Chiang Lily v Secretary for Justice

FAMC Nos. 64 & 65 of 2009 (26 March 2010)[1]

Court of Final Appeal

Issues

In *Chiang Lily v Secretary for Justice*, the Applicant faced five charges relating to commercial crimes. She challenged the following matters by way of judicial review:

(i) the decision of the Secretary for Justice ("SJ") to apply for the Applicant's trial to be transferred to the District Court ("DC") pursuant to s. 88 of the Magistrates Ordinance (Cap. 227) ("s. 88") for *Wednesbury* unreasonableness on the ground that the SJ had failed to give due consideration to the principle of trial by jury under BL 86 in reaching his decision ("1st JR");

(ii) the constitutionality of s. 88 for infringing the principle of separation of powers in the Basic Law on the ground that it conferred on the SJ the judicial power to decide the venue of trial which should be exercised by the courts ("2nd JR").

1st JR - SJ's Decision to Transfer the Trial to DC

In the 1st JR, whilst conceding that there was no constitutional right to trial by jury in Hong Kong, the Applicant nevertheless argued that the SJ's decision to have her trial transferred to the DC was *Wednesbury* unreasonable for the following reasons:

(i) trial by jury was such an important factor to which the SJ should give due consideration in deciding to apply for a transfer pursuant to s. 88;

(ii) the SJ had not given any due consideration to the importance of trial by jury in arriving at the decision. This was demonstrated by the inadequacy of the reasons he gave the Applicant for maintaining the decision.

The CFI held that the SJ had given sufficient reasons for his decision to have the Applicant's trial transferred to the DC. The CA agreed with the CFI and held that:

(i) where there was neither a constitutional right to trial by jury nor any objective, peculiar and powerful circumstances indicating the desirability of a jury trial, it was difficult to see why trial by jury should be elevated into almost a

[1] Reported at (2010) 13 HKCFAR 208.

paramount consideration;

(ii) in any event, since the SJ had already stated in his letter to the Applicant that he had "carefully considered" all the points she made, it was not for the SJ to demonstrate that each factor had been considered. Rather, it was for the Applicant to demonstrate with details that the decision was flawed before the SJ was required to answer her points.

In dismissing the Applicant's application for leave to appeal against the CA's decision, the CFA held that the Applicant was not able to suggest that she could not have a fair trial in the DC before a judge sitting alone and that there were plainly no grounds for holding the SJ's decision to seek trial in the DC to be irrational.

2nd JR – Constitutionality of S. 88 of the Magistrates Ordinance (Cap. 227)

S. 88 requires a magistrate to make an order transferring to the DC a charge or complaint in respect of an indictable offence upon application made by or on behalf of the SJ. Once the SJ has made an application to transfer the proceedings to the DC under s. 88, it is mandatory for the magistrate to make an order to that effect.

In the 2nd JR, the Applicant challenged the constitutionality of s. 88 on the following grounds:

(i) the Basic Law contained the principle of separation of powers in that the exercise of judicial power belonged to the courts whereas the exercise of prosecutorial prerogative belonged to the prosecution;

(ii) the power to decide the proper venue for a criminal trial was a judicial power and should therefore be exercised by the courts as stipulated in the Basic Law;

(iii) s. 88 of the Magistrates Ordinance, by vesting the judicial power to decide the venue for trial in the SJ, contravened the principle of separation of powers in the Basic Law and was therefore unconstitutional.

The CFI rejected the Applicant's arguments that the power to decide the venue for trial was a judicial power. In its view, such a power was within the prosecutorial prerogative to be exercised by the SJ free from any intervention under BL 63.

Without going into the merits of the CFI's decision on the constitutionality of s. 88, the CA disposed of the Applicant's appeal by ruling that the 2nd JR was an abuse of process of the court. The CA said it would be an abuse of process to litigate in a later set of proceedings a matter which could and should have been litigated in an earlier one. The CA held that it was clearly an abuse of process for the Applicant to bring the 2nd JR for the following reasons:

(i) the underlying assumption of the 1st JR was the power given to the SJ to determine the venue of trial and so the 1st JR was the most appropriate

set of proceedings for the Applicant to mount a constitutional challenge to that assumption;

(ii) nonetheless, the Applicant chose to mount the constitutional challenge in the 2nd JR despite the fact that she had expressly conceded this point in the 1st JR;

(iii) this had resulted in delay and disruption in the proceedings against the Applicant which was an affront to the administration of justice unless justified by exceptional circumstances which were absent in the present case.

