Judgment Update

Leung v Secretary for Justice
CACV No 317 of 2005[1] (September 2006)
Court of Appeal

The applicant was a homosexual aged 20 at the time of his application, who by judicial review proceedings successfully challenged the constitutionality of certain provisions of Part XII of the Crimes Ordinance (Cap 200). The appeal by the Secretary for Justice concerned the constitutionality of section 118C of the Crimes Ordinance which made "homosexual buggery with or by [a] man under 21" an offence. The constitutional issue was whether section 118C was contrary to the right to privacy and equality before the law, contained in BL 25 and 39 and Articles 1, 14 and 22 of the BoR.

This case raised the important point of whether homosexual men had been unjustifiably discriminated against by certain provisions contained in the Crimes Ordinance relating to buggery. In this context, an interesting argument had emerged: could a piece of legislation be deemed unequal or discriminatory where on their face, the relevant provisions could be seen to apply equally (in the present case, to men and women, homosexuals and heterosexuals alike)?

The applicant's challenge was:

(1) The buggery provisions (sections 118C and 118F(2)(a)) were discriminatory because: (a) as an act of or akin to sexual intercourse as far as consensual sex was concerned, the minimum age limit for buggery was put at 21 years whereas as far as sexual intercourse between men and women were concerned, the age limit was 16 years of age (section 118C compared with section 124 of the Crimes Ordinance); and (b) notwithstanding consent or that both parties were 21 years or older, it was an offence for buggery to take place when more than two persons were present whereas there was no such offence for men and women when having sexual intercourse (section 118F(2)(a)).

(2) As for acts for gross indecency, while it was an offence for man to commit an act of gross indecency with another man if either was under the age of 21, the minimum age limit for heterosexual or lesbian couples was 16 (section 118F compared with section 122(2), which dealt with the offence of indecent assault). Further, even if a man reached the said minimum age of 21 and notwithstanding consent, it was an offence if more than two persons were present whereas no such offence existed for heterosexuals or lesbians (section 118J(2)(a)).

At the substantive hearing of the judicial review, the respondent contended first, that the court lacked jurisdiction to hear the judicial review or grant the declarations sought. However, the respondent conceded that if the court did have

[1] Reported at [2006] 4 HKLRD 211.

the necessary jurisdiction, then he would accept that sections 118F(2)(a), 118H and 118J(2)(a) were unconstitutional in the light of the Basic Law and the Bill of Rights. The effect of the concessions was that section 118H would be read down so that references to the age limit of 21 would be read as references to 16. Sections 118F(2)(a) and 118J(2)(a) were accepted to be unsustainable in their entirety. Notwithstanding these concessions, the respondent nevertheless contended that section 118C did not breach either the Basic Law or the Bill of Rights. The Court of First Instance held that the court had the necessary jurisdiction to deal with the judicial review and further held that section 118C did breach the Basic Law and Bill of Rights. The respondent appealed to the Court of Appeal ("CA") seeking to set aside the declarations only insofar as section 118C was concerned.

As with most inquiries into whether a piece of legislation was unconstitutional, the CA held that two stages should be analysed as a matter of legal approach:

(1) First, had a right protected by the Basic Law or the Bill of Rights (the ICCPR) been infringed?

(2) Second, if so, could such infringement be justified?

An infringement that could not be justified would mean that the relevant piece of legislation would be held to be unconstitutional and of no effect.

The CA held that as a matter of the burden of proof, it was for the applicant to make good the first stage inquiry, *viz*, whether the Basic Law or the Bill of Rights had been breached. If this could not be shown, that was the end of the matter. But if an infringement was proved, then the second stage came into play and it was for the respondent (usually the Government or one of its arms) to demonstrate that the breach was justified. It was at the second stage that the court examined whether the constitutional infringement could be legally justified by the application of the proportionality test. Any restriction on a constitutional right could only be justified if: (a) it was rationally connected to a legitimate purpose; and (b) the means used to restrict that right had to be no more than was necessary to accomplish the legitimate purpose in question. This was sometime known as the components of the proportionality test.

For the following reasons, the CA was of the view that homosexual buggery and sexual intercourse between a man and a woman were to be regarded as being similar:

(1) Sexual intercourse between men and women was not just for the purposes of procreation. It also constituted an expression of love, intimacy and constituting perhaps the main form of sexual gratification. For homosexual men, buggery fitted within these definitions. At one stage, societal values dictated that buggery was some form of unnatural act, somehow to be

condemned and certainly not condoned. These values had changed in Hong Kong and perhaps one needed to look no further than the 1991 amendments that led to the legalization of buggery to confirm this.

