



Summary of Judicial Decision

**Kwok Wing Hang and Others v Chief Executive in Council and Another
Leung Kwok Hung v Secretary for Justice and Another
HCAL 2945/2019 and 2949/2019; [2019] HKCFI 2518**

Decision : **Application for judicial review allowed**
Date of Hearing : **31 October and 1 November 2019 (substantive hearing) and 21 November 2019 (hearing on relief and costs)**
Date of Judgment/Decision : **18 November 2019 (substantive judgment) (the “judgment”) and 22 November 2019 (decision on relief and costs) (the “decision”)**

Background

1. These proceedings raise questions of the constitutionality and legality of the Emergency Regulations Ordinance (Cap 241) (“**ERO**”) and the Prohibition on Face Covering Regulation (Cap 241K) (“**PFCR**”) made thereunder.
2. Since early June 2019, there have been protests and civil unrest arising from the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019. The degree of violence had escalated in early October. On 4 October 2019, the Chief Executive in Council (“**CEIC**”) formed the view that the violence and rampage had placed Hong Kong in a state of public danger and that it was necessary in the public interest for the PFCR to be made with a view to restoring law, order and public peace. Accordingly, the PFCR was made on that day pursuant to the ERO, was gazetted on the same day, and came into operation about nine hours later at midnight on 5 October 2019.
3. The application in HCAL 2945/2019 and HCAL 2949/2019 were made by 24 Members of the Legislative Council (“**LegCo**”) and Mr Leung Kwok Hung respectively.

Issues in dispute

4. The following grounds have been put forward as the basis for judicial review:-
 - (1) **Ground 1** — The ERO is unconstitutional because it amounts to an impermissible grant or delegation of general legislative power by the legislature



to the CEIC and contravenes the constitutional framework under the Basic Law (“**delegation of legislative power ground**”).

(2) **Ground 2** — The ERO was impliedly repealed in 1991 by s 3(2) of the Hong Kong Bill of Rights Ordinance (Cap 383) (“**HKBORO**”) either entirely or to the extent it is inconsistent with s 5 of the HKBORO; alternatively, it was impliedly repealed in 1997 by Art 4 of the International Covenant on Civil and Political Rights as applied through Art 39 of the Basic Law (“**implied repeal ground**”).

(3) **Ground 3** — The ERO, to the extent that it empowers the CEIC to make regulations restricting fundamental rights protected by the Basic Law and the Hong Kong Bill of Rights (“**Bill of Rights**”), falls foul of the “prescribed by law” requirement in Art 39 of the Basic Law (“**prescribed by law ground**”).

(4) **Ground 4** — By reason of the principle of legality, the general words in s 2(1) of the ERO are not to be read as allowing the Government to adopt measures that infringe fundamental rights of the individual in circumstances far removed from emergency situations. The PFCR is therefore *ultra vires* — beyond the power conferred on the CEIC by the ERO (“**principle of legality ground**”).

(5) **Ground 5A** — Section 3 of the PFCR amounts to a disproportionate restriction of a person’s liberty and privacy, freedom of expression and right of peaceful assembly under Arts 5, 14, 15, 16, 17 of the Bill of Rights and Art 27 of the Basic Law (“**section 3 proportionality ground**”).

(6) **Ground 5B** — Section 5 of the PFCR constitutes a disproportionate interference with the rights and freedoms protected by Art 27, 28 and 31 of the Basic Law and Arts 5(1), 8, 14 and 16 of the Bill of Rights (“**section 5 proportionality ground**”).

