Judgment Update

HKSAR v Fung Ka Chun and Another; HKSAR v Chan Pau Chi

CACC No. 368 of 2016; CACC No. 228 of 2019 (20 January 2023)[1]

CA

Background

1. Both appeals concerned the statutory interpretation of the meaning of "living on the earnings of prostitution of another" under s. 137(1)[2] of the Crimes Ordinance (Cap. 200) whilst the Appellants in CACC 368/2016 additionally challenged the constitutionality of s. 137(1).

2. In CACC 368/2016, the Appellants operated a website ("Website A") which featured an adult forum with different membership levels for male and female members. Female memberships were free but female members were required to provide personal information such as height, age, body measurements, photographs and contact details which male members could have access to and make request for meeting depending on the membership fees they paid and their membership level. Police evidence suggested that Website A was being used as a platform for advertising prostitution. Accordingly, the income generated from the website was deemed to constitute "earnings of prostitution of another" as defined in s. 137(1) of Cap. 200. The 1st and 2nd Appellants were charged with (i) living on the earnings of prostitution of another; and (ii) aiding, abetting, counselling, and procuring another to commit an offence under s. 137(1), respectively. Both were convicted after trial.

3. In CACC 228/2019, the Appellant was the "overall boss" of a website ("Website B"), which the prosecution alleged was promoting prostitution by providing a platform for sex workers to advertise

their services for a fee. The Appellant was convicted, *inter alia,* of the charge of conspiracy to live on the earnings of prostitution of another contrary to s. 137(1) of Cap. 200.

4. Following their convictions, the Appellants of both cases appealed to the CA. Leave was granted to them to appeal on the questions of what constitutes "earnings of prostitution of another" and the scope of the offence of living on the earnings of prostitution of another, as well as the constitutionality of s. 137(1) of Cap. 200.

Grounds of appeal

5. The Appellants in CACC 368/2016 presented multiple grounds of appeal. Central to their arguments was the contention that s. 137(1) should be given a narrow interpretation that respects both

[1] Reported at [2023] 1 HKLRD 1265.

[2] S. 137(1) of Cap. 200 provides that:
"A person who knowingly lives wholly or in part on the earnings of prostitution of another shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years."

the construction of the provision and the Appellants' constitutional rights, including freedom of choice of occupation, protection of privacy, and the right to the safety and personal security of prostitutes. They argued that the prosecution had relied on an overly broad interpretation of the law, leading to an expansion of liability for the offence. They asserted that the focus should be on the exploitation of individuals for the purpose of prostitution or instances where there is control, direction, or influence over the movements of prostitutes. Adopting a broader interpretation would result in uncertainty in the application of the offence.

6. They also argued, *inter alia*, that the earnings in question did not come from female members but from male members and could not be considered as "earnings of prostitution".

7. The Appellant in CACC 228/2019 contended that the evidence, even when considered at its highest, did not satisfy the legal requirements for the offence of conspiracy to live on the earnings of prostitution. Specifically, he challenged the applicability of the precedent set in *Shaw v Director of Public Prosecutions* [1962] AC 220, arguing that it was wrongly decided. The Appellant argued, alternatively, that the present case could be distinguished from *Shaw*, and therefore, the Appellant should not have been convicted.

Major grounds

(a) CACC 368/2016

Statutory construction of s. 137(1)

8. The Appellants questioned the parameters of the offence under s. 137(1) and submitted that a narrow interpretation was correct for the expression "earnings of prostitution", that is, the offence is confined to an individual who exerts actual control or influence over the person or exploits the person for the purpose of prosecution. They further argued that when s. 137(1) is read with s. 137(2),[3] the expression is not apt, nor intended, to extend to an individual who profits from or is involved in the activities of a prostitute without actually controlling any of those activities. It was contended that adopting a wide interpretation would extend the liability of the offence and lead to uncertainty in its application and operation.

9. The CA adopted a purposive approach to the interpretation of s. 137(1) taking into account its context and purpose, and rejected the narrow interpretation proposed by the Appellants. The CA acknowledged that s. 137(1) was necessarily framed in general terms to cater for the myriad of circumstances in which a defendant could be living on the earnings of prostitution of another. It recognized that the focus of the offence is the parasitic or exploitative nature of the relationship between the offender and the prostitute. The mischief it aimed to address is any system or instrument of exploitation of sex workers, which seeks to profit from their work and take advantage of their vulnerable circumstances in which they operate and conduct their trade. Having reviewed the authorities, the CA found that it is clear that there is a distinction to be drawn between a service which could be supplied to a person, whether a prostitute or not, and one which by its nature is referable to prostitution and nothing else.

