HCAL 1528/2024
[2026] HKCFI 241

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

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 1528 OF 2024

BETWEEN

CHOW HANG TUNG	Applicant
and	
COMMISSIONER OF CORRECTIONAL SERVICES	Respondent

Before: Hon Coleman J in Court
Date of Hearing: 14 April 2025
Date of Further Submissions: 18 December 2025
Date of Judgment: 13 January 2026

J U D G M E N T

A. Introduction

1. The 'long and the short' of the dispute raised by this application may turn on precisely that, and what should be the 'default position', albeit subject to exemptions: is it long trousers or shorts?

2. The question arises in the following circumstances. The Applicant is a woman, who is currently a member of the female

prison population ("Female PICs"). The Applicant has been a Female PIC at Tai Lam Centre for Women ("TLCW") since 10 September 2021.

3. As a Female PIC, the Applicant is required to wear the prison uniform issued to prisoners under the Prisoner Personal Provisions ("Scales"). The Scales require Female PICs to wear long trousers in summer. However, the Scales require members of the male prison population ("Male PICs") to wear shorts in summer. It may be important that both requirements admit of certain exemptions or exceptions.

4. The Applicant asserts that this difference in treatment between Female PICs and Male PICs amounts to unlawful discrimination, contrary to the provisions of the Sex Discrimination Ordinance Cap 480 ("SDO") and/or the provisions of Articles 25 of the Basic Law ("BL25") and Article 22 of the Hong Kong Bill of Rights ("BOR22"). She also argues that it is unreasonable and irrational as a matter of public law, and illegal as being in breach of the relevant rules.

5. Those arguments are pursued in these proceedings, commenced by Form 86 dated 30 August 2024, but which is now in re-amended form ("RAF 86") dated 3 April 2025. The Applicant's judicial review challenge is to (1) the Scales and/or policy ("Clothing Policy") of the Correctional Services Department ("CSD"), designated pursuant to the Prison Rules Cap 234A ("PR"), and (2) the alleged decision of (or made for) the Commissioner of Correctional Services ("Commissioner") made on or around 13 August 2024 to refuse the Applicant's request to wear shorts ("Decision").

6. On 10 September 2024, I granted leave on paper. The Respondent is the Commissioner, who is appointed by the Chief Executive under section 3 of the Prisons Ordinance Cap 234 for the service of the prisons in Hong Kong.

7. I gave directions for the filing of evidence, and to bring the matter to a hearing on 14 April 2025. Prior to the hearing, 19 affirmations/affidavits were filed by or for the Applicant and 11 affirmations were filed by or for the Commissioner.

8. At the hearing, the Applicant was represented by Mr Jeffrey Tam, Mr Andrew Lau and Ms Yvonne Leung of Counsel. The Respondent Commissioner was represented by Mr Mike Lui SC, leading Ms Vivian Kao, Senior Government Counsel of the Department of Justice.

9. It might be fair to say that both Mr Tam and Mr Lui have pressed their respective cases with vigour, and without any shyness about suggesting the other party has provided incomplete and/or misleading evidence. However, though I have kept the criticisms – and the strength of expression of them – in mind, and unless obviously addressed in this Judgment, I do not think it is for the most part necessary for present purposes to resolve these kinds of allegation.

10. At the end of the argument at the hearing, I reserved my decision to be handed down later, in light of and with the benefit of the materials previously filed by the parties and the oral submissions made by Mr Tam and Mr Lui.

11. In the process of preparation of the Judgment, it came to my attention that legislative amendment has been made to Rule 26 ("PR26") of the PR, after the hearing (see below). On 27 November 2025, I directed that further submissions be provided by the parties, if any, on the amendment to PR26 in relation to the grounds of review as relied upon by the Applicant and the response from the Commissioner. The supplemental submissions regarding the PR26 issue were filed by the Applicant and the Commissioner, both on 18 December 2025 (as extended by consent).

12. This is my Judgment.

B. Factual Background

13. I can set out the following background matters, much of which has been helpfully summarised in Mr Tam's and Mr Lui's skeleton submissions, and in the parties' affirmation/affidavit evidence.

B.1 Prison Rules Cap 234A

14. The main material provisions of the PR are PR26 and PR29, which provide as follows:

> [Pre-amended version of PR26 (referred to by the parties in their skeleton submissions and at the hearing)]
>
> **26. Adequate clothing to be supplied**
>
> Every prisoner shall be provided with a complete outfit of clothing adequate for warmth and health in accordance with a scale approved by the Commissioner and shall wear such clothing and no other:
>
> Provided that special clothing may be authorized by the Superintendent in special circumstances on the recommendation of the Medical Officer.

[Current version of PR26 (published in the Gazette on 18 July 2025, taking effect on the same day)]

26. Provision of uniforms

(1) The Superintendent must provide every prisoner with a uniform that meets a scale imposed by the Commissioner.

(2) Without limiting the matters that the Commissioner may take into consideration in imposing the scale, the Commissioner must impose the scale for the following purposes—

(a) ensuring the safety, comfort, health and hygiene of prisoners;

(b) safeguarding prisoners' privacy;

(c) ensuring that prisoners are decently dressed;

(d) ensuring that prisoners are suitably dressed during the course of work or other activities in which they would likely be engaged; and

(e) maintaining the security, good order and discipline of the prison.

(3) A prisoner must not wear any clothes other than the uniform unless with the approval of the Superintendent given in special circumstances.

29. Prohibition of unauthorized clothing, blankets, etc.

A prisoner shall not, except with the authority of the Commissioner in special circumstances, or in pursuance of special rules, have in his possession any clothing, blankets or necessaries otherwise than in accordance with the scales approved by the Commissioner.

B.2 The Scales and the Clothing Policy

15. Pursuant to PR26, the Scales were promulgated to set out the scales of personal provisions (including clothing) for the PICs admitted to correctional facilities, and provides as follows:

Scale No.1 – Prison (Women), Summer

	Clothing items
1.	Shirt, Short Sleeves, Brown Checkers
2.	Trousers, Female, Summer, Brown
3.	Sandals, Plastic
4.	Pyjamas Top, Summer, Cotton, Pink
5.	Pyjamas Shorts, Summer, Cotton, Pink
6.	Underwear, Brassiere
7.	Undervest, Bodice Vest, V-collar, Cotton
8.	Underpants, Female, Cotton

16. According to the Clothing Policy (based on the PR), Female PICs are required to wear long trousers during summer daytime unless special approval for deviation is obtained.

17. Pursuant to PR29, PICs are not allowed to alter their generally provided clothing, including folding or pulling up their long trousers as if wearing shorts. If that were to happen, CSD officers would order the relevant PIC to unfold her long trousers to full length. Failure to comply with it could result in a disciplinary action.

B.3 Considerations for the Clothing Policy

18. According to the Commissioner, the primary aim or objective of the Clothing Policy is to provide a humane, decent and healthy custodial environment to all PICs, consistent with the relevant statutory regulations including PR26. Maintaining custodial discipline in clothing provision, as achieved by uniformity, is also a relevant perspective/objective.

19. Clothing items provided for Male PICs and Female PICs are customized largely based on type of correctional facilities and training

regimes. Considerations of necessary requirements of clothing include its design and length, the activities involved (such as the level of intensiveness of required labour/work), different seasons, and gender, which (in Mr Lui's words) are "considered holistically" seeking to ensure the clothing items are appropriate and adequate for "warmth and health" pursuant to the pre-amended PR26.

20. Mr Lui emphasized that the following matters should not be overlooked.

21. First, the alleged aim or purpose of the Clothing Policy as being limited to only custodial discipline (in the submissions as advanced by Mr Tam on the proportionality analysis under Ground 2) is misconceived.

