here, I note that Lord Hoffmann said in *Runa Begum*:

> "37 … But, when, as in this case, the decision turns upon a question of contested fact, it is necessary *either* that the appellate court have full jurisdiction to review the facts *or* that the primary decision-making process be attended with sufficient safeguards as to make it virtually judicial." [Emphasis added]

34. But here it is rightly accepted that the determination by the Board of Review is Article 10 compliant.

35. However, we remain concerned with the Applicants' right of access to the court under BL35; a right which is independent of Article 10. The BL35 right of access is to be considered in the context where a taxpayer has had a determination by a:

> "… decision-making process (which is) attended with sufficient safeguards as to make it virtually judicial."

36. Mr Swaine has rightly accepted that in any event the right of access to court under BL35 is not absolute.

37. This is what the Law of Human Rights said about the right of access in the context of Article 6 which may be applied to BL35 as well:

> "The right of access to court is not absolute, 'by its very nature it calls for regulation by State, regulation which may vary in time and place according to the needs and resources of the community and individuals.' However, as the Court said in *Ashingdane v United Kingdom*:
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> > The limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired [and] a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" para 11.374

38. Section 69 provides for an appeal to the Court of First Instance by way of case stated[12]. Furthermore, as Lam J has held, and I do not think Mr Swaine contends to the contrary, in appropriate cases, judicial review of the decision of the Board of Review is

[12] For the sake of completeness I note that under section 69A, an appeal may be made directly to the Court of Appeal with leave. But, we are here concerned with section 69 only.

possible. So basically, what Mr Swaine complains about is the absence of the possibility of appeal against factual findings by the Board of Review.[13]

39. He referred us to the fact that, in 1947, section 69 not only enabled an appeal by way of case stated to the Supreme Court, it also provided by a proviso that the taxpayer or the Commissioner

> "… may appeal to the Supreme Court on a question of fact with the leave of such Court".

40. That proviso was removed subsequently and he has referred us to the Report of the Inland Revenue Ordinance Committee published in December 1954, which said:

> "93. We were advised that no procedure exists whereby leave may be obtained from the Supreme Court to appeal on a question of fact and that the proviso to section 69(1) is therefore meaningless.
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> WE RECOMMEND that the last three lines of section 69(1) be repealed."

41. No further light can be shed on why the proviso was removed. As Tse Yuk-yip of the Inland Revenue Department has explained in his affidavit of 22 July 2009:

> "28 … the said suggestion in the Report was adopted by the Legislative Council without any apparent discussion. …"

42. The reason given in the Report is difficult to follow since it is hard to imagine how an appeal with leave could be rendered nugatory for want of a procedure.

43. Be that as it may, I do not believe the fact that at one time appeals on a question of fact could be brought with the leave of the court provides any help to the question whether the absence of such a right infringes BL35.

44. In this context, I would respectfully adopt the views of Lord Hoffmann spoken in the context of Article 6 which I believe may equally apply to BL35:

> "57 … The concern of the court, as it has emphasised since *Golder's case* 1 EHRR 524 is to uphold the rule of law and to insist that decisions which on generally accepted principles are appropriate only for judicial decision should be so decided. In the case of decisions appropriate for administrative decision, its concern, again founded on the rule of law, is that there should be the possibility of adequate judicial review. For this purpose, cases like *Bryan* and *Kingsley* make it clear that limitations on

[13] Mr Swaine would be satisfied if the Ordinance permits appeals against findings of fact with the leave of the court.

practical grounds on the right to a review of the findings of fact will be acceptable."[14]

45. Moreover, like Lord Bingham[15], Lord Hoffmann also said:

> "47 … In any case, the gap between judicial review and a full right of appeal is seldom in practice very wide. Even with a full right of appeal it is not easy for an appellate tribunal which has not itself seen the witnesses to differ from the decision-maker on questions of primary fact and, more especially relevant to this case, on questions of credibility."

46. That was also the view of the Supreme Court in Mauritius. In *Mauritius Breweries Ltd v Commissioner of Income Tax* (1997) MR 1, which was concerned with a provision in the constitution which was derived from article 6(1)[16].

47. The Supreme Court of Mauritius was concerned with, first, whether the Tax Appeal Tribunal was independent and impartial for the purpose of Article 6(1). On that issue, they held that whilst the Chairman and Vice-Chairman of the Tax Appeal Tribunal were independent and impartial, that was not so in regard to the members.

