



Summary of Judgment

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

Leung Kwok Hung v Secretary for Justice and Another

FACV 6, 7, 8 & 9/2020 (on appeal from CACV 541, 542 & 583/2019); [2020] HKCFA 42

Decision : **Applicants' Appeals on the ERO and the PFCR dismissed, Respondents' Appeal on the PFCR allowed**

Date of Hearing : **24-25 November 2020**

Date of Judgment/Decision : **21 December 2020**

Background

1. These are the appeals of Mr Leung Kwok Hung (“**Mr Leung**”), 24 (former) Members of the Legislative Council (“**LegCo**”), and the Chief Executive in Council (“**CEIC**”) and the Secretary for Justice, against the Judgment of the Court of Appeal (“**CA**”) dated 9 April 2020 (“**Decision**”) *partially allowing* the Respondents’ appeals against the Court of First Instance’s (“**CFI**”) decisions dated 18 and 22 November 2019 (in which the Applicants’ applications for judicial review were allowed in full) and holding that (i) the Emergency Regulations Ordinance (Cap. 241) (“**ERO**”) is constitutional and s.3(1)(b) of the Prohibition on Face Covering Regulation (Cap. 241K) (“**PFCR**”) made thereunder is proportionate; and (ii) PFCR ss.3(1)(c) & (d) are disproportionate.
2. The background facts are briefly set out in paras. 11-12 of the Judgment of the Court of Final Appeal (“**CFA**”) (paras. 1-20 of the CA’s Judgment set out the background facts in detail).¹
3. The grounds for judicial review are repeated in para. 14 of the CFA’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 the PFCR on the basis that there was an occasion of “public danger”. The 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. The PFCR took effect at midnight on 5 October 2019.

² In summary:-

1. **Ground 1** — The ERO is an unconstitutional delegation of general legislative power by the legislature to CEIC, contrary to various provisions of the Basic Law (“**BL**”).
2. **Ground 2** — The ERO was impliedly repealed by s.3(2) of the Hong Kong Bill of Rights Ordinance (Cap. 383) (“**HKBORO**”) entirely / to the extent inconsistent with s.5 of the HKBORO.
3. **Ground 3** — The ERO infringes the “prescribed by law” requirement in BL 39.
4. **Ground 4** — The PFCR is *ultra vires* by reason of the principle of legality.
5. **Ground 5A** — PFCR s.3 amounts to a disproportionate restriction of the rights to liberty and privacy,



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4. At the CFI level, the ERO (insofar as it empowers the CEIC to make regulations on any occasion of public danger) and the PFCR were held to be unconstitutional and invalid on Ground 1 (the delegation of legislative power ground). On the challenges against the PFCR, PFCR ss.3(1)(b) – (d) and 5 were held to be unconstitutional and void for amounting to a disproportionate restriction of the relevant rights.

(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. Following the CA's Judgment, the resulting position was summarised in para. 18 of the CFA's Judgment. In short, the ERO (insofar as it empowers the CEIC to make emergency regulations on any occasion of public danger) was held to be constitutional (i.e. the Government's appeal on the ERO was allowed, and the Applicants' cross appeals were dismissed). The constitutionality of PFCR s.3(1)(a) was not challenged; PFCR s.3(1)(b) was held to be constitutional, but ss.3(1)(c)-(d) & 5 were held to be unconstitutional (i.e. the Government's appeal on PFCR s.3(1)(b) and ss.3(1)(c)-(d) & 5 were allowed and dismissed respectively).

(Full text of the CA's Judgment is available at

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

6. By Notices of Motion filed on various dates in May 2020, the Applicants sought leave to appeal against the CA's Decision on the ERO and PFCR s.3(1)(b), while the Government sought leave to appeal against the CA's Decision only on PFCR ss.3(1)(c)-(d) (but not s.5).

