



Summary of Judgment

Kwok Wing Hang and Others v Chief Executive in Council and Another

Leung Kwok Hung v Secretary for Justice and Another

CACV 541, 542 & 583/2019 (on appeal from HCAL 2945/2019 and 2949/2019); [2020]

HKCA 192

Decision : **Respondents' Appeal on (1) the ERO allowed, and (2) the PFCR partially allowed**
Applicants' Cross Appeals dismissed

Date of Hearing : **9-10 January 2020**

Date of Judgment/Decision : **9 April 2020**

Background

1. These are the appeals of the Chief Executive in Council (“**CEIC**”) and the Secretary for Justice (“**SJ**”), and the cross appeals of Mr Leung Kwok Hung (“**Mr Leung**”) and 24 Members of the Legislative Council (“**LegCo**”), against the Judgment of the Court of First Instance (“**CFI**”) dated 18 November 2019 (“**CFI Judgment**”) and the Decision of the CFI (on the questions of relief and costs) dated 22 November 2019 (“**Decision**”) *allowing* the application for judicial review and holding (i) the Emergency Regulations Ordinance (Cap. 241) (“**ERO**”) and the Prohibition on Face Covering Regulation (Cap. 241K) (“**PFCR**”) made thereunder unconstitutional and invalid (“**Tier 1 Challenge**”); and (ii) PFCR ss.3(1)(b) – (d) and s.5 unconstitutional and void (“**Tier 2 Challenge**”).
2. The background facts can be found in paras. 1-20 of the Judgment of the Court of Appeal (“**CA**”).¹
3. The grounds for judicial review are repeated in para. 29 of the CA’s Judgment.²

¹ In summary, since June 2019, Hong Kong had experienced serious social unrests and public disorders marked by protests, escalating violence, vandalisms and arsons arising from the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019. To tackle the situation, on 4 October 2019, CEIC, in exercise of the powers under ERO s.2, made PFCR on the basis that there was an occasion of “public danger”. PFCR (*inter alia*) made it an offence for anyone to, without reasonable excuse, wear any facial covering such as a mask that will prevent identification at public assemblies or processions, and empowers the Police to require any person to remove the mask and, if that person refuses to do so, to remove it with force if necessary. PFCR took effect at midnight on 5 October 2019.

² In summary:-

Tier 1

1. **Ground 1** — The ERO amounts to an impermissible grant or delegation of general legislative power by the legislature to CEIC and contravenes the constitutional framework under the Basic Law (“**BL**”).
2. **Ground 2** — The ERO was repealed by s.3(2) of the Hong Kong Bill of Rights Ordinance (Cap. 383) (“**HKBORO**”) entirely / to the extent it is inconsistent with s.5 of the HKBORO.
3. **Ground 3** — The ERO falls foul of the BL 39 “prescribed by law” requirement.



4. The conclusions on each ground of judicial review are summarised in paras. 31-37 of the CA's Judgment.³ In short, on the Tier 1 Challenge, ERO (insofar as it empowers CEIC to make regulations on any occasion of public danger) and PFCR were held by CFI to be unconstitutional and invalid only on Ground 1 (delegation of legislative power ground) but not on Grounds 2 (implied repeal ground) and 3 (prescribed by law ground), with no determination made on Ground 4 (principle of legality ground). On the Tier 2 Challenge, PFCR ss.3(1)(b) – (d) and 5 were held unconstitutional and void on both Grounds 5A (s.3 proportionality ground) and 5B (s.5 proportionality ground). (full text of the CFI judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=125452&QS=%2B&TP=JU)
5. By Notices of Appeal both filed on 25 November 2019, CEIC and SJ appealed against the CFI Judgment and Decision on Grounds 1, 5A and 5B (see paras. 6-7 of the CA's Judgment for the grounds of appeal). By Notices of Cross Appeal both filed on 16 December 2019, Mr Leung and the 24 Members of LegCo cross-appealed on Grounds 2, 3 and/or 5B (see paras. 8-10 for the grounds of cross appeals).

