Kwok Cheuk Kin and Others v Secretary for Justice and Others

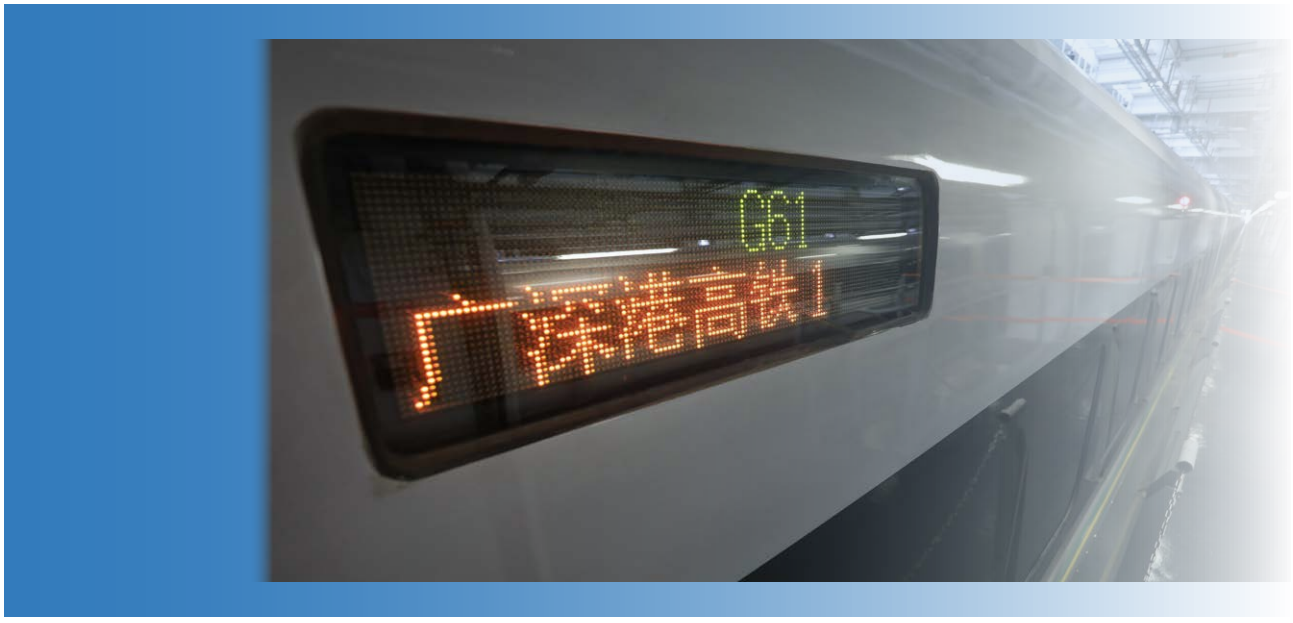
CACV Nos. 8, 10, 87 & 88 of 2019 (11 June 2021)[1]

CA

1. These appeals concern the constitutionality of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Cap. 632). The Guangzhou-Shenzhen-Hong Kong Express Rail Link ("XRL") is a high-speed rail system linking Hong Kong with Guangzhou. The Hong Kong Section of the XRL is a 26-kilometre long underground railway running from the boundary at Huanggang to the West Kowloon Station ("WKS"), connecting Hong Kong with the national high-speed rail network in the Mainland.

2. Within the WKS, a co-location arrangement of customs, immigration and quarantine clearance procedures ("CIQ") has been put in place by the establishment of the Mainland Port Area ("MPA") in which passengers can complete the respective CIQ required by the HKSARG and the Mainland successively in one place ("Co-location Arrangement").

3. The implementation of the Co-location Arrangement followed the "Three-step Process" consisting of (i) an agreement on the co-location arrangement signed between the Mainland and the HKSARG as co-parties on 18 November 2017 ("Co-operation Arrangement"); (ii) the decision by the NPCSC made on 27 December 2017 ("NPCSC Decision") approving the Co-operation Arrangement as being consistent with both the Constitution and the Basic Law; and (iii) the HKSARG introducing and the LegCo enacting Cap. 632 to give effect to the Co-operation Arrangement. Cap. 632 was gazetted on 22 June 2018 and came into operation on 4 September 2018.



[1] Reported at [2021] 3 HKLRD 140.

4. S. 6 of Cap. 632 provides that except for 6 reserved matters, the MPA is to be regarded as an area lying outside Hong Kong but within the Mainland for the purposes of (i) the application of Mainland laws (over non-reserved matters) and Hong Kong laws (over the 6 reserved matters) in the MPA; and (ii) delineation of jurisdiction (including jurisdiction of the courts) in the MPA. The XRL commenced operation on 23 September 2018.

5. The Applicants challenged the constitutionality of Cap. 632 on various grounds including that the application of Mainland laws in the MPA was in violation of BL 18 and BL 19 and contravened the "one country, two systems" principle underlying the Basic Law. The CFI dismissed the application for judicial review. The Applicants appealed to the CA.

Grounds of Appeal

6. The major grounds of appeal are as follows:-

i. The CFI erred in relying on or placing excessive reliance on the principle that the Basic Law should be treated as a "living instrument". ("Ground 1")

ii. The CFI erred in taking into account the NPCSC Decision and/or finding it to be highly persuasive. ("Ground 2")

iii. The CFI erred in finding that Cap. 632 is consistent with the Basic Law, contrary to BL 18 and BL 19 and the basic purposes and policies of the Basic Law. ("Ground 3")

iv. The CFI erred in finding that the establishment of the MPA in the WKS is itself a manifestation of the exercise of Hong Kong's high degree of autonomy and recognition of the two distinct and separate systems being practised in Hong Kong and the Mainland. ("Ground 4")