48. The court then considered whether the fact that appeal from the Tax Appeal Tribunal to the court was limited to points of law only was repugnant to the constitution. On the question "Is an appeal on points of law really restrictive in practice and does it cover much the same ground as the Supreme Court's power of review?"[17], and the Supreme Court of Mauritius said:

> "It is obvious from what precedes that, although appeal and review are distinct procedures, appeal dealing with merits and review with legality, an appeal on points of law covers much the same ground as review proceedings as we encounter on appeal the same familiar doctrines of (a) error of law on the face or the record (b) reasoned decisions, (c) reasonableness, (d) review for no evidence and (e) abuse of discretion." At page 7

> "… as stated already, there is not much difference in practice between an unrestricted right of appeal and a right of appeal on points of law." At page 9

49. *Abdul Raouf Jauffur v Commissioner of Income Tax (Mauritius)* [2006] UKPC 32 (dated 21 June 2006) is a decision of the Privy Council on appeal from the Supreme Court of Mauritius. There, the Privy Council had to consider section 8 of the Constitution of Mauritius which expressly provided that there should be no compulsory deprivation of property

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14 *Runa Begum*
15 See para 30 above.
16 Thus, the court applied the principles of *Bryan*: page 8.
17 *Mauritius Breweries Ltd* at page 3

> "… except where [the relevant law provides]
>
> > '(ii) … a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining payment of that compensation;'"

50. When dealing with this express right of access to the court, their Lordships regarded the argument that since the Tax Appeal Tribunal Act 1984 required appeals to be by way of case stated it contravened the Constitution, to be without substance. Lord Walker of Gestingthorpe, giving the judgment of the Privy Council, said

> "… An appeal by way of case stated is recognised in many jurisdictions as the most convenient medium for an appeal from an inferior tribunal limited to points of law. The substance of the matter was clearly and correctly covered by the Supreme Court in *Mauritius Breweries Ltd v Commissioner of Income Tax* [1997] MR 1, 7-9 (the fourth and sixth issues). …" Para 8

51. I would further note the following passages from the judgment of Lord Walker:

> "1. Many countries have found that the complexity of their social organisation and legislation calls for the establishment of specialised tribunals to serve as the first port of call for citizens who wish to contest official decisions on such matters as taxation, social security, and planning permission. Such specialised tribunals (which are not courts) perform the function of ascertaining and evaluating the facts relevant to a matter within their special expertise. There is almost invariably a right of appeal from a specialised tribunal to a court, but often the appeal is restricted to questions of law.
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> ……
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> 9. The judgment of the Supreme Court in the *Mauritius Breweries Ltd* case is, in their Lordships' respectful opinion, an admirable statement of how fair trial principles apply to the proceedings of specialised inferior tribunals, and to appeals from them. It followed the decision of the European Court of Human Rights in *Bryan v United Kingdom* (1995) 21 EHRR 342. Since the coming into force of the United Kingdom Human Rights Act 1998 the subject has been revisited by the House of Lords in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 and in *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430. But there is nothing in those decisions to cast doubt on the correctness of the decision in the *Mauritius Breweries Ltd* case."

52. With respect, *Abdul Raouf Jauffur* provides further support for the view that appeals by way of case stated are an acceptable limitation on a taxpayer's right of access to the court under BL35.

53. Subsequent to the decision of the Court of Final Appeal, the Administration has proposed an amendment to section 69 so as to replace appeal by way of case stated by an appeal on a point of law. Mr Swaine submitted that the amendment which does not provide for the possibility on an appeal on fact does not comply with Article 35. That is not an issue that we have to decide but for obvious reasons I do not agree.

54. Mr Swaine refers to the proposal to show that the Administration:

> "… expected that the efficiency in processing an appeal case could be enhanced with the abolition of the case stated procedure, …"[18].

55. That may be so but I do not believe it supports Mr Swaine's argument that appeals by way of case stated under section 69 are a disproportionate restraint on access to court.

56. Mr Swaine also contends that the limited factual review which is possible, either by way of case stated or on judicial review, is not a sufficient replacement for an appeal on fact. He pointed to the fact that section 67 of the Inland Revenue Ordinance enables the parties by agreement to bypass the Board of Review and appeal directly from the Commissioner to the Court of First Instance. If that course were taken, there would be a right of appeal on fact against the decision of the Court of First Instance. Mr Swaine submitted that this supports the view that insofar as proceedings by case stated under section 69 limit an appeal to points of law only, that is not a proportionate constraint.

