Secretary for Justice v Leung Kwok Hung

FACC No. 3 of 2021 (27 September 2021)[1]

CFA

Background

1. The appeal arose out of the prosecution of the Appellant, then a member of the LegCo, for an alleged offence of contempt during a committee meeting of the LegCo. It raised the question of the extent to which a member of the LegCo may be subject to criminal prosecution for disorderly conduct interrupting proceedings of the LegCo.

The facts and proceedings below

2. On 15 November 2016, the LegCo's Panel on Housing and its Panel on Development held a joint meeting. The meeting was attended by the Appellant and the then Under Secretary for Development ("Under Secretary"). During the meeting, the Appellant left his seat, walked over towards the Under Secretary, snatched the Under Secretary's folder which contained confidential documents and then passed it to another member of the LegCo, ignoring repeated demands of the Chairperson of the meeting to return the folder to the Under Secretary and return to his seat. Eventually, the Chairperson ordered the Appellant to withdraw from the meeting and temporarily suspended the meeting.

3. The Appellant was prosecuted for the offence of contempt under s. 17(c) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) which provides:

> "Any person who –
> …
> (c) creates or joins in any disturbance which interrupts or is likely to interrupt the proceedings of the Council or a committee while the Council or such committee is sitting,
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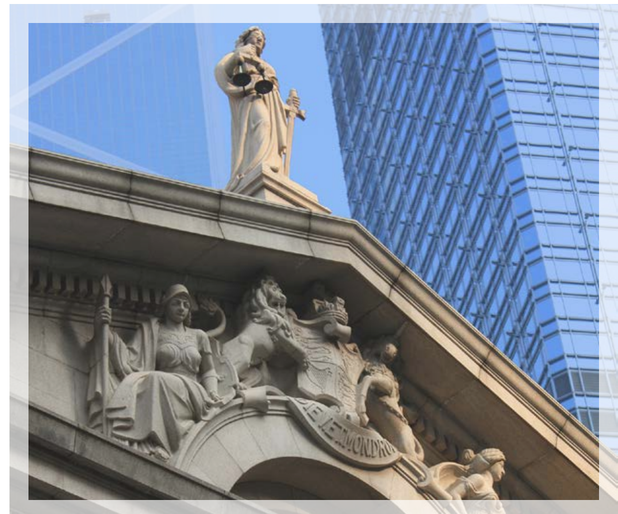
> commits an offence and is liable to a fine of $10,000 and to imprisonment for 12 months, and in the case of a continuing offence to a further fine of $2,000 for each day on which the offence continues."



4. The magistrate ruled that s. 17(c) was applicable to the proceedings of the LegCo or a committee in general but it was not applicable to members of the LegCo. She did not deal with the issue of constitutionality of s. 17(c). Pursuant to s. 105 of the Magistrates Ordinance (Cap. 227), the prosecution appealed by way of Case Stated as to the correctness of the magistrate's ruling and the constitutional validity of s. 17(c). By order of the CFI, the Case Stated was reserved for the CA's consideration pursuant to s. 118(1)(d) of Cap. 227. The CA held that the magistrate was: (1) wrong to rule that conduct

[1] Reported at (2021) 24 HKCFAR 234.

caught by s. 17(c) was protected by the privilege in s. 3 of Cap. 382; [2] (2) wrong to hold that s. 17(c) was inapplicable to LegCo members; and (3) right to find that s. 17(c) applied to all proceedings of the LegCo and its committees. The CA also held against the argument that s. 17(c) was unconstitutional.

Issues before the CFA

5. The main issues before the CFA were:

(1) whether the Appellant was immune from prosecution by reason of freedom of speech and debate in the LegCo ("First Issue"); and

(2) whether the Appellant was immune from prosecution by reason of the non-intervention principle ("Second Issue").

Appellant's conduct *prima facie* caught by s. 17(c)

6. The CFA noted that s. 17(c) only penalized those interruptions which were the result of a disturbance to the relevant proceedings, and, having considered the dictionary definition of the word "disturbance", held that an offence under s. 17(c) was committed when a defendant created a disturbance which interrupted or broke up the proper functioning of the LegCo or its committees and, in particular, occurred when the resulting interruption involved interference with the rights of others.

7. The CFA held that since the wording of s. 17(c) referred to "any person", there was no reason to exclude a member of the LegCo from the ambit of s. 17(c). The CFA considered that a compelling contextual argument for this was the presence of the qualification "other than a member or officer of the Council" in s. 20 of Cap. 382,[3] and observed that where Cap. 382 was not intended to apply to a member of the LegCo, it said so. Also, given the statutory purpose of Cap. 382,[4] there was no good reason to exclude a member of the LegCo, in circumstances where they were not protected by the freedom of speech and debate conferred on them, from liability for contempt constituted by the creation of a disturbance interrupting proceedings.

8. The CFA held that the Appellant was *prima facie* caught by s. 17(c) because the joint panel meeting was a proceeding of a committee of the LegCo and the Appellant was a person who evidently created a disturbance which interrupted the proceedings of that committee. The central question was whether the Appellant's conduct fell within any privilege conferred on members.

First Issue

9. The principal reason advanced by the Appellant for not being liable under s. 17(c) was the privilege conferred by law in respect of statements made at meetings of the LegCo and its committees. Specifically, the Appellant relied on ss. 3[5] and 4[6] of Cap. 382 and BL 77.[7]

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[2] S. 3 of Cap. 382 provides that:
"There shall be freedom of speech and debate in the Council or proceedings before a committee, and such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Council."

[3] S. 20 of Cap. 382 provides that:
"Any person, other than a member or officer of the Council, who –
(a) enters or attempts to enter the Chamber or the precincts of the Chamber in contravention of any of the Rules of Procedure or any resolution under section 8(2); or
(b) contravenes any administrative instructions issued under section 8(3), or any direction given thereunder, regulating the admittance of persons to or the conduct of persons within the Chamber or the precincts of the Chamber,
commits an offence and is liable to a fine of $2,000 and to imprisonment for 3 months."

[4] See below the CFA's discussion on the statutory purpose of Cap. 382.

[5] See note 2 above.

[6] S. 4 of Cap. 382 provides that:
"No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Council or a committee, or by reason of any matter brought by him therein by petition, Bill, resolution, motion or otherwise."

[7] BL 77 provides that:
"Members of the Legislative Council of the Hong Kong Special Administrative Region shall be immune from legal action in respect of their statements at meetings of the Council."

10. The Appellant contended that since s. 3 was closely modelled on Article 9 of the Bill of Rights 1689 ("Article 9"), [8] it was relevant to have regard to English cases on Article 9, including the UK Supreme Court's interpretation of the provision in *R v Chaytor* [2011] 1 AC 684. Relying on *R v Chaytor*, the Appellant argued that the ambit of protection conferred by s. 3 of Cap. 382 (as under Article 9) was "the core or essential business of the LegCo, which consists of collective deliberation and decision making" and that the prosecution of him would involve the criminal court in addressing "the proceedings in the LegCo" and "the legislative or deliberative processes of" the LegCo. Therefore, the Appellant submitted that so long as his alleged conduct occurred during the business of the meeting of the LegCo Panel, s. 3 and likewise BL 77 conferred an absolute privilege and granted him immunity from prosecution even if his conduct fell within the terms of s. 17(c).

11. The CFA considered that the Appellant's argument required acceptance of the proposition that the conduct of the Appellant constituted an exercise of the protected freedom of speech and debate. The CFA held that whilst it might be correct to say that s. 3 was modelled on Article 9 and that the former, like the latter, conferred an absolute privilege which could not be waived, it nevertheless remained for the courts to determine where the boundaries of s. 3 lie on its true construction. The CFA cited *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689 ("*Leung Kwok Hung v LegCo President*"), at [39]-[43], to illuminate that it was for the courts to determine the scope of the legislature's privilege:

> "… in the case of a written constitution, which confers law-making powers and functions on the legislature, the courts will determine whether the legislature has a particular power, privilege or immunity".

12. The CFA adopted the well-established principles of statutory construction and construed the relevant provisions by reference to their context and purpose, and noted that s. 3 was not in identical terms to Article 9. The latter extended its protection to "proceedings in Parliament", as well as freedom of speech and debates, and the English cases emphasized that it protected what was "said or done within the walls of Parliament". In Cap. 382, the privilege or immunity applied to "speech and debate" and "words spoken … or written" in the LegCo as provided for in ss. 3 and 4 respectively, which was reflected in the immunity for "statements" in BL 77. The CFA held that although freedom of expression embraced the manner in which an individual wished to express their views and was therefore not limited to spoken

[8] Article 9 provides that:
"That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."

or written words, the question whether any particular conduct fell within the protected freedom of speech and debate must depend on a proper construction of the relevant provisions of Cap. 382 as a whole, given that s. 17(c) provided a criminal offence of contempt for interruptive disturbances.

