Re Ho Chun Yan Albert

FACV Nos. 24, 25 & 27 of 2012, FACV No. 1 of 2013 (11 July 2013)[1]
CFA

Background

The appeals (FACV 24, 25/2012, FACV 27/2012 and FACV 1/2013) arose from various election petition proceedings and judicial review proceedings in relation to the CE Election ("the Election") in 2012. The written judgment given by Ma CJ was unanimously agreed by the other four Judges in the CFA.

Mr. Leung Chun Ying ("Mr. Leung") was declared the returned candidate in the election on 25 March 2012. On 4 July 2012, Mr. Ho Chun Yan Albert ("Mr. Ho"), a candidate in the same election, lodged an election petition. On 5 July 2012, Mr. Ho and Mr. Leung Kwok Hung both issued a notice of application for leave to apply for judicial review. All three proceedings put in issue whether Mr. Leung was duly elected, alleging that he made false or misleading statements in the course of the election which amounted to illegal conduct within the meaning of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) ("ECICO") and rendered him not a "person of integrity, dedicated to his or her duties" for the purposes of BL 47(1).

The election petition and the applications for judicial review were all dealt with by Lam JA, sitting as an additional judge in the CFI, who gave the following judgments:

(a) By a judgment handed down on 30 July 2012, Mr. Ho and Mr. Leung Kwok Hung's application for leave to apply for judicial review was refused on the grounds that (1) Mr. Ho had abused the process in bringing both an election petition and a judicial review in relation to the same matter; (2) They both could not rely on the grounds for election petitions as set out in s. 32(1)(a) of the Chief Executive Election Ordinance (Cap. 569) ("CEEO") in a judicial review; and (3) the challenge based on BL 47(1) was unsustainable. This judgment gave rise to the First Issue to be discussed by the CFA in the appeal case.

(b) By a judgment handed down on 12 September 2012,[2] Lam JA considered the application brought by Mr. Leung to strike out Mr. Ho's election petition on the basis that it was time-barred[3] and without merits. On the issue of the merits, Lam JA held that Mr. Ho's case was arguable on the facts and so declined to strike out the petition on this basis. On the issue of time

[1] Reported at (2013) 16 HKCFAR 735.
[2] The Secretary for Justice had intervened in these proceedings in view of the importance of the legal issues raised.
[3] The election petition was lodged on 4 July 2012, after the seven-day limit after the day on which the result of an election was declared as stipulated by s. 34(1) of the CEEO.

bar, Lam JA held that the seven-day time limit contained in s. 34(1) of the CEEO, if an absolute one, was unconstitutional as it denied Mr. Ho's access to the Courts, a protected right under BL 35. Instead of striking down s. 34(1), Lam JA adopted a remedial interpretation whereby the provision was subject to the Court's discretion to extend time. This judgment gave rise to the Second Issue to be discussed by the CFA in the appeal case.

(c) On 25 September 2012, Lam JA dealt with the application by Mr. Ho for an extension of time to lodge the election petition. By a judgment dated 5 October 2012, the application was refused on the basis that the complaints made by Mr. Ho against Mr. Leung did not have any real prospect of success.

Leave to appeal to the CFA was sought by all parties who were unsuccessful in the various applications in the CFI. In the Determination dated 13 November 2012, the Appeal Committee of the CFA concluded that no reasonably arguable grounds existed for appealing against Lam JA's judgment dated 5 October 2012. That notwithstanding, given the importance of some of the issues raised, the Appeal Committee decided that a sufficiently great public interest existed to grant leave even though the issues were, strictly speaking, academic. Leave was accordingly granted on the following two issues:[4]

(1) Under the CEEO, how do challenges to

[4] Leave to appeal was also given in relation to the costs order made by Lam JA on 28 September 2012, which is not a subject of discussion in this case summary.

a CE election pursuant to the election petition procedure in s. 32 relate to challenges pursuant to the judicial review procedure in s. 39?

(2) Does the seven-day time limit laid down by s. 34 of CEEO involve any infringement of the right of access to a Court guaranteed by BL 35, and if so, is such time limit unconstitutional?

First Issue: the scope of election petitions in the CEEO and their relationship to judicial review and other proceedings

The CFA handed down its judgment on 11 July 2013. On the first issue, the Chief Justice emphasised that the proper starting point in statutory interpretation, as well as constitutional and contractual interpretation, is to look at the relevant words or provisions having regard to their context and purpose. Given the obvious importance of the post of CE, there is a necessity to have certainty in the elections for the post of CE and the sooner any doubts as to election results are resolved, the better. S. 32(1) of the CEEO stipulates various grounds ("s. 32(1) grounds")[5] on which election petitions may be brought to challenge the result and s. 33 identifies the category of persons who may lodge an election petition (e.g. candidates in the election like Mr. Ho) ("s. 33 persons"). S. 34 provides that the time limit for lodging an election petition is seven days after declaration of an election result. Given this elaborate structure in relation to election petitions, the intention must have been for election petitions to be the primary and most speedy means of questioning the result because the s. 33 persons will likely be the class of persons most affected by an adverse election result and therefore most likely to take action questioning an election result. The very limited time allowed for lodging of election petitions indicates that speed is of the essence.

On the aspect of exclusivity, s. 32(1) stipulates that an election may be questioned "*only*" by an election petition on the grounds stated in sub-paragraphs (a) and (b). Three facets need to be considered:

(i) Can an election be questioned only by an election petition to the exclusion of any other

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[5] S. 32(1) states: "An election may be questioned only by an election petition on the ground that-
(a) the person declared by the Returning Officer under section 28 as elected was not duly elected because-
(i) he was not eligible to be nominated as a candidate under section 13;
(ii) he was disqualified under section 14 from being nominated as a candidate;
(iii) he should have been disqualified under section 20(1) from being elected but was not so disqualified;
(iv) he engaged in corrupt conduct or illegal conduct at the election;
(v) another person engaged in corrupt conduct or illegal conduct in respect of him at the election in connection with his candidature;
(vi) corrupt conduct or illegal conduct was generally prevalent at the election; or
(vii) material irregularity occurred in relation to-
(A) the election;
(B) the poll at the election; or
(C) the counting of votes in respect of the election; or
(b) the candidate declared by the Returning Officer under section 22(1AB)(c) as not returned at the election is not returned because material irregularity occurred in relation to-
(i) the election;
(ii) the poll at the election; or
(iii) the counting of votes in respect of the election."

type of proceedings (e.g. judicial review)?

(ii) Can an election be questioned only on those s. 32(1) grounds?

(iii) Are the s. 33 persons restricted only to the election petition procedure in questioning a CE election result such that, for instance, the judicial review proceedings envisaged under s. 39 of the CEEO are not open to this class?

As to the first facet, the CFA held that the wording of s. 39 of the CEEO pre-supposes the availability of judicial review and other proceedings putting in issue whether a candidate who is declared to be elected "can lawfully assume the office of the Chief Executive". An election petition is not the only means of challenging an election.

As to the second facet, s. 32(1) grounds relate only to election petition proceedings. Nothing is said about the grounds which may be available in judicial review or other proceedings envisaged under s. 39 of the CEEO to question whether a candidate can lawfully assume the office of CE. Hence, those s. 32(1) grounds are not the only grounds based on which a challenge can be made to CE elections.

As to whether judicial review (or other proceedings) was open to all s. 33 persons like Mr. Ho, the CFA held that ss. 32 and 33 of the CEEO must be read together in order to ascertain who can lodge election petitions and on what grounds. The word "*only*" in s. 32(1) makes it clear that where an election is "questioned" by a s. 33 person on s. 32(1) grounds, this can only be done by an election petition. Judicial review is not available to any s. 33 persons relying on s. 32(1) grounds, but they may bring judicial review proceedings on any grounds other than those grounds provided that the usual requirements for judicial review proceedings have been satisfied. As for non-s. 33 persons, nothing in the CEEO excludes them from relying on the s.

32(1) grounds or otherwise to bring judicial review proceedings so long as the usual requirements for judicial review proceedings, including whether the Applicant has sufficient standing to bring the action, are satisfied.

In reaching the above conclusion, the CFA took the view that the primary and most speedy form of proceedings to question an election is the election petition which, however, cannot be the only form of proceedings available to question an election. Judicial review is also available, although the time for instituting such proceedings is reduced to 30 days from the usual three months. The availability of judicial review as a fallback procedure to deal with those situations where, for whatever reason, election petition proceedings are not instituted, constitutes an additional guarantee to enable elections for the CE to have integrity and to be genuine, open, honest and fair. While the time limit for the lodging of election petitions may be shorter, those proceedings can be instituted and pursued as of right. Judicial review proceedings, on the other hand, require leave before they can be properly instituted. It, therefore, does not follow that judicial review proceedings will necessarily prolong the challenges that may be made regarding elections.