Core Issue

7. The CA formulated the core issue before the court as follows:

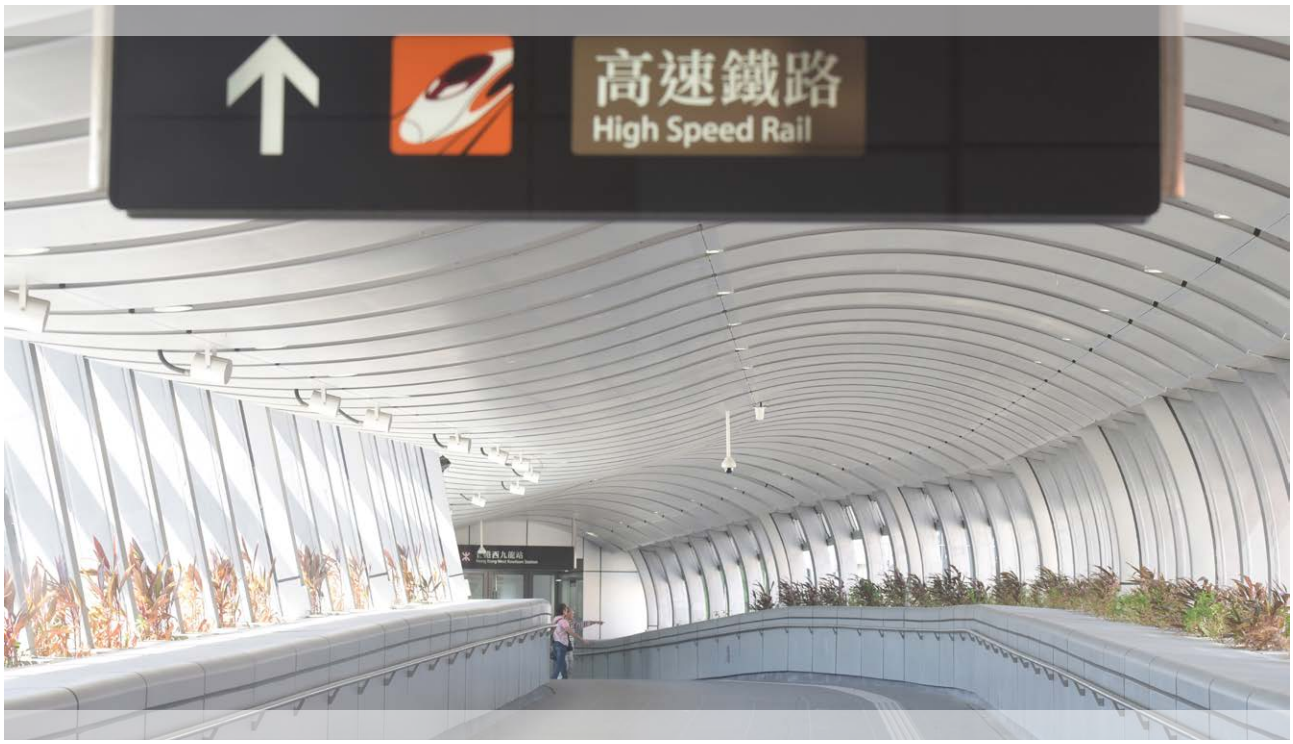
> "Whether except for the reserved matters as defined, in deeming the [MPA] at the [WKS] as an area lying outside Hong Kong but lying within the Mainland for the purpose of applying the Mainland law and the delineation of jurisdiction (including jurisdiction of the courts) over the [MPA], the Ordinance contravenes BL 18 and BL 19, thereby infringing the basic policies of establishing the HKSAR under the "one country, two systems" principle; and diminishes the high degree of autonomy enjoyed by the HKSAR."

Ground 1

8. The CA held that, as a facet of purposive construction, the Basic Law was a living instrument given its unique characteristics of a constitutional document. The Basic Law was drafted with an eye to the future. Whilst the Basic Law's function was to provide a continuing constitutional framework for the maintenance of the Hong Kong system under the "one country, two systems" principle, it did not mean stagnation. The Hong Kong system should continue to develop within the confines of the Basic Law to suit the contemporaneous needs and circumstances of Hong Kong's society.

9. The courts must approach the Basic Law as a living instrument in determining the constitutionality of Cap. 632, which was a novel matter not envisaged when the Basic Law was promulgated. In doing so, the courts were still guided and bound by the purpose of the Basic Law, the relevant articles, and its language in light of its context.

10. The fact that the Co-location Arrangement was beneficial to the overall interests of Hong Kong was a relevant factor in determining whether it was prohibited by the Basic Law. The CA observed that CFI Judge had in mind the primary purpose of the Basic Law, namely, to maintain and preserve the



Hong Kong distinct system under the "one country, two systems" principle. It was abundantly clear that the CFI Judge did not overly rely on the concept of living instrument as complained. Ground 1 was rejected accordingly.

Ground 2

11. It was common ground that the Co-operation Arrangement lay squarely at the interface between the Mainland system and the Hong Kong system. The Applicants' complaint was that Cap. 632 stroke at the very heart of the constitutional order of the HKSAR as it offended BL 18 and BL 19, thereby infringing the "one country, two systems" principle and undermining the high degree of autonomy of the HKSAR.

12. The CA held that the "one country, two systems" principle was underpinned by the imperative that the Mainland system and the Hong Kong system, though kept separate and distinct under the Basic Law, were within one country and one national constitutional order. There were interfaces where the two systems met and interacted within the constitutional framework set by the Constitution and the Basic Law. The CA identified four mechanisms in the Constitution and the Basic Law to regulate their interactions and to ensure that any subject matter lying at the interface conforms to both systems. [2]

13. The CA accepted the evidence of the Mainland law expert engaged by the Respondents and held that the NPCSC Decision was squarely at the interface of the two systems. It addressed specifically the question of the consistency of the Co-operation Arrangement with the Basic Law and had legal effect and was binding on governmental authorities in the Mainland. As a matter of the Mainland law, the NPCSC Decision was also binding on the HKSAR, including the Hong Kong courts, because (i) the NPCSC exercised the will of the State, (ii) the NPCSC had the power to supervise the implementation of the Constitution, and (iii) the NPCSC was an organ of the sovereign body which authorized the establishment of the HKSAR and its governmental authorities.

[2] The four mechanisms identified by the CA were: (i) a decision made by the NPCSC; (ii) the mechanism under BL 17(3) for returning of law; (iii) application of national laws under Annex III of the Basic Law; and (iv) an interpretation made by the NPCSC under BL 158.

14. As to whether the NPCSC Decision was binding under Hong Kong law, one may argue that under both the Constitution and the Basic Law, the NPCSC had the ultimate authority and power to decide if a subject matter lying at the interface of the two systems conformed with the Constitution and the Basic Law. The authority of the NPCSC to make such decision must be fully acknowledged and respected in Hong Kong as both the Mainland and Hong Kong systems were within one country.

15. The CA agreed with the CFI that the NPCSC Decision was highly persuasive for the construction exercise to determine if Cap. 632 had contravened the Basic Law, although not treated as post-enactment extrinsic materials as the CFI Judge did.

16. The CA further held that if a referral of a Basic Law provision concerning the relationship between the Central Authorities and the HKSAR was made under BL 158(3), common sense dictated that in all probabilities, the NPCSC, after consulting the Basic Law Committee, would give the same answer in its interpretation.

17. The CA rejected all the Applicants' submissions on the status and effect of the NPCSC Decision which were contrary to the Mainland expert of the Respondent. Ground 2 was rejected accordingly.

Grounds 3 and 4

18. The CA held that Hong Kong, in exercising the high degree of autonomy bestowed on it by the Basic Law, plainly had ample powers to establish the MPA within the WKS. The HKSARG may exercise its own immigration controls on the entry into and exit from the Region as part of the executive power that it enjoyed pursuant to the authorization by the NPC. Establishing the MPA at the WKS for the purpose of conducting CIQ and related matters was well within the executive power of the HKSARG. Enacting Cap. 632 to give statutory backing to the MPA's establishment likewise fell within the legislative power of the LegCo.

19. The CA rejected the Applicants' argument that it was impermissible to deem the MPA as an area lying outside Hong Kong but within the Mainland for the purpose of applying the Mainland law and the delineation of jurisdiction. Deeming the MPA as an area lying outside Hong Kong and within the Mainland in terms of legal jurisdiction did not alter the boundary of the HKSAR, as s. 6(2) of Cap. 632 made plain. It certainly did not have the effect of "surrendering" a part of the HKSAR back to the Mainland, contrary to the Applicants' suggestion. It met the special needs and circumstances arising from the Co-operation Arrangement, and no more.