13. The CFA held that the statutory purpose was the starting point of any such construction and considered the statutory purpose of Cap. 382. The CFA noted that Cap. 382 was enacted in 1985 in anticipation of the resumption of the exercise of sovereignty over Hong Kong by the PRC. It was recognized that the powers and privileges of the former colonial legislature would cease to have effect after 30 June 1997, hence the then Hong Kong Government proposed the Bill which became Cap. 382 in order to provide a statutory footing for the LegCo's management of its own affairs, effective investigatory powers and its powers and privileges. The CFA also noted that the enactment of Cap. 382 in July 1985 preceded the drafting of the Basic Law, and there was no suggestion that the Basic Law was intended to depart from or extend the powers and privileges of the LegCo as provided for in Cap. 382 since BL 77 only immunized "statements at meetings of the Council".

14. The CFA further noted that the Long Title of Cap. 382 reflected its statutory purpose and cited *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425 in which the statutory purpose was explained, at [82], as including the provision of:

> "… a statutory framework aimed at creating a secure and dignified environment in the LegCo complex conducive to the legislature carrying out its constitutional functions at its sittings without disruption or disturbance, while permitting members of the public to observe the proceedings within the Chamber as an open legislative process".

15. Construing the statutory privilege of free speech and debate in the LegCo contextually and purposively, the CFA rejected the Appellant's argument that his impugned conduct fell within the protection of free speech and debate under ss. 3 or 4 or BL 77. The CFA held that Cap. 382 was to be construed as a coherent whole with ss. 3 and 4 read in context together with other provisions, including s. 17(c). Endorsing the CA's observation,[9] the CFA held that the provisions regulating admission and creating offences, including s. 17(c), were designed to achieve the statutory purpose of creating a secure and dignified environment conducive to the legislature carrying out its constitutional functions at its sittings without disruption or disturbance. Accordingly, the CFA held that accepting the Appellant's broad argument that he had absolute immunity for his actions even if such actions amounted to a disruption caught by s. 17(c) merely because he was present at and had been participating in a committee meeting of the LegCo would extend the privilege of free speech and debate beyond the purpose for which it was granted.

16. The CFA further considered whether the Appellant's conduct amounted to speech and debate protected by ss. 3 or 4 or BL 77. The CFA held that the Appellant had created a disturbance by the act of crossing the floor of the chamber during a debate and snatching property belonging to others which he passed to a third party over the owner's objections. The Appellant thereby interfered with the rights of the Under Secretary, to whom as a public officer the privileges and immunities enjoyed by LegCo members were also extended under s. 8A of Cap. 382,[10] including his privacy rights in relation to the confidential documents in his file. The Appellant

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[9] The CA observed at [42] of its judgment that:

"Protection of the core legislative and deliberative business in terms of free speech and debate in the Council and proceedings in a committee is conferred by sections 3 and 4. Together with other privileges and immunities, they aim at enabling LegCo to carry out its functions independently and without outside interference. The provisions regulating admittance, etc. and for offences, including section 17(c) aim at maintaining the secure and dignified environment that LegCo needs to carry out its functions."

[10] S. 8A of Cap. 382 provides that:

"(1) The persons specified in subsection (2) shall, in the relevant circumstances described in that subsection, enjoy the same privileges or immunities as those provided in or conferred on the members by section 3, 4 or 5.

(2) The persons and circumstances referred to in subsection (1) are—

(a) the Chief Executive when present at a sitting of the Council or a committee; and

(b) any public officer designated by the Chief Executive for the purpose of attending sittings of the Council or any committee, while so designated and attending any such sitting."

acted in breach of the LegCo rules and ignored the Chairperson's repeated demands that he resumed his seat and returned the folder to the Under Secretary. This led to the suspension of the meeting. The CFA held that by his actions the Appellant had created a disturbance which interfered with the ability of other members of the LegCo to carry out their proper functions and that the Appellant was not making a speech or participating in any debate of business before the meeting.

17. The CFA held that whilst the limits of the freedom were widely drawn and properly described as absolute, conduct which did not form part of any speech or debate in the LegCo fell outside the privilege conferred by ss. 3 or 4 of Cap. 382 or BL 77, and such conduct which created a disturbance constituting an interruption to proceedings interfered with the proper functioning of the LegCo or its committees, and in particular where it interfered with the rights of others, might attract liability under s. 17(c). The CFA held that it was plain that the Appellant's conduct, *prima facie* contrary to s. 17(c), was not protected by the privilege conferred by ss. 3 and 4 or BL 77.

Second Issue

18. The Appellant further argued that the courts should refrain from exercising criminal jurisdiction over contempt of the LegCo under s. 17(c) on the basis that taking jurisdiction would offend the non-intervention principle. The principle was said to derive from the doctrine of separation of powers as affirmed by the CFA in *Leung Kwok Hung v LegCo President*. The Appellant submitted that: (1) given the constitutional significance of the principle, clear words would be required to conclude that exclusive competence had been waived; (2) s. 17(c) said nothing express about exclusive competence and could not be read as displacing that principle in the context of an ordinance which included s. 3; and (3) there was scope for s. 17(c) to operate even if it did not extend to the conduct of a LegCo member.

19. The CFA referred to the non-intervention principle as stated at [28] of *Leung Kwok Hung v LegCo President*:

> "… the principle that the courts will recognize the exclusive authority of the legislature in managing its own internal processes in the conduct of its business, in particular its legislative processes. The corollary is the proposition that the courts will not intervene to rule on the regularity or irregularity of the internal processes of the legislature but will leave it to determine exclusively for itself matters of this kind (the non-intervention principle)."

20. The CFA noted that *Leung Kwok Hung v LegCo President* concerned the question whether the courts should exercise its powers of judicial review regarding the regularity or otherwise of

the President of the LegCo's decision to curtail the time for debate and to end a long filibuster, which was clearly a matter involving the internal process of the legislature. The present case was entirely different. In exercising jurisdiction in respect of the Appellant's prosecution under s. 17(c), the courts were carrying out its judicial function of applying primary legislation enacted by the LegCo itself. There was no issue of separation of powers. The LegCo had carried out its constitutionally allotted legislative function of enacting the offence provision conferring jurisdiction on the courts and the courts carried out their constitutionally allotted adjudicative function in trying prosecutions for the offence so enacted. Accordingly, the CFA held that the non-intervention principle had no application and did not require that the courts to refuse exercising criminal jurisdiction over a member of the LegCo in a prosecution under s. 17(c).

21. The CFA ruled that by enacting s. 17(c) as primary legislation, the LegCo had deliberately vested the courts with the criminal jurisdiction thereby created. To the extent that it might have been arguable that the conduct was subject to regulation as part of the LegCo's internal process, the LegCo had waived any exclusivity in its disciplinary jurisdiction and conferred penal powers on the courts. The LegCo itself had never claimed criminal jurisdiction in respect of misconduct committed inside the LegCo. The CFA agreed with the CA that insofar as there was overlapping jurisdiction over misconduct of the type covered by s. 17(c), the fact that internal LegCo disciplinary proceedings might have been commenced in respect of a particular incident would be a relevant factor in any decision of the Secretary for Justice to grant consent pursuant to s. 26 of Cap. 382 for the institution of a prosecution under Cap. 382 in respect of the same incident.

22. The CFA held that none of the Appellant's arguments in support of the contention that the LegCo had not waived its exclusive competence over LegCo members for disturbances falling within s. 17(c) were convincing reasons for holding that the non-intervention principle applied in the present case. The wording of s. 17(c) and its application to LegCo members was clear and unambiguous. Part IV of Cap. 382, including s. 17(c), was part of the "statutory framework aimed at creating a secure and dignified environment in the LegCo complex conducive to the legislature carrying out its constitutional functions at its sittings without disruption or disturbance, while permitting members of the public to observe the proceedings with the Chamber as an open legislative process". Therefore, excluding LegCo members from the operation of s. 17(c) would be anomalous.

Conclusion

23. The CFA held that the Appellant was not immune from prosecution for the alleged offence under s. 17(c). The appeal was dismissed.

