Chee Fei Ming and Another v Director of Food and Environmental Hygiene and Another

CACV Nos. 489 & 490 of 2018 (16 December 2019)[1]

CA

Background

1. The appeals concerned the constitutionality of the scheme for regulating the display of bills and posters on Government land under the Public Health and Municipal Services Ordinance (Cap. 132) and the impact of this scheme on the display of banners in "static demonstrations".

2. The Applicants and other fellow Falun Gong ("FLG") practitioners had been staging static demonstrations at various public locations, which involved displaying banners and other publicity materials. The display of publicity materials on Government land requires prior written permission from the Director of Food and Environmental Hygiene ("the Director"), which is the Authority for granting the permission, pursuant to s. 104A(1)(b) of Cap. 132.[2] Any person who does so without permission commits an offence under s. 104A(2) of Cap. 132.[3]

3. In 2003, the Director delegated his power under s. 104(1)(b) to the Director of Lands who processed applications for permission to display publicity materials at designated spots according to a published Management Scheme.[4] In respect of non-designated locations, the Director would consider those applications on a case-by-case basis.

4. The FLG's demonstration sites were non-designated spots. However, no permission had ever been obtained from the Director or the Lands Department for the display of FLG's publicity materials, constituting a breach of s. 104A(1)(b). In April 2013, the Food and Environmental Hygiene Department took enforcement action and removed the FLG's publicity materials from their demonstration sites pursuant to s. 104C of Cap. 132[5] ("the Decisions").

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1 Reported at [2020] 1 HKLRD 373.

2 S. 104A(1)(b) of Cap. 132 provides that "No bill or poster shall be displayed or affixed —

… on any Government land, except with the written permission of the Authority."

3 S. 104A(2) of Cap. 132 provides that "A person displaying or affixing a bill or poster in contravention of subsection (1) commits an offence."

4 Its full name is "Management Scheme for the Display of Roadside Non-commercial Publicity Materials Implementation Guidelines".

5 S. 104C of Cap. 132 provides that:

"(1) Where—

(a) a bill or poster is displayed in contravention of section 104A(1); or

(b) a bill or poster is not maintained in a clean and tidy condition as required under section 104B(1),

the Authority may remove the bill or poster and may recover the cost of removal from the person displaying the bill or poster as a civil debt.

(2) Where any person is convicted of an offence under section 104A(1) or 104B(1) the court by whom that person is convicted may order him to pay, in addition to or in lieu of any penalty for which he is liable for that offence, the cost or estimated cost of removing the bill or poster in respect of which the offence was committed.

(3) Where a bill or poster to which subsection (1)(a) or (b) applies is displayed on private land, nothing in this section shall derogate from any cause of action or remedy which the owner or occupier of that land may be able to enforce against the person who displays the bill or poster."

Decision of the CFI

5. The Applicants challenged the Decisions by judicial review on the grounds that s. 104A(1)(b) infringed their freedom of expression, assembly and demonstration under BL 27[6] and Articles 16 and 17 of BoR.[7] BL 39[8] stipulates that these freedoms shall not be restricted unless as prescribed by law. The Applicants argued that:

(1) s. 104A(1)(b) imposed a restriction on their freedom of expression, assembly and demonstration that did not satisfy the "prescribed by law" requirement; and

(2) s. 104A(1)(b) failed the proportionality test because of the criterion based on content-screening set out in the Management Scheme.

6. The CFI allowed the applications for judicial review and quashed the Decisions. It ruled in favour of the Applicants on the "prescribed by law" issue. However, it did not rule on the proportionality challenge.

7. The Respondents appealed to the CA on the "prescribed by law" issue; while the Applicants cross-appealed on the proportionality issue.

8. The CA allowed the Respondents' appeals and dismissed the Applicants' cross-appeals.[9]

Issues

9. The main issues before the CA were:

(1) Does s. 104A(1)(b) satisfy the "prescribed by law" test?

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[6] BL 27 provides that:

"Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike."

[7] Article 16 of BoR provides that:

"(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary—

(a) for respect of the rights or reputations of others; or

(b) for the protection of national security or of public order (ordre public), or of public health or morals."

Article 17 of BoR provides that:

"The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

[8] BL 39 provides that:

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

[9] The Applicants' subsequent application for appeal to the CFA was dismissed by the Appeal Committee of the CFA in FAMV Nos. 42 and 43 of 2016, and FAMV Nos. 213 and 214 of 2020 on 18 May 2021. The Appeal Committee rejected the Applicants' argument that s. 104A(1)(b) of Cap. 132 had failed the proportionality test and infringed BL 27. The Appeal Committee held that the Applicants' proposition that the mere requirement of permission to display a bill or poster on Government land necessarily constituted an unlawful restriction of their protected rights was unduly wide and could not be reasonably arguable. The Applicants' argument that s. 104A(1)(b) did not satisfy the proportionality test "by reason of the criterion based on content-screening" was not supported by evidence. Further, as the Applicants had never made an application for permission to display their publicity materials, there was no evidence as to the decision-making process that could give rise to a properly formulated argument. Insofar as the Applicants' constitutional challenge was premised on the Director being entirely at liberty to impose conditions for the grant of permission and therefore s. 104A(1)(b) lacked legal certainty, the Appeal Committee held that such challenge was not reasonably arguable given the purpose and object of Cap. 132, the limited interference with the protected rights involved and the various legal safeguards applicable to the Director's exercise of discretion.

(2) Does s. 104A(1)(b) satisfy the proportionality requirement by reason of the criterion based on content-screening?

First Issue: Prescribed by law

10. Two requirements flow from the concept of "prescribed by law", which stems from BL 39 and Articles 16 and 17 of BoR. First, the law must be adequately accessible. Secondly, the law must be formulated with sufficient precision to enable a citizen to regulate his conduct and to foresee to a reasonable degree the consequences of his action.

11. In the present appeals, there was no issue on the accessibility of the law. Accordingly, the focus of the dispute before the CA was on the foreseeability of the law.

(a) Foreseeability and safeguards against arbitrary interference

12. The CA held that the foreseeability of the law should be analysed by reference to the statutory scheme under s. 104A(1)(b).

13. Although s. 104A(1)(b) confers a discretion on the Director to grant written permission, such a provision for discretionary power by itself does not infringe the "prescribed by law" requirement if the law:

(1) indicates with sufficient clarity the scope of the Director's discretion and the manner of its exercise; and

(2) provides adequate and effective safeguards against abuse. Such safeguards may include procedures for effective scrutiny by the courts.

14. If the above two tests are met, there would be legal protection against arbitrary interference by the Director with the right to demonstration and the freedom of expression. The foreseeability requirement would then be satisfied.

(b) "The law": a holistic approach

15. The CA held that when examining "the law", the court would adopt a holistic approach and have regards not only to the statutory provision in question, but also the common law and even published policy and guidelines.

16. First, common law is recognized to be a source of law in Hong Kong and has been taken into account in ample authorities in assessing whether the foreseeability requirement under "prescribed by law" is satisfied.

17. Besides, referring to European and English cases, the CA found that the holistic approach also examined how the law was actually administered, including the effectiveness of judicial supervision through judicial review. So long as there is sufficient guidance in the published rules or policies setting out the boundaries of an administrative discretion, it would provide an adequate basis for working out the precise outcome in a particular case by way of judicial review.

18. After setting out the holistic approach, the CA was of the view that the CFI judgment did not depart from this approach.

19. The CA rejected the Applicants' argument that all statutory discretions must contain explicit limitations on the same in order to satisfy the "prescribed by law" requirement. This argument was directly contradictory to the Hong Kong case law and also against the holistic approach adopted in the international cases discussed above.

