



## Summary of Judgment

**Tam Sze Leung & Others (“Appellants”) v  
Commissioner of Police (“Commissioner”)  
FACV 7/2023; [2024] HKCFA 8**

**Decision** : **Appellants’ appeal dismissed**  
**Date of Hearing** : **4 March 2024**  
**Date of Judgment/Decision** : **10 April 2024**

### Background

1. This is the Appellants’ appeal to the Court of Final Appeal (“CFA”) from the judgment of the Court of Appeal (“CA”) in setting aside the declaration made by the Court of First Instance (“CFI”) that the Letters of No Consent (“LNCs”) and the No Consent Regime (“NCR”) as operated by the Commissioner were *ultra vires* sections 25 and 25A of the Organized and Serious Crimes Ordinance, Cap. 455 (“OSCO”), and incompatible with Articles 6 and 105 of the Basic Law (“BL”) because the NCR as operated by the Commissioner was not prescribed by law and disproportionate.

(Full text of the CFI’s judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=141312&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=141312&QS=%2B&TP=JU)).

(Full text of the CA’s judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=151894&QS=%2B%7C%28CACV%2C152%2F2022%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=151894&QS=%2B%7C%28CACV%2C152%2F2022%29&TP=JU)).

2. In the CFI, the Applicants (now the Appellants) sought to challenge, by way of judicial review, the Commissioner’s decision to issue and maintain LNCs in respect of their accounts held by a number of banks (collectively “Banks”), as well as the legality and constitutionality of the “informal freezing” of their accounts under the so-called the NCR, under sections 25 and 25A of OSCO.
3. The four Applicants are family members. Since 2019, the Applicants had come under suspicion by the Securities and Futures Commission (“SFC”) for having committed breaches of the Securities and Futures Ordinance, Cap. 571 (for the suspected offence of “stock market manipulation”).
4. SFC had referred the matter to the Police for investigation against the Applicants for the suspected offence of “money laundering”, following which the Police had taken a number of steps, including communicating with the Banks to inform them of investigation against the Applicants and requested for the Banks’ action.
5. From around late November 2020, the Banks filed suspicious transaction reports to the Joint Financial Intelligence Unit under section 25 of OSCO. Pursuant to



those requests, LNCs were issued under section 25A of OSCO<sup>1</sup> in relation to the specified accounts. This eventually led to the Applicants' accounts being "frozen" by the Banks. LNCs were subsequently maintained upon monthly reviews conducted pursuant to the procedures stipulated in Chapter 27-19 of the Force Procedures Manual ("FPM").

6. In March 2021, the Appellants were arrested for the offence of money-laundering and remained silent under caution. In October 2021, in separate proceedings, the Secretary for Justice obtained Restraint Orders from the Court against the Applicants' accounts. As a result of the grant of the Restraint Orders, the LNCs against the Applicants were lifted.

### Procedural history

7. At the CFI, Coleman J allowed the application on grounds that the NCR as operated is (i) *ultra vires* sections 25 and 25A of OSCO, and incompatible with BL 6 and 105 (property rights) because the NCR as operated is (ii) not prescribed by law and (iii) disproportionate.
8. The Commissioner lodged an appeal to the CA. By the judgment handed down on 14 April 2023, the CA allowed the Commissioner's appeal and upheld the lawfulness of the Police actions concerned.
9. The Appellants subsequently sought leave from the CA to appeal to the CFA. By judgment handed down on 15 August 2023, the CA granted leave to appeal on the four questions below:-
  - (i) Whether the NCR operated by the Commissioner and the LNCs issued in respect of the Appellants' bank accounts are *ultra vires* and/or whether the LNCs were issued for an improper purpose ("**Question 1**").

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<sup>1</sup> Section 25A(1) and (2) of OSCO provides:

"(1) Where a person knows or suspects that any property—

- (a) in whole or in part directly or indirectly represents any person's proceeds of;
- (b) was used in connection with; or
- (c) is intended to be used in connection with,

an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.

(2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 25(1) (whether before or after such disclosure), and the disclosure relates to that act, he does not commit an offence under that section if—

- (a) that disclosure is made before he does that act and he does that act with the consent of an authorized officer; or
- (b) that disclosure is made—
  - (i) after he does that act;
  - (ii) on his initiative; and
  - (iii) as soon as it is reasonable for him to make it."



