



Summary of Judicial Decision

Interush Limited & Interush (Singapore) Pte Limited (collectively “the Applicants”)

v

**The Commissioner of Police, The Commissioner of Customs & Excise
& Mak Wing Yip Cyril, Superintendent of Police (collectively “the Respondents”)**

CACV 230/2015; [2019] HKCA 70

Decision : The Applicants’ Appeal dismissed
Date of Hearing : 19 & 22 October 2018
Date of Judgment/Decision : 17 January 2019

Background

1. In November 2013, the Applicants were under investigation for promoting an alleged pyramid scheme contrary to Pyramid Schemes Prohibition Ordinance (Cap. 617). Shortly around this time, one of the financial institutions filed a “Suspicious Transaction Report” with the Joint Financial Intelligence Unit to discharge its duty under section 25 of the Organized and Serious Crimes Ordinance (Cap. 455) (“OSCO”). Upon investigation, the Police had, on suspicion of proceeds of crime, issued a set of “Letter of No Consent” (“LNC”) to the banks which held the Applicants’ property, pursuant to section 25A of OSCO.
2. In December 2014, the Applicants applied for judicial review challenging the constitutionality of sections 25 and 25A of OSCO on the grounds that these provisions infringed Articles 6 and/or 105 of the Basic Law (“BL 6”; “BL 105”) (protection of property rights), and Article 35 of the Basic Law (“BL 35”) and/or Article 10 of the Hong Kong Bill of Rights (“BOR 10”) (access to court). The Applicants alleged, among other things, that section 25 of OSCO interferes with the use or disposal of the Applicants’ property. The Applicants further alleged that the Police’s decision to refuse consent was unlawful and unreasonable as such refusal was not subject to any prescribed time limit, and there was no provision under the statutory scheme for any application to the court for effective remedy.
3. The Applicants’ challenges were rejected by the Court of First Instance (“CFI”) on the grounds that BL 6 and BL 105 are not engaged and BL 35 and BOR 10 are not contravened, the internal guidelines of the Police are sufficient safeguard and the Applicants can sue the financial institution or challenge the Police’s decision by judicial review.
(full text of the CFI’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=99782&QS=%2B&TP=JU)
4. The Applicants appealed to the Court of Appeal (“CA”) against the CFI’s judgment in October 2015, but the Applicants did not proceed to prosecute the



appeal until around November 2017. The Respondents filed a Respondents' Notice seeking to contend further or in the alternative that the CFI judgment should be additionally affirmed on the ground that even if sections 25(1) and 25A of OSCO engage and interfere with the right to property under BL 6 and BL 105, they are a proportionate interference and thus constitutional. By judgment of 17 January 2019, the CA dismissed the Applicants' appeal.

Issues in dispute

5. The issues in dispute are :

(A) the systemic challenge :

- (1) whether the constitutional right to property under BL 6 & BL 105 are engaged;
- (2) whether the consent regime is 'prescribed by law' (raised for the first time by the Applicants);
- (3) whether the infringement of property rights is justified under the proportionality test; and

(B) the fact-specific challenges that the Respondents acted unconstitutionally (or otherwise unfairly and unreasonably) against the Applicants by using the consent regime to bypass the procedural safeguards for restraint order application.

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/search_result_detail_frame.jsp?DIS=119632&QS=%2B&TP=JU)

6. The CA found that, by adopting the analysis in *The Chief Officers, Customs & Excise, Immigration & Nationality Service v Garnet Investments Ltd. (unrep. Guernsey Judgment 19/2011, 6 July 2011)*, section 25 of OSCO whether by itself or in combination of section 25A, does not engage the property rights. Section 25 merely sets out the creation of the offence of dealing with property known or believed to represent proceeds of an indictable offence. (paragraphs 6.1-6.5).
7. The LNC does not by itself freeze the accounts of the Applicants but this letter has affected the use by the Applicants of their money in the bank accounts. The CA held that although the "temporary freezing" of the Applicants' accounts does not constitute a deprivation of their property, the use by the Applicants of their property in the nature of the debt which has an economic value is affected, and property rights are engaged. The Respondents' argument that



the Applicants had assumed risk when entering into a commercial transaction with their banks was rejected (paragraphs 6.18-6.27).