Kwok Tak Ying v HKSAR

HCMA No. 216 of 2020 (11 October 2021)[1]

CA

Background

1. This case concerned the right of private prosecution under the laws of the HKSAR. On 28 April 2020, the Appellant laid information in the Shatin Magistrates' Courts alleging that between 20 November 2019 and 28 March 2020, Mr Leung Ka Wing ("Mr Leung"), the then Director of Broadcasting, misconducted himself in public office whereby various television and news programmes with misleading and distorted information were broadcast by the RTHK, contrary to common law and punishable under s. 101I(1) of the Criminal Procedure Ordinance (Cap. 221). She applied for a summons to be issued under s. 8 of the Magistrates Ordinance (Cap. 227).

2. On 12 June 2020, the magistrate, without an oral hearing, refused the application on the ground that there was no *prima facie* case to establish the requisite *mens rea*.[2] The Appellant's review brought under s. 104 of Cap. 227 was further dismissed by the magistrate at the hearing on 10 July 2020. The Appellant then appealed under s. 113 of Cap. 227.[3] Barnes J transferred the appeal to the CA since it involved important questions of law warranting the CA's determination.

Statutory scheme for private prosecutions

3. The right to private prosecution originated in the English common law and had been adopted in Hong Kong since its colonial days. It received statutory backing with the introduction of s. 14 of Cap. 227. The right, subject to the power of the Secretary for Justice ("SJ") to intervene, is embedded in s. 14(1):

> "A complainant or informant who is not acting or deemed to act on behalf of [the SJ] may if he so wishes and without any prior leave conduct in person or by counsel on his behalf the prosecution of the offence to which the complaint or information relates but the [SJ] may at any stage of the proceedings before the magistrate intervene and assume the conduct of the proceedings and may within the time limited by section 104 for applying for a review intervene for the purpose of applying for or being made a party to any review."

4. Under s. 14(2), as from the date of any such intervention the SJ shall be deemed to be a party in lieu of such complainant or informant.

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1 Reported at [2021] 4 HKLRD 841.

2 That is, Mr Leung had willfully and intentionally misconducted himself: *郭德英 訴 梁家榮* [2020] HKMagC 2, at [12]-[16].

3 S. 113 of Cap. 227 provides that:

"(1) Any person aggrieved by any conviction, order or determination of a magistrate in respect of or in connection with any offence, who did not plead guilty or admit the truth of the information or complaint, may appeal from the conviction, order or determination, in manner hereinafter provided to a judge.

(2) Any person who after pleading guilty or admitting the truth of the information or complaint is convicted of any offence by a magistrate may appeal to a judge against his sentence unless the sentence is one fixed by law.

(3) After the hearing and determination of any complaint or other proceeding which a magistrate has power to determine in a summary way other than a determination or proceeding relating to or in connection with an offence either party thereto may appeal from such order or determination of such magistrate to a judge."

Questions for determination

5. The CA identified four questions for determination. The first question concerned the constitutionality of private prosecutions:

(1) Is the right to private prosecution, embedded in s. 14(1), compatible with BL 63? ("Question 1")

If the answer to Question 1 is in the affirmative, three further questions arise:

(2) What should be the test adopted by the magistrate for the sufficiency of the evidence in determining whether to issue a private summons? ("Question 2")

(3) What is the good practice to deal with an application for issue of a private summons? In particular, bearing in mind BL 63 and s. 14(1), what is the proper procedure to enable the SJ to decide if she should intervene? ("Question 3")

(4) What is the proper way to challenge a decision by the magistrate of refusing to issue a private summons? ("Question 4")

Question 1 – compatibility with BL 63

6. BL 63 provides:

> "The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference."

7. The purpose behind BL 63 was summarized by the CA in *Re C (A Bankrupt)* [2006] 4 HKC 582 at [21], namely "… apart from its prime purpose of prohibiting political interference is to reflect the boundary that protects [the SJ] from judicial encroachment upon his right to decide whether to institute a prosecution, what charge to prefer, whether to take over a private prosecution, and whether to discontinue proceedings". Control of criminal prosecutions also includes how and by whom prosecutions should be conducted;[4] and the choice of venue of trial.[5]

8. A purposive and contextual construction requires BL 63 to be read together with other relevant articles. BL 35 is relevant for the purpose of considering private prosecutions because the right to private prosecution is an aspect of a person's established right of access to the courts for remedy of wrongs under the common law. BL 35 states:

> "Hong Kong residents shall have the right to … access to the courts … and to judicial remedies."

9. In England, the right to private prosecution went back as far as the Middle Ages, when crimes were regarded as being committed not against the state but against a particular person or family, and private prosecutions were the main way to enforce the criminal law. The subsequent establishment of public authorities to assume responsibility for most of criminal prosecutions does not extinguish or diminish the right to bring private prosecutions, which remains firmly part of the English common law[6] and has been expressly reserved by statute.[7]

10. In the contemporary criminal justice system, the right to private prosecution is viewed as a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of the public prosecuting authorities to prosecute offenders, and their inertia or partiality. With that in mind, the CA considered the right to private prosecution in the context of BL 63.

11. The right of private prosecution is neither absolute nor inviolable. The law, whether under the common law or s. 14, gives a right to institute a private prosecution but limits the right to continue by reference to the SJ's power to interfere. After assuming the proceedings, the SJ may terminate them by entering a *nolle prosequi* under s. 15 of Cap. 227, discontinuance, withdrawal or offering

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4 *Re Perry QC* [2013] 1 HKLRD 145 at [16].

5 *Chiang Lily v Secretary for Justice* (2010) 13 HKCFAR 208 at [15].

6 *R (Gujra) v Crown Prosecution Service* [2013] 1 AC 484 at [68].

7 S. 6(1) of the Prosecution of Offences Act 1985.

no evidence, or decline to sign the charge sheet or indictment.[8] The conduct of a private prosecution is also subject to the procedural constraint in s. 8(1B)(b) of Cap. 227.[9] If the magistrate refuses to issue a summons for good cause, the proceedings are effectively stopped. The court may also stay the proceedings for abuse of process, applying the relevant principles in precisely the same way as they do to public prosecutions. A private prosecutor may be at risk of being sued for malicious prosecution.

12. The CA noted the criticisms about the merits of private prosecution. Some regard the right as a potentially malign relic of the common law. The CA had already explained why the right remains a fundamental feature to Hong Kong's criminal justice system, and the rare exercise of the right does not detract from its value as a constitutional safeguard against the public prosecuting authorities' possible inaction or dereliction of duty. Some find it objectionable that the coercive structures of the criminal justice system could be set in an individual's motion. However, that is the necessary consequence when one exercises his or her constitutional right to access to the criminal courts. The fear that the right could be abused is legitimate, but there are inbuilt safeguards in the law, in terms of control by the SJ and the court, to prevent abuse of the right and imposition of tortious liability for malicious prosecution.

13. Since the right to private prosecution, whether under the common law or s. 14, is subject to the control by the SJ, what is enshrined in BL 35 is such a qualified right. It does not fall foul of the SJ's exclusive power to control criminal prosecutions under BL 63. In short, it is compatible with BL 63. So the answer to Question 1 is "yes".

Question 2 – test for sufficiency of evidence

14. The decision whether to issue a summons is a judicial function which must be exercised by the magistrate judicially. The CA held that the common law principles on how a magistrate should decide whether to issue a private summons as summarized in *R (Kay) v Leeds Magistrates' Court* [2018] 4 WLR 91 at [22] also apply in Hong Kong. For sufficiency of evidence, a magistrate only has to be satisfied that

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8 See ss. 74 and 75 of the District Court Ordinance (Cap. 336) and s. 17 of Cap. 221.

9 S. 8(1B)(b) of Cap. 227 provides that:

"A summons may be issued without consideration of the complaint or information by the magistrate or an officer of a magistrate's court who is authorized under subsection (1), but, if a magistrate does consider the complaint or information, he may for good cause refuse to issue a summons."

the essential ingredients of the offence are *prima facie* present ("PF Test").

15. Regarding the juridical basis for the adoption of the PF Test, the CA considered that this is informed by the magistrate's core function in deciding whether to issue a private summons. The magistrate must carefully balance the right of the private complainant who seeks justice through the criminal process under BL 35 and the interest of the prospective defendant who should not be brought before the court and bear the full brunt of the criminal process unless justified. The magistrate is essentially conducting a screening exercise against unmeritorious, frivolous and vexatious cases. The prospective defendant has no *locus standi* and no right to be heard. The magistrate will ordinarily only act on the materials presented by the private complainant, and will not weigh up the evidence or consider potential defence. The PF Test thus strikes a proper balance between the competing interests of the parties by allowing only cases where all the elements of the alleged offence are *prima facie* present to proceed. The CA considered this as the juridical basis for adopting the test.

