

HONG KONG / JUDGMENT

THREE WEEKLY LTD v. OBSCENE ARTICLES TRIBUNAL AND ANOTHER

COURT

Court of Appeal

DECIDED

31 May 2007

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bjbj CACV 315/2006 & 316/2006 CACV 315/2006 IN THE HIGH COURT OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 315 OF 2006 (ON
APPEAL FROM HCAL NO. 42 OF 2003)

BETWEEN THREE WEEKLY LIMITED Applicant and OBSCENE ARTICLES TRIBUNAL 1st
Respondent COMMISSIONER FOR TELEVISION AND ENTERTAINMENT LICENSING AUTHORITY
2nd Respondent

CACV 316/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL CIVIL APPEAL NO. 316 OF 2006 (ON APPEAL FROM HCAL NO. 43 OF 2003)

BETWEEN THREE WEEKLY LIMITED Applicant and COMMISSIONER FOR TELEVISION AND
ENTERTAINMENT LICENSING AUTHORITY Respondent

Before : Hon Ma CJHC, Stock JA & Burrell J in Court Dates of Hearing : 15 & 16 March 2007 Date of
Handing Down Judgment : 31 May 2007

J U D G M E N T

Hon Ma CJHC : At the heart of the present appeals is a decision of the Obscene Articles Tribunal
(the OAT), the 1st Respondent, made on 8 April 2003 classifying as obscene an article published
by Three Weekly Limited (the Applicant) in the 2 November 2002 issue of Three Weekly

magazine. The issues arising in the present appeal involve challenges to this decision based on the Basic Law and the Hong Kong Bill of Rights Ordinance as well as challenges with regard to the reasoning and merits of the actual decision. I will identify these issues in due course. The article in question and the classification of it made by the 1st Respondent On 30 October 2002, there was published in East Week magazine an article which included on its cover and in the inside pages a photograph, said to be of a well known actress, that showed the face of a woman and her naked breasts. The eyes and nipples were blurred or pixelated. The front cover was headed was taken, were described in some detail. The East Week article caused a public outcry and there was widespread condemnation. On 2 November 2002, the Applicant published the edition of Three Weekly with which we are concerned in this appeal. A detailed description of the cover and contents is contained in the judgment of Lam J dated 29 June

2006. I will only attempt a brief description. The heading on the cover is)Y0W N ng just her face (eyes pixelated) and a part of her breasts (but not the nipples). The contents page indicated that the feature article appeared at page 28 of the magazine. On that page was again the photograph of the woman, similar to the picture on the cover except larger. The same banner (Not Acceptable by any Standard) was also emblazoned across the picture. The article contained the same heading as on the front cover. The article ran for several pages (from page 28 to 34, altogether five (excluding advertisement pages)). Apart from informing the reader of the background of the photograph of the woman and the result of interviews with various people (including a friend and the boyfriend of a well known actress (whose picture was also shown), and the reactions of some members of the public, who were pictured with a copy of the East Week magazine I have earlier described), there also appeared a description of the photograph. At page 29, under the heading gq&N^ man bears very close similarity to a female artist of the entertainment sector, further, it is quite obvious that the photo was taken under duress inside what is believed to be the cabin of a light goods van. As the incident took place a long time ago, the actress, said to be the subject of the photo, has undergone transformation in her appearance and has also become one of the heavyweight in the movie industry, after having made a move from the television industry. The reason for the showing up of a photo, which was made over a dozen of years ago, seems to remain an unsolvable puzzle at this stage. Following publication of the magazine, on 5 November, the Commissioner for Television and Entertainment Licensing Authority (the 2nd Respondent) submitted part of the magazine to the OAT for an interim classification under section 13(2) of the Control of Obscene and Indecent Articles Ordinance, Cap.390 (the Ordinance). The Form used by the 2nd Respondent (which is a proforma one under the Rules to the Ordinanc hT R The classification exercise (described in section 8 of the Ordinance) involves the OAT classifying an article submitted to it as being Class I (neither obscene nor indecent), Class II (indecent) or Class III (obscene). On 6 November, the OAT made the interim classification and classified the article as Class III (that is, obscene). Notice of this was given to the Applicant on 9 November and this was also published in newspapers by the Registrar of the High Court (pursuant to section 19 of the Ordinance) the same day. The

same description of the article as set out in paragraph REF _Ref164224163 \r \h * MERGEFORMAT above, was used. On 12 November 2002, the Applicant applied for a review of the interim classification. By a letter dated 7 November 2002, the Applicant's solicitors requested the Registrar of the OAT to identify precisely which parts of the article and photographs contained in the magazine were said to be obscene. In reply, by a letter dated 8 November 2002, the Officer charge in the weekly Volume 160 was the dominant effect of the article as a whole which causes obscenity. The review hearing took place over the course of two days (18 February and 7 March

- 2003) before the OAT which was presided by a magistrate (Mr Selwyn Au). The proceedings were conducted in Chinese. By a reasoned decision dated 8 April 2003, the Tribunal upheld the earlier classification (which was apparently made by another Tribunal also presided over by Mr Au). It is from this decision that the Applicant appealed under section 30 of the Ordinance (in HCAL 43/2003). For reasons that will become apparent later, the Applicant also instituted judicial review proceedings (HCAL 42/2003). Initially, the court only heard the statutory appeal (on 3 and 4 March
- 2004) but this was later consolidated with the judicial review proceedings and the two proceedings were heard by Lam J on 13 June
2006. By a judgment dated 29 June 2006, Lam J dismissed both the statutory appeal and the application for judicial review. It is from these dismissals that the Applicant now appeals to this court. Before going into the issues, I should just point out that on 29 April 2003, the Applicant and its editor were charged with publishing an obscene article under to section 21(1)(a) of the Ordinance. The prosecution has been adjourned pending the outcome of the present proceedings. The issues on appeal The challenges made by the Applicant against the classification of obscenity made by the OAT (the 8 April 2003 decision) can conveniently be analyzed under two broad headings : first, the challenges based on the Basic Law and the Bill of Rights; secondly, those challenges made as to the reasoning and merits of the actual decision. In his written submissions, Mr Gerard McCoy SC (who appears for the Applicant) categorized the first set of challenges as being constitutional in character; the challenges to the merits of the decision were based on rationality and legality arguments. The constitutional challenges were essentially as follows It was submitted as a starting point that the classification exercise undertaken by the OAT constituted criminal proceedings and ought therefore to be seen in such light. The consequences of such a premise in the present case were said to be two fold. First, the effect was that on a true construction of the Ordinance, the OAT had no jurisdiction to conduct a post publication classification exercise at all. In other words, any classification undertaken by the OAT could only relate to pre publication articles. This therefore automatically invalidated the Tribunal's decision for lack of jurisdiction. Secondly, as an alternative argument, the effect of the classification exercise being criminal proceedings was that Article 11 of the Bill of Rights was accordingly engaged. It was argued that the requirements of that Article were not complied with by the OAT in the present case. Specifically, (a) there should have been a

