HKSAR v Yip Po Lam and Others

FAMC Nos. 54 & 60 of 2018 (2 April 2019)

CFA

Background

1. The four Applicants were involved in two separate incidents where the Finance Committee of the LegCo was holding a meeting regarding the North East New Territories Development Proposal at the LegCo complex. The proposal was apparently a controversial topic. During the first meeting on 6 June 2014, the 1st Applicant of FAMC 54/2018 ("D1") together with others, entered and remained at the lobby of the LegCo complex for five hours, without either permission or a visitor's pass. The D1 delivered two speeches which, though peaceful, had the effect of encouraging others to continue to remain at the lobby and blocking the doors. The 2nd Applicant of FAMC 54/2018 ("D3") was amongst those who blocked the doors, and resisted attempts by the police and security staff to take action in relation to the doors. During the second meeting on 13 June 2014, the 1st Applicant of FAMC 60/2018 ("D4"), with the assistance of the 2nd Applicant of FAMC 60/2018 ("D5"), hung four banners (measuring 8 m x 2 m) from the canopy of the car park of the LegCo complex, ignoring warnings from security staff.

2. The Applicants were convicted of contravening an administrative instruction, *i.e.* s. 11 of the Administrative Instructions for Regulating Admittance and Conduct of Persons (Cap. 382A) ("AI"),[1] which was issued under s. 8(3)[2] of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382). The offence creating provision under which the Applicants were charged was s. 20(b)[3] of Cap. 382.[4] Fines were imposed on the D4 and D5. The D1 and D3 were sentenced to terms of imprisonment of two weeks and three weeks respectively.

3. The CFI dismissed their appeals in a judgment dated on 10 October 2018. The Applicants then sought leave to appeal to the CFA on five issues. At the hearing on 27 March 2019, four issues were left in respect of which leave to appeal were

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[1] S. 11 of the AI provides that "Persons entering or within the precincts of the Chamber shall behave in an orderly manner and comply with any direction given by any officer of the Council for the purpose of keeping order."

[2] S. 8(3) of Cap. 382 stipulates that "The President may from time to time, for the purpose of maintaining the security of the precincts of the Chamber, ensuring the proper behaviour and decorum of persons therein and for other administrative purposes, issue such administrative instructions as he may deem necessary or expedient for regulating the admittance of persons (other than members or officers of the Council) to, and the conduct of such persons within, the Chamber and the precincts of the Chamber."

[3] S. 20(b) of Cap. 382 stipulates that "Any person, other than a member or officer of the Council, who–

…

contravenes any administrative instructions issued under section 8(3), or any direction given thereunder, regulating the admittance of persons to or the conduct of persons within the Chamber or the precincts of the Chamber,

commits an offence and is liable to a fine of $2,000 and to imprisonment for 3 months."

[4] The words "Chamber" and "precincts of the Chamber" in these provisions are defined in s. 2 of Cap. 382. The former includes, "any lobbies, offices or precincts used exclusively in connexion with the proceedings of the Council"; and the latter includes, "during the whole day of any day the Council or a committee is sitting, the entire building in which the Chamber is situated and any forecourt, yard, garden, enclosure or open space adjoining or appertaining to such building and used or provided for the purposes of the Council."

sought. The Appeal Committee of the CFA ("Appeal Committee") dismissed their applications for leave to appeal and handed down the reasons for determination on 2 April 2019.

Issues

4. The four issues were:

(i) Whether there is jurisdiction for a CFI judge to grant bail pending application for certification;

(ii) Whether AI s. 11 is unconstitutional, constituting a disproportionate restriction of the Applicants' rights to freedom of speech, assembly and demonstration under BL 27 and Articles 16 and 17 of BoR;

(iii) Whether, for the purposes of securing a conviction on the basis of a failure "to behave in an orderly manner" under AI s. 11, it has to be shown that the relevant behaviour actually disrupted or disturbed either LegCo proceedings or the right of the public in observing such proceedings; and

(iv) Whether the offence under AI s. 11 involves the proof of two elements: not only must it be proved that the Applicants "failed to behave in an orderly manner", it also had to be shown that there was a failure to "comply with any direction given by an officer of the LegCo for the purpose of keeping order".

First Issue: Jurisdiction to grant bail

5. S. 34(1) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) confines the jurisdiction to grant bail to an applicant who is appealing or applying for leave to appeal or who is in custody pending the determination of an appeal.

6. The Appeal Committee held that the jurisdiction to grant bail under s. 34(1) does not arise until the relevant person has taken the first step to appeal, which involves applying for leave to appeal. It is incumbent on the applicant to act expeditiously and it is not necessary to seek certification before applying for leave to appeal. The CFA further agreed that the issue was in any event academic in the circumstances of the case.

Second Issue: The proportionality of AI s. 11

7. The Applicants contended that AI s. 11 was unconstitutional if it was sufficient under this provision to merely prove that there was a failure "to behave in an orderly manner" without more, because it would fail to satisfy the proportionality test, in particular the 3rd and 4th limbs of the test. The 4 limbs were articulated in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372.

8. The Appeal Committee was content that the proportionality test was applicable assuming that BL 27 as well as Articles 16 and 17 of BoR were engaged. In considering whether AI s. 11 served a legitimate aim or purpose (1st limb of the test), the Appeal Committee found that s. 8(3) of Cap. 382 was clear on this regard: administrative instructions could be issued for the purpose of maintaining security, ensuring the proper behavior and decorum of persons in the precincts of the Chamber and other administrative purposes. Citing the CFA's decision in *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425, the Appeal Committee agreed that the purpose of AI s. 11 was "to set a standard of orderly behaviour on the part of visitors congruent with LegCo's institutional and social importance". The Appeal Committee had no doubt that AI s. 11 was rationally connected to its purposes (2nd limb of the test).

9. As to whether the provision satisfied the no more than necessary test (3rd limb of the test), the Appeal Committee disagreed with the Applicants' contention that AI s. 11 went beyond what was necessary. AI s. 11 did not totally bar persons exercising their rights of expression or free speech. It was applicable only within "the precincts of the Chamber" and even then only prevented persons from behaving in a disorderly manner in the context of the concern of keeping order. The Appeal Committee considered that it should be left to the trial judge to determine whether the Applicants had misbehaved, having regard to the time, place and circumstances of the conduct in question. The Appeal Committee further considered that the requirement of behaving in an orderly manner could not be said to be a disproportionate response. It was so whichever of the two standards was adopted under the 3rd limb (*i.e.* the reasonable necessity standard and the manifestly without reasonable foundation standard).

