



**Summary of Judicial Decision**

**Chee Fei Ming substituted by Pun Lin Fa v Director of Food and Environmental Hygiene (“the Director”) and another;  
Hung Shui Fung v The Director and another  
CACV 489/2018 & CACV 490/2018; [2019] HKCA 1425**

<b>Decisions</b>	<b>:</b>	<b>The appeal of the Respondents (Director and others) allowed; the cross-appeals of the Applicants (Chee Fei Ming substituted by Pun Lin Fa and Hung Shui Fung) dismissed</b>
<b>Dates of Hearing</b>	<b>:</b>	<b>12 &amp; 13 November 2019</b>
<b>Date of Judgment/Decision</b>	<b>:</b>	<b>16 December 2019</b>

**Background**

1. The Applicants and other fellow Falun Gong (“FLG”) practitioners had been staging what they described as “static demonstrations” at various locations in Hong Kong, i.e. gathering in front of banners, placards or billboards. No permission has ever been obtained from either the Director of Food and Environmental Hygiene under section 104A(1)(b) of the Public Health and Municipal Services Ordinance (Cap.132) or the Lands Department under the Management Scheme for the display of such materials. Section 104A(1)(b) provides that a person must first obtain written permission from the Director before he could display publicity materials on any Government land falling within the Director's purview. Any person who did so without permission committed an offence under s.104A(2). In April 2003, the Director delegated his functions and powers under s.104A(1)(b) to the Lands Department without precluding himself from exercising or performing the same. Since then, a Management Scheme had been adopted for processing applications for permission to display non-commercial materials at designated spots on public roadsides. In April 2013, the Food and Environmental Hygiene Department (“FEHD”) issued warning letters but FLG did not remove their displays. On 12 April 2013 and thereafter, the FEHD took enforcement actions by removing and confiscating the FLG materials under s.104C (“the Decisions”) and laid charges under s.104A(2).
2. On 31 August 2018, the Court of First Instance (“CFI”) allowed the application for judicial review and made an order quashing the Decisions of the Respondents. The CFI held that s.104A(1)(b) imposed a restriction on the Applicants’ freedom of



expression, assembly and demonstration that did not sufficiently meet the “prescribed by law” requirement. The CFI did not rule on the proportionality challenge. (full text of the CFI’s Judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=117196&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=117196&QS=%2B&TP=JU)

3. The Respondents appealed to the Court of Appeal (“CA”). In brief, the Respondents appealed against the CFI’s ruling on the “prescribed by law” point. The Applicants also cross-appealed on the proportionality challenge. By the judgment of 16 December 2019, the CA allowed the Respondents’ appeals and dismissed the Applicants’ cross appeals.

### **Issues in dispute**

4. The issues in dispute are:
  - (a) Whether s.104A(1)(b) of the Ordinance satisfies the “prescribed by law” test (“**the Prescribed by Law Issue**”); and
  - (b) Whether s.104A(1)(b) satisfies the proportionality requirement by reason of the criterion based on content-screening (“**the Proportionality Issue**”).

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

(Full text of the judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=126150&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=126150&QS=%2B&TP=JU))

#### **The Prescribed by Law Issue**

5. Under the “prescribed by law” requirement, the law must be adequately accessible and with sufficient precision. In this case there was no issue on the accessibility and the focus was on the foreseeability. (paras. 23-26)

#### *Foreseeability and safeguards against arbitrary interference*

6. The statutory scheme confers a discretion on the Director but such provision by itself does not infringe the “prescribed by law” requirement provided that the law indicates with sufficient clarity the scope of any such discretion and the manner of its exercise and provides adequate and effective safeguards against abuse. (para. 34)