22. Secondly, the Court must appreciate that the question is not of administrative "preference" *per se*, as the Clothing Policy is based on decades of experience and expertise derived from the CSD's management and governance of correctional facilities in Hong Kong, with the benefit of recommendations of the task groups over time. The Commissioner alone is entrusted by the legislature to ensure the supply of adequate clothing to PICs, and custodial discipline must be relevant in that regard. That a PIC prefers a kind of clothing in any given situation different from the one supplied to him or her does not mean the Clothing Policy and the Scales are unreasonable.

23. Thirdly, clothing uniformity is considered crucial to underscoring collective conformity, reinforcing custodial discipline and respect for institutional authority, unless a deviation is justified by special

circumstances. There is nothing wrong in mandating uniformity in the "default clothing" for PICs. Mr Lui referred to the image of students in uniform as an analogy.

B.4 Scales are Designed Gender-Specifically

24. The Commissioner stated that the Scales have always been tailored for each gender in recognition of the various inherent biological, physiological and cultural differences that result in unique needs and preferences.

25. In formulating the Scales of clothing items for Females PICs, the CSD factored in the presence or absence of male personnel at female institutions such as visiting justices, Prison Chaplains, and contractual workers ("Male Personnel") as well as male CSD officers. While female PICs are all times attended by or in company of female officers, and no male officer shall enter a female institution save on duty and in the company of a female officer, a not insignificant number of Female PICs actually expressed decency concerns when encountering Male Personnel in female institutions.

26. The provision of general clothing items for female PICs in the summer season is as follows:

(1) Daytime – Short sleeve shirts with trousers. Trousers are considered suitable as daytime activities may involve squatting or climbing up ladders and such movement may lead to unintentional exposure of body parts. The CSD factored in (among others) the not infrequent presence of Male Personnel and male officers during daytime.

(2) Night time – Pyjama sleeveless tops with shorts. Shorts are found suitable for the hot weather in summer. The CSD factored in (among others) the absence of Male Personnel during night time coupled with the general restriction on male officers entering the night accommodation of female PICs, save on duty and in the company of a female officer. There is a less risk of concern about unintentional exposure of body parts than in the case of daytime work activities. To the extent that a PIC chooses to engage in a personal activity or maintain a posture that risks exposure of body parts, that is a matter of personal choice.

(3) Optional – For Physical Education ("PE") Sessions, short sleeve shirts with shorts ("PE Shorts") are given to those medically fit PICs who choose to participate in those sessions. Shorts are considered suitable for the intensity of the physical activities. PE Sessions are optional so Female PICs who have privacy and decency concerns from wearing PE Shorts can and may choose not to participate in PE Sessions. Since the sessions are run by female instructors, there is little risk of concern about the unintentional exposure of body parts.

27. To affirm the legitimacy of the CSD's gender-specific approach, the expert opinion of Dr Hung Suet Wai ("Dr Hung"), Senior Clinical Psychologist, was adduced on the relevant kind of differences between male and female, with reference to an array of research literature and based on her clinical observations (see below for the analysis pertinent to the issues in this judicial review application).

B.5 Exceptions Permitting Individual Deviations

28. As a starting point, the Clothing Policy covers items that are generally provided to PICs, who are not entitled to "free choice". There exist exceptions, permitting the exercise of discretion, to allow a PIC to wear special clothing in special circumstances, deviating from the "standard items" as set out in the Scales from time to time.

29. Under the rules giving rise to the Exceptions, the CSD is conferred with a broad discretion to grant permission for PICs to wear special clothing in special circumstances deviating from the specified items in the Scales. There is no definition of "special clothing" in the PR or the Scales, which does not impose any limitation on an item of special clothing.

30. Each request for special clothing is decided on a case-by-case basis, depending on the need of a relevant PIC on medical or non-medical grounds. According to the CSD's available records, between 2018 and August 2024, a total of 604 requests were made by PICs for special clothing on medical or religious grounds as follows:

(1) A majority (82%) of such requests were made by Male PICs for permission to wear trousers (instead of shorts) in summer;

(2) 603 of the 604 requests were approved for PICs to wear special clothing such as additional pyjamas, long sleeved clothes and trousers in summer; and

(3) 1 of the 604 requests was refused in the absence of any justifiable ground provided.

B.6 Summer Uniform for Female PICs: Historical Development

31. Historically, Female PICs were required to wear short sleeve dresses and knickers in summer and winter, with some approved to wear blouses and trousers on medical, religious or cultural grounds. In 2003, Female PICs were provided with trousers (instead of knickers) as part of their daytime uniform in winter upon the endorsement of the recommendation from a task group, which triggered a significant number of requests from Female PICs that they be allowed to wear trousers even in summer for various reasons including medical and decency concerns, practices of religion, thermal perception and personal preferences. The CSD considered many of those requests unjustified and therefore rejected them.

32. Following the 2010 Task Group review on the uniform for Female PICs (inclusive of design, comfort, costs, and materials), the current set of short sleeve shirts or blouses and trousers made of all-season materials (instead of dresses and knickers) was introduced in 2011 as the by-default uniform of Female PICs in summer daytime to address actual medical reasons or decency concerns.

33. In the most recent review, the 2021 Task Group appointed by the CSD conducted an overall review on the uniform of PICs (leading to the 2023 Report in June 2023) covering design, material, climate suitability and adequacy for health and hygiene. As to the uniform bottoms of Female PICs, the 2023 Report concluded that trousers made of all-season materials remained suitable in summer, whereas trousers made of a different material (benchmarked against the thickness and material of trousers provided to Male PICs) should be provided to enhance their ability to keep warm. Hence, the prevailing trousers (65% polyester and

35% cotton, 195g/m2) provided to Female PICs would be provided to them in summer only. Therefore, it is at least unfair to suggest that there was no consideration of thermal comfort, a phrase which seems to me necessarily to encompass whether something is perhaps uncomfortably too hot or uncomfortably too cold.

34. In the recent survey conducted about the provision of special uniform items (by calling for return of information from various institutions), the CSD received no special request from Female PICs concerning the length of trousers provided to them in summer (2023 Report §§4.3.4 and 8.1.2). Hence, the recommendation in the 2023 Report that the provision of trousers for PICs in summer should remain unchanged.

35. It can be noted that after commencement of another earlier judicial review application in August 2021 – i.e. Chung Suet-ying's similar challenge in HCAL 1094/2021 ("Chung's JR") – 53 Female PICs submitted written representations to the CSD to express preference for wearing trousers and a reluctance to wear shorts in summer. The reasons given include references to: comfort; convenience at work; covering against sunlight; decency, covering of tattoos and scarring. Those reasons echo the matters expressed by the various deponents for the Commissioner in these proceedings, and provide some factual basis in support of the opinion of Dr Hung (see below). On the available statistics offered, the only request for shorts made was by Chung Suet-ying herself, albeit on the day before the commencement of Chung's JR, and it was withdrawn.

B.7 The Alleged Decision

36. There is a dispute between the parties as to the existence of the alleged Decision.

37. The Applicant alleged that the Decision had been made known to her as follows:

(1) On 26 July 2024, she verbally asked two welfare officers about the possibility of wearing shorts or other thinner bottoms and received negative replies.

(2) On 1 August 2024, she repeated the request to wear shorts to another welfare officer, who confirmed that the request would be passed to her superior for consideration.

(3) On 13 August 2024, the Decision was communicated to the Applicant by the same welfare officer, who verbally explained that the Female PICs are required to wear long trousers as their age varies and some of them have skin allergies.