10. For the same reasons discussed above, the Appeal Committee found that the 4th limb of the test was also satisfied. The Appeal Committee held that the encroachment on the rights of the Applicants were relatively limited, whereas the purposes of AI s. 11 were clear in defining the societal benefits of the measure.

Third Issue: Evidence disrupting or disturbing the LegCo proceedings

11. The Applicants submitted that the conviction on the basis of a failure "to behave in an orderly manner" for the purposes of AI s. 11 could not be secured, as it had to be shown that the relevant

behaviour actually disrupted or disturbed either LegCo proceedings or the right of the public in observing such proceedings. There was no evidence of such disruption and disturbance.

12. The Appeal Committee held that the limitations which the Applicants submitted should be read into the provision were simply not there. The submissions proceeded on a misunderstanding of *Fong Kwok Shan Christine*. There, the CFA was not setting out the elements required to be proved in relation to AI s. 11. The references to the legislature carrying out its constitutional functions without disruption or disturbance and permitting the public to observe proceedings were made to show the relevant context and purpose of AI s. 11 within its statutory framework.

Fourth Issue: Elements of the offence under AI s. 11

13. The Applicants also submitted that the offence under AI s. 11 must not only involve proving that the Applicants "failed to behave in an orderly manner", but also proving that they failed to "comply with any direction given by any officer of the [Legislative] Council for the purpose of keeping order".

14. The Appeal Committee looked at the content and purpose of AI s. 11 and it disagreed with the Applicants' submissions. The Appeal Committee held that it was wrong to elide the two situations and this was precisely what the CFA held in *Fong Kwok Shan Christine*. The Appeal Committee further ruled that s. 20(b) could not support the submissions. On the contrary, this section supported the opposite view: an offence is committed if there is any contravention of any administrative instructions issued under s. 8(3) or any directions given "thereunder".

Conclusion

15. The applications for leave to appeal were dismissed.

Judgment Update

HKSAR v Chow Ho Yin

FACC No. 4 of 2019 (10 January 2020)[1]

CFA

Background

1. This case concerned the right of an accused to be present at his trial under Article 11(2)(d) of BoR.[2] The Appellant was convicted of trafficking in a dangerous drug under ss. 4(1)(a) and (3) of the Dangerous Drugs Ordinance (Cap. 134) and sentenced to 8½ years in prison after a trial before a jury. He was absent for a portion of the trial due to a medical condition. The issue on this appeal was whether the trial judge's refusal to adjourn the trial while the Appellant was absent attending a medical appointment was in breach of Article 11(2)(d) as to require his conviction to be set aside and a new trial to be ordered.

2. The Appellant was caught hiding drugs in his underpants. He admitted to possession of the drugs in question ("Confession") and was charged with trafficking in a dangerous drug. At trial, the Appellant's defence was that the Confession was involuntary and thus inadmissible. He claimed that the Confession was induced by certain promises made to him by one of the arresting police officers ("PW2").

3. A hearing known as a "*voir dire*" was held to determine the admissibility of the Confession. However, when PW2 was about to give evidence one afternoon, the Appellant fell ill. The Appellant's counsel applied to adjourn the hearing to the next morning while the Appellant sought medical attention, but the judge refused. The trial judge concluded that the Appellant had a choice to stay or leave and would not be prejudiced by being absent because his counsel had full instructions. The Appellant was absent from the *voir dire* for the whole afternoon and thus not present for the examination in chief and cross-examination of PW2, who had allegedly given the inducement that made the Confession involuntary. The Confession

[1] Reported at (2020) 23 HKCFAR 1.

[2] Article 11(2)(d) of BoR makes provisions for the rights of persons charged with or convicted of criminal offence. It provides:

" (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality—

…

(d) to be tried in his presence …".

was held admissible and the Appellant was eventually convicted. The Appellant contended that a substantial and grave injustice had been done because of the trial judge's refusal to adjourn the hearing and her decision to continue the *voir dire* in his absence deprived him of a fair trial.

Decision of the CA

4. The Appellant applied for leave to appeal against his conviction to the CA. Unrepresented, he complained of the refusal of the trial judge to adjourn his case to allow his counsel to prepare for the *voir dire*, and of the trial judge's failure to provide adequate directions to the jury. The application was dismissed.

5. In an Addendum to its judgment, the CA noted that the Appellant had claimed he was ill on day 2 of the *voir dire* but that the trial had continued that afternoon in his absence. However, since it had already issued an order dismissing his application for leave to appeal, the CA viewed itself as *functus officio* and did not deal with this matter.

6. The Appeal Committee of the CFA granted leave to appeal on the substantial and grave injustice ground, namely that it was reasonably arguable that the Appellant was deprived of a fair trial by the trial judge's refusal to grant a short adjournment when the Appellant was not able to attend court because of illness.

Decision of the CFA

7. The well-established right under Article 11(2)(d) of BoR allows the accused to see and hear the case against him, confront his accusers, and give prompt and continuous instructions to his legal representatives. The right to be present at one's trial is part of the broader right of everyone charged with a criminal offence to a fair trial.[3] It is not an absolute right. The trial judge has a discretion to continue the trial in the accused's absence in exceptional and appropriate circumstances. A proper exercise of the discretion would require the trial judge to proceed with utmost care and caution, and to consider all factors relevant to ensuring a fair trial including but not limited to the following:

- Was the accused's absence voluntary or involuntary? Where an accused is absent because of illness, the absence is generally treated as involuntary.

- Has the accused waived the right to be present at his trial?

- Would an adjournment resolve the problem of the accused's absence? If so, would the adjournment required be short or long? Would an adjournment impact negatively on the conduct of the trial?

- Is the accused legally represented? If so, to what extent are his legal representatives able to receive and act upon instructions in his absence?

- Would the accused be prejudiced by his absence, having regard to the nature of his defence and the evidence against him?

- Would there be a risk of the jury reaching an improper conclusion about the accused's absence?

8. A judge in exercising the discretion should carefully consider all the relevant circumstances arising in the case with the "overriding concern … to ensure that the trial, if conducted in the absence of the [accused], will be as fair as circumstances permit and lead to a just outcome."[4] If an accused

[3] BL 87 and Article 10 of BoR.

[4] *R v Jones (Anthony)* [2003] 1 AC 1 (*"Jones"*), at [14].

is absent because of illness "it would very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin."[5] The CFA held that the trial judge should have exercised her discretion with greater care.

