Case Summary

HKSAR v Chow Hang Tung (鄒幸彤) and Others

WKCC 3633/2021; [2023] HKMagC 2
(West Kowloon Magistrates' Courts)
(Full text of the Court's reasons for verdict in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=150992&currpage=T)

Before: Mr. Peter Law, Principal Magistrate
Date of Verdict: 4 March 2023

Public interest immunity – whether disclosure of Police Investigation Report would jeopardise ongoing investigation – redaction of unrelated information – fair trial not undermined

Requirement for foreign agent to provide information under Sch. 5 to IR – less stringent than Sch. 7 to IR – effective prevention and investigation of offences endangering national security – threshold for identification of foreign agent relatively low, not even requiring prima facie proof – proof of foreign agent as a fact not an element of offence of non-compliance with Notice

Legality of Notice under Sch. 5 to IR – challenge at trial proper – systemic proportionality – IR not amenable to judicial review – operational proportionality – threshold for applying Sch. 5 less rigid and slightly lower than Sch. 1 and Sch. 7 – threshold of "reasonable grounds to believe" for identifying foreign agent slightly lower than "reasonable grounds for suspecting" – correct approach adopted by Police – requirement to provide information constrained in terms of time periods and nature – within parameters of NSL 43(1)(5) and Sch. 5 to IR – information before promulgation of NSL could be required – not necessary for Police to pursue alternative means to obtain information – no ulterior motive – requirement not oppressive –

fair balance achieved

Non-compliance with Notice under Sch. 5 to IR – Defendants not exercised due diligence – statutory defence under s. 3(3)(b) of Sch. 5 not available

Background

1. The three Defendants (D1, D2 and D5), being office-bearers of the Hong Kong Alliance in Support of Patriotic Democratic Movements of China ("HKA"), were charged with one count of failure to comply with a notice under s. 3(1)(b)[*] of Sch. 5 (Rules on Requiring Foreign and Taiwan Political Organizations and Agents to Provide Information by Reason of Activities Concerning Hong Kong) of the Implementation Rules for Article 43 of the NSL ("the Notice")[†], contrary to s. 3(3)(b) of Sch. 5.

2. The HKA was incorporated in 1989 as a company under the Companies Ordinance until its recent winding up. At all material times, D1 was the vice-chairperson while D2 and D5 were committee members. On 25 August 2021, the Commissioner of Police ("the CP") issued and served the Notice on the Defendants and others, requiring them to provide the specified information in writing with supporting documents within 14 days. The Defendants did not comply with the Notice.

Major provision(s) and issue(s) under consideration

- NSL 3, 13, 14, 43(1)(5) and 43(3)
- Implementation Rules for Article 43 of the NSL ("IR"), Sch. 1, Sch. 5 (s. 3) and Sch. 7

[*] Section 3(1)(b) of Sch. 5 of the IR read:
"(1) If the Commissioner of Police reasonably believes that it is necessary to issue the requirement for the prevention and investigation of an offence endangering national security, the Commissioner may from time to time, with the approval of the Secretary for Security, by written notice served on a foreign agent or Taiwan agent, require the agent to provide the Commissioner with the following information within the specified period in the specified way— … (b) if the agent is an organization— (i) the personal particulars of the staff of the organization in Hong Kong, and of the members of the organization in Hong Kong … ; (ii) the activities of the organization in Hong Kong; (iii) the assets, income, sources of income, and expenditure of the organization in Hong Kong."

[†] Reproduced at para. 71 of the Reasons for Verdict.

- BOR 10, 11, 14 and 18

3. The Court had addressed the following issues:

A. Public Interest Immunity
B. Preliminary issues
   (a) Whether it was necessary for the Prosecution to prove that HKA was a foreign agent as a matter of fact
   (b) Whether the Defence could challenge the legality of the Notice in the context of Sch. 5 of the IR in a criminal trial
C. The trial proper: Legality of the Notice
   (a) Whether it was correct to adopt the threshold of "reasonable grounds to believe" that HKA was a foreign agent
   (b) The material times for determining legality of the Notice
   (c) Whether the CP had reasonable belief as to the necessity to issue the requirement
   (d) Whether the scope of the requirement was too wide
   (e) Whether the complaint as to retrospectivity was valid
   (f) Alternative means to obtain the information
   (g) Whether there was ulterior motive behind the requirement
   (h) Whether the requirement was oppressive
   (i) Whether fair balance had been achieved
   (j) Whether the CP's decision was defective