57. He has referred to the official report of proceedings on Wednesday, 14 March 1979 when the Financial Secretary on the second reading on the amendment to introduce section 67 said:

> "The proposal to provide for the right of direct appeal, by-passing the Board of Review, is made in the interests of both the Commissioner of Inland Revenue and of taxpayers. The Commissioner wishes to see that, in cases which involve important or difficult points of law, binding judicial precedents are established as soon as possible. Taxpayers wish to see that their expenses are minimised. Where large sums are in dispute, a taxpayer often engages at his expense, a tax silk to represent him before the Board because adverse decisions by the Board, particularly on questions of fact, are very difficult to upset on subsequent appeals to the Courts. In such cases, it ought to be possible, if the parties so prefer, to have the appeal argued before the High Court. At present, not

[18] LC Paper No. CB(1) 1152/09-10 at page 13

> infrequently, cases concerning important questions of law, as determined by the Board, are subsequently taken on appeal to the High Court."

58. But with respect, I do not believe section 67[19] supports the argument that absence of the possibility of appeal on a matter of fact from the Board of Review is unconstitutional.

59. Lam J has described in detail the existing tax appeal regime in paras 12 to 26 of his judgment. As he pointed out, apart from the chairman and 10 deputy chairmen who shall be persons with legal training and experience, there is a panel of not more than 150 members. There are currently 96 members, of whom 50 are legally qualified and 10 with accounting qualifications. The remainder consist of academics and business people. The Board decides by a majority, thus the chairman or deputy chairmen could be outvoted by the members. One might describe it as a tribunal made up of taxpayers to decide the tax liability of a fellow taxpayer. The fact that neither the Commissioner nor the taxpayer may appeal on fact is eminently reasonable and certainly not a disproportionate restraint.

60. The learned judge then went on to review the relevant local authorities on case stated in paras 31 – 44 and then the availability of judicial review in addition to appeals under section 69.

61. Mr Swaine submitted that the learned judge regarded judicial review as the primary route of access. With respect, I agree with Mr Rimsky Yuen, SC (with Ms Jennifer Tsui, for the Commissioner) that the learned judge had not so regarded it. As the learned judge explained because of the Applicants' systemic challenge, he found it necessary:

> "45. … to briefly mention about the alternative of … judicial review …"

62. For the reasons I have given above, there is no real difference between judicial review and an appeal on law only.

63. I must say I also regard any difference between an appeal by way of case stated and judicial review to be more apparent than real. In *Kwong Mile Services Ltd v Commissioner of Inland Revenue* (2004) 7 HKCFAR 275, Ribeiro PJ described an appeal by way of case stated as follows:

> "31. Appeals from the Board of Review to the courts lie only on questions of law. But intervention in an appeal on law only is not confined to instances in which it is apparent on the face of the record that the determination appealed against resulted from a specifically identifiable error of law. Just because there is no appeal on facts, it does not mean that the appellate court is precluded from detecting and correcting errors of law buried beneath conclusions ostensibly of fact. Sometimes, as Lord Radcliffe put it in *Edwards (Inspector of Taxes) v. Bairstow* [1956]

[19] A "procedure (which) has been rarely used": Lam J at para 23.

> AC 14 at p.36, 'the true and only reasonable conclusion contradicts' the determination appealed against. If so, the appellate court will assume that the determination resulted from an error of law. And that opens the way for the appellate court to intervene on the ground of an error of law.
>
> ……
>
> 37. In an appeal on law only the appellate court must bear in mind what scope the circumstances provide for reasonable minds to differ as to the conclusion to be drawn from the primary facts found. If the fact-finding tribunal's conclusion is a reasonable one, the appellate court cannot disturb that conclusion even if its own preference is for a contrary conclusion. But if the appellate court regards the contrary conclusion as the true and only reasonable one, the appellate court is duty-bound to substitute the contrary conclusion for the one reached by the fact-finding tribunal. The correct approach for the appellate court is composed essentially of the foregoing three propositions. These propositions complement each other, although the understandable tendency is for those attacking the fact-finding tribunal's conclusion to stress the third one while those defending that conclusion stress the first two."

64. It will have been noted that in *Abdul Raouf Jauffur*, the Privy Council was concerned with an appeal by way of case stated only.

65. With respect, I agree with Lam J who said:

> "30. … the Case Stated procedure is cumbersome and perhaps inefficient (in the sense of being more costly and time consuming for the parties), whether such procedure has the effect of watering down the Applicants' right of access to court is quite a different issue. …"

66. Indeed, the passage from the judgment of McHugh NPJ quoted in para 4 above was also concerned with the inefficiency of an appeal by way of case stated as compared with an appeal on a point of law.

67. Mr Swaine relied on paras 98 to 108, especially para 108 in McHugh PJ's judgment. Mr Swaine submitted that had the Applicants not been confined to an appeal by way of case stated, the result might have been different.

68. In para 108, McHugh NPJ said:

> "108. Although I think the Case Stated and the reasoning of the Board have a number of unsatisfactory elements, the limited scope of an appellate court's function on a Case Stated means that this appeal must be dismissed."