Issues in dispute

6. For the Tier 1 Challenge, the core issue is whether ERO confers on CEIC general legislative powers to make subordinate legislation or primary legislation. For the Tier 2 Challenge, the core issue is whether the restrictions that PFCR ss.3(1)(b) – (d) and 5 imposed on fundamental rights satisfy the proportionality test and the proper standard to be applied in the analysis (see paras. 156-164 of the CA's Judgment).

Department of Justice's Summary of the rulings of CA

(Full text of the CA's Judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=127372&QS=%2B&TP=JU)

4. **Ground 4** — The PFCR is *ultra vires*, i.e. beyond the power conferred on CEIC by the ERO.

Tier 2

5. **Ground 5A** — PFCR s.3 amounts to a disproportionate restriction of the rights and freedom under Arts 5, 14, 15, 16, 17 of the Hong Kong Bill of Rights ("HKBOR") and BL 27.
6. **Ground 5B** — PFCR s.5 constitutes a disproportionate interference with the rights and freedoms protected by BL 27, 28 and 31 and HKBOR 5(1), 8, 14 and 16.

³ In gist:-

1. **Ground 1:** The ERO, insofar as it empowers CEIC to make regulations on any occasion of public danger, is incompatible with BL, having regard in particular to BL 2, 8, 17(2), 18, 48, 56, 62(5), 66 and 73(1).
2. **Ground 5A:** The restrictions under PFCR ss.3 (b) - (d) go further than is reasonably necessary notwithstanding their legitimate societal aims and connection therewith.
3. **Ground 5B:** The restrictions under PFCR s.5 go further than is reasonably necessary.



Respondents' appeal (Grounds 1, 5A and 5B)

7. At the outset, the CA:-

- (1) Reasserted the Court's jurisdiction and duty to deal with challenges on whether laws previously in force and adopted as HKSAR's laws are constitutional under the BL framework; (paras. 45 & 49)
- (2) Recognised the analysis of ERO's constitutionality under BL is informed by the theme of continuity; (para. 58)
- (3) Acknowledged that the pre-1997 LegCo could delegate to the Governor a limited legislative power to make subordinate legislation by an enabling ordinance. Due to the theme of continuity, such constitutional arrangement mirrors the past (subject to the necessary modifications under BL). (paras. 86 & 91)

8. Further, CA recognised that the HKSAR Government is executive-led, and that CE in consultation with the Executive Council may introduce bills and make subordinate legislation (recognised by BL 56(2)) by way of LegCo's delegation. The LegCo remains as the legislature exercising general legislative powers subject to BL. The common law principle of delegation also remains in place post-1997. (paras. 93-97 & 100)

9. In ruling that the Judges erred in failing to give sufficient weight to the theme of continuity at para. 121, the CA held:-

- (1) BL contemplates that ERO is an integral option for tackling emergency and public danger; ERO is constitutionally compliant and should remain as part of Hong Kong laws to avoid a significant legal lacuna; (para. 111)
- (2) The Court can also exercise control over CEIC's exercise of such power and the emergency regulations made. (para. 120)

10. CA concluded at paras. 152-153 that the emergency regulations which ERO authorises CEIC to make are subordinate legislation, rather than primary legislation, so that BL is not contravened. In response to certain key features of ERO under challenge, the following was held (*inter alia*):-

- (1) CFI failed to appreciate the true nature of ERO and emergency regulations; given the requirement for an urgent response to deal with emergency or public danger, the regulations that could be made are necessarily wide in scope; (paras. 126 & 128)
- (2) Although "public danger" is not defined, it is not objectionable to task CEIC to determine



if an occasion of public danger exists, but it does not follow that CE could act without any rein, given judicial scrutiny under the *Wednesbury* or *Padfield* principles; all emergency regulations must also not contravene BL; (paras. 131-133, 136)