16. The CA accepted that a private prosecutor has the same duty as a public prosecutor to objectively assess the evidence and determine if there is a reasonable prospect of conviction. However, the defendant is not compelled to appear by the information or complaint. He or she is only so compelled by a magistrate's summons. The magistrate still applies the same standard, namely the PF Test, to a private prosecution as much as to a public prosecution. The CA further stressed that the respective role of a prosecutor and a magistrate in assessing the sufficiency of evidence are markedly distinct.

17. The CA rejected the argument that the PF Test imposes a threshold too low and may lead to abuse and waste of judicial resources. The magistrate must apply a judicial mind to the materials before him or her and examine them critically. He or she must conduct a rigorous legal analysis to ensure that all elements of the alleged offence are established. Further, he or she may consider the prior conduct of the private prosecutor. He or she should also be alert to the inherent potential conflict of interest that a private prosecutor may have and may have regard as appropriate to the person's failure to approach the police and prosecution authorities.

18. Finally, the Respondent's counsel argued that since the SJ has to consider whether to intervene and take over a private prosecution duly and timely, it may disrupt the work priority of the Department of Justice and impact on its resources. A more stringent test is required to prevent such possible adverse implications. However, the CA considered that such concerns are irrelevant to the magistrate's decision on issuance of a private summons.

19. In consequence, the answer to Question 2 is the PF Test.

Question 3 – good practice and proper procedure

20. The CA considered it to be in the interest of administration of justice to have a procedural code on the practice and procedure for an application for issue of a private summons, but this is a matter for the government. Absent such a code, the magistrate should exercise his or her case management power to control the conduct of the application and to facilitate its fair and expedient disposal. The CA proposed the following to be adopted as and when appropriate.

21. First, the magistrate should satisfy himself or herself that all the papers in support meet all the applicable statutory requirements. He or she may direct the private prosecutor to provide written submissions.

22. Second, a private prosecutor has the same duty of candour expected of a public prosecutor during his or her *ex parte* application for issue of a summons. The duty includes a duty not to mislead the magistrate in any material way and requires the disclosure of any material which is potentially adverse to the application or might militate against the issue of the summons or may be relevant to it. Any failure on his or her part may amount to an abuse of process. The magistrate may require an affirmation from the private prosecutor to support the application.

23. Third, although the magistrate may inform the

prospective defendant of the application and to hear him or her, such discretion should only be exercised exceptionally.

24. Fourth, the magistrate will ordinarily be able to dispose of the application on paper. If, however, he or she wishes to have an oral hearing, it must not be turned into a mini-trial. The magistrate should give proper case management directions and control the conduct of hearing as appropriate.

25. Fifth, in deciding whether to notify the SJ of the application, the magistrate should duly recognize the SJ's power to control prosecutions under BL 63 and give true and meaningful effect to s. 14(1). Generally speaking,

(1) If the magistrate is going to refuse the application, it serves no practical purpose to notify the SJ until after he or she has dismissed it.

(2) If the magistrate needs the SJ's assistance, the SJ should be notified and invited to appear as an interested party. It is up to the SJ to decide whether to do so, and the magistrate should then give further case management directions as appropriate.

(3) If the magistrate does not need the SJ's assistance and will allow the application, the SJ should be notified as soon as the magistrate has issued the summons. The SJ may decide whether to intervene and take over the proceedings.

26. The CA reiterated that the above was meant to be guidance and not a straightjacket, and tailor-make case management decisions are required.

Question 4 – proper way to challenge a refusal to issue summons

27. An aggrieved person may not challenge a magistrate's refusal to issue a private summons under Cap. 227 including s. 113. Any purported appeal is improperly constituted and is liable to be dismissed on this ground alone.

28. The High Court has supervisory jurisdiction by way of judicial review over magistrates' courts, and this covers the decision whether to issue a private summons. Judicial review is thus the only proper way for a private prosecutor to challenge the magistrate's decision refusing to issue a private summons.

Conclusion

29. As the appeal was purportedly brought under s. 113 of Cap. 227, it was improperly constituted and was dismissed on this ground alone. For completeness, the CA briefly dealt with the merits of the appeal. Applying the PF Test, there was no *prima facie* evidence to establish the necessary *mens rea*. The magistrate was thus correct in refusing to issue the private summons. The appeal was dismissed.

Chu Kong v Sun Min and Others

FACV Nos. 6 & 7 of 2022 (6 December 2022)[1]

CFA

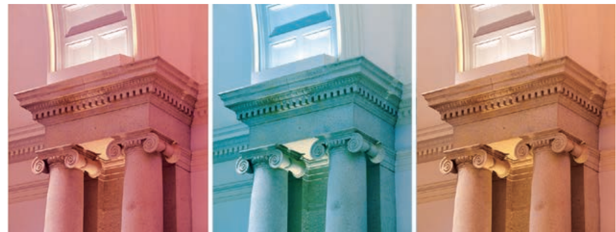
Background

1. The basic issue of principle raised on these appeals is whether a person other than the Secretary for Justice ("SJ") who wishes to bring proceedings for criminal contempt of court must obtain the SJ's consent before commencing such proceedings.

2. The action underlying the contempt application arose from a dispute concerned with the control of a motor vessel "Grain Pearl", which was owned by a company (i) 50% owned by Chu Kong ("Respondent") and two associates, and (ii) 50% ultimately owned by Lau Wing Yan and his associates, Sun Min ("1st Appellant") and Chang Dafa ("2nd Appellant") (collectively "Lau and associates").

3. Disagreements arose between the Respondent and Lau and associates, which led to the commencement of the underlying action by Lau and associates and Pacific Bulk Shipping (Cayman) Ltd ("3rd Appellant") (collectively "the Appellants") against the Respondent, in which the Appellants relied on, among other things, three emails ("Emails") to support their *ex parte* application for an injunction against the Respondent. The Emails had been altered by one Yan Donghai ("Yan") so as to bolster the case of Lau and associates. The Respondent contended that the 1st and 3rd Appellants were aware of these alterations.

4. The Respondent applied for leave to commence contempt proceedings against the Appellants and Yan in respect of their use of the Emails and other allegedly false materials.



CFI and CA decisions

5. Leave to bring the contempt proceedings was first granted by DHCJ Kent Yee, but was set aside by DHCJ Saunders on ground of material non-disclosure. However, DHCJ Saunders held that it was unnecessary for the Respondent to obtain the SJ's consent to bring the contempt proceedings.

6. In reversing DHCJ Saunders' setting aside of leave, the CA overruled DHCJ Saunders' finding of material non-disclosure, but agreed that the SJ's consent to bring the contempt proceedings was not needed.

Questions before the CFA

7. The questions before the CFA were:

(1) whether the SJ has the exclusive right to bring criminal contempt proceedings against an alleged contemnor;

(2) if the answer to (1) is no, whether a private litigant who seeks to commit another for criminal contempt under Order 52 of the Rules of the High Court (Cap. 4A) ("O. 52") is or should be required to consult the SJ;

(3) if the answer to (2) is yes, and if the SJ declines to bring the proceedings, whether

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[1] Reported at (2022) 25 HKCFAR 318.

the private litigant is required to join the SJ as party, and/or lay the relevant facts before the court including any views expressed by the SJ; and

(4) if the answer(s) to any of the above questions is/are yes, whether the leave granted to the Respondent to commence committal proceedings against the Appellants and Yan should be set aside, and these contempt proceedings dismissed.

Civil and criminal contempt of court

8. The CFA first discussed the nature of contempt of court ("contempt") jurisdiction. The CFA recognized that the ability of a court to entertain applications for contempt and the power to punish those who commit contempt is an essential ingredient of "justice being effectively administered" and represents a very well-established aspect of the court's inherent jurisdiction, as part of the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in an orderly and effective manner. The court's power and duty to enforce its orders and to protect the administration of justice against contempt is therefore an integral part of the court's constitutional function.

9. The authorities establish two categories of contempt, namely, civil contempt and criminal contempt. The CFA recognized that the distinction is well-established and has not been challenged on these appeals. The CFA ruled that the only appropriate way to bring an alleged contempt before the court is through civil proceedings. The CFA held that criminal contempt proceedings, while *sui generis*, are ultimately civil in nature and that the initiation of contempt proceedings should not be described as a "prosecution".

10. While it is open (and indeed normal) for criminal contempt proceedings to be initiated by an individual interested in the proceedings or the SJ, the CFA ruled that the court has jurisdiction to initiate such proceedings of its own motion. The party bringing such proceedings performs the basic function of drawing the court's attention to the facts and matters which are said to give rise to the contempt, while leaving it to the court to decide on the existence of a criminal contempt and, if so, the appropriate sanction.