20. The intention of the deeming provision, in laying down a hypothesis, was that the hypothesis should be carried as far as necessary to achieve the legitimate purpose and no further. The purpose of Cap. 632 was to establish a port in the WKS where immigration controls and related measures were to be implemented to facilitate passengers who chose to travel between Hong Kong and the Mainland by using the XRL with the associated convenience provided by the Co-location Arrangement. The deeming provision in Cap. 632 gave effect to this purpose and no more.

21. The CA also gave full weight to the NPCSC Decision confirming that Cap. 632, including the deeming provision, conformed with the Basic Law.

22. The CA held that, once it was accepted that the deeming provision rested on sound legal footing, then within the MPA, there was no question of contravention of BL 18(2) by way of application of the Mainland law in the HKSAR; or contravention of BL 18(1) on account of the disapplication of Hong Kong laws; or contravention of BL 19(2) in terms of the jurisdiction of the Hong Kong courts as being curtailed.

23. The CA considered that its conclusion was supported by the coherence principle. The legislative and judicial powers under BL 18 and BL 19 were to be exercised for furthering the HKSAR's high degree of autonomy and for maintaining the Hong Kong system and not *vice versa*.

24. The CA held that the Co-operation Arrangement, though a novel matter, satisfied the socio-economic policy of the Basic Law.

25. To sum up, in terms of constitutional purpose and context, given its specific purpose, its unique characteristics, and its limited applicability in terms of geographical location and classes of individuals, in deeming the MPA as an area lying outside the HKSAR and lying within the Mainland for the purpose of applying the Mainland law and jurisdiction except for the reserved matters, Cap. 632 did not contravene BL 18 and BL 19. It did not diminish the high degree of autonomy enjoyed by the HKSAR as authorized by the NPC. It did not impermissibly allow the Mainland system to pass the demarcation line between the two systems jealously guarded by the Basic Law and encroach upon the Hong Kong system. Grounds 3 and 4 were rejected accordingly.

26. The CA accepted that if the relevant provisions of the Basic Law were engaged, Cap. 632 clearly satisfied the proportionality assessment as propounded by the CFA in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372. If necessary, the CA will uphold Cap. 632 of its constitutionality on the proportionality ground as well.

Conclusion

27. Applying the purposive construction to the Basic Law and treating it as a living instrument, the CA held that although Cap. 632 was a novel matter, it conformed with the Basic Law. The core issue was answered with a "No".

Kwok Cheuk Kin v Director of Lands and Others

FACV Nos. 2, 3 & 4 of 2021 (5 November 2021)[1]

CFA

Background

1. The appeal concerned the constitutionality of the New Territories Small House Policy ("SHP"), a non-statutory administrative policy which was approved by the ExCo on 14 November 1972, allowing eligible male indigenous inhabitants of the New Territories ("NTIIs"), aged 18 years old or above who are descended through the male line from a resident in 1898 of a recognized village in the New Territories, to apply to the Government for permission to build for himself a small house once during his lifetime on a suitable site within his own village (commonly known as the "Ding rights"). Three forms of land grants are issued by the Government, which include (i) free building licence allowing NTIIs to build on private land owned by them at nil premium ("FBL"); (ii) private treaty grant of Government land at concessionary premium ("PTG") and (iii) land exchange.

CFI and CA proceedings

2. Kwok Cheuk Kin ("Appellant") commenced judicial review proceedings against the Director of Lands in respect of the SHP on the ground that it was unconstitutional for being discriminatory on the basis of sex, birth or social origin in contravention of the right to equality protected by BL 25,[2] BL 39[3] and/or Article 22 of BoR.[4]

3. At the CFI, it was held that the Ding rights formed part of the "rights and interests" protected by BL 40.[5] As to whether the Ding rights were both "lawful" and "traditional" within the meaning of BL 40, the CFI held that the Ding rights were "lawful" in the sense that the word "lawful" was purely descriptive of those traditional rights enjoyed by NTIIs before 1 July 1997. The CFI further held that "traditional" rights were rights "traceable" to those which NTIIs had enjoyed before the commencement of a lease under which the *Qing* Government leased part of San On (later known as "the New Territories") to the Great Britain in 1898.

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1 Reported in (2021) 24 HKCFAR 349.

2 BL 25 provides that:

"All Hong Kong residents shall be equal before the law."

3 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."

4 Article 22 of BoR provides:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

5 BL 40 provides that:

"The lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administrative Region."

On the basis that FBL was traceable to rights existing before 1898 while PTG and land exchange were not, the CFI ruled that the SHP was constitutional in relation to FBL but unconstitutional in relation to PTG and land exchange.

4. All parties appealed and at the CA, it was held that the SHP was constitutional in its entirety. The CA held that the relevant date for determining both the lawfulness and the traditional character of BL 40 rights was 4 April 1990 when the Basic Law was promulgated. The CA disagreed with the CFI that the "traditional rights" protected by BL 40 involved a tracing exercise back to 1898.

5. The Appellant appealed to the CFA.

Main issue before the CFA

6. The CFA acknowledged that the SHP was *prima facie* discriminatory on grounds of both sex and social origin. Therefore, the main issue before the CFA for determination was whether the Ding rights conferred by the SHP on NTIIs constituted "lawful traditional rights and interests" under BL 40, such that the SHP was rendered constitutional by virtue of BL 40 under the Basic Law.

Historical Background

7. Prior to 1898 and under the rule of *Qing*, land in the New Territories was held under a system of customary tenure and it was then the custom for NTIIs to build village houses on their private lands for their own occupation. The British, upon their occupation of the New Territories, introduced a new land tenure system and the previous customary tenure was replaced by the Crown lease. The new system in effect abolished the previous customary titles and replaced it with a system of Crown leases for a term limited to 99 years.

8. It was against such historical background that the SHP was formalized as a form of government policy in 1972 to assist the transition from the customary tenure system to an entirely different system of land ownership by time-limited Crown leases.

Construction of BL 40: Legal context

9. In construing BL 40, the CFA agreed with the CA in holding that the relevant date for deducing the context and purpose of BL 40 was April 1990 when the Basic Law was promulgated. Citing *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 224, the CFA

endorsed the CA's judgment that the context and purpose of Basic Law provisions were established at the time when it was enacted in 1990, and relevant pre-enactment extrinsic materials, including the state of domestic legislation at the time of Basic Law's promulgation, were materials available for identifying the context and purpose of a Basic Law provision.

10. Given that the Basic Law maintains in effect so far as consistent with its terms the existing laws of Hong Kong (BL 8), the existing rights and freedoms of residents (BL 39) and the existing rights of leaseholders (BL 120), the CFA held that BL40 must be addressed to rights and interests of the NTIIs which are (i) special to those inhabitants and not common to the generality of residents, and (ii) potentially open to challenge in the absence of BL40, on the ground that those rights were in breach of the anti-discrimination provisions under the Basic Law.