- (3) The wide and extensive scope of ERO s.2(1) can be justified by the nature of the ERO and emergency regulations, but they are subject to LegCo's negative vetting procedures; ERO does not allow CEIC to amend or suspend the same as it must be construed to be compatible with BL (including BL 73(1) on LegCo's control over emergency regulations). (paras. 137 & 149)

11. Turning to Ground 5A of the Tier 2 Challenge, CA reversed the CFI' decision on PFCR s.3(1)(b). CA stressed that the freedom to demonstrate and of assembly are not absolute and, for the purpose of the proportionality test, the more intensive standard of "no more than necessary" should be adopted (see paras. 158 & 175 of the CA's Judgment). It was held that PFCR s.3(1)(b) is not more than "reasonably necessary" and strikes a fair balance between the societal benefits pursued by the restrictions, and inroads made to individuals' rights :-

- (1) CFI failed to have regard to the preemptive nature of the provisions in imposing sanctions against unauthorised assemblies under POO and their significance in maintaining public order, particularly in the context of public danger, as well as the safeguards under s.17(3) of the Public Order Ordinance (Cap. 245) ("**POO**"). (see paras. 211, 212 & 218)
- (2) Distinctions were made as to different scenarios of unauthorised assemblies; it was also highlighted that there are valid and serious public order concerns for unauthorised assemblies. Specifically, in authorised / notified assemblies where some protestors conduct themselves in such ways that are in breach of the Police-imposed conditions, the responsible police officer's issuance of an order for them to be stopped or the crowd to be dispersed under POO s.17(3) (Cap. 245) (which is subject to proportionality review on the operational level) is the point when they turn unauthorised. A person remaining at the scene will be acting in defiance. (paras. 217, 224 & 243);
- (3) The defence of reasonable excuse under PFCR s. 4 provides adequate protection to innocent protestors who are unaware of the POO s.17(3) order or have no reasonable opportunity to leave the scene. (paras. 233 & 238(5))
- (4) PFCR s.3's legitimate aim of deterring the giving of tacit support to the more violent protestors and shielding of them from law enforcement is acknowledged. A deliberate defiance against the POO regime designed to maintain public order and protect others' rights is no less reprehensible than conducts regarded as an unlawful assembly. (paras. 221, 231 & 237)

12. In light of the power to regulate the safe and peaceful conducts of lawful assemblies, and



to disperse a gathering when it is hijacked by violent or disorderly conducts, there is no justification for the further restrictions on lawful assemblies or public processions under PFCR ss.3(1)(c) and (d). (paras. 243 & 247)

13. On PFCR s.5, CA held that the statutory powers in place are sufficient to address its objectives. There is no justification for a wider power envisaged thereunder, and that such wide and unqualified power is against the concept of law providing proper safeguard against arbitrary interference of fundamental rights. (paras. 270 & 281)

Applicants' Cross Appeal (Grounds 2 to 4)

14. In dismissing the Applicants' cross appeals, the CFI' reasoning was adopted. In particular:

- (1) On Ground 2 (implied repeal ground), CA upheld that ERO is not impliedly repealed by HKBORO s.5, and reinforced the distinction between situations that a public emergency is officially proclaimed (measures may be adopted under ERO which derogate from BOR) and other situations that the restrictions have to satisfy the dual requirements of "prescribed by law" and "proportionality"; (para. 294)
- (2) On Ground 3 (prescribed by law ground), CA upheld that ERO does not fall foul of the "prescribed by law" requirement; ERO itself does not provide for any restriction of fundamental rights, and ERO cannot be said to have conferred unfettered power on CEIC with no independent safeguard against abuses; (paras. 315, 331-338)
- (3) On Ground 4 (principle of legality ground), CA upheld that ERO permits the enactment of PFCR; it was objectively intended by the legislature to give CEIC a wide power to make regulations including those imposing restrictions on rights and freedoms. (para. 351)

Civil Division

Department of Justice

April 2020