9. Where the discretion has been exercised improperly, the remaining question is whether, viewing the trial as a whole, the absence of the Appellant rendered the trial unfair. The right to be present at one's trial is part of the broader fair trial right. Not every departure from the norm will require a new trial. As the proviso in s. 83(1) of the Criminal Procedure Ordinance (Cap. 221) states: "… the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred." The principle enshrined in the proviso is inherent in the Court's function to do justice. The CFA cited Bokhary PJ's observation in *Tang Siu Man v HKSAR* [1998] 1 HKLRD 350, at p. 379I-J, "To allow an appeal just because something has gone wrong at the trial even though it has not resulted in a miscarriage of justice would not be doing justice."

Application of the law

10. The CFA concluded that trial judge had failed to exercise her discretion correctly to order the trial to continue in the Appellant's absence.

11. The trial judge did not consider the factors referred to in the cases in a careful and systematic way, particularly those authorities concerning an accused who is genuinely ill. She very quickly concluded that there would be no prejudice to the Appellant because the matter at that stage was the *voir dire*, not the trial proper; and because the Appellant had instructed his counsel.

12. The trial judge did not appreciate that the issue of the admissibility of the Confession was crucial to the Appellant's defence. The trial judge's suggestion that the Appellant had a choice to stay or leave when she was advised that the Appellant was in great pain was also questionable and went against the weight of authorities, which had consistently treated absence due to genuine illness as involuntary. Similarly, the trial judge's assumption that the Appellant would not be prejudiced because he had instructed his counsel, and his objections to the admissibility of the Confession had been reduced to grounds of objections filed with the court, while relevant, did not fully answer the Appellant's concern.

13. Critically, the trial judge did not take into account the fact that the adjournment would have been for the afternoon only. When the brevity of

[5] *Jones*, at [13]. Although this is couched in the context of commencing trial in the accused's absence, Lord Bingham also specifically recognized that the same discretion exists regardless of whether the question is one of commencing or continuing a trial in the accused's absence, at [10].

the proposed adjournment was weighed against the importance of the Appellant's right to be present at all stages of his trial and his involuntary absence, the cautious approach required by the authorities suggested that the better course would have been to adjourn the proceedings until the next morning.

14. The remaining question was whether the trial, considered as a whole, had been fair, notwithstanding the Appellant's absence during PW2's evidence. The CFA agreed with the Respondent's submission that the proceedings must be viewed as a whole to consider whether the Appellant's trial was fair. The Respondent pointed to nine considerations and submitted that the Appellant's absence from the courtroom for PW2's evidence did not render his trial unfair:

(1) The Appellant had experienced counsel throughout the trial and the *voir dire*.

(2) The Appellant's counsel agreed with the trial judge that he had full instructions.

(3) The Appellant's counsel had filed detailed written grounds of objection to the Confession, containing all conceivable challenges.

(4) The alleged inducement by PW2 was made in the presence of PW1, who testified as to how it was not made in the Appellant's presence.

(5) The Appellant knew that the trial would proceed in his absence and probably instructed his counsel over the lunch break before leaving to seek medical attention.

(6) The absence of the Appellant was short.

(7) The Appellant did not attempt to recall PW2 at the end of the *voir dire*.

(8) The Appellant testified in the *voir dire* and had meaningful participation.

(9) The *voir dire* was recanvassed in the trial proper. The evidence presented on the *voir dire* was again presented on the trial proper before the jury.

15. The CFA held that the trial must be viewed as a whole in determining whether the Appellant, in all the circumstances, had a fair trial. The Court found it impossible, viewing the proceedings as a whole, to conclude that the Appellant's absence from the trial for the afternoon during which PW2 testified on the *voir dire* rendered his trial unfair. The CFA concluded that the Appellant's short absence neither prejudiced his defence nor rendered his whole trial unfair. Accordingly, no substantial and grave injustice had been done to the Appellant.

16. The CFA held that the Appellant had not shown that a substantial and grave injustice had been done to him. The CFA dismissed the appeal.

ZN v Secretary for Justice and Others

FACV No. 4 of 2019 (10 January 2020)[1]

CFA

Background

1. ZN ("the Appellant"), a Pakistani national, was brought to Hong Kong to work as a foreign domestic helper between 2007 and 2010, during which he was unpaid, and was regularly abused and beaten by his employer. After returning to Hong Kong in 2012, the Appellant sought to report such mistreatment to various Government agencies, which had failed to recognise that he was a victim of forced labour. Forced labour is prohibited by Article 4(3) of BoR.[2]

The CFI and CA decision

2. The Appellant commenced judicial review proceedings against the HKSARG for breach of his rights under Article 4 of BoR. At the CFI, Zervos J held that the Appellant was a victim of human trafficking for the purpose of forced labour, and he had been denied protection under Article 4 of BoR. The Judge held that the HKSARG had positive obligations under Article 4 of BoR to enact laws to prohibit forced labour including trafficking for that purpose. He found that the HKSARG had not adequately fulfilled its positive obligations under Article 4.

3. On appeal, the CA upheld the Judge's ruling that the HKSARG had failed in its investigative duty under Article 4 of BoR, but held that Article 4 of BoR did not cover human trafficking (as a form of modern slavery) or human trafficking for forced labour. The CA further held that Article 4 of BoR did not impose positive obligations on the Government to criminalise forced labour by a specific criminal offence. Zervo J's finding that the HKSARG had breached its positive duties under the article must be disturbed.

Main issues in dispute at the CFA

4. At the CFA, the main issues in dispute were:

(1) Does Article 4 of BoR include a prohibition against human trafficking and, if so, what is

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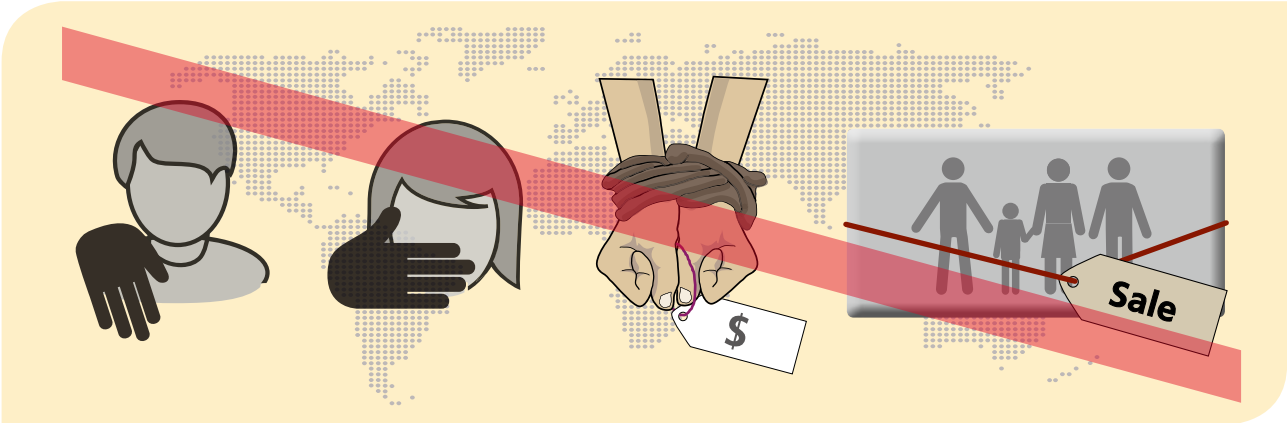
1 Reported at (2020) 23 HKCFAR 15.