69. Earlier at para 102, he said:

> "102. Despite the absence of the above factors, if I had been the tribunal of fact in this case, I have little doubt that I would find on the whole of the evidence, if I had accepted it, that the husband carried on the business of share trading. …"

70. However, it is also necessary to note that at para 103, he pointed to the difficulty that:

> "103. … the Board made no findings of fact concerning the evidence set out in para.20 of the Case or, for that matter, anywhere else. I have already mentioned the principles concerning the construction of a Case Stated to which Lord Atkinson referred in *Usher's Wiltshire Brewery Ltd v. Bruce* [1915] AC 433 at pp.449-450 … But even giving those principles their maximum application to the present Case Stated, I do not think that this Court has the power to treat the recital of evidence in para.20 as constituting facts. This is particularly so as the Board having outlined this evidence went on thereafter to indicate that it had grave doubts as to the overall creditability of the husband. Construing this paragraph as containing implied findings of fact is made even more difficult by reason of the Board referring in para.39 of its Reasons to 'the strategy he *claimed* to adopt for the purpose of trade' (my emphasis). Because I think that para.20 cannot be construed as if it consisted of facts found by the Board, I have reluctantly concluded that the appeal must be dismissed."

71. I also note that in the joint judgment of Bokhary and Chan PJJ they said:

> "38. The question whether something amounts to the carrying on of a trade or business is a question of fact and degree to be answered by the fact-finding body upon a consideration of all the circumstances. In the circumstances of the present case, a conclusion that the husband's dealings in securities and futures amounted to the carrying on of a trade or business is by no means to be regarded as the true and only reasonable conclusion. Imposing a conclusion contrary to that reached by the Board is particularly difficult where – as in the present case – the parties contending for that contrary conclusion bore the onus of proof, the material facts were peculiarly within the knowledge of one of them, they sought to rely on his testimony but he was not found to be a reliable witness and was regarded as an evasive one. It is particularly difficult for parties so placed to establish a sufficiently full set of facts when seeking appellate intervention in their favour on the 'true and only reasonable conclusion' basis."

72. As Lam J said and I respectfully agree:

> "113. In the course of the hearing of the present application, Mr Swaine submitted that the Applicants did not have the opportunity of properly putting before the court a case of misdirection in terms of the Board's failure to consider certain relevant matters and to make the relevant findings on the same because nobody perceived such matters to be relevant until the Court of Final Appeal changed the law. Counsel referred to paras. 65 to 96 in the judgment of McHugh NPJ.
>
> 114. I am not sure whether the Court of Final Appeal had changed the law in the light of the scope of the appeal before that court and the basis on which the other members of the Court of Final Appeal disposed of the appeal. It may be that counsel was encouraged by para. 100 to 102 of the judgment in making such submission.
>
> 115. However, even assuming that the law has been changed, as Mr Yuen submitted the Applicants' predicament was not caused by the Case Stated procedure. The crux of the matter is that the Applicants had not perceived the case in the same way as McHugh NPJ did and the tax appeal had never been argued accordingly. Thus, they would be faced with the same predicament whether the appeal was brought by way of Case Stated or otherwise.
>
> 116. Admittedly the Applicants could not bring an appeal on facts under the statutory appeal regime. But this limitation has nothing to do with the Case Stated procedure. Rather this is a restraint set upon the supervisory and the appellate jurisdiction of the court in respect of administrative decisions.
>
> 117. Hence, I conclude that the Applicants have all along enjoyed access to the courts with full jurisdiction to deal with all the proper complaints that could have arisen from his tax assessments."

73. I am of the view that the fact that the Applicants could only appeal by way of case stated made no difference to the result. Furthermore, as the learned judge has pointed out, and I agree, proceedings by way of case stated was also possible. Moreover, I must say, I see no significant difference in substance between an appeal by way of case stated, judicial review or an appeal on law only although procedurally they are different.

74. For the above reasons, I would dismiss the appeal and make an order nisi that the Applicants pay the cost of the appeal.

Hon Hartmann JA:

75. I have had the benefit of reading in draft the judgment of Tang VP. I agree with his judgment and I too would dismiss the appeal.

Hon McWalters J:

76. I agree with the judgment of the Vice President.

(Robert Tang)	(M J Hartmann)	(Ian McWalters)
Vice-President	Justice of Appeal	Judge of the Court of First Instance

Mr John J E Swaine & Mr Anthony Wu instructed by Raymond C P Lo & Co for the Appellants

Mr Rimsky Yuen, SC & Ms Jennifer Tsui instructed by Department of Justice for the 2nd Respondent

1st Respondent: Board of Review, in person (Appearance Excused)