presumption of innocence, (b) the Tribunal ought to have applied a criminal burden and standard of proof and (c) the provisions of section 11(b)(i) of the Ordinance allowing hearsay evidence be adduced in classification proceedings, were unconstitutional as being contrary to Article 11(2)(e) of the Bill of Rights. It was then argued as an alternative that if the classification exercise did not constitute criminal proceedings, then they involved the determination of rights and obligations in a suit at law so as to engage Article 10 of the Bill of Rights. Accordingly, there were breaches of that Article in the present case in that (a) the members of the Tribunal (other than the presiding magistrate) which made the determination had not taken a judicial oath, (b) the Tribunal had not been an independent or impartial one in that the presiding magistrate had sat at both the interim classification and review classification stages and (c) the mechanism for an appeal against any decision of the OAT was too limited (this last ground also meant there was allegedly a breach of the Article 35 of the Basic Law as there was insufficient access to the courts). The challenges made by the Applicant regarding the reasoning and merits of the actual decision can be identified as follows The OAT exceeded its jurisdiction by classifying the contents or index page of the magazine when this was not before it for determination. The Tribunal also erred in finding that the relevant article and photographs showed a victim of crime and violence when there was no evidence before it to justify such a finding. The Tribunal misapplied the law by referring to factors found in the Film Censorship Ordinance, Cap.392 (the FCO) in arriving at its classification of obscenity. The Tribunal was wrong to take into account any breach of the right to privacy or the invasion of privacy of the woman referred to in the relevant article and as depicted in the relevant photograph. The Tribunal was also wrong to take into consideration in arriving at its classification of obscenity the fact of commercial exploitation of the photograph in question. The Tribunal failed to take into account the comparables that had been provided by the Applicant, these being other articles and photographs previously classified by the OAT. Before dealing with these issues, I think it is important first to set out the statutory scheme regarding the legal status and functions of the OAT. This will have an important bearing on many of the issues that arise in the present appeals. The Control of Obscene and Indecent Articles Ordinance, Cap.390 The object of the Ordinance is, as the preamble states, to control articles which consist of or contain material that is obscene or indecent. As the Chief Justice observed in *Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority* (1997-98) 1 HKCFAR 279 at 283I, the Ordinance restricts the freedom of speech in the interest of the community as a whole. Restrictions are effected in a number of ways : first, by a system of classification under which articles are classified, with the result that if classified as either obscene or indecent, their publication or sale may be prohibited or made subject to conditions; secondly, by a system of prosecution whereby criminal consequences may follow the publication or display of articles that have been classified as obscene or indecent, or which are held by a court of law to be obscene or indecent. These quite different aspects both involve the OAT. In *Oriental Daily Publisher Ltd* at 284G I, in going through the statutory scheme, the Chief Justice (with whose judgment the other judges in the Court of Final Appeal concurred) highlighted the fact that the OAT performed

two separate functions : a classification function and a court referral function. The classification function is a self contained procedure triggered by a reference to it by particular persons or public officers named by the Ordinance; whereas the court function can only be triggered by a court or magistrate seeking the Tribunal's determination of an issue in ongoing litigation. As Lam J observed in the court below, these two functions are in fact specifically referred to in the preamble to the Ordinance. The common thread running through these two quite different functions performed by the Tribunal is the responsibility to determine whether any article referred to it is indecent or obscene. In the performance of these functions, the OAT has, as it were, the monopoly : only it can make classifications or determinations of obscenity and indecency. The OAT consists of a presiding magistrate sitting together with two adjudicators chosen from a panel of adjudicators : section 7(1). The panel of adjudicators consists of eligible persons appointed by the Chief Justice : section

5. I understand that at present the panel has about 150 adjudicators. The Ordinance gives some guidance to the Tribunal (in the exercise of both its functions) as to what constitutes obscenity or indecency. The following provisions are relevant
 - (2) For the purposes of this Ordinance a thing is obscene if by reason of obscenity and repulsiveness.
10. Guidance to Tribunal
 - (1) In determining whether an article is obscene or indecent or whether any matter publicly displayed is indecent, or in classifying an article, a Tribunal shall have regard to standards of morality, decency and propriety that are generally accepted by reasonable members of the community, and in relation thereto may, in the case of an article, have regard to any decision of a censor under section 10 of the Film Censorship Ordinance (Cap.
- 392) in respect of a film within the meaning of section 2(1) of that Ordinance; the dominant effect of an article or of matter as a whole; in the case of an article, the persons or class of persons, or age groups of persons, to or amongst whom the article is, or is intended or is likely to be, published; in the case of matter publicly displayed, the location where the matter is or is to be publicly displayed and the persons or class of persons, or age groups of persons likely to view such matter; and whether the article or matter has an honest purpose or whether its content is merely camouflage designed to render acceptable any part of it. (2) The classification function of the OAT (the function with which we are involved in these appeals) arises in the following way Part III of the Ordinance deals with the classification function of the OAT (as we shall see, a different part of the Ordinance Part deals with the court referral function). This part is headed CLASSIFICATION OF ARTICLES BY A TRIBUNAL . Articles (or any matter that is publicly displayed) can be submitted to the Tribunal by a number of persons : the author, printer, manufacturer, publisher, importer, distributor or owner of the copyright of any article or any person who commissions the design, production or publication of any article, the Secretary for Justice or any public

officer authorized by the Chief Secretary (this including the Commissioner for Television and Entertainment Licensing Authority) (section 13). In the present case, the initial submission to the OAT was made by the Commissioner. As to the possible outcomes that may occur upon submission of an article, section 8(2) provides