The CFA dismissed the Applicant's application for leave to appeal against the CA's decision on the 2nd JR. The CFA upheld the CFI's decision and took the view that choice of the venue for a prosecution was clearly a matter covered by BL 63 which gave control of prosecutions to the SJ without any external interference. This became obvious upon considering the context and basis of any decision regarding venue.

Regarding context, if selection of venue were a judicial function, the magistrate would have to hear submissions and look in some detail at the alleged offence and the circumstances of the accused, turning the mere decision as to venue into a mini-trial. That could not be the proper function of the magistrate.

Regarding the basis of making the selection, the CFA referred to the Statement of Prosecution Policy and Practice (2009), which gives the following guidance for choosing the venue:

> "In the selection of venue, the sentence which is likely to be imposed upon an accused after trial is an important factor for the prosecutor to examine. The prosecutor will also wish to consider the general circumstances of the case, the gravity of what is alleged, the antecedents of the accused and any aggravating factors."

The CFA considered that these were matters that might properly guide the prosecutor but which would be highly undesirable for a magistrate to explore before the trial. Further, it would be most inappropriate for there to be a debate as to the likely sentence or antecedents or aggravating factors before the magistrate regarding a person fully entitled to the presumption of innocence. The present system avoided this by properly treating the question of venue as a prosecutorial choice with the transfer following on a mandatory basis.

Lai Hay On v Commissioner of Rating and Valuation and Director of Lands

CACV No. 130 of 2007 (31 March 2010)[1]

Court of Appeal

Background

The Appellant's father, an indigenous villager, assigned his New Territories land (land to which Part II of the New Territories Ordinance (Cap. 97) ("NTO") applies) to his only son, the Appellant, by way of gift, by an assignment dated 5 November 1992. The Appellant's father passed away in October 1994. The Appellant applied for exemption from annual Government rent under s. 4 of the Government Rent (Assessment and Collection) Ordinance (Cap. 515) ("GRACO"). The application was refused by the Director of Lands in August 1999 on the ground that the Appellant was not a "lawful successor" within the meaning of s. 4(1)(a)(ii)(B) of GRACO. The Appellant's appeal to the Lands Tribunal was dismissed.

The Appellant appealed against the judgment of the Lands Tribunal to the CA raising the following issues (a) whether the Appellant held the New Territories land as his father's "lawful successor" as a result of the *inter vivos* gift; and (b) whether s. 4 of GRACO was inconsistent with BL122 and BL40.

The Appellant appeared in person throughout the proceedings. The CA invited the Heung Yee Kuk to appear at the hearing of the appeal and to make submissions in writing. The CA had also appointed an *amicus curiae*.

"Lawful successor"

It was common ground that the Appellant's father was a person descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong. The critical issue in this appeal was whether the Appellant held the New Territories land as his father's "lawful successor" as a result of the *inter vivos* gift.

S. 4(1)(a)(ii)(A) of GRACO provides that exemption from Government rent applies to an interest which "has not since its ceasing to be held by the indigenous villager been conveyed to any person who is not a lawful successor in the male line of the indigenous villager"; and under s. 4(1)(a)(ii)(B) "continues to be held by a person who is a lawful successor in the male line of the indigenous villager."

Under s. 2 of GRACO, "'lawful successor' means a person, male or female, who on the death of an indigenous villager is or becomes entitled to an

[1] Reported at [2010] 3 HKLRD 286.

interest in the estate of the deceased by lawful succession and which person is a descendant through the male line of the deceased". S. 2 defines "lawful succession" as "succession whether testate or intestate or in accordance with Chinese customary law operating in the New Territories and includes a succession on a succession".