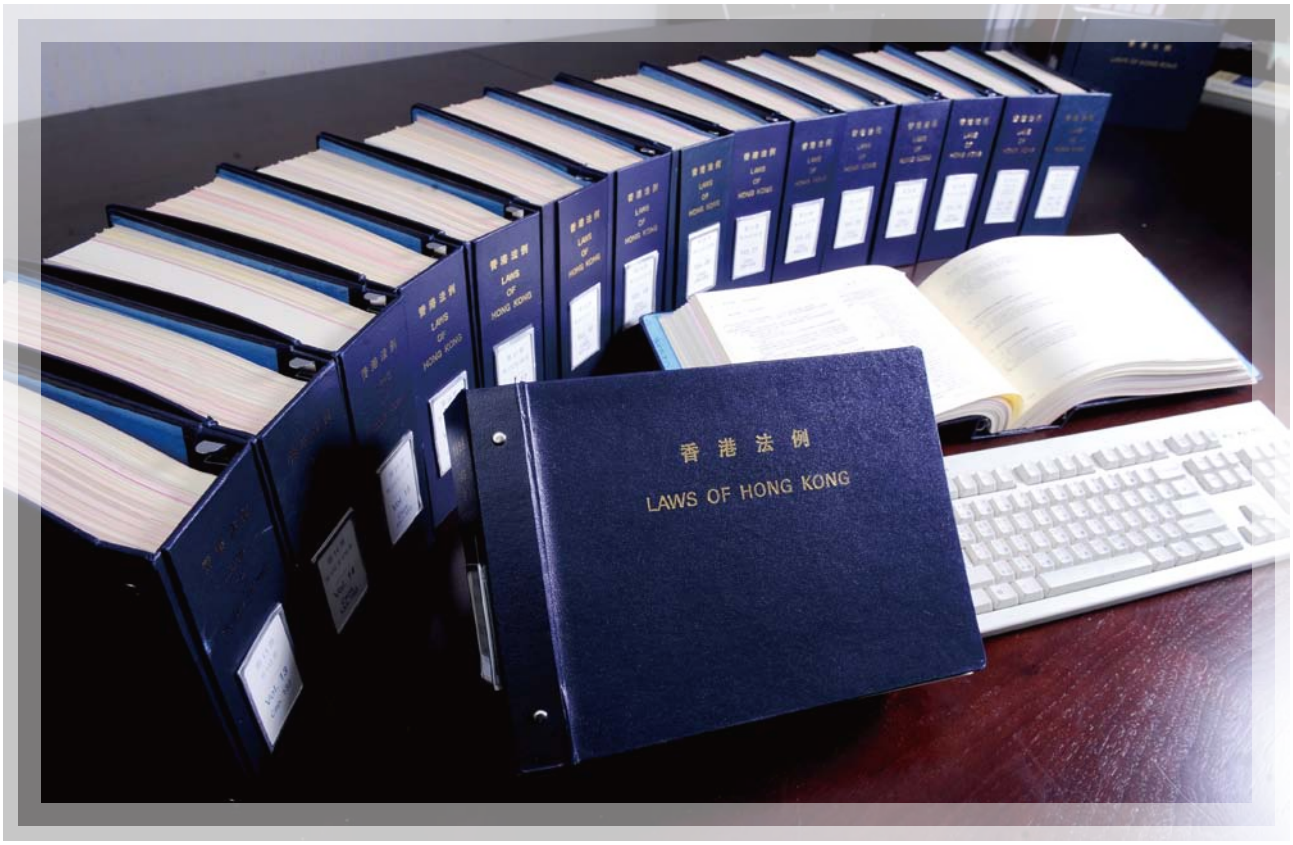
To conclude in terms of the actual result, Lam JA was right to refuse leave to Mr. Ho to commence judicial review proceedings. As regards to the application of Mr. Leung Kwok Hung (who had not pursued his appeal), Lam JA ought not to have, at that stage, refused leave on the basis that Mr. Leung Kwok Hung was not entitled to rely on a s. 32(1)(a) ground to found his application for judicial review. However, as the Appeal Committee held in its Determination dated 13 November 2012, the factual assertions made by Mr. Leung Kwok Hung were unsustainable as a matter of law.

Second Issue: Constitutionality of s. 34(1) of the CEEO

The seven-day limit for the lodging of election petitions under s. 34(1) of the CEEO is an absolute one. There is no provision allowing the seven-day limit to be extended. This is to be contrasted with the 30-day limit for judicial review contained in s. 39 of the CEEO, which can be extended by the Court. Lam JA, in the CFI, agreed with Mr. Ho's position that s. 34(1) is unconstitutional in denying his constitutional right of access to Court protected by BL 35, which states that "*Hong Kong residents shall have the right to … access to the courts…… for timely protection of their lawful rights and interests … and to judicial remedies.*"

On the essence of BL 35, the CFA repeats its observations as made in *Stock Exchange of Hong Kong Limited v New World Development Company Limited* (2006) 9 HKCFAR 234, at paragraph 50 that: "*…Article 35 ensures that the fundamental rights conferred by the Basic Law as well as the legal rights and obligations previously in force and carried through to apply in the HKSAR are enforceable by individuals and justiciable in the courts. It gives life and practical effect to the provisions which establish the courts as the institutions charged with exercising the independent judicial power in the Region. This dimension of art.35 is therefore concerned with ensuring access to the courts for such purposes, buttressed by provisions aimed at making such access effective.*"

The CFA rejected the argument that s. 34(1) of the CEEO is one of the provisions which merely defines the jurisdiction of the election petition procedure



and went on to hold that the right of access to Courts protected by BL 35 was engaged in the present case although whether such restrictions amount to an infringement of the constitutional right depends on whether on analysis the essence of the right has been impaired in the present case.

The CFA observed that the question of whether s. 34(1) impairs the essence of the right of access to the Courts must be seen in the context that the provision is part of a whole scheme regarding election petitions. This scheme is an elaborate one, restricting the class of persons entitled to use that procedure to the s. 33 persons but it has the important feature of allowing election petitions to be lodged as of right without the need for leave to be obtained. There is a need for any proceedings questioning an election to be dealt with speedily which is obviously the purpose of s. 34(1). On this basis and, in the context of the scheme as a whole, it does not seem disproportionate to impose a seven-day limit. Although a tight one, given that the class of persons entitled to lodge election petitions proceedings are those who can be expected to have been intimately involved in an election right from the start and who can therefore be expected to pay close attention not only to their own election activities but also the activities of their opponents, the limit is not unduly short. This time limit is also more or less in line with those imposed for similar proceedings in other jurisdictions. It is by no means unusual for time limits for the institution of proceedings questioning an election to be non-extendable and this feature of s. 34(1) is not regarded as objectionable.

Further, the right of access to the Courts is not an unlimited one and a due margin of appreciation should be accorded by the Court to the legislature

in deciding whether a seven-day time limit is appropriate. In *Fok Chun Wa v Hospital Authority* [2012] 2 HKC 413, at para. 64, the CFA emphasized the point that the concept of margin of appreciation reflected the different constitutional roles of the judiciary on the one hand, and the executive and legislature on the other. In the context of election law, this difference in roles must be borne in mind. Elections involve political and policy considerations and it is in these areas where the legislature is involved. The determination that seven days is the appropriate limit for the lodging of election petitions is one that does involve considerations other than legal ones. A due margin of appreciation should be accorded in the present case.

In relation to Lam JA's observation that the seven-day non-extendable time limit in s. 34(1) for election petition proceedings could not be reconciled with the more generous time limit in s. 39 (30 days which could be extended) for judicial review proceedings, the CFA disagreed with Lam JA's observation and pointed out that election petition proceedings is the primary and most speedy means to challenge a CE election which is as of right whereas judicial review proceedings is a residual means of challenge which requires leave. Devising the scheme of challenges to elections with different time limits for different proceedings represents an attempt by the legislature to balance on the one hand the need to resolve any questions about the legality of elected persons to become the CE as speedily as possible and due respect for the integrity of elections on the other.

Finally, the CFA rejected the submission from Mr. Ho's counsel that the inflexible time limit in s. 34(1) had the potential of causing injustice where the facts supporting one or more of the grounds in s. 32(1)(a) of the CEEO were not discovered until after the seven-day time limit had expired. It is because where a line is drawn, it is inevitable that there may be hard cases that would arise when persons fall on the wrong side of the line. Furthermore, the election petition procedure does not provide the only means of redress. The existence of judicial review proceedings (although not open to s. 33 persons on the s. 32(1) grounds), the possibility of criminal proceedings under say, ECICO, the impeachment proceedings under BL 73(9), or simple political realities to be faced by the elected CE are all relevant considerations. The seven-day non-extendable time limit is not objectionable from a constitutional point of view.

To conclude in terms of actual result, Mr. Leung's and the Secretary for Justice's appeals were allowed. The election petition proceedings instituted by Mr. Ho ought to have been struck-out on the basis that they were barred by s. 34(1) of the CEEO.

