



Summary of Judgment

Cheung Tak Wing (“Applicant”) v Communications Authority and Director of Information Services CACV 570/2018; [2021] HKCA 2003

Decision : **Applicant’s appeal dismissed**
Date of Hearing : **2 December 2021**
Date of Judgment/Decision : **30 December 2021**

Background

1. This is an appeal to the Court of Appeal (“**CA**”) against the Judgment of Au J (as he then was) (“**Judge**”) in dismissing the Applicant’s judicial review, challenging decisions made respectively by the Communications Authority (“**Authority**”) and the Director of Information Services (“**DIS**”) to broadcast a series of announcements in the public interest (“**APIs**”) entitled “2017, Make it happen!” (“**Impugned Announcements**”). The Impugned Announcements were for the purpose of promoting and soliciting public support for the reform proposals for the method for selecting the Chief Executive (“**CE**”) in 2017.
2. Under the statutory regime for television and radio broadcasting in Hong Kong, the Government may require a television or radio licensee, in compliance with a standard licence condition, to broadcast materials supplied by the Government which are APIs free of charge. APIs are those which satisfy any of the following three criteria (“**3 Criteria**”) collectively):
 - (1) it is in the public’s interest to broadcast that message (Criterion 1);
 - (2) the message relates to issues of public concern such as health, safety, social welfare, legal obligations, availability of public resources and changes affecting traffic or other environmental factors (Criterion 2); or
 - (3) the message is directly related to a government policy or operational objective (Criterion 3).
3. Further, a television or radio licensee may not broadcast any advertisement of a political nature. That prohibition, however, does not apply to materials supplied by the Government (“**Exemption**”).

Issues in dispute

4. The principal issues raised in this appeal are:



- (1) Whether the Impugned Announcements were APIs; (Issue 1)
- (2) Even if the Impugned Announcements were APIs, whether the relevant provisions, that is, section 23(3) of the Broadcasting Ordinance, Cap. 562 (“**BO**”), and paragraph 5(b)(ii) of the Radio Code of Practice on Advertising Standards (“**Radio Code**”), which created the Exemption, were unconstitutional in that they had impermissibly infringed the Applicant’s right to:
 - (a) freedom of expression under article 27 of the Basic Law (“**BL 27**”) and article 16 of the Hong Kong Bill of Rights Ordinance (“**BOR 16**”); (Issue 2) and
 - (b) equality under article 25 of the Basic Law (“**BL 25**”) and article 22 of the Hong Kong Bill of Rights Ordinance (“**BOR 22**”). (Issue 3)

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

(full text of the CFI’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=141310&QS=%2B&TP=JU)

Issue 1: whether the Impugned Announcements were APIs

5. CA held that the Impugned Announcements qualified as APIs under all 3 Criteria. (paragraphs 31-45)

Issue 2: whether the Applicant's freedom of expression are engaged and, if yes, infringed

6. The Applicant, relying heavily on *Animal Defenders International v Secretary of State for Culture, Media & Sport* [2008] 1 AC 1312, argued that BL 27 and BOR 16 positively protect not only the freedom to express one's political views but also the converse, namely not to receive partial political advertisement. CA took the view that the Applicant's reliance on *Animal Defenders* is entirely misplaced and concluded that BL 27 and BOR 16 do not encompass the right not to be exposed to potential mischief of partial political advertising. The Applicant's rights under BL 27 and BOR 16 are not engaged on the facts. (paragraphs 46-53).
7. For completeness, CA found that, in any event, the interference with the Applicant’s supposed right not to receive partial political advertising can be readily justified under the proportionality test when balanced against (a) the right of other members of the public who do want to receive Government supplied information through television and radio, and (b) the fact that the applicant could easily block out the broadcast contents that he does not like by



changing channels or switching-off his television or radio. (paragraphs 54-55)

Issue 3: whether the Applicant's right to equality are infringed

8. CA approached the Applicant's discrimination challenge by first determining whether there is a differential treatment on a prohibited ground and, only if this can be demonstrated, examining whether it can be justified. To show the existence of a differential treatment on a prohibited ground, the complainant must establish (a) he has been treated differently to a person in a comparable, or analogous, position, and (b) the reason for the differential treatment is based on the prohibited ground. For justification, the court applies the 4-stage proportionality test¹. (paragraph 56)
9. CA rejected the Applicant's submissions that the Government and any person or party who supports or opposes the Government are in an analogous position in the context of expression of views on a hotly divisible political matter. As provided for in articles 43, 48 and 62 of the Basic Law, the Government has a unique constitutional power and function to formulate and implement policies. Requiring television and radio licensees to broadcast APIs, where the APIs are political with the aid of the Exemption, is essential to that function (paragraphs 57-58).
10. Further, CA considered that the Government has to cater for the public interest of Hong Kong as a whole and the different and competing interests of various sectors of the society in formulating policies and making decisions. It is therefore inapt to compare the Government with them. That unique constitutional position is also borne out by the role the CE and the Government play in the framework for amending the method for selecting the CE under article 7 of Annex I of the Basic Law. In consequence, CA held that the Applicant's discrimination challenge fails. (paragraphs 59-61)
11. For completeness, the Court ruled that the Exemption has, in any event, passed the proportionality test. (paragraph 63)

Miscellaneous points

12. Lastly, CA dealt with the remaining miscellaneous points raised by the Respondents and held that:
 - (1) it was open to the Judge to entertain the Applicant's application for judicial review even if it had become academic;

¹ In *Leung Chun Kwong v Secretary for Civil Service* (2019) 22 HKCFAR 127 at [19]-[21].



- (2) on delay, it was open to the Judge to exercise his discretion to extend time and grant relief; and
 - (3) their conclusions on the merits have rendered the issue on the Applicant's standing academic. (paragraphs 65-68)
13. In the circumstances, CA dismissed the appeal with costs of the appeal be to the Respondents, to be taxed if not agreed, with a certificate of two counsel.

Civil Division

Department of Justice

30 December 2021