Noting the above definitions in GRACO, the CA observed that a person could not be a lawful successor except by lawful succession. Regarding land in the New Territories, succession could be (a) testate; (b) intestate; or (c) in accordance with Chinese customary law. Prior to 1994, s. 17 of NTO provided the only means by which a succession according to Chinese customary law could be effected. A s. 17 succession could only take place on the death of the relevant ancestor. In other words, it did not include an *inter vivos* gift or Chinese customary succession otherwise than under s. 17 of the NTO, such as a lifetime distribution of property by a *pater familias* (分家 or *fenjia*).

The CA held that the *inter vivos* gift to the Appellant took effect as a gift and not by way of lawful succession, and the Appellant did not thereby become his father's lawful successor in respect of the New Territories land.

Submission of *amicus curiae*

The *amicus curiae* submitted that as a matter of principle, s. 4 of GRACO ought to be interpreted in the light of BL122 which in turn was to be interpreted in the light of para. 2 of Annex III to the Joint Declaration. It was also submitted that exemption from the annual rent was part of the "lawful traditional rights and interests of the indigenous inhabitants" provided by BL40 such that "lawful successor" in BL122 should be construed so as to include a person who had "succeeded" to the relevant land by an *inter vivos* gift.

BL122

The CA noted that both the Joint Declaration and BL122 provided for exemption from the annual rent "so long as" the property was held by an indigenous lessee on 30 June 1984 or by one of his lawful successors in the male line. The phrase "so long as" in BL122 was important because it implied continuity of holding by that person or his lawful successor. Both s. 9(2) of the New Territories Leases (Extension) Ordinance (Cap. 150) and s. 4(1)(a) of GRACO gave effect to the requirement of continuity. The CA noted that a condition for exemption was that the land "was on 30 June 1984" held by an indigenous inhabitant. The exemption was only extended to land in the New Territories held by an indigenous person "on 30 June 1984" and continued to be held by his lawful successor(s) in the male line thereafter. The exemption did not come with the status of being an indigenous inhabitant.

The CA also found it important to remember that, but for the Joint Declaration and the Basic Law, no extension of such leases beyond 30 June 1997 could have been granted. In other words, for all intents and purposes the Joint Declaration and the Basic Law (Article 121) enabled the

government (during the period from 27 May 1985 to 30 June 1997) to extend such leases beyond 30 June 1997 and to 30 June 2047, at the annual rent. Such extension was made possible by the Joint Declaration and BL121.

The CA believed that "lawful successors" in BL122 referred to a person who had become such by lawful succession. BL122 did not permit or require lawful succession to have a more extensive meaning than as recognised by the law in Hong Kong. That was consistent with BL8. At all relevant times, 19 December 1984 (the Joint Declaration) and 4 April 1990 (the adoption of the Basic Law), as explained above, there were only three ways by which succession could take place. It followed that s. 4 of GRACO was not inconsistent with BL122.

BL40

The *amicus curiae* pointed out that, notwithstanding that the Government lease contained a provision for a review of the rent after the first 10 years of the term, and the rent for the new term of 24 years less three days was to be at a new rent to be fixed, the rent had never been revised. In time the rent had become nominal. Thus, no doubt for historical reasons, land in the New Territories had been treated more favourably. Further, both the Appellant and the Heung Yee Kuk placed heavy reliance on the *dictum* of Li CJ in *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459, which stated that there was no dispute that the lawful traditional rights and interests within BL40 "include various property rights and interests such as exemption from Government rent and rates in respect of certain properties held by indigenous villagers" (447E-F).

Noting the above, the CA held that the right to exemption from the annual rent was governed by BL122, which was the specific provision dealing with exemption to pay the annual rent in respect of a lease renewed by virtue of BL121. For the reasons given above, the CA believed that "lawful successors" in BL122 referred to a succession on the death of the relevant ancestor and did not include an *inter vivos* transfer. There was nothing in BL40 which required a different interpretation.

Medical Council of Hong Kong v Helen Chan

FACV No. 13 of 2009 (14 May 2010)[1]

Court of Final Appeal

Issues

In *Medical Council of Hong Kong v Helen Chan*, the Medical Council of Hong Kong ("MC") found the Respondent guilty of misconduct in a professional respect and ordered that her name be removed from the General Register, such removal to be suspended for two years. The Respondent appealed to the CA which quashed the MC's finding of professional misconduct. The CA held that:

(i) the presence of the Legal Adviser to the MC ("LA") during the MC's deliberations and his drafting of a decision for the MC were prohibited by the relevant legislation and hence unlawful;

(ii) such presence and decision drafting were also inconsistent with the right to a competent, independent and impartial tribunal under Article 10 of the BoR and which is entrenched by BL39 hence unconstitutional.