(2) The courts had consistently treated buggery as a form of sexual intercourse and had certainly treated the two acts as being comparable when examining the constitutionality of legislation dealing with buggery.

After referring to judicial authorities before the European Court of Human Rights and other jurisdictions, the CA agreed with the court below that "for gay couples the only form of sexual intercourse available to them is anal intercourse." For heterosexuals, the common form of sexual intercourse open to them was vaginal intercourse. This was obviously unavailable as between men. It was clear then that section 118C of the Crimes Ordinance significantly affected homosexual men in an adverse way compared with heterosexuals. The impact on the former group was significantly greater than on the latter. The CA agreed with the following passage from the judgment below:

> "Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. During the course of submissions, it was described as 'disguised discrimination'. It is, I think, an apt description. It is disguised discrimination founded on a single base: sexual orientation."

For the above reasons, the CA was of the view that the existence of section 118C did infringe the rights to privacy and equality contained in those articles of the Basic Law and the Bill of Rights earlier identified.

The question was whether the infringement could be justified. The CA held that the proportionality test had as a starting point the inquiry as to the purpose of the legislation in question. It had to be shown that the purpose was a legitimate one for legislation to pursue and that the legislation was rationally connected to it. If this could be shown, the final hurdle was to demonstrate that the means used in the legislation to achieve the legitimate purpose was no more than was necessary to accomplish it.

Adopting this approach, the CA reached the conclusion that the respondent had not sufficiently demonstrated any justification for the infringement of the applicant's rights:

(1) The purpose of the legislation could be said to be the protection of the young from sexual activities which were, for want of a better term, for more mature persons. The Legislature was obviously better equipped to gauge

public opinion and to assess the relevant health or other considerations.

(2) The focus therefore shifted to the age limit of 21 that the Legislature had imposed in our legislation. The CA failed to see on any basis the justification of this age limit. No evidence had been placed before the CA to explain why the minimum age requirement for buggery is 21 whereas as far as sexual intercourse between a man and a woman was concerned, the age of consent was only 16.

(3) The CA was shown the relevant extracts from *Hansard* recording the debates in the Legislative Council regarding the 1991 amendments. It was there recorded that the legislative provisions closely followed the recommendations of the 1983 Law Reform Commission Report on Laws Governing Homosexual Conduct. In the Law Reform Commission Report, the age limit of 21 was recommended on the basis that it was the age of majority in Hong Kong and that it would allow for more mature consideration before this form of sexual activity and propensity were embarked on.

(4) In the CA's judgment, these reasons (if they were the operative ones) could not be sustained. First, the age of majority in Hong Kong became 18 when in 1990, section 2 of the Age of Majority (Related Provisions) Ordinance (Cap 410) was passed. Voting rights were attained at 18 years of age as well (Legislative Council Ordinance (Cap 542)). Yet when the 1991 amendments took place, the majority age remained at 21. Second, it was difficult to see just what was the justification to treat homosexuals differently to heterosexuals.

(5) In the Legislative Council debates and in the said Law Reform Commission Report, there were references to the need to curb blackmail as being some form of justification for the different age limits. The CA was of the view that this was difficult to see. No figures or any other evidence were produced to support this assumption. In any event, it was difficult just how the lowering of the age of consent for buggery to 16 would give rise to a greater risk of blackmail than in the case of sexual intercourse between men and women.

(6) In the CA's view, the respondent had not discharged the burden of justifying the infringement of the applicant's fundamental rights.

The CA also dealt with the argument put forward by the respondent: this was the concept of the margin of appreciation that should be accorded by the courts to the legislature whenever legislation was being challenged as being unconstitutional. This term encapsulated the recognition by the

court that the Legislature was in a better position to assess the needs of society whenever it passed legislation. It was not for the courts to take over this role; indeed the role of the court was to defer to the Legislature in matters of policy.

There were, however, limits to the margin of appreciation that could be accorded to the Legislature. Where there was an apparent breach of rights based on race, sex or sexual orientation, the court would scrutinize with intensity "the reasons said to constitute justification". Where the court did not see any justification for the alleged infringement of fundamental rights, it would be its duty to strike down unconstitutional laws, for while there had to be deference to the Legislature as it represented the views of the majority in a society, the court had to also be acutely aware of its role which was to protect minorities from the excesses of the majority. In short, the court's duty was to apply the law; in constitutional matters, it had to apply the letter and spirit of the Basic Law and the Bill of Rights. The Court also stressed the need for the court to be provided with sufficient materials to understand just what might be the justification for any infringement of fundamental rights.