(4) On 4 February 2025 and 5 February 2025, the Applicant sought permission to wear shorts during daytime in the upcoming summer on the basis that the long trousers provided were too stuffy and hot.

(5) By letter dated 12 February 2025, the CSD set out the following written record of their verbal reply communicated to the Applicant in an interview, stating, *inter alia*, that:

> According to the applicable laws and internal guidelines (including the [PR] and Religious Manual), and as a matter of established practice, special clothing for a person in custody may be authorised in special circumstances on the recommendation of a medical officer or on religious grounds.

> Applying the said laws, guidance and practice, and having considered the reason stated in your written submissions dated 4.2.2025 and 5.2.2025, and after holding an interview with you on 6.2.2025, it is considered that your request for permission to wear shorts (as opposed to trousers) during daytime in the upcoming summer, is premature because it is impossible to predict the conditions of the upcoming summer, let alone reach any definitive conclusion in the present winter season, and therefore come to a fair and reasonable view on the suitability of the clothing to be supplied in the upcoming summer in so far as you are concerned.
>
> Your request will be promptly and duly considered when the summer season starts, and an examination of your condition by a Medical Officer may be arranged where appropriate. This reply shall not be treated as a rejection of your request.

(6) Special approval for deviation is allowed only on medical or religious grounds – a point emphasised by Mr Tam in his submissions, in support of the contention that the reality of the Exceptions is limited, particularly in practice, and where a person does not need to have a medical problem in order to feel hot.

38. The stance of the Commissioner is that the alleged Decision does not exist at all because the Applicant has never, in the past four summers, made any request through the prescribed channel for permission to wear shorts (instead of trousers) during summer daytime activities, and that the Applicant's bare assertions in respect of the alleged Decision are not credible.

39. On the facts of the present case and in consideration of the affidavit/affirmation evidence filed by the parties, I accept Mr Lui's submission that the Applicant's assertion must be rejected for the following reasons.

40. First, the Applicant's assertions about her requests made to the CSD officers in July and August 2024 for permission to wear shorts have been flatly refuted by the relevant officers. There is no substance in the Applicant's argument that CSD officers can exercise reasonable discretion to handle, on-the-spot, matters which may be trivial or out of basic living necessity (so the request allegedly made were not via the self-service kiosk implemented in the CSD institution).

41. Secondly, the Applicant is keenly aware of and has the ability to utilise the prescribed channel in making requests at the self-service kiosks (or mobile kiosks in the form of a tablet), and indeed has submitted a total of 297 requests via the kiosks between 23 August 2023 and 30 September 2024 (i.e. 21 requests per month on average), among which none was for permission to wear shorts in summer daytime.

42. Thirdly, if the Applicant indeed suffered from any "warmth and health" condition as a result of "being overly clothed" by wearing summer trousers, it would be expected for her to speak out when attended by the medical officers for the sake of her "endangered health". However, despite attendance by medical officers on as many as 136 occasions between July 2021 and September 2024, the Applicant never complained nor raised concerns about medical conditions arising from her wearing of trousers in summer daytime, nor did she make any request to wear shorts in summer due to any medical reason.

43. Fourthly, the 12 February 2025 letter specifically identified that it regarded any request made during winter months to be premature, but that the letter was not to be taken as a refusal of the request.

44. In this judicial review application, there are challenges to both the Clothing Policy and/or the Scales (i.e. a rule challenge) and the alleged Decision (i.e. a fact-specific challenge). It is fair to say that if the Applicant succeeds on the rule challenge, the fact-specific challenge would become insignificant.

45. In light of the foresaid, I also accept Mr Lui's submission that the Clothing Policy and/or the Scales should be treated as the subject of the complaint in the submissions on the Grounds as relied upon by the Applicant. Anyway, Mr Tam also agreed in his oral submissions that the focus should be on the rule challenge. The following analysis of the issues in this judicial review application will also be done on the same basis.

C. Grounds of Review

46. As set out in the RAF 86 and Mr Tam's skeleton submissions, the Applicant has raised four Grounds of review as follows:

(1) Ground 1: The Scales and/or the Clothing Policy and/or the Decision are contrary to the SDO and unlawful, in that they unlawfully discriminate against the Applicant on the ground of her sex.

(2) Ground 2: The Scales and/or the Clothing Policy and/or the Decision are inconsistent with Article 25 of the Basic Law ("BL25") and Article 22 of the Hong Kong Bill of Rights ("BOR22"), and thus, are unconstitutional, in that they unlawfully discriminate against the Applicant on the ground of her sex.

(3) Ground 3: The Scales and/or the Policy and/or the Decision are unreasonable in the public law sense.

(4) Ground 4: The Scales and/or the Policy and/or the Decision are illegal because they are in breach of PR26.

47. As is obvious, there is some degree of overlap between the Grounds. It is logical to deal with Grounds 1, 2 and 4 (legality and constitutionality) first and then Ground 3 (the overall reasonableness or rationality).

D. Relevant Articles of the Basic Law, Hong Kong Bill of Rights, and Statutory Provisions

48. Before doing so, it is helpful to set out the articles of the BL, the BOR and the statutory provisions applicable to the present case.

49. The constitutional guarantee of equality before the law is enunciated in BL25 as follows:

> **Article 25**
>
> All Hong Kong residents shall be equal before the law.

50. The principle of equality before and equal protection of law is spelt out in BOR22 as follows:

> **Article 22**
>
> **Equality before and equal protection of law**
>
> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

51. Sections 5(1)(a) of the SDO (dealing with direct discrimination on the basis of sex) provides:

> **5. Sex discrimination against women**
>
> (1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Ordinance if—
>
> (a) on the ground of her sex he treats her less favourably than he treats or would treat a man; or
>
> (b) he applies to her a requirement or condition which he applies or would apply equally to a man but—
>
> (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it;
>
> (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied; and
>
> (iii) which is to her detriment because she cannot comply with it.

52. Section 10 of the SDO sets out the comparison of cases under sections 5(1), 7(1) and 8 as follows:

> **10. Comparison of cases under sections 5(1), 7(1) and 8**
>
> A comparison of the cases of persons—
>
> (a) of different sex under section 5(1);
>
> (b) of different marital status under section 7(1);
>
> (c) who are pregnant and not pregnant under section 8,
>
> shall be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

53. Section 38(1) of the SDO provides that it is unlawful for the Government to discriminate against a woman in the performance of its functions or in the exercise of its powers:

> **38. Government**
>
> (1) Subject to subsection (2), without prejudice to the operation of the other provisions of this Part in relation to the Government, it is unlawful for the Government to discriminate against a woman in the performance of its functions or the exercise of its powers.
>
> (2) Subsection (1) shall not render unlawful—
>
> (a) as regards a woman not having the right to enter and remain in Hong Kong, any act done under any immigration legislation governing entry into, stay in and departure from Hong Kong; or
>
> (b) any act done in relation to a woman if it was necessary for that act to be done in order to comply with a requirement of an existing statutory provision.

E. Ground 1: Illegality – Contravention of the SDO

54. The gist of the Applicant's complaint under Ground 1 is that the present case involves direct discrimination. The rule against discrimination aims to achieve formal equality of treatment, and there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality, or ethnic or national origins – see *Leung Kwok Hung (Long Hair) v Commissioner of Correctional Services* (2020) 23 HKCFAR 456 at §11.