CFA's Decision

In a unanimous judgment delivered by Mr Justice Bokhary PJ, the CFA reinstated the MC's findings and held that:

(i) the LA's presence during the MC's deliberations and his drafting of a decision for the MC were lawful;

(ii) neither the LA's presence nor his drafting of the decision compromised the real or apparent competence, independence or impartiality of the MC or the real or apparent fairness of the MC's proceedings.

The Requirement of Lawfulness

Presence during the Medical Council's Deliberations

The CFA found no express or implied provision in the relevant legislation prohibiting the LA's presence during the MC's deliberations. To the contrary, the CFA found two provisions of the relevant legislation which expressly contemplate the LA's presence, namely:

(i) Regulation 8 of the Medical Registration (Miscellaneous Provisions) Regulation (Cap. 161, sub. leg. D) which provides that the LA may tender advice to the MC

[1] Reported at [2010] 3 HKLRD 667.

after it has commenced its deliberations but if the LA does so he or she must inform every party to the proceedings or the person representing each party of the advice that has been given;

(ii) Regulation 32(4) of the Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap. 161, sub. leg. E) which provides that the LA may be present when the MC votes on any matter.

Decision Drafting for the Medical Council

Regarding the LA drafting a decision for the MC, the CFA found no express or implied provision in the relevant legislation permitting or prohibiting any such drafting.

Article 10 of the BoR

After reviewing case law in other jurisdictions, the CFA concluded that "[u]nder our constitution, it is the right of anyone and everyone who is dealt with by a tribunal that the tribunal be – and be seen to be – competent, independent and impartial."

Competence

The CFA considered there was no reason to regard the MC as incompetent. In its view, the competence of a tribunal lies essentially in the tribunal's own qualities and a competent tribunal would not be rendered incompetent or made to appear so by erroneous legal advice or assistance.

Impartiality

In the CFA's view, there was no reason to think that the sort of presence at the MC's deliberations or decision drafting which the present case concerned would render a tribunal impartial or make it appear so. According to the CFA, legal advisers such as the MC's LA function impartially. They do not espouse one side or the other's cause. Nor do they present or urge one side or the other's case. Their allegiance is only to professional propriety under the law.

Independence

Regarding the presence of the LA during the MC's deliberations, the CFA considered it sufficient to say that what held good for impartiality also held good for independence. The CFA also ruled that LA's decision drafting for the MC did not compromise or appear to compromise the MC's independence in view of the following safeguards built into the MC's practice:

(i) the MC must deliberate without any participation by the LA apart from giving the MC legal advice;

(ii) no drafting by the LA may commence until after the MC, having so deliberated, has arrived at its decision and has made its decision, findings and reasoning known to the LA;

(iii) what the LA drafts must embody the MC's findings and reasoning;

(iv) the MC must scrutinise the draft and, if

necessary, modify the draft to ensure that it is the MC's product and not that of the LA's, and that it said what the tribunal meant;

(v) the decision drafting by the LA must be done in the MC's presence.

Other grounds

Apart from the role of the LA, the Respondent challenged the legality and constitutionality of the "long-established rule" which she was found by the MC to have breached, namely: "doctors are prohibited from public endorsement or promotion of a commercial brand of medical or health related products".

The Respondent challenged the above rule on the following grounds:

(i) it was unfair and contrary to natural justice for the MC to invoke such a rule without having warned her of it before the hearing commenced;

(ii) such a rule, if it existed, would be a restraint on free speech which was not prescribed by law and hence unlawful;

(iii) in any event, the rule was neither a necessary nor a proportionate restriction on the constitutional freedom of expression.