Elements of BL 40

"Rights and interests"

11. In considering the nature of the "right" or "interest" of an SHP applicant, the CFA observed that although the existence of the SHP was implicitly acknowledged in certain legislation[6] and the Basic Law itself,[7] the SHP was an administrative policy and had never had any statutory basis giving rise to a legal right. The SHP was applied simply as a matter of administrative discretion.

12. The CFA held that the "right" conferred by the SHP was founded entirely on public law. The CFA defined the nature of the "right" or "interest" of an SHP applicant as a right to have his application dealt with in accordance with the criteria laid down in the Government's statements of the current SHP, subject to the discretion lawfully exercised by the Lands Department. The CFA held that such right created by the SHP was a relevant "right" within the meaning of BL 40.

"Lawful"

13. The CFA held that the word "lawful" in BL 40 was neither purely descriptive nor redundant. It went to the lawfulness of the way that the discretion was exercised as a matter of public law. The right or interest under the SHP was lawful if the discretion to make a grant under the Policy was lawfully exercised as a matter of public law. It would not be lawful if, for example, the discretion was vitiated by corruption or bias. "Lawful" did not refer to the absence of discriminatory features forbidden by BL 25 or BL 39. The application of these two articles in the special context of indigenous rights was addressed by BL40 and excluded.

14. On 19 December 1984, the Sino-British Joint Declaration was signed between the PRC and the British governments, under which the PRC would resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997, and Hong Kong would become a Special Administrative Region of the PRC. The CFA recognized that the fundamental principle underlying the Joint Declaration was the theme of continuity.

15. The Basic Law was promulgated in April 1990 to incorporate the basic policies of the PRC regarding Hong Kong as set out in the Joint Declaration into domestic law. The CFA acknowledged that the Basic Law was also founded on the principle of continuity which was evident in BL 5 that "[Hong Kong's] previous capitalist system and way of life shall remain unchanged for 50 years". On the basis that those Ding rights enjoyed by the NTIIs originated from 1898 and were still enjoyed by the NTIIs in April 1990, the Ding rights were part of the "systems" which the HKSAR inherited and which BL 40 protected. In the premises, the CFA held that BL 40 was indeed a saving provision seeking to give effect to the principle of continuity by protecting the existing entitlement to the NTIIs as a particular class of persons.

16. The CFA held that legislative instruments must be read as a coherent whole. By reading the Basic Law

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[6] For example, the Buildings Ordinance (Cap. 123), the Buildings Ordinance (Application to the New Territories) Ordinance (Cap. 121) and the Rating Ordinance (Cap. 116).

[7] For example, BL 122 which provides that:

"In the case of old schedule lots, village lots, small houses and similar rural holdings, where the property was on 30 June 1984 held by, or, in the case of small houses granted after that date, where the property is granted to, a lessee descended through the male line from a person who was in 1898 a resident of an established village in Hong Kong, the previous rent shall remain unchanged so long as the property is held by that lessee or by one of his lawful successors in the male line."

provisions coherently as a whole, the specific provision shall prevail over the general provision. The CFA cited *Pretty v Solly* (1859) 26 Beav. 606, 610 (Sir John Romilly MR) to enunciate on the coherence principle adopted in interpreting Basic Law provisions:

> "The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

17. The provisions concerned in the present case were BL 25, BL 39, BL 40 and Article 22 of BoR. Given that BL 25, BL 39 and BL 40 were contained in the same instrument, no doubt they must be read together. Although Article 22 of BoR was a provision enacted separately in the Hong Kong Bill of Rights Ordinance (Cap. 383) which gave effect to the ICCPR, it was incorporated into the Basic Law by reason of BL 39 and was thereby given constitutional status.[8] Applying the coherence principle, the CFA held that the right to equality protected by BL 25, BL 39 and Article 22 of BoR were general provisions, while BL 40 was a specific provision dealing with the special position of the NTIIs. Hence BL 40 shall prevail over BL 25, BL 39 and Article 22 of BoR. BL 40 qualified and limited the application of the anti-discrimination provisions.

18. The CFA further considered the interplay between BL 40 and BL 122. The latter provision, which dealt with the level of rent payable on "old schedule lots, village lots, small houses and similar rural holdings", assumed that grants will continue to be made under the SHP to descendants in the male line of pre-1898 village residents, notwithstanding the discriminatory features of the Policy which were specifically referred to in that Article. The CFA considered that this assumption cast a good deal of light on what the drafters of the Basic Law must have believed that they had provided for in BL40.

19. The Appellant argued that consistency with the anti-discrimination provisions was a condition for the application of BL 40. He argued that the anti-discrimination provisions actually qualified and limited the scope of BL 40. The CFA rejected the Appellant's argument. The CFA held that BL40 was a

[8] *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59, at [24]-[35].

saving provision seeking to give effect to the principle of continuity by protecting an existing entitlement of NTIIs. The CFA held that absent BL 40, all the privileges enjoyed by NTIIs would be inherently discriminatory unless they could satisfy the justification test for differential treatment as being necessary in pursuit of a legitimate aim.[9] Shall the "condition" argument made by the Appellant stand, either (i) the discrimination was justified which rendered the specific provisions of BL 40 unnecessary; or (ii) the discrimination was unjustified, in which case BL 40 would have no application. Either result would defeat the whole purpose of BL 40, given that BL 40 must be devised to give certain effect or protection.

"Traditional"

20. In respect of the "traditional" aspect of rights and interests of the NTIIs in BL 40, the CFI previously held that for rights or interests to be "traditional", they were required to be traceable to the pre-1898 period. The CFA disagreed with the CFI's approach and upheld the CA's holding that the "traditional" rights were those rights which were recognized as traditional at the time of promulgation of the Basic Law in April 1990.

21. The CFA held that there was no explicit requirement in BL 40 for protected right or interest to be traceable to the pre-1898 period. Such requirement was also not implicit in the concept of tradition. Taking into account that the Basic Law was promulgated in 1990 to address the problem of continuity between the British regime and the systems to be instituted in Hong Kong following the PRC's resumption of exercise of sovereignty over Hong Kong, the CFA found that the issue of continuity between the *Qing* dynasty and the British regime was of no subsisting relevance by 1990. As such, there was no rational reason which could justify why the PRC should wish to make the preservation of indigenous rights dependent on their similarity to those rights which existed before 1898.

Conclusion

22. In light of the foregoing reasons, the CFA dismissed the appeal by holding that the Ding rights conferred by the SHP fell within the ambit of BL 40 and upheld the constitutionality of the SHP in its entirety.

[9] *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335, at [20]-[22].

Cheung Tak Wing v Communications Authority and Another

CACV No. 570 of 2018 (30 December 2021)[1]

CA

Background

1. A standard licence condition requires television and radio licensees to broadcast Government-provided "announcements in the public interest" ("APIs") free of charge. A message is an API if:

(1) it is in the public's interest to broadcast that message ("Criterion 1");

(2) the message relates to issues of public concern such as health, safety, social welfare, legal obligations, availability of public resources and changes affecting traffic or other environmental factors ("Criterion 2"); or

(3) the message is directly related to a government policy or operational objective ("Criterion 3").