10. The Court found the Appellants' proposed interpretation to be unrealistic. To establish the offence, it must be proven that a defendant knowingly lives on the earnings of prostitution. The relationship between a defendant and the prostitute must be exploitative, with a defendant's reward directly tied to the prostitution. The CA highlighted that the purpose and structure of Website A were to facilitate the provision of sexual services by female members to male members. The earnings derived from the website were considered to be from the exploitation of the prostitutes and thus fell within the ambit of the "earnings of prostitution". The Court emphasized that there must be a close connection between the receipt of money and the trade before the recipient committed an offence. The Court concluded that the ambit of the offence

[3] S. 137(2) of Cap. 200 provides that:
"For the purposes of subsection (1), a person who lives with or is habitually in the company of a prostitute, or who exercises control, direction or influence over another person's movements in a way which shows he or she is aiding, abetting or compelling that other person's prostitution with others, shall be presumed to be knowingly living on the earnings of prostitution, unless he or she proves the contrary."

provision in s. 137(1) is not unfairly wide, it would not catch persons who are not exploiting prostitutes. Accordingly, the Appellants' submission was rejected.

Constitutionality of s. 137(1)

Freedom of choice of occupation

11. The Appellants raised a constitutional challenge based on the freedom of choice of occupation under BL 33[4] and the right to privacy or private life under BL 30[5] and Article 14 of BoR[6] which, the Appellants argued, provide a derivative right to work. They asserted that these rights have been encroached upon by s. 137(1) of Cap. 200 which barred them from engaging in the work of their choice, namely setting up and operating Website A.

12. In addressing the constitutional arguments, the Court first examined whether the rights identified by the Appellants exist as defined by them. It then considered whether these rights have been encroached upon and, if so, the nature and degree of such encroachment ("encroachment of rights issue"). The Court noted that the "wide interpretation" of s. 137(1) was central to the encroachment of rights issue. Accordingly, once the "narrow interpretation" as submitted by the Appellants was rejected, the arguments advanced by them on the encroachment of rights issue largely fell away.

13. Despite maintaining their stance on the "narrow interpretation" being the correct one for s. 137(1), the Appellants also questioned the basis of a previous CA decision in *Leung Sze Ho Albert v Bar Council of Hong Kong Bar Association* [2016] 5 HKLRD 542 ("*Albert Leung*"). In that case, the CA followed the CFA's decision in *GA v Director of Immigration* (2014) 17 HKCFAR 60 and held that BL 33 only protects against conscription to particular fields of occupation and does not confer a right to work in general. The Appellants argued that they had the freedom to engage in their chosen occupation of setting up a dating website and it would be overly restrictive not to allow them to do it because some activities related to the sex trade were also taking place. They contended that *Albert Leung* was plainly incorrect.

14. The CA rejected this argument and maintained that BL 33 does not confer a right to work in general. The Court did not accept the Appellants' contention that the right under BL 33 requires the government not to do anything to interfere with, diminish or take away what a resident chooses to do as an occupation. The reality of the situation was that the Appellants were not prevented from taking up the occupation of their choice, as long as it did not involve any criminal offence. There was nothing preventing the Appellants from setting up a dating website which was not engaging in any criminal activities.

Right to privacy

15. In addition, the Appellants relied on Article 14 of BoR, which provides for the protection of "private life". It was submitted that the concept of "privacy" or "private life" encompasses a person's professional or business life or employment, including freedom of choice of occupation, citing Article 8 of the European Convention on Human Rights[7] ("ECHR 8") in support.

16. The CA, however, did not find Article 14 of BoR

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[4] BL 33 provides that:

"Hong Kong residents shall have freedom of choice of occupation."

[5] BL 30 provides that:

"The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences."

[6] Article 14 of BoR provides that:

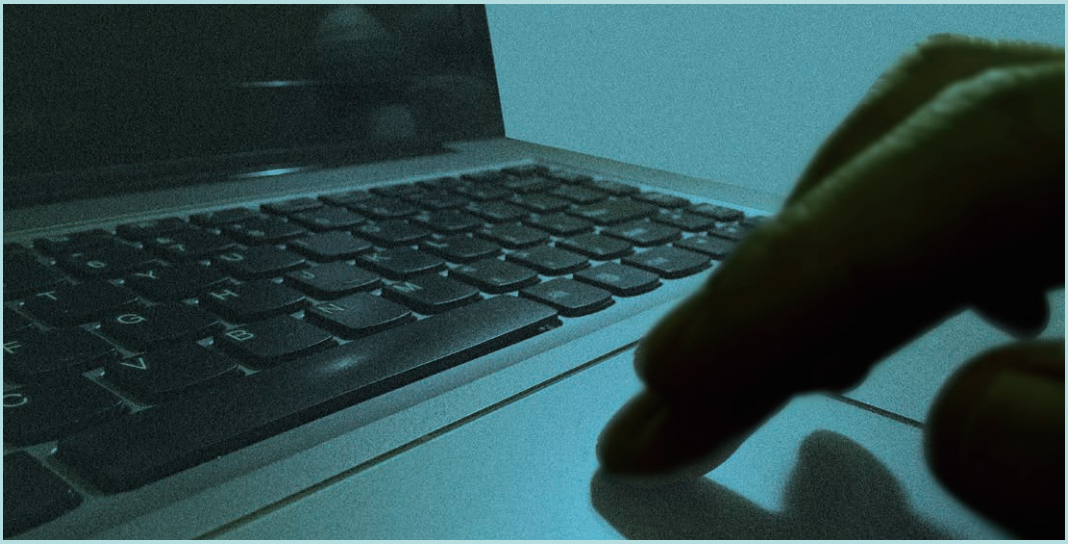
"(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