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?](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=125452&QS=%2B&TP=JU)

[DIS=125452&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=125452&QS=%2B&TP=JU)) (Full text of the decision at

[https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=125574&QS=%2B&TP=JU)

[DIS=125574&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=125574&QS=%2B&TP=JU))

5. Under ground 1 (delegation of legislative power ground), the Court held that it is the power and function of the LegCo as the designated legislature of the Hong Kong SAR to legislate. Other bodies cannot consistently with the constitutional framework be given general legislative power but only the power to make



subordinate legislation. Insofar as the public danger ground is concerned, the ERO is so wide in its scope, the conferment of powers so complete, its conditions for invocation so uncertain and subjective, the regulations made thereunder invested with such primacy, and the control by the LegCo so precarious, that it is not compatible with the constitutional order laid down by the Basic Law having regard in particular to Arts 2, 8, 17(2), 18, 48, 56, 62(5), 66 and 73(1) of the Basic Law. Remedial interpretation is not possible because it would introduce changes that the Court is ill-equipped to decide on or would produce something wholly different from what the legislature originally intended. (paragraphs 35 – 97 of the judgment)

6. In relation to ground 2 (implied repeal ground), the Court held that the ERO was not impliedly repealed by s 3(2) of the HKBORO. Insofar as it is invoked in situations not falling within the kind of public emergency referred to in s 5 of the HKBORO, the Bill of Rights is not suspended and the relevant measure which has the effect of restricting fundamental rights may not derogate from the Bill of Rights and has to satisfy the twin requirements that the restriction is prescribed by law and meets the proportionality test. (paragraphs 98 – 109 of the judgment)
7. As regards ground 3 (prescribed by law ground), the Court held that the ERO did not itself purport to limit any fundamental rights and it, as the source of power for making regulations, could not be attacked on its own under the “prescribed by law” requirement. It is the regulations, if and when enacted thereunder, that have to meet the principle of legal certainty, not the enabling Ordinance in itself which has no direct effect on any individual right or freedom. Where regulations and measures are adopted under the ERO that curtail fundamental rights, the entire relevant body of law including the regulations and measures have to be taken together to see whether they meet the requirement of sufficient accessibility and certainty. (paragraphs 110 – 120 of the judgment)
8. As for ground 4 (principle of legality ground), the Court did not find it necessary to deal with the argument based on the principle of legality, given the tension between ground 1 and ground 4 as advanced by the applicants and the fact that the applicants’ contention on ground 1 had been upheld. The tension is that ground 1 embodies the submission that s 2(1) of the ERO is of the widest scope, essentially conferring an unrestricted and unfettered legislative power whereas ground 4 includes the contention that s 2(1) is to be read as not authorising any regulation to be made that would restrict fundamental rights. (paragraphs 121 – 125 of the judgment)



9. Concerning ground 5A (section 3 proportionality ground), the Court held that the provisions in s 3(1)(a), (b), (c) and (d) of the PFCR were rationally connected to legitimate societal aims that the respondents intended by those measures to pursue. However, the restrictions that sub-paragraphs (b), (c) and (d) impose on fundamental rights go further than is reasonably necessary for the furtherance of those objects, having regard to the reach of the impugned restrictions to perfectly lawful and peaceful public gatherings, the width of the restrictions affecting public gatherings for whatever causes, the lack of clarity as regards the application of the restrictions to persons present at the public gathering other than as participants, the breadth of the prohibition against the use of facial covering of any type and worn for whatever reasons, the absence of any mechanism for a case-by-case evaluation or assessment of the risk of violence or crimes such as would justify the application of the restrictions, the lack of robust evidence on the effectiveness of the measure, and lastly the importance that the law attaches to the freedom of expression, freedom of assembly, procession and demonstration, and the right to privacy. (paragraphs 126 – 168 of the judgment)
10. Regarding ground 5B (section 5 proportionality ground), the Court held that the measure introduced by s 5 of the PFCR was rationally connected to the legitimate societal aims pursued. Nevertheless, the restrictions it imposes on fundamental rights also go further than is reasonably necessary for the furtherance of the aim of law enforcement, investigation and prosecution of violent protesters even in the prevailing turbulent circumstances in Hong Kong, and such measure fails to strike a reasonable balance between the societal benefits promoted and the inroads made into the protected rights, taking into account the following features of s 5 of PFCR:
- (1) It applies to any public place, not necessarily one where a public meeting or public procession is taking place or about to take place or even a neighbouring area. Nor is there any provision for a senior police officer to designate particular places where the section applies, based on actual circumstances.
 - (2) The power may be exercised by any police officer, not only by or with the authorisation of an officer of or above a certain rank.
 - (3) It applies to facial covering of any type.
 - (4) The only condition for the exercise of the power is that the officer reasonably believes that the facial covering is likely to prevent identification. There is