Kong Yunming v Director of Social Welfare

FACV No. 2 of 2013 (17 December 2013)[1]
CFA

Introduction

In *Kong Yunming v Director of Social Welfare*, the Applicant applied for judicial review to challenge the decision of the Director of Social Welfare ("the Director") to refuse her application for Comprehensive Social Security Assistance ("CSSA"). The Applicant challenged the Director's refusal on the basis that the seven-year residence requirement was unconstitutional and inconsistent with BL 25, BL 36 and BL 145, as well as Article 22 of the BoR. The CFI rejected her application and the CA upheld the CFI's decision. The CFA allowed the Applicant's appeal. While the Applicant's case in the CFI and CA focused on the right to equality before the law and protection against discrimination, the final appeal focused on "the right to social welfare in accordance with law" under BL 36 and BL 145.

The Applicant was married to a Hong Kong permanent resident who died the day after her arrival to Hong Kong on strength of a One-Way Permit for settlement. The Director rejected her application for CSSA, in accordance with the policy that persons who have resided in Hong Kong for less than seven years do not qualify for CSSA.

The CSSA scheme is a non-statutory scheme administered by the Social Welfare Department. It is a non-contributory and means-tested social security scheme aiming to provide a safety net to ensure that those with limited or no other sources of income can meet their basic needs. Since the 1970s, the residence requirement to qualify for the benefit had been one year, until the seven-year residence requirement was introduced on 1 January 2004.

The nature of BL 36 right

BL 36 provides: "Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits and retirement security of the labour force shall be protected by law." BL 145 provides: "On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the

[1] Reported at (2013) 16 HKCFAR 950.

economic conditions and social needs."

The CFA held that the welfare benefit of the CSSA scheme is clearly within the BL 36 concept of "social welfare" because it aims to provide welfare benefit addressing basic "safety net" needs, which is a fundamental function of any social security system. Reading BL 36 together with BL 145, the intention of the Basic Law must be taken to be that the administrative scheme of the CSSA is to be treated as a system providing "social welfare in accordance with law" within the meaning of BL 36, involving a constitutionally protected right.

The CFA agreed with the CA that BL 36 does not confer on all Hong Kong residents a right to all forms of social welfare regardless of eligibility criteria or level of benefit subject only to such restriction as was limited by law, as such an approach isolates the Government's social welfare obligations from its other cost-bearing obligations and functions. On the other hand, the CFA considered that the approach of the CA in laying the emphasis entirely on BL 145 (i.e. to focus on the Administration's role in formulating social welfare policies and defining eligibility and other conditions for the benefits subject only to such conditions not being discriminatory) as inadequate, as it would render the first sentence of BL 36 meaningless and would allow equality rights to eclipse the welfare right.

The CFA held that BL 36, read together with BL 145, provides the framework for identifying a constitutionally protected right to social welfare. Once it is clear that an administrative scheme such as the CSSA scheme has crystallised a set of accessible and predictable eligibility rules, those rules may properly be regarded as embodying a right existing "in accordance with law", qualifying for BL 36 protection. BL 145 endorses the policies established under the social welfare system prior to 1 July 1997 and implicitly regards them as rules established "in accordance with law". This means that BL 36 confers a constitutional protection on the rules which laid down a one-year, and not a seven-year, residence requirement as a condition of eligibility for CSSA.

Proportionality analysis

The CFA held that the importance of a right being recognized as a social welfare right protected by BL 36 is that any restriction subsequently placed on that right is subject to constitutional review by the Courts on the basis of a proportionality analysis. BL 145 makes it clear that the Government may formulate policies "on the development and improvement of [the previous] system". BL 145 does not preclude the elimination or reduction of particular welfare benefits if that proves necessary to develop, improve or maintain the sustainability of the welfare system as a whole. The Government is entitled to make changes to its policy, but any changes pursuant to policies developed in accordance with BL 145 are subject to constitutional review.

The steps for the proportionality analysis to determine the constitutionality of the restriction of the seven-year residence requirement were set out by the CFA as follows -

(i) identify the constitutional right engaged (i.e. BL 36 right in the present case) (*Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754);

(ii) identify the legal or administrative measure said to restrict the constitutional right (i.e. the imposition of the seven-year residence requirement in the present case);

(iii) ask whether that restriction pursues a legitimate societal aim;

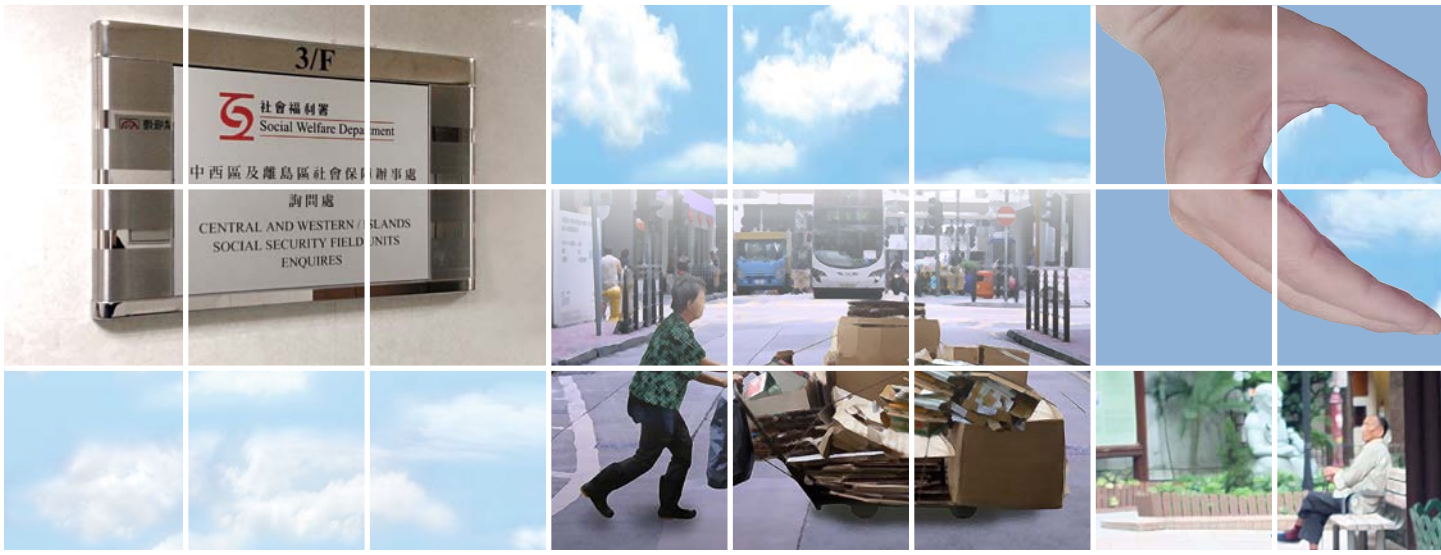
(iv) having identified that aim, ask whether the impugned restriction is rationally connected with the accomplishment of that end;

(v) if such rational connection is established, the next question is whether the means employed are proportionate or whether, on the contrary, they make excessive inroads into the protected right (*HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574).

The CFA have held that where the disputed policy change involves the implementation of the Government's socio-economic policy choices regarding the allocation of limited public funds without impinging on fundamental rights or involving possible discrimination on inherently suspect grounds, the Court would only intervene when the disputed policy change is "manifestly without reasonable justification" (*Fok Chun Wa v Hospital Authority* [2012] 2 HKC 413, (2012) 15 HKCFAR 409 and *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 4 All E.R. 27, [2012] 1 W.L.R. 1545). In the present case, if the policy change from one-year residence requirement to seven-year residence requirement is rationally connected to a legitimate societal aim, the restriction would only be held disproportionate if it is manifestly without reasonable foundation.

The constitutional right engaged and the disputed new restriction

The right protected by BL 36 is the administratively defined right to social welfare of Hong Kong residents, who passed the means test and are not otherwise disqualified, for CSSA after having resided in Hong Kong for one year. This was the established position as at 1 July 1997 when BL 36 took effect. But for the seven-year



residence requirement, the Applicant would have qualified for CSSA after residing here for one year.

