



Summary of Judgment

Tam Sze Leung & Others v Commissioner of Police (“Commissioner”)

HCAL 191/2021; [2021] HKCFI 3118

Decision : Application for judicial review allowed in some grounds of review; parties to make further submissions on relief

Date of Hearing : 19-20 October 2021

Date of Judgment/Decision : 30 December 2021

Background

1. In this judicial review, the Applicants sought leave to apply for judicial review to challenge the Commissioner’s decision to issue and maintain certain so-called “letters of no consent” (“LNCs”) in the context of section 25A of the Organised Serious Crimes Ordinance, Cap. 455 (“OSCO”).
2. The four Applicants are members of the same family and they hold monies in a number of accounts (“Accounts”) held with various banks in Hong Kong (“Banks”). This matter arises out of the Securities and Futures Commission’s (“SFC”) investigation against the Applicants and other suspects for the suspected offence of “stock market manipulation” in Hong Kong between 2018 and 2020.
3. On 25 November 2020, SFC referred the matter to the Police for investigation against the Applicants for the suspected offence of “money laundering”. Given the referral and ongoing investigations by the Financial Investigation Division (“FI”), the Joint Financial Intelligence Unit (“JFIU”) communicated with the Banks alerting them to the fact that investigations concerning suspected money-laundering activities were being conducted, and urged the Banks to file appropriate suspicious transaction reports (“STRs”). The relevant emails issued included clear statements that LNCs would be issued.
4. In late November 2020, the Banks filed STRs to JFIU under section 25 of OSCO. Based on FI’s consideration of the STRs and investigation results at the material times, there was suspicion of proceeds of crime. In December 2020, upon consideration of FI’s written requests, JFIU issued LNCs under the “No Consent Regime” to the Banks in relation to the Accounts, pursuant to section 25A of OSCO¹.

¹ 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



5. In October 2021 (prior to the rolled-up hearing of the application for judicial review on 19 and 20 October 2021), in separate proceedings, the Secretary for Justice obtained Restraint Orders against the Applicants and their Accounts. As a result of the grant of the Restraint Orders, the LNCs against the Applicants have been withdrawn. The LNCs were therefore in place for a period of roughly 10 months.

Issues in dispute

6. The Applicants' grounds of challenge encompass both systemic ones that are directed at the constitutionality and legality of the Commissioner's operation of the No Consent Regime as well as grounds that are directed at the particular LNCs issued in the case. (§40)
7. The six grounds were as follows (§41):-
 - (1) whether the issue and maintenance of the LNCs are tainted by procedural impropriety and unfairness;
 - (2) whether the LNCs are *ultra vires* OSCO, which does not confer power on the Commissioner to operate a *de facto* property freezing regime;
 - (3) whether LNCs interfere with the Applicants' constitutional rights under the Basic Law and Hong Kong Bill of Rights, and that such interference is not 'prescribed by law';
 - (4) whether LNCs breach the Applicants' right to a fair hearing under Article 10 of the Hong Kong Bill of Rights ("BOR 10");
 - (5) whether the No Consent Regime and the LNCs disproportionately interfere with the Applicants' property rights under Articles 6 and 105 of the Basic Law ("BL 6"; "BL 105"), and rights to privacy and family under Hong Kong Bill of Rights ("BOR 14"); and
 - (6) whether the decision to refuse even partial consent to release of funds are unlawful in that the LNCs causes a 'blanket freeze', without any distinction as to which assets are or could be alleged to represent proceeds of crime.

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- 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."



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=141312&QS=%2B&TP=JU)

8. Although reliefs sought by the Applicants to quash LNCs have been rendered academic since Restraint Orders have been obtained and LNCs have been withdrawn, the Court considered it appropriate to hear the parties' substantive arguments. The Judge is of the view the proceedings raise issues of real public importance in respect of a frequently operated regime with potential application to any bank account held in Hong Kong by any person or corporation. (§37)

Ground 1: No Consent Regime was found not to be subject to procedural impropriety and unfairness (§§119-132)

9. The Applicants contended that the Commissioner failed to: (1) give any notice, or even confirm that he had issued LNCs; (2) supply any reasons, or relevant information that the Applicants would require in order to make meaningful representations on the LNCs; and/or (3) accord the Applicants a fair hearing (or any hearing). (§122) The Judge accepted that there should be no requirement for disclosure of anything material in a pending prosecution. That it would be contrary to public interests in almost all cases for the grounds of an officer's suspicions to be disclosed while investigation is in process, and contrary to the statutory framework under OSCO as well as common sense. (§§126-128)