55. As a starting point, Mr Tam referred to sections 5(1)(a) and 38(1) of the SDO (in relation to direct discrimination on the basis of sex and prohibition on the Government to discriminate against a woman in

the performance of its functions or in the exercise of its powers) and the following 4-step approach for finding sex discrimination affirmed by Ma CJ in *Long Hair* at §15:

> … the 4-step approach contained in the speech of Baroness Hale of Richmond in *R (European Roma Rights) v Prague Immigration Officer* is helpful. …
>
> (a) There must be a difference in treatment between one person, the complainant … and another person, real or hypothetical, from a different sex group, the compared person.
>
> (b) The relevant circumstances between the complainant and the compared person are the same or at least not materially different.
>
> (c) It must then be shown that the treatment given to the complainant is less favourable than that given to the compared person.
>
> (d) The difference in treatment is on the basis of sex.

56. It is well-settled that the test is an objective one, to the extent that subjective and conscious motive, malice or intention to discriminate are not necessary for discrimination to be made out: see *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459 at 476D-E and *Long Hair* at §14.

57. As identified by Mr Tam in his skeleton submissions, the four steps involved in the present case are as follows:

(1) Step 1: Difference in treatment

(2) Step 2: Comparable circumstances between Female PICs and Male PICs

(3) Step 3: Less favourable treatment

(4) Step 4: Difference in treatment based on sex

58. Regarding the Applicant's argument on direct discrimination, the Commissioner does not take issues with Steps 1 and 4.

59. The crux of Mr Lui's response to Ground 1 is that the Clothing Policy does not constitute direct sex discrimination because:

(1) the circumstances of Male PICs and Female PICs concerning provision of clothing are not the same or are materially different (Step 2); and/or

(2) the differential treatment of Female PICs (on wearing of trousers in summer) is not shown to be "less favourable" than the treatment of Male PICs (on wearing of shorts in summer) (Step 3).

60. As is obvious, therefore, the main battle ground between the parties is Steps 2 and 3, though I can touch on Steps 1 and 4.

E.1 Step 1: Difference in treatment

61. As pointed out by Mr Tam, the difference in treatment is that Female PICs are required to wear long trousers made of poly-cotton during daytime activities in all seasons, subject to them obtaining special approval for deviation, while Male PICs are allowed to wear cotton shorts in summer and long cotton trousers in winter. Male PICs do not need to obtain special approval for deviation to wear shorts in summer. The comparator is Male PICs.

E.2 Step 2: Comparable circumstances between Female PICs and Male PICs

62. In reliance of section 10 of the SDO, Mr Tam contended that the Applicant is comparing "the like with the like" (*Long Hair* at §17) by comparing Female PICs with Male PICs, who are two groups of PICs

both subject to the rules and regulations of the Commissioner during their periods of remand, and whose living conditions inside the prisons are also similar.

63. Mr Tam further submitted that differential treatment cannot be justified on stereotypes: *Long Hair* at §36, and that the following four issues put forward by the Commissioner do not distinguish the circumstances between Female PICs and Male PICs:

(1) Gender specific clothing to accommodate Female PICs special needs.

(2) Effect of clothing on psychological safety and comfort for Female PICs.

(3) Concerns arising from clothing related self-esteem and interpersonal dynamics among Female PICs.

(4) Health issues among Female PICs.

64. The main plank of Mr Lui's response to Ground 1 is that Male PICs and Female PICs are incomparable for the following reasons.

65. First, he submitted, the Applicant's assertion ignores the inherent biological, physiological and cultural differences between them, as demonstrated by the objective evidence and supported by case law pertinent to the comparability analysis in *Weatherall v Canada (Attorney General)* [1993] 2 SCR 872 at 877f-j. There, the following was stated by La Forest J:

> The jurisprudence of this Court is clear: equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality. Given the historical, biological and sociological differences between men and women, equality does not demand that

> practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. The reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men of the victims and women the aggressors. Biologically, a frisk search or surveillance of a man's chest area conducted by a female guard does not implicate the same concerns as the same practice by a male guard in relation to a female inmate. Moreover, women generally occupy a disadvantaged position in society in relation to men. Viewed in this light, it becomes clear that the effect of cross-gender searching is different and more threatening for women than for men. The different treatment to which the appellant objects thus may not be discrimination at all.

66. Second, the Applicant does not argue that there could or should be absolute equality or equivalence in all clothing items provided to Male PICs and Female PICs. So she must be taken to have accepted that the circumstances for Male PICs and Female PICs are not the same or are materially different, and the CSD is entitled to adopt different policies on the provision of clothing to Male PICs and Female PICs. The stance of the Applicant resembles the one accepted by a Male PIC complainant in *R (on application of James Dowsett) v Secretary of State for Justice* [2013] EWHC 687 (Admin) who challenged the scope of the permissible objection to being rub-down searched by a female prison officer, but did not contend that Male PICs should only be searched by male prison officers.

67. In response, Mr Tam submitted the both those cases are very different from the current situation, because those cases involved physical contact. He submitted that wearing shorts is not related to any historical trend of violence, and biologically whether shorts or trousers are worn would make no difference and does not give rise to the same concerns arising from physical contact. Hence, the closer case would be the *Long*

Hair case, where there was no issue as to male and female being incomparable positions as regards hair length. I accept that there is some force in those submissions, but there remains the underlying principle that equality does not necessarily connote identical treatment and different treatment may be called for in some cases so as to promote equality.

E.2.1 Special needs, psychological safety and comfort

68. As regards the first issue of "gender specific clothing to accommodate Female PICs' special needs", Mr Tam submitted that it is really about the reasonableness of Female PICs being required to wear long trousers in summer due to "concerns of privacy, health and hygiene issues", which overlaps with the second issue of "effect of clothing on psychological safety and comfort for Female PICs".

69. The gist of Mr Tam's further contention is that the following assertions made by the Commissioner are unsupported by the articles cited in the affirmation evidence, which were taken completely out of proper context: Female PICs having a "larger expectation of privacy than men"; women being "generally more sensitive to what they wear and what impression they are giving others in comparison to me"; and "wearing long trousers can provide [women with] a sense of control and security". Mr Tam provided submissions at some length, but I do not think they need to be repeated in full.

70. With respect, I do not agree with Mr Tam's assertion that the expert opinion adduced by the CSD was made out of proper context.

71. On the contrary, I accept Mr Lui's submission that the following "salient points" in Dr Hung's opinion provide persuasive justifications for the gender-specific approach adopted by the CSD for the Clothing Policy and/or the Scales, which are in summary that:

(1) Men and women are indisputably biologically different. Different social and personal consequences naturally follow, and they include different respective custody experiences that are disproportionately harsher for women. Equal treatment of men and women does not necessarily result in equal outcome.

(2) In the context of a custodial environment that is predominantly designed for the majority male prison population, Female PICs are widely considered to be more vulnerable in terms of mental health and adaptability than Male PICs, with the needs of Female PICs easily neglected.

(3) Regarding clothing in a custodial setting, it carries more meaning and calls for distinct needs for Female PICs who are generally (when compared with Male PICs) more sensitive to what they wear and what impression they give.

(4) In a biological and social sense, females have a larger expectation of privacy than males in both prison and society. From clinical experience, it is observed that Female PICs, particularly those with histories of abuse, trauma, self-harm and/or intravenous injection of illicit drugs, tend to be more self-aware of their own physical appearance, sensitive to exposure of scars, and anxious about unwanted sexual attention.

(5) In a correctional institutional setting, given women are more attentive and psychologically vested in their physical

appearance than men, policy on clothing is a subtle but nonetheless significant aspect which may impact the physiological wellbeing of Female PICs, especially when Male Personnel and male officers are often present in female institutions for various operational purposes or reasons. Appropriate clothing items should be provided to maintain the privacy of Female PICs and accommodate their needs where possible.

(6) Trousers (instead of dresses or shorts) would offer added clothing coverage (less exposure of body parts) which in turn provides a greater sense of overall psychological safety and comfort to Female PICs, including concealing bodily scars or long leg hairs (with such concerns less prominently observed for Male PICs in male institutions).