The central issue as a matter of principle

11. The CFA held that no entity other than the court itself should be able to fetter the ability of any person to bring an alleged contempt, whether civil or criminal, to the attention of the court. Whilst the CFA agreed that the SJ has a vital and fundamental role in supporting the rule of law and hence the role and authority of the courts, the CFA rejected the Appellants' contention that the SJ can prevent a court from initiating criminal contempt proceedings of its own motion, which the CFA opined as running wholly counter to the important constitutional principle of separation of functions.

12. Recognizing that the court's leave is needed to bring contempt proceedings, the CFA took the view that the court is the only gatekeeper controlling access to the court to a party seeking to bring criminal contempt proceedings. The fact that civil contempt proceedings can freely be brought to court without the consent of the SJ or any other third party also supports the proposition that the same should be true for criminal contempt proceedings. Given that the contempt jurisdiction is based on the court's duty to protect its own efficacy and authority, it would be strange if the court was more restricted when it came to entertaining the more serious criminal contempt proceedings.

13. The CFA opined that the very fact that all members of the public have an interest in the proper administration of justice lends support to the contention that there should be no fetter imposable by any entity other than the court itself on a party seeking to bring criminal contempt proceedings. Further, seeking the leave of the court can involve no or little loss of time or extra effort. By contrast, if consent has to be sought from the SJ, it would involve extra delay and expense. Given that contempt proceedings require the leave of the court, it is difficult to see why the consent of a third party is also required. In addition, given the limited resources or power on the part of the SJ to carry out investigation, the CFA noted that it would represent an unnecessary burden on the SJ to vet every proposed contempt application.

14. The CFA rejected the Appellants' proposition that there is an inherent conflict between the conduct of criminal contempt proceedings which are public law proceedings concerned solely with the administration of justice and public interest, and the notion that a private party with his own agenda and motive can bring such proceedings. Firstly, the need for the court's leave enables the judges to scrutinize each application brought by private parties. Secondly, an alleged contemnor has substantial protection in that he or she can apply to have an *ex parte* grant of leave set aside if there was abuse and the court may, at any stage, of its own motion, or at the instigation of a party, seek assistance from the SJ.

15. The CFA noted the several analogies pressed by the Appellants. The CFA warned that analogies are always dangerous, and that must be particularly true in relation to criminal contempt proceedings which have been consistently described as *sui generis*.

Domestic constitutional, legislative, and other materials

16. The CFA further considered whether there are other materials which may assist the Appellants' case. The CFA made clear that the Appellants would only succeed if they were able to identify a legislative provision or case law developed in such a way which imposes or recognizes a requirement for the SJ's consent before a private person can initiate criminal contempt proceedings.

Rules of the High Court

17. The CFA first held that there is no general applicable rule in Cap. 4A which assists for present purpose. The CFA ruled that O. 52, which is headed "Committal", appears to be limited to contempt applications seeking committal in light of its title and the provisions of O. 52 rr. 1 and 2.[2] The court's leave would still be required under O. 52 r. 2, read together with O. 52 r. 9,[3] if a fine or some form of security, rather than committal, is the sanction sought in a contempt application.[4]

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[2] O. 52 r. 1 of Cap. 4A provides that:

"1. Committal for contempt of court (O. 52, r. 1)

The power of the Court or of the Court of Appeal to punish for contempt of court may be exercised by an order of committal made by a single Judge or by a single justice of appeal. *(See App. A, Form 85)*"

O. 52 r. 2 of Cap. 4A provides that:

"2. Grant of leave to apply for committal (O. 52, r. 2)

(1) No application for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made ex parte to a judge, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than the preceding day to the Registrar and must at the same time lodge with the Registrar copies of the statement and affidavit.

(4) The judge may determine the application for leave without a hearing, unless a hearing is requested in the notice of application, and need not sit in open court; and in any case the Registrar shall serve a copy of the judge's order on the applicant.

(5) Where an application for leave is refused by a judge or is granted on terms, the applicant may appeal against the judge's order to the Court of Appeal within 10 days after such order.

(6) Without prejudice to the powers conferred by Order 20, rule 8, the judge hearing an application for leave may allow the applicant's statement to be amended on such terms, if any, as the judge thinks fit.

(7) If the judge grants leave he may impose such terms as to costs and as to giving of security as he thinks fit."

[3] O. 52 r. 9 of Cap. 4A provides that:

"9. Saving for other powers (O. 52, r. 9)

Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the Court to make an order requiring a person guilty of contempt of court, or a person punishable by virtue of any written law in like manner as if he had been guilty of contempt of the Court of First Instance, to pay a fine or to give security for his good behaviour, and those provisions, so far as applicable, and with the necessary modifications, shall apply in relation to an application for such an order as they apply in relation to an application for an order of committal."

[4] The CFA further noted that the court's leave would be required under O. 45 r. 5(i)(b)(i) and (ii) of Cap. 4A if sequestration is the sanction sought.

18. The CFA noted that O. 52 applies to both civil and criminal contempt applications. Committal is almost always sought in criminal contempt applications, and where it is not sought, the applications would presumably seek a fine, security or sequestration and therefore would require the court's leave. On the other hand, committal is often sought in civil contempt applications. However, given the purpose of civil contempt proceedings, it is possible to envisage the making of an application which seeks a different remedy, *e.g.* simply requiring the alleged contemnor to appear before the court. Thus, while the leave requirement under O. 52 will apply to the great majority of civil contempt applications, it may be that it would not necessarily apply to them all.

19. The way in which O. 52 is drafted has avoided parties or the court having to delve into the sometimes difficult question whether the alleged contempt is civil or criminal. The sole question is whether the application seeks the imprisonment, the imposition of a fine, the provision of security or sequestration: if it does, then whether the alleged contempt is criminal or civil, the court's leave must be obtained. If it does not, then it would seem that leave would not be needed, unless it was required under another rule of court, or another legislative provision. There is not even a hint in O. 52 that an applicant seeking to commit someone for contempt needs to apply to the SJ.

20. The CFA rejected the Appellants' reliance on O. 41A r. 9 of Cap. 4A[5] as being unhelpful to the Appellants' case. It is noted that this provision not only specifically requires an applicant to obtain leave of the court under sub-paragraph (b) for bringing contempt while saying nothing about the SJ's consent, but it also has the SJ in mind as shown by sub-paragraph (a).

[5] O. 41A r. 9 of Cap. 4A provides that:

"9. False statements (O. 41A, r. 9)

(1) Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

(2) Proceedings under this rule may be brought only —

(a) by the Secretary for Justice or a person aggrieved by the false statement; and

(b) with the leave of the Court.

(3) The Court shall not grant the leave under paragraph (2) unless it is satisfied that the punishment for contempt of court is proportionate and appropriate in relation to the false statement.

(4) Proceedings under this rule are subject to the law relating to contempt of court and this rule is without prejudice to such law."

Constitutional provisions

21. As to the Appellants' reliance on BL 63,[6] the CFA upheld the CA's ruling that BL 63 does not extend to applications for criminal contempt given the different constitutional bases between criminal contempt jurisdiction and criminal jurisdiction. The CFA emphasized that very clear and unambiguous words would be required for a legislative provision, or even a Basic Law provision, to enable the SJ to prevent the court from considering an alleged contempt but such wording is absent in BL 63.

22. The CFA also relied on the theme of continuity in support of its conclusion above. The CFA agreed that the Basic Law "aims to provide for continuity between the pre-existing and the present courts and judicial systems".[7] The CFA referred to an authoritative 1987 Final Report[8] which led to the drafting of some provisions of the Basic Law, including BL 63. The Report discussed the role of the Attorney General ("AG"), the SJ's effective predecessor before the Basic Law. The CFA noted that "criminal proceedings" and "contempt" were being referred to in paragraphs 3 and 4 of Appendix I to the 1987 Final Report[9] respectively. While the AG had the overall authority for the initiation of the former, he only played a more general public interest role as *amicus curiae* with regard to the latter.

23. The CFA noted that the reference to "criminal proceedings" in paragraph 3 of Appendix I to the 1987 Final Report was not envisaged as extending to criminal contempt proceedings, and it was significant that "criminal proceedings"[10] was the relevant expression in BL 63. There appears to be no conceivable reason why it would have been thought to be appropriate to transfer control over criminal contempt proceedings to the Department of Justice, and there was no trace of any suggestion that such a transfer was contemplated, let alone intended. Hence, the CFA concluded that BL 63 does not apply to criminal contempt proceedings.