2. A licensee may not broadcast any advertisement of a political nature, however, that prohibition does not apply to Government-provided API ("the Exemption").

3. From April to June 2015, the Government produced certain television and radio advertisements on the 2017 CE election entitled "2017, Make it happen!" ("the Impugned Announcements"), for consultations on reforming the CE selection method, promoting the Government's reform proposals ("the Reform Proposals") and soliciting public support.

Decision of the CFI

4. The Applicant claimed that he had seen and heard the Impugned Announcements at least once a day on television or radio since 22 April 2015. He brought judicial review proceedings against the Communications Authority and Director of Information Services, complaining that:

(1) the Impugned Announcements, being political in nature, were not APIs;

(2) even if they were APIs, the Exemption disproportionately interfered with his right to freedom of expression under BL 27[2]

[1] Reported at [2022] 1 HKLRD 457.

[2] 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."

and Article 16 of BoR,[3] which included a right not to receive the Impugned Announcements since they contained partial political views; and

(3) the Exemption infringed the Applicant's right to equality under BL 25[4] and Article 22 of BoR,[5] by treating the Government more favourably than other Hong Kong residents.

5. By the time of the CFI substantive hearing, it was academic to restrain by injunction the broadcast of the Impugned Announcements, since the LegCo had already failed to pass the motion endorsing the Reform Proposals ("the Motion"). Still, the CFI heard the judicial review application and rejected it on substantive grounds.

6. The CFI ruled that the Impugned Announcements were APIs under Criterion 3, without deciding whether they met Criteria 1 and 2; the Applicant's right to freedom of expression was not engaged; and no discrimination existed, since the Government's position relevantly differed from other Hong Kong residents' in relation to political advertising.

Issues

7. On the Applicant's appeal to the CA, the substantive issues were:

(1) whether the Impugned Announcements were APIs ("Issue 1"); and

(2) even if they were APIs, whether the Exemption infringed the Applicant's rights to:

(a) freedom of expression under BL 27 and Article 16 of BoR ("Issue 2"); and

(b) equality under BL 25 and Article 22 of BoR ("Issue 3").

Issue 1

8. The Impugned Announcements were APIs if and only if they satisfied any of the 3 Critieria.

(a) Criterion 1

9. Whether Criterion 1 is satisfied is an objective assessment of all the circumstances, having regard to:

(1) the subject matter of the advertisement;

(2) the significance of the subject matter to Hong Kong, the general public or a sector thereof as the case may be;

(3) the purpose of the advertisement; and

(4) any other relevant considerations.

10. The subject matter of the Impugned Announcements was of great public interest. The Reform Proposals concerned the CE selection method in attaining the ultimate aim of universal

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[3] Article 16 of the 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."

[4] BL 25 provides that:

"All Hong Kong residents shall be equal before the law."

[5] Article 22 of the BoR provides that:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

suffrage as prescribed by BL 45[6] and within the parameters of the "Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016". The Reform Proposals were also a necessary precursor to further reforms for constituting the LegCo by universal suffrage.

11. On the significance of the subject matter, the Reform Proposals were tremendously important for Hong Kong and the general public. They were pivotal to Hong Kong's further constitutional development and would represent a most significant development in Hong Kong's constitutional and political structure under "one country, two systems".

12. On the purpose of the Impugned Announcements, the Government had produced them because it considered it as the Government's duty to widely publicize and promote the Reform Proposals, given their constitutional significance and the public interest involved.

13. Therefore, the Impugned Announcements qualified as APIs under Criterion 1.

(b) Criterion 2

14. Under this Criterion, an advertisement qualifies as an API if it relates to issues of public concern. The considerations entail an objective assessment of all circumstances. Given the Reform Proposals' constitutional and political importance, the public had a legitimate interest in knowing and understanding them to form informed views, and the Government had a corresponding duty to explain them to the public. Therefore, the Impugned Announcements were qualified as APIs under also Criterion 2.

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[6] BL 45 provides that:
"The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government.
The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.
The specific method for selecting the Chief Executive is prescribed in Annex I 'Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region'."

(c) Criterion 3

15. Under this Criterion, an advertisement qualifies as an API if it is directly related to a government policy or operational objective. The Reform Proposals were "government policies" within the term's natural meanings. They were formulated and put forward by the Government as part of its constitutional duty to further constitutional development regarding the CE selection method in accordance with BL 45 and the parameters set up by the NPCSC, and were proposals the Government considered constitutional and according with practical reality to achieve the goal of selecting the CE by universal suffrage. A government policy may be controversial, a deeply divisive political topic, or may be viewed as one-sided by a sector of the public; may not have the LegCo's blessing yet; and may cover high-level matters. The CA held that the Impugned Announcements were directly related to a government policy and qualified as APIs under Criterion 3.

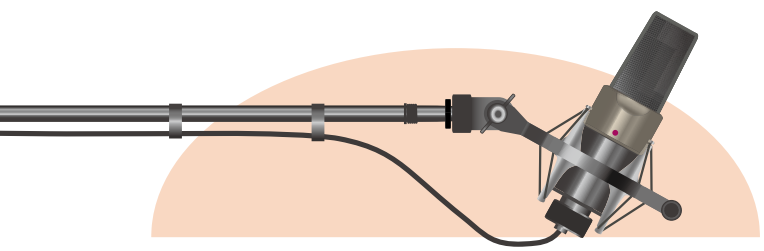
Issue 2

(a) Whether the right to freedom of expression was engaged

16. The Applicant argued that the freedom of expression included a right not to receive partial political advertisements, citing a statement from *Animal Defenders International v Secretary of State for Culture, Media & Sport* [2008] 1 AC 1312, para. 28, that:

> "[t]he rights of others which a restriction on the exercise of the right to free expression may properly be designed to protect must, in my judgment, include a right to be protected against the potential mischief of partial political advertising."

He reasoned that the right not to be exposed to the potential mischief of partial political advertising must be of equal status to and included in the freedom of expression.



17. The CA disagreed. The cited statement referred to the rights of others that justified restricting the right to freedom of expression, not a right arising from that freedom. BL 27 and Article 16 of BoR did not encompass the right not to be exposed to potential mischief of partial political advertising as contended. Whether an aim or interest capable of justifying restrictions on non-absolute rights was of equal weight or status to those rights would depend on the actual circumstances.

18. The CA found it illogical for the Applicant to argue the Exemption restricted his right not to receive the Impugned Announcements as partial political advertising as alleged, when he accepted that the ban against others' political advertising itself was not an infringement.

19. The CA held that the Exemption did not engage, let alone infringe, the Applicant's right to freedom of expression.

(b) Whether the restriction was justified

20. Even if the right to freedom of expression was engaged, the interference was justified under the proportionality test, when balanced against the right of other members of the public who wanted to receive Government-supplied information through television and radio, and the ease with which the Applicant could block out broadcast contents he did not like by switching channels or turning off his television or radio.