(c) The degree of precision

20. The CA recognized at the outset that absolute precision or certainty of the laws is not achievable. Some degree of vagueness is inherent in the formulation of laws, especially laws expressed in general terms, which may require judicial clarification.[10]

21. On the degree of precision required of the law, the Court set out the following principles from case law:

(1) The central requirement is whether there is "a settled core" of meaning of the law in question. If yes, the mere existence of debatable issues surrounding the settled core does not make the law legally uncertain.[11]

(2) Where the issue is the exercise of a discretionary power conferred by statute, the degree of precision required of the law will also be adjusted, depending on the particular subject matter of the discretion, the content of the instrument in question, the field it is designed to cover, and the number and status of those to whom it is addressed.[12]

(3) The question is ultimately answered by whether the law is able to enunciate some boundaries which create an area of risk and provide guidance to citizens to regulate his conduct.[13]

22. In the current appeals, the statutory provision in question, *i.e.* s. 104A(1)(b), is concerned with a statutory power applicable to a wide range of public spaces and a large variety of potential users and purposes for which posters and bills may be displayed or affixed. The size and contents of such posters and bills also vary. The characters of the location and neighbourhood as well as duration for the display and affixing of them further vary with different environmental and social issues. The conflict of interests behind a decision on permitting or refusing permission for display and affixing of posters and bills can vary.

23. The CA ruled that in such circumstances, it was inevitable that s. 104A(1)(b) has to be worded in a general manner.

(d) Certainty as to the scope of the discretion and the manner of its exercise

24. To begin with, the scope of the discretion is to be determined by reference to the statutory objectives.

25. It was acknowledged that the exercise of power under s. 104A(1)(b) must be rooted in the statutory objectives of protecting the cityscape, balancing the use of public space by different segments of the citizenry, preventing chaos and conflicts in the competition for such space, and promoting road safety.

26. The CFI previously held that the statutory objects did not provide sufficient guidance for the purpose of the "prescribed by law" requirement and were interpreted as precluding materials containing objectionable contents, a very wide power.

27. However, the CA disagreed with the CFI and was of the view that the statutory objects do set sufficient guide for proper control of the exercise of discretion by the court to prevent arbitrary interference with the display of banners or poster, including such display for a static demonstration of

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[10] *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386 at [61]-[62].

[11] *Hong Kong Television Network Ltd v Chief Executive in Council* ("*HK Television Network Ltd*") [2016] 2 HKLRD 1005 at [98].

[12] *HK Television Network Ltd* [2015] 2 HKLRD 1035 at [121].

[13] *Ibid.*

habitual regularity or permanence. Given the nature of the power under s. 104A(1)(b), the discretion has to be framed widely and generally.

28. The interference of the discretion under s. 104A(1)(b) with the right of demonstration was limited. The discretion would not affect the use of banner or poster in a mobile demonstration. As for the FLG static demonstrations, the regular use of a particular site would not carry with it any symbolic meaning in the exercise of the right of demonstration either.

29. Accepting that the exercise of the power under s. 104A(1)(b) may entail prohibition against the display of defamatory messages or lurid pictures, the CA did not think the power was unlimited. Such content-screening can be permitted only to the extent that it is necessary to further the statutory objectives. Accordingly, the width of the power could not be a reason for holding that the discretion was not prescribed by law though one might still challenge its proportionality.

30. As regards the manner of the exercise of the power, the Management Scheme is the primary mode of control exercised by the Director (delegating the power to the Director of Lands) under s. 104A(1)(b). At the same time, as the statute itself does not limit its application to designated spots and has no provision for eligibility criteria, the Director must have a residual power to grant permission in cases falling outside the Management Scheme. However, given the residual nature of such power, the Director would be expected to exercise such power paying due regard to the policy considerations embodied in the Management Scheme with necessary modifications in respect of applications concerning non-Management Scheme spots.

31. With the guidance provided by the Management Scheme, the exercise of the residual discretion by the Director on a case by case basis would not be arbitrary. Hence, the CA ruled that the CFI erred in holding that the Management Scheme could not provide relevant guidance to an applicant in a case falling outside the scope of that scheme.

32. In relation to the content-based criteria under the Management Scheme, only materials which are for the promotion of public awareness of matters of general and significant community interests of non-commercial nature are permitted. The CA agreed that they are consistent with the objects and purposes of the statutory power and their core meanings are sufficiently clear.

33. Specifically with regard to the Applicants' challenge that the expression of "objectionable nature" under paragraph 7(b)(iv)[14] of the Management

[14] It provides that no publicity materials of an obscene or objectionable nature shall be displayed.

Scheme was not sufficiently clear, the Court ruled that such an expression must be understood in the context of the objects and purposes of the statutory power. It was found to be similar to the standards of "offensiveness" and "public controversy" in an English case,[15] in which these concepts were held to be sufficiently precise to meet the requirement of legal certainty.

34. On the whole, the CA held that there is sufficient guidance in the publicly available materials including the Management Scheme to guide the courts in resolving a dispute if an application for permission should be granted. The CFI's decision on the "prescribed by law" challenge was overturned accordingly.

Second Issue: Proportionality

35. The Applicants' proportionality challenge was rejected.

36. The Applicants argued that s. 104A(1)(b) failed to meet the proportionality requirement. They contended that there was no limitation under s. 104A on the restriction of the rights of demonstration and freedom of expression and it provided no guidance on what the decision maker would take into account in deciding whether or not to grant approval. They alleged that the decision maker would be at liberty to impose conditions, including content-screening, on applications.

37. The CA rejected the above arguments. First, s. 104A(1)(b) does not apply to most demonstrations, be it mobile or static. Permission under this section is only required if a demonstrator occupies a spot on some permanent and habitually regular basis.

38. Moreover, the discretion cannot be exercised in an arbitrary manner. Even for a non-Management Scheme application, the exercise of the residual discretion must still be guided by statutory purpose of the power and the applicable criteria set out in the Management Scheme, including those on content-screening.

39. The Applicants' another argument that the avoidance of environmental nuisance was not a legitimate purpose for the restriction of the rights under Articles 16 and 17 of BoR was also rejected. It was held that the objectives of the statutory power under s. 104A(1)(b) are not restricted to avoidance of environmental nuisance, but also include controlling to promote the orderly and proper use of public space, which is within the scope of public order.

40. A scheme of control over the display of banners, bills and posters at public space was found to be necessary and needed irrespective of the purposes of the display, including a display in association with a demonstration at a spot with a degree of permanence and habitual regularity.

41. Despite the availability of redress under the Summary Offences Ordinance (Cap. 228) and the common law offence of public nuisance to tackle problems arising from banners causing obstruction of highway, the CA pointed out that the statutory objectives under s. 104A(1)(b) are not confined to road safety or road obstruction. Further, there is no power for removal of offending items under Cap. 228 or the common law offence as that provided for under s. 104C.

42. The CA ruled that there was no effective proportionality challenge by reference to the content-based screening criteria set out in the Management Scheme and the criteria did not entail political censorship.

Conclusion

43. Upholding the constitutionality of s. 104A(1)(b), the CA allowed the Respondents' appeals and dismissed the Applicants' cross-appeals.

[15] *R (Core Issues Trust) v Transport for London* [2014] PTSR 785.

