



Summary of Judgment

**The Hong Kong Journalists Association (“HKJA”) v The Commissioner of Police
 (“Commissioner”) & Secretary for Justice**

HCAL 2915/2019; [2020] HKCFI 3101

Decision : **Application for leave to apply for judicial review allowed
Application for judicial review dismissed**

Date of Hearing : **17 April 2020**

Date of Judgment : **21 December 2020**

Background

1. In this part of the application for judicial review by HKJA¹, it challenged (a) the alleged failure of the Hong Kong Police Force (“Police”) to facilitate, and not to hinder, lawful journalistic activities in the course of public order events on and after 12 June 2019; and (b) the failure of the Commissioner to address a catalogue of operational deficiencies in that connection.
2. The challenges raised by HKJA were based on numerous statements by journalists together with supporting evidence (“Journalist Statements”) alleging a series of Police ill-treatment against journalists during the public order events arising out of the now withdrawn Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019.
3. In view of the numerous factual allegations raised by HKJA against the Police, the Court directed a directions hearing to consider how the present leave application for judicial review should be conducted. Subsequently, the Court directed that the issue should be determined as a matter of principle only (see paragraph 4 below).

Issue in dispute

4. The issue as identified by the Court was whether, in principle, the Police is under a legal duty to facilitate, and not to hinder, lawful journalistic activities in the course of public order events on and after 12 June 2019, and if the answer is ‘yes’, what are the limits and scope of such duty.

¹ On 19 November 2020, the court handed down a joint judgement in relation to other issues raised by HKJA in HCAL 2915/2019 and 4 other applications for judicial review in HCAL 1747, 1753, 2671 & 2703/2019 which were heard together ([2020] HKCFI 2882).



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=132513&QS=%2B&TP=JU)

5. At the outset, the Court made clear that it would make no findings on the veracity of the allegations against the Police contained in the Journalist Statements. The Court also pointed out that the Commissioner has adopted the stance of not responding to the factual complaints raised in the Journalist Statements (which was disputed by the Commissioner) directly or individually because it was clear and accepted by all parties in these proceedings that there would be no determination of those factual allegations in the present application. (paras 8, 16)

6. On the issue in dispute, the Court summarised the parties' respective submissions on the Police's duty to facilitate and not to hinder lawful journalistic activities. The Court noted that the Commissioner did not categorically deny that there might have been breaches of the duty on the part of police officers on some occasions, but contended that any breach in specific instance did not mean that the Police had breached its said duty on a systemic level, and relied on the fact that the Police had clear guidelines and measures including the Police General Orders, Force Procedures Manuals, etc. to facilitate journalist activities. (paras 3, 10-24)

7. The Court then discussed why HKJA's suggestion of adopting an "assumed facts" approach, i.e. treating the Journalist Statements as "assumed facts" and/or "matters of which there is prima facie evidence", should be rejected. Having considered a number of instances where such approach was adopted in both Investigatory Powers Tribunal² and judicial review proceedings in the UK, the Court held that an "assumed facts" approach is unworkable and inappropriate in the present case because (i) the parties have not agreed on any assumed facts, or any issues of laws to be determined based on such assumed facts; (ii) no statement of assumed facts have been produced by HKJA; (iii) the assumed facts ought to be capable of being stated clearly and concisely but the Journalist Statements contained numerous factual allegations and run to over 200 pages (together with exhibits); (iv) it served little or no practical utility in granting the declarations sought the validity of which is dependent on the truth of the

² The UK's Investigatory Powers Tribunal is a special tribunal established to examine, among other matters, the conduct of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters.



“assumed facts”; and (v) no substantive relief is sought by HKJA and in particular it expressly stated that it does not seek compensation or damages for assaults against any individual journalists. (paras 4-6, 35-48)

8. The Court then indicated agreement with the Commissioner on the imprecision of the declarations sought by HKJA and noted the undesirability of making a sweeping and general declaration of breach of the Basic Law (“BL”) or the Hong Kong Bill of Rights (“BOR”). (paras 49 -50)

(1) The Court found that HKJA failed to identify the specific public order events in which it was said the Police acted unlawfully, or the ways or manners in which it was said the Police failed to facilitate or hindered lawful journalistic activities. It also failed to identify which “cases” concerned failing to facilitate, and which cases concerned active hindering of, lawful journalistic activities.

