



Summary of Judicial Decision

Cheung Tak Wing (“Applicant”) v Director of Administration (“Director”)

CACV 577/2018; [2020] HKCA 124

Decision : **Director’s appeal allowed; Applicant’s cross-appeal dismissed**

Date of Hearing : **14-15 August 2019**

Date of Judgment : **14 February 2020**

Background

1. The East Wing Forecourt was part of the Central Government Offices (“**CGO**”) (“**Forecourt**”). It serves the CGO both as a vehicular circulation area for passenger pick-up or drop-off and a pedestrian passageway for the staff and visitors of the CGO and the Legislative Council Complex. The Director had the management responsibility of the Forecourt. In 2011, the Director implemented a permission scheme (“**Scheme**”) under which the Forecourt was only open to the public on Sundays and public holidays from 10:00 am to 6:30 pm for holding public meetings and processions upon application to the Director and the latter’s approval.
2. The Applicant, a Hong Kong permanent resident, submitted an application for permission to use the Forecourt for a public meeting on 19 September 2014 from 9:00 am to 7:00 pm. His application was rejected by the Director (“**Decision**”), as the proposed date of the event was on a weekday. The Application brought a judicial review challenging the constitutionality and lawfulness of the Scheme (relying, specifically, on breaches of the rights to freedom of expression and assembly under Basic Law (“**BL**”) Art. 27 and Hong Kong Bill of Rights (“**BOR**”) Arts. 16 and 17).
3. The Court of First Instance (“**CFI**”) allowed the judicial review, declared the Scheme to be unconstitutional and quashed the Decision, with the following rulings:
 - (a) The Scheme satisfied the prescribed by law requirement.
 - (b) The Scheme did not satisfy the proportionality test and was unconstitutional for being inconsistent with BL 27, BOR 16 and BOR 17.
 - (c) The Director also committed an error of law by formulating the Scheme starting on the premise that, as a landowner, he could in principle exclude



anyone from entering the place concerned to exercise the rights of freedom of expression and assembly.

4. The Director appealed to the Court of Appeal (“CA”) and the Applicant also sought to either affirm the judgment below on other grounds, vary the judgment or cross-appeal.

Issues in dispute

5. At the CA, the main issues in dispute are:
 - (a) whether the Scheme is prescribed by law (“**Prescribed by Law Issue**”);
 - (b) whether the Scheme is tainted with illegality, i.e. by reason of the error of fact or error of law (“**Illegality Issue**”);
 - (c) whether the Scheme is proportionate (“**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=126906&QS=%28CACV%7C577%2F2018%29&TP=JU)

6. By the judgement of 14 February 2020, the CA allowed the Director’s appeal whereby it:
 - (a) affirmed that the Scheme satisfied the prescribed by law requirement;
 - (b) reversed the ruling that the Scheme was tainted with illegality by reason of the error of law and upheld the CFI’s ruling that there was no error of fact; and
 - (c) reversed the ruling on proportionality and held that the Scheme was proportional.

Prescribed by Law Issue

7. A restriction is prescribed by law if it is (a) imposed with proper legal authority; (b) accessible; and (c) formulated with sufficient precision, clarity and safeguards to protect individual against abuse by way of arbitrary interference of his rights (paras. 47 - 50). In this case there was no issue on the accessibility and the focus was on the other two issues. (para. 53)
8. On the issue of proper legal authority, CA held that the proprietary right of the Government in respect of the Forecourt and its duty as occupier provided proper legal authority for implementing the Scheme and thus no further statutory



backing is needed for the Scheme. This criterion is thus satisfied. (para. 52)

9. On the issue of sufficient precision, CA, by referring to the terms set out in the administrative guidelines for enforcing the Scheme, held that on the evidence there are sufficient safeguards against arbitrary inference with the exercise of rights to freedom of expression and assembly. This criterion is also satisfied and hence the Scheme is prescribed by law. (paras. 54 – 57)

Illegality Issue

10. The Scheme could be tainted with illegality by reason of the error of fact or error of law or both.

11. On the issue of error of fact, CA held that, on the evidence, the Applicant has no basis to suggest that the Director erred in managing the Forecourt on the basis that the Government had ownership of the land. On the contrary, CA found that the Director's legal authority for formulating the Scheme stemmed from such ownership. (paras. 58 - 61)

12. As for the issue of error of law, CA held that the Court of Final Appeal ("**CFA**") judgement in *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425 ("*Fong Kwok Shan*") did not say that the Government's property ownership is irrelevant. Further, the Director, as the manager of the CGO on behalf of the Government, had a duty to ensure activities in the Forecourt would not hamper business operations at the CGO and the safety and security of those visiting or working there. (paras. 62, 64)

13. Thus, it was not an error of law for the Director to start from the premise that as landowner the Government could set conditions for public to use the Forecourt. Nevertheless, such conditions must be subject to the proportionality analysis, which will be elaborated below. (paras. 62, 63 – 65)

Proportionality Issue

14. CA held that the present case does not involve any competing constitutional rights insofar as the Forecourt is concerned (para. 93). Following *Fong Kwok Shan*, the property rights guaranteed by BL 6 and BL 105 are not engaged in respect of Government properties. (paras. 79 – 85) Nor is the right to inviolability of other premises under BL 29 engaged, as it only applies to CGO, which is a workplace of the civil servants and Government ministers, but not the Forecourt. (paras. 87, 91 – 92)



15. Following *Fong Kwok Shan*, CA held that the applicable standard of scrutiny is “no more than necessary”. Applying the 4-step proportionality analysis, Steps 1, 2 and 4 are satisfied:

Step 1: There are legitimate aims for the implementation of the Scheme (paras. 103 – 106, 111);

Step 2: The Scheme is rationally connected with the legitimate aims (paras. 112 – 115); and

Step 4: A fair balance has been struck between the societal benefits of the encroaching measure on the one hand and the inroads made into the guaranteed right on the other. (paras. 139 – 141)

16. The major issue before the Court is Step 3 – whether the Scheme is no more than necessary to achieve the legitimate aims. CA held that, the proportionality of the Scheme should be assessed together with other alternative avenues for demonstration and petitions at or in the vicinity of the CGO. Having assessed the extent of the restriction and balancing the same against the potential risks of disruption to the operation of the CGO during the working days, CA held that the Scheme is no more than necessary to achieve the legitimate aims. (paras. 119, 124, 138)

Civil Division

Department of Justice

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