E.2.2 Clothing related self-esteem and interpersonal dynamics

72. As to this issue, the focus of Mr Tam's contention was on three aspects. First, the articles cited by the Commissioner in the affirmation evidence are not specific to the prison context and have little value to Female PICs. Secondly, the alleged "clinical contact with a Female PIC who suffered from incarceration-related psychological stress leading to skin issues" lacks particulars for it to be of any use. Thirdly, it is quantum leap to suggest that wearing long trousers could minimize body image distortion and dissatisfaction, which is not a proposition supported by the article cited.

73. I find the argument advanced by Mr Tam unconvincing, as it is forensic and of little assistance in analysis of the issue. I accept Mr Lui's submission that there is proper basis for tackling the issue of

clothing related self-esteem and interpersonal dynamics ("Self-esteem Issue") by a gender-specific approach, as reflected in Dr Hung's opinion in relation to the legitimacy of the CSD's approach to devise the Clothing Policy, as follows:

> (1) As women tend to be more socially-oriented and more concerned about social exclusion, in the event that Female PICs are required to wear shorts (instead of trousers), they may feel pressured to align with the norms of the peer groups in wearing the "general" clothing items despite having a personal preference to conceal the above concerns, which may trigger problems with their self-esteem body image dissatisfaction and psychological well-being.
>
> (2) Research evidence shows that women at all ages are more concerned than men as to physical appearance and generally have lower body-related self-esteem.

E.2.3 Health issues

74. Regarding the issue that "Female PICs have a greater tendency to feel or perceive themselves to be cold if the legs are nakedly exposed for an extended time", the submissions made by Mr Tam were very brief and were twofold. First, the Commissioner's assertion lacks empirical support. Second, there is no evidence to suggest that Female PICs might feel cold if required to wear shorts during summer.

75. With respect, the forensic argument advanced by Mr Tam does not undermine the legitimacy of the Clothing Policy in relation to the health issue. I accept Mr Lui's submission that the legitimacy of this aspect has been satisfactorily explained by Dr Hung in her opinion as follows:

(1) Regarding the issue of warmth and health ("Warmth and Health issue"), correctional healthcare literature recognises that incarceration is linked to greater prevalence of a multitude of physical illness amongst women across age-groups when compared to men, and women have gender-specific health needs that correctional facilities need to address.

(2) Among other things, women have a heightened body sensitivity to cold temperatures, including influence from menstrual bleeding; and from clinical experiences, Female PICs have indeed expressed their favour for wearing trousers due to its added warmth in prison setting.

76. Though I agree with Mr Tam's suggestion that thermal comfort is a legitimate concern for both groups (i.e. Female PICs and Male PICs) as they are subject to the same environmental conditions within correctional facilities, including living conditions and exposure to seasonal weather, on a proper reading of Dr Hung's opinion and understanding of the Clothing Policy, I reject Mr Tam's submission that there exists any improper reliance on generalisations and stereotypes by the Commissioner to differentiate the circumstances of Female PICs and Male PICs which would constitute discriminatory conduct.

E.3 Step 3: Less favourable treatment

77. Mr Tam referred to a number of case authorities in relation to the unlawfulness of discrimination, the concept of less favourable treatment, and the irrelevance of motive in direct discrimination, which are well explained in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 (§49), *Birmingham City Council, ex p Equal Opportunities Commission* (1176B-C), and *Long Hair* (§§19-20).

78. The gist of Mr Tam's submissions is in summary that:

(1) The Applicant and other Female PICs lose the chance to wear shorts during summer daytime unless they have special medical or religious reasons for deviation, which is less favourable treatment because their health, comfort and physical well-being are being ignored. The negative impacts of overdressing on one's health and physical well-being are obvious or common sense: clothing traps heat and inhibits evaporation. Further, one particular example of an article in the evidence emphasises that, in hot environments, clothing acts as a barrier to thermal balance and can create a micro environment between the skin and clothing generally hotter and more humid than the ambient environment, particularly during work and exercise. It is unclear why the Commissioner has given no consideration to the thermal comfort of Female PICs during their summer daytime activities.

(2) Less favourable treatment is also evidenced in the materials used to produce the long trousers for Female PICs, which form part of the objective evidence. Some criticisms were made on the choice of fabric and the considerations taken into account by the opinion of the 2021 Task Group (and their 2023 Report) on this topic. The effect of the less favourable treatment is evidenced by the first-hand accounts of 14 former Female PICs who have elaborated on the necessity of allowing Female PICs to wear shorts during summer daytime in correctional institutions.

(3) The presence of fans (claimed by the Commissioner as being installed in sufficient number) applies to both female and male correctional facilities, but only Female PICs are

required to wear long trousers during summer daytime. The real issue as to why there is a less favourable treatment has not been addressed.

(4) The Commissioner's assertion that "a significant number of Female PICs have indicated a strong preference for wearing trousers in summer" is not supported by the evidence adduced, including that:

(a) Regarding that the recommendation of the 2010 Task Group on Female PICs to wear long trousers (switched from "knickers and dresses"), any preference of Female PICs to wear long trousers instead of "knickers and dresses" cannot be taken out of its proper context to mean that they have a preference for long trousers over shorts, especially during the hot summer months.

(b) The Commissioner's statement that there is an "obvious lack of request by Female PICs to wear shorts in summer" is questionable because:

(i) there was Chung's JR (HCAL 1094/2021), and the Applicant's request to wear shorts during summer daytime is supported by 14 former PICs; and

(ii) even if there were a lack of requests, the lack of requests would not indicate a preference for Female PICs to wear long trousers, which only reflects the fact that the system does not allow for deviation from the Scales based on thermal comfort as, according to the Clothing Policy, requests for deviation may only be made if there are "valid reason(s)", either medical

ground or non-medical reasons like a PIC's religion (Mr Tam described the Exceptions as "limited", which "do not assist the Applicant").

(c) As regards the 53 statements allegedly from Female PICs indicating their reluctance to wear shorts in summer, the problem is that (i) the argument is not just in the numbers; (ii) however, the sample size is too small to be representative of all Female PICs; (iii) they were made more than 3 years ago; and (iv) their provenance is questionable.

(d) The Commissioner is relying on statements rather than having the Female PICs attesting on oath their alleged reluctance to wear shorts in summer, which is in contrast with the 14 former Female PICs who have provided sworn affirmations/affidavits in support of this judicial review application.

(5) The unlawfulness of the discrimination would not be negated by the consent of the person discriminated against, or the alleged lack of requests to wear shorts during summer: see *Waliyah v Yip Hoi Sun Terence* [2017] 1 HKLRD 1082 at §24(iii), which is echoed in section 38 of the SDO focusing on the nature of the Commissioner's conduct.

79. With respect, the arguments advanced by the Mr Tam do not assist the Applicant to establish that there exists less favourable treatment to the Female PICs.

80. I agree with Mr Lui's analysis that there can be no less favourable treatment for the following reasons relied upon in his skeleton submissions and in Dr Hung's opinion.

81. First, there are Exceptions (see above) under the Clothing Policy. Female PICs, including but not limited to the Applicant, who consider the wearing of trousers in summer daytime causes any "warmth and health" issue may seek special permission to wear clothing items different from the default ones provided to them, on medical or non-medical grounds (i.e. grounds not confined to medical and religious reasons). Hence, the Applicant's argument that she and other Female PICs have lost the chance or been denied an opportunity to wear shorts in summer daytime must be rejected.