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

[7] ECHR 8 provides that:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."



engaged in this case. The Court held that BL 33 is the specific provision dealing with the right to work and it does not accord a positive right to work. Accordingly, such right cannot be derived from other general, non-specific provisions in the Basic Law or BoR such as Article 14 of BoR. While the Appellants heavily relied on the concept of "private life" under ECHR 8, the Court clarified that it does not give rise to a right to choose a particular occupation.

Safety and personal security

17. The Appellants raised another constitutional challenge based on the right to safety and personal security of prostitutes under Articles 5(1)[8] and 14 of BoR which, the Appellants argued, provide a derivative right to personal security or protection from violence. They argued that there is an independent right to security separate from that of liberty, and it protects the physical integrity of the person. They contended that under the "wide interpretation" of s. 137(1), persons not exploiting prostitutes would be captured and that prostitutes would be prevented from hiring persons, such as drivers, receptionists, and bodyguards, to provide them with protection and security or operating through a secure environment as offered by Website A. The CA rejected this argument.

18. The Court held that in Hong Kong, the right of liberty and security under Article 5 of BoR is a conjoint right. The article does not encompass an independent right to security separate from the right to liberty, as affirmed in *HKSAR v Coady* [2000] 2 HKLRD 195 and *SW v Secretary for Justice* [2019] 1 HKLRD 768. The Court found no compelling reason to overturn the precedent set in *Coady*. There was no evidence to suggest that the decision was plainly wrong or that the CA had misapplied or misunderstood the law.

19. Furthermore, the Appellants lacked the requisite standing to raise this aspect of the challenge since it specifically relied on the rights of prostitutes of which the Appellants did not have sufficient interest to advance or represent in the proceedings.

The proportionality test

20. As previously mentioned, the CA was not persuaded that the Appellants' constitutional rights were engaged. Even if any of the Appellants' rights were indeed engaged, the Court considered the restrictions on such rights satisfy the four-step proportionality test. The Court found that the offence provision of s. 137(1) serves a legitimate purpose, which is to protect prostitutes from abuse and exploitation by others who live on their earnings,

[8] Article 5(1) of BoR provides that:
"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

without improperly criminalizing their conduct. The Court held that there is a clear, rational connection between the protection of females in the trade of prostitution and s. 137(1). The Court further held that s. 137(1) is also rationally connected to furthering the aim of curtailing the criminality of prostitution. S. 137(1) does what is necessary and strikes a reasonable balance between the societal benefits of the encroachments and the inroads made to the rights in question. The Court concluded that s. 137(1) clearly satisfied the four-step proportionality test.

(b) CACC 228/2019

Statutory construction of s. 137(1) and *Shaw*

21. The CA agreed with the respondent that the broad mischief which s. 137(1) aims to address is the exploitation of prostitution for financial gain and held that this is apparent from the language of the offence and by reference to other related offences in the same section titled "Exploitation of other persons for sexual purposes" in Part XII of Cap. 200. It found that the approach taken in *Shaw* appropriately balanced the concern, on the one hand, to give effect to the underlying legislative intent to address the problem of those taking advantage of the prostitution of others, which may take many forms and involve a wide range of means; and on the other, to provide a fair and rational basis for those, like the ordinary tradesmen in their ordinary course of business, who do not directly and intentionally gain a reward specifically from others because of their involvement in prostitution.

22. The Court clarified that the inclusion of evidence showing "control, direction, or influence" over a prostitute's movements is not a necessary ingredient of the offence under s. 137(1). It emphasized that s. 137(2) provides an evidential presumption that, if satisfied, presumes a person is knowingly living on the earnings of prostitution. This evidentiary presumption is supported by a strong line of authority. The absence of the "control, direction or influence" requirement in s. 137(2) means that