8. The CA held that in a constitutional challenge, the burden rests upon the respondent to justify the intrusion of the protected rights. If the 'prescribed by law' issue that the consent regime under OSCO falls foul of such requirements of adequately accessible and sufficiently precise to enable individual to regulate and foresee the consequence of their conduct has been raised below, the Respondents in order to discharge this burden was clearly entitled to adduce evidence in order to justify why the Hong Kong legislative and executive authorities chose to deal with the consent regime in its current form in particular why details of the operation are only provided in an internal manual not accessible to the public. The Applicants are not entitled to rely on the 'prescribed by law' arguments for the first time in this court (paragraphs 6.28 to 6.32).
9. The CA applied the four-stage proportionality test and the two standards identified in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, and held that
 - (1) as accepted by the Applicants, sections 25 & 25A are rationally connected to the legitimate aim of deterring criminal activity by restricting access to the proceeds of crime (paragraph 6.39).
 - (2) the procedural steps in the Police Force Manual ('the Manual') are not so uncertain that they fall foul of the proportionality requirement. The CA rejected the Applicants' arguments of 'absence of temporal limit' and 'lack of guideline', and accepted the Respondents' submissions that
 - (i) there is an implied duty of all persons exercising public power such as the Police to act reasonably and that reasonable suspicion activates the right to arrest or to investigate and such assessment can only be challenged on the basis that it is *Wednesbury* unreasonable, namely perverse : *Shaaban Bin Hussien & Others v Chong Fook Kam & Another* [1970] AC 942;
 - (ii) in Hong Kong, there is no time frame imposed for investigation of any criminal offence;
 - (iii) there is no limit at common law for the prosecution of any indictable offence subject to the power of the court to stay proceedings by reason that a fair trial could not take place because of delay;
 - (iv) the decision making process under the Manual must be subject to section 70 of Interpretation and General Clauses Ordinance (Cap. 1) that 'where no time is prescribed or allowed within which any thing should be done, such thing shall be done without unreasonable delay,



and as often as due occasion arises.’

- (v) the time and the method taken by the Police to investigate must necessarily depend on the complexity of the case and the way in which the person under investigation responds to the enquiries by the Police’;
 - (vi) the level of precision required of a law ‘must depend on the subject matter of the law in question’; and
 - (vii) the long established authorities that where a statute imposes an obligation on a public body to take a particular step, that does not normally import an requirement to take that step within a particular time and the general rule that delay is controlled by the application of established public law principles and not by the Court reading in time limits (paragraphs 6.40 to 6.42).
- (3) the Applicants’ argument that the consent regime is disproportionate as it severely affects fundamental rights and there are less intrusive alternatives available was rejected. The CA considered that the comparison of the consent regime with the restraint regime is not appropriate. The purpose and the standard of the two regimes are different. The CA further considered that comparison with the anti-money provisions in other countries is not appropriate. In any event, a margin of discretion should be accorded to the legislative and executive branches, who were the originators of the impugned measures as better placed to assess the appropriate means to advance the legitimate aim espoused (paragraphs 6.43 to 6.52).
10. The Applicants’ fact-specific challenges on the continuing withholding consent and the delay in applying for a restraint order in this case was rejected. The CA adopted the formulation in *Engineers’ and Managers’ Association v Advisory Conciliation and Arbitration Service* [1980] 1 WLR 302 and concluded that in this case, no bad faith is alleged and the complexity of the issues with cross-border elements involved has to be considered (paragraphs 6.54 to 6.56).
11. The CA held that the access to court rights have not been engaged in this case because of the judicial remedies available to the Applicants by way of judicial review and civil claims against the banks (paragraphs 6.57 to 6.60).

**Prosecution Division
Department of Justice**

January 2019