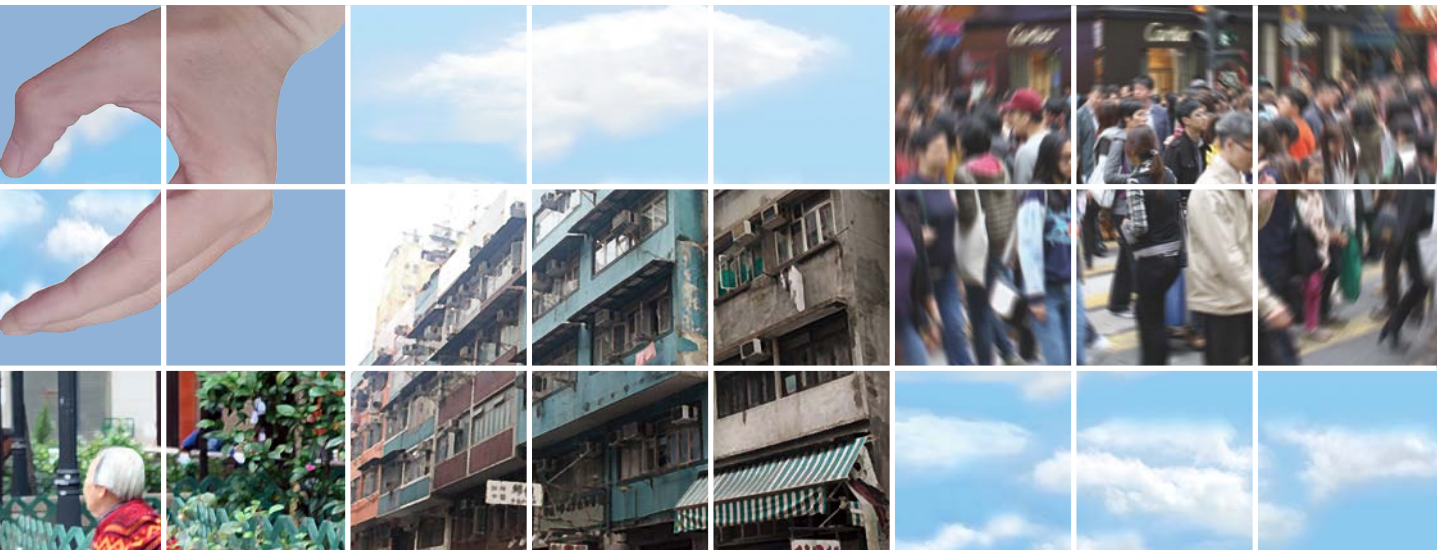
It is important to note that the new seven-year residence requirement does not apply to all new arrivals. It does not apply to children under 18, current Hong Kong residents (i.e. those who have become Hong Kong residents before the seven-year residence requirement came into effect) and other new arrivals for whom the requirement is waived as a matter of discretion.

The purpose of the new restriction

The Government submitted that the societal aim in adopting the seven-year residence requirement was to ensure the sustainability of the social security system by cutting expenditure, and the need was justified by three factors, namely: (i) the policy of accepting immigrants from the Mainland under the One-Way Permit scheme; (ii) Hong Kong's ageing population; and (iii) the rise in expenditure on the CSSA. The CFA held that none of the three factors justified the seven-year residence requirement.

(i) One-Way Permit scheme as justification

The CFA held that the One-Way Permit scheme provides no rational basis for adopting the new restriction. The laudable purpose of the One-Way Permit scheme is to promote family reunion, with respect to the right of abode of children of Hong Kong permanent residents under the Basic Law. It gives preference to young children to come to Hong Kong; their Mainland parents, usually their mothers, are encouraged to come to Hong Kong on Two-Way Permits to take care of them pending issue of the One-Way Permits applied for and eventually settle in Hong Kong as residents in their own right. Given that new arrivals under 18 years of age had been exempted from the seven-year residence requirement, the CFA found it illogical that, unless the restriction is waived as a matter of discretion, the exemption does not apply to their Mainland parents who come to take care of them even if such a family's means-tested income does not cover the basic needs of its members. Accordingly, the adoption of the One-Way Permit policy, in cooperation with Mainland authorities, does not justify the



disputed restriction. On the contrary, the logic underlying the One-Way Permit policy would call for the disapplication of the restriction in relation to One-Way Permit arrivals.

(ii) Ageing population as justification

The CFA agreed that the Government was right to regard the problems of Hong Kong's ageing population as serious and to lay down policies that aimed at mitigating those problems with a view to ensuring the long-term sustainability of the social welfare system. However, the CFA held that there was no rational connection between such mitigation and the disputed restriction. The CFA noted that the immigration of young Mainland new arrivals might help to rejuvenate the population. However, although new arrivals under 18 years of age are exempted from the seven-year residence requirement, their parents who arrive to be reunited with and to care for such children are not. Therefore, apart from being far from a rational measure to mitigating the ageing population problem, the restriction is a counter-productive and irrational measure to encourage young immigrants to enter Hong Kong.

Evidence also shows that new arrivals who are elderly only constitute a small proportion of all new arrivals, as they are allotted a relatively smaller sub-quota under the One-Way Permit scheme; and of those who do enter Hong Kong, only a small proportion receive CSSA. The amount of expenditure that could be cut with the introduction of the seven-year residence requirement would be minimal. The CFA held that the savings to the CSSA does not qualify as a response to the ageing population, aimed at ensuring the sustainability of the welfare system.

(iii) Rise in CSSA expenditure as justification

The CFA recognized the problem of the sharply increasing expenditure on CSSA and that the Government has the duty to consider policies that could ensure its sustainability. However, the CFA found no rational basis for the implementation of the seven-year residence requirement in this respect. There is no evidence to show that CSSA claims by new arrivals caused any particular problem regarding the rise in CSSA expenditure. As in March 2003, only 18% of new arrivals were

on CSSA. The overall increase in expenditure may be due to a whole range of factors, some of which do not concern new arrivals, thus there is nothing to justify the seven-year residence requirement relating to new arrivals. There is also no evidence as to the savings which the disputed restriction has achieved by excluding the segment of new arrivals actually affected, bearing in mind that the new restriction has no application on new arrivals under 18 years of age, new arrivals who were already Hong Kong residents before the new restriction took effect and new arrivals who obtained a waiver of the residence requirement. Actual savings in respect of new arrivals affected by the seven-year residence requirement represent only a very small fraction of the overall expenditure on CSSA.

The CFA held that the legitimate aim is preserving the social security system's sustainability, and not merely saving money. With the relatively insignificant level of savings achievable by implementing the seven-year residence requirement, the CFA held that the Government has failed to show that the restriction was genuinely intended to, or functioned as, a measure that is rationally designed to ensure the system's sustainability.

(iv) Other justifications

The Government argued that the seven-year residence requirement would provide a uniform qualifying period for major welfare benefits, like CSSA and public healthcare benefits, that are heavily subsidised by the Government. However, the CFA held that creating a seven-year qualifying period for the sake of symmetry was hardly a legitimate aim. The Government further suggested that the restriction reflects the contribution a resident has made towards the Hong Kong economy over a sustained period of time in Hong Kong. The CFA held that the idea makes little sense in that it is illusory to assume that the adoption of the restriction will turn such a person in need of CSSA into a net contributor to the economy. This would also be inconsistent with the principle accepted in Hong Kong since 1970s that social welfare is the responsibility of the Government to be met by public funds. Neither was the CFA convinced that the restriction was introduced to cut spending so

as to rein in the fiscal deficit observed in the year ended 31 March 2003.

The Government also argued that the seven-year residence requirement is a reasonable policy because any hardship flowing from the restriction is catered for, or at least significantly mitigated in the following manners: (a) prior warning against coming to Hong Kong had been widely publicized on the Mainland; (b) if denied CSSA, new arrivals may seek help from charities; and (c) the existence of the Director's discretion to waive the seven-year residence requirement. On the prior warning argument, the CFA found the approach unattractive as it deters potential new arrivals to settle in Hong Kong and undermines the policy of family reunion. The CFA found the second argument in principle objectionable as it amounts to the Government abdicating its constitutional responsibility for social welfare to private charities. Lastly, the CFA noted the discretion to waive the seven-year residence requirement applies only in exceptional cases and is subject to certain unattractive conditions, including, inter alia, unavailability of other forms of assistance and being unable to return to where the CSSA claimant came from. Given that the Applicant in her difficult situation was not granted a waiver, the CFA opined that the internal guidelines for a waiver require a very high threshold and the CSSA was not "always available to the financially vulnerable" and the Director's discretion therefore provided marginal, if any, mitigation.

Conclusion

The CFA held that the Government has failed to show that the seven-year residence requirement for the CSSA scheme is rationally connected to the legitimate aim of curbing expenditure so as to ensure the sustainability of the social security system. Even if there is any rational connection, the restriction is wholly disproportionate and manifestly without reasonable foundation. The CFA concluded that the seven-year residence requirement is an unjustifiable contravention of the right to social welfare in accordance with law conferred by BL 36 and declared that it is unconstitutional, restoring the pre-existing one-year residence requirement. The CFA however found that there can be no constitutional objection to the Government's exempting new arrivals under the age of 18 from any residence requirement.

Judgment Update

GA & Ors v Director of Immigration

FACV Nos.7-10 of 2013 (18 February 2014)[1]
CFA

In *GA & Ors v Director of Immigration*, the CFA unanimously held that mandated refugees and screened-in torture claimants do not have any right to work under BL 33, Article 14 of the BoR ("BOR 14"), Article 6 of the ICESCR ("ICESCR 6") or the common law while remaining in Hong Kong.

Background

The first three Applicants (GA, FI and JA) are mandated refugees who have established their claims as refugees to the satisfaction of the United Nations High Commissioner for Refugees Hong Kong Sub-Office ("the UNHCR HK"). They are allowed to remain in Hong Kong at the discretion of the Director of Immigration ("the Director") pending voluntary repatriation or resettlement overseas as arranged by the UNHCR HK. The fourth Applicant (PA) is the 1st screened-in torture claimant who has established to the satisfaction of the Immigration Department that there are substantial grounds for believing that he would be in danger of being subjected to torture if he were returned to his country of origin. The Applicants have been remaining in Hong Kong for a long period of time ranging from 9 to 13 years.