The CFA dismissed all of the above grounds and held that:

(i) the rule represented a consensus within the medical profession and it was neither unfair nor contrary to natural justice for the MC to hold the Respondent to such a rule;

(ii) the speech involved in the present case was commercial rather than political and the restriction thereon was both necessary for the protection of public health and proportionate to that need;

(iii) the finding that what the Respondent did constitute misconduct in a professional respect was not unfair, contrary to natural justice, incompatible with free speech or with legal certainty.

Accordingly, the CFA restored the MC's finding of professional misconduct and remitted the case to the MC for it to hear full mitigation then order either a reprimand or the serving of a warning letter.

Mok Charles Peter v Tam Wai Ho

Final Appeal No. 8 of 2010 (Civil) (13 December 2010)[1]

Court of Final Appeal

Background

The issue before the CFA was whether a finality provision (that is, one that curtails the right of appeal from the decision of a court) contained in the Legislative Council Ordinance (Cap. 542) ("LCO"), was constitutional. The relevant finality provision was contained in s. 67(3) of the LCO which stated that, in the case of an election petition questioning the election of a member to the LegCo, the decision of the CFI shall be final as to the matters in issue.

The first respondent (Dr. Tam Wai Ho) was declared by the second respondent (Returning Officer) to be elected to the LegCo for the Information Technology (IT) functional constituency in September 2008. The petitioner subsequently lodged an election petition, asserting material irregularities in the election as well as illegal and corrupt conduct on the part of the first respondent and seeking an order that he instead be declared the winner for the IT functional constituency.

In a judgment delivered on 9 April 2009, Reyes J dismissed the petition with costs. The petitioner then sought to appeal from this decision to the CA. On 3 December 2009, the CA unanimously dismissed the appeal on the sole ground that it lacked jurisdiction, in that the finality provision contained in s. 67(3) of the LCO barred any further appeal from the CFI on an election petition. The CA, applying the proportionality test (to be mentioned below), held that s. 67(3) was constitutional and thus valid. At the appeal stage, leave was given to the Secretary for Constitutional and Mainland Affairs to intervene to argue the constitutional issue, and leave to intervene was similarly granted to the Secretary ("Intervener") in relation to the appeal before the CFA by a consent order.

[1] Reported at [2011] 2 HKC 119.

Having been refused leave to appeal directly to the CFA, the petitioner then sought leave from the CA to appeal to the CFA. This having been refused, the petitioner applied to the Appeal Committee of the CFA for leave. On 2 June 2010, leave was given on the following question of great general and public importance:-

> "Are the provisions of section 67(3) of the Legislative Council Ordinance making the determination of the Court of First Instance as certified at the end of the trial of an election petition final inconsistent with Article 82 of the Basic Law and therefore unconstitutional?"

Constitutional issue

BL 82 (insofar as material) provides that the power of final adjudication shall be vested in the CFA.

Following its decision in *Solicitor v Law Society* (2003) 6 HKCFAR 570, the CFA held that while access to the CFA was not unrestricted under BL 82, any restriction or limitation on the power of final adjudication must satisfy the proportionality test. The proportionality test consisted of the following analysis in respect of any restriction or limitation:-

(i) The restriction or limitation must pursue a legitimate aim.

(ii) The restriction or limitation must also be rationally connected with that legitimate aim.

(iii) The restriction or limitation must also be no more than was necessary to accomplish that legitimate aim.

The CFA held that the proportionality test could be applied to statutory restrictions or limitations that might, for example, provide that the decision of a court, at any level, should be final. Where the proportionality test was satisfied, the restriction or limitation would be justified from a constitutional point of view. If not, the restriction or limitation would be held to be invalid. Further, the burden of satisfying the proportionality test was on the party who sought to rely on the restriction or limitation to BL 82.

The CFA underlined that the issue on appeal concerned the validity of the restriction or limitation on the function of final adjudication vested in the CFA under BL 82, rather than a constitutional right of appeal. Thus although it agreed to the Intervener's submissions that nothing in the Basic Law stated in terms that a right of appeal existed against decisions of the courts, that BL 83 provided that the structure, powers and functions of the courts in Hong Kong shall be prescribed by law, and that the appellate jurisdiction of any particular court was the creation of statute, it considered that BL 82 was engaged in the present appeal.

