



Summary of Judgment

陳基裘 v Hong Kong Police Force (“Police”); 郭卓堅 & 梁頌恆 v Secretary for Security & Commissioner of Police (“CP”); Yeung Tsz Chun v CP; Chan Kung Shun & Lo Cham Sze & Ng Hong Luen v CP; The Hong Kong Journalists Association (“HKJA”) v CP & Secretary for Justice

HCAL 1747, 1753, 2671, 2703 & 2915/2019; [2020] HKCFI 2882

Decision : Leave to apply for judicial review (“JR”) dismissed in HCAL 1747 & 1753/2019
JR partially allowed in HCAL 2671/19, and allowed in HCAL 2703 & 2915/2019

Date of Hearing : 24 & 26 June 2020

Date of Judgment : 19 November 2020

Background

1. These are applications for JR challenging whether (1) the system for the identification of Police officers when carrying out non-covert duties in public order events arising out of the withdrawn Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 (i.e. “Operation TIDERIDER”) (the “Operation”) and (2) the two-tier Police complaint handling mechanism are compliant with the requirements under Article 3 of the Hong Kong Bill of Rights (“BOR 3”), and are capable of fulfilling the Government’s positive obligations thereunder.
2. During the Operation, Police officers including those belonging to the Special Tactical Contingent (“STC officers”) and anti-riot Police officers (“AR officers”) were deployed. Following modifications in the mechanism for identification, STC officers were eventually required to display an “alphanumeric code” (“Alpha ID”) at the back of their helmets, and AR officers (and other officers of Uniform Branch and plainclothes officers) were required to conspicuously display an operational call-sign (“Call-Sign”) printed on a blue standard security card (“Blue Card”).
3. Each of the Applicants in HCAL 1747, 2671 & 2703/2019 complained that he was subjected to some forms of Police ill-treatment during the Operation, but was unable to make any identification; while the Applicants in HCAL 1753/2019 did not suggest they were subjected to any Police ill-treatment. As for HCAL 2915/2019, the challenges raised by HKJA were based on a series of alleged Police ill-treatment against journalists and media organisations during the Operation. A



rolled-up hearing was conducted before Mr Justice Chow on 24 & 26 June 2020.

Grounds of Review

4. In all 5 JRs, the common ground of review (framed in different wordings) is that the current system for identification of Police officers against whom a BOR 3 complaint is made constitutes a breach of or is inconsistent with the right to be free from torture or cruel, inhuman or degrading treatment or punishment under BOR 3 and/or Article 7 of the International Covenant on Civil and Political Rights (“ICCPR 7”, which is substantially the same with BOR 3).
5. In HCAL 1747, 1753 & 2671/2019, an additional ground of review that the Police’s decision that during the Operation (and thereafter) the relevant Police officers were not to or need not display their unique identification numbers (“UI Numbers”) or ranks on their uniforms is unlawful as it is premised on a misinterpretation or misapplication of the Police General Order and/or the Police Force Ordinance (Cap. 232) and/or common law concerning the dress and appearance of Police officers was raised. And in HCAL 1749, 1753, 2671 and 2915/2019¹, an additional ground of review concerning the Government’s failure to make available an independent mechanism (currently involving the Complaints Against Police Office (“CAPO”) and the Independent Police Complaints Council (“IPCC”)) capable of conducting effective investigation into complaints of ill-treatment by Police officers was raised.

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=131964&QS=%2B&TP=JU)

6. First of all, the Court highlighted that an application for JR is wholly inappropriate for resolving substantial disputes of primary facts, and should not be used for such purpose; the Court will only deal with matters of principle, but not whether the Applicants or individual journalists were as a matter of fact subjected to any Police ill-treatment in any specific case. (paragraph 16)
7. After reviewing insignia policy for uniformed officers (other than STC officers) and plainclothes officers and the STC insignia policy, the Court noted there is evidence demonstrating cases of multiple Police officers wearing the same Call-Sign in a single event or not properly displaying the Blue Cards such as blocking their view by some objects, and STC officers belonging to the same team and deployed at

¹ In HCAL 2915/2019, the other ground of review concerning the Police’s duty to facilitate, and not to hinder, lawful journalistic activities and the alleged breach is to be addressed in a separate judgment.



the same time and location failing to attach the assigned letters to their helmets or only displaying the team call sign. (paragraphs 26 and 38)