Leung Kwok Hung (Long Hair) v Commissioner of Correctional Services

FACV No. 8 of 2019 (27 November 2020)[1]

CFA

Background

1. Leung Kwok Hung ("the Appellant"), a political activist widely known as "Long Hair", was convicted of two charges of criminal damage and two charges of disorderly behaviour in the Magistrates' Courts in March 2012. On appeal, one of the charges was quashed and the Appellant was sentenced to a term of imprisonment of four weeks. At the Lai Chi Kok Reception Centre, the Appellant was required to have his hair of about 80 cm long cut pursuant to Standing Order 41-05 ("SO 41-05"),[2] which was issued by the Commissioner of Correctional Services ("Respondent"). The Appellant applied for judicial review against the Respondent's decision requiring the Appellant to cut his hair. The Appellant's complaint was that he was discriminated against on account of his sex: while the hair of male convicted prisoners like him had to be kept sufficiently close, by contrast female prisoners had a freer choice and, except as recommended by a Medical Officer, their hair could not be cut shorter than the style on admission to prison without their consent.

CFI and CA decisions

2. The CFI decided in favour of the Appellant on the grounds of discrimination under the Sex Discrimination Ordinance (Cap. 480) and breach of equality provisions under BL 25, yet held that it was not necessary to rule on the *Wednesbury* unreasonableness ground and the breach of dignity provisions under Article 6(1) of BoR. Accordingly, the decision to require the Appellant to cut his hair ("Decision") was quashed. On the Respondent's appeal, the CA allowed the appeal and set aside the CFI's order.

Questions before the CFA

3. The following questions were before the CFA:

Whether the SO 41-05 issued by the Respondent requiring all male prisoners but not female prisoners to have their hair cut "sufficiently close" (盡量剪短):

(1) constitutes direct discrimination under s. 5(1)(a) of Cap. 480[3] and is therefore unlawful under s. 38 of Cap. 480[4]; and/or

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1 Reported in (2020) 23 HKCFAR 456.

2 SO 41-05 provides that:

"1. The hair of all male convicted prisoners will be kept cut sufficiently close, but not close clipped, for the purposes of health and cleanliness unless the prisoner himself requests it.

2. Upon request, female prisoners will have their hair cut especially before discharge or production in court. Except as recommended by MO, a female prisoner's hair shall not be cut shorter than the style on admission without her consent."

3 S. 5(1)(a) of Cap. 480 provides that: "A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Ordinance if on the ground of her sex he treats her less favourably than he treats or would treat a man". Although this provision refers to discrimination against women, it equally applies to discrimination against men by virtue of s. 6(1) of Cap. 480, which provides that: "Section 5, and the provisions of Parts 3 and 4 relating to sex discrimination against women, shall be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are necessary."

4 S. 38(1) of Cap. 480 provides that: "Subject to subsection (2), without prejudice to the operation of the other provisions of this Part in relation to the Government, it is unlawful for the Government to discriminate against a woman in the performance of its functions or the exercise of its powers." This provision, which is under Part 4 of Cap. 480, equally applies to discrimination against men by virtue of s. 6(1) of Cap. 480.

(2) is inconsistent with BL 25[5] and is therefore unconstitutional.

Four-step approach to sex discrimination cases

4. In order to demonstrate direct discrimination, the CFA held that the Appellant must show that on the ground of his sex, he has been treated less favourably by the Respondent than the Respondent has treated or would treat a female prisoner in similar circumstances. The CFA referred to the "but for" test articulated by Lord Goff of Chieveley in *R v Birmingham City Council, ex p Equal Opportunities Commission* [1989] 1 AC 1155, at 1194A-B and adopted by the CFA in *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459, at 476A-D. The test is an objective, not subjective, one. As Baroness Hale of Richmond enunciated in *R (European Roma Rights) v Prague Immigration Officer* [2004] UKHL 55 ("the *Roma* case"), there is a four-step approach in deciding whether sex discrimination can be made out:

(i) There must be a difference in treatment between the complainant and another real or hypothetical person who is from a different sex group ("the compared person");

(ii) The relevant circumstances between the complainant and the compared person are the same or at least not materially different;

(iii) The treatment accorded to the complainant is less favourable than that accorded to the compared person; and

(iv) The difference in treatment is on the basis of sex.

5. Applying the 4-step approach, the CFA held that there had been differential treatment and the Appellant was comparing himself with female prisoners. Whether there was less favourable treatment under s. 5(1)(a) of Cap. 480 would be the focal point in discrimination cases. With regard to what amounts to "less favourable treatment", Lord Goff of Chieveley in the House of Lords in *R v Birmingham City Council, ex p Equal Opportunities Commission*, above, highlighted the reference to "reasonable grounds" and the relevant test is an objective one. Once a complainant shows difference in treatment, the discriminator will have to refer to the underlying policy objectives to demonstrate that such a difference in treatment does not amount to less favourable treatment. In determining whether there is less favourable treatment, the discriminator will have to show that the difference in treatment is logically and reasonably connected to the underlying policy objectives. The CFA emphasized that the approach to less favourable treatment takes into account the basis on which the relevant decision has been taken as opposed to the motive of the person being complained to make that decision.

6. The CFA noted the Respondent's submission that the Decision is justified by custodial discipline which requires the imposition of reasonable uniformity and conformity in appearance among prison inmates. According to the Respondent, the difference in treatment between male and female inmates reflects the conventional standards of appearance in society and there is as such no less favourable treatment of male prisoners.

7. The CFA agreed that it may be legitimate to refer to societal or conventional standards in certain

[5] BL 25 states that: "All Hong Kong residents shall be equal before the law."

circumstances and referred to *R (On the Application of James Dowsett) v Secretary of State for Justice* [2013] EWHC 687 (Admin) where Silber J held that the practice that male prisoners were subject to searches by both male and female prison officers whereas female prisoners could only be searched by female officers is not discriminatory on the grounds of privacy and decency. Nevertheless, the CFA considered that it is not necessary and wise to define the limits of the factor of conventional standards in determining the aspect of less favourable treatment.

8. The Respondent submitted that when determining discrimination, it is necessary to have regard to the whole context, *i.e.* custodial discipline in prisons, in addition to comparing the length of hair between male and female inmates. This taking into account of the whole is what is involved in the so called package approach. The CFA opined that this package approach is supported by s. 10 of Cap. 480 which states that relevant circumstances should be taken into consideration. The package approach was originated from *Smith v Safeway PLC* [1996] ICR 868 in which the English Court of Appeal ruled against the complainant who was dismissed by a supermarket on account of his refusal to cut his hair on the basis that it was necessary to consider the matter in the context of a dress and appearance code. The CFA reiterated that the package approach ought to be treated as an exercise in putting matters in proper context, applying some common sense as well, so as to enable a proper comparison to be made in order to discover whether less favourable treatment has been accorded to the complainant in the particular aspect about which he or she has complained as being discriminatory. The CFA cited *Department for Work and Pensions v Thompson* [2004] IRLR 348 where the Employment Appeal Tribunal emphasized the need to look at context and held that a male employee who was required to wear a collared shirt where their female counterparts were not did not amount to less favourable treatment and discrimination. However, the CFA remarked that courts have to exercise care when adopting the package approach to ensure that it does not become an exercise of merely comparing features applicable to the complainant with separate features belonging to the compared person. It is always necessary to examine whether the policy or decision does in context result in less favourable treatment. On the assumption that conventional standards are relevant, there has to be some factual basis as opposed to mere assertion or subjective belief to support the conventional standards. Next the CFA asked the question what if asserted conventions or conventional standards involve stereotyping.

9. As the House of Lords in the *Roma* case suggested, stereotyping generally constitutes discriminatory conduct. Each person should be treated as an individual and not assumed to be like members of the group. In *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690, the HKSARG's policy of entry to secondary schools was found to be discriminatory on the basis that girls were assumed to be more academically developed than boys. The CFA, however, acknowledged that there exists a question as to whether conventional standards which reflect stereotyping are appropriate for the purpose of defeating an argument of less favourable treatment, but this case is not an occasion on which these potential difficulties ought to be resolved.