21. All in all, the Exemption did not violate the Applicant's right to freedom of expression under BL 27 or Article 16 of BoR.

22. The CA answered Issue 2 with a "No".

Issue 3

23. In discrimination challenges, the court will first determine whether a differential treatment on a prohibited ground exists. To show this, generally a complainant must establish he has been treated differently to a person in a comparable or analogous position, and the reason for the differential treatment is the prohibited ground. If

this is established, the court will determine whether the differential treatment is justified under the proportionality test.

(a) Whether the Government was in a relevantly different position

24. Given its unique position in the Basic Law's constitutional setting, the Government is not simply in an analogous position to any person supporting or opposing Government policy in the context of expression of views on a hotly divisive political matter on which the LegCo will imminently vote.

25. First, under BL 43,[7] BL 48[8] and BL 62,[9] the Government has a unique constitutional power and function to formulate and implement policies.

[7] BL 43 provides that:

"The Chief Executive of the Hong Kong Special Administrative Region shall be the head of the Hong Kong Special Administrative Region and shall represent the Region.

The Chief Executive of the Hong Kong Special Administrative Region shall be accountable to the Central People's Government and the Hong Kong Special Administrative Region in accordance with the provisions of this Law."

[8] BL 48 provides that:

"The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

(1) To lead the government of the Region;

(2) To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the Hong Kong Special Administrative Region;

(3) To sign bills passed by the Legislative Council and to promulgate laws;

To sign budgets passed by the Legislative Council and report the budgets and final accounts to the Central People's Government for the record;

(4) To decide on government policies and to issue executive orders;

(5) To nominate and to report to the Central People's Government for appointment the following principal officials: Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration and Commissioner of Customs and Excise; and to recommend to the Central People's Government the removal of the above-mentioned officials;

(6) To appoint or remove judges of the courts at all levels in accordance with legal procedures;

(7) To appoint or remove holders of public office in accordance with legal procedures;

(8) To implement the directives issued by the Central People's Government in respect of the relevant matters provided for in this Law;

(9) To conduct, on behalf of the Government of the Hong Kong Special Administrative Region, external affairs and other affairs as authorized by the Central Authorities;

(10) To approve the introduction of motions regarding revenues or expenditure to the Legislative Council;

(11) To decide, in the light of security and vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before the Legislative Council or its committees;

(12) To pardon persons convicted of criminal offences or commute their penalties; and

(13) To handle petitions and complaints."

[9] BL 62 provides that:

"The Government of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

(1) To formulate and implement policies;

(2) To conduct administrative affairs;

(3) To conduct external affairs as authorized by the Central People's Government under this Law;

(4) To draw up and introduce budgets and final accounts;

(5) To draft and introduce bills, motions and subordinate legislation; and

(6) To designate officials to sit in on the meetings of the Legislative Council and to speak on behalf of the government."

It has to engage the public, encourage public discussion and participation in the formulation and implementation process, inform the public of the subject matter, and seek public support where due. Political APIs are essential to that function.

26. Secondly, having to cater for the public interest of Hong Kong as a whole in policy and decision-making, the Government is entirely different from ordinary political parties or interest groups, who focus on their own political agendas or objectives.

27. Thirdly, the CE and Government play a unique constitutional role in amending the CE selection method: it is for the CE to report to the NPCSC on whether amendment is needed, and for the Government alone to introduce relevant amendment bills.[10] In political reality, the Government's constitutional duty continued even after the Motion was placed before the LegCo.

28. In light of its unique and pivotal constitutional role and functions, the CA held that the Government stood relevantly different from others and the discrimination challenge failed.

(b) Whether differential treatment was justified

29. Even if differential treatment on a prohibited ground existed, the CA agreed with the Judge below that the different treatment was justified:

(1) the Exemption served the legitimate aim of allowing the Government to promote and educate the public on its policies and legislative proposals and to seek public support, whether or not the policy, like the Reform Proposals, was "deeply divisive";

(2) the Exemption was rationally connected with the aim since television and radio were cost-effective means for the Government to reach its audience;

(3) the Exemption was no more than reasonably necessary to achieve its aim because:

(a) the Government could not reach out to the public by other means as effective as television and radio;

(b) the Government, unlike ordinary citizens, had a specific duty to engage the public on policies and legislative proposals; and

(c) ordinary citizens can voice their views through other forms of media; and

(4) removing the Exemption would unduly restrict the media through which the Government could inform the public on policies and enlist the public's support and cooperation; meanwhile, the Applicant could easily avoid receiving political advertising by changing channels or turning off the television or radio.

30. The CA answered Issue 3 with a "No".

Conclusion

31. The CA dismissed the Applicant's appeal.

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[10] Para. 3 of "The Interpretation by the Standing Committee of the National People's Congress of Article 7 of Annex I and Article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" on 2 April 2004 provides that:

"The provisions in the two Annexes mentioned above that any amendment must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive and shall be reported to the Standing Committee of the National People's Congress for approval or for the record mean the legislative process that must be gone through before the method for selecting the Chief Executive and the method for forming the Legislative Council and its procedures for voting on bills and motions are to be amended. Such an amendment may become effective only if it has gone through the said process, including the approval finally given by the said Committee in accordance with law or the reporting to the Committee for the record. The Chief Executive of the Hong Kong Special Administrative Region shall present a report to the Standing Committee of the National People's Congress as regards whether there is a need to make an amendment, and the Committee shall, in accordance with the provisions in Articles 45 and 68 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, make a determination in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The bills on amendments to the method for selecting the Chief Executive and the method for forming the Legislative Council and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the Government of the Hong Kong Special Administrative Region into the Legislative Council."

Wong Wing Wah v Collector of Stamp Revenue

CACV No. 13 of 2021 (21 January 2022)[1]

CA

Background

1. The appeal concerned the constitutionality of the HKSARG's imposition of Buyer's Stamp Duty ("BSD") on residential properties by virtue of s. 29CB(1) of the Stamp Duty Ordinance (Cap. 117).[2]

2. BSD was introduced by the HKSARG on 27 October 2012 together with the enhancement to the existing Special Stamp Duty as part of the package of the measures proposed to address the overheated residential property market. The essence of BSD is that an agreement for sale of any residential property[3] is chargeable with BSD unless specifically exempted. The major exemption from BSD is provided in s. 29CB(2)(a)[4] of Cap. 117 where the purchaser is a Hong Kong permanent resident ("HKPR") acquiring the property on his or her own behalf.

3. In January 2013, the Applicant, a HKPR, signed a provisional agreement for sale and purchase of a residential property ("the Agreement") to purchase a property ("the Property"). In the same month later, the Applicant executed a trust deed in which she declared that she merely held the Property as trustee for a Mr Wong who was also a HKPR. The sale was completed in April 2013.

4. On the basis that the Applicant was acting in the capacity of a trustee for and on behalf of Mr Wong instead of acting on her own behalf under the Agreement, the Collector of Stamp Revenue concluded that the exemption under s. 29CB(2)(a) of Cap. 117 was not applicable and the Agreement was chargeable with BSD ("the Assessment") pursuant to s. 29CB(1) of Cap. 117.