The CA held that section 118C was unconstitutional and breached the Basic Law and the Bill of Rights.

Judgment Update

Re C (A Bankrupt)

CACV Nos 405 and 406 of 2004, 230 of 2005[1] (September 2006)

Court of Appeal

This was an appeal by the Official Receiver and the Secretary for Justice (the "Secretary") against the decision of the Court of First Instance ("CFI"), in which the CFI dismissed two applications made by the Official Receiver under section 138 of the Bankruptcy Ordinance (Cap 6) ("the Ordinance") for an order that the bankrupts C and L be prosecuted for certain offences contrary to the Ordinance. The CFI ruled that the power conferred upon the Court under section 138 was constitutionally impermissible as contravening the requirement of BL 63 that stipulates that:

> "The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference."

Section 138 of the Ordinance provides as follows:

> "Where the Official Receiver or a trustee in bankruptcy reports to the court that in his opinion a bankrupt who has been adjudged bankrupt has been guilty of any offence under this Ordinance, or where the court is satisfied upon the representation of any creditor or member of the creditors' committee that there is ground to believe that the bankrupt has been guilty of any such offence, the court shall, if it appears to the court that there is a reasonable probability that the bankrupt will be convicted and that the circumstances are such as to render a prosecution desirable, order that the bankrupt be prosecuted for such offence, but no such order shall be a condition antecedent to any prosecution under this Ordinance."

The offences to which section 138 relate are offences by the bankrupt himself under the Ordinance. The offences are listed in Part VIII of the Ordinance and include sections 129, 131-136.

The Court of Appeal ("CA") considered that BL 63 referred to the depository of the guarantee of prosecutorial independence as the Department of Justice, but the CA was of the view that it was convenient and appropriate to refer in the judgment to the depository as the Secretary for Justice, for he headed that Department and with him ultimately rested the prerogatives covered by that guarantee.

The CA was of the view that the prosecutorial independence of the Secretary was a linchpin of the rule of law. He was in the discharge of that duty to be "actuated by no respect of persons whatsoever" (quoted from Sir Robert Finlay, 1903, *Parliamentary Debates Vol 118*, cols 349-390) and "the decision whether any citizen should be prosecuted or whether any prosecution should be discontinued, should be a matter for the prosecuting authorities to decide on the merits of the case without political or other pressure. ... any practice savouring of political pressure, either by the executive or Parliament, being brought to

[1] Reported at [2006] 4 HKC 582.

bear upon the Law officers when engaged in reaching a decision in any particular case, is unconstitutional and is to be avoided at all costs." (quoted from Edwards, *The Law Officers of the Crown* (1964), p 224) Although these statements of fundamental principle were made in reference to the prosecutorial role of the Attorney General in England, they reflected accepted and applied fundamental principle in the Hong Kong jurisdiction the continuation of which was preserved by the entire theme of the Basic Law as well, specifically, as by BL 63. It was to these principles that the reference to "control" in conjunction with the requirement that that control be free from interference in BL 63, was directed. They were principles underpinned by a number of statutory provisions (eg sections 14(1), 14B, 15(1) of the Criminal Procedure Ordinance (Cap 221)).

The CA apprehended that BL 63 was directed to interference of a political kind. But the rule that ensured the Secretary's independence in his prosecutorial function necessarily extended to preclude judicial interference, subject only to issues of abuse of the Court's process and, possibly, judicial review of decisions taken in bad faith.

The CA was concerned with judicial interference with a decision-making process. If that process had not yet commenced - and section 138 when invoked came into play when no such process had been engaged - then it was difficult to see whence came the interference, unless it be said that the initiation of prosecutions was exclusively the preserve of the Secretary, or that he was bound by the order under section 138. What BL 63 did, apart from its prime

BL 63

The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.

purpose of prohibiting political interference was to reflect the boundary that protected the Secretary from judicial encroachment upon his right to decide whether to institute a prosecution, what charge to prefer, whether to take over a private prosecution, and whether to discontinue proceedings.

