



Summary of Judgment

Tam Sze Leung & Others v Commissioner of Police (“Commissioner”) CACV 152/2022; [2023] HKCA 537

Decision : Commissioner’s Appeal allowed
Date of Hearing : 9 February 2023
Date of Judgment/Decision : 14 April 2023

Background

1. This is the Commissioner’s appeal in relation to the Judgment dated 30 December 2021 and the decision dated 23 March 2022 before the Court of First Instance (“CFI”), whereby it was held that the “No Consent Regime as operated” was ultra vires, not prescribed by law and disproportionate. (Full text of the CFI’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=141312&QS=%2B&TP=JU).
2. The Applicants sought to challenge, by way of judicial review, the Commissioner’s decision to issue and maintain “letters of no consent” (“LNCs”) in respect of their accounts (“Accounts”) held by Bank of China Hong Kong, Bank of East Asia, Hongkong and Shanghai Banking Corporation and Hang Seng Bank (“HSB”) (collectively “Banks”) under the Organised Serious Crimes Ordinance, Cap. 455 (“OSCO”).
3. The four Applicants are family members. Since 2019, the Applicants have come under suspicion by the Securities and Futures Commission (“SFC”) for having committed breaches of the Securities and Futures Ordinance, Cap. 571. In particular, for the suspected offence of “stock market manipulation” in Hong Kong between 2018 and 2020.
4. On 25 November 2020, SFC referred the matter to the Police for investigation against the Applicants for the suspected offence of “money laundering”. From 27 November 2020, the Police took a number of steps, including communicating with the Banks (with exception of HSB) to inform them of investigation against the Applicants and requested for the Banks’ action.
5. From around late November 2020, the Banks filed suspicious transaction reports to the Joint Financial Intelligence Unit (“JFIU”) under section 25 of OSCO. Pursuant to those requests, LNCs were issued under section 25A of OSCO¹ in

¹ Section 25A(1) and (2) of OSCO provides:

“(1) Where a person knows or suspects that any property—

- (a) in whole or in part directly or indirectly represents any person’s proceeds of;
- (b) was used in connection with; or
- (c) is intended to be used in connection with,

an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or



relation to the specified accounts. This eventually led to the Accounts being “frozen” by the Banks. LNCs were subsequently maintained upon monthly reviews conducted pursuant to the procedures stipulated in Chapter 27-19 of the Force Procedures Manual.

6. In mid-October 2021, in separate proceedings, the Secretary for Justice obtained Restraint Orders against the Applicants’ Accounts. As a result of the grant of the Restraint Orders, the LNCs against the Applicants have been lifted.

Issues in dispute

7. The Applicants advanced six grounds for judicial review (§43):-
 - (1) whether the issue and maintenance of the LNCs are tainted by procedural impropriety and unfairness (“**Procedural Unfairness Ground**”);
 - (2) whether the LNCs are *ultra vires* OSCO, which does not confer power on the Commissioner to operate a *de facto* property freezing regime (“**Ultra Vires Ground**”), with an associated alternative argument that the LNCs were issued for an improper purpose (“**Improper Purpose Ground**”);
 - (3) whether LNCs interfere with the Applicants’ constitutional rights under the Basic Law and Hong Kong Bill of Rights – specifically (i) property rights under Articles 6 and 105 of the Basic Law, and (ii) rights to privacy and family under Hong Kong Bill of Rights (“**BOR 14**”) – and such interference is not ‘prescribed by law’ (“**Prescribed By Law Ground**”);
 - (4) whether LNCs breach the Applicants’ right to a fair hearing under Article 10 of the Hong Kong Bill of Rights (“**Fair Hearing Ground**”);
 - (5) whether the No Consent Regime and the LNCs disproportionately interfere with the Applicants’ above fundamental rights (“**Proportionality Ground**”); and
 - (6) whether the decision to refuse even partial consent to release of funds are unlawful in that the LNCs causes a ‘blanket freeze’, without any distinction as to which assets are or could be alleged to represent proceeds of crime

suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.

- (2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 25(1) (whether before or after such disclosure), and the disclosure relates to that act, he does not commit an offence under that section if—
 - (a) that disclosure is made before he does that act and he does that act with the consent of an authorized officer; or
 - (b) that disclosure is made—
 - (i) after he does that act;
 - (ii) on his initiative; and
 - (iii) as soon as it is reasonable for him to make it.”



(“Blanket Freeze Ground”).

8. The CFI held in favour of the Applicants on the Ultra Vires Ground (with the Improper Purpose Ground), the Prescribed By Law Ground and the Proportionality Ground, but rejected the Procedural Unfairness Ground, Fair Hearing Ground and the Blanket Freeze Ground.
9. The Commissioner appealed, contending that the declaration should be set aside and the application for judicial review (“JR”) be dismissed. The Respondents filed a Respondents’ Notice contending that the grounds of review dismissed by the CFI should be upheld.