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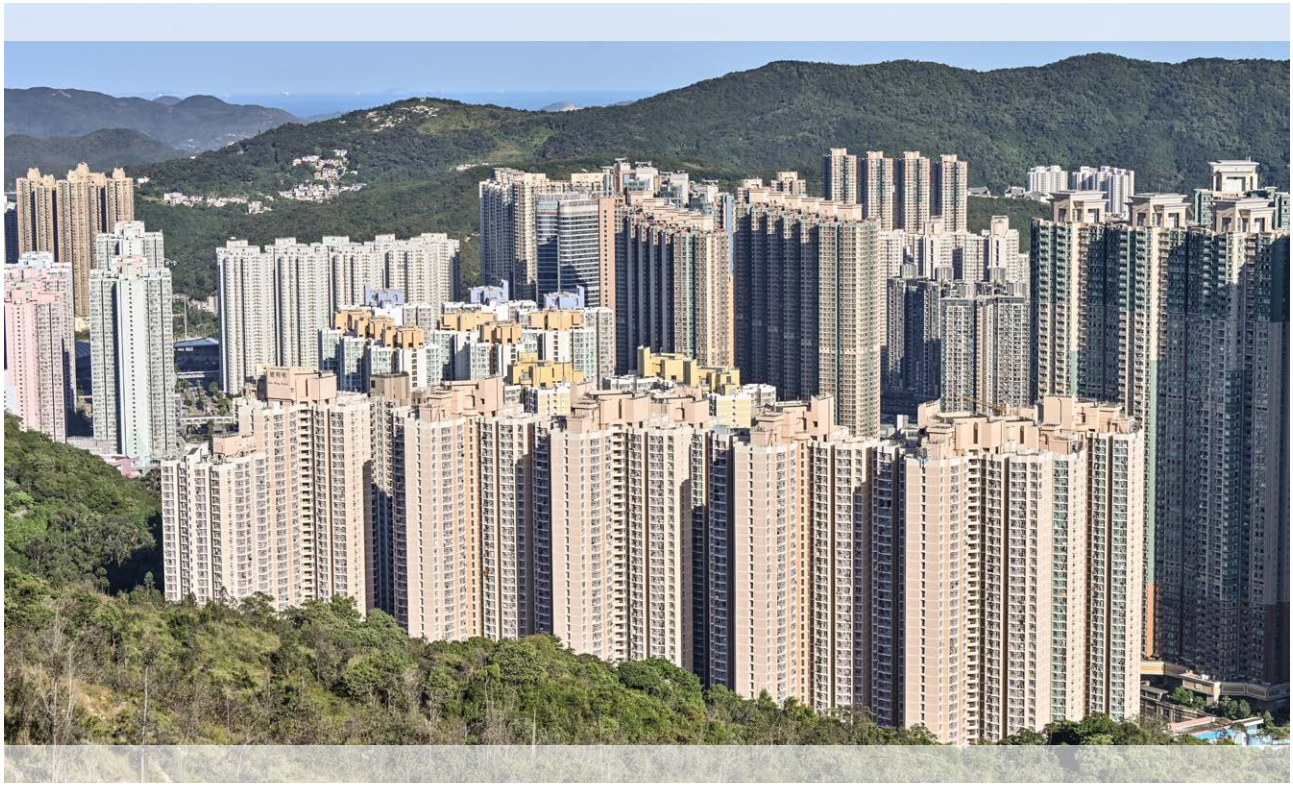
1 Reported at [2022] 1 HKLRD 926.

2 S. 29CB(1) of Cap. 117 provides that:
"… head 1(1C) in the First Schedule applies to a chargeable agreement for sale of any residential property executed on or after 27 October 2012." Head 1(1C) in the First Schedule to Cap. 117 stipulates the rate of stamp duty for an agreement for sale chargeable with BSD and the time for payment of BSD.

3 The words "residential property" and "non-residential property" are defined in s. 29A of Cap. 117. The former refers to "immovable property other than non-residential property". The latter refers to "immovable property which, under the existing conditions of —
(a) a Government lease or an agreement for a Government lease;
(b) a deed of mutual covenant, within the meaning of s. 2 of the Building Management Ordinance (Cap. 344);
(c) an occupation permit issued under s. 21 of the Buildings Ordinance (Cap. 123); or
(d) any other instrument which the Collector is satisfied effectively restricts the permitted user of the property,
may not be used, at any time during the term of the Government lease in respect of the property or during the term of the Government lease that has been agreed for in respect of the property (as is appropriate), wholly or partly for residential purposes."

4 S. 29CB(2)(a) of Cap. 117 provides that:
"A chargeable agreement for sale is not chargeable with buyer's stamp duty … if it is shown to the satisfaction of the Collector that the purchaser, or each of the purchasers, under the agreement is a Hong Kong permanent resident acting on his or her own behalf."



District Court and CFI proceedings

5. The Applicant appealed against the Assessment to the District Court on the grounds that s. 29CB(2)(a) of Cap. 117 infringed a HKPR buyer's constitutional rights to acquire property under BL 6[5] and BL 105[6] by disproportionately restricting the HKPR buyer's right to acquire property by way of trust.

6. On 8 January 2020, the Applicant's appeal against the Assessment was dismissed by the District Court by reason that BL 6 and BL 105 were not engaged, since the HKSARG's right to levy tax, including stamp duty under BL 108[7] could not be restricted by the rights guaranteed by BL 6 and BL 105.

7. The Applicant applied for leave for judicial review of the Assessment and the application was dismissed by the CFI on 6 January 2021. The CFI found that the imposition of BSD had satisfied all the four steps of the proportionality test. In light of this conclusion, it was unnecessary to consider the anterior question if the Applicant's right to acquisition of property protected by BL 6 and/or BL 105 was engaged. If it were necessary to do so, the Court would find that such right was not engaged.

8. Subsequently, the Applicant appealed to the CA against the CFI's rulings.

Issues before the CA

9. The main issues before the CA were:

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5 BL 6 provides that:
"The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law."

6 BL 105 provides that:
"The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property …"

7 BL 108 provides that:
"… The Hong Kong Special Administrative Region shall, taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation."

(i) whether the imposition of BSD on all residential properties by s. 29CB of Cap. 117 engaged the right to acquire property protected under BL 6 and BL 105;[8] and

(ii) if the answer to (i) was yes, whether the interference or restriction of such right was proportional.

First Issue: If the right to acquisition of property under BL 105 was engaged

10. The CA considered first the issue whether the right to acquire property protected under BL 105 was engaged in this case, as it was more logical to deal with this first in that the proportionality test would only arise if the right under BL 105 was engaged.