This was not to say that the Courts were powerless to prevent an abuse of their process, but the exercise of such a judicial power, even though it might have the effect of bringing proceedings to a halt, arose after the institution of proceedings and, as the phrase "abuse of process" itself illustrated, was a power directed at the preservation of the integrity of the judicial process. It was a necessary corollary to the exercise of judicial authority, itself preserved by the Basic Law. There was also authority for the proposition that "dishonesty, bad faith or some other exceptional circumstances" might found a basis for challenge in the Courts of the exercise in a particular case of a prosecutorial prerogative.[2]

The question in this case was: "in making an order under section 138 of the Ordinance, did the Court thereby control any of the prosecutorial prerogatives of the Secretary?" The Secretary's

[2] *R v Director of Public Prosecutions, ex p Kebeline* [2000] 2 AC 326, 376.

prosecutorial prerogatives included his discretion to institute, or direct the institution of, a prosecution; to decline to institute a prosecution; to take over proceedings commenced by others; and to discontinue proceedings that he had commenced.

The CA considered that by the exercise of the section 138 power, it did not interfere with any of those prosecutorial prerogatives because in neither of the cases had the Secretary sought to put into motion any prosecution or to make any decision in relation to a subsisting prosecution which a Court had intervened. Nor had there been any decision by him not to institute proceedings which a Court had by order sought to overturn. That being so, it was difficult to see how the Court in making an order under section 138 interfered with or controlled the Secretary in the exercise of any one of his prosecutorial prerogatives.

Furthermore, the CA decided that, in making an order under section 138, the Court did not interfere with prosecutorial independence, firstly, because the power under section 138 was ancillary to a function that was judicial and, secondly, because the power might reasonably, and therefore had to be, construed as subject to the rights of the Secretary to decline to proceed where his signature to a charge sheet or an indictment was required, or to stop a prosecution by the entry of a *nolle prosequi* where he saw fit to do so.

The CA was of the view that the power to order a prosecution under section 138 was an incident of the judicial function conferred by the Ordinance on the Court in the exercise of its bankruptcy jurisdiction. The Court did no more than direct a prosecution. It did not itself control that prosecution nor itself determine the case that was then presented.

The CA also decided that the concern of the judge of the CFI that the Secretary might fall foul of a Court order by thwarting its purpose were he to intervene, was a concern that did not arise if the power under section 138 was read as one that did not preclude the Secretary from the exercise of such powers as were provided to him by law to withhold his authority for the continuation of a prosecution where that authority was needed, or to intervene and bring an end to such proceedings; or put another way, section 138 should be read as subject to those powers.

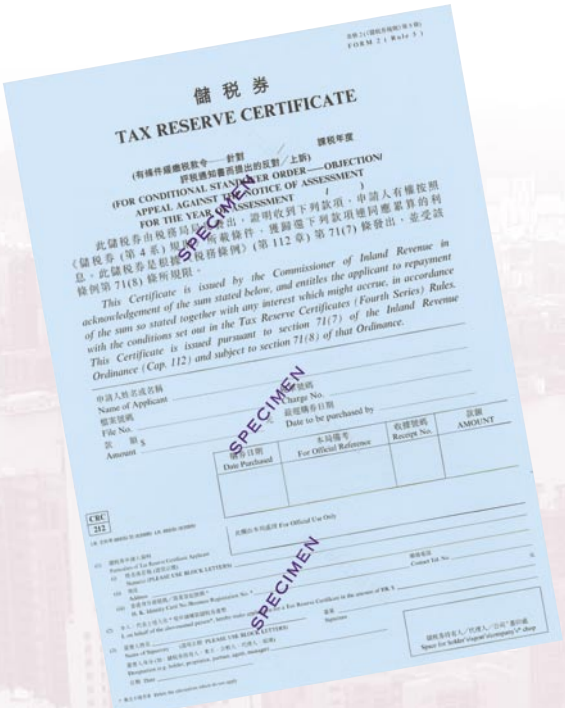
The Court was satisfied that the power of the Court in section 138 to order a prosecution did not contravene BL 63.

Weson Investment Limited v The Commissioner of Inland Revenue

CACV No 261 of 2005[1] (January 2007)

Court of Appeal

The plaintiff purchased land in the New Territories. After redevelopment, part of that land was sold, as a result of which the plaintiff made a substantial profit. The plaintiff submitted a profits tax return and audited financial statements. The Commissioner of Inland Revenue (the "Commissioner") considered that the profit generated from the sale of land was taxable. A notice was issued assessing and demanding payment of tax. The plaintiff's tax advisers objected to the notice of assessment and requested the Commissioner to hold over the amount of tax payable pending the result of the objection. A holding over is governed under section 71(2) of the Inland Revenue Ordinance (Cap 112) ("the Ordinance"). The Commissioner ordered that the payment of tax be held over pending the result of the objection on condition that an equal amount of Tax Reserve Certificates ("TRC") be purchased by the plaintiff. That was in conformity with section 71(7) of the Ordinance.