10. In respect of the fourth requirement under the *Roma* case, *i.e.* whether the difference in treatment is on the basis of sex, the CFA highlighted that it is important to distinguish between finding out what caused the discriminatory treatment in question (which is permissible, indeed critical), and looking at justification or motive for the discriminatory treatment (which is not permissible). It is also an inquiry based on substance and not form. This is the approach applied by the House of Lords in *James v Eastleigh Borough Council* [1990] 2 AC 751. There, the House of Lords ruled that the policy of offering free admittance to leisure centres in accordance with the pensionable age for women (which is 60) and men (which is 65) constitutes less favourable treatment to men on the basis of sex but not pensionable age.

Application to the facts

11. Applying the four-stage test in the *Roma* case, the Respondent did not dispute that there is a difference in treatment between male and female prisoners and such a difference is based on sex. It is also accepted by the Respondent that the relevant circumstances between the Appellant and female prisoners for the purpose of hair length are not materially different. The real issue is whether less favourable treatment has been given to male prisoners like the Appellant. The CFA considered that SO 41-05, on the face of it, suggests that male prisoners who are deprived of the choice of hair length are treated less favourably than their female counterparts. Accordingly, the onus is

shifted to the Respondent to show that the difference in treatment does not constitute less favourable treatment.

12. The CFA summarized the Respondent's arguments in the lower courts as follows. At the CFI, the Respondent submitted that SO 41-05 was a preventive operational measure which had the effect of reducing the number of risks which threatened the individual rights of prisoners while in custody. Such risks are (a) the inherent vulnerability of prisoners with long hair in the case of an attack by another inmate involving violence; (b) long hair is used as a potential method of concealing prohibited items which could be used to attack other inmates, to inflict self-harm, or for suicide; (c) the risk of violence associated with gang affiliation; and (d) the risk of using long hair as a readily accessible tool for self-harm and suicide. Importantly, it is the Commissioner's evidence that these risks are significantly higher in the male inmates population than the female inmates population. Hence the hair cutting requirement is not on ground of sex but on prison security and discipline ground. Au J held against the Respondent on the basis of stereotyping in that the various risks involved stereotypes of male prisoners "as a gender as a whole". At the CA, the Respondent placed emphasis on custodial discipline and Lam VP agreed that the conventional hairstyle of male persons in Hong Kong is a short hairstyle and male prisoners are therefore required to wear a similar short hairstyle.

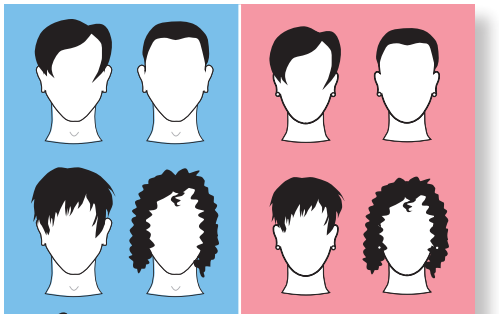
13. On the Appellant's appeal to the CFA, the Respondent maintained its position and argued that there is no less favourable treatment given to male prisoners in the context of custodial discipline. As a matter of custodial discipline, the Respondent submitted that his Department is entitled to impose reasonable uniformity and conformity in appearance among inmates, and in the present case by way of SO 41-05. The Respondent seeks to explain the difference in treatment in SO 41-05 by reference to the underlying conventional standards of appearance in society for men and women. The Respondent argued that there is not any less favourable treatment as far as male prisoners are concerned because the length of hair requirements in the standing order treat men and women in accordance with conventional standards. Accordingly, whether one adopts the item by item approach or the package approach, the Respondent contended that the Appellant had simply not made out a case of less favourable treatment.

14. The CFA rejected the Respondent's argument. Whilst the CFA accepted that custodial discipline is a legitimate factor to be taken into account, it is difficult to see how a difference in treatment regarding the length of hair between male and female prisoners based on asserted conventional standards has any reasonable connection with custodial discipline. The CFA did not accept that male prisoners should be deprived of individual choices while female prisoners have such choice. Without a reasonable connection to the stated objective, policy or reason, the Respondent does not really begin to explain the difference in treatment and why there has not been less favourable treatment.

15. Further, the CFA took the view that the evidence adduced by the Respondent was not sufficient to establish the factual premise that there exist conventional standards for men and women in society in relation to hair length. The evidence available falls short of showing that there are conventional standards for men and women in relation to hair length and that the conventional standard for men is a short one while the standard for women can either be a long or short one. The CFA held that these are matters which the Respondent must bear the burden of proof as opposed to those which the Court may simply take judicial notice. In the absence of satisfactory evidence establishing the conventional standards of hair length for men and women, the Respondent's view on the hair lengths of men and women in society amounts to stereotyping.

Conclusion

16. For the foregoing reasons, the CFA unanimously concluded that the Decision constitutes sex discrimination under Cap. 480. The outcome of the CFA's decision would not have been different had the focus of the analysis been on the breach of equality provisions under BL 25. The Appellant's appeal was allowed.



Kwok Wing Hang v CE in C

FACV Nos. 6, 7, 8 & 9 of 2020 (21 December 2020)[1]

CFA

Background

1. Following an exceptional and sustained outbreak of violent public lawlessness, the CE in C made the Prohibition on Face Covering Regulation ("PFCR"), which came into effect at midnight on 5 October 2019, under s. 2 of the Emergency Regulations Ordinance (Cap. 241). The challenges in these appeals were whether the CE in C was lawfully given power by the LegCo to make the PFCR under Cap. 241, and, if Cap. 241 was constitutional, whether, by applying the proportionality analysis, certain provisions of the PFCR were a proportionate restriction of protected rights.

CFI and CA proceedings

2. The Applicants ("the Appellants") advanced the following grounds at the lower courts:

(i) Cap. 241 is an unconstitutional delegation of general legislative power by the LegCo to the CE in C contrary to the Basic Law ("Ground 1");

(ii) Cap. 241, being inconsistent with s. 5 of the Hong Kong Bill of Rights Ordinance (Cap. 383),[2] was impliedly repealed by s. 3(2) of Cap. 383[3] or Article 4 of the ICCPR[4] ("Ground 2");

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1 Reported in (2020) 23 HKCFAR 518.

2 S. 5 of Cap. 383 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."

3 S. 3(2) of Cap. 383 was not adopted as part of the laws of the HKSAR under the Decision of the NPCSC dated 23 February 1997. The provision prior to 1 July 1997 provided that: "All pre-existing legislation that does not admit of a construction consistent with [Cap. 383] is, to the extent of the inconsistency, repealed."

4 Article 4 of ICCPR provides that:

"Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

(iii) Cap. 241 infringes the "prescribed by law" requirement under BL 39[5] ("Ground 3");

(iv) The PFCR is *ultra vires* since the adoption of measures which infringe fundamental rights should be precluded other than in circumstances amounting to emergency situations, *i.e.* the principle of legality ground ("Ground 4");

(v) S. 3 of the PFCR[6] constitutes a disproportionate restriction of various rights and freedoms under BoR and Basic Law ("Ground 5A"); and

(vi) S. 5 of the PFCR[7] constitutes a disproportionate restriction of various rights and freedoms under BoR and Basic Law ("Ground 5B").

3. The CFI ruled in favour of the Appellants on Grounds 1, 5A (in respect of ss. 3(1)(b), (c) and (d) of the PFCR) and 5B. At the CA, the Respondents sought to challenge the decisions of the CFI judgment on these grounds. The Appellants sought to challenge the CFI's rejection of Grounds 2 and 3 by way of cross-appeal and affirm the CFI judgment on Ground 4 by way of respondent's notice.