2 Article 4 of BoR provides that:

"No slavery or servitude
(1) No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
(2) No one shall be held in servitude.
(3) (a) No one shall be required to perform forced or compulsory labour.
(b) For the purpose of this paragraph the term 'forced or compulsory labour' shall not include –
(i) any work or service normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
(ii) any service of a military character and, where conscientious objection is recognized, any national service required by law of conscientious objectors;
(iii) any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
(iv) any work or service which forms part of normal civil obligations."



the scope of that prohibition?

(2) Does Article 4 of BoR impose a positive duty on the HKSARG to maintain specific criminal offences criminalising the activities prohibited under that article?

Principles of construction

5. The CFA held that the question as to the scope of Article 4 of the BoR is a matter of construction. Article 4 of BoR is a provision in the Hong Kong Bill of Rights Ordinance ("HKBORO"), which gives effect to the ICCPR, and has constitutional status by reason of BL 39(1). The CFA reiterated that it should give a generous interpretation to provisions containing constitutional guarantees of freedoms and must keep in mind that constitutional provisions are living instruments intended to meet changing needs and circumstances.[3]

Question 1: Scope of Article 4 of BoR

(a) Appellant's argument contrary to the language of Article 4

6. The CFA held that Article 4 of BoR has three separate and distinct concepts, namely, prohibition against "slavery", "servitude", and "forced or compulsory labour". The distinction does not allow the introduction of a general concept of "human trafficking" which would blur the boundary between these concepts. Moreover, s. 5(2)(c) of HKBORO[4] is clear in giving a non-derogable status to slavery and servitude, as opposed to the prohibition of the requirement to perform forced or compulsory labour which is derogable. It is clear

[3] *Ng Ka Ling and Others v Director of Immigration* (1999) 2 HKCFAR 4 at p. 28D and p. 29A.

[4] S. 5 of the HKBORO provides that:
"5. Public emergencies
(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, measures may be taken derogating from the Bill of Rights to the extent strictly required by the exigencies of the situation, but these measures shall be taken in accordance with law.
(2) No measure shall be taken under subsection (1) that—
(a) is inconsistent with any obligation under international law that applies to Hong Kong (other than an obligation under the International Covenant on Civil and Political Rights);
(b) involves discrimination solely on the ground of race, colour, sex, language, religion or social origin; or
(c) derogates from articles 2, 3, 4(1) and (2), 7, 12, 13 and 15."

that Article 4 of BoR is structured to distinguish the three as separate and distinct concepts. The CFA held that the prohibitions in Article 4(2) and Article 4(3)(a) of BoR are prohibitions of substantive conduct rather than processes. The prohibition on servitude in Article 4(2) clearly refers to the state of being held in servitude and not to any anterior process by which a person might be brought to that status. To expand the meaning of Article 4 of BoR to prohibit human trafficking for exploitation generally would ignore the language of the article and alter the underlying concepts addressed in Article 4(2) and Article 4(3)(a). Further, the drafting materials of the corresponding provisions of Article 4 of BoR in the ICCPR, *i.e.* Article 8 of ICCPR, show that the article was intended to refer to slavery and the slave-trade in their narrow, traditional sense, *i.e.* destruction of one's juridical personality.

(b) Impermissible application of Palermo Protocol to Hong Kong

7. Relying on the definition of "trafficking in persons" in the Protocol to the United Nations Convention against Transnational Organized Crime ("Palermo Protocol") as an aid of construction, the Appellant sought to introduce the concept of "human trafficking" into the concept of "slavery and the slave-trade in all their forms" under Article 4(1) of BoR. The CFA noted that when the CPG acceded to the Palermo Protocol on 8 February 2010, the CPG lodged a declaration to the effect that the Protocol should not apply to the HKSAR. To use the definition as an aid of construction would inappropriately give a backdoor application to a treaty which the PRC has expressly declared should not apply to Hong Kong.

(c) "Modern slavery" does not eliminate the distinctions between slavery, servitude and forced or compulsory labour

8. The CFA considered the UK's Modern Slavery Act 2015 and the European Court of Human Rights ("ECtHR") decision in *Rantsev v Cyprus and Russia*[5] and opined that the term "modern slavery" is not a term of art and its genesis is not clear. The CFA noted that the ECtHR considered that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership; it treats human beings as commodities. The CFA held that the description of human trafficking as a form of modern slavery is problematic for the purposes of construing Article 4. First, the definition of "human trafficking" under the Palermo Protocol[6] shows that such concept is directed to a *process* (rather than an *outcome* or *substantive conduct*). The ECtHR's definition of human trafficking, in contrast, looks to an outcome rather than the process. Secondly, in limiting the aim of human trafficking to the exercise of ownership rights, the ECtHR's definition of human trafficking limits the forms of exploitation that may be involved in human

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[5] (2010) 51 EHRR 1.

[6] Article 3 of the Palermo Protocol defines the term "trafficking in persons" in the following terms:

"(a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) 'Child' shall mean any person under eighteen years of age."

trafficking too narrowly. Thirdly, the ECtHR's approach to human trafficking is, at the same time, too broad as it ignores the separate concepts of slavery, servitude and forced or compulsory labour contained in Article 4.