8. The Court went on to discuss the legal principles relating to BOR 3. It was reiterated that the rights protected by BOR 3 are absolute and non-derogable so that, even in times of public emergencies, however serious, the rights thereunder must still be respected by the Government and protected by the courts (citing *Ubamaka Edward Wilson v Secretary for Security* (2012) 15 HKCFAR 743 and section 5 of the Hong Kong Bill of Rights Ordinance). For conduct to be covered by BOR 3, it must attain a “minimum level of severity”, generally involving actual bodily injury or intense physical or mental suffering; conduct may also be regarded as degrading for the purpose of BOR 3 if it humiliates or debases an individual showing a lack of respect for or diminishing his/her human dignity, arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance. For a person confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the rights set forth in BOR 3. Such violation would occur even if the minimum severity threshold for degrading treatment had not been attained. (paragraphs 66-68)
9. The Court also held that there is a procedural obligation on the government’s part under ICCPR 7 to investigate promptly and impartially any suspected case of breach thereof. Noting the Court of Appeal’s ruling in *ZN v Secretary for Justice* [2018] 3 HKLRD 778 (accepted by the Court of Final Appeal) that the Government was under a positive obligation to carry out investigation once it is aware or ought to be aware of circumstances giving rise to a credible suspicion of a breach, or a real and immediate risk of breach, of Article 4 of the Hong Kong Bill of Rights, it was held that there is no reason why the same approach should not be applicable to BOR 3. The Government is under a positive duty to put in place an adequate system to effectively investigate such credible suspected cases of breach of BOR 3. (paragraphs 69, 73-75, 92)
10. For the purpose of establishing a credible suspicion of a breach of BOR 3, the existence of an “arguable claim” would suffice and, having considered the specific complaints raised by the Applicants in HCAL 2671, 2703/19 and individual journalists under HCAL 2915/19, the Court’s view was there are many instances of arguable claims of use of unnecessary or excessive force, or application of ill-treatment by Police officers which, if proved, would constitute breaches of BOR 3 such that the Government’s positive investigative duty is triggered. In order to fulfill such duty, the investigation must be independent from those implicated in the events, and must be capable of leading to the identification and punishment



of individuals responsible; there is also the requirement of promptness and reasonable expedition. (paragraphs 76-79)

11. The investigative duty arising under BOR 3 serves to secure the effective implementation of the prohibition of BOR 3 treatment or punishment by government agents or bodies, including Police officers; to ensure accountability for improper conduct in violation of BOR 3; and to deter violation of BOR 3 through effective criminal laws and disciplinary regulations. (paragraph 84)
12. On the particular need for the display of distinctive insignia where masked Police officers are deployed, victims should be able to make effective complaints of Police ill-treatment and take legal actions against the officers involved. In response to the Police's submissions that individual instances of failure to follow the relevant policies do not amount to a systemic failure, the Court observed that the duty to investigate suspected cases of breach of BOR 3 encompasses both a systemic or structural duty as well as an operational duty, and either form of failure would suffice for establishing a breach of the investigative duty, even though such duty should not be interpreted in a way imposing an impossible or disproportionate burden on the authorities. (paragraphs 85-91)
13. For an investigation to comply with BOR 3, the victims should be able to participate in the investigation effectively; they should be permitted to identify, or at least provided with a reasonable means to identify, the Police officers involved in ill-treatment. They should be entitled to reasonable identification of the Police officers concerned for commencing civil actions or private prosecutions. An obvious measure would be to require Police officers to wear and prominently display their UI Numbers or marks. (paragraphs 93-94)
14. The system of identification of Police officers cannot be merely through the internal process, otherwise victims would be entirely or largely at the mercy of the Police who can decide whether to take legal or disciplinary actions against the Police officers responsible for the ill-treatment. (paragraph 95)
15. Applying the above legal principles, it was held that an effective system should at least be reasonably capable of leading to the identification of the Police officers concerned. It should be necessary for the identification number or mark to be unique to each Police officer (as in the case of a UI Number) to facilitate identification and avoid the risk of confusion; it must also be worn and displayed prominently to allow victims and eyewitnesses a reasonable opportunity to identify the Police officers concerned and file effective complaints. The doxing concern does not of itself override the duty to maintain an adequate system to



investigate suspected cases of breach of BOR 3. (paragraphs 96 & 98)

16. The Court then held:

- (1) The identification mechanism fails to meet the standard of effectiveness of investigation required BOR 3 – (i) both the Call-Signs and Alpha IDs are not unique to the Police officers assigned with them; (ii) there is evidence showing problems with their display, with no evidence showing adequate measures in place to ensure proper display and to take actions against Police officers failing to properly wear and display the Call-Signs / Alpha IDs. Specifically, the display of Alpha IDs at the back of STC officers' helmet causes substantial impairment of its effectiveness as a means of identification. (paragraph 99)
- (2) The police complaint handling mechanism fails to meet the requirement of independent (both institutional / hierarchical independence and practical independence) investigation under BOR 3 – (i) CAPO lacks institutional and practical independence, while (ii) IPCC lacks the necessary investigative powers of its own, cannot overturn CAPO's decisions and has no power to make any binding determination. (paragraphs 101-102)

17. The challenge that the system for the identification of Police officers is unlawful due to a misinterpretation or misapplication of the Police General Order and/or the Police Force Ordinance is not accepted.

18. As a result, the Court, inter alia, made the following declarations (paragraphs 123-124):

- (1) The failure of CP to establish and maintain an effective system to ensure that every Police officer deployed in carrying out non-covert duties in the Operation wears and prominently displays an identification number or mark which is unique to that officer violates BOR 3; and
- (2) The Government is under a duty, pursuant to BOR 3, to establish and maintain an independent mechanism capable of conducting effective investigation into complaints of suspected ill-treatment by Police officers in contravention of BOR 3, and that the existing complaints mechanism involving CAPO, with oversight by IPCC, is inadequate to discharge this obligation.

Civil Division

Department of Justice

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