8. Jurisdiction (1)
- (2) In relation to any article submitted to it under section 13, a Tribunal shall refuse an application to make a classification if it is of the opinion that the article may be child pornography within the meaning of section 2(1) of the Prevention of Child Pornography Ordinance (Cap.579), and may in any other case refuse an application to make a classification in respect of any article if it considers that article cannot be adequately described for the purpose of giving notice of classification under section 19; or make a classification that the article is a Class I article if it is of the opinion that the article is neither obscene nor indecent; a Class II article if it is of the opinion that the article is indecent; or a Class III article if it is of the opinion that the article is obscene; and
- (c) in respect of any classification that an article is a Class II article and at the time of making that classification, impose conditions relating to the publication of that article. (3) It will be remembered that the relevant article in the present case was classified as Class III. In relation to this provision, it is important to note that the function of the Tribunal in this context is to give an opinion as to whether an article is indecent or obscene. This is what is required of the Tribunal in the classification exercise and the word opinion is used throughout the section. Where an article is submitted to the Tribunal, it first makes an interim classification and this is done in private without the attendance of either the original applicant or any other person : section 14(1)(a). This determination must be made within five days of the original submission of the article to it and, unless this period is extended, if an interim classification is not made within this period, there is a provision to the effect that a full hearing shall take place (as to which see below) : sections 14(1)(b), (2). In making an interim classification, the Tribunal is not obliged to give reasons unless a point of law is involved but it is obliged to identify the particular part of the relevant article which is classified as obscene or indecent : sections 7(3), 14(3)(a) and (c). The Tribunal may also give guidance to the applicant in relation to the submitted article : section 14(3)(b). Where, as in the present case, an interim classification is made, the Registrar of the High Court is required to give notice of it, once each in an English language and Chinese language daily newspaper : sections 19(1), (2). Unless such notice is given, the interim classification does not take effect : section 4(a). This is effectively the method of notification to all interested persons. Notice of the relevant article in the present case was given on 9 November 2002 (see paragraph REF _Ref164149059 \r \h * MERGEFORMAT above). Within five days of an interim classification taking effect, the person who submitted the article for classification or any person who would have been entitled to do so, may apply for a full hearing before the OAT to review the interim classification : section 15(1). In the present case, this was done by the Applicant on 12 November 2002 (see paragraph REF _Ref164149059 \r \h * MERGEFORMAT

above). Where no full hearing is requested, the interim classification becomes a final one : section 15(5). The full hearing is before a presiding magistrate and four adjudicators from the panel but no adjudicator who was on the Tribunal which made the interim classification may sit : sections 15(1A), 2(b). This limited exclusion means, however, that in theory the same magistrate can sit at both the interim and review classification stages. This is one of the complaints made by the Applicant in the present case : see paragraph REF _Ref164151225 \r \h * MERGEFORMAT 12(3) above). At the full hearing, the interested parties may appear as well as their representatives (including legal representatives) : section 15(2)(a). The Tribunal can determine its own procedure, has power to compel persons to give evidence or to produce documents. The proceedings at this stage can in some respects be said to bear some similarity to judicial proceedings but, in my view, is considerably less formal by reason in particular of the leeway allowed to the Tribunal regarding the consideration of evidence. Sections 11(b) and (c) of the Ordinance state

11. Powers A Tribunal (a)
 - (b) when exercising its jurisdiction under Part III may, subject to that Part and Part VIII, determine its own procedure and in particular may receive and consider any material, whether by way of oral evidence, written statements, documents or otherwise, notwithstanding that such material would not be admissible in evidence in civil or criminal proceedings; by notice in writing signed by the presiding magistrate, require any person to attend before it at any hearing and to give evidence and produce documents; administer oaths and affirmations; examine on oath, affirmation or otherwise any person attending before it at any hearing and require such person to answer all questions put by or with the consent of that Tribunal; determine the manner in which the material mentioned in subparagraph (i) shall be received; and determine the manner in which any article shall be viewed, seen or examined by that Tribunal;
 - (c) may do all things ancillary to the powers conferred by this section; or reasonably necessary for the discharge of its functions under this Ordinance. After the full hearing, the Tribunal has the same power as in the case of an interim classification : see section 8(2) (see subparagraph (3) above). Notice of any classification following a full hearing is again to be given by the Registrar of the High Court under section 19 of the Ordinance (see subparagraph (6) above). Following the classification made by the OAT, a reconsideration of that decision can take place, although the Tribunal may refuse any request to reconsider where the article was classified within a period of three years prior to the earlier classification : section 17. Any party to any proceedings before a Tribunal may appeal to the Court of First Instance against a decision of the Tribunal on a point of law : section

30. Points of law are determined on behalf of the Tribunal by the presiding magistrate (who is the only person on the Tribunal required to be legally qualified) : section 7(3). Such an appeal, it should be noted, is restricted only to points of law which have actually been decided by the Tribunal. In other words, it is not enough that points of law are involved; such points must have been adjudicated upon by the presiding magistrate. This was the effect of sections 30 and 31 of the Ordinance as confirmed by the Court of Final Appeal in *Oriental Daily Publisher Ltd* at 293J 294A. However, apart from this statutory appeal, a person who is dissatisfied with a decision of the OAT may also institute judicial review proceedings and this was what has happened in the present case. No one has sought to argue that the statutory right of appeal somehow excludes the judicial review route; indeed the possibility of both statutory appeal and judicial review proceedings was expressly confirmed by the Court of Final Appeal in *Oriental Daily Publisher Ltd* (see in particular at 293F 295J). Before dealing with the court referral function of the OAT, I should briefly describe some of the criminal offences created under the Ordinance. Some of these offences are set out in Part IV of the Ordinance. The offences under this Part can be divided into two types : first, offences that deal with the publication or display of obscene and indecent material (sections 24); secondly, offences that follow a classification made by the OAT and these offences relate to the publication or possession of material that has been classified as Class II (indecent) or Class III (obscene) (sections 27A). Section 28 provides a statutory defence where the relevant article that is published or displayed was intended for the public good on the ground that such publication or display was in the interests of science, literature, art or learning, or any other object of general concern. I now turn to the court referral function of the OAT. I have referred to the function in this way to highlight the fact that this function is performed by the Tribunal in the context of court proceedings, whether criminal or civil. Part V of the Ordinance (headed DETERMINATION BY A TRIBUNAL) contains only section 29 which reads
29. Tribunal to have exclusive jurisdiction
- (1) A Tribunal shall have exclusive jurisdiction to determine for the purposes of this Ordinance whether any article is obscene or indecent; any matter that is publicly displayed is indecent; or the ground of defence under section 28 is proved in respect of the publication of an article or the public display of any matter.
- (2) Subject to subsection (3), where in any civil or criminal proceedings before a court or magistrate a question arises for the purposes of this Ordinance as to any of the matters mentioned in subsection (1), that court or magistrate shall refer that question to a Tribunal; and the parties to those civil or criminal proceedings and, in the case of proceedings to which a public officer is not a party, the Secretary for Justice or their representatives, may appear and be heard at any hearing of that Tribunal relating to that reference.