Applicants' claim

The Applicants challenged by way of judicial review the Director's policy not to permit them to take up paid employment in Hong Kong pending their resettlement save in exceptional circumstances and the decisions made thereunder refusing to grant permission to work to two of the Applicants. They claimed a right to work under BOR 14, ICESCR 6, BL 33 and at common law. They contended that any exercise of the Director's discretion affecting their right to work must therefore meet the proportionality test. A refusal to grant permission to work cannot be justified, the Applicants argued, if the person seeking permission has been staying in Hong Kong for more than 4 years. Further, where there is a substantial risk of inhuman or degrading treatment ("IDT") within the meaning of Article 3 of the BoR ("BOR 3"), the Director has no discretion and must give permission to work.

[1] Reported at (2014) 17 HKCFAR 60.

Decisions below

All the applications for judicial review of the Director's said policy were dismissed by the CFI, except the challenge to the individual refusal decisions by the first Applicant (i.e. GA) (and another mandated refugee known as MA who did not pursue his appeal to the CFA). While the Applicants' arguments based on BOR 14, BOR 3, ICESCR 6, BL 33 and the common law all failed before the CFI, it was accepted that even with the conventional limitations on the scope of the Court's power of review, the Court must be entitled to subject an administrative decision to the more vigorous examination, to ensure that it is in no way flawed, according to the gravity of the subject matter in question. In other words, there is a sort of sliding scale in terms of the intensity of review. The burden of argument shifts from an applicant to the decision-maker, who needs to produce justification for the decision and the Court will be less inclined to accept *ex post facto* justification from the decision maker. In the case of GA and MA, the Court held that the Director did not properly consider their personal circumstances or deal with them with an open mind. The Director's decisions to refuse them permission to work were therefore quashed and the Director was required to consider their request for permission to work afresh. On appeal, the CFI decision was affirmed by the CA.

Appeals to the CFA

Since the CA decision, the four appeals had become academic in the sense that the outcome of the appeals to the CFA would not matter to the Applicants either because permission to work had been given or the Applicant could not work in any event. That notwithstanding, the appeals

proceeded since the CFA considered that they raise important issues and should be dealt with in the public interest. In a unanimous judgment handed down by Ma CJ, the appeals were dismissed by the CFA following a thorough discussion on the Applicants' submissions regarding BOR 14, BOR 3, ICESCR 6, BL 33, the common law and the proportionality test.

BOR 14

BOR 14 protects a person against arbitrary or unlawful interference with his privacy, family, home or correspondence and against unlawful attacks on his honour and reputation. The Applicants sought to rely on the privacy right in BOR 14. Since they do not have the right to enter or remain in Hong Kong, it is necessary to first consider whether BOR 14 applies in view of s. 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO"). S. 11 of the HKBORO states that the Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong or the application of any such legislation as regards persons not having the right to enter and remain in Hong Kong.

The Applicants argued that s. 11 of the HKBORO only relates to immigration legislation dealing with entry into, the right to remain in and departure from Hong Kong. The word "governing" in s. 11 is given a qualification and was said to mean only "determining who has the right to" or "addressing the right to". It was contended that s. 11 is not apt to cover legislation that relates to the activities or rights of persons while they are in Hong Kong. It does not therefore cover any legislation that gives the Director the discretion to decide whether or not to grant permission to work to persons like the Applicants once they are already in Hong Kong. Ma CJ rejected this argument on the ground that it fails to give sufficient weight to the context and purpose of s. 11 of the HKBORO as reflected in BL 154(2) and the Reservation entered into by the UK Government on the ratification of the ICCPR on 20 May 1976 ("the ICCPR Reservation").

BL 154(2) provides that the HKSAR Government may apply immigration controls on entry into, stay in and departure from the HKSAR by persons from foreign states and regions. The same words "entry into, stay in and departure from Hong Kong" appear in s.11 of the HKBORO. It is clear from s. 11 of the HKBORO that it is dealing with immigration control on entry into, stay in and departure from Hong Kong, as reflected in BL 154(2). The intention of s. 11 of the HKBORO is to except the applicability of the BoR to the aforesaid aspects of immigration control. The ICCPR Reservation reserves the right of the UK Government to continue to apply such immigration legislation governing entry into, stay in and departure from the UK as it may deem necessary as regards persons not having the right to enter and remain in the UK. A similar right is reserved in regard to each of the dependent territories. As far as Hong Kong is concerned, the significance of the ICCPR Reservation is that it qualifies the application of the ICCPR and enables the Government to deal with immigration matters and have in place legislation deemed necessary to govern entry into, stay in and departure by

persons not having the right to enter and remain in Hong Kong. It was against this background that the HKBORO incorporating the ICCPR provisions into Hong Kong domestic law was enacted. BL 39(1) made it clear that the ICCPR was effective only "as applied to Hong Kong", i.e. subject to the ICCPR Reservation.

In the opinion of Ma CJ, both BL 154(2) and the ICCPR Reservation seek to enable the effective exercise of immigration control. When the context of s. 11 of the HKBORO involves matters of immigration control, it appears artificial in the extreme to restrict s. 11 to the right of entry, the right to stay in a place and departure. Immigration control must extend to the activities of persons who have entered and remain in Hong Kong. It is obvious that the discretion vested in the Director to determine whether or not persons in the Applicants' position should be permitted to work comes within the scope of immigration control. On this basis, it was held that the immigration legislation which gives the Director that discretion does govern the stay in Hong Kong of persons like the Applicants and fall within the scope of immigration legislation referred to in s. 11 of the HKBORO. It follows that by reason of s. 11 of the HKBORO (but subject to s. 5 of the HKBORO) the Applicants cannot rely on BOR 14. It was not necessary for the Court to come to any views on the meaning and ambit of BOR 14.

BOR 3

In the light of the CFA decision in *Ubamaka v Secretary for Security*, s. 11 of the HKBORO should be read subject to s. 5(2)(c) of the HKBORO and there can be no derogation from BOR 3, which protects the absolute right against IDT[2]. Ma CJ held that where IDT or a substantial and imminent risk of IDT can be shown, the Director must exercise his discretion to give permission to work. The burden is on the Applicants to show that there is a substantial and imminent risk of IDT if the Director does not grant them permission to work.

Accepting that a high threshold has to be surmounted, Ma CJ was inclined to agree with the lower courts that the Applicants' position could conceivably constitute IDT if they were not given permission to work. They all have remained in Hong Kong for a long time and have adduced evidence regarding their mental condition which refers to their loss of dignity and feelings of hopelessness and desperation. It was, however, unnecessary to come to a definite view on the issue of IDT since permission to work has been given to three of the four Applicants and the remaining Applicant is unable to work in any event.

ICESCR 6

Ma CJ then turned to ICESCR 6, which expressly recognises the right to work. As in the case of BOR 14, it is necessary to determine whether ICESCR 6 applies in the first place. BL 39 provides that the provisions of the ICCPR, ICESCR and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. The provisions of the international covenants and conventions referred to in BL 39 are not directly enforceable in Hong Kong by any individual unless implemented by domestic or municipal law. This is sometimes called the common law dualist principle. Where an

[2] FACV No.15 of 2011 (21 December 2012), reported at (2012) 15 HKCFAR 743.

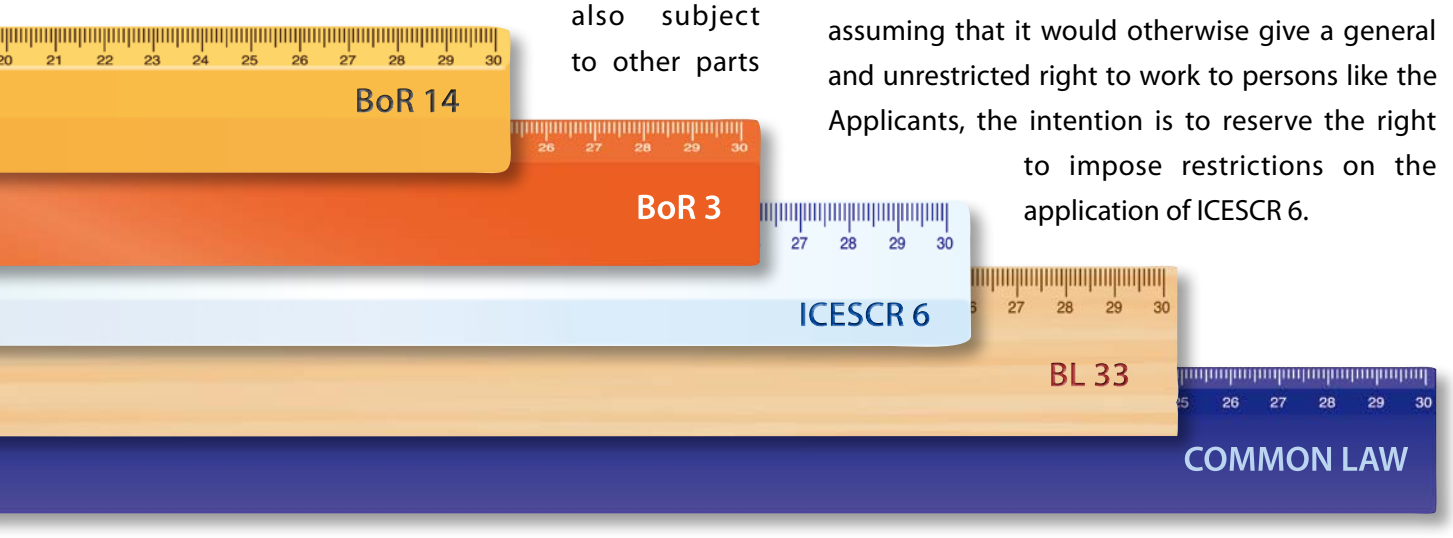
international obligation has not been made part of domestic law, then whatever the international position may be, an individual cannot rely on the content of that international obligation.

