

**Relevant Extracts of the Judgment
Handed Down by Hon Justice M H Lam on 10 August 2007
on the Application for Judicial Review
(Chu Hoi Dick and Ho Loy vs Secretary for Home Affairs)**

(a) Non-statutory nature of the grading system

“The Classification has no statutory standing. It is an internal mechanism of the Board.” (paragraph 5 of the Judgment)

“Thus, regarding the actual measures to be adopted for the preservation of a graded building, the decision maker is AMO. Regarding a declaration as a monument, the decision maker is the Authority. A classification by the Board is a matter that the decision maker can take into account. But it is by no means binding.” (paragraph 6 of the Judgment)

(b) No automatic linkage between grading and monument declaration

“Hence, as a matter of actual practice in the past, a classification by the Board, whether as Grade I, Grade II or Grade III buildings, is not determinative as regards whether a declaration would be made by the Authority under Section 3 of the Ordinance.” (paragraph 11 of the Judgment)

“Given my analysis, I do not think it is misleading to say that there is no automatic linkage between the grading system and a declaration under Section 3.” (paragraph 41 of the Judgment)

(c) Advisory Role of AAB

“Under the Ordinance, the Board only plays an advisory role: see Section 18 of the Ordinance. In respect of the power to declare a building to be a monument under Section 3, it is crystal clear that the power is vested upon the Authority, not the Board.” (paragraph 12 of the Judgment)

“Since the Board was established by the Ordinance, its proper role is the role set out under the Ordinance. As provided under Section 18, the function of the Board is to provide advice. It is not the function of the Board to make decision. As to how its advice would be weighed in the light of other relevant matters, it is a matter for the decision maker. ...Whilst the Board may give advice even on its own volition, it would be acting *ultra vires* if it purports to dictate the Authority as regards whether a Section 3 declaration should be made.” (paragraph 29 of the Judgment)

(d) Discretion of the Antiquities Authority

“... under the Ordinance the discretion under Section 3 is vested on the Authority, not the Board. In the exercise of his discretion, he could have regard to the Classification. ... How he weighed it against the other relevant matters falls primarily

within the province of his judgment.” (paragraph 21 of the Judgment)

“But it does not follow that the Authority has to make a declaration once he is satisfied a place, building, site or structure has some historical, archaeological or palaeontological significance. After all, the declaration of a building as a monument would entail consequences under Section 6 and that may in some cases result in serious interference with property rights. I agree with Mr Yu that one must not confuse the condition precedent to the exercise of a power under Section 3 with the prescription of the sufficient condition for the exercise of such power. By the use of the word ‘may’, the statute clearly confers a discretion on the Authority not to exercise the power even if the condition precedent is satisfied.” (paragraph 47 of the Judgment)

(e) High Threshold for Monument Declaration

“He (*i.e. The Authority*) said the prevailing standard is a stringent one and all declared monuments have to pass a high threshold (“門檻極高”) with indisputable (“毋庸置疑”) historical, archaeological or palaeontological significance. “(paragraph 43 of the Judgment)

“... as far as an exercise under Section 3 is concerned, a grading by the Board is only a preliminary step in the screening process by the AMO. Having regard to the serious consequence for a declared monument under Section 6, it is perfectly legitimate for the Authority to set a more stringent standard for a Section 3 declaration as opposed to a grading exercise under the administrative grading system.” (paragraph 55 of the Judgment)

“The Ordinance does not set the yardstick for a Section 3 declaration. It leaves it to the Authority to do so. In the exercise of his very wide discretion, bearing in mind the object of the statute and the consequences of a declaration and the availability of other preservation options, a Section 3 declaration is at the higher end of the measures that can be adopted for preservation. Therefore, it is right and proper that the Authority should adopt a high threshold in line with how the discretion has been exercised in the past. That cannot be said to be *Wednesbury* unreasonable. Nor can such threshold be regarded as unlawful.” (paragraph 55 of the Judgment)