82. Secondly, in Dr Hung's opinion based on research literature and her own clinical experience, the general provision of summer trousers to Female PICs can be more favourable when compared with shorts, in particular for dealing with the Warmth and Health Issue and Self-esteem Issue.

83. Thirdly, it is well-established that the determination of whether treatment is less favourable is an objective exercise not dependent on a complaint's subjective point of view: see *Long Hair* at §18 and *Dowsett* at §48(a). The subjective preference of the Applicant (and/or the other former Female PICs) is irrelevant in the analysis. The burden is objectively to demonstrate how the differential treatment of having to wear trousers can be said to be "less favourable".

84. Fourthly, it is wrong in approach for the Applicant to focus on one single aspect of the Clothing Policy, and compare the summer uniform bottom provided to Female PICs with what is provided to Male PICs, without considering it in its proper context: see *Long Hair* at §§25-29, *Schmidt v Austicks Bookshops Ltd* [1978] ICR 85 at 87G-88F,

Smith v Safeway Plc [1996] ICR 868 at 877A-D & 880C, and *Department for Work and Pensions v Thompson* [2004] IRLR at §27.

85. The overall context of the Clothing Policy is that the clothing items provided by default have always been customised for each gender in each season and enforced between Male PICs and Female PICs. Those PICs having warmth and health issues with the clothing normally given to them have the same chance to seek authorisation for special clothing under the Exceptions. There is no basis to suggest that either sex is being treated less or more favourably.

86. Fifthly, it is fair to say that the Clothing Policy was devised by having proper regard to a variety of considerations (see above), including privacy and decency concerns of PICs identified as legitimate and relevant considerations in case authorities: see *Long Hair* at §22, *Dowsett* at §§63-64, and *Weatherall* at 877e-f. As supported by Dr Hung's opinion with research literature, women are more prone to having concerns about privacy and heightened sensitivity to clothing than men in both prison and society. Having regard to the privacy and decency concerns is by no means an exhibition or act of stereotyping.

87. Sixthly, as to the suggestion that the health impact is obvious, I think it helpful to take into account the other evidence filed on behalf of the Commissioner from the Medical Officers ("MOs") who worked at the TLCW:

(1) Dr Ho Chun Pang, who had served as a MO for some 24 years, had never been made aware of any health issue, medical condition or skin disease suffered by any Female PIC attributed to the wearing of trousers in summer, nor had

he ever attended to the diagnosis or treatment of such conditions.

(2) Dr Lau Ming Fai, who has been serving as a senior MO at TLCW since 2014, stated that the prescription of any particular medication does not necessarily lead to a conclusion that there were elements caused by the wearing of trousers in summer.

(3) Further, Dr Lau was personally reviewed the medical records of all the Former PICs making assertions concerning their own experience of medical and skin conditions while being detained in TLCW/LWCI, and has confirmed that there is no record that any of them had ever at any time suffered medical or skin -related conditions caused by or attributed to the wearing in any season of trousers generally provided to them as Female PICs.

E.4 Step 4: Difference in treatment based on sex

88. As pointed out by Mr Tam, the test for deciding whether there is less favourable treatment is the 'but for' test: see *Chan Wah* at 476A-D, and in the present case, the Applicant would have received the same treatment as the Male PICs in respect of the clothing supplied but for her sex, which satisfies Step 4.

89. As the Commissioner does not take issue with Step 4, it is not necessary to delve into discussion on it.

E.5 Conclusion on Ground 1

90. Nevertheless, as traversed above, the Applicant is unable to satisfy or succeed on at least Step 2 and Step 3. Therefore, Ground 1 fails upon substantive review in this judicial review application.

F. Ground 2: Constitutionality – Contravention of BL25 and/or BOR22

91. Mr Tam referred to the guarantee of equality as found in BL25 and BOR22 and the essence of the right succinctly stated in *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 at §1. In his analysis, he relied upon the well-established four-step justification test under the context of equality challenge: see *Leung Chun Kwong v Secretary for the Civil Service and Another* (2019) 22 HKCFAR 127 at §22:

> (i) does the differential treatment pursue a legitimate aim;
>
> (ii) is the differential treatment rationally connected to that legitimate aim;
>
> (iii) is the differential treatment no more than necessary to accomplish the legitimate aim;
>
> (iv) has a reasonable balance been struck between the societal benefits arising from the application of differential treatment and the interference with the individual's equality rights.

92. Mr Tam submitted that the differential treatment concerned in this judicial review application is that, according to the Scales and/or the Policy and/or Decision, it is a mandatory requirement for Female PICs to wear long trousers during summer daytime as in winter, unless special approval for deviation is obtained. In contrast, the requirement to wear long trousers during summer daytime does not apply to Male

PICs. The dividing line for the differential treatment is drawn solely on the basis of sex, which is a personal and immutable characteristic.

93. In passing, I would note that the submission overlooks the fact that the summer trousers issued to Female PICs are different from the warmer trousers issued in winter (see above). Therefore, it might be said at least to some extent that the Female PICs and Male PICs are treated alike in that they are each issued with different legwear in summer and winter.

94. Mr Tam again stressed that the comparators are Male PICs and further submitted that:

(1) Female PICs and Male PICs are subject to the same environmental conditions within correctional facilities, including living conditions and exposure to seasonal weather. Thermal comfort is a legitimate concern for both groups.

(2) There is no reason to suggest that shorts are not decent *per se*.

(3) It is no justification if the same legitimate aim, i.e. custodial discipline, applies to Male PICs, but only Female PICs are in the less favourable position of being required to wear long trousers during summer daytime.

(4) The Commissioner raises custodial discipline as the justification for differential treatment, requiring the imposition of uniformity and conformity in appearance amongst inmates. Even if custodial discipline were a legitimate aim, the Scales and/or the Policy and/or the Decision are unconstitutional because they fail the remaining parts of the justification test.

F.1 Legitimate Aims and Rational Connection

95. Mr Tam asserted that the Commissioner has not provided evidence to explain the supposed link between the need for custodial discipline and the requirement for Female PICs, but not Male PICs, to wear long trousers during summer daytime, for the following reasons.

96. First, he said it is not clear how requiring all Female PICs to wear long trousers during summer daytime, while Male PICs can wear shorts, has any rational connection to custodial discipline and foster a sense of collective conformity.

97. Secondly, he said custodial discipline has nothing to do with the purported decency concerns heavily relied upon by the Commissioner, who contends that long trousers are necessary for Female PICs to avoid unintentional exposure of body parts to male officers and to protect Female PICs' more acute awareness and decency concerns.

98. Thirdly, the suggestion that Female PICs must wear long trousers when there are Male Personnel around says more about the Commissioner's perceptions and assumptions about their own Male Personnel than it does about the actual needs or equality rights of female PICs.

99. Fourthly, if the privacy and decency concerns were indeed rationally connected with the purported legitimate aim of custodial discipline, one should expect a similar policy to be adopted for Female PICs across different jurisdictions, which is not the case.

100. As is obvious, the submissions made by Mr Tam are premised on the proposition that it is untenable that the Scales and/or Clothing Policy and/or Decision are made for any genuine need of custodial discipline without resorting to gender stereotypes.

101. With respect, I reject Mr Tam's submissions.

102. First, Grounds 1 and 2 are interlinked and overlap to a significant extent. Essentially re-labelling of the Applicant's argument (put forward in Ground 1) as unconstitutionality does not advance the Applicant's case further.

103. Secondly, in addition to acceptance of Mr Lui's analysis provided for Ground 1, I see the force in his submission that the Applicant's allegation of the aim or purpose of the Clothing Policy as being confined only to custodial discipline is misconceived. It is clear from the affirmation evidence filed by the Commissioner that the aims of the Clothing Policy, including the provision of trousers as default clothing items to Female PICs, is to provide all PICs a humane, decent and healthy custodial environment, which are the legitimate aims as can be identified.