- (3) Where in any civil or criminal proceedings before a court or magistrate a person admits for the purposes of this Ordinance that an article is obscene or indecent or that any matter publicly displayed is indecent the court or magistrate may accept that admission and so find against that person, and subsections
- (1) and (2) shall not apply. I would like to draw attention specifically to two points regarding this function of the Tribunal It is apparent particularly from section 29(2) that the role of the OAT is intertwined with the civil or criminal proceedings out of which any question of obscenity or indecency arises. Where a question regarding any of the matters set out in section 29(1) is referred to the OAT by the relevant court in civil or criminal proceedings, the proceedings before the Tribunal become a part of those civil or criminal proceedings. This is not only the clear implication of section 29, but is also supported by section 11(a) which states that where a Tribunal exercises its jurisdiction under Part V, it shall have the same powers as a magistrate under the Magistrates Ordinance Cap.227. This conclusion is also supported by authority see *Sham Ling v Obscene Articles Tribunal* (1992) 2 HKPLR 669, at 675 (lines
- 12) (Deputy Judge Patrick Chan, now Chan PJ). As Hartmann J said in *Mong Ming v Anthony Yuen*, unreported, HCAL 137/2004, 15 November 2005, at paragraphs 63 and 69 of his judgment
63. I say that because it is apparent that the Tribunal, when exercising its jurisdiction under Part III of the Ordinance to classify articles, is a different body, possessed of different powers, and subject to different procedures and rules of evidence, from when it is exercising its jurisdiction under Part V of the Ordinance in respect of criminal prosecutions.
69. In summary, it seems clear to me that the Tribunal, when exercising its jurisdiction under Part III of the Ordinance, does so essentially as an administrative Tribunal, entitled to act only within the powers given to it by the Ordinance. However, when the Tribunal exercises its jurisdiction under Part V of the Ordinance, in respect, for example, of criminal proceedings, it does so as a court of the classic kind, possessing the powers and authority of such a court. I respectfully agree with these observations. While it is true that the OAT whether performing its classification function or the court referral function, must decide whether an article is obscene or indecent, the nature of its functions in each case is quite different. As stated above, in the case of classification proceedings, the OAT is obliged to furnish an opinion as to whether an article is obscene or indecent. By contrast, in its court referral function involving issues of obscenity or indecency, any findings made by the Tribunal in these respects become findings of fact by the referring court. For example, where in criminal proceedings involving a prosecution for, say, the publication of an obscene article (section 21(1)(a) of the Ordinance), the OAT will, on a reference to it, have to determine whether in fact the relevant article is obscene. Although the OAT when performing either its classification or determination functions, utilizes the same guidelines regarding obscenity or indecency (see paragraph REF_Ref164246318 \r \h * MERGEFORMAT above), there is a very real difference from a practical point of view between the two. Where the Tribunal is asked to make findings of obscenity or indecency in

civil or criminal proceedings, questions as to the burden and standard of proof will arise. In criminal proceedings, for example, it will be necessary for the prosecution to prove to the OAT beyond a reasonable doubt that an article is obscene or indecent. This, however, is not the same exercise in classification proceedings where it is somewhat artificial and inappropriate to talk in terms of the burden and standard of proof. I shall deal further with this point later as it arises in the context of the Applicant's challenge based on the Bill of Rights (see paragraph REF _Ref164246334 \r \h * MERGEFORMAT 12(2) above). The analysis just undertaken of these two wholly different functions of the OAT make this Tribunal a unique one, having in relation to the same subject matter (obscenity and indecency) both an administrative as well as a judicial function. I associate myself with Lam's comments that care should be taken to ensure that different panels of the OAT should sit in the exercise of its different functions in relation to the same article, for fear there may otherwise be an appearance of bias. Lastly, I should say something about section 33(1) of the Ordinance which reads

33. Proof of certain matters

- (1) A document purporting to be under the hand of the Registrar certifying that an article was at any time classified as a Class I, a Class II or a Class III article; notice in accordance with section 19(2) was given in the manner and on the date specified in that document in respect of that article, shall be admissible on its production and without further proof in any proceedings and such document shall be conclusive evidence of the facts contained in it unless it is proved that the document was not signed by the Registrar.
- (2) A document purporting to be under the hand of a presiding magistrate stating a decision or determination of a Tribunal shall be admissible on its production and without further proof in any proceedings and such document shall be conclusive evidence of the facts contained in it unless it is proved that the document was not signed by a presiding magistrate. This provision again highlights the difference between the two functions of the Tribunal. Where a document certifies an article as having been classified as Class I, II or III, that document would be admissible without further proof in any proceedings and such document shall be conclusive evidence of the facts contained in it : section 33(1)(a). Contrary to the submissions of Mr McCoy, this provision does not mean that the relevant article, where a classification has been made by the OAT, is obscene or indecent (where a Class II or III classification is given) as a matter of fact (with the consequence that a document certifying such a classification may be used in the criminal proceedings under sections 24 of the Ordinance to prove obscenity or indecency). Rather, the reference in this provision to the facts contained in [such documents] is only to facts such as the classification itself. It would then be relevant to prosecutions under sections 27A of the Ordinance which are premised on a classification having been made. I would reiterate the point that in its classification function, the OAT provides an opinion rather than to make findings of fact on obscenity or indecency. On the other hand, where a document purporting to be under the hand of a magistrate setting out a determination of the OAT, say, on a reference made in civil or