The CFA was not persuaded by the Intervener's arguments that the decision in *Solicitor v Law Society* (insofar as it dealt with the constitutional issue) was either *obiter* or was wrong. It held that even on the assumption that it was obiter, it could not be said to be wrong, noting that the

true nature of the issue in that appeal involved looking at the function of final adjudication vested in the CFA (rather than the examination of a constitutional right of appeal as such), and that the proportionality test was well established.

Proportionality

The CFA upheld the CA's finding that the first two steps of the proportionality test were fulfilled in the present appeal: the speedy determination of an election petition was a legitimate aim and the finality provision contained in s. 67(3) was rationally connected to achieving that aim.

However, the CFA held that the burden on the first respondent and the Intervener on the issue of proportionality had not been discharged. It was of the view that the finality provision contained in s. 67(3) went much further than was necessary to deal with the said aim of speedy determination in election petitions.

Firstly, it noted that the nature of the restriction was absolute: there was simply no avenue of appeal, however much in error the CFI might have been. Further, it was perhaps easy to see the possibility of points of constitutional importance being raised in the course of an election petition and yet the effect of a finality provision such as that in s. 67(3) was that no appellate court (and in particular the CFA) would have an opportunity to deal with them.

Secondly, it was difficult to appreciate why there should be an absolute bar on an appeal when comparable legislation (even within the same ordinance) did not contain such a restriction. In this regard, reference was made to the relevant provisions in the Chief Executive Election Ordinance (Cap. 569) ("CEEO") and s. 73 of the LCO.

The CEEO provided for a limited right of appeal from an election petition from the CFI directly to the CFA: see s. 22(1)(c) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) and s. 34(2) of the CEEO. Although an explanation was sought to be provided to explain the differences between the CEEO and the LCO, the CFA considered that it was not convincing:

(i) While the time frame under the CEEO and the LCO, as well as the time between elections and assumption of office, were admittedly different, there was no reason why they could not be made similar, if not identical. Moreover, given the importance of what might be in issue in election petitions, the courts could be expected to act with appropriate expedition.

(ii) Both the CEEO and the LCO dealt with important elections, one involving the head of the executive branch of government, the other the Legislature. It was difficult to see the reason or logic for the inclusion of a right of appeal from the decision of the CFI in an election petition under the CEEO but not in relation to elections for the Legislative Council.

(iii) Judicial review proceedings were

possible (albeit in a limited manner) in relation to the election of the Chief Executive: s. 39 of the CEEO. There were no applicable finality provisions in relation to these proceedings. They were therefore subject to the usual appellate processes. This was not a provision that existed under the LCO.

Moreover, whatever might be the position of judicial review proceedings in relation to elections for the LegCo, the LCO did provide for another means of challenging the qualification of a member of the LegCo, namely, s. 73. Without deciding the precise ambit and applicability of that provision, and whether or not there was any overlap between proceedings under that provision and proceedings under the election petition procedure under Part VII of the LCO, the CFA observed the point of importance that whether under s. 73 or under the election petition procedure of the LCO, common to both might be a challenge to the qualification or eligibility of a member of the LegCo, whether to be elected to or remain in the Council. One would have thought the urgency in having to determine such issues ought to be the same under both procedures.

The CFA held that in the absence of a cogent explanation, it was difficult to escape the conclusion that the bar on an appeal in an election petition under the LCO had gone much further than was necessary to deal with the need to have election disputes quickly disposed

of. Further, in these circumstances, the margin of appreciation on the part of the LegCo could have little significance. Where, essentially, the legislation was inconsistent with the Basic Law, there was great difficulty in understanding just what was it the court was asked to appreciate.

Accordingly, the CFA held that the burden to demonstrate that the restriction in s. 67(3) of LCO satisfied the proportionality test had not been discharged. It therefore followed that s. 67(3) of the LCO must be declared unconstitutional as being inconsistent with BL 82 insofar as the finality aspect was concerned [2].

[2] In light of the CFA's decision, the Electoral Legislation (Miscellaneous Amendments) Ordinance 2011 (Ord. No. 18 of 2011) was enacted to amend various pieces of legislation to allow a party to an election petition concerning a Legislative Council election, District Council election or Village Representative election, as the case may be, to lodge an application for leave to appeal to the CFA against the determination of the petition by the CFI.