Chan NPJ also added an observation that there is no obligation under BL 39(1) to enact new laws to implement the ICCPR or ICESCR; there is also no right to apply to the Court to mandate governmental compliance with this obligation. These are not the effect of BL 39(1).

While the Applicants did not dispute the application of the dualist principle and that there is no comprehensive incorporation of the ICESCR into one single piece of legislation domestically, they submitted that ICESCR 6 which guarantees a general, unrestricted right to work for persons like them has been incorporated into ss. 17G(2), 38AA and 37ZX of the Immigration Ordinance (Cap. 115) ("IO").

As a matter of statutory construction, Ma CJ did not accept that the above provisions have the effect of incorporating ICESCR 6. S. 17G(2) of the IO does not give a general right to work at all. The classes of persons who are "lawfully employable" under s. 17G(2) are restricted. The provision is also subject to other parts of the IO relating to conditions of stay. S. 38AA of the IO, if anything, is quite the opposite of allowing a general, unrestricted right to work. It actually prohibits the taking up of employment. S. 37ZX of the IO is also restricted in allowing persons to work. It merely enables the Director to give permission to work to a screened-in torture claimant. Hence, even if ICESCR 6 provides for a general and unrestricted right to work as submitted by the Applicants, it does not assist them since it has not been incorporated into Hong Kong domestic legislation.

Ma CJ also referred to the Reservation entered into by the UK Government on 20 May 1976 in relation to the ICESCR ("the ICESCR Reservation"). The ICESCR Reservation reserves the right of the UK Government to interpret ICESCR 6 as not precluding the imposition of restrictions, based on place of birth or residence qualifications, on the taking of employment in any particular region or territory for the purpose of safeguarding the employment opportunities of workers in that region or territory. Pursuant to BL 39(1), only the ICESCR "as applied to Hong Kong" remains in force, i.e. the ICESCR applies to Hong Kong subject to the ICESCR Reservation. Further, from a simple reading of the ICESCR Reservation, it is clear that whatever the effect of ICESCR 6 and even assuming that it would otherwise give a general and unrestricted right to work to persons like the Applicants, the intention is to reserve the right to impose restrictions on the application of ICESCR 6.



BL 33

Ma CJ then dealt with the Applicants' submissions on BL 33 which provides that Hong Kong residents shall have freedom of choice of occupation. Ma CJ pointed out that BL 33 does not refer to the right to work in general. The freedom of choice of occupation in BL 33 is much narrower than the alleged right to work. If it is intended that a wider right should exist, BL 33 would simply have said so or would have been much clearer.

Ma CJ next cited with approval the CA judgment relating to BL 33. Apart from the narrow wording of BL 33, the CA noted that BL 33 has to be considered in its proper context. Having regard to the relevant context, it would not be right to construe BL 33 as being co-extensive with ICESCR 6 since to do so would ignore the ICESCR Reservation. Besides, it has previously been held that BL 33 does not guarantee a right to be employed either generally or in any particular field but only protects against conscription to particular fields of occupation. Ma CJ agreed with the CA's conclusion that the right conferred by BL 33 is a passive or negative right of freedom to choose an occupation. It does not imply a right to take up available employment in the first place. Nor does it confer an unqualified right to obtain employment which is necessarily subject to market forces and legal constraints such as visa and qualification requirements.

Given the above interpretation of BL 33, it is not necessary for the CFA to arrive at a view on BL 41 in the present context.

Common law

Apart from a constitutional right to work, the Applicants claimed a right to work at common law. Ma CJ did not find it necessary to deal with this claim at length since it is not borne out by any of the authorities cited by the Applicants. More importantly, it is difficult to conceive of the existence of a right to work at common law in the light of the discussions on s. 11 of the HKBORO, BL 39, the ICCPR Reservation and the ICESCR Reservation.

Proportionality test

Given the decision that no constitutional right to work exists in favour of the Applicants, no question arises as to whether the Director's refusal to grant them permission to work satisfies the proportionality test.

Conclusion

For the above reasons, the appeals were unanimously dismissed by the CFA. Ma CJ nonetheless made it clear that the absence of a constitutional right to work does not mean that the Director can do as he pleases without limitation when exercising his discretion whether or not to permit persons like the Applicants to work. The precise limits of such a discretion will have to be worked out in future cases. It is obvious that IDT is an important factor to be taken into account when exercising that discretion.

HKSAR v Chan Yau Hei

FACC No. 3 of 2013 (7 March 2014)[1]
CFA

Background

The principal and novel question raised in this appeal is whether the common law offence of outraging public decency can be committed by posting a message on an internet discussion forum. A subsidiary issue is whether a message of the type posted in this case is capable of constituting the offence. The judgment of Mr Justice Fok PJ was unanimously agreed and the Appellant's conviction was quashed.

On 16 June 2010, a newspaper reporter made an inquiry to the police about some allegedly inflammatory messages posted on an internet discussion forum. The messages related to proposals for political reform in Hong Kong, on which the LegCo was to vote on 23 June 2010. The police investigated the matter and discovered one such message, posted in Chinese on 11 June 2010 by the Appellant, which read as follows: "我哋要學猶太人炸咗中聯辦 # fire #". The English translation of this message was: "We have to learn from the Jewish people and bomb the Liaison Office of the Central People's Government # fire #."

The Appellant was soon arrested at his home. Under caution, he admitted that he had participated in the discussion and posted the message to the discussion forum and said that he had done it for fun only and had no intention to commit any offence.

The Appellant pleaded guilty to the charge and admitted the above facts in the Eastern Magistrates' Court (ESCC 3628/ 2010). The Appellant was thereupon convicted by the magistrate. At the adjourned hearing for sentence, the Appellant informed the magistrate that he wished to apply to change his plea to not guilty on the ground that the facts admitted did not support the charge. The magistrate refused the application and sentenced the Appellant to 12 months' probation.

The Appellant appealed to the CFI against the magistrate's refusal of the application for a reversal of plea (HCMA 42/ 2011). The Judge dismissed the appeal and confirmed the conviction. After the Appellant's application to certify a question for the determination of the CFA was rejected by the Judge, he renewed that application to the Appeal Committee, which granted leave to appeal on the following question of law of great and general importance, namely:

"Whether the posting of such a message on a discussion forum on the internet is capable of amounting to the offence of outraging public decency."

[1] Reported at (2014) 17 HKCFAR 110.

That certified question gave rise to the following issues for determination in this appeal, namely:

(1) Whether the posting of the message on the internet discussion forum satisfies the public element of the offence (the public element issue); and

(2) Whether the message, by its nature and content, is of a type capable of constituting the offence (the nature of the act issue).

The offence of outraging public decency

It is an offence at common law to do in public an act of a lewd, obscene or disgusting nature which outrages public decency (*R v Hamilton* [2008] QB 224 at §§18-25). Apart from the mental element, there are two elements of the offence. The first concerns the nature of the act that has to be proved and the second concerns the public element of the offence (*R v Hamilton* at §21).

Mental element

The mental element of the offence is satisfied if the defendant intentionally does an act which outrages public decency. It is not necessary for the prosecution to prove that the defendant intended to outrage public decency, or even that he was reckless (*R v Gibson and Sylveire* at pp.627E & 629D-F). In the present case, no issue as to *mens rea* was raised because the Appellant admitted posting the message in the discussion forum, showing that the posting was intentional and deliberate.

The nature of the act issue

As to the nature of the act, indecency is not confined to sexual indecency, it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting (per Lord Reid in *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435 at p. 458). It is an indictable offence to say or do or exhibit anything in public which outrages public decency, whether or not it also tends to corrupt and deprave those who see or hear it (per Lord Reid in *Shaw v DPP* [1962] A.C. 220 at p.281).

It must be proved that the act or exhibition or publication is of such a lewd, obscene or disgusting character that it outrages public decency. An obscene act is one which offends against recognized standards of propriety and is at a higher level of impropriety than indecency. A disgusting act is one which fills the onlooker with loathing or extreme distaste or causes the onlooker extreme annoyance. Further, it is not enough that the act might shock people; it must be of such a character that it outrages minimum standards of public decency as judged by the jury in contemporary society (*R v Hamilton* at §30). The test is an objective one representing the current standards of ordinary, right-thinking people.