criminal proceedings (section 33(2)), the reference to the facts contained in [such a document] will include the findings of the Tribunal on obscenity or indecency. I have dealt with the statutory scheme at some length because in the determination of the various issues in the appeal, it will be essential to bear this scheme in mind. I now deal with the various issues earlier identified (see paragraphs REF _Ref164158787 \r \h * MERGEFORMAT and REF _Ref164158805 \r \h * MERGEFORMAT above). The Basic Law and Bill of Rights challenges A. Are classification proceedings criminal in nature? It can be seen from the analysis just undertaken of the statutory scheme that the classification function of the OAT is a distinct and separate one from the court referral function (the latter, unlike the former, actually arising in the context of civil or criminal proceedings). Although in the sense that there may be more than one party before the Tribunal contending different points of view, it can be said that classification proceedings are adversarial, this is not necessarily always the case. For example, as can be seen from section 13(1) of the Ordinance, a publisher or author of an article may make a submission to the OAT for classification and there may not necessarily be anyone to oppose him. Certainly, applying any standard analysis, it simply cannot be said that classification proceedings are criminal in nature : no penalty is involved, certainly no record of conviction and indeed, the function of the Tribunal is to classify, not to make findings of innocence or guilt. Mr McCoy basically contended that where a pre publication classification was made, this would have the effect of determining one of the essential elements of the criminal offences set out in sections 27A of the Ordinance, namely, a classification of either obscenity or indecency. Where a post publication classification was made, he further argued that this would have a significant, if not decisive, impact on the court referral function of the Tribunal and therefore on any criminal proceedings that may be brought under sections 24 of the Ordinance. For this reason alone, the classification exercise could not have been intended by the legislature to apply post publication. I do not agree with these points Pre publication classifications The offences set out in sections 27A of the Ordinance are all predicated on a classification having been made by the OAT. However, this cannot mean that a classification performed by an administrative body somehow becomes a part of any criminal proceedings. As we have seen, where a classification takes place, this is not necessarily adversarial in nature, certainly there is no prosecution by a prosecuting authority of a person. And the Tribunal does not determine guilt; it merely classifies. No criminal offence is committed (resulting in the possibility of prosecution) unless an article classified as obscene or indecent has been published or displayed. It is these acts that would result in a prosecution and thus criminal proceedings. No doubt the classification made by the OAT as to whether an article is obscene or indecent is an element that will have to be proved in any criminal proceedings under sections 27A, but the classification proceedings themselves are not criminal proceedings at all. Post publication classifications

- (a) In this context, there is simply no link between this function and the court referral function of the OAT. The classification function involves no court proceedings whereas the court referral function inevitably does. As the courts have consistently held, the two functions are

entirely separate and distinct. Mr McCoy relied on section 33 to provide a link between the two functions but, as we have seen (paragraphs REF _Ref164246516 \r \h * MERGEFORMAT REF _Ref164246537 \r \h * MERGEFORMAT above), any classification made by the OAT involves only an opinion as to obscenity or indecency and not any findings of fact to this effect at all. Furthermore, if the Applicant's arguments were correct in this regard, it would effectively render otiose some of the statutory defences based on a classification having been made (for example, sections 21(2)(a) and (b), 22(2)(a)).

- (b) Mr McCoy did, however, question the purpose of a post publication classification exercise. The argument ran something like this : while a pre publication classification by the Tribunal would serve the purpose of enabling a publisher (for example) to know whether or not to publish an article, a post publication classification would have no such purpose since publication had already taken place. Therefore, it was argued, a post publication classification could only serve to support any criminal charges that may be brought based on sections 27A. I think the fallacy of this argument is that it is based on the assumption that a post publication classification serves no useful purpose other than for a criminal prosecution. With respect, it does. Where an article may be republished, a post publication classification after the initial publication would serve an obvious purpose. As Lam J observed in his judgment (at paragraph
- 88. An attack as to the legitimacy of a post publication classification pending criminal proceedings was rejected by Hartmann J in *Mong Hon Ming v Anthony Yuen* HCAL 137 of 2004, 15 November
- 2005. I respectfully agree with Hartmann's observations in that judgment on the legitimacy of such classification and the relationship between classification and determination. In particular, I agree that even in respect of one off publications, there may be occasions where public interest demands classifications be made (see Para. 58). The facts of the present case is a good illustration of the sort of copy-cat mentality that a classification might discourage. Even though it is not a re publication, it is unreal to suggest that a classification would not have any deterrent effect on others intending to publish articles of similar nature. I would add this. As observed earlier (paragraph REF _Ref164246639 \r \h * MERGEFORMAT 19(5) above), one of the OAT's functions is to give guidance to an applicant (section 14(3)(b)). This, together with the duty to give reasons (the ratio of the Court of Final Appeal's judgment in *Oriental Daily Publisher Ltd*), constitute sufficient justification for the post publication classification function of the Tribunal. In *Pao Wai Louis & Anor v Obscene Articles Tribunal* [1995] 1 HKC 51, at 56I 57B, Godfrey JA warned of the possibility of abuse where a post publication classification was used for the purpose of influencing the result of prospective criminal proceedings. He was of the view that a post publication classification was only appropriate in cases where an article was to be on permanent or semi permanent display or where publication was likely to be repeated. This obiter remark was qualified by Hartmann J in *Mong Ming* at paragraphs 59 of his judgment and with respect, I agree

58. In my view, it must further be recognised that, even in respect of one off publications, there may be occasions when it is in the public interest to obtain interim classifications. Most often this will arise when there is a perceived danger of further publication of an article, often by way of copy cat publishing. An interim classification acts to prevent this, putting those who may be tempted to re publish on notice that it will be an offence to do so. In this regard, s.25 of the Ordinance reads Where an article is classified as a Class III article by virtue only of an interim classification, any person who publishes that article, whether or not he knows it has been so classified, commits an offence and is liable to a fine of \$1,000,000 and to imprisonment for 3 years.
59. In *Pao Wai Louis and Another v. Obscene Articles Tribunal* (cited in paras.48 and 49), Godfrey JA said that it seemed to him to be extraordinary that the procedure of seeking an interim classification should be employed for a one off publication. With the greatest of respect, I cannot agree with this obiter remark. In my view, one off publications, especially when they are (or become) notorious, may well give rise to numerous re publications through all kinds of networks. Unless an early warning is given, the initial damage, for example, to the dignity or reputation of a well known personality, may be multiplied many times. B. Article 11 of the Bill of Rights Articles 11(1) and (2)(e) of the Bill of Rights read Article 11 Rights of persons charged with or convicted of criminal offence
- (1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. (2)
- (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; First, it was contended by the Applicant that the classification proceedings being criminal in nature, the presumption of innocence arose. Quite what practical effect this had or why it was said the OAT's classification in the present case was therefore liable to be set aside, were never really articulated. Be that as it may, the point simply does not arise. Classification proceedings are not criminal proceedings for reasons already gone into. Next, Mr McCoy argued that in the present classification, the 1st Respondent ought to have applied the criminal standard and burden of proof. This argument was really made to reinforce the Applicant's point that classification proceedings were criminal in nature since a classification would or might have criminal repercussions. Mr McCoy's contention was basically this : since a classification may give rise to a criminal proceedings in relation to offences under sections 27A of the Ordinance, surely then before the OAT could classify an article as obscene or indecent, it would have to be satisfied beyond a reasonable doubt? This argument is ultimately a flawed one. As observed above (paragraphs REF _Ref164246741 \r \h * MERGEFORMAT REF _Ref164246753 \r \h * MERGEFORMAT), classification proceedings are not criminal in nature at all and classification is primarily intended to prevent the commission of a crime. It is a matter of choice whether to publish an article classified as obscene, and the fact that someone chooses to publish an article despite a prior classification, thereby committing an offence, can hardly turn the classification exercise into