(d) No judicial support for the Appellant's construction arguments

9. The CFA held that the Appellant's construction arguments are not supported by any judicial decisions on Article 8 of ICCPR, Article 4 of BoR or similar provisions. The CFA noted that the Appellant had relied on the ECtHR decision in *Rantsev v Cyprus and Russia*, but the Court opined that the ECtHR had adopted a broad brush approach in holding that human trafficking itself fell within the scope of Article 4 of the European Convention on Human Rights ("ECHR4")[7] and that it was not necessary to identify whether the treatment complained of was slavery, servitude or forced or compulsory labour. The CFA held that the broad brush approach of the ECtHR in *Rantsev v Cyprus and Russia* is unsatisfactory and should not be followed in respect of Article 4 because it expressly ignores the separate concepts of slavery, servitude and forced or compulsory labour.

(e) HRC General Comment No. 28 and HRC Concluding Observations provide no support for Appellant's construction of Article 4 of BoR

10. The Appellant relied on General Comment No. 28 issued by the United Nations Human Rights Committee ("HRC") in respect of Article 3 of ICCPR:

"Having regard to their obligations under article 8, States parties should inform the Committee of measures taken to eliminate trafficking of women and children, within the country or across borders, and forced prostitution. They must also provide information on measures taken to protect women and children, including foreign women and children, from slavery, disguised, inter alia, as domestic or other kinds of personal service. States parties where women and children are recruited, and from which they are taken, and States parties where they are received should provide information on measures, national or international, which have been taken in order to prevent the violation of women's and children's rights."

11. The CFA held that it reads too much into the above paragraph to conclude that Article 8 of ICCPR (and therefore Article 4 of BoR) should be construed as prohibiting human trafficking either

[7] ECHR4(1) provides: "No one shall be held in slavery or servitude."

generally for exploitation or for the specified purposes of slavery, servitude and forced or compulsory labour. The paragraph instead refers to the desirability for States Parties to inform the HRC of measures taken to eliminate trafficking of women and children. The weight to be attached to the above paragraph in General Comment No. 28 is clearly a point open to argument. It would be unsafe to conclude that the paragraph in question was intended to go as far as representing the HRC's conclusion that Article 8 of ICCPR covers human trafficking.

12. Similarly, the HRC's Concluding Observations on the Third Periodic Report of Hong Kong, China,[8] as well as the Concluding Observations of the HRC in respect of the reports of various other States Parties in support of his construction of Article 8 of ICCPR as including a prohibition against human trafficking, cannot be read as binding statements on the scope of Article 8. The CFA noted that the status of Concluding Observations of the HRC is ill-defined. They have no binding status though they deserve respect given the eminence of their authors.

(f) HKSAR policy does not govern the interpretation of Article 4 of BoR

13. Whilst the Respondents' evidence showed that the HKSARG is committed to addressing human trafficking, such evidence is not relevant to the construction of Article 4 of BoR. The CFA held that there is a clear distinction between legal obligation and government policy. The mere fact that a policy has been pursued to combat human trafficking does not require Article 4 of BoR to be construed as prohibiting that activity.

(g) Article 4(3)(a) of BoR prohibits the substantive conduct not the process

14. The Appellant argued that the word "required" in Article 4(3)(a) must refer to a process since a person can be required to perform forced or compulsory labour even before he actually does so and, therefore, human trafficking for forced or compulsory labour would be caught by requiring someone to perform forced or compulsory labour. The CFA rejected this construction and held that the word "required" is singularly inapt to convey a meaning of trafficking. If this was intended a much more suitable term would have been used.

Answering Question 1

15. The CFA answered Question 1 as follows:

(1) Article 4(1) of BoR does not prohibit human trafficking generally for the purposes of exploitation.

(2) Nor does Article 4(1) of BoR prohibit human trafficking for the purposes of servitude and forced or compulsory labour (even assuming it prohibits human trafficking for slavery).

(3) Article 4(3)(a) of BoR does not prohibit human trafficking for forced or compulsory labour.

Question 2: Bespoke legislation?

16. Question 2 concerns whether Article 4 of BoR imposes an obligation on the HKSARG to enact specific or bespoke legislation to afford protection against the activities prohibited by the article or whether reliance on a "patchwork" of statutory provisions[9] is sufficient. Given its conclusion on

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[8] Adopted by the HRC at its 107th session (11-28 March 2013).

[9] The patchwork of provisions include those in the Crimes Ordinance (Cap. 200), the Immigration Ordinance (Cap. 115), the Protection of Children and Juveniles Ordinance (Cap. 213), the Offences Against the Person Ordinance (Cap. 212), the Prevention of Child Pornography Ordinance (Cap. 579), the Employment Ordinance (Cap. 57), the Employment of Children Regulations (Cap. 57B), and the Human Organ Transplant Ordinance (Cap. 465). Offences on "physical abuse, false imprisonment, criminal intimidation, unlawful custody of personal valuables, child abduction, child pornography, various trafficking activities for the purposes of prostitution and rape or other sexual offences" are included: see para. 110 of the judgment.

Question 1, the CFA held that the only outstanding issue was whether there is an obligation under Article 4 of BoR to criminalise forced or compulsory labour. Whilst the Respondents accepted that there is a positive duty on the HKSARG under Article 4 of BoR to have in place measures providing practical and effective protection against the activities prohibited under Article 4, they did not accept that there is a duty to enact bespoke criminal legislation for that purpose.

Wide margin of discretion

17. On Question 2, in holding that there is no absolute duty on the HKSARG to maintain an offence specifically for criminalising violations of Article 4 of BoR, the CFA reasoned that the HKSARG would have a wide margin of discretion in the manner in which it complies with its positive obligations under Article 4 of BoR and, even in the context of non-derogable rights, such positive obligations should be interpreted in a way as not to impose an excessive burden on the authorities, bearing in mind the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources. The touchstone is whether the protection of the rights under Article 4 of BoR is practical and effective, the decision as to how to achieve such protection must be a matter for the HKSARG subject to the supervision of the courts.

Lack of specific criminal offence not shown to cause breach of Article 4 of BoR

18. The CFA opined that inherent in this wide margin of discretion is the need to consider whether breach of Article 4 rights has arisen because of the lack of a specific criminal offence. For the contention that a specific criminal offence was required in this case, there must be a causal connection between the absence of a specific offence against forced or compulsory labour and the breach of the Appellant's rights under Article 4 of BoR. The causal connection was not established in the present case.

19. The CFA referred to the CA's decision upholding the Judge's finding that the HKSARG had failed in its investigative duty under Article 4 of BoR in relation to the Appellant's complaints in this case. However, there was no finding that the breach of the investigative duty under Article 4 was the result of the absence of a specific offence criminalising forced or compulsory labour. On the contrary, Cheung CJHC concluded:

"From the evidence presented before the court, it is plain that the breach was due not to the absence of any specific criminal offence as such, but rather the lack of training of the officers of the various government authorities involved regarding article 4 violations, and the total lack of

central supervision and coordination in terms of investigating and combating such violations."