Issues in Dispute

7. The issues in dispute are (1) whether, in the light of the BL, the CEIC was lawfully given power by LegCo to make the PFCR under the ERO (i.e. the constitutionality issues), and (2) if the ERO is determined to be constitutional and the PFCR duly made thereunder, whether certain of the provisions of the PFCR are a proportionate restriction of protected rights (i.e. the proportionality issues). (Paras. 3-4 of the Judgment)

Department of Justice's Summary of the Rulings of the CFA

(Full text of the CFA's Judgment at

freedom of expression and right of peaceful assembly (under Arts 5, 14, 15, 16, 17 of the Hong Kong Bill of Rights ("BOR") and BL 27).

6. **Ground 5B** — PFCR s.5 constitutes a disproportionate restriction of various rights and freedom under the BOR and the BL.



https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=132501

[Press summary issued by the Judiciary at](#)

https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2019/CACV000541A_2019_files/CACV000541A_2019ES.htm)

The constitutionality issues

8. The Court first noted the opposite conclusions on the constitutionality of the ERO reached by the CFI and CA, and that the CFI's Decision in this connection was reversed by the CA by relying on the theme of continuity as informing the analysis of the constitutionality of the ERO. It was also accepted by the Court that, under the BL, the Chief Executive, the Executive Authorities, the Legislature and the Judiciary all have different roles to play, powers to exercise and functions to perform, and the legislative power which the National People's Congress authorises the HKSAR to exercise is exercisable by LegCo which is the HKSAR's legislature. (Paras. 29-30 & 34 of the Judgment)

 9. The Court however clarified that it does not mean the CE and the Executive Government does not have any role to play in terms of legislating for the HKSAR. While acknowledging that the HKSAR's legislative power is only vested in LegCo which cannot delegate its power to make primary legislation to anybody including the CEIC, it was noted it does not mean that LegCo cannot delegate its power to make subsidiary legislation. The question thus becomes, whether in truth and in substance, the ERO is a piece of legislation which seems to delegate to the CEIC general legislative power to make primary legislation (unconstitutional), or whether it merely authorises the CEIC to make subordinate legislation in times of emergency or public danger (constitutional). (Paras. 35-37 of the Judgment)

 10. Turning to the context of situations of emergency or public danger, it is recognised that it is essential to give the executive wide and flexible legislative powers whether or not the legislature is sitting. While the considerations under situations of emergency (or public danger) are entirely different, it does not mean that the delegated power to make emergency regulations can be totally untrammelled and unguided. On the other hand, the CEIC's power to make emergency regulations, as well as any regulation so made, are controlled and restrained by the internal requirements of the ERO, by the courts, by LegCo and by the BL. (Paras. 44, 47 & 49 of the Judgment)
- (1) ERO s.2(1) imports a requirement of good faith on the CEIC's part which is judicially reviewable; it also requires the CEIC's conclusion that an occasion of emergency or public danger has arisen to be a reasonable one in the public law sense. Yet, there



should be some margin of discretion accorded to the CEIC in determining whether an occasion of emergency or public danger exists, notwithstanding neither “emergency” or “public danger” is by nature capable of exhaustive definition. (Paras. 50-54)

- (2) The CEIC’s exercise of the power to make regulations is subject to judicial control: the CEIC’s conclusion that an occasion of emergency or public danger has arisen must be *bona fide*, the regulations made must be for the purpose of dealing with such emergency or public danger, and must be made in the public interest. (Paras. 55-56)
- (3) LegCo retains full control of regulations made under the ERO as they are subject to negative vetting by LegCo. Any political or other difficulties in introducing a private bill to LegCo with a view to amending or repealing any regulation made does not affect the legal position as to whether LegCo has sought to delegate general legislative power to the CEIC under the ERO. (Paras. 57-58 & 64)
- (4) Lastly, the CEIC’s exercise of the power is subject to constitutional control; there can be no restriction of fundamental rights protected under the HKBORO as guaranteed under BL 39 unless the regulations satisfy the prescribed by law requirement and proportionality analysis. (Para. 69)

11. Finally, the CFA did not consider it necessary to labour the theme of continuity to uphold the constitutionality of the ERO, and no incompatibility between the ERO and the post-1997 constitutional design under the BL was seen. (Para. 75 of the Judgment)

The proportionality issues

12. The Court first repeated that the restrictions of protected rights under any PFCR provision should satisfy the four-step proportionality test laid down in *Hysan Development Co Ltd v Town Planning Board*; the Court also gave an account of the available evidence showing, among other things, the alarming breakdown of law and order and escalating violence around the time of introduction of the PFCR. (Paras. 86-97 of the Judgment)