The Appellant's argument was that the message itself was not of the kind of "lewd, obscene and disgusting nature" covered by the offence. Fok PJ rejected this argument and held that the standard the magistrate applied to the meaning of "obscene" and "disgusting" was consistent with the authorities. It was open to the magistrate to find that the message was obscene and disgusting or such that it would outrage public decency. There was no basis for interfering with the conclusions reached by the Courts below as regards the content of the message.

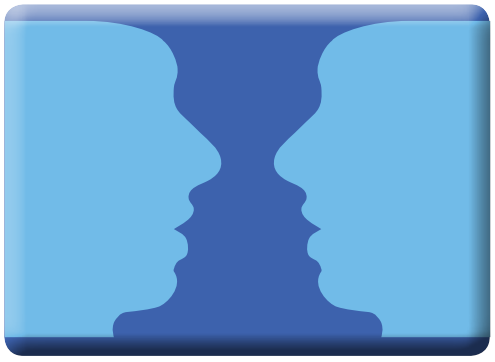
Fok PJ also stated that he would, in any event, have reached the same conclusion. An incitement to bomb any premises would be potentially obscene and disgusting because of the brazen disregard for the potential loss of life, personal injuries and damage to property as well as the public trauma caused by an act of terrorism. The message was potentially capable of causing or exacerbating a sense of outrage by suggesting that all Jews are terrorists and in the habit of perpetrating acts of terrorism in order to promote political objectives.

The public element issue

The public element of the offence has two parts (*R v Hamilton* at §31). First, the offence must be committed in public in the sense of being done in a place to which the public has access or in a place where what is done is capable of public view.[2] Secondly and additionally, the public nature of the offence can only be satisfied if the act is capable of being seen by two or more persons who are actually present, even if they do not actually see it, i.e. the "two person rule".[3]

The issue in this appeal was primarily concerned with the first part of the public element that requires the act to be done in a place to which the public has access or in a place where what is done is capable of public view. The question for the Court was whether this part of the public element of the offence requires that the act must be done in an actual or physical, tangible place. Fok PJ noted that with the exception of *HKSAR v Chan Johnny Sek Ming*,[4] all previous cases involving convictions for the offence of outraging public decency involved things said, done or exhibited in a physical, tangible place. It was concluded that the public element of the offence required the act to be committed in a physical, tangible place. If it was decided that the public element of the offence was satisfied by way of a posting to an internet discussion forum, it would amount to the recognition of a new category of situation giving rise to the potential for prosecution.[5]

Fok PJ held that it was a fiction to describe the internet as a place in any physical or actual sense. The fiction arose because material uploaded to the internet was simply computer code and not humanly intelligible until accessed or downloaded in comprehensible form to a computer or mobile platform connected to the internet. For this reason, material placed on the internet was commonly described as being in "cyberspace" or in a "virtual" place or forum. A message posted to an internet discussion forum could only be seen by other people when accessed or downloaded in a comprehensible form and it was only then that their sense of decency may be outraged. The readers of that message might be in various different places when they accessed or downloaded the relevant webpage and, because they might be using mobile internet devices, those places might be private or public. But it was in those actual places that their sense of decency might be outraged, not in some virtual place. For the purposes of the offence, the internet was properly to be regarded as a medium and not a place.



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[2] This does not mean that the relevant act must be done on public property. It is sufficient if members of the public can see the object or act in question whether by going there or by looking in.

[3] The rule does not require anyone actually to witness the defendant's act, so long as at least two people are present and capable of seeing the act should they happen to look (*R v Hamilton* at §39).

[4] [2006] 4 HKC 264.

[5] In a common law system, the development of the laws by the Courts over time, by clarification and modification to meet new circumstances and conditions, was not constitutionally objectionable provided that it did not result in judicially extending the boundaries of criminal liability.

It was similarly a fiction to regard persons who accessed an internet discussion forum as being in the same position as reasonable people who ventured out physically in public and who were entitled to protection against having their sense of decency outraged. Notwithstanding that they might be physically outdoors at the time, those who surfed the internet were not in fact venturing out anywhere and were instead only virtually visiting a place when accessing a particular website or discussion forum. To hold that the internet was a public place for the purposes of the offence would involve either dispensing with the first part of the public element of the offence or substantially extending its meaning and would therefore amount, impermissibly, to judicially extending the boundaries of criminal liability.

Regarding *HKSAR v Chan Johnny Sek Ming*, the specific argument that the internet was not a public place for the purposes of the offence was not raised therein and there was no detailed analysis or reasoning in support of the conclusion that it was. Fok PJ therefore did not regard the decision as providing any support for the Respondent's case on this issue.

Conclusion on the Appellant's liability

Although the message posted by the Appellant deserved of condemnation, the public element of the offence was not satisfied. The appeal was allowed and Appellant's conviction was quashed.

Fok PJ emphasized that this judgment should not be understood as deciding that the offence of outraging public decency can never be constituted by a message posted on an internet discussion board. The internet was properly to be regarded as a medium and not a place for the purposes of the offence. It remained a possibility that a message posted to an internet discussion forum would be seen in a physical place to which the public has access or where what is done is capable of public view. There might have been evidence that the message was accessed on a computer which was in plain sight of many members of the public had they chosen to look. Subject to the availability of evidence, the offence could be committed by a message posted to an internet discussion forum.

Consistency with freedom of expression

Fok PJ opined that the offence was consistent with the constitutional right to freedom of expression. There was a balance to be struck between the protection of the public and its sense of decency from being outraged by things said, done or exhibited on the one hand and the right to freedom of expression on the other. The message in the present case was posted as part of a discussion forum concerning proposals for political reform in Hong Kong to be debated by the LegCo. That was a subject on which there would obviously be a plurality of views. Those views were likely to be felt and expressed strongly. The

offence of outraging public decency was clearly not intended to be used to prosecute those who simply express trenchant views in strong terms. As Lord Judge CJ observed in *Chambers v DPP* [2013] 1 Cr. App. R. 1 at §28:

"Satirical, or iconoclastic, or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matters, banter or humour, even if distasteful to some or painful to those subjected to it should and no doubt will continue at their customary level, quite undiminished by this legislation."

The threshold of outraging public decency was a high one. Not every rude, abusive or low grade statement in the course of spirited debate on a topical matter of public interest would cross that threshold.

The need of law reform

Fok PJ opined that there would be a strong case for introducing statutory provisions to criminalize the posting on the internet of certain material like that in the present case. Whilst the offence might be committed where the internet content is accessed if that place satisfies the public element of the offence, it was unsatisfactory that there is room for arbitrariness between some internet contents that will be open to prosecution for the offence and other contents that will not simply because of where it is seen. Although there were statutory offences under Hong Kong law which address the sending and exhibition of, amongst other things, lewd, obscene and disgusting material, those offences did not apply to materials posted on the internet. Ma CJ was also of the view that the common law offence of outraging public decency, which had a history going back at least 350 years, was not one that comfortably fits into the modern internet age. Criminal liability in the context of the present case was one that should be determined by legislation.

Judgment Update

Leung Kwok Hung v The President of the Legislative Council of the Hong Kong Special Administrative Region & Secretary for Justice

FACV No.1 of 2014 (29 September 2014)
CFA

Following the CFA decision in *Leung Kwok Hung v The President of the Legislative Council of the Hong Kong Special Administrative Region & Secretary for Justice*, it is now clear that the President of the LegCo ("the President") has power to set limits and to close a debate when presiding over meetings under BL 72(1). The Court will exercise jurisdiction to determine the existence of a power, privilege or immunity of the President; however, it is not for the Court to consider whether or not the power has been properly exercised on any occasion.

Background

During the second reading of the Legislative Council (Amendment) Bill 2012 prohibiting a person who has resigned as a LegCo member from standing for a by-election within six months of his resignation ("the Bill"), the Committee of the whole Council spent over 33 hours debating 1,306 amendments proposed by two LegCo members. Most of the time the speeches were made by members who admittedly engaged in filibustering tactics and the Appellant was one of them. The President as chairman of the Committee considered that the debate was not serving its proper objective and should come to an end. He eventually made a decision to end the debate pursuant to Rule 92 of the LegCo Rules of Procedure ("the Rules").

Rule 92 of the Rules provides that in any matter not provided for in the Rules, the practice and procedure to be followed in the LegCo shall be such as may be decided by the President. Rule 92 was made by the LegCo pursuant to BL 75(2), which states that the rules of procedure of the LegCo shall be made by the Council on its own provided that they do not contravene the Basic Law. As regards the role of the President, BL 72(1) provides for his power and function to preside over meetings. Shortly after the President made the decision to end the debate, the Appellant sought leave to apply for judicial review of the decision. Leave was refused by the CFI whose decision was affirmed by the CA[1].

[1] Reported at [2012] 3 HKLRD 470 (CFI) and [2013] 2 HKC 580 (CA).

The CFI decision

At the hearing before the CFI, the Appellant relied on BL 73(1), which provides for the LegCo's power and function to enact, amend or repeal laws in accordance with the provisions of the Basic Law and legal procedures. He argued that the President's decision infringed his constitutional right to participate in the work of the LegCo as a legislator and his right to speak at the LegCo meetings. He claimed that the Courts have a duty to act to protect his constitutional right.