20. The CFA considered that there is no proper basis to disturb that finding of the CA. Given the range of offences of which the Appellant's employer might have been charged, the failure by the Respondents to investigate the Appellant's case could not, realistically, be said to have occurred because of the lack of a specific offence criminalising forced or compulsory labour.

21. While it could not be said that the patchwork of offences available to the HKSARG was inadequate in this case to afford practical and effective protection of rights under Article 4 of BoR, a different conclusion might be reached in a future case. Nor should it be taken to indicate that a patchwork of offences would necessarily be sufficient to address a prohibition on human trafficking.

Answering Question 2

22. The CFA answered Question 2 as follows:

(1) The HKSARG has a wide margin of discretion in the manner in which it complies with its positive obligations under Article 4 of BoR and there is no absolute duty on the HKSARG to maintain an offence specifically criminalising forced or compulsory labour.

(2) To comply with Article 4, the HKSARG must take steps to afford practical and effective protection of those rights. Whether practical and effective protection has been provided will depend on the facts of any given case.

(3) On the facts of this case, it has not been shown that a bespoke offence criminalising forced or compulsory labour is necessary in that the patchwork of offences already in existence have failed to afford the Appellant sufficient protection.

(4) The determination that a bespoke offence is not required does not preclude a different conclusion being reached in a future case, in the event that the HKSARG is shown in future not to afford practical and effective protection of the rights under Article 4 by reason of the absence of such an offence. Nor should this judgment be taken to indicate that a patchwork of offences would necessarily be sufficient to address a prohibition on human trafficking, if the HKSARG were under a constitutional duty to prohibit that activity.

Conclusion

23. In light of the above, the CFA unanimously dismissed this appeal.

Secretary for Justice v Leung Kwok Hung

HCMA No. 520 of 2018 (2 June 2020)[1]

CA

Background

1. In Hong Kong, a member of the LegCo enjoys various privileges and immunities at both constitutional and statutory levels including the freedom of speech and debate in the LegCo.

2. At the constitutional level, BL 77 provides:

"Members of the Legislative Council of the Hong Kong Special Administrative Region shall be immune from legal action in respect of their statements at meetings of the Council."

3. At the statutory level, ss. 3 and 4 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) respectively provides:

> **"3. Freedom of speech and debate**
>
> There shall be freedom of speech and debate in the Council or proceedings before a committee, and such freedom of speech and debate shall not be liable to be question in any court or place outside the Council.
>
> **4. Immunity from proceedings**
>
> No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Council or committee, or by reason of any matter brought by him therein by petition, Bill, resolution, motion or otherwise."

The CA confirmed that the intention of the two sections is to confer the same privilege and immunity on LegCo members contained in BL 77.

4. Cap. 382 provides a range pf criminal offences in Part IV. Featuring in the appeal is s. 17(c) for contempt:

"Any person who –

…

> (c) creates or joins in any disturbance which interrupts or is likely to interrupt the proceedings of the Council or a committee while the Council or such committee is sitting,

commits an offence and is liable to a fine of $10,000 and to imprisonment for 12 months, and in the case of a continuing offence to a further fine of $2,000 for each day on which the offence continues."

5. The appeal concerned the scope of the privilege and immunity of ss. 3 and 4, their interface with s. 17(c) and the constitutionality of s. 17(c) if they apply to a LegCo member.

The facts & proceedings below

6. On 15 November 2016, the Panel on Housing and the Panel on Development of the LegCo held a joint meeting. The Respondent, then a LegCo member and the Under Secretary for Development ("Under Secretary") were in attendance then. During the meeting, the Respondent snatched the Under Secretary's meeting folder which contained confidential documents and passed it to another LegCo member for him to read, ignoring the repeated demands of the meeting's chairperson

[1] Reported at [2020] 3 HKLRD 190.

to return the folder to the Under Secretary. Finally, the chairperson ordered the Respondent to withdraw from the meeting pursuant to the Rules of Procedure of the LegCo.

7. On 12 May 2017, the Respondent was prosecuted for the offence of contempt, contrary to s. 17(c) of Cap. 382. Acting Principal Magistrate Ms Ada Yim ("the Magistrate") ruled on 5 March 2018 that what was said and done by a LegCo member during proceedings was within the sphere of the privilege under s. 3 of Cap. 382 provided that it did not amount to an ordinary criminal offence; and that although s. 17(c) was applicable to the proceedings of the LegCo or a committee in general, it was not applicable to LegCo members. The Magistrate did not find it necessary to decide whether s. 17(c), if found to be applicable to a LegCo member, was unconstitutional.

8. Pursuant to s. 105 of the Magistrates Ordinance (Cap. 227), the Secretary for Justice appealed against the Magistrate's rulings by way of case stated. Such hearing is usually heard in the CFI. However, at the Direction Hearing on 29 November 2018, Anthea Pang J ordered that the appeal be reserved for the consideration of the CA under s. 118(1)(d) of Cap. 227.

Questions of law

9. The following questions of law were raised in this appeal:

(1) Was the Magistrate correct in finding that what is said and done by a member of LegCo during the proceedings is within the sphere of the privilege provided that it does not amount to an ordinary criminal offence? (Question 1)

(2)(a) Was the Magistrate correct in ruling that, upon true interpretation, s. 17(c) of Cap. 382 is not applicable to the members of LegCo? (Question 2(a))

(2)(b) Was the Magistrate correct in ruling that, upon true interpretation, s. 17(c) of Cap. 382 is applicable to the proceedings of LegCo or a committee in general (*i.e.* not limited to proceedings related to evidence taking under oath)? (Question 2(b))

(3) Should the Magistrate's ruling that s. 17(c) is inapplicable to the Respondent be upheld on the alternative basis that s. 17(c) is unconstitutional if interpreted to apply to a member of LegCo? (Question 3)

Scope of ss. 3 and 4 and their interface with s. 17(c)

10. The CA held that the Respondent's reliance on s. 4 did not add anything to the analysis of the case. The scope of s. 3 would also determine that of s. 4.

11. Since both ss. 3 and 17(c) are statutory provisions, their scope and interface must be determined by the courts as a matter of statutory interpretation. Indeed, in *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689, the CFA at [39]-[43] held that under the constitutional framework of the Basic Law, the courts will determine whether the LegCo has a particular power, privilege or immunity. The CA held that this accorded with the English approach.