The plaintiff did not purchase a TRC by the due date nor did it pay the tax and was thereafter in default. Because of the default, the Commissioner added 5% surcharge to the debt under section 71(2) of the Ordinance. The Commissioner sued the plaintiff to recover the tax and the surcharge, in the sum of $8,001,704. The plaintiff took no steps and subsequently a District Court Registrar entered judgment by default for such amount together with interest and costs. Later the Commissioner issued a final notice demanding payment, failing which a further surcharge of 10% would be added. On the next day, the Commissioner exercised his powers under section 76 of the Ordinance to recover, on account of the debt, part of the tax amount from the plaintiff's bank account. The tax was subsequently paid by cheque but the plaintiff later objected to payment of the tax. The Commissioner determined that the plaintiff's objection had failed.

The matter was then taken to the Board of Review (the "Board"). The Board came to the view that the gain which had arisen on the disposal of the land was capital in nature. The Court of Appeal ("CA") observed that it was not without some hesitation that the Board reached that conclusion. Nevertheless, it allowed the appeal

[1] Reported at [2007] 2 HKLRD 567.

and set aside the additional assessment of profits tax that had been made by the Commissioner. A revised additional assessment and refund of tax was issued.

The immediate response of the plaintiff was that, in the light of events which were alleged to have taken place when the tax was paid, it should be taken as having purchased a TRC for the amount of the tax. On that basis a claim was made for interest. The Commissioner's position in reply was that a TRC had not been purchased and that there was therefore no interest to be paid. The Commissioner made further refunds of the amounts of the tax surcharge and of the legal costs and judgment interest that had been paid. That, however, did not satisfy the plaintiff.

Action was commenced by the plaintiff in the Court of First Instance ("CFI") claiming interest on the basis that the demand for the tax had been unlawful and outside the powers of the Commissioner and, in those circumstances, the Commissioner had been unjustly enriched to the extent of the amounts paid at the expense of the plaintiff, who was thus entitled to restitution and interest. The plaintiff relied upon BL 6 and 105. The plaintiff lost before the CFI and appealed to the CA.

The plaintiff's primary submission was that BL 105 applied and that the plaintiff had been deprived of the capital used to pay the tax without compensation for loss of use. The Hon Rogers VP (Le Pichon JA agreeing) was of the view that BL 105 had no application to legitimate taxation. Taxation is governed under BL 108 which reads:

> "The Hong Kong Special Administrative Region shall practise an independent taxation system.
>
> The Hong Kong Special Administrative Region shall, taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation."

That is to be contrasted with BL 105 which reads:

> "The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.
>
> Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.
>
> The ownership of enterprises and the investments from outside the Region shall be protected by law."

The CA held that when the Government imposed tax on an individual, of necessity it deprived the individual of his property without any right to compensation. The two articles were mutually exclusive.

The CA was of the view that even if it were right to construe the power to tax under BL 108 as being subject to an overriding requirement of proportionality stemming from BL 105, which was not considered to be correct by the Court, the question of proportionality had to be considered in the context of the case as well as the provisions of the Ordinance. In the context of this case, the fact was that the plaintiff was given an opportunity to purchase a TRC which would have entitled it to interest. Hence the argument that the Commissioner was entitled to interest on unpaid tax whereas the individual was not entitled to interest on tax subsequently refunded fell away.

Tang VP took the view that BL 105 had no application in this case. "Deprivation", in BL 105, is used in the sense of expropriation, which is the expression used in its original Chinese. BL 105 concerns essentially a taking, as under eminent domain. Tang VP did not believe that suing for tax by action or for example, the recovery of a penalty or fine by action, even if it subsequently turned out to be wrong, would amount to or come within the scope of lawful expropriation under BL 105.

Tang VP said he had no doubt that the Ordinance, which provided for objections and appeals, came within the ambit of BL 108, so that a payment which turned out not to have been payable because of a successful objection or appeal was nevertheless covered by BL 108.

The plaintiff submitted that in reading BL 105 and 108, the Court had to strike a fair balance, so that there had to be a reasonable relationship of proportionality between the means employed and the aims pursued. Tang VP did not believe it was right to read BL 105 and 108, as if the right of the HKSARG to tax had to strike such a fair balance. Rather, the judge was of the view that unless the taxation scheme could not be regarded as genuine, but was in fact a disguised expropriation of property, BL 105 had no application. And the Court had no power to interfere.

BL 105

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Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

The ownership of enterprises and the investments from outside the Region shall be protected by law.