Department of Justice’s Summary of the Court’s rulings

(full text of the CA’s judgment at https://legalref.judiciary.hk/lrs/common/search/searchbox_result.jsp?txtselectopt=4&isadvsearch=0&selDatabase=ALL&selDatabase=J&selDatabase=RV&selDatabase=RS&selDatabase=PD&stem=1&selall=1&ncnValue=&ncnParagraph=&ncnLanguage=en&txtSearch=CACV+152%2F2022&query=Go%21&selSchct=FA&selSchct=CA&selSchct=HC&selSchct=CT&selSchct=DC&selSchct=FC&selSchct=LD&selSchct=OT&selallct=1)

Ultra Vires Ground (§§53-72)

10. Court of Appeal (“CA”) held that an account is “frozen” not because there is any enforceable order made by the Police that blocks the account, but because the bank has chosen not to comply with its customer’s instruction, no doubt due to concern about criminal liability under section 25(1). Police have no power to require the bank to do anything.
11. Police have power to refuse consent and it is not ultra vires for them to inform a bank by a LNC that the bank does not have the Police’s consent to deal with further funds in that account. It does not matter for the purpose of vires that the bank’s suspicion was triggered by information from the Police. Alerting the Banks of relevant investigations and suspicions is within the power of the Police; it does not follow that a subsequent LNC becomes ultra vires simply because the Police had “proactively reached out” and alerted the banks to the suspicious circumstances in the first place: §§58, 63-66.

Improper Purpose Ground (§§73-77)

12. CA found that it is not improper to refuse consent for the purpose of preventing dissipation of property while Police investigation is ongoing. There is no suggestion that the Police did not have such reasonable suspicion when they issued and maintained the LNCs: §§76-77.

Prescribed by Law Ground (§§78-96)



13. CA was of the view that the statutory scheme does not fall foul of the prescribed by law requirement. There is no relevant uncertainty or vagueness in section 25(1). There are remedies in private law for any infringement of property or contractual rights. Although Police's discretion under section 25A(2)(a) is without specific parameters, there are sufficient constraints to guard against arbitrary refusal and sufficient guidance for a citizen with legal advice to anticipate the scope of the discretion and the manner of its exercise: §96.

Proportionality Ground (§§97-104)

14. CA found it difficult to see how *Interush Ltd v Commissioner of Police* [2019] HKCA 70, [2019] 1 HKLRD 892 ("*Interush*") can be distinguished in this case and affirmed that *Interush* is binding authority before CA and below, which had held that sections 25 and 25A of OSCO and the practice of JFIU in issuing LNCs are not systemically unconstitutional. The Judge should not have entertained the systemic challenge. Further, CA did not see the significance of the Commissioner's acceptance that the No Consent Regime is an "informal freezing regime", this being a generic description that seems no more than an acknowledgement of the effect of the combined operation of sections 25 and 25A of OSCO: §§102, 104.
15. CA was not satisfied with the Applicant's contention that *Interush* is plainly wrong: §105.

Procedural Fairness Ground (§§106-108)

16. CA rejected the Procedural Fairness Ground where Applicants have failed to show how the Judge erred in finding that, as a matter of general principle, there should be no requirement for disclosure of anything which is material in a pending prosecution, and that it would be contrary to public interest for the grounds of an officer's suspicions to be disclosed during ongoing investigation. Requirement of notice is completely contrary to the statutory framework under OSCO as well as common sense: §107.

Fair Hearing Ground; Rights to Private and Family Life and Access to Legal Advice and to the Court (§§109-112)

17. As held in *Interush*, CA doubts whether Police's decision to withhold consent engages BOR 10 (right to fair hearing). In any event, there is access to the court by way of JR and a more intensive review is not essential for compliance with BOR 10 in the present context: §§111-112.
18. CA endorsed the Judge's holding that BOR 14 (rights to private and family life) was not engaged: §§114-115.

Blanket Freeze Ground (§§116-118)



19. Fact-specific challenge is wholly academic since LNCs have been superseded by the Restraint Order, and should not be entertained in this Court: §118.

Court's Disposition

20. In allowing the appeal, the Court of Appeal (§120):-

- (1) Set aside the declaration and costs order made in court below;
- (2) Granted leave to apply for JR in respect of the (i) Ultra Vires Ground, (ii) Improper Purpose Ground, and (iii) Prescribed By Law Ground – but substantive JR fails;
- (3) Refused leave for JR in respect of the (i) Proportionality Ground;
- (4) For the grounds rejected by the CFI, CA took that CFI did not grant leave for JR so they are not disturbed; and
- (5) Costs order nisi that the Applicants pay the costs in the appeal and below, with a certificate for two counsel.

Civil Division

Department of Justice

14 April 2023