11. A critical issue in this appeal was whether the CA's decision in *Weson Investment Ltd v Commissioner of Inland Revenue* [2007] 2 HKLRD 567 ("*Weson*") should be followed. In *Weson*, a taxpayer objected to the assessment for profits tax, but paid the assessed amount in full pending final determination of the objection. On appeal, the taxpayer successfully set aside the assessment and received a refund of the tax overpaid. However, the Commissioner of Inland Revenue refused the taxpayer's claim for interest on the tax refunded. The taxpayer argued that BL 105 had been breached since it had been deprived of the capital used to pay the tax prior to the refund without compensation for the loss of use. The CA rejected the taxpayer's argument and held that the right to compensation for lawful deprivation of property under BL 105 had no application to legitimate taxation, which was imposed by the HKSARG and governed under BL 108.[9] The CA held in *Weson* that BL 105 and BL 108 were mutually exclusive.[10]

12. The Applicant submitted that *Weson* was distinguishable in that it only concerned the second limb of BL 105, *i.e.* the right to compensation for lawful deprivation of property but did not concern the first limb, *i.e.* the right to acquisition of property. The Applicant argued that there was no mutual exclusiveness or antinomy between BL 108 and the first limb of BL 105.

13. The CA agreed with the CFI that although a distinction may theoretically be drawn in that there were two limbs in the relevant part of BL 105 which provided for the protection of two different rights, the reasoning of the CA in *Weson* can be extended such that the right to acquisition of property was equally not engaged when the Government exercised the power to levy tax under BL 108. There was no good reason to make a differentiation and confine the reasoning – that legitimate taxation by its very nature operated in an opposite direction to the protection of private property rights – to the second limb. The CA ruled that the right to acquisition of property under BL 105 was equally not engaged when the HKSARG exercised the power to levy tax, including BSD, under BL 108.

14. The Applicant argued further that *Weson* was impliedly overruled by the CFA in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 ("*Hysan*"), since it was held in *Hysan* that the proportionality analysis should apply to the rights

[8] The CA was of the view that reliance on the right to private ownership of property protected under BL 6 would not add significance to the analysis. BL 6 was also not specifically dealt with by the Applicant in this appeal.

[9] *Weson*, at [18].

[10] Ditto.

under BL 105 "without qualification" and *Weson* was not mentioned in the judgment. The Applicant also contended that the "implied antimony" approach had not been adopted in subsequent decisions of the CFA, namely *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950 ("*Kong Yunming*") and *Hysan*, where a fundamental right was arguably restricted by another provision in the Basic Law. The CA did not accept the Applicant's argument and pointed out that neither *Hysan* nor *Kong Yunming* concerned the HKSARG's right to levy tax under BL 108. There was no basis to support the contention that *Weson* was impliedly overruled by subsequent CFA decisions merely because a different approach was adopted to resolve what may seem to be a conflict between certain Basic Law provisions. Further, there was no intrinsic and necessary mutual exclusivity between the Basic Law provisions relied on by the applicants in *Kong Yunming* and *Hysan* and those provisions relied on by the HKSARG.

The coherence principle

15. The CA agreed with the Respondent that the CFA's approach in *Kwok Cheuk Kin v Director of Lands* [2021] HKCFA 38 ("*Kwok Cheuk Kin*") should be followed. In *Kwok Cheuk Kin*, the CFA applied the coherence principle and held that legislative instruments must be read as a coherent whole and the specific shall prevail over the general. The CFA held that BL 40 was the specific provision which qualified the application of the anti-discrimination provisions. The CA held that the coherence principle should also apply to the interplay between BL 105 and BL 108. BL 105 and BL 108, being placed in the same section of the same chapter in the Basic Law, should be read as a coherent whole. The CA held that BL 108 was a specific provision dealing with the power of the HKSARG to levy tax; and BL 105 was a general provision on the protection of property rights. BL 108 as the specific provision shall prevail over BL 105. Hence BL 105 had no application to legitimate taxation which was governed under BL 108.

16. Regarding the Applicant's argument that *Weson* was "plainly wrong" and should not be followed, the CA remarked that the "plainly wrong" test set a very high threshold.[11] It was only where the CA was convinced that the contentions against its previous decision were "so compelling that it can be demonstrated to be plainly wrong" that the test was satisfied. Based on the analysis on the interplay between BL 105 and 108, the CA rejected the applicant's contentions that *Weson* was "plainly wrong".

Second Issue: Proportionality

17. The Applicant's proportionality challenge was rejected by the CA. Having concluded that BL 105 was not engaged in the present case, it was not necessary for the CA to consider whether the proportionality test was satisfied. Nevertheless, the CA stated the Court's conclusion on this issue.

18. The 4 steps of the proportionality test[12] were articulated in *Hysan*. In considering whether BSD pursued a legitimate aim (1st step of the test) and whether BSD was rationally connected to its aims (2nd step of the test), the CA made reference to the Legislative Council Brief on the Stamp Duty (Amendment) Bill 2012 prepared by the Transport and Housing Bureau dated December 2012 ("LegCo Brief") setting out the objectives of BSD and other proposed measures introduced by the HKSARG:

(i) to prevent even further exuberance in the housing market which may pose significant risks to the macro-economic and financial sector stability;

(ii) to ensure the healthy and stable development of the residential property market which was crucial to the sustainable development of Hong Kong as a whole; and

(iii) to accord priority to HKPR buyers over non-HKPR buyers under the current market situation.

19. The CA held that it was wrong to single out according priority to HKPR buyers over non-HKPR buyers as the objective or an important objective sought to be achieved by BSD, without regard to other objectives of the measures proposed. The CA

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[11] *A Solicitor v Law Society of Hong Kong* (2008) 11 HKCFAR 117, at [45]-[50].

[12] The four steps of the proportionality test are: (1) whether the impugned measure pursues a legitimate aim; (2) if so, whether the impugned measure is rationally connected with advancing that aim; (3) whether the measure is no more than reasonably necessary for that purpose; and (4) whether a reasonable balance has been struck between the societal benefits of the encroachment and inroad into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

held that BSD and other proposed measures were introduced as a package, "taken together" to attain the above objectives (i) to (iii), as evident by the LegCo Brief. Considering objective (iii) in the proper context, BSD was meant to reduce demand from non-HKPR buyers by increasing the transaction costs of residential property acquisitions to address the home ownership needs of HKPRs, but not to facilitate the use of legitimate asset protection arrangement to hold property by an HKPR, such as a trust.

20. In light of the above, the CA held that the objectives of cooling down the residential property market and to accord priority to HKPRs in addressing their home ownership needs were legitimate aims. It was self-evident that imposing BSD was rationally connected to the dual objectives. Steps (1) and (2) of the proportionality were satisfied.

21. As to whether imposition of BSD satisfied the 3rd step of the test, the manifestly without reasonable foundation test standard was adopted by the CA, taking into account that BSD was a form of the HKSARG's socio-economic policy to which a wide margin of discretion should apply.[13] The CA held that it was clear that the package of measures introduced in October 2012 including BSD would help curb the buying demand and achieve the dual objectives of cooling down the residential property market and addressing the home ownership needs of HKPRs. Rational connection to the legitimate aims was clearly made out and in no way could it be said that the measures proposed were manifestly without reasonable foundation. The CA held that step (3) of the test was also plainly satisfied.

Conclusion

22. The CA held that the application for judicial review was not reasonably arguable and had no realistic prospect of success. The appeal was dismissed.

[13] *Hysan*, [101]-[104].