a criminal proceeding or issue or import criminal standards of proof. The said offences under these sections consist essentially of publication or display of material that has been classified as obscene or indecent, not the publication or display of material that is obscene or indecent (the subject matter of charges under sections 24 of the Ordinance). Lam J was of the view that it was somewhat abstract to talk about burden and standard of proof without specific reference to a particular issue. I agree. Where, as in the case of the OAT, a tribunal is required to provide an opinion and there is not necessarily more than one party before it, it is artificial to discuss its functions by reference to standard and burden of proof. These terms really have their proper place in adversarial proceedings where one party or other makes an allegation which it then has to prove. These terms are defined in Phipson on Evidence (16th edition) at paragraph 01 in the following way The phrase burden of proof is used to describe the duty which lies on one or other of the parties, either to establish a case or to establish the facts upon a particular issue. The phrase standard of proof is used to describe the degree to which the proof must be established. I fully acknowledge that in the discharge of its functions in classification proceedings, the OAT will have to be satisfied after taking into consideration a number of possible factors before arriving at an opinion as to whether or not an article is obscene or indecent. Some of these factors are set out in section 10 of the Ordinance. Sometimes, these will involve purely factual matters. For example, there may arise factual issues over the extent to which material is displayed publicly (cf section 10(1)(d)). Section 11 envisages the possibility of persons giving evidence on oath and this reinforces the point that the Tribunal may on occasion have the responsibility to make pure findings of fact. In these circumstances, it is therefore, I think, helpful from a practical point of view to indicate that in the classification of articles and material, a tribunal should be satisfied on a balance of probabilities (for want of a better term) where pure matters of facts are concerned. The Tribunal will obviously need to be satisfied before it reaches an opinion whether any article is obscene or indecent, but here, I think, it is not appropriate to use the terms burden and standard of proof when one is referring only to opinions. Certainly, it is misconceived to talk in terms of a criminal burden and standard of proof. I now turn to the third limb of what the Applicant contended to be the consequences of classification proceedings being criminal in nature, namely, that hearsay evidence ought not to be admitted. The relevant provision in the Ordinance is section 11(b)(i) (see paragraph REF _Ref164246969 \r \h * MERGEFORMAT 19(10) above). In the classification proceedings that took place before the OAT in the present case, there was no live evidence from witnesses. The Applicant's complaint is that where there were involved in the relevant article allegations of criminal and violent conduct (see paragraph REF _Ref164246996 \r \h * MERGEFORMAT 13(2) above), the Tribunal ought to have heard live evidence instead of just relying on the article itself and its contents (which could be said to be hearsay in nature). I shall deal below with the validity of the premise that the Tribunal had to be satisfied anyway that there was criminal or violent conduct involved before arriving at a classification, but for present purposes, the point made by the Applicant seems to be this. Article 11 of the Bill of Rights (in particular Article 11(2)(e)) prevents hearsay material being adduced in criminal proceedings and therefore that Article renders unconstitutional provisions such as section

11(b)(i) of the Ordinance. The simple answer to this point is once again that classification proceedings are not criminal proceedings at all. Article 11 (which deals with the rights of persons charged with criminal offences) is accordingly not engaged. In classification proceedings, as we have seen, no one is charged or prosecuted. C. Article 10 of Bill of Rights : Do classification proceedings involve the determination of rights and obligations in a suit at law ? Article 10 of the Bill of Rights states Article 10 Equality before courts and right to fair and public hearing 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. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. Using the foundation that classification proceedings involve the determination of rights and obligations in a suit at law , the Applicant makes three points : first, regarding the absence of a judicial oath taken by members of the OAT; secondly, the fact that the same magistrate sat at both the interim and review classification stages; and thirdly, an inadequate appellate procedure (see paragraph REF _Ref164151225 \r \h * MERGEFORMAT 12(3) above). These were said to constitute breaches of Article 10 of the Bill of Rights and Article 35 of the Basic Law. Lam J was of the view that the classification proceedings before the OAT did not involve a suit at law . Some of the authorities were reviewed but many others were not. We have been referred to some of the relevant authorities in the area. In my view, it is neither necessary nor desirable to arrive at a firm conclusion on this somewhat difficult issue and I would prefer to leave the resolution of it open. Even assuming for present purposes only that the classification proceedings do involve a suit at law, the fundamental question to be answered is whether the Applicant had in the present case nevertheless been given a fair hearing by a competent, independent and impartial tribunal with an adequate appellate procedure. In my view, the three points advanced by the Applicant in this context have no merit As to the absence of a judicial oath taken by members of the Tribunal, it is difficult to see why members should be required to do so or be treated as judges in the discharge of what is plainly an administrative function (the classification function). Mr McCoy was unable to point to any authority in which members of such a tribunal would be required to take a judicial oath. The object of an oath was, so argued Mr McCoy, to ensure that the OAT was an independent and impartial tribunal. However, any tribunal and its members are required by the rules of natural justice anyway to be independent and impartial, and the absence of an oath does not, in my view, detract from these requirements. There is in the present case no question that the Tribunal was anything other than independent and impartial except for the point, to which I now turn, that the presiding magistrate sat at both the interim and full classification stages (see paragraph REF