Legislative provisions

24. The CFA rejected the Appellants' contention that a breach of s. 3(1) of the Judicial Proceedings (Regulation of Reports) Ordinance (Cap. 287) is a species of contempt and that s. 3(3) shows that contempt applications need the consent of the SJ. First, a breach of s. 3(1) of Cap. 287 is rendered a crime by s. 3(2) and it is not a contempt of court. Besides, the requirement of the SJ's consent is expressly spelled out in s. 3(3) of Cap. 287, which could be contrasted with O. 52 as the latter contains no such requirement. The contrast reinforces the notion that such consent is not needed for an application to which O. 52 applies.

Case law and other domestic materials

25. As to the Appellants' reliance on *Secretary for Justice v Choy Bing Wing* [2005] 4 HKC 416 for the proposition that a criminal contempt is a matter for the SJ to raise, acting as the guardian of the public interest, the CFA opined that the relevant statement made by the Court in *Choy Bing Wing* was not expressed in exclusive terms and that saying that "an applicant (be it an aggrieved litigant or the [SJ])

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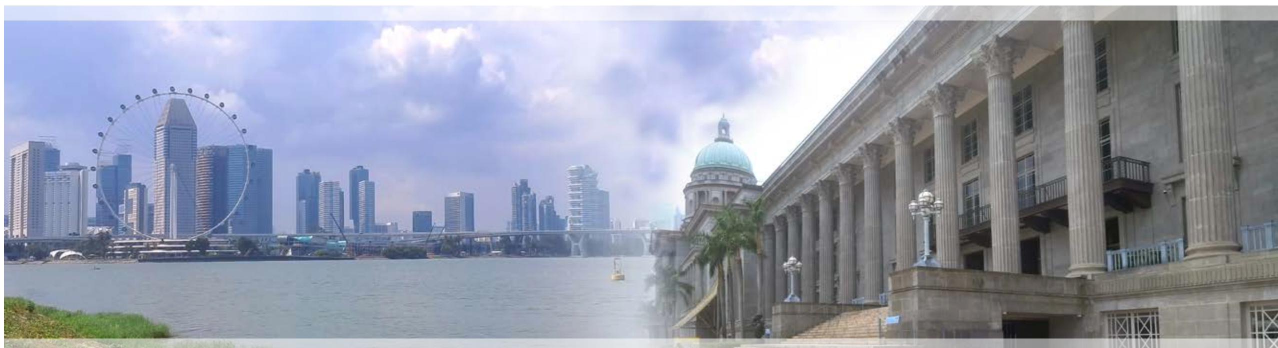
[6] BL 63 provides that:
"The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference."

[7] *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234, at paragraph 43 (per Ribeiro PJ).

[8] Its full name is "Final Report on Some Aspects of Final Adjudication and the Judicial System of the SAR, and the Role of an Independent Prosecuting Authority" of 12 June 1987.

[9] Paragraphs 3 and 4 of Appendix I to the 1987 Final Report stipulates that:
"3. The Attorney General has overall authority for the initiation of criminal proceedings. His specific consent is required under a number of statutes. He has power to lay ex officio criminal informations, to take over the conduct of privately initiated prosecutions and to enter nolles prosequi. He has responsibility for initiating appeals and has power to refer questions of law to the Court of Appeal. It is effectively within his power to grant immunity from prosecution.
4. As guardian of the public interest in a wider sense, the Attorney General has a formal but important role in the initiation of relator actions to enforce public legal rights. He has a right to intervene in any case where the prerogatives of the Crown may be affected. He represents the public interest as counsel to Tribunals of Inquiry. He must be joined as a party in all actions to enforce charitable or public trusts. The Attorney also has a more general public interest role as amicus curiae, the most important example of which is the bringing of alleged contempts to the notice of the courts."

[10] BL 63 actually uses the expression "criminal prosecutions".



may seek committal for contempt…whether the contempt is…civil or criminal", it must be implied in the statement that no consent from the SJ was needed.

26. The CFA also referred to the Hong Kong Law Reform Commission's 1986 Report on Contempt of Court and noted that members of the Commission considered that the AG's consent was not required.

Case law and other materials from other jurisdictions

27. Insofar as judicial observations in case law of other jurisdictions are concerned, the CFA cautioned that care must be taken before one gives weight to a statement in a judgment where the point was not in fact in issue and may well not have been the subject of much argument. The CFA considered that case law and materials from other common law jurisdictions[11] on the topic confirms the view that SJ's consent was not required.

28. The CFA noted that the decision of the Court of Appeal of Singapore in *Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013] 2 SLR 246 represents an exception. There the Singapore court concluded that given the AG's unique and integral role as guardian of the public interest *vis-à-vis* the institution and conduct of all criminal proceedings, including criminal contempt proceedings, as reflected in Article 35(8) of the Constitution of the Republic of Singapore,[12] a private party cannot initiate criminal contempt proceedings without first giving the AG the opportunity to initiate the proceedings. Only if the AG elects not to do so that the private party would be free to initiate such proceedings, subject to the court's leave.

29. The CFA, however, ruled that the Singapore case is of no assistance to the Appellants. Firstly, even in Singapore, the AG does not have the power to prevent a private party from bringing criminal contempt proceedings. Secondly, there was no suggestion in that case that the AG would not want all projected criminal proceedings be brought to his attention, which was not the case of the SJ. Thirdly, Article 35 of the Constitution of the Republic of Singapore, which forms the basis of part of the court's reasoning, has no part to play in Hong Kong.

Conclusion

30. The CFA concluded that an applicant need not apply to, or otherwise involve, the SJ before issuing an application for leave to proceed with criminal contempt proceedings under O. 52 r. 2 and subject to obtaining leave of the court, a private party is free to initiate criminal contempt proceedings.

31. Accordingly, the CFA unanimously dismissed the appeals.

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[11] Cases reviewed by the CFA included *Attorney-General v Times Newspapers Ltd* [1974] AC 273, *KJM Superbikes Ltd v Hinton* [2009] 1 WLR 2406, *Robb v Caledonian Newspapers Ltd* 1994 SCCR 659, *DPP v Australian Broadcasting Corporation* (1987) 7 NSWLR 588, *Witham v Holloway* (1995) 183 CLR 525, *Re Colina ex p Torney* (1999) 200 CLR 386, *R v Ellis* (1889) 28 NBR 497, *Murphy v British Broadcasting Corporation* [2005] 3 IR 336, *AG v Kiwanuka* [2022] UGHCCD 46, *etc*. The CFA also referred to the 1974 *Report of the Committee on Contempt of Court*, Cmnd 5794 and leading textbooks on contempt, *i.e. Borrie & Lowe*: *The Law of Contempt*, 4th edn. (2010) and *Arlidge, Eady & Smith on Contempt*, 5th edn. (2017).

[12] Article 35(8) of the Constitution of the Republic of Singapore provides that:
"The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence."

Q and Another v Commissioner of Registration

FACV Nos. 8 & 9 of 2022 (6 February 2023)[1]

CFA

Background

1. Every resident over the age of 11 is required to register for a Hong Kong identity card ("HKID card") under the Registration of Persons Ordinance (Cap. 177) and the Registration of Persons Regulations (Cap. 177A). Inspection of HKID cards is a routine measure to verify one's identity. The HKID card shows the holder's gender ("gender marker"), a feature intended to help verify the identity of the holder. The gender marker does not signify recognition of the holder's sex as a matter of law.

2. The two Appellants were born in Hong Kong and their sex at birth was registered as "female" and they were issued with HKID cards stating the holders' sex as "female". Both of them were female to male ("FtM") transgender persons who were diagnosed as gender dysphoria patients. Gender dysphoria is a medical condition involving distress and discomfort arising out of the discordance they experienced between the (female) sex assigned to them at birth and the (male) gender with which they intrinsically identified. After a lengthy course of medical and surgical treatment designed to affirm their male gender identity with conforming bodily changes, their gender dysphoria had been medically certified as sufficiently treated for their social integration and psychological well-being without the need for additional surgical procedures. For medical purposes they might be regarded as having transitioned to the acquired male gender.

3. The Appellants applied to the Commissioner of Registration ("Commissioner") to amend the gender marker on their HKID cards to reflect their acquired gender. The Commissioner refused their applications ("Commissioner's decision") on the ground that they had not undergone full sex re-assignment surgery ("SRS"). According to the Commissioner's policy, the gender marker on a transgender individual's HKID card would only be amended upon completion of full SRS ("Policy"). The Appellants brought judicial review proceedings to challenge the Commissioner's decision and the Policy.