4. The CA allowed the Respondents' appeal on Ground 1 and held that Cap. 241 was compatible with the Basic Law. The appeal under Ground 5A was partially allowed to the extent that the CFI judgment that s. 3(1)(b) of the PFCR is disproportionate was set aside. The Respondents' appeal on Ground 5B was dismissed. On the other hand, the Appellants' challenges on Grounds 2, 3 and 4 were all dismissed by the CA.

5. The Respondent did not seek leave to appeal against the CA's decision in relation to Ground 5B. The CA granted leave to the Appellants to appeal to the CFA on Grounds 1, 2, 3, 4 and 5A (in respect of s. 3(1)(b) of the PFCR), and leave to the Respondent on Ground 5A (in respect of ss. 3(1)(c) and (d)).

Question 1: the constitutionality issues (Grounds 1 to 4)

(a) Background of Cap. 241

6. The CFA addressed the questions raised as to the constitutionality of Cap. 241 and the power

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5 BL 39, insofar as relevant, provides that:

"… The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

6 S. 3 of the PFCR stipulates that:

"3. Use of facial covering in certain circumstances is an offence

(1) A person must not use any facial covering that is likely to prevent identification while the person is at—

(a) an unlawful assembly (whether or not the assembly is a riot within the meaning of s. 19 of Cap. 245);

(b) an unauthorized assembly;

(c) a public meeting that—

(i) takes place under s. 7(1) of Cap. 245; and

(ii) does not fall within paragraph (a) or (b); or

(d) a public procession that—

(i) takes place under s. 13(1) of Cap. 245; and

(ii) does not fall within paragraph (a) or (b).

(2) A person who contravenes subs. (1) commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 1 year."

7 S. 5 of the PFCR stipulates that:

"5. Power to require removal in public place of facial covering

(1) This section applies in relation to a person in a public place who is using a facial covering that a police officer reasonably believes is likely to prevent identification.

(2) The police officer may—

(a) stop the person and require the person to remove the facial covering to enable the officer to verify the identity of the person; and

(b) if the person fails to comply with a requirement under paragraph (a)—remove the facial covering.

(3) A person who fails to comply with a requirement under subsection (2)(a) commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months."

to make regulations thereunder anterior to the considerations of whether ss. 3(1)(b), 3(1)(c) and 3(1)(d) of the PFCR satisfy the proportionality test.

7. The CFA noted that the two legal challenges against the *vires* of Cap. 241 under the pre-1997 constitutional setup[8] were both unsuccessful. Upon the establishment of the HKSAR, Cap. 241 was adopted as part of the laws of the HKSAR, save that the CE in C replaced the Governor in Council as the regulation making authority under the Ordinance.

(b) CFI and CA decisions

8. The CFA summarized the diverging positions of the CFI and CA on the constitutionality of Cap. 241. The CFI took the view that the constitutional order established by the Basic Law after 1997 vests the general power of legislation in the LegCo only. Cap. 241 attempts what cannot be done under the Basic Law, namely, to delegate the LegCo's general legislative power to the CE in C to enact what is in the nature of primary legislation. In contrast, the CA, relying on the theme of continuity, concluded that Cap. 241 does not confer general legislative power to enact primary legislation on the CE in C and accordingly, Cap. 241 does not infringe the constitutional set-up under the Basic Law.

9. The CFA recognized that the legislative power that the HKSAR may exercise pursuant to BL 2 is exercisable by the LegCo under BL 66. In particular, BL 73(1) mandates that the LegCo shall exercise the power and function "to enact, amend or repeal laws in accordance with the provisions of [the Basic Law] and legal procedures". Nevertheless, the CFA made clear that this does not mean that the CE and the HKSARG have no role to play in the legislative process of the HKSAR. BL 62(5) provides that the HKSARG has the power and function "to draft and introduce bills, motions and subordinate legislation". Moreover, BL 56(2) stipulates that the CE "shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council". This illustrates the constitutional set-up in Hong Kong in which LegCo can give another person or body the power to draft and introduce subordinate legislation to the LegCo.

(c) The impermissible delegation argument

10. The CFA pointed out that the only real issue is whether Cap. 241 is a piece of legislation which seeks to delegate general legislative power to the CE in C, or whether it merely authorizes the CE in C to make subordinate legislation in circumstances of emergency and public danger.

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[8] *R v To Lam Sin* (1952) 36 HKLR 1; *R v Li Bun & Others* [1957] HKLR 89.

11. While accepting the Appellants' contentions that subordinate legislation cannot go outside the confines of the primary legislation enacted by the LegCo, that subordinate legislation is subordinate to primary legislation, and that subordinate legislation does not introduce major changes to the law, the CFA referred to *Bennion on Statutory Interpretation* ("*Bennion*") which sets out necessary or desirable situations for a legislature to delegate legislative power. In particular, *Bennion* points out that where a sudden emergency arises, it may be essential to give the executive wide and flexible legislative powers to deal with the emergency. Referring to *R v Li Bun*, above, the CFA agreed with the CA that in circumstances of emergency or public danger, the making of emergency regulations requires the delegation of wide and flexible legislative power to the executive.

12. With regard to the Appellants' challenge that Cap. 241 constitutes an impermissible delegation of general legislative power where it confers the power to make any regulations on the CE in C in such circumstances as he or she considers desirable in the public interest, the CFA opined that the power of the CE in C to enact emergency regulations is constrained by the internal requirements of Cap. 241, the courts, the Basic Law and the LegCo. First, the power to make emergency regulations may only be invoked if there exists a reasonable occasion of emergency or public danger under s. 2(1) of Cap. 241.[9] Although a margin of discretion is accorded to the CE in C in determining whether an occasion of emergency or public danger exists, a requirement of good faith is imposed on the CE in C, whose decisions are judicially reviewable by courts.

13. Second, judicial control over the power to make emergency regulations requires that the conclusion as to the existence of an occasion of emergency or public danger is not *Wednesbury* unreasonable. The regulations must also be made only in the public interest and for the purpose of dealing with the emergency or public danger.

14. Third, just like any other subsidiary legislation, regulations made under Cap. 241 are subject to scrutiny and control of the LegCo by way of the negative vetting procedures under s. 34 of the Interpretation and General Clauses Ordinance (Cap. 1). BL 73(1) vests the legislative power of the HKSAR in the LegCo and s. 2A(1) of Cap. 1 requires all pre-1997 laws to be construed in a way not to contravene the Basic Law. S. 2A(1) operates to mandate the court to adopt a construction which does not contravene BL 73(1). S. 2(3) of Cap. 241[10] does not deprive the LegCo of the power to amend or repeal the regulations made by the CE in C under Cap. 241.

15. Fourth, the power of the CE in C to make regulations under Cap. 241 is subject to the Basic Law. BL 39 requires that all restrictions of fundamental rights under Cap. 241 must satisfy the dual requirements of "prescribed by law" and proportionality. S. 5 of Cap. 383 which is based on Article 4 of the ICCPR provides for the derogation from the fundamental rights in times of public emergency subject to specified conditions. Any regulations made under Cap. 241 may not restrict rights guaranteed under the Basic Law, including the right of access to the courts, unless the restriction can be justified.

(d) Other arguments

16. The CFA dismissed the Appellants' remaining submissions challenging the constitutionality of Cap. 241. On the theme of continuity, the CFA did not find it necessary to labour on the theme. The Court noted that Cap. 241 has been in our statute book for almost 100 years and had been resorted to on many occasions before 1997. It has survived two constitutional challenges prior to the transfer of sovereignty and it has not been

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[9] S. 2(1) of Cap. 241 provides that:
"On any occasion which the Chief Executive in Council may consider to be an occasion of emergency or public danger he may make any regulations whatsoever which he may consider desirable in the public interest."