_Ref164151225 \r \h * MERGEFORMAT 12(3) above). As we have seen (see paragraph REF _Ref164247152 \r \h * MERGEFORMAT 19(8) above), section 15(2)(b) of the Ordinance prohibits a member of the OAT who sat on an interim classification to sit at the full hearing, but there is no prohibition in relation to the presiding magistrate. I do not regard this as a valid point of objection at all. The presiding magistrate is a professional judge and legally qualified person. As Lam J observed, he is and can be expected to review an earlier decision in an impartial and fair way. Afterall, this is no different a situation from where a judge is asked to reverse an order that had previously been made ex parte or where a court has powers of review (say, the Magistrates Court and the District Court). In any event, as Lam J further remarked, the rules of natural justice will ensure that there is no bias or perceived bias and where appropriate, a presiding magistrate may be asked to recuse himself : see the principle of bias and apparent bias contained in cases like *Deacons v White & Case Ltd Liability Partnership & Others* (2003) 6 HKCFAR 322, at 329B 332H (paragraphs 24). Mr McCoy also complained of the lack of an adequate appellate system regarding classification decisions of the OAT. He relied on the judgment of the Chief Justice in *Oriental Daily Publisher Ltd* (see paragraph REF _Ref164247215 \r \h * MERGEFORMAT 19(3) above) where it was held that the statutory right of appeal under sections 30 and 31 of the Ordinance was restricted to points of law which have actually been decided by the Tribunal. However, as already pointed out, there is available to a person aggrieved with a decision of the Tribunal, the possibility of judicial review proceedings where the merits so allow and this was expressly envisaged by the Court of Final Appeal in the *Oriental Daily Publisher Ltd* case. Mr McCoy countered this by saying that, as the procedural events in the present case demonstrated (see paragraph REF _Ref164247262 \r \h * MERGEFORMAT above), the combination of statutory appeal proceedings and judicial review proceedings may be cumbersome, and could cause delay and expense. I do not accept this submission. While admittedly it is to an extent somewhat cumbersome, to have two sets of proceedings afoot in relation to the same decision, this need not cause significant delay or additional expense once directions are sought at an early stage that both sets of proceedings ought to proceed in tandem. This was what eventually transpired in the present case. For the above reasons, I would for my part reject the Applicant s challenges based on the Bill of Rights and the Basic Law. I now turn to the challenges on the actual merits and reasoning of the decision reached by the OAT. The challenges based on the merits and the reasoning of the Tribunal s decision These have already been identified in paragraph REF _Ref164158805 \r \h * MERGEFORMAT above. I deal with each in turn. D. Taking into account the contents or index page The Applicant asserted it was wrong for the OAT in making the classification in the present case to have included the index or contents page of the relevant edition of *Three Weekly*. The Form used by the 2nd Respondent in referring the matter to the OAT for an interim classification described the matters for classification as Front cover and the related feature article published in a magazine entitled *Three Weekly* 3 hT R ondent to have included the index page as well at the review classification stage. In my view, the words Front cover and the related feature article are broad enough to include the contents or index page, which linked the cover with the related article. As the judge pointed out by reference to the Pau

Louis case (in particular the judgments of Power Acting CJ at 55B C and Godfrey JA at 56D F), it is important to consider the context of any photograph or article under scrutiny. There is a further point to be made. No one was under any misapprehension as to what was being considered by the OAT. The Tribunal was clear that the contents page was under consideration as was the Applicant, especially when its solicitors sought and obtained clarification from the Tribunal : see paragraph 7 above. E. Findings of criminal and violent conduct In its Reasons for Decision, the OAT stated that (as translated) the dominant effect of the article shows violence and crime . There are also references to the depiction of the person in the photograph as being subject to coercion and abuse . The Applicant submitted that these conclusions of violent and criminal conduct were made by the Tribunal without there being sufficient evidence of either violence or criminal conduct. In my view, this submission misunderstands the true purport of what drove the OAT to classify the relevant article as Class III (obscene). It is clear that the Tribunal analyzed what was the dominant effect of the article and sought to consider just what was the sense behind it. It concluded that the dominant effect was one of violence and criminal conduct and accordingly, readers who read the article would feel depraved and repelled . It was not necessary for the Tribunal to have made any findings of actual criminal or violent conduct, nor did it seek to. On analysis, it was merely considering the effect on readers. I see nothing wrong in what the Tribunal did; indeed, looking at the dominant effect of an article is precisely what the OAT is required to do under section 11(1)(b) of the Ordinance. F. The relevance of the Film Censorship Ordinance, Cap.392 The OAT was criticized by the Applicant (and was said therefore to have erred in its decision) for having regard to those factors set out in the FCO in arriving at its classification. Sections 10(2)(a) & (b) of that Ordinance list a number of factors that a film censor can take into account in deciding whether or not to approve a film. Such factors include the portrayal, depiction or treatment of cruelty, torture, violence, crime, horror, disability, sexuality or indecent or offensive language or behaviour and also whether there is there denigration or insult to any particular class of the public by reference to the colour, race, religious beliefs or ethnic or national origins or the sex of the members of that class. The OAT remarked in the Reasons for Decision that the various factors contained in section 10 of the FCO were useful reference points. I do not see how it can be said that the Tribunal had erred. It was certainly not equating the classification function under the Ordinance with that of the film censor under the FCO. Lam J accepted that the regimes under the two Ordinances were separate but was of the view that the Tribunal could not be criticized for making a passing reference to those elements set out in section 10 of the FCO. He observed there were clearly overlaps between the criteria in both Ordinances. He said this at paragraph 37 of his judgment

37. Obviously, there are overlaps between the two sets of criteria. For example, there comes a point where a depiction in an article of cruelty, torture, violence, crime, horror, disability, sexuality or indecent or offensive language or behaviour would offend the standards of morality, decency or propriety generally accepted by reasonable members of the community to such an extent that it renders the article indecent or even obscene. Section

10(1)(a) of the Ordinance makes a specific reference to the Tribunal having regard to any decision of film censor under section 10 of the FCO where a film is concerned. Mr McCoy argued that this therefore marked the limits of the utility of that Ordinance. This is too narrow a position. To my mind, this reference reinforces the overlap between the two Ordinances referred to by Lam J. It is also important to note that in *Oriental Daily Publisher Ltd*, the Court of Final Appeal linked those factors set out in section 10(2) of the FCO with the responsibilities of the OAT in its classification function. At 292E F, the Chief Justice said this These relevant matters [i.e. the FCO section 10 matters] are similar in kind to the matters under the Ordinance which the tribunal has to consider in deciding on indecency and obscenity. The criticisms of the 1st Respondent here therefore have no merit in my view. G. The breach of the right to privacy as a factor In its Reasons, the OAT said this regarding to the invasion of privacy

- (5) Invasion of privacy and injury to the dignity Invasion of privacy and injury to the dignity of the person photographed is not a relevant or legal factor for the Tribunal's consideration when making classification of the Article. Invasion of privacy or injury to the dignity per se is not sufficient to make an article Class II (indecent) or Class III (obscene). However, when considering standards of morality, decency and propriety, the Tribunal must take into account the article's particular characteristics and all the circumstances, including but not limited to the subject article may involve the invasion of privacy and injury to the dignity of the person photographed. Each case must be decided on its own merits. The Applicant attacks the approach of the Tribunal contained in this passage. It was argued that in the classification of whether an article was obscene or indecent, the OAT should not take into account the extent to which, if at all, the right to privacy of the person who is the subject matter of the relevant article or photograph, has been breached. Whether or not there is any breach is simply irrelevant to the question of classification. In my view, the reasoning of the Tribunal cannot be faulted. It is true that by itself the extent to which there is a breach or invasion of privacy is not relevant to the question whether or not an article is obscene or indecent (and the Tribunal made this clear). However, the fact that a breach or invasion of the right to privacy is involved may in some circumstances be a legitimate factor to be taken into account in ascertaining the context or effect of an article or photograph. I put it no higher than that. In the circumstances of the present article and photograph, the fact that the woman who was the subject matter of the relevant article and photograph, had her privacy exposed in what was said to be a very distressing and humiliating way, was quite different to a situation where, say, she was merely posing or acting. The task of the OAT is to look at the intrinsic nature of the article in question from the vantage point of the reader so as to ascertain whether the reader or potential reader would be repelled or whether there would be aroused any revulsion. These circumstances could include the invasion of privacy and affront to dignity. In his judgment, Lam J concluded Sometimes, the obscenity or indecency lies in the publication of matters which a reasonable and decent person in our community would regard as an undue invasion of privacy. He made reference to a passage in the judgment of Bokhary JA (now Bokhary PJ) in *Next Magazine Publishing Ltd v*