12. The CA revealed the privilege and immunity of speech and debate under Article 9 of the Bill of Rights (1689) in England and relevant jurisprudence. The CA noted that under the English law, the privilege and immunity under Article 9 had been customarily described as the "exclusive cognisance of Parliament". It referred to the exclusive right of the Parliament to regulate its own affairs without interference from others or from outside Parliament. Including in its exclusive cognisance is Parliament's

power to discipline its own members for misconduct and, further, power to punish anyone, whether or not a member, for behaviour which interfere substantially with the proper proceedings of parliamentary business. Such interference is known as contempt of Parliament. This falls within the penal jurisdiction of each House to ensure that it can carry out its constitutional functions properly and that its members are not obstructed or impeded.[2]

A purposive and contextual approach & the relevant law

13. The courts adopt a purposive and contextual approach to statutory interpretation. The context of a statutory provision includes other provisions of the statute and the existing state of the law. It also includes its legislative history and purpose. The Respondent contended that Cap. 382 is a codifying statute. The CA agreed that it is convenient to examine the relevant state of law prior to the enactment of Cap. 382 in 1985.

14. The state of the relevant pre-existing law is this: LegCo members had the absolute privilege of freedom of speech and debate in Council by virtue of the doctrine of inherent necessity. The LegCo also had inherent disciplinary power to maintain its order and discipline to deal with contempt including the power to order a member to withdraw on gross disorderly conduct or a non-member to withdraw. But unlike the English Parliament, the LegCo did not have penal jurisdiction to impose criminal sanctions, against any person, whether he was a member or not, for his disorderly conduct generally. The LegCo did not claim to have any penal jurisdiction to impose criminal sanctions over disorderly conduct.

15. The LegCo had jurisdiction to punish persons guilty of contempt in connection with proceedings for taking evidence under s. 4(1) of the Oaths and Declarations Ordinance (Cap. 11). However, there was no criminal offence as such in the criminal statute or at common law.

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[2] *R v Chaytor* [2011] 1 AC 684 at [13] and [63].

The legislative deliberations

16. The deliberations during the legislative process shed light on the purpose and context of Cap. 382. Cap. 382 was enacted with the resumption of sovereignty of Hong Kong by the Government of the PRC in 1997 in view. The first point to note from the legislative deliberations of the Legislative Council (Powers and Privileges) Bill 1985 is that the privileges and immunities to be conferred on the LegCo by legislation were derived from those already in existence under the common law doctrine of inherent necessity. The same doctrine of necessity should inform an exercise to define the scope of the privileges as a matter of statutory interpretation.

17. The CA agreed that to a limited extent, Cap. 382 is a codification. The common law doctrine of inherent necessity applied to the pre-1997 LegCo. Insofar as the privileges and immunities were conferred by that doctrine, they are codified in the corresponding provisions in Part II. They include the absolute privilege under s. 3, which was modelled on Article 9 of the English Bill of Rights 1689. Further, s. 4 of Cap. 11 was replaced by the corresponding provisions in Part III. However, the criminal offences in Part IV including those in connection with evidence and disorderly conduct are not codifying provisions. Those concern proceedings of witnesses might have been derived from Cap. 11. Prior to the enactment of Cap. 382, there were no such criminal offences. Only the LegCo had the jurisdiction to punish persons guilty of such conduct. The CA held that it was open to the LegCo to relinquish the jurisdiction to the courts by enacting the provisions. For other criminal offences, the LegCo did not have the necessary penal jurisdiction. The corresponding provisions including s. 17(c) vested the courts, and not the LegCo, with the jurisdiction to punish persons guilty of the offences.

A statutory framework for a secure and dignified environment

18. Like any other legislature, the LegCo can only properly discharge its constitutional functions as legislature of Hong Kong, free from outside interference, in an environment which is secure, dignified and conducive to the orderly and effective conduct of its business without disruption or disturbance while permitting members of the public to observe its proceedings as an open process. The CA held that Cap. 382 clearly aims at securing such a statutory framework for the LegCo.

19. Protection of the core legislative and deliberative business in terms of free speech and debate in the Council and proceedings in a committee is conferred by ss. 3 and 4. Together with other privileges and immunities, they aim at enabling the LegCo to carry out its functions independently and without outside interference. The provisions regulating admittance, *etc* and for offences, including s. 17(c) aim at maintaining the secure and dignified environment that the LegCo needs to carry out its functions. This main purpose of Cap. 382 is also illustrated by the retention and continual application of the Standing Orders at the time of the enactment and after 1997, their replication in the Rules of Procedure. They set a standard of orderly behaviour for both members and non-members that is congruent with the LegCo's constitutional and social importance so that it may perform its functions orderly and effectively without interference and disruptions.

General propositions relevant to interpretation

20. The following general propositions germane to the privileges and immunities of the LegCo also inform the interpretative exercise at hand. First, the privileges and immunities are deeply rooted in the doctrine of separation of powers to enable LegCo to function properly, efficiently, without interference or disruptions. This is well borne out in the judgment of the CFA in *Leung Kwok Hung v President of the Legislative Council (No 1)*, *ibid*. Second, the non-intervention principle identified by the CFA is necessarily subject to constitutional requirements. Third, the purpose of conferring the privileges and immunities on LegCo members is not to put them above the law. They just ensure that LegCo members can carry out their role and perform their functions as legislators without fear of any outside interference. Fourth, since the whole purpose of conferring the privileges and immunities is to enable LegCo members to perform their functions as legislators without fear or interference, they are not immune from civil or criminal proceedings merely by reason of their status. Thus they would enjoy no immunity if charged with ordinary criminal offences which are not connected with their legislative functions. This covers such criminal offences as an assault in the corridors of the legislature, theft of another member's money, or a sexual offence, none of which related to legislative activity or proceedings in the legislature. Fifth, the courts will determine whether the legislature has a particular power, privilege or immunity by the test of necessity, that is, whether it is necessary for the legislature to function as a legislative body. The test of necessity can be formulated thus: does the claimed privilege or immunity go to the "core or essential business" of the legislature?

21. In drawing the contour of the privilege and immunity, the courts must firmly bear in mind the doctrine of separation of powers, the underlying rationale why privilege and immunity are conferred and the test of necessity.