[10] S. 2(3) of Cap. 241 reads:
"Any regulations made under the provisions of this section shall continue in force until repealed by order of the Chief Executive in Council."

declared by the NPCSC to be in contravention of the Basic Law pursuant to BL 160(1). The CFA did not see Cap. 241 as being incompatible with the post-1997 constitutional design under the Basic Law. Regarding the Appellants' principle of legality argument that the legislature may not confer an unfettered legislative power on the CE in C, the CFA took the view that it was no different from the Appellants' rejected argument on impermissible delegation. In relation to the implied repeal ground, the CFA held that Cap. 241 and any regulations made thereunder must be subject to s. 5 of Cap. 383 concerning derogation of fundamental rights in times of public emergencies. Therefore, there is no question of any implied repeal of Cap. 241 for being inconsistent with s. 3(2) of Cap. 383. Further, the CFA considered that the prescribed by law requirement under BL 39(2) is not directed at empowering legislation such as Cap. 241, and the protection is achievable by subjecting any regulations made under Cap. 241 seeking to restrict protected rights to the prescribed by law requirement. In view of the foregoing reasons, the Appellants' constitutional challenge against Cap. 241 was rejected by the CFA.

Question 2: the proportionality issues (Ground 5A)

17. The CFA agreed that the validity of restrictions of any protected rights under the PFCR will depend on the provision satisfying the four-step proportionality test laid down in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372. The Respondents had adduced evidence to demonstrate the dire situation leading to the making of the PFCR which was not challenged by the Appellants. Nor was it disputed that, if Cap. 241 was constitutional, there was a proper basis for the CE in C to form the opinion that there was an occasion of public danger.

18. The CFA emphasized in its judgment the scale and extent of the public order events from June 2019 to October 2019, the alarming breakdown of law and order as well as escalating violence on 29 September and 1 October 2019 in particular, and the "black blocs" tactics adopted by protesters for concealing their identities and evading arrest and prosecution. The CFA further noted the propensity for peaceful assemblies to degenerate into unlawful public assemblies and even violence, the trend of an increasing number of young persons and students taking part in unlawful assemblies and riots and engaging in unlawful or criminal acts of violence and vandalism. In addition, the CFA took into consideration the trend that some innocent bystanders and law-abiding passersby who voiced opposition to the damage and inconvenience were subjected to violent reprisals by some protesters. For example, one person was set on fire and another killed when struck by a hard object thrown by protesters. The Respondents filed further evidence to illustrate the deteriorating situation of public disorder from October to November 2019 despite the making of the PFCR. The CFA acknowledged the

continued escalation of violence and vandalism and the consequential need to apply appropriate force for dispersal and arrest of law-breaking persons.

19. The CFA agreed that the restrictions imposed by the PFCR on the wearing of facial coverings at particular types of public gatherings affect the enjoyment of the freedom of assembly, procession and demonstration under Article 17 of BoR and BL 27, the freedom of expression under Article 16 of BoR and BL 27, and the right to privacy under Article 14 of BoR. None of the above rights was absolute. The restrictions need to be examined by reference to the four steps of the proportionality test.

(a) Legitimate aim

20. Having considered the Respondents' case that the PFCR pursues a two-fold aim: (1) to deter and eliminate the emboldening effect and (2) to facilitate law enforcement, apprehension and prosecution of law breakers, the CFA agreed that the aims of the Government in making the PFCR are undeniably legitimate. The CFA held that all restrictions under ss. 3(1)(b), (c) and (d) of the PFCR on the use of facial coverings pursue the same legitimate aims.

(b) Rational connection

21. In line with the CFI and CA rulings, the CFA agreed that whether a measure is rationally connected to an identified aim is largely "a matter of logic and common sense". By prohibiting the use of facial coverings at public events the Government would self-evidently directly address both unlawful behaviour itself and the emboldening effect the wearing of mask has on violent and peaceful protestors alike. It would obviously assist in the identification of those who break the law and facilitate their apprehension and prosecution.

(c) Proportionality

22. The issue at this stage concerns the Appellants' appeal against the CA's ruling that s. 3(1)(b) of the PFCR (*i.e.* ban on facial coverings at an unauthorized assembly[11]) is proportionate and the Respondents' appeal against the CA's ruling that ss. 3(1)(c) and (d) of the PCFR (*i.e.* ban on facial coverings at a public meeting[12] and a public procession[13] respectively) are not proportionate. The CFA took the view that the cardinal importance of the freedom of speech and peaceful assembly set out in *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229 at [1] and *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at [38] and [39] hinges on their peaceful exercise.

23. The CFA observed that the common factor in the events envisaged under ss. 3(1)(b), (c) and (d) of the PCFR is that they are all gatherings, public meetings and public processions which the Commissioner of Police is aware and to which he has not objected, or which are in contravention of the statutory conditions (in s. 7 or 13 of Cap. 245) or involve refusal or wilful neglect to obey an order issued by the Police (under s. 6 or 17(3) of Cap. 245). The distinction between these events is that some breach of condition will have already occurred in the case of unauthorized assemblies, whereas public meetings and public processions will take place in accordance with any conditions duly imposed by the Police under Cap. 245.

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[11] S. 17A(2) of the Public Order Ordinance (Cap. 245) provides that:

"Where –

(a) any public meeting or public procession takes place in contravention of section 7 or 13;

(b) 3 or more persons taking part in or forming part of a public gathering refuse or wilfully neglect to obey an order given or issued under section 6; or

(c) 3 or more persons taking part in or forming part of a public meeting, public procession or public gathering, or other meeting, procession or gathering of persons refuse or wilfully neglect to obey an order given or issued under section 17(3),

the public meeting, public procession or public gathering, or other meeting, procession or gathering of persons, as the case may be, shall be an unauthorized assembly."

[12] S. 2(1) of Cap. 245 provides that:

"public meeting (公眾集會) means any meeting held or to be held in a public place;"

[13] S. 2(1) of Cap. 245 provides that:

"public procession (公眾遊行) means any procession in, to or from a public place;"

24. The Appellants submitted that the prohibition under s. 3(1)(b) of the PCFR was too wide as the outbreak of isolated violence during an unauthorized assembly did not deprive the demonstration of its peaceful characteristic. The CFA considered the European Court of Human Rights decision in *Kudrevičius v Lithuania* (2016) 62 EHRR 34 and accepted that a peaceful demonstration does not lose its character as such simply because of an outbreak of isolated violence. The question, however, is one of degree and will be highly fact sensitive. The fundamental flaw of the Appellants' argument is that the PCFR's legitimate aims are not limited to deter violence and crime but also to promote effective law enforcement. The events of 2019 in Hong Kong show that large demonstrations are fluid and can be difficult to control and police. What may start as a peaceful demonstration may readily degenerate into a serious public order incident involving many people. The preventative and deterrent nature of the PFCR is crucial. Accordingly, the CFA agreed with the judgment of the CA in holding that the ambit of s. 3(1)(b) is not disproportionate in deterring violence and crime and in promoting effective law enforcement.