Summary of the Court's rulings

A. Public Interest Immunity

4. The Prosecution claimed Public Interest Immunity in respect of certain information in the Police Investigation Report on HKA and the recommendations to the CP in relation to s. 3 of Sch. 5 of the IR, mainly on the ground that the disclosure would jeopardise the ongoing investigation. The Investigation Report and the recommendations were not solely targeted at HKA, but also related to ongoing investigation into other organizations and persons. The Court held that leaking of secret information, such as identities, strategies and interim investigation results of others, would seriously jeopardise the ongoing investigation of

other national security cases. (paras. 11-14)

5. The focus should be on the factual nexus which led to the triggering of the measure (i.e. the requirement to provide information) rather than the identities of others. In order to minimize the risk of any side-track strategy leading to reasonably guessing as to the identities of the targets, the Court ordered redaction on certain materials, including the identities of entities/persons who were subject to ongoing investigation and all information relating to ongoing investigation which were not related to HKA and the Defendants. (paras. 16-17)

6. The Court held that the non-disclosure of materials, other than those related to HKA and the Defendants, would not undermine a fair trial. The anonymity with limited disclosure of some factual nexus was sufficient for the purpose of conducting the defence and ensuring a fair trial. There was no possible detriment or disadvantage of any kind or degree to the Defence. (paras. 17-18)

B. Preliminary issues

Whether the Prosecution was required to prove that HKA was a foreign agent

7. NSL 43 empowered the Police to obtain information either by serving a notice with the approval of the Secretary for Security under Sch. 5 or by applying to a CFI judge for a production order under Sch. 7 (Rules Relating to Requirement to Furnish Information and Produce Materials) of the IR. The Court had the following observations after comparing the power to obtain information under Sch. 5 and Sch. 7 of the IR. (paras. 24, 27-31)

(a) The measures taken under Sch. 5 were meant to be responsive and effective, which was the purpose of NSL 3.
(b) It was not an offence to set up a foreign agent or any associate of it.
(c) There was no mandatory scheme for setting up a foreign agent, nor was there any list thereof.

(d) Setting up a foreign agent could be as simple as registering as a company. There was no requirement to register an individual as a foreign agent.
(e) A foreign agent was inevitably associated with overseas connections. Information could be sought with the assistance of foreign authorities but this would be delayed with unexpected difficulties and even be unfeasible under prevailing climate.
(f) The measures under Sch. 5 were less stringent than Sch. 7 for reasons that:
    (i) the former would be taken at a more peripheral stage;
    (ii) the maximum penalties for non-compliance with the requirements of Sch. 5 were less severe; and
    (iii) the procedure of Sch. 5 was simpler.

8. Having regard to the requirements of NSL 3(2) and (3) and the special features of Sch. 5, the Court held that the IR were intended to provide an effective procedure to facilitate the implementation of the NSL, in particular NSL 43(1)(5). The objective of NSL 43 and Sch. 5 was the prevention and investigation of offences endangering national security. (paras. 30 and 70)

9. The Court had the following conclusions from the above observations. (para. 32)

(a) Lesser severity of the measure should be proportionate to lesser stringency of the threshold.
(b) The overall purpose of Sch. 5 was an effective measure for the prevention and investigation of matters relating to national security. To be effective, the measure had to be responsive and efficient.
(c) Sch. 5 was silent on the threshold for identification of a foreign agent; the rule-makers were minded to create some flexibility for the CP to exercise professional judgement at that juncture, regardless of the strict rules of evidence and the burden and standard of proof required in a criminal trial.
(d) Identifying the foreign agent was the entry to and also part and parcel of the long process of effective prevention and

investigation. Having regard to the background and purpose of the promulgation coupled with the deliberate silence on the threshold, it was clear that the lawmakers and rule-makers did not intend to make proof of foreign agent as a matter of fact an element of the offence of non-compliance.

(e) Prevention and investigation being a state of surmise, the threshold must be relatively low, not even requiring prima facie proof.

10. Foreign agent was defined in s. 1 of Sch. 5 but the Schedule was silent on the criteria to identify a particular organization as a foreign agent. The Court ruled that the concept of foreign agent was the conclusion of an administrative decision at that juncture; it was not an essential element of the offence that the Prosecution had to prove at the trial. The Prosecution did not have to prove that HKA was a foreign agent as a matter of fact. (para. 24 and 33)

Whether the Defence could challenge the legality of the Notice in the context of Sch. 5 of the IR in a criminal trial

11. There was no mechanism for licensing or registration of foreign agents. The norm was that all entities had no obligation to disclose their composition, activities or means unless by stipulation. The Court held that the defence was entitled to challenge the legality of the Notice at the trial for matters not been dealt with by it. (para. 34)

C. Trial proper

Legality of the Notice

12. The following were the Court's major findings of fact. (para. 69)

(a) Since the establishment in 1989, HKA had engaged in multiple nexus activities and interaction with Hong Kong and non-Hong-Kong entities and people as stated in the Investigation Report and the recommendations of the Superintendent of Police in charge.