4. The applications before the CFI and the appeals to CA were both dismissed. The CA granted leave to appeal to the CFA.

Issues

5. The issue before the CFA was whether the Commissioner's decision and the Policy had infringed the two Appellants' right to privacy protected by Article 14 of BoR.[2]

The diagnosis and treatments for gender dysphoria

6. The consensus in medical evidence was that gender dysphoria is a biological condition and not a lifestyle choice, involving misalignment between experienced gender and assigned sex. The clinical condition of patients would vary and individualized treatments are required. The Hospital Authority has been providing health care for persons with gender dysphoria. The treatment pathway generally

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1 Reported in (2023) 26 HKCFAR 25.

2 Article 14 of BoR provides:

"(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks."

involves an initial assessment by psychiatrists and clinical psychologists and, upon confirmation of a diagnosis of gender dysphoria, a period living in the experienced gender with medical support and guidance.

7. If the real life experience is deemed successful and the patient is psychiatrically ready for hormonal treatment, the person would be referred to an endocrinologist to start treatment. In FtM cases, the therapy would produce bodily changes involving the development of male characteristics, including cessation of menses and increased muscle. After the 1-year continuous use of the hormones and if surgical treatment is desired, the patient may be referred for consideration of a range of surgical procedures. Those options may involve removal of breasts and, as the ultimate surgical intervention, full SRS, *i.e.* genital surgery which comprises removal of the uterus, ovaries and vagina, and phallus construction. Full SRS may involve certain post-operative risks and possible urologic complications.

8. The medical evidence provided background for discussion of the issues concerned. The CFA reiterated that it was concerned with the Commissioner's decision refusing to change a gender marker on an identification document and not with determining the Appellants' sex as a matter of law.

The Appellants' application to amend HKID cards

9. Regulation 18(1)(a) of Cap. 177A places a duty on holders to report to a registration officer whenever HKID card particulars previously submitted "have become incorrect".

10. In the light of the medical treatment that they had received, and on the basis that there was no further medical need for them to undergo further surgery to treat their gender dysphoria, the Appellants applied to the Commissioner under Regulation 14 of Cap. 177A to alter the gender marker on their HKID cards.

11. In refusing the Appellants' applications, the Commissioner applied the Policy contained in guidelines issued in April 2012 ("Guidelines") which stipulated that a FtM transgender applicant seeking an amendment to gender marker on HKID card must have "completed SRS". The CFA noted that such surgical procedures were at the most invasive end of the treatment spectrum for gender dysphoria and were considered by medical evidence as unnecessary to many transgender persons (including the Appellants) whose gender dysphoria had been effectively treated.

The challenge under Article 14 of BoR

12. In considering a constitutional challenge alleging a violation of a constitutional right or freedom, the first question is whether the constitutional right is engaged. The next question is whether the impugned measure constitutes an encroachment on such right. If so, unless the constitutional right is absolute, a proportionality assessment is then undertaken to determine whether such interference with the right can be justified.[3]

13. The applicants in the present appeal alleged that the Policy constituted an unlawful interference with the constitutional rights under Article 14 of BoR.

14. Article 14 of BoR is in the same terms as Article 17 of ICCPR. By virtue of BL 39, the rights and freedoms in the ICCPR as applied to Hong Kong and incorporated via BoR are protected and given constitutional effect. The rights under Article 14 of BoR are not absolute and may be restricted as prescribed by law.

15. It was undisputed by the parties and accepted by the CA that Article 14 of BoR protected, *inter alia*, the right to gender identity and the right to physical integrity. The CFA agreed with the CA that gender identity was one of the most crucial identities of a person, and the concept of privacy under Article 14 was materially equivalent to the concept of respect for private life in Article 8 of the European Convention on Human Rights ("ECHR 8").[4] In this context, the European Court of Human Rights held in *AP, Garçon and Nicot v France*[5] that the right to respect for private life under ECHR 8 applied fully to gender identity, as a component of personal identity.

16. The CFA held that Article 14 of BoR was clearly engaged. Privacy was a concept inherently linked to a person's dignity. The refusal to allow an amendment to the gender marker resulted in humiliation, distress and loss of dignity in routine activities involving the inspection of the Appellants' HKID cards. Furthermore, the Policy resulted in a choice between accepting frequent infringements of their rights to privacy under Article 14 of BoR when using unamended HKID cards and undergoing major invasive and medically unnecessary surgery. It thus fell to be determined whether the Policy could be justified in accordance with the proportionality test, the burden being on the Commissioner to provide justification.[6]

17. The proportionality assessment involves a four-step inquiry: (1) whether the encroachment pursues a legitimate aim; (2) whether such encroachment is rationally connected with achieving that aim; (3) whether it is proportionate to achieve that aim; and (4) whether a reasonable balance has been struck between the societal benefits brought and the individual's constitutionally protected right or freedom.[7]

Legitimate aim and rational connection

18. The aim of the Policy, as formulated by the Commissioner, was "to establish a fair, clear, consistent, certain and objective administrative guideline" to consider a change of the gender marker on the HKID card. The aim was held by the Courts below to be legitimate and not disputed by the Appellants who also accepted the presence of rational connection to such legitimate aim. The focus was on the requirement of full SRS for amending the gender marker and whether its incursion into constitutional privacy rights could be justified as proportionate.

The margin of discretion in the proportionality analysis

19. In a proportionality analysis, if a wide margin of discretion available to the decision maker is called for, the "manifestly without reasonable foundation"

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3 *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754 at [65].

4 See *ZN v Secretary for Justice* (2020) 23 HKCFAR 15 at [60].

5 Application Nos. 79885/12, 52471/13 and 52596/13, Judgment dated 6 April 2017.

6 *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 at [21]; *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 at [56] and [60].

7 *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at [134]-[135].

standard may be appropriate. Where a narrow margin of appreciation is available, the "reasonable necessity" standard may be applied.[8] The two standards are not wholly independent concepts but indicate a continuous "reasonableness" spectrum by which the court determines the intensity of judicial scrutiny.[9]

20. Both the CFI and CA rejected adoption of the "manifestly without reasonable foundation" test, and held that applying *Fok Chun Wa v Hospital Authority*,[10] since the rights to gender identity and physical integrity were "core values relating to personal or human characteristics", the court should accord a narrow margin of discretion to the Commissioner and adopt the "no more than reasonably necessary" standard.

21. Counsel for the Commissioner submitted that it was wrong to apply the stringent standard whenever "core values" were involved. The right to privacy was not absolute and should be given way when brought into contact with public life or in conflict with other protected interests. The impact of the Policy on the public was an important matter involving social policy making and was morally and ethically sensitive, hence a wide margin of discretion should be accorded.

22. The CFA rejected the submission and upheld the decision to apply the "no more than reasonably necessary" standard. Relevant considerations included the significance of and extent of interference with the right concerned, the identity of the decision-maker and the measure's content and features. The Policy concerned the expression of an individual's gender identity on a HKID card and a requirement to undergo extensive surgical intervention for a change of gender marker. These were core values which engaged a more stringent standard of scrutiny.

23. The present case did not concern a person's sexual status for all legal purposes, but merely the change of a gender marker on an identification document which did not affect legal status. Thus the CFA rejected the Commissioner's contention to have regard to any relevant consensus across different jurisdictions or complications about the relationship of inter-linked legislation across different contexts as in the case of gender recognition generally.

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8 *Ibid* at [106].
9 *Ibid* at [119]-[122].
10 (2012) 15 HKCFAR 409.

24. Accordingly, the "no more than reasonably necessary" standard was adopted.

Is the Policy no more than reasonably necessary?

25. The Commissioner provided three main justifications for the Policy: (1) a full SRS was the only workable, objective and verifiable criterion for determining an application; (2) administrative problems due to incongruence between the holder's external physical appearance and the gender marker would arise if another line was drawn; and (3) hormonal and psychiatric treatments were not absolutely irreversible, giving rise to a risk that a FtM pre-operative transgender person, whose gender marker on HKID card had been changed to male, might stop hormonal treatment, recover fertility, become pregnant, and give birth.

26. The CFA noted that the function and purpose of the gender marker on HKID cards was to help verify the identity of the holder, making it rational to adopt a policy accepting an amendment to the marker if its verification function was impaired due to an incongruence between the holder's appearance and the HKID card content, as was likely the case for a transgender person. Such amendments were prescribed by Regulation 18(1)(a) of Cap. 177A whenever the HKID card particulars previously submitted "have become incorrect". Regulation 14 of Cap. 177A empowered the registration officer to decide whether there should be a change after examination of evidence and investigation.