25. As regards public meetings and public processions under ss. 3(1)(c) and 3(1)(d) respectively, the CFA reiterated that the preventive and deterrent nature of the PFCR is crucial and it is proportionate for the PFCR to prohibit the wearing of facial coverings which are used to conceal identities of law breakers and gain an emboldening effect at a public meeting or public procession. In particular, the CFA pointed out the errors in the reasoning of the CA which opined that there cannot be serious public order or safety issues if public meetings or processions are conducted in compliance with the notice requirements under Cap. 245. The CFA took the view that given the fluid nature of public meetings or processions, there is no simple dichotomy between peaceful and violent protesters. The PFCR, intended to be a preventive and deterrent regulation, should not be confined to the situation where an offence under Cap. 245 has been shown to be established. Turning to the Appellants' submission that innocent bystanders or passersby who are "at" the relevant public gathering will be caught by s. 3 of the PFCR, the CFA indicated that persons wearing a mask for medical or other legitimate reasons whose presence in the public gathering is wholly fortuitous may rely on the defence of reasonable excuse under s. 4 of the PFCR. More importantly, the CFA considered that the wearing of a facial covering, whilst it may be a legitimate form of expression, does not lie at the heart of the right to peaceful assembly. It is still possible to demonstrate peacefully without wearing a facial covering.

26. With reference to *Austin v United Kingdom* (2012) 55 EHRR 14, *Kudrevičius v Lithuania*, above, and the United Nations Human Rights Committee's

General Comment No. 37, the CFA noted that the anonymity of participants in public assemblies should be allowed unless there are similarly compelling reasons. Yet, the CFA distinguished the situation in Hong Kong from that of *Kudrevičius v Lithuania*. The CFA considered that in the context of the degeneration of law and order, as well as ever increasing violence and lawlessness, the prohibition on facial coverings merely constitutes a relatively minor incursion into the rights of the Appellants. Applying the higher "no more than necessary" threshold of the proportionality test, the CFA held that the fact that there might have been some other means of achieving a suitably defined set of circumstances in which to impose a prohibition on the wearing of facial coverings does not affect the conclusion that the PFCR is proportionate.

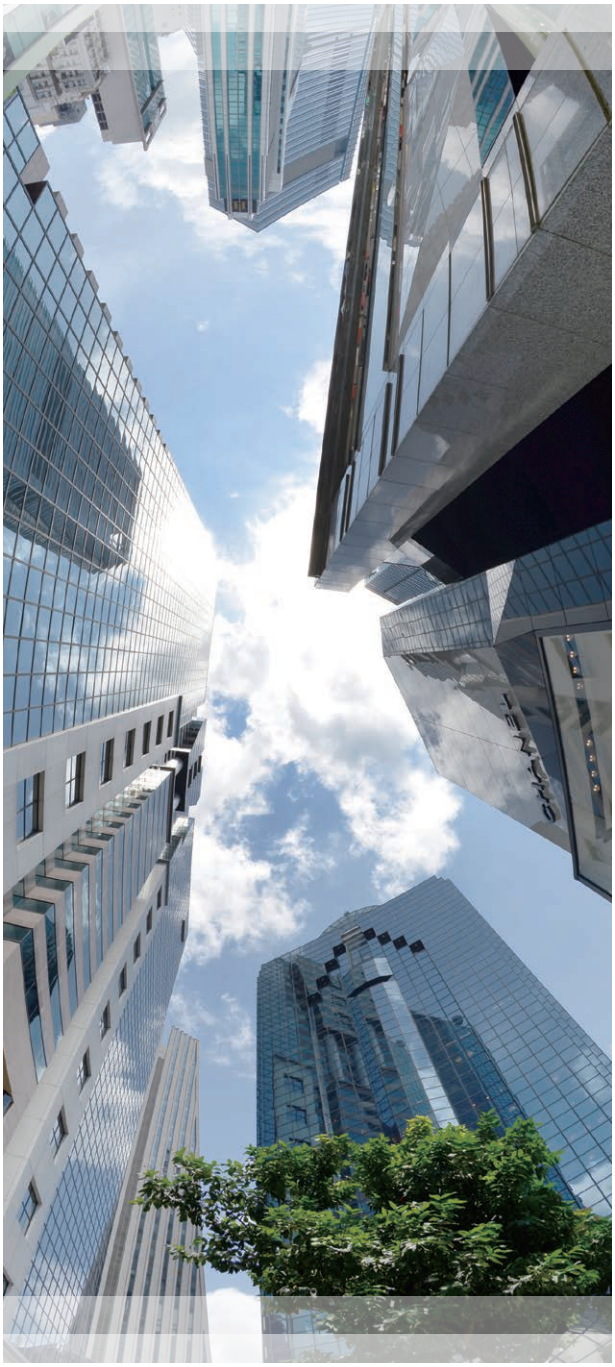
27. The CFA further held that the fact that almost every person in Hong Kong was wearing a mask in public place at the time of judgment due to COVID-19 does not affect the Court's decision on the proportionality of the PFCR. The proportionality of the PFCR has to be judged by reference to the circumstances pertaining in October 2019 when the prohibition on facial coverings was made. It is irrelevant to that question that subsequent events have changed the legal context.

(d) Striking a fair balance

28. With reference to the fourth step of the proportionality analysis, the CFA considered that the prohibition on facial covering was tailored to the specific public gatherings under s. 3 of the PFCR and the Respondents did not address the legitimate aims to deter violence and to promote effective law enforcement by casting the net of the prohibition on facial coverings as widely as possible. The CFA considered that the situation on the streets in Hong Kong had become dire at the time when the PFCR was made to address the ongoing situation of violence and unlawfulness. Some people were deterred from demonstrating peacefully in view of the ongoing violence on the streets. There is a clear societal benefit in the PFCR when it is weighed against the limited extent of encroachment into the protected rights in question.

Conclusion

29. In light of the above, the CFA unanimously dismissed the Appellants' appeal on Grounds 1, 2, 3, 4 and 5A, and allowed the Respondents' appeal on Ground 5A.



HKSAR v Lai Chee Ying

FACC No. 1 of 2021 (9 February 2021)[1]

CFA

Background

1. On 30 June 2020, pursuant to BL 18(2) and (3), the NPCSC listed the "Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region" ("NSL") in Annex III to the Basic Law to be applied locally by way of promulgation by the HKSAR. The NSL was accordingly promulgated by the CE who gave notice that the NSL would apply in the HKSAR as from 11pm on the same date.

2. On 12 December 2020, the Respondent was charged with one count of "collusion with a foreign country or with external elements to endanger national security" contrary to Article 29(4) of the NSL.

3. The Chief Magistrate refused bail and remanded the Respondent in custody. On 23 December 2020, on the Respondent's application for a review of the magistrate's refusal of bail, a CFI judge ("Judge") granted him bail pursuant to s. 9J of the Criminal Procedure Ordinance (Cap. 221) subject to certain undertakings offered by the Respondent and other conditions imposed by the Judge.

4. On 31 December 2020, the prosecution sought leave to appeal to the CFA putting forward two questions as being of the requisite importance. The first was whether the CFA had jurisdiction to entertain an appeal against the grant or refusal of bail below. The Appeal Committee of the CFA refused to grant leave on this ground. However, leave was granted on the second question which sought the CFA's ruling on the correct construction of Article 42(2) of the NSL ("NSL 42(2)").[2]

The formulation and application of the NSL to the HKSAR

5. The CFA held that the determination of the meaning and effect of NSL 42(2) required the provision to be examined in the light of the context and purpose of the NSL as a whole, taking into account the constitutional basis on which the NSL is applied in the HKSAR. The CFA observed that since the PRC's resumption of the exercise of sovereignty over Hong Kong on 1 July 1997, the HKSAR has been constitutionally obliged to enact a law relating to national security under BL 23. Although a draft law was prepared after widespread consultation by the HKSARG in 2003, it was withdrawn in the face of political opposition and no such law has been locally enacted despite the passage of some 23 years. In the wake of serious and prolonged disturbances to public order and challenges to the authority of the HKSARG and CPG, the Central Authorities considered the absence of national security legislation unacceptable and decided to take such legislation into their own hands.