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- (ii) Whether the NCR operated by the Commissioner and the LNCs issued in respect of the Appellants' bank accounts comply with the constitutional requirements for protection of (i) the fundamental right to property in BL 6 and 105, (ii) rights to private and family life in Article 14 of the Hong Kong Bill of Rights ("BOR"), and (iii) right to access to legal advice and to the court in BL 35 and BOR 10 including in particular: (a) whether they fulfil the requirements of being prescribed by law; and (b) whether they are proportionate restrictions on such fundamental rights ("**Question 2**").
- (iii) Whether the NCR operated by the Commissioner is and the issue of the LNCs in respect of the Appellants' bank accounts were procedurally unfair at common law and/or in violation of the right to fair hearing under BOR 10 in that there was (i) no or no adequate notice of the decision to issue the LNCs, before or after the issue; (ii) no or no adequate opportunity to provide meaningful representations as to whether the LNCs should be maintained; (iii) no or no adequate reasons given for the decision to issue the LNCs; and (iv) no hearing before an independent and impartial tribunal in terms of BOR 10 ("**Question 3**").
- (iv) Whether the case of *Interush*<sup>2</sup> was correct in holding that the "consent regime" (as defined in that judgment) is a necessary and proportionate restriction on the right to enjoyment of private property under BL 6 and 105 ("**Question 4**").

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

(full text of the CFA's judgment at

[https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=159306&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=159306&currpage=T))

10. Chief Justice Cheung and Mr Justice Ribeiro PJ delivered the joint judgment with which the other members of the Court (Mr Justice Fok PJ, Mr Justice Lam PJ and Lord Collins of Mapesbury NPJ) unanimously agreed:-

#### **On Question 1 (§§57-74)**

11. The CFA rejected the Appellants' contention that the LNCs are *ultra vires* because OSCO does not confer power to operate a *de facto* property freezing regime. Section 25A(2) of OSCO is principally concerned with the conferring of immunity in cases where disclosure has duly been made. Properly viewed, the Police's communications with the banks aimed at preventing money laundering and securing the suspect assets pending further investigation and are performed pursuant to the statutory duties and powers of the Police under the Police Force Ordinance, Cap. 232 ("**PFO**") to prevent crime and to protect property.

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<sup>2</sup> *Interush Ltd v Commissioner of Police* [2019] 1 HKLRD 892



12. The CFA also rejected the acts of the Police as freezing the accounts. On the contrary, it is the bank which disables and freezes its customer's account when it decides that the suspicion is not dispelled, in compliance with their own legal duties under OSCO and the anti-money laundering legislation as well as regulatory obligations laid down by the Hong Kong Monetary Authority. The CFA did not agree that banks would regard the Police's communications of suspicions as instructions which would invariably be obeyed.
13. It was also held that the LNCs were not issued for an improper purpose for the reasons above (i.e. section 25A(2) of OSCO is not the source of the Police powers to deal with the bank but rather from PFO, and the freezing of the accounts is not by the Police but the banks). Even if the "freezing" was properly attributed to the actions of the Police, such a temporary measure aimed at preventing dissipation of suspect assets pending further investigation and possible invocation of the court's jurisdiction is not a misuse of the powers conferred by PFO.

On Question 2 (§§75-94)

14. As noted, the withholding of consent to deal with funds under section 25A(2) of OSCO amounts to the withholding of immunity against liability under section 25(1) of OSCO. The Police does not by its acts freeze or make a "crucial contribution" to the bank's decision to freeze the accounts. The Police's acts therefore did not prevent the Appellants from using the property and thus did not infringe their property rights as alleged by the Appellants. Accordingly, BL 6 and 105 are not engaged and, on this ground alone, the constitutional challenge based on property rights cannot be sustained.
15. Even if the Police's actions did "freeze" the accounts, the actions are "prescribed by law" by the combined effect of PFO and FPM. Such actions are governed by clear and accessible provisions which confer the applicable powers on the Police and identify the principles under which their investigations and interactions with banks are to be conducted. They also pass the proportionality analysis. (§§82-87)
16. As for the Appellants' challenge based on the right to private and family life under BOR 14, it fails *in limine*. The CFA observed that no evidence had been adduced of any hardship. There is also no "systemic" challenge to any rule which engages BOR 14.

On Question 3 (§§95-101)

17. The CFA held that neither BOR 10 nor the common law fair hearing rights is engaged. It defies common sense to suggest that Police's investigations of suspected money laundering should be treated as if the Police were conducting a "suit at law" involving a public hearing in some adjudicative forum, giving the



suspects notice, reasons and an opportunity to make representations. The statutory purpose of OSCO is clear to avoid prejudicing the investigation. The Police are fully entitled to keep sensitive aspects of their investigations confidential.

On Question 4 (§§103-109)

18. Although the CFA does not fully support the analysis adopted by the CA in *Interush* since the Police's acts do not freeze the accounts and hence the property rights are not affected, the CFA considered that the CA in *Interush* had still arrived at the correct result.

**Court's Disposition**

19. Accordingly, the CFA unanimously dismissed the Appellants' appeal.

**Civil Division  
Department of Justice  
10 April 2024**