



Summary of Judgment

Secretary for Justice (“SJ”) v Persons conducting themselves in any of the acts prohibited under paragraph 1(a), (b), (c) or (d) of the Indorsement of Claim

CACV 274/2023

CAMP 303/2023

[2024] HKCA 442

Decision : Appeal allowed, the Order of the Judge below set aside, and interim injunction granted

Dates of Hearing : 19 December 2023 and 24 February 2024

Date of Judgment : 8 May 2024

Background

1. In the proceedings below, the SJ, as guardian of public interest, applied for an interlocutory injunction in aid of criminal law under section 21L(1) of the High Court Ordinance to restrain the Defendants from committing four specified acts (“**4 Acts**”) in connection with a song commonly known as “願榮光歸香港” or “Glory to Hong Kong” (“**the Song**”). SJ’s application was refused by Anthony Chan J (“**the Judge**”) by a decision dated 28 July 2023. This is SJ’s appeal before the Court of Appeal (“**CA**”).
2. The CA observed that since its first publication, the Song has been widely circulated and used prominently in violent protests and secessionist activities. The Song is still freely available on the internet and on various music platforms and remains prevalent. It is so notwithstanding the fact that the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (“**NSL**”) has already applied in Hong Kong since 30 June 2020.

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

(Full text of the Court’s Judgment at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=159920&currpage=T)

Main Issues

3. The CA identified three main issues: (§18)



- (1) What should be the court's approach to an application for injunction in aid of the criminal law for safeguarding national security?
- (2) What is the role of the court where the executive has made an assessment of national security in the predictive exercise of the likely utility of an injunction to prevent activities endangering national security?
- (3) Are there real and substantial conflicts between contempt proceedings and criminal proceedings such that the injunction should be refused?

The Proper Approach

4. After going through the authorities and contextual considerations, the CA stated that the approach to the injunction sought is as follows:
 - (1) Given its complementary nature, a civil injunction should be granted only if its assistance in terms of prevention of the particular acts or activities endangering national security is necessary to help the criminal law achieve its public interest purpose of safeguarding national security. Necessity does not require proof of certainty that nothing short of the injunction would achieve the purpose or that the injunction would provide greater deterrence than what the criminal law has already provided. Utility of the injunction is a weighty but not conclusive factor in the overall evaluation of its necessity. (§84)
 - (2) In deciding if the injunction should be granted: (§85)
 - (a) In relation to the assessment of national security by the executive, the court is bound by a certificate issued by the Chief Executive under NSL 47, if any; or in other cases, will give great deference to the assessment.
 - (b) In relation to the injunction as a counter-measure, since it is a legal question to be resolved by the court alone, the court will make its own judgment while giving considerable deference to the executive's decision to invoke the court's jurisdiction. The court will also firmly bear in mind its constitutional duty to safeguard national security and the mandate in the NSL to fully deploy the equitable jurisdiction to grant injunctions to safeguard national security in the exercise of the discretion.
 - (3) If the injunction engages any fundamental right, the court has to be satisfied



that the restriction imposed is constitutionally justified. The terms of the injunction should be clear and certain; should not be wider than the criminal law; and should not constitute any disproportionate encroachment of the right. (§86)

- (4) As a newcomer¹ injunction, it should contain clear safeguards to enable any person affected by it or a newcomer to come to the court for setting aside, variation, clarification or to make other representations as appropriate. Further, as an ex parte injunction in substance, the SJ as applicant should draw the court's attention to any material points on the available evidence that may affect the court's exercise of the discretion. (§87)

The Present Case

5. CA found that that the findings and reasoning of the Judge on the lack of utility of the injunction, its compatibility with the criminal law and its *contra mundum* effect, and accordingly his exercise of discretion, cannot be supported. (§88)

6. In exercising the discretion afresh and applying the correct approach, the CA was satisfied that the injunction should be granted (§89) and took into account:

- (1) The composer of the Song has intended it to be a “weapon” and so it had become. It had been used as an impetus to propel the violent protests plaguing Hong Kong since 2019. It is powerful in arousing emotions among certain fractions of the society. It has the effect of justifying and even romanticizing and glorifying the unlawful and violent acts inflicted on Hong Kong in the past few years, arousing and rekindling strong emotions and the desire to violent confrontations. Further, in the hands of those with the intention to incite secession and sedition, the Song can be deployed to arouse anti-establishment sentiments and belief in the separation of the HKSAR from the PRC. (§90)

- (2) As is the case of any national anthem, the national anthem of the PRC is a symbol and sign of the State. It represents the country with her sovereignty, dignity, unity and territorial integrity and is the identity of the Chinese people. Misrepresenting the Song as the national anthem of the HKSAR in the manner

¹ “Newcomers” are persons who are not parties to the proceedings. They are neither the Defendants nor identifiable, and who have not yet committed or threatened to commit the prohibited acts, but may do so in the future. (§78)



proscribed is both an offence under the National Anthem Ordinance and, importantly too, constitutes an act endangering national security as it misrepresents Hong Kong as an independent state or arouses the sentiments for the independence of Hong Kong. (§91)

(3) By the Certificate issued under NSL 47 (“**the Certificate**”), the Chief Executive assessed that the 4 Acts pose national security risks and are contrary to the interests of national security. The Certificate is binding on the court. The same conclusion can also be reached on the evidence. (§92)

(4) There is an immediate need to stop the 4 Acts. However, the Song is still freely available on the internet and remains prevalent. CA accepted the assessment of the executive that prosecutions alone are clearly not adequate to tackle the acute criminal problems and that there is a compelling need for an injunction, as a counter-measure, to aid the criminal law for safeguarding national security. (§93):-

(a) The past and threatened conduct of the Defendants as seen in the wide-spread, persistent flouting of the criminal law before and especially after the NSL came into force, exacerbated by the misconceptions harboured by many members of the public about the unlawful activities in connection with the Song, clearly shows that the criminal law alone will not achieve the public interest purpose of safeguarding national security. The injunction must come to aid in terms of enhancing prevention by providing additional deterrence to actual or potential offenders and dispelling the misconceptions held by the public. (§94)

(b) Such is the seriousness of the criminal problems that the court must intervene immediately to prevent the continuation of the prevailing unlawful state of affairs; otherwise any further damage to national security would likely to be irreparable. (§95)

(c) An injunction is necessary to persuade the internet platform operators (“**IPOs**”) to remove the problematic videos in connection with the Song on their platforms. (§96) The CA observed from the evidence that in light of the way the criminal acts in connection with the Song are conducted on the internet by various unidentifiable persons, it is impracticable to bring proceedings against each of the wrongdoers. A much more effective way to safeguard national security in such circumstances is to ask the IPOs to



stop facilitating the acts being carried out on their platforms, to break the circuit. Although the IPOs have not taken part in these proceedings, they have indicated that they are ready to accede to the Government's request if there is a court order. The injunction is therefore necessary. (§98)

7. The Judge considered that education might be more effective in remedying the public's misconceptions about broadcasting etc of the Song. In terms of a forceful, immediate response to aid the criminal law in tackling the damage and threats to national security caused by the 4 Acts and the public misconceptions, injunction, as a preventive measure backed by the regime for contempt, is clearly more effective than education. (§99)

Conclusion

8. The CA allowed the appeal, set aside the Judge's order and made an interim injunction as appeared in the Annex to the judgment. (§105)

Department of Justice

May 2024