6. The CFA held that given the special status of the NSL as a national law applied under BL 18(2) and (3), and given the express reference in NSL 1[3] to the process

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1 Reported at (2021) 24 HKCFAR 33.

2 NSL 42(2) provides that:

"No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security."

3 NSL 1 states that:

"This Law is enacted, in accordance with the Constitution of the People's Republic of China, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, and the Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for Safeguarding National Security in the Hong Kong Special Administrative Region, for the purpose of:

- ensuring the resolute, full and faithful implementation of the policy of One Country, Two Systems under which the people of Hong Kong administer Hong Kong with a high degree of autonomy;
- safeguarding national security;
- preventing, suppressing and imposing punishment for the offences of secession, subversion, organization and perpetration of terrorist activities, and collusion with a foreign country or with external elements to endanger national security in relation to the Hong Kong Special Administrative Region;
- maintaining prosperity and stability of the Hong Kong Special Administrative Region; and
- protecting the lawful rights and interests of the residents of the Hong Kong Special Administrative Region."

of formulating and applying the NSL to the HKSAR, the Explanations and Decisions made in proceedings of the NPC and the NPCSC regarding promulgation of the NSL as a law of the HKSAR may be taken into account as extrinsic materials relevant to consideration of the context and purpose of the NSL.

The NSL

7. The CFA held that in addition to NSL 1, NSL 3,[4] 4[5] and 5[6] are of immediate relevance to the construction of NSL 42. In particular, the CFA ruled that while it is evident that the legislative intention is for the NSL to operate in tandem with the laws of the HKSAR, seeking "convergence, compatibility and complementarity" with local laws, NSL 62[7] provides for possible inconsistencies, giving priority to NSL provisions in such cases.

Jurisdiction

8. The CFA held that the legislative acts of the NPC and NPCSC leading to the promulgation of the NSL as a law of the HKSAR in accordance with BL 18(2)and (3) and the procedure therein, were done on the footing that safeguarding national security is a matter outside the limits of the HKSAR's autonomy and within the purview of the Central Authorities, the CPG having an overarching responsibility for national security affairs relating to the HKSAR. Such acts are not subject to constitutional review by the Court on the basis of any alleged incompatibility as between the NSL and the Basic Law or the ICCPR as applied to Hong Kong.

Construction of NSL 42(2)

9. The CFA held that NSL 41[8] and 42 expressly envisage the granting of bail in cases involving offences of endangering national security. The CFA ruled that NSL 42(2) creates a specific exception to the rules and principles governing the grant and refusal of bail in Hong Kong, and imports a stringent threshold requirement for bail applications. The specific exception in NSL 42(2) is intended to operate in tandem with constitutional rights and freedoms, and the human rights and the rule of law principles affirmed by NSL 4 and NSL 5, as well as with the general procedural rules made applicable by NSL 41 and NSL 42, as a coherent whole.

10. In applying NSL 42(2) when dealing with bail applications in cases involving offences endangering national security, the CFA held that the judge must first decide whether he or she "has sufficient grounds

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4 NSL 3 provides that:

"The Central People's Government has an overarching responsibility for national security affairs relating to the Hong Kong Special Administrative Region.

It is the duty of the Hong Kong Special Administrative Region under the Constitution to safeguard national security and the Region shall perform the duty accordingly.

The executive authorities, legislature and judiciary of the Region shall effectively prevent, suppress and impose punishment for any act or activity endangering national security in accordance with this Law and other relevant laws."

5 NSL 4 provides that:

"Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region. The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law of the Hong Kong Special Administrative Region and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong, shall be protected in accordance with the law."

6 NSL 5 provides that:

"The principle of the rule of law shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security. A person who commits an act which constitutes an offence under the law shall be convicted and punished in accordance with the law. No one shall be convicted and punished for an act which does not constitute an offence under the law.

A person is presumed innocent until convicted by a judicial body. The right to defend himself or herself and other rights in judicial proceedings that a criminal suspect, defendant, and other parties in judicial proceedings are entitled to under the law shall be protected. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings."

7 NSL 62 provides that:

"This Law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law."

8 NSL 41 materially provides that:

"(1) This Law and the laws of the Hong Kong Special Administrative Region shall apply to procedural matters, including those related to criminal investigation, prosecution, trial, and execution of penalty, in respect of cases concerning offence endangering national security over which the Region exercises jurisdiction.

(2) No prosecution shall be instituted in respect of an offence endangering national security without the written consent of the Secretary for Justice. This provision shall not prejudice the arrest and detention of a person who is suspected of having committed the offence or the application for bail by the person in accordance with the law. ..."

for believing that the criminal suspect or defendant will not continue to commit acts endangering national security". In doing so:

(i) The judge should consider everything that appears to the court to be relevant to making that decision, including the possible imposition of appropriate bail conditions and materials which would not be admissible as evidence at the trial. It may in particular cases be helpful to have regard to factors such as those set out in s. 9G(2) of Cap. 221[9] in connection with the "sufficient grounds" question.

(ii) "Continue" may be understood to involve recognising that the defendant is alleged to have committed an offence or offences involving acts endangering national security and NSL 42(2) requires assurance that he or she will not commit acts of such a nature if bail is granted. The judge should take the reference to "acts endangering national security" to mean acts of that nature capable of constituting an offence under the NSL or the laws of the HKSAR safeguarding national security.

(iii) The CFA held that the grant or refusal of bail under our laws does not involve the application of a burden of proof. The judge should regard the NSL 42(2) "sufficient grounds" question as a matter for the court's evaluation and judgment and not as involving the application of a burden of proof.

11. The CFA held that if, having taken into account all relevant materials, the judge concludes that he or she does not have sufficient grounds for believing that the accused will not continue to commit acts endangering national security, bail must be refused. If, on the other hand, the judge concludes that taking all relevant materials into account, he or she does have such sufficient grounds, the court should proceed to consider all other matters relevant to the grant or refusal of bail, applying the presumption in favour of bail. This includes consideration of whether there are substantial grounds for believing that the accused would fail to surrender to custody, or commit an offence (not limited to national security offences) while on bail, or interfere with a witness or pervert or obstruct the course of justice. Consideration should also be given to whether conditions aimed at securing that such violations will not occur ought to be imposed.

The Judge's decision

12. The CFA held that the Judge had elided the NSL 42(2) question with discretionary considerations under s. 9G of Cap. 221 in his ruling granting bail to the respondent. The Judge had applied an erroneous line of reasoning and his approach was clearly inconsistent with the Court's analysis in this judgment and could not be supported. The CFA held that the Judge had misconstrued NSL 42(2) and misapprehended the nature and effect of the threshold requirement created. The CFA held that the Judge had never made a proper assessment under NSL 42(2).

Conclusion

13. The appeal was accordingly allowed and the Judge's decision to grant the respondent bail was set aside.

[9] The factors set out in s. 9G(2) of Cap. 221 are:
"(a) the nature and seriousness of the alleged offence and, in the event of conviction, the manner in which the accused person is likely to be dealt with;
(b) the behaviour, demeanour and conduct of the accused person;
(c) the background, associations, employment, occupation, home environment, community ties and financial position of the accused person;
(d) the health, physical and mental condition and age of the accused person;
(e) the history of any previous admissions to bail of the accused person;
(f) the character, antecedents and previous convictions, if any, of the accused person;
(g) the nature and weight of the evidence of the commission of the alleged offence by the accused person;
(h) any other thing that appears to the court to be relevant."