(b) Throughout the entire period concerned, direct and indirect flow of funds was recorded.
(c) HKA had the five operational goals throughout the years, including End One-Party Dictatorship and Build a Democratic China.
(d) The three Defendants were amongst the office-bearers at the material time.
(e) The Superintendent honestly relied on and evaluated the investigation information, and he *bona fide* compiled the Investigation Report and made recommendations to the CP.
(f) The CP endorsed the whole of the recommendations.
(g) The Secretary for Security approved the measure.
(h) Up to the due date, none of the required information was provided.

13. The Defence asserted that they were not a foreign agent of any organization. They challenged the legality of the Notice. Their key argument was that there was no requirement to prove as a matter of fact that HKA was a foreign agent. They alleged that the Notice had infringed their right against self-incrimination (BOR 11), the right to a fair trial (BOR 10), freedom of association (BOR 18) and the right to protection of privacy (BOR 14 and the Personal Data (Privacy) Ordinance (Cap. 486)).

14. In considering the legality of the Notice, the Court applied the CA decision in *Leung Kwok Hung v Secretary for Justice* [2020] HKCA 192 which held that the proportionality analysis had to be applied on two different levels: (a) examining the systemic proportionality by reference to the legislation or rules in question; and (b) examining the operational proportionality by reference to the actual implementation or enforcement of the relevant rule on the facts and specific circumstances of a case at the operational level. (para. 72)

Systemic proportionality

15. Following *HKSAR v Lai Chee Ying* [2021] HKCFA 3, the Court held that the NSL was not the subject of any challenge. As for the IR, they

were made by the CE in conjunction with the Committee for Safeguarding National Security of the HKSAR under NSL 43(3). NSL 13 provided for the composition of the Committee, which included (among others) the CE (as the chairperson) and a secretary-general appointed by the CPG upon nomination by the CE. NSL 14(2) provided that the Committee's decisions should not be amenable to judicial review. After noting that judicial review was not a term of art and had to be construed according to ordinary language together with the purpose of promulgation, the Court held that the Committee's decisions were not amenable to any judicial proceeding or decision. In light of the context of NSL 13, 14 and 43(3), the IR were also not the subject of any challenge. (paras. 74-80)

Operational proportionality

16. The Defence contended they were not obliged to answer the purported Notice *ab initio*. The Court stated that the application of the operational proportionality analysis had to be taken in full picture and done objectively. (paras. 81 and 83)

(a) Whether it was correct to adopt the threshold of "reasonable grounds to believe" that HKA was a foreign agent

17. The IR set out respectively in s. 2(2) of Sch. 1[‡] and s. 2(4)(b) of Sch. 7 the thresholds for identification of the specified evidence and the recipient of a production order, but no threshold was provided in Sch. 5 for identification of the foreign agent concerned. In the present case, the CP adopted the threshold of "reasonable grounds to believe" by stating in the Notice that he had reasonable grounds to believe that HKA was a foreign agent specified in s. 1 of Sch. 5. The Court had the following observations: (paras. 71 and 84-85)

(a) identifying the foreign agent was the initial step to the Sch. 5 measure;
(b) when multiple organizations, people and interactions were involved (with some even overseas), adopting a stringent

[‡] Sch. 1 set out the Rules Relating to Search of Places for Evidence.

standard of identification would be unrealistic;

(c) information obtained at the early stage would normally be in loose pieces;
(d) ensuring effectiveness was essential under NSL 3;
(e) national security was of cardinal importance;
(f) there was no mechanism for registration nor was there any list of foreign agents;
(g) the overall difficulties in the entire situations.

18. Unlike Sch. 1 and Sch. 7 which required strict judicial scrutiny, the application of Sch. 5 was less rigid and a slightly lower threshold was to be expected. "Reasonable grounds to believe" was not in itself a low standard but just slightly lower than "reasonable grounds for suspecting" with which there was still a series of hurdles to overcome in the balancing exercise. Having regard to the nature, purpose, necessities and to strike a balance between the measures and the rights concerned, the adoption of the threshold of "reasonable grounds to believe" could hardly be criticized. Bearing in mind their backgrounds, political aims, activities and nexus with both locals and non-locals throughout the years, the Court held that the approach adopted by the CP was correct. (paras. 86-88)

(b) The material time for determining legality of the Notice

19. The material time relevant to legality was the point of time when the CP made his decision, not in hindsight. Any subsequent information, no matter how significant it was, was irrelevant as the legitimacy had already been frozen at that point of time. (para. 89)

(c) Whether the CP had reasonable belief as to the need to issue the requirement

20. While all measures taken for prevention and investigation on national security had to be executed with the highest standard of professionalism, a professional investigation body would definitely have its own judgement and strategy to act on the needs arising in different circumstances. Divergence in the deployed tactics *per se* could not be criticised as unreasonable unless it was found to be obviously absurd.

