



---

**Summary of Judgment**

**Sham Tsz Kit & Yeung Kwok Ming v Commissioner of Police (“Commissioner”) &  
Secretary for Justice**

**HCAL 2670/2019; [2021] HKCFI 746**

**Decision :** Application for leave to apply for judicial review refused in respect of some grounds of review (systemic challenge) For other grounds of judicial review (operational challenge), the Applicants have leave to apply for an order that these proceedings shall continue as if they had begun by writ under Order 53, rule 9(5) of the Rules of the High Court within 14 days from the date of the judgment.

**Date of Hearing :** 29 & 30 June 2020

**Date of Judgment :** 24 March 2021

**Background**

1. On 11 June 2019, the Hong Kong Police Force (“**Police**”) issued a letter of no objection for the Civil Human Rights Front (“**CHRF**”) to organise a public meeting, to be held between 10:00 am and 11:45 pm on 12 to 14 June 2019 at Lung Wui Road southern pavement outside CITIC Tower at 1 Tim Mei Avenue, Admiralty (“**Public Meeting**”). The Public Meeting was dispersed by Police on 12 June 2019 because of outbreak of violence and a notice of prohibition which prohibited the holding of the Public Meeting based on reasons of public safety and public order pursuant to section 9(1) of the Public Order Ordinance, Cap 245 (“**POO**”) (“**Notice of Prohibition**”) was issued by Police to CHRF at around 11:00 pm on the same day.
2. On 11 September 2019, the Applicants made the present application for judicial review challenging (a) the decision by the Police at around 4:00 pm on 12 June 2019 to disperse the Public Meeting using tear gas grenades at the Lung Wui Road southern pavement (“**Dispersal by Tear Gas Decision**”); (b) the constitutionality of sections 17(2)(a) and (3)(a) of the POO <sup>1</sup>, and (c) the legality of the Notice of Prohibition.
3. The 1<sup>st</sup> Applicant was the convenor of CHRF while the 2<sup>nd</sup> Applicant was a participant of the Public Meeting.

---

<sup>1</sup> Sections 17(2)(a) and (3)(a) of POO concern the Police’s powers to prevent the holding of, stop, disperse or vary the place or route of any public gathering and to use such force as may be reasonably necessary.



---

## Grounds of review

4. The grounds of review are:

- (a) The Dispersal by Tear Gas Decision was unlawful and unconstitutional as (1) it amounted to a breach of the right to be free from torture or cruel, inhuman or degrading treatment or punishment (“**CIDPT**”) under Article 3 of the Hong Kong Bill of Rights (“**BOR**”), and/or a breach of the right to life under Article 2 of BOR (“**Ground 1**”); (2) it constituted use of unreasonable force and amounted to a violation of section 46 of POO<sup>2</sup> and/or section 101A of the Criminal Procedure Ordinance, Cap 221 (“**CPO**”)<sup>3</sup> (“**Ground 2**”); and (3) it was premised on a misinterpretation/ misapplication of the Police’s internal guidelines regulating the use of tear gas grenades or the use of force and firearms (“**Ground 3**”);
- (b) Section 17(2) and/or (3) of POO are unconstitutional in that they place unreasonable restrictions on the right to lawful assembly and/or give the Police sweeping and excessive powers to ban, stop and disperse a notified assembly (“**Ground 4**”);
- (c) The Dispersal by Tear Gas Decision and section 17(2) and/or (3) of POO unjustifiably restricted the right to freedom of peaceful meeting (“**Ground 5**”);
- (d) It was ultra vires/illegal for the Commissioner to issue a notice of prohibition with less than 24 hours’ notice and/or once the public meeting as notified under section 8 of POO has commenced (“**Ground 6**”).

## 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=134448&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=134448&QS=%2B&TP=JU))

5. The Court set out the relevant legal principles and briefly explained the meaning and effect of the relevant provisions and the Police’s internal guidelines relied upon by the Applicants in respect of Grounds 1 to 3. In particular, the Court observed that:- (paras 15-22)

- (a) The right not to be subjected to torture or CIDTP under Article 3 of BOR is absolute and non-derogable; to constitute CIDPT, the ill-treatment in

---

<sup>2</sup> Under section 46 of POO, where the POO provided that such force as may be necessary may be used for any purpose, the degree of force which may be so used shall not be greater than is reasonably necessary for that purpose.

<sup>3</sup> Section 101A of CPO provides, inter alia, that a person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.



question must attain “a minimum level of severity”<sup>4</sup>; and European jurisprudence establishes that in respect of a person who is 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 relevant rights.