no requirement that the person is using the facial covering for the purpose or with the intention of preventing identification. There is equally no requirement for the officer to believe that it is necessary to exercise the power for the purpose of preventing, detecting or investigating any offence.

(5) It applies to any person who is using a facial covering. It does not require that the officer should have any suspicion or ground for suspicion that the person has committed or is about to commit an offence or is acting in a suspicious or otherwise objectionable manner.

(paragraphs 169 – 191 of the judgment)

11. In respect of s 3(1)(b), (c) and (d) and s 5, the Court held that any remedial interpretation by “reading in” or “reading down” would require a substantial re-writing of the legislation in a manner which would effectively be a fresh legislative exercise involving fundamental changes to the substance of the provisions, and is a task which ought to be undertaken by the legislature itself rather than by the Court. The Court also made it clear that it was not the Court’s judgment that “anti-mask” law was generally objectionable or unconstitutional. It depends on the details of the legislation and the particular societal aims sought to be pursued by the measures being brought in through the legislation. (paragraph 192 of the judgment)

12. In summary, the Court held that:-

(1) the ERO, insofar as it empowers the CEIC to make regulations on any occasion of public danger, is incompatible with the Basic Law;

(2) consequentially, the PFCR made pursuant to the ERO on an occasion of public danger is accordingly invalid and of no effect;

(3) section 3(1)(b), (c) and (d) of the PFCR is inconsistent with Art 27 of the Basic Law and Arts 14, 16 and 17 of the Bill of Rights, and is therefore null, void and of no effect; and

(4) there be a declaration that s 5 of the PFCR is inconsistent with rights under Art 28 of the Basic Law and Art 5 of the Bill of Rights, and is therefore null, void and of no effect.

13. The Court in handing down its decision on relief and costs, declined to make any temporary validity order or suspension order which had been sought by the respondents. With respect to the temporary validity order, the Court held that



(i) while there were likely to be multiple causes or factors at play for the recent escalation of violence in Hong Kong, it had not been shown on the evidence before the Court that postponing the coming into operation of the declarations of invalidity pursuant to the judgment would be likely to bring about any substantial relief to the public danger currently faced by Hong Kong; (ii) temporary validity should not be given merely because failing to do so would, or may, be wrongly perceived as a message or signal to the public unintended by the judgment; and (iii) the danger to the public was posed by radicals who commit acts of violence and vandalism but not the striking down of the ERO and PFCR. (paragraphs 17 – 21 of the decision)

14. In relation to the suspension order, the Court held that even if a suspension order was granted, there would be nothing to prevent a person from relying on the judgment in any context. There could be endless arguments between such a person and the Government as to the legal implications of the actions the person has taken in light of the judgment and the actions taken by the Government in light of the suspension order. A suspension order regarding the PFCR would seem more likely to fuel further battles than facilitate effective functioning of the law and Government. To grant a suspension order in relation to the ERO would be likely to create more confusion and legal uncertainty than is inherent in the system. (paragraphs 33 - 36 of the decision)

15. In view of the highly exceptional circumstances, the Court considered right for a short interim suspension order to be granted for the respondents to apply to the Court of Appeal, if so advised, for any interim relief. As such, an interim temporary suspension order to postpone the coming into operation of the declarations of invalidity for 7 days up to the end of 29 November 2019 (with liberty to apply) was granted. (paragraph 38 of the decision)

Civil Division

Department of Justice

November 2019