Commissioner for Television and Entertainment Licensing Authority (1995) 5 HKPLR 373, where at 376A D, it was said There was an element in the article which justified the tribunal in its view that it was indecent even though a fictional account to the same effect might not have been. Some people may say and I would not criticize them for saying it that there was a peeping Tom element in the article. For my own part, I prefer to put it like this. There are standards of privacy which decent people in Hong Kong value as a human right. And the privacy of the naive couple concerned, who did not seem to understand curtain walls or have contemplated telephoto lenses, was invaded and, not to put too fine a point on it, sold in circumstances which branded the result as indecent. Much if not most of the journalism in Hong Kong deserves and commands widespread respect. This kind of journalism, if it is journalism at all, is not that kind. This passage requires careful consideration; otherwise, it is apt to confuse. In my view, properly understood, Bokhary JA was not saying that the invasion of privacy of the relevant couple in that case or the fact that the article was sold for profit were elements per se in the classification of obscenity and indecency. Rather, what the learned judge meant was no more than (a) the fact that the photograph and story in that case involved a couple's intimate moments was relevant only when compared with, say, a fictional account (this was the very point made at 376A B) and (b) the reference in the passage to sold was a reference to the circumstances of the magazine being sold to juveniles (see 375A C); cf sections 2(2)(b) and 10(1)(c) of the Ordinance). It has all to do with the relevant context from the point of view of potential readers, and the relevance of the breach of privacy in this particular case is contextual. The article with which we are concerned, constituted by the photographs and the words accompanying them, displayed not merely a woman in a state of undress but in a state of undress whilst being abused and, further than that, it shows in its effect a woman being photographed against her will whilst in a state of undress and abuse. If the article in question had been, say, a film of a woman abducted and made to undress with a photographer shown in the film degrading her further by taking snapshots of her, I dare say that that additional intrusion upon her dignity would properly be said to contribute to the overall conclusion that the film was obscene. The difference here is that the photographer is not shown; yet the fact that he is there photographing her distress and adding to it no doubt by taking the shots is self evident and the result is no different. H. Commercial Exploitation In arriving at its classification, the OAT focused on the factors set out in sections 10(1)(a), (b), (c) and (e) of the Ordinance. In relation to section 10(1)(a) (standards of morality, decency and propriety generally accepted by reasonable members of the community), the Tribunal said this

- (2) Commercial Exploitation The Applicant submits that the Three Weekly merely used others' sufferings to obtain commercial interests; the Actress could be a victim of abuse. The effect was not different from publishing the photograph of a victim of any other crimes. The laws do not prohibit the appearance of a victim of crime. At any time the members of the community can through the media see photographs of dead bodies of homicide and casualties of traffic accidents etc. A news institute has a right to use a news story for commercial exploitation. The Tribunal thinks that it has no objection to commercial

exploitation of a news story by a commercial organization, a publisher or any news institute. Commercial exploitation per se shall not suffice to make an article classified as Class II (indecent) or Class III (obscene). However, the Tribunal thinks that when considering the standards of morality, decency and propriety that are generally accepted by reasonable members of the community, it shall take into consideration everything pertaining to the article's characteristics and the circumstances, including but not limited to the likelihood of commercial exploitation of the article. Moreover, every case has its own background and elements. Generalization is not possible. McCoy submitted the fact that an article or photograph was exploited for commercial gain could not be a factor in deciding whether they were obscene or indecent from the point of view of generally accepted standards of morality, decency and propriety. This was not a ground that was run in the court below but only raised in the course of counsel's submissions in these appeals. Mr Kevin Zervos SC (who appears for the Respondents) submitted that this reference to commercial exploitation (which specifically addressed the Applicant's arguments to the Tribunal: see paragraph (2) (a) of the quoted passage in paragraph REF _Ref164230010 \r \h * MERGEFORMAT above) was really an attempt to address the factors set out in section 10(1)(e) of the Ordinance. No doubt the aspect of commercial exploitation would be relevant when considering section 10(1)(e), but it is clear from the Reasons that the Tribunal was treating this as a factor under section 10(1)(a). In my view, it is difficult to see how the fact that this particular article is commercially exploited years after the event can be relevant to standards of morality, decency or propriety or to the intrinsic nature of the article (section 10(1)(a)). In this respect, therefore, the Tribunal erred but the error (which arose from the Applicant's submission) is insufficient by itself to disturb the Tribunal's findings and we would not do so on this ground. It is perfectly clear from the Tribunal's detailed reasoning that the gravamen of their finding of obscenity was influenced by other central factors and that this was but an aside. We would therefore in the exercise of our discretion decline to grant relief because of this error. I. Comparables The Tribunal was referred by the Applicant to 11 other cases in which articles were classified as Class I, II or III articles in an attempt to demonstrate that the article in Three Weekly was perhaps not as bad as some of the others that were not even classified as obscene. The Tribunal said this The Tribunal thinks that each article's contents are different and their natures vary. When considering classification of an article, it should consider the article's individual elements. It should consider the article independently rather than considering and comparing with similar articles. Moreover, in the above case the contents, themes, backgrounds and objectives of report are different from the article

- s. In fact, each case has its own characteristics that affect the Tribunal's classification. In many cases, the photographed people are models, actresses or other females who made money out of taking nude photographs. For the present classification, the Article involves a genuine victim of a sexual crime. Again, the approach of the Tribunal cannot in my view be faulted. It was right to say that each article was different and had to be treated on its own merits. Authority supports such an approach. In Sham Ling, Deputy Judge Patrick Chan (now Chan PJ) said at 676 (lines On the admissibility of these other issues, I think it is not disputed by

Conclusion

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