



Summary of Judicial Decision

**Chee Fei Ming substituted by Pun Lin Fa v Director of Food and Environmental Hygiene (“the Director”) and another;
Hung Shui Fung v The Director and another
FAMV 42 & 43/2016 & FAMV 213 & 214/2020; [2021] HKCFA 16**

Decisions : **The Applicants’ application for leave to appeal to the Court of Final Appeal dismissed**

Dates of Hearing and Determination : **13 May 2021**

Date of Reasons for Determination : **18 May 2021**

Background

1. The Applicants and other fellow Falun Gong (“**FLG**”) practitioners had been staging what they described as “static demonstrations” at various locations in Hong Kong, i.e. gathering in front of banners, placards or billboards.
2. Section 104A(1)(b) of the Public Health and Municipal Services Ordinance (Cap.132) (“**PHMSO**”) provides that a person must first obtain written permission from the Director before he could display bills and posters on any Government land. Any person who did so without permission committed an offence under s.104A(2).
3. The Applicants have never applied for such permission under s.104A(1)(b). In 2013, the Director issued warning letters to the Applicants requiring them to remove their displays which they did not do so. Hence, the Director took enforcement actions by removing and confiscating the FLG materials under s.104C (the “**Decisions**”) and laid charges under s.104A(2).
4. On 23 April 2013, the Applicants applied for leave for judicial review against the Decisions. This application for leave for judicial review, through a long procedural history, culminated into a number of judgments from the Court of First Instance, Court of Appeal and Appeal Committee of the Court of Final Appeal.¹

¹ CFI (15 October 2014): https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=95272
CA (6 June 2016): https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=104388
CFA (leave) (13 February 2017): https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=108057
CFI (31 August 2018): https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=117196
CA (16 December 2019): https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=126150



5. On 10 September 2020, the Applicants applied for leave to appeal to Court of Final Appeal in respect of a number of legal issues which arose from some of the judgments referred to in paragraph 4 above. On 13 May 2021, the Appeal Committee heard the leave applications and dismissed them on the same day, and handed down the Reasons for Determination on 18 May 2021.

Questions of Law

6. There are four questions of law for which leave to appeal was sought from the Appeal Committee:

The Construction Issue

- (1) “Whether it is reasonably arguable that on its true construction the requirement in Section 104A of the PHMSO for prior approval for display of bills and posters on government land is not applicable to demonstrators' banners?” (“**Original Construction Question**”);
- (2) “Whether Section 104A of the PHMSO only applies to displays which involve a degree of permanence and habitual regularity?” (“**Question 1**”);
- (3) “What is a demonstration for the purpose of Article 27 of the Basic Law?” (“**Question 2**”); and

The Proportionality Issue

- (4) “On the assumption that section 104A(1)(b) of the PHMSO is applicable to banners displayed during a demonstration, whether Section 104A so construed is inconsistent with the Protected Rights, and is therefore unconstitutional?” (“**Question 3**”).

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=135806&QS=%2B&TP=JU)

Original Construction Question and Question 1

7. The Applicants contended that the scheme should not apply to their attended banners at their demonstration sites and that a demonstration is not caught by the statutory scheme. (§ 12)



8. The Appeal Committee accepted CA's construction that s.104A requiring the bill or poster to be displayed "*with a degree of permanence and habitual regularity*" is a sensible purposive reading to address the environmental nuisance caused by such bills or posters in place for more than a temporary or passing demonstration. (§ 14)
9. The Appeal Committee further held that the bill or poster does not have to be attached or adhered to the land in order to be caught by the scheme. (§ 15)
10. Even if the bills or posters are attended and will be removed at night, e.g. FLG banners displayed at their demonstration sites herein, they fall within the statutory scheme. Attended banners can be just as much an environmental nuisance as unattended banners. (§§ 14 & 16)
11. Thus, the Appeal Committee considered that the question of construction of s.104A(1)(b) is not reasonably arguable.

Question 2

12. Concerning the meaning of a "demonstration" for the purposes of Article 27 of the Basic Law ("**BL27**")², the Appeal Committee held that the question as framed is too wide and, in any event, does not arise on the proposed appeal. (§ 18)

Question 3

13. The Appeal Committee held that the proposition of the mere fact that permission is required to display a bill or poster on Government land necessarily constitutes an unlawful restriction of protected rights is unduly wide. This cannot be reasonably arguable. (§ 20)
14. The Applicants originally in their applications for leave to judicial review contended that s.104A(1)(b) did not satisfy the proportionality test "by reason of the criterion based on content-screening". However, the Director had filed evidence to refute such contention. Further, as the Applicants had never made an application to the Director for permission to display bills and posters, there was no evidence as to the decision making process that could give rise to a properly formulated argument. Thus the Appeal Committee found such proportionality challenge not reasonably arguable. (§§ 22-23)

² Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.



15. Insofar as the Applicants' constitutional challenge is premised on the Director being entirely at liberty to impose conditions for the grant of permission and thus lacks legal certainty, the Appeal Committee held that such challenge is not reasonably arguable given the purpose and object of the PHMSO, the limited interference with the protected rights involved and the various legal safeguards which apply to the Director's exercise of discretion. (§ 24)
16. For the above reasons the Appeal Committee dismissed the Applicant's applications for leave to appeal with costs to the Government. This decision brings the Applicants' judicial review proceedings to a final end.

Civil Division
Department of Justice
18 May 2021