In the judgment of the CFI, Lam J (as he then was) said that the starting point is the principle of parliamentary privilege which is a facet of the doctrine of separation of powers. The issue is whether the constitutional provision in question has the effect of displacing that principle. According to the principle of parliamentary privilege, the Court will not intervene in the internal procedure of the LegCo except in cases where a procedure adopted by it is said to violate the Basic Law. Yet, even in such cases, the Court will not exercise its jurisdiction at the pre-enactment stage unless there will otherwise be immediate and irreversible consequences giving rise to substantial damage and prejudice. In the present case, BL 73(1) relied on by the Appellant does not have the effect of displacing the principle of parliamentary privilege. Nor does it encompass the right to filibuster. Even assuming that a constitutional right is involved and a case based on procedural constitutionality is made out, the criteria for pre-enactment intervention are not satisfied. It follows that the Court should adopt a non-intervention approach and leave it to the LegCo and the President to determine the proper interpretation of Rule 92 of the Rules.

The CA decision

The Bill was passed and became law shortly

after the CFI decision. On appeal to the CA, the Appellant based his challenge on both BL 73(1) and BL 75(2). Apart from arguing that the President's decision infringed his right to speak at the meetings, the Appellant asserted that the decision to apply Rule 92 of the Rules when there were other rules to deal with filibustering violated the requirement of "in accordance with legal procedures" in BL 73(1). The Appellant also submitted that the President was in effect making a new rule of procedure when he closed the debate in the way he did in violation of BL 75(2), which provides for rules of procedure to be made by the LegCo as a whole but not by the President.

Cheung CJHC, delivering the principal judgment of the CA, observed that the President's decision is a matter squarely covered by parliamentary privilege. In the local context, the Courts are empowered and required to inquire into the internal workings of the LegCo only if and only to the extent that the Basic Law requires. The Basic Law does not require or empower court intervention in the case of the LegCo's non-compliance with its own rules of procedure in the absence of any suggestion that the procedure adopted contravenes the Basic Law. In the present case, the expression "in accordance with legal procedures" in BL 73(1) cannot be a constitutional requirement displacing parliamentary privilege and it was unnecessary for the Court to determine the proper interpretation of Rule 92 of the Rules. BL 73(1) is about the powers and functions of the LegCo as a body but not about the rights of an individual legislator. Any constitutional right to speak or participate in the legislative process must be read subject to the President's power to preside over meetings in BL 72(1) and cannot include the right to engage in filibustering. As regards the challenge based on BL 75(2), what the President did was clearly covered by BL 72(1) and he was not making any new rule of procedure.

Appeal to the CFA

Subsequent to the CA decision, the Appellant sought and obtained leave to appeal to the CFA. Leave to appeal was granted on the ground that the appeal raised the following questions of great general or public importance:

(a) Having regard to the Basic Law and the Rules, under what circumstances may a decision made by the President during the legislative process be judicially reviewed?

(b) In the light of the answer to the above question, is the President's decision to close the debate in the present case purportedly pursuant to BL 72(1) and Rule 92 of the Rules amendable to judicial review?

BL 73(1) does not confer a right on individual members to participate in the legislative process

At the substantive appeal before the CFA, the Appellant submitted that a grant of law-making power to the LegCo by BL 73(1) necessarily gives its members an individual constitutional right to participate in the legislative process. While this right does not include the right to engage in filibustering, it does embrace the right to speak at the LegCo meetings.

The CFA held that the purpose of BL 73(1) is to confer certain powers and functions on the LegCo

as a law-making body and is not directed to the powers or rights of individual members. Unlike BL 74, which provides for the power of LegCo members to introduce bills in accordance with the Basic Law and legal procedures, BL 73 makes no reference to members in their individual capacities. The view that the purpose of BL 73 is not to confer rights on individual LegCo members to participate in the legislative process is further supported by the LegCo's power to make its rules of procedure on its own under BL 75(2) and the President's extensive powers under BL 72. These two provisions indicate that the LegCo is to have exclusive authority in determining its procedure and the President is to exercise his power to preside over meetings so as to ensure the orderly, efficient and fair disposition of LegCo's business.

Besides, the Appellant's interpretation of BL 73(1) will open the door to the Courts so that any LegCo member dissatisfied with the way in which the Rules were applied to him or with the President's rulings could seek relief from the Courts by way of judicial review not only at the post-enactment stage but also at the pre-enactment stage. This prospect is extremely damaging to the orderly, efficient and fair deliberations and working of the LegCo. Its proceedings will be liable to disruption, delays and uncertainties occasioned by applications for judicial review, judgments and appeals.

BL 73(1) does not displace the principle of non-intervention

The Appellant further argued that BL 73(1) makes compliance with the provisions of the Basic Law and the Rules a condition of the validity of legislation enacted by the LegCo. He submitted

that Rule 92 of the Rules confers no power on the President to close the debate and there exist other rules to deal with filibustering. Such non-compliance with the Rules vitiated the amendments to the Bill that were subsequently enacted. The Appellant also relied for the first time on the Israeli jurisprudence under which the Courts will intervene in the legislative process where a defect has occurred in the legislative process that goes to the heart of the process. The Appellant submitted that the President's reliance on Rule 92 for his decision to close the debate constituted a defect of this kind.

The CFA noted the preliminary objection that the Appellant should not be permitted to rely on the Israeli jurisprudence which had not been considered by the Courts below. It then ruled that the case for adopting the Israeli jurisprudence in the present case is less than compelling in any event. In the first place, the Israeli approach to judicial intervention is entirely at odds with the relevant traditional principles of common law constitutionalism and the public policy on which they are based. In addition, the principles governing such intervention by the Israeli High Court of Justice seem to be insufficiently precise to offer firm guidance and seem to involve the making of judicial assessment of a kind which the common law courts do not usually make. The CFA therefore declined to adopt the Israeli jurisprudence.

In the opinion of the CFA, BL 73(1) should be interpreted in the light of the relevant common law principles and policy considerations. The relevant common law principles include the doctrine of separation of powers and, within it, the established relationship between the legislature and the Courts. This relationship includes the principle that the Courts will recognise the exclusive authority of the legislature in managing its own internal process in the conduct of its business, in particular its legislative process. The corollary is the proposition that the Courts will not intervene to rule on the regularity or irregularity of the internal process of the legislature but will leave it to determine exclusively for itself matters of this kind ("the non-intervention principle").

The grounds on which the principle of non-intervention is based have generated a strong related principle of interpretation and presumption. According to this principle, the Courts will lean against an interpretation of a constitutional provision that makes compliance with procedural regularity in the law-making process of a legislature a condition of the validity of an enacted law. That said, the principle of non-intervention is necessarily subject to constitutional requirements. The provisions of a written constitution may make the validity of a law dependent upon any fact, event or circumstances that they identify, and if one so identified is a proceeding in, or compliance with, a procedure in the legislature the Courts must take it under their cognisance in order to determine whether the supposed law is a valid law.

As regards the relevant policy considerations, the CFA observed that the LegCo has as its primary responsibility its law-making function. It is also vested with other important powers and functions under BL 73 which include examining and approving budgets introduced by the government, approving taxation and public expenditure, receiving and debating the policy addresses of the CE, raising questions on the work of the government, and debating any issue concerning public interests. The important responsibilities of

the LegCo require that it should be left to manage and resolve its own internal affairs, free from intervention by the Courts and from the possible disruption, delays and uncertainties which could result from such intervention. Freedom from those problems is both desirable and necessary in the interests of the orderly, efficient and fair disposition of LegCo's business.

Turning to BL 73(1) itself, while "legal procedures" in that provision plainly include the Rules, it makes no attempt to address the question whether non-compliance with the Rules will result in invalidity of a law which is subsequently enacted. In the opinion of the CFA, the provisions of BL 73(1) are ambiguous on this point and they do not displace the principle of non-intervention. BL 73(1) does not make compliance with the Rules essential to the validity of the enactment of a law by the LegCo. It is for the LegCo itself to determine its own rules of procedure and how they will be applied.

The CFA's conclusion on BL 73(1) is, however, subject to one important qualification. This qualification arises from the circumstances that, in the case of a written constitution which confers law-making powers and functions on the legislature, the courts will exercise jurisdiction to determine whether the legislature has a particular power, privilege or immunity. In the present case, it is clear that the President has the power to set limits to and terminate a debate. This power is inherent in, or incidental to, the power to preside over meetings under BL 72(1). As long as the President has this power, it is not for the Courts to consider whether or not the power was properly exercised and whether the President's decision to end the debate constituted an unauthorised making of a new rule of procedure.

Conclusion

For the above reasons, the CFA unanimously dismissed the appeal. Following the CFA decision, it is clear that BL 73(1) is not intended to confer a right on individual LegCo members to participate in the legislative process. Nor does it displace the non-intervention principle. Applying the non-intervention principle, given that the President clearly has the power to close a debate when presiding over meetings under BL 72(1), the Courts will not exercise their jurisdiction to determine whether that power has been properly exercised or not.