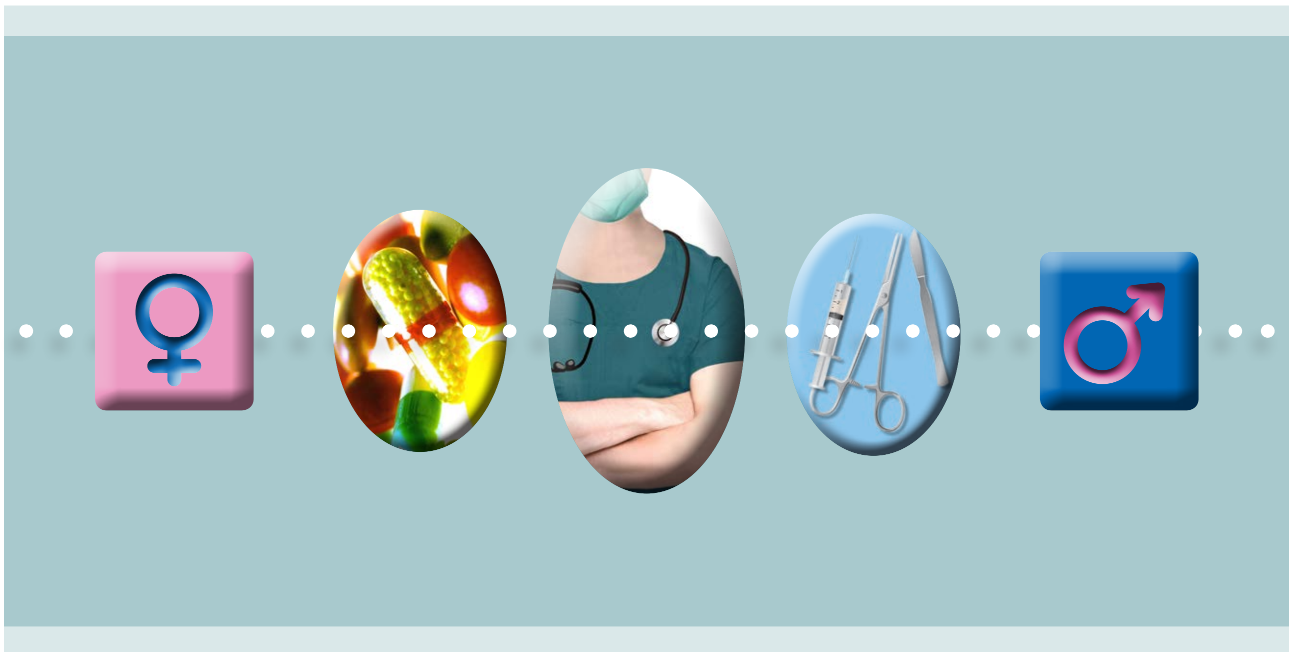
27. However, the Policy made alteration of the gender marker conditional on the most invasive surgical intervention in the range of available treatments which might be medically unnecessary for some cases. Such a criterion might be considered as the basis in recognizing change of sex for all legal purposes, which was not in issue in this case. Some transgender persons felt pressured to undergo full SRS merely to amend the gender marker on HKID cards in order not to experience discrimination, humiliation, violation of dignity and invasion of privacy. Such pressure was objectionable in principle. The CFA accepted that medical treatment must always be administered in one's best interests and adjusted to her or his specific situation, and should not be prescribed merely to promote administrative convenience or clarity. The CFA considered that the adoption of such a criterion weighed significantly against the Policy in assessing its proportionality.

28. As to the Commissioner's justifications, firstly, the CFA considered it untenable to suggest that a full SRS was the sole workable, objective and verifiable criterion and that the only alternative would involve self-declaration. As acknowledged in the Commissioner's evidence, there were possible exceptions permitting certification of different medical reasons and consideration of applications on a case-by-case basis, showing that requiring full SRS was not the only line that could be drawn. The decisions could be approached on a case-by-case basis without causing great administrative burden since there were likely to be relatively few applications from transgender persons.

29. The CFA noted that in numerous other jurisdictions, criteria short of full SRS were applied in deciding change of gender markers on identification documents, or even in recognizing change of sex for all legal purposes. For instance, the granting of a Gender Recognition Certificate under the United Kingdom's Gender Recognition Act 2004 did not require SRS. The number of applicants under such model had been steady, and there was no evidence that it had caused administrative difficulty.

30. The CFA further rejected the justification that drawing a different line might involve having to deal with medical certificates based on varying and inconsistent standards. The CFA considered that whilst the Guidelines contained provisions in relation to certification of completion of full SRS, the Commissioners could make similar stipulations in respect of such other certification as might be required.

31. Secondly, regarding the argument on practical administrative problems that might arise if a line short of full SRS were to be drawn, the CFA considered it to be over-stated. In circumstances requiring emergency assistance such as ambulance services, any incongruence between the victim's apparent sex and the gender marker was rendered insignificant. In respect of the possible confusion to the allocation systems and embarrassment to teachers and



students in the context of single-sex schools, the CFA considered such suggestion had lost touch with the issues concerned because children under the age of 11 were exempt from registering for a HKID card, and SRS would not be performed on anyone under 18 and very uncommonly before 21. In the context of recruitment for the disciplined services which set different physique requirements for candidates of different genders, such requirements would certainly be subject to physical tests rather than mere reliance on the gender marker on the identity cards.

32. The CFA held that counsel for the Commissioner also failed to distinguish between what might be called "external incongruence" and any incongruence arising out of a FtM man's retention of female genital organs and lack of a surgical male genital reconstruction. A FtM person who had undergone hormonal treatment and was living as a male would generally present himself and be regarded by others as a male. If a gender marker on the HKID card had been so amended so that his external appearance was in line with his gender marker, such incongruence and any associated problems would be far less likely to arise, if at all. Exposure of a person's genital area was rarely required.

33. Leaving the gender marker unamended might produce greater confusion or embarrassment. For example, if a transgender man who had not had full SRS but whose external appearance was in every respect male was to enter a women's public lavatory, it would cause consternation from other users. If he instead walked into the men's facility, no one would have raised an eyebrow. He could be expected to deal with his own transgender needs in a sensible way, such as by using a cubicle to ensure privacy. In situations where medical care was given in sex-specific hospital or clinic providing treatment for sexually transmitted diseases, examination revealing non-conduction of full SRS would unlikely concern other patients as it should be conducted in privacy behind screens, and privacy rights would also likely have been waived to the extent of the consent given. Lastly, in the situations of routine HKID card checks by police officers, the unamended gender marker's function as an identifier would be deficient, due to the external incongruence and causing doubt on whether the transgender person was the lawful holder of the document, leading to the embarrassment, humiliation, violation of dignity and invasion of privacy.

34. The CFA noted that genuine and difficult issues concerning the appropriate treatment of transgender persons would undeniably arise, such as out of the prison admission and search arrangements and classification of transgender athletes in sports activities, but amendment of the gender marker on the HKID card and the Policy demanding full

SRS as a condition were irrelevant to resolving such difficulties.

35. Thirdly, regarding the argument on reversibility of treatment received by transgender persons who had not received full SRS thus a risk of FtM transgender person becoming pregnant and giving birth, the CFA highlighted that such occurrences would be exceptional. In the great majority of cases, the person's commitment to achieving a permanent transition to the male gender would be plain and obvious, even if full SRS had not been performed. Elements of FtM hormonal treatment were irreversible. It would require an extremely elaborate and medically-assisted course of action for a transitioned FtM person to achieve pregnancy. It would be disproportionate to justify the Policy by the exceptional risk of a post-transition FtM pregnancy, thereby requiring all FtM transgender persons to undergo full SRS for changing gender markers on HKID cards.

36. The CFA therefore held that the Policy had failed the test of reasonable necessity and was disproportionate.

Step 4: striking a reasonable balance

37. Since the Policy and the Commissioner's decision had failed the proportionality test, it was unnecessary to consider the fourth step of the proportionality analysis. If it had been necessary to proceed to Step 4, the CFA considered that the Policy placed persons like the Applicants in the dilemma of having to choose whether to suffer regular violations of their privacy rights or to undergo highly invasive and medically unnecessary surgery, infringing their right to bodily integrity, while the societal benefits of the Policy might be illusory and at best relatively slim. This did not reflect a reasonable balance. The Policy imposed an unacceptably harsh burden on the individuals concerned.

Conclusion

38. For the foregoing reasons, the CFA allowed the appeals. The Commissioner's decisions in refusing the Applicants' applications for alteration of the gender marker on their HKID cards were quashed. A Declaration was also granted that the Commissioner's decisions and the underlying Policy requiring FtM transgender persons to undergo full SRS under the Guidelines as a requirement for altering the gender marker on their HKID cards, had violated the Appellants' rights under Article 14 of BoR and were unconstitutional.