(2) HKJA also failed to identify the “operational deficiencies” relied upon, or how it was said that the Commissioner has failed or refused to address such deficiencies.

9. Based on the above, while the Court found that the intended application for judicial review was reasonably arguable, it rejected the substantive application.

10. As for the alternative declarations sought by HKJA³, while the Court was tempted to lay down some guidelines on the legal limits and scope of the Police’s duty to facilitate, and not to hinder, lawful journalist activities with the hope of minimising unnecessary conflicts between the Police and journalists in public order events, it would be wrong to decide matters in *vacuo* and misleading to make declarations of legal duties in unqualified terms without identifying the possible limits or qualifications of the relevant duties. These alternative declarations were

³ Two alternative declarations put forward by the HKJA were:

(1) “A declaration that:

(a) the Hong Kong Police Force owes both positive and negative duties under BL 27 and BOR 16 to facilitate, and not to hinder, lawful journalistic activities, as well as a duty to investigate allegations of breaches of those duties; and

(b) those duties include, specifically, a duty to distinguish journalists from participants of [public order events] in their operations, a duty to ensure journalists’ safety and protect them and their equipment from harm, and a duty to ensure journalists’ full access and uninhibited reporting “first-hand.”

(the “1st Alternative Declaration”).

(2) “A declaration that, if the facts assumed in Journalists’ Statement [No.#] were true (to which the Court offers no view at this stage), the Hong Kong Police Force would have breached their duties under BL 27 and BOR 16 at an operational level to facilitate, and not to hinder, lawful journalistic activities.” (the “2nd Alternative Declaration”)



therefore also rejected. (paras 52-59)

(1) The Court noted that the Police's negative duty not to hinder lawful journalistic activities arises from the express terms of BL 27 and BOR 16, while the positive duty to facilitate lawful journalistic activities is a necessary corollary to give full measure to the freedom of the press. However, a general, or bare, declaration in terms of sub-paragraph (a) of the 1st Alternative Declaration could not be granted without also stating the limitations and qualifications of the Police's duty, including that:-

- (a) such duty is not absolute and may be restricted;
- (b) in so far as the positive duty is concerned, the Police has a wide discretion in the choice of reasonable and appropriate measures to be used to facilitate lawful journalistic activities;
- (c) in so far as the negative duty is concerned, the lawfulness of the Police's measure which restricted the freedom of the press has to be determined by reference to the proportionality test; and
- (d) the need to strike a fair balance between the Police's observance of the positive and negative duty and the Police's statutory duties under section 10 of the Police Force Ordinance (Cap 232).

(2) While it is not incorrect to state generally that the Police has a duty to distinguish journalists from participants of public order events, a duty to ensure journalists' safety and protect them and their equipment from harm, and a duty to ensure journalists' reasonable access and uninhibited reporting 'first-hand', such duties as stated in sub-paragraph (b) of the 1st Alternative Declaration are not absolute. The scope of these duties and their application to the facts of any given case must also have regard to other considerations such as the Police's duty to maintain law and order, the lawfulness of the conduct of the protestors and journalists, whether any violence was used, and if so the degree of violence used, by the protestors, and all other relevant circumstances on the ground. Whether there have been breaches of the relevant duties by the Police in any instance can only be determined having regard to the particular facts and circumstances of the case.

(3) As regards the 2nd Alternative Declaration, it suffered the same difficulties as set out in paragraph 8 above.

11. In the circumstances, the Court dismissed the substantive application for judicial review, but made it clear that this judgment must not be read as indicating that



the Court has found that the Police either has, or has not, acted unlawfully or in breach of BL or BOR. Such question can only be determined after a full investigation of the relevant facts and circumstances of that case in an ordinary writ action. (paras 61-62)

Civil Division

Department of Justice

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