104. There is no legally sound basis for the Applicant to assert that the Clothing Policy does not bear a rational connection with the advancement of those aims.

F.2 Proportionality

105. The main plank of Mr Tam's contention is that even if there was a rational connection with the legitimate aim of custodial discipline,

the differential treatment is more than reasonably necessary to accomplish that aim.

106. Mr Tam provided submissions in some length, but I do not think they need to be rehearsed at that same length in this Judgment. His submissions are in summary that:

(1) Applying the standard of "particularly severe scrutiny" – see *QT v Director of Immigration* (2018) 21 HKCFAR 324 at §108 – the Scales and/or the Clothing Policy and/or the Decision are clearly a disproportionate restriction on the right to equality of Female PICs.

(2) The fact that Male PICs are permitted to wear shorts during summer demonstrates that an alternative, less restrictive measure exists. The Applicant merely asks that Female PICs be given shorts during summer daytime without requiring special approval, which is the same policy currently in place for Male PICs and has the benefit of balancing the needs of Female PICs to stay cool during summer daytime with the purported objectives of uniformity.

(3) The Scales and/or the Clothing Policy and/or Decision cause significant hardship to Female PICs during the hot summer months, which is disproportionate and can be avoided, because custodial discipline can still be maintained if Female PICs are permitted to wear shorts like Male PICs. Custodial discipline might even be better if Female PICs are required to wear shorts during summer daytime, as this would eliminate the need for them to fold or pull up their long trousers to stay cool, thereby avoiding unnecessary disciplinary issues.

(4) The issue can easily be addressed by simply allowing Female PICs to wear the same shorts currently provided to Male PICs during summer daytime, which should be available within the custodial system. With the readily available less restrictive alternatives at no additional costs or logistical burden for the CSD, the requested policy adjustment simply involves the extension of an existing practice to Female PICs, ensuring fair and equal treatment without compromising the purported aim of custodial discipline.

(5) There are no societal benefits arising from the application of the differential treatment, which comes at the expense of the right to equality and health, followed by no reasonable balance between the non-existent societal benefits and interference with equality rights.

107. With respect, I do not accept Mr Tam's submissions.

108. It is trite that matters should be looked at in their proper context. In addition to the reasons set out in the analysis of the legitimate aims and rational connection above, I also accept the following arguments advanced by Mr Lui.

109. First, the appropriate standard or intensity of review in the present case is "manifestly without reasonable foundation", giving a wide margin of discretion to the Commissioner, which is justified in *Long Hair* (Court of Appeal), [2018] 2 HKLRD 933 at §112. The management of prison and maintenance of custodial discipline are matters within the expertise and professional judgment of the Commissioner. The Courts

are not equipped with the same professional expertise in the assessment of the significance of conformity in reformation and discipline.

110. Secondly, there is little merit in the Applicant's assertion that the Clothing Policy and/or the Scales, regarding the provision of the current trousers to all Female PICs in summer daytime, are disproportionate in encroaching on the Applicant's right to equality, for the following reasons:

(1) The context and historical background to the formulation and adoption of the current Scales should not be overlooked and in particular, the current set of uniform for Female PICs in summer daytime activities was the product of a carefully deliberated conclusion for the protection of all Female PICs and with the agenda to address the privacy and decency concerns raised by Female PICs in the local correctional environment, which is the context and is not disproportionate.

(2) Having regard to results of reviews and recommendations from task groups, the CSD would determine the Clothing Policy (including the Scales) based on a basket of considerations including but not limited to thermal comfort, with a full appreciation of the inherent biological and cultural differences of Female PICs and Male PICs.

(3) With the Exceptions, the Clothing Policy is neither absolute nor inflexible, because any PIC who considers a generally provided clothing item actually or potentially causing any adverse effect for them in terms of warmth or health can always seek special permission to wear deviating clothing items based on legitimate grounds (medical or non-medical), which is the mechanism permitting individual circumstances

and needs of any PIC to be considered on a case-by-case basis.

111. In consideration of the parties' affirmation evidence (including but not limited to the considerations of the Clothing Policy, the Exceptions, and the expert opinion adduced by the Commissioner) and their submissions, I find that the CSD's current policy on clothing provision is not disproportionate. It is unnecessary to go any further to Step 4 of the *Hysan* proportionality test.

112. On the above basis, Ground 2 falls to be rejected.

G. Ground 4: Illegality – Breach of PR26

113. Unsurprisingly, according to the supplemental submissions filed by Mr Tam and Mr Lui, the Applicant and the Commissioner share the common view that the new PR26 does not substantively change and has no impact on the analysis of the Grounds pleaded in this judicial review application.

114. It is of assistance first to set out the relevant background and rationale of the legislative amendment to PR26, which are helpfully summarised in the parties' supplemental submissions.

115. As regards the amendment to the old PR26, the explanation provided by the Security Bureau in the Legislative Council Brief (Ref.: SBCR 10/1/5691/89) ("LegCo Brief") is as follows (emphasis added):

> 25. The extant rule 26 of the PR stipulates that every PIC shall be provided with a complete outfit of clothing adequate for warmth and health in accordance with a scale approved by the Commissioner and shall wear

> such clothing and no other. Exemptions are only allowed in special circumstances. **In order to enhance the clarity of the considerations in setting the criteria for PIC's clothing**, we propose that **amendments be made to the PR to make clear the purposes of CSD's regime on supplying uniforms to PICs**, i.e. ensuring the safety, comfort, health and hygiene of PICs; safeguarding privacy of PICs; ensuring PICs are decently dressed; ensuring that PICs are suitably dressed during the course of work or other activities in which they would likely be engaged; and maintaining the security, good order and discipline of the prison.

116. The stance of the Commissioner is that there was no change introduced by the new PR26 to the Scales or the Clothing Policy, which is in summary that:

(1) New PR26(1) provides that every PIC must be provided with a uniform that meets the Scales imposed by the Commissioner, which echoes the old PR26 (i.e. supply of default clothing items).

(2) New PR26(2) explicitly reflects in the rule, in a non-exhaustive fashion, the legitimate purposes which the Commissioner must take into consideration in imposing the Scales, which the legislature has entrusted him to devise, among the basket of multifaceted considerations (including "warmth and health" in the old PR26) consistently and holistically factored in by the CSD when formulating the Clothing Policy of "default clothing" items, as set out in the Scales.

(3) New PR26(3) consolidates the Exceptions under the old PR, conferring upon the Commissioner a wide discretion in special circumstances to allow a PIC to wear clothing items in special circumstances in deviation from the "default"

clothing items set out in the Scales. Special approval could be granted on medical and other grounds.

117. Mr Lui submitted that the new PR26 has been introduced to reflect, by codification, the considerations of the Commissioner in formulating the Scales and Clothing Policy, and that the enactment of the new PR26 has no bearing on the Applicant's pleaded Grounds, which is echoed in Mr Tam's submission that the additional considerations under the new PR26(2)(b)-(e) should not affect this judicial review application.

118. Of course, I have not lost sight of the arguments as originally advanced by the parties in their skeleton submissions and at the hearing, and have taken into considerations Mr Tam's and Mr Lui's supplemental submissions on the new PR26.

119. As is apparent, the underlying issue under Ground 3 remains whether thermal comfort has been taken into consideration by the Commissioner in formulating the Scales and/or the Clothing Policy.