Defining the boundary of s. 3

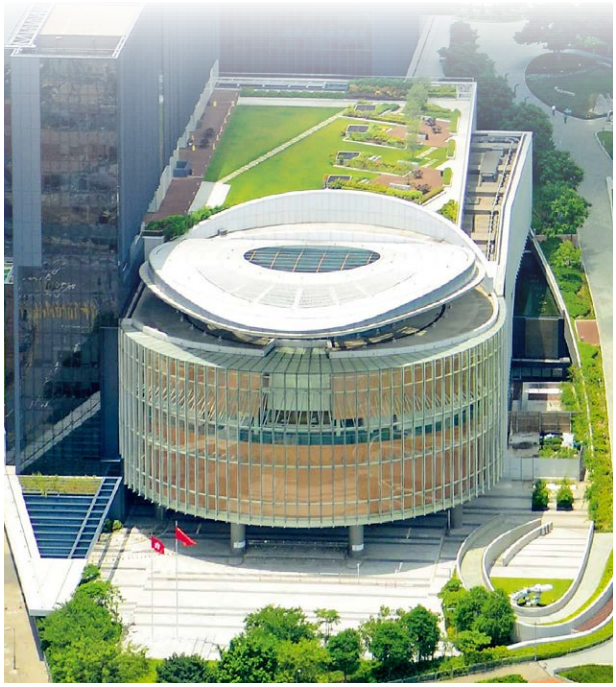
22. The CA considered that s. 3 is modelled on Article 9 of the English Bill of Rights (1689). In *Chaytor*, *ibid*, Lord Philips at [61] emphasized that the protection of Article 9 is absolute and cannot be waived. The same must be true for the privilege of s. 3. However, it remains for the court to determine whether the disorderly conduct of a LegCo member, if caught by s. 17(c), falls within the privilege.

23. The absolute privilege conferred by s. 3 of Cap. 382 enables LegCo members to perform their functions as legislators without external interference or fear of reprisal by legal proceedings for the purpose of furthering the constitutional objects and functions of the LegCo. The privilege under s. 3 must not be exercised in a way which is inconsistent with or even defeats the main purpose of Cap. 382 in creating and maintaining a secure and dignified environment that is necessary for the Council to conduct its business orderly and

effectively. Equally important, the privilege must not be exercised in a way which infringes the same privilege other LegCo members need in order to perform their functions as legislators. It follows that the privilege must not be exercised in a so disruptive manner that it is caught by the impugned conduct of s. 17(c). For it cannot possibly be the legislative intent to confer the privilege of s. 3 to allow a LegCo member to cause or join a disturbance which interrupts or is likely to interrupt the proceedings of the Council or a committee, thereby disrupting the business of the Council or the committee and infringing the freedom of speech and debate of other LegCo members.

24. Approaching the privilege by reference to the doctrine of necessity, it is not inherently necessary for the proper functions of the LegCo to give its members, as part of the s. 3 privilege, the freedom to disorderly conduct themselves within the meaning of s. 17(c), thereby disrupting LegCo's business or infringing other members' freedom of speech and debate. The protection for such disorderly conduct does not go to the core or essential business of LegCo.

25. The boundary of the privilege of s. 3 drawn above only aims at prohibiting a member from



frustrating the very purpose of the privilege, and no more. It does not inhibit any member from exercising their freedom of speech and debate in any manner other than that caught by s. 17(c).

26. The CA held that s. 17(c) is derived from the English law on parliamentary privilege concerning contempt of Parliament. The English experience shows that Parliament, if so decided, could relinquish the penal jurisdiction to the courts without offending the non-intervention principle. Before 1997, the LegCo did not have penal jurisdiction to deal with contempt of legislature generally, whether committed by members or not. It is clear from the legislative process of Cap. 382 that it was considered necessary to give the LegCo additional safeguards to maintain its order and discipline. The protective disciplinary powers to deal with contempt of legislature were not sufficient. New criminal sanctions in Part IV to punish for contempt of legislature were created. The LegCo decided to vest such penal jurisdiction with the courts.

27. The LegCo had made a deliberate and informed decision to relax the non-intervention principle by relinquishing to the courts the penal jurisdiction over matters concerning contempt of legislature which falls within the rubric of its exclusive cognisance. Insofar as it concerns a member whose conduct is caught by s. 17(c), the LegCo retains its full exclusive jurisdiction to discipline him. As an additional safeguard to maintain its order and discipline, the LegCo gives the courts the criminal jurisdiction to penalize the member should a prosecution be brought under s. 17(c).

28. By virtue of the criminal offences in Part IV, both the LegCo and the courts have different, overlapping, jurisdiction over contempt of legislature. The LegCo can take disciplinary proceedings against the person guilty of such contempt; the courts can try him for the crime. The non-intervention principle does not prevent LegCo from conferring the criminal jurisdiction to the courts over a member whose conduct is caught by s. 17(c).

Interpreting s. 17(c)

29. Read in the context of the statutory framework under Cap. 382 to provide a secure and dignified environment for the LegCo to perform its functions and conduct its business, s. 17(c) clearly aims at protecting the order and discipline of all the proceedings in the Council or a committee from any person whose conduct is caught by the provision, whether he is a member or not. Insofar as criminal offences are concerned, Cap. 382 is not a codifying statute. The new criminal offences, including s. 17(c), were created to give the LegCo further safeguards to maintain its order and discipline.

30. The expression "any person" in s. 17(c) carries its natural and ordinary meaning. The legislative intent is clearly to include a member. Excluding a member from its application would have the consequences of defeating the main purpose of Cap. 382 and infringing other members' exercise of their privileges and immunities in performance of their functions.

31. S. 17(c) must cover all proceedings in order to achieve the aim of Cap. 382 to protect the order and discipline of the proceedings of the Council and its committee. On a proper interpretation, s. 17(c) applies to a LegCo member.

32. Under the constitutional framework of the Basic Law, only the courts have judicial powers. The LegCo is never vested with any judicial power. Since the criminal aspect of penal jurisdiction is judicial, it always belongs to the courts exclusively. It is exactly because of the doctrine of separation of powers that s. 17(c) must vest such penal jurisdiction with the courts and not the LegCo. The LegCo's decision to relax the non-intervention principle as explained above conforms entirely with that doctrine. The CA ruled that s. 17(c) is constitutional and does not offend the doctrine of separation of powers.

33. The answers to the questions of law above are:

> Question 1: the Magistrate erred in finding that the privilege of s. 3 covers the disorderly conduct of a LegCo member if caught by s. 17(c);
>
> Question 2(a): No;
>
> Question 2(b): Yes; and
>
> Question 3: No.

34. The case was remitted to the Magistrate and she was directed to restore the proceedings and proceed with the remainder of the trial.