To evaluate reasonableness of needs, one must not derail the purposes of the NSL, the IR and the reality. (paras. 90-91)

21. The Court found that the Police had taken a self-restrained approach. The requirement for information was not a broad-brush fishing exercise, but was constrained in terms of periods of time and nature. (paras. 92-96)

(a) There was no mechanism for registration as a foreign agent. Some agents were even hiding. A comprehensive searching and screening exercise was necessary.
(b) HKA was set up in 1989 and had been carrying out non-stop political activities with local and non-local organizations and people.
(c) It was essential to retrieve the personal information of its directors and full-time staff as well as the full list of its assets to ascertain its background and functions.
(d) It was necessary to explore its dealings and connections with various entities and people abroad as well as their monetary flows to find out their affiliation and ultimate purpose.

(d) Whether the scope of the requirement was too wide

22. After discussing the meaning of "information", "in writing", "supporting documents" and "investigation", the Court stated that NSL 43(1)(5) embraced s. 3(1) of Sch. 5 and the Personal Data (Privacy) Ordinance; the information required to be provided did not go beyond the perimeters of NSL 43(1)(5) and Sch. 5 of the IR. (paras. 97-102)

(e) Whether the complaint as to retrospectivity was valid

23. In relation to the argument that some of the information required was dated before the promulgation of the NSL and some even back to 1989 when it was a time of a different regime, the Court held that the concept of national security was not just limited to an outbreak at a particular point of time but a continuation of a series of acts with accumulative and generative aim to an ultimate end, be it part of the adventure under the same or another different regime. The Defendants' claim for

retrospective limitation was invalid. (paras. 105-106)

(f) Alternative means to obtain the information

24. It would be unrealistic to expect the Police to first obtain a full collection of yearbooks and pamphlets and then approach the target under investigation for assistance in verification as to correctness and completeness at its discretion. Since Sch. 5 was for prevention and investigation, the more direct the approach the better; at least this could minimize the risk of delay and omission. Compared with Sch. 1 (search of places for evidence) and Sch. 7 (requirement to furnish information and produce materials through SJ's *ex parte* application to a CFI judge for a production order), the measure under Sch. 5 was the mildest of all. (paras. 107-111)

(g) Whether there was ulterior motive behind the requirement

25. Although the Police had initiated another proceedings against HKA, striking off HKA from the Companies Registry was under a different mechanism and criteria. Any omission from mentioning foreign agent was nothing odd or sceptical. There was no ulterior motive behind the requirement. The Superintendent of Police in charge held an honest belief in the truthfulness of the investigation information and he acted *bona fide* on his analysis. (paras 112-113)

(h) Whether the requirement was oppressive

26. In considering whether the requirement to provide information was oppressive, the Court looked into the whole picture, including the capabilities, resources and the conduct of the recipient of the notice. Although the Defendants were required to provide a large amount of information, some even aged, within 14 days, the Court found no room for any claim of oppression after making the following observations: (paras. 114-117)

(a) a liaison contact point had been provided in the Notice which could serve as a channel for relief if necessary;
(b) the high-profile press conference held by HKA and their open

letter to the CP conveyed a clear message of total refusal;

(c) most of the information required was not that aged, only back from 2014;

(d) some of the information required was actually information that it was necessary for HKA to maintain, such as accounting records, tax returns, and provident fund documents with personal details of all employees;

(e) no attempt had been made to retrieve any information; and

(f) none of the required information was provided in the end, not even information that was not difficult to have access.

(h) Whether fair balance had been achieved

27. National security was of cardinal importance to public interest and the whole nation. For the prevention and investigation of offences endangering national security, information was the core of the measures; any obstruction would defeat the whole process. The requirement was restrained and reasonably necessary. Given the close nexus, interactions amongst HKA and the others who shared common objectives and the monetary flows, all the required information was necessary for the prevention and investigation of an offence endangering national security. Having taken an objective, panoramic and complete evaluation of all evidence, the Court was satisfied that an overall fair balance had been achieved. (paras. 118-121)

(i) Whether the CP's decision was defective

28. While the CP endorsed the recommendations without query or seeking clarification, it was a sign of his satisfaction as to the sufficiency of information which enabled him to make his professional decision. There was no material fault on the CP's decision. (paras. 123-124)

Conclusion

29. The Court held that the Notice was legal when it was served on the Defendants. The Defendants were obliged to provide the information required. As the Defendants had not exercised due diligence and had

not taken any actual steps to retrieve the information, the statutory defence under s. 3(3)(b) of Sch. 5 was not available. Their non-compliance was unjustified. The Defendants were convicted as charged accordingly. (para. 129-135)

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