



Summary of Judicial Decision

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

HCAL 136/2014; [2018] HKCFI 2557

Decision : Application for Judicial Review Allowed
Date of Hearing : 6 September 2017
Date of Judgment/Decision : 19 November 2018

Background

1. The Tamar Site is collectively occupied by the Central Government Offices (“CGO”), the Chief Executive’s Office (“CEO”), the Legislative Council Complex (“LCC”) and the Tamar Park, and was allocated to the Director of Administration (“Director”) under Permanent Government Land Allocation.
2. The CGO has two wings: East Wing and West Wing. There is a Forecourt outside CGO East Wing (“Forecourt”). The Forecourt is part of the CGO and is under the management responsibility of the Director. It serves the CGO both as a vehicle circulation area for passenger pick-up or drop-off and a pedestrian passageway for the staff and visitors of the CGO and LCC.
3. Since the commissioning of the CGO and the CEO in late 2011, the Director has implemented a scheme (“the Permission Scheme”) requiring applications be made for use of the Forecourt for public meetings and processions or public order events (“POEs”). Under the Permission Scheme:
 - (a) The Forecourt is only open to the public on Sundays and public holidays from 10:00am to 6:30pm for holding public meetings and processions upon application to the Director and the latter’s approval. In other words, the Forecourt is *not* open to public on all weekdays and Saturdays for holding POEs.
 - (b) Permission to use the Forecourt for POEs on Sundays and public holidays has to be obtained first from the Director irrespective of the number of persons involved. Such approval given may be withdrawn at any time without prior notice.
 - (c) Only when the Director gives permission for access to specified areas within the Forecourt areas will those areas become public places under the Public Order Ordinance, Cap. 245, during such permitted hours of access.
4. On 17 September 2014, the Applicant submitted an application under the Permission Scheme for holding a public meeting at the Forecourt on 19 September 2014 from 9:00am to 7:00pm. As the proposed date of event was on



a weekday, the application was rejected on the same day (“the Decision”).

5. In this judicial review, the Applicant challenged the constitutionality and lawfulness of the Permission Scheme and the Decision on the grounds that they violated, amongst others, the right to freedom of expression and peaceful assembly guaranteed under Article 27 of the Basic Law (“BL 27”) and Articles 16 and 17 of the Hong Kong Bill of Rights (“BOR 16” and “BOR 17”) respectively, and that they failed the prescribed by law requirement as the consequences of the exercise of powers by the Director under the common law of property in relation to management of the Forecourt are not sufficiently certain or predictable, and not adequately foreseeable.

Issues in dispute

6. The issues in dispute are:
 - (1) Whether the Permission Scheme and the Decision meet the prescribed by law requirement. (“Prescribed by Law issue”)
 - (2) Whether the Permission Scheme and the Decision are unconstitutional in violation of BL 27 and BOR 16 & BOR 17 as the restriction on the rights to freedom of expression and peaceful assembly do not satisfy the proportionality test. (“Proportionality issue”)
 - (3) Whether the Permission Scheme and the Decision are unlawful or irrational as they were made under an error of fact. (“Illegality issue”)

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=118531&QS=%2B&TP=JU&ILAN=en)

7. In coming to its decision, the Court relied on the principles laid down in the Court of Final Appeal (“CFA”) judgment in *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425 concerning how the court should assess and determine the constitutionality and lawfulness of a restriction on the rights to freedom of expression, assembly and demonstration in relation to persons seeking to exercise those rights at another’s property (paragraphs 40 to 50).
8. In gist, the principles referred to in paragraph 7 are:-
 - (i) The rights to freedom of expression, assembly etc are engaged when they are sought to be exercised at any kind of property (whether it is stated-owned, government property, commercial property or private residential property).
 - (ii) It is wrong in principle for the government to regard it as having an entitlement as property owner to have an unfettered choice to exclude the public or to grant access.



- (iii) There should only be one common test to be applied which is the prescribed by law requirement and the proportionality test.
 - (iv) In relation to the proportionality test, it is necessary to weigh up “the manner, form and impact of each of the demonstration at the sites concerned” since the rights to freedom of expression and assembly extend to the manner and location in which the protestors wish to express their views (paragraph 47).
9. On the Prescribed by Law issue, the Court held that the restrictions imposed by the Director under the exercise of its common law proprietary right, coupled with the terms under the Permission Scheme, satisfied the prescribed by law requirement. A person seeking to enter and use the Forecourt knows with a reasonable degree of certainty the boundary and risks of any consequences in relation to his/her exercise of the rights of freedom of expression and assembly at the Forecourt. This ground is therefore rejected (paragraph 65).
10. On the Proportionality issue, the Court held that the Permission Scheme did not satisfy the proportionality test and was therefore unconstitutional (paragraphs 73 to 77):
- (a) The Director cannot demonstrate that the strict and blanket restrictions (mentioned at paragraph 3 above) are no more than necessary to achieve the legitimate aim of ensuring the normal operation of the CGO would not be interrupted.
 - (b) The Permission Scheme does not allow any discretion to approve an application made for weekdays or Saturdays by way of exception, meaning that there is no consideration towards the manner in which the applicant wishes to exercise the right at the Forecourt and the number of participants concerned.
 - (c) The availability of alternative ways for would-be protestors to submit their petitions to the Government nearby the CGO does not detract from the fact that the restrictions imposed *at the Forecourt* has to satisfy the proportionality test.
11. On the Illegality Issue, following the CFA judgment in *Fong Kwok Shan*, the question of whether the Forecourt is a private or public place is no longer relevant. However, the Court found that the Director had committed an error of law by formulating the Permission Scheme on the basis that, as a landowner, he could in principle exclude anyone from entering the place to exercise the rights of freedom of expression and assembly. On this basis, the Permission Scheme is tainted with an illegality and is therefore unlawful (paragraphs 84 to 85).



Department of Justice

The Government of the Hong Kong Special Administrative Region

Civil Division

Department of Justice

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