- (b) While police officers are entitled to use force in the course of carrying out lawful operational duties, the force actually used should be no more than reasonably necessary in the circumstances of the case to achieve the intended purpose(s). Where circumstances permit, prior warning should be given of the intended use of force and of the nature and degree of the force that it is intended to use. The person or persons against whom force is intended to be used should be given an opportunity to obey police instructions before force is actually used.
  - (c) More stringent requirements and safeguards should be observed if tear gas grenades are used. Where tear gas is to be deployed to disperse a crowd, police officers should give prior warning of its intended deployment, allow the crowd sufficient time to disperse, and provide a reasonable route for safe and effective dispersal without being subjected to tear gas.
  - (d) A failure to observe the above requirements may lead to the conclusion that the police officers concerned have acted in breach of Article 3 of BOR, section 46 of POO, section 101A of CPO and the Police’s relevant internal guidelines.
6. The Court considered that, on the available evidence, the Applicants’ case that the Police acted in breach of Article 3 of BOR, section 46 of POO, section 101A of CPO and the Police’s relevant internal guidelines on 12 June 2019 (i.e. Grounds 1, 2 and 3) is reasonably arguable and have a realistic prospect of success. However, whether such case can actually be made out would depend on a proper resolution of substantial disputes of facts<sup>5</sup>, which was not possible to do on the basis of the existing affidavit evidence that have not been tested by cross-examination, and the Court in an application for judicial review was not in a position to resolve those disputes even with the assistance of contemporaneous photos and video recordings which the Court has examined with care. Similarly, the question of whether the Dispersal by Tear Gas Decision unjustifiably restricted the right to freedom of peaceful meeting raised in Ground 5 depended on the resolution of those factual disputes. (paras 11, 23, 24, 39 and 47)

---

<sup>4</sup> A “minimum level of severity” “generally involves actual bodily injury or intense physical or mental suffering” or “humiliates and debases an individual, diminishing his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance”.

<sup>5</sup> Some of the factual disputes were highlighted in paragraph 23 of the Judgment.



7. The Court therefore would not dismiss Grounds 1, 2, 3 and Ground 5 (in so far as it was contended that the Dispersal by Tear Gas Decision imposed unjustifiable restrictions on the right to freedom of peaceful meeting) at this stage and gave leave for the Applicants to apply, if they wish, for an order that these proceedings shall continue as if they had been begun by writ under Order 53, rule 9(5) of the Rules of the High Court within 14 days from the date of the Judgment. (paras. 26 and 47)
  
8. The Court refused leave in respect of all other grounds, i.e. Ground 4, Ground 5 (in so far as it was contended that sections 17(2) and (3) of POO impose unjustifiable restrictions on the right to freedom of peaceful meeting) and Ground 6 as these grounds were not reasonably arguable or did not have a realistic prospect of success.
  - (a) For Ground 4 (constitutionality of section 17(2) and/or (3) of POO), the freedom of lawful assembly, despite being an important fundamental right in any modern society, is not absolute. In this regard, the Court found that the restrictions imposed by section 17(2) and/or (3) of the POO are prescribed by law and proportional. Further, as the Court of Appeal in *Kwok Wing Hang v Chief Executive in Council* [2020] 2 HKLRD 771 was clearly of the view that the full range of discretionary powers that the Commissioner could exercise in restricting the freedom of assembly under the POO, including the powers under section 17 of POO, were constitutional, it was not open for a judge at first instance to find section 17(2) and/or (3) of POO to be unconstitutional. (paras 30-38)
  
  - (b) For Ground 5 (in so far as whether section 17(2) and/or (3) of POO unjustifiably restrict the right to freedom of peaceful meeting), given these sections are constitutionally valid, they cannot be regarded as imposing unjustifiable restrictions on the right to freedom of peaceful meeting. (para. 40)
  
  - (c) For Ground 6 (legality of the Notice of Prohibition), the Commissioner clarified that the Notice of Prohibition did not have retrospective effect but only prohibited the remainder of the Public Meeting from the time of its issue. Further, as the 1<sup>st</sup> Applicant gave less than 24 hours' notice of the proposed Public Meeting, section 9(3) of POO (which prohibits the Police from exercising powers under section 9(1) to prohibit the holding of any public meeting notified under section 8 of POO) is not applicable. (paras. 41-45)



**Department of Justice**

The Government of the Hong Kong Special Administrative Region

---

**Department of Justice**

**24 March 2021**