13. Importantly, the Court reminded that the freedom and rights said to be restricted by the PFCR, i.e. the freedom of assembly, procession and demonstration (under BOR 17 and BL 27), the freedom of speech and expression (under BOR 16 and BL27) and the right to privacy (under BOR 14) are not absolute but may be subject to lawful restrictions. (Paras. 99-100 of the Judgment)

14. Applying the proportionality test:-

- (1) While the Applicants accepted that PFCR s.3(1)(a) pursues the legitimate aims of preventing, deterring and stopping violence or at least assisting the police to detect and



apprehend those persons breaking the law, there is no suggestion that the restrictions under PFCR ss.3(1)(b)-(d) do not also pursue the same legitimate aims; (Para. 103)

(2) On the rational connection between the restrictions and their legitimate aims, it was held that by prohibiting the use of facial coverings at public order events the Government would directly address both unlawful behaviour itself and the emboldening effect the wearing of masks has on both violent and peaceful protestors alike; it would also assist in the identification of those persons breaking the law and facilitate their apprehension and prosecution. (Para. 105)

(3) On the third step of the proportionality test:-

(a) The Court first highlighted that the cardinal importance of the freedom of speech and peaceful assembly hinges on their peaceful exercise. Once any public gathering has deteriorated to the point it is an unlawful assembly, the protected rights are no longer being exercised by those particular individuals who are taking part in the unlawful activities, and should be subject to legal sanctions and constraints. Equally, prohibiting a person present at an unlawful assembly from wearing a facial covering is no more than reasonably necessary to achieve the legitimate aim of removing the emboldening effect of anonymity and the consequent propensity to break the law. (Paras. 107 & 109)

(b) The Court appreciated the distinction between PFCR s.3(1)(b) and ss.3(1)(c)-(d), i.e. whether the breach of some conditions have occurred. While not disputing that a peaceful demonstration does not lose its character as such because of an isolated outbreak of violence, the question was considered to be a matter of degree and highly fact sensitive – noting the propensity for a peaceful demonstration to degenerate into a serious public order incident, the Court held that the preventative and deterrent nature of the PFCR to be crucial. (Paras. 115, 120-121)

(c) The Court identified two errors in the CA's Decision regarding PFCR ss.3(1)(c)-(d): (i) the acceptance that there is no simple dichotomy between peaceful and violent protesters and that it is important to give effect to the preventative and deterrent nature of the prohibition was ignored, and (ii) it was erroneous to limit the need for preventative measures to be taken to those situations in which an offence under section 17A(2)(a) or 17A(3) of the Public Order Ordinance (Cap. 245) has been committed because the such measures do not hinge on the commitment of any offence thereunder. (Paras. 125-126, 129-130)

(d) Whether the restrictions may catch innocent bystanders or passersby would be a matter of evidence in any given case to determine if they were "at" the relevant public gathering for the purposes of the PFCR; they may also be able to rely on a defence of reasonable excuse or lawful authority under s.4. (Paras. 132 & 141)

(e) In response to the Applicants' contention, while the wearing of a facial covering may be a form of expression or be used for reasons of privacy or a legitimate desire



for anonymity, it does not lie at the heart of the right to peaceful assembly as it is still possible to demonstrate peacefully without wearing a facial covering; it can be regarded as a relative minor incursion into the relevant rights. (Paras. 134 & 136)

(f) The restrictions under ss.3(1)(b)-(d) pass the proportionality test notwithstanding that the higher “no more than necessary” threshold were applied. (Para. 140)

(4) Finally, on whether a fair balance has been struck, the Court held that there is a clear societal benefit in the PFCR when weighed against the limited extent of encroachment of the protected rights in question. Notably, the Court agreed that the interests of a range of different people and, in particular, the interests of Hong Kong as a whole, should be given due weight in the balance, especially when the rule of law itself was being undermined by the actions of masked lawbreakers who were seemingly free to act without impunity with their identities concealed. (Para. 146)

Civil Division

Department of Justice

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