120. The gist of the Applicant's criticism underpinning Ground 4 is that:

(1) The Scales and/or the Policy and/or the Decision are contrary to the old PR26, which mandated the provision of a complete outfit of clothing "adequate for warmth and health" for every prisoner. In particular, the old PR26 had been misinterpreted by the Commissioner. There was no evidence to show how the Commissioner had interpreted the

old PR26 and how he had considered the thermal comfort of Female PICs.

(2) The "comfort" contained in the new PR26(2)(a) must entail a consideration of thermal comfort. Accordingly, the new PR26 does not change the Applicant's case and has strengthened her case because:

(a) The mandatory consideration of thermal comfort under the new PR26(2)(a) reinforces the submission that PICs need to be provided with clothing that would keep them warm in cold weather and clothing which would keep them cool in the summer, which the Commissioner has failed to do.

(b) There is also no evidence that the CSD had considered thermal comfort of Female PICs when determining the Scales and/or the Policy and/or the Decision.

121. With respect, I do not agree with Mr Tam's analysis.

122. In consideration of the parties' submissions and on a proper reading of the materials filed, it is clear that thermal comfort has all along been a relevant consideration under the Clothing Policy.

123. I accept the following submissions made by Mr Lui.

124. First, the argument that regard has not been given to thermal comfort of PICs is evidentially unsupported:

(1) The CSD has over the years analysed or reviewed the suitability of trousers for female PICs. Comparative assessment of the type, weight, thickness and property of

materials by the 2010 and 2021 Task Groups is plainly evidence that objective thermal comfort, breathability and suitability were duly taken into consideration.

(2) The 2010 Task Group also considered that shorts for Male PICs and trousers for Female PICs are equally suitable for summer weather, both made of different materials of similar weight. The type and thickness of the all-season materials for Female PICs' trousers were also found suitable in summer and winter.

(3) The 2021 Task Group concluded that the trousers made of all-season materials provided to Female PICs remained suitable in summer, but recommended adjustments to the materials for trousers to be provided to female PICs in winter to keep them warmer.

(4) The 2021 Task Group also considered the respective benefits of cotton or poly-cotton blend, and found the poly-cotton blend to be adequate for trousers for Female PICs in summer.

(5) The Applicant's assertion as to polyester or synthetic fabrics being a less satisfactory material is not substantiated on the objective evidence, as shown in the studies.

125. Secondly, the subjective preference of the Applicant and/or some other Female PICs for the type of trousers (i.e. not preferring the type currently provided and which Female PICs are required to wear in summer daytime) is irrelevant:

(1) The task group reviews over time amply demonstrate the CSD has always been alive to the need to pay attention to the type of clothing items, as well as the type and thickness

of materials used as being suitable for the different weather seasons and appropriate for the various activities to ensure objective thermal comfort.

(2) It is not the task for the Court to find as a fact what adequate comfort is or should be for Female PICs as a class. The task is entrusted to the Commissioner in law, and he has the sole authority to approve the Scales devised with the benefit of many years of experience and expertise of the CSD in managing and governing correctional facilities.

126. As can be seen in the above, there is no force in the Applicant's assertion that there is misinterpretation of the PR26. Nor did the Commissioner or the CSD fail to consider relevant material considerations as alleged by the Applicant.

127. Ground 4 is, thus, not made out.

H. Ground 3: Unreasonableness

128. It is trite that a decision is *Wednesbury* unreasonable or irrational in circumstances which include that the decision is so unreasonable that no reasonable authority could ever have come to it. It is also trite that establishing irrationality is a high hurdle for a judicial review applicant to overcome.

129. The gist of Mr Tam's submissions on the alleged irrationality of the Scales and/or the Policy and/or the Decision is as follows:

(1) The Commissioner clearly recognises the benefits of Female PICs wearing shorts in the summer, including during weekly PE sessions and pyjamas.

(2) It is the self-serving and bare assertion that the CSD has considered thermal comfort when determining the uniform for Female PICs, which is not shown in all 11 of their affirmations and the recommendations of the Task Groups (of 2003, 2010 and 2021) and is manifested in the use of poly-cotton blend for the long trousers of female PICs.

(3) The fact that Male PICs are provided with shorts to wear during summer daytime shows that the ventilation measures present in correctional institutions are inadequate. Therefore, the CSD should provide Female PICs with similar shorts. The absurdity is compounded by the fact that Female PICs are prohibited from folding or pulling up their trousers as if wearing shorts.

(4) If there are Female PICs who prefer long trousers over shorts due to medical or religious reasons, they can still apply to wear long trousers. It is an impossible proposition that all Female PICs prefer to wear shorts during summer daytime.

130. In response, Mr Lui relied on his analysis in relation to consideration of the thermal comfort of PICs (above) and submitted that Ground 3 is devoid of merit. I accept the force in his submission that, in so far as the Applicant argues that thermal comfort has not been taken into consideration, that must be rejected. Further, if the Applicant's point is that the Commissioner should have accorded more weight to the consideration of thermal comfort, or should have devised a different policy to address heightened concerns expressed by some Female PICs, that cannot succeed as an irrationality challenge.

131. Indeed, it seems to me that this intended Ground of review – *Wednesbury* unreasonableness or irrationality – is essentially more or less

repackaging of the above other Grounds as advanced by Mr Tam. I have dealt with the issue of irrationality in the above context as well.

132. Ground 3 is rejected.

I. Conclusion

133. As I indicated near the commencement of this Judgment, the issue in this case arises in the context of prison uniform and perhaps boils down to whether – for Female PICs in summer – the default position should be (1) the provision of uniform long summer trousers (from which there might be exceptions on a case-by-case basis) or (2) the provision of uniform summer shorts (from which there might be exceptions on a case-by-case basis).

134. It is of course possible to envisage that some individual Female PICs would prefer to wear shorts, and might – like the Applicant – advocate the provision of shorts as the default position. But:

(1) there are plenty of other Female PICs who have expressed a preference for the provision of long summer trousers as the default position;

(2) the provision of summer trousers has been the subject of careful consideration and review by the person charged by statute with the relevant decision-making power;

(3) that decision-maker has the relevant expertise and experience in context, which justifies a reasonably wide margin of discretion;

(4) the decision has encompassed the taking into account of professional opinion;

(5) the factual evidence contradicts any assertion that there is widespread concern about the health effects of wearing the issued long trousers in summer;

(6) there is no absolute rule or inflexibility because of the express possibility of exceptions; and

(7) there is no challenge I the RAF 86 to suggest that the scope of the exceptions is impermissible as part of the Clothing Policy.

135. Once those matters are recognised, then the underlying complaint quickly loses what might at first blush appear to be its merit. I accept that in considering the overall context of the Scales and Clothing Policy, the items provided by default appear to have been customised for each gender in each season, and enforced equally between Male PICs and Female PICs. Further, all PICs claiming to suffer warmth and health issues arising from the clothing normally given to them would have the same chance to seek authorisation for special clothing as an exception. Any request for exceptional clothing is considered independently, and there is no basis to suggest that either sex is being treated more or less favourably.

136. Ultimately, on the law and principles applicable, all Grounds as put forward by the Applicant are rejected on the substantive application for judicial review.

137. As to costs, it seems to me that the costs should follow the event and the Commissioner's costs should be payable by the Applicant, to be taxed if not agreed. I make that order on a *nisi* basis, to become absolute after 14 days unless any party makes an application for

variation of the *nisi* order. Any variation application will be dealt with on paper.

(Russell Coleman)
Judge of the Court of First Instance
High Court

Mr Jeffrey Tam, Mr Andrew Lau, and Ms Yvonne Leung, instructed by Ho Tse Wai & Partners, for the applicant

Mr Mike Lui SC, instructed by, and Ms Vivian Kao, Senior Government Counsel of, the Department of Justice, for the respondent