*“The law”: a holistic approach*

7. When examining “the law”, the Court would adopt a holistic approach and have regards not only to the statutory provision in question but also the common law and even published policy and guidelines: (para. 37)
  - (a) Common law is recognized to be a source of law in Hong Kong and there are ample authorities for taking common law into account in assessing in a particular case whether the foreseeability requirement under “prescribed by law” is satisfied. (para. 39)
  - (b) Further, the holistic approach also examines how the law is actually administered, including the effectiveness of judicial supervision through judicial review. (para. 44)
  - (c) So long as there is sufficient guidance in the published rules or policies setting out the boundaries of an administrative discretion, it would provide an adequate basis for working out the precise outcome in a particular case by way of judicial review. (para. 45)

*The degree of precision*

8. Section 104A(1)(b) is concerned with a statutory power applicable to a wide range of variables (including public spaces and a large variety of potential users and purposes for which posters and bills may be displayed or affixed and their locations). In such circumstances, it is inevitable that the statutory provision has to be worded in a general manner. (para. 58)

*Certainty as to the scope of the discretion and the manner of its exercise*

9. The scope of the discretion is to be determined by reference to the statutory objectives by reference to the statutory objectives in accordance with the well-established principle of *Padfield*<sup>1</sup>. As regards the manner of its exercise, it is to be guided by the Management Scheme. (para. 59)
10. The statutory objects do set sufficient guide for proper control of the exercise of discretion by the court to prevent arbitrary interference with the display of banners or poster including such display for a static demonstration of habitual regularity or permanence. (para. 65)

---

<sup>1</sup> The principle that there are no unfettered discretions in public law, and that statutory powers must be used to promote the policy and objects of the statute, to be determined by the courts as a matter of law.



11. The interference with the right of demonstration is limited. In the assessment of the constitutional compliance of a legal restriction on the exercise of fundamental human rights, the extent of restriction can be relevant. In the present case, the discretion would not affect the use of banner or poster in a mobile demonstration. This is not a case where the static demonstration at a regular location or site carries with it symbolic meaning in the exercise of the right of demonstration. (para. 66)
12. Content-screening can only be permitted insofar as it is necessary for the furtherance of the statutory objectives so the width of the power could not be a reason for holding that the discretion is not prescribed by law. (para. 67)
13. Management Scheme is the primary mode of control exercised by the authority (delegating the power to the Director of Lands) under Section 104A(1)(b). At the same time, as the statute itself does not limit its application to designated spots and has no provision for eligibility criteria, the authority must have a residual power to grant permission in cases falling outside the Management Scheme. However, given the residual nature of such power, the authority would be expected to exercise such power paying due regard to the policy considerations embodied in the Management Scheme with necessary modifications in respect of applications that do not fall within such scheme. (para. 73)
14. With guidance from the Management Scheme and “the law” (under the above holistic approach), and the possibility of the guidance from courts by judicial review, the exercise of the residual discretion by the authority on a case by case basis is not arbitrary.

#### The Proportionality Issue

15. The Applicants argued that there was no limitation under s. 104A on the restriction of the rights of demonstration and freedom of expression and it provided no guidance on what the decision maker would take into account in deciding whether or not to grant approval. They alleged that the decision maker would be at liberty to impose conditions, including content-screening, on applications. (para. 86)
16. The CA rejected these arguments for the following reasons:
  - (a) Permission under 104A(1)(b) is only required if a demonstrator occupies a spot on some permanent and habitually regular basis. (para. 87)
  - (b) Second, the discretion cannot be exercised in an arbitrary manner: the exercise of residual discretion must be guided by the statutory power and criteria set



out in the Management Scheme. (para. 88)

17. In respect of the Applicants' argument that the avoidance of environmental nuisance is not a legitimate purpose for the restriction of rights, the CA held that the objectives of the statutory power was not restricted to avoidance of environmental nuisance, but also included controlling to promote the orderly and proper use of public place which fell within the scope of public order (*ordre public*). (paras. 91-92)

18. In any event, there is no effective proportionality challenge by reference to the content-based screening criteria set out in the Management Scheme and the CA was satisfied that the criteria did not entail political censorship. (para. 99)

19. For the above reasons the CA rejected the proportionality challenge.

**Civil Division**

**Department of Justice**

**December 2019**