Ground 2: No Consent Regime as operated was found to be ultra vires sections 25 and 25A of OSCO (§§67-93)

10. The Commissioner recognised that his purpose in taking step of issuing the LNC is to bring about the result that the recipient will refuse to deal with the relevant property, and that the property will be 'informally frozen'. (§75) The Court accepted that the Commissioner has, as part of his common law duty, the ability to alert financial institutions to potential money-laundering offences, and to remind them of their obligation to submit disclosures under section 25A(1) of OSCO. Further, that the mechanism based on Chapter 27-19 of the Force Procedures Manual ("**FPM**"; outline of which is posted on JFIU's website) is intended to provide some form of safeguard to the operation of the No Consent Regime. (§§84, 88)
11. However, there is no basis for a necessary implication of the Commissioner's power to operate an informal asset freezing No Consent Regime. To use the express provision relating to consent in section 25A(2)(a) of OSCO for the purpose of securing an informal, unregulated freezing of assets is to use that power for a purpose other than that for which it was supplied. (§§91, 92)



Ground 3: No Consent Regime as operated was found to be not prescribed by law (§§94-118)

12. The Judge is of the view that the No Consent Regime as operated is not ‘prescribed by law’. There is no clarity or certainty to be found in OSCO itself, and the FPM suffers from the same vices. The Judge found there is no sufficient clarity as to the scope of the power and the manner of its exercise, nor does the law provide adequate effective safeguards against abuse. Though there is a proper distinction between systemic unfairness and individual failures, the failures in this case are, in the Judge’s view, indicative of the systemic problems. (§§11-1187)

Ground 4: No Consent Regime did not breach Article 10 of the Hong Kong Bill of Rights (right to a fair hearing) (§§133-141)

13. In *Interush Ltd v Commissioner of Police* [2019] 1 HKLRD 892 (another application for judicial review to challenge the constitutionality of No Consent Regime under sections 25 and 25A of OSCO), the Court of Appeal held that access to court rights have not been engaged. Even if BOR 10 is engaged, as said in *Interush*, it would not be breached where there is the right to commence judicial review on the propriety of the LNC, civil claim against the banks, and to seek compensation from the Government for serious default in the prosecution or investigation process pursuant to section 29 of OSCO. (§§135-137) Where judicial review is available, it does not seem that some other form of hearing is necessary for there to be a fair hearing. (§140)

Ground 5: No Consent Regime as operated found to disproportionately interfere with an individual’s right (§§142-160)

14. No Consent Regime as operated was found to disproportionately interfere with an individual’s right to property under BL 105, in particular right to the use of property. However, the Judge did not accept that BOR 14 (right to privacy and family life) was engaged. (§§146, 150)
15. As held by the Court of Appeal in *Interush*, BL 105 is engaged. There is an obvious legitimate purpose of deterring criminal activity and a rational connection to such purpose by restricting access to the proceeds of crime. But considering that the No Consent Regime can operate (and is operated) without temporal limitation but with only internal intermittent review of justification, the Judge found a reasonable balance had not been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual. This was asking in particular whether pursuit of the societal interests results in an unacceptably harsh burden on the individual. (§§155, 159)



16. In light of the Commissioner's stance that he has the power to and does operate the No Consent Regime precisely to effect an informal freezing of bank accounts, the Judge is of the view that the regime fails the proportionality assessment. (§160)

Ground 6: LNCs issued against the Applicants found to be not unlawful (§§161-164)

17. The Applicants contended the Commissioner's decisions to refuse even partial consent to release of funds are unlawful in that the LNCs cause 'blanket freeze', without any distinction as to which assets are or could be alleged to represent the proceeds of crime and which assets could not. (§41(6))
18. The Judge noted there was no 'blanket freeze' of the Applicants' accounts. Further, there is no basis in the evidence to suggest any delay nor evidence of actual hardship suffered by the Applicants, who have chosen not to dispel suspicions that the funds in question are the proceeds of crime. Albeit, the Judge remarked that there may be some legitimate concern about the length of time during which LNCs in this case were maintained. (§163)

Relief

19. The Judge directed the parties to make a further round of submissions on relief to be followed by a short oral hearing. (§§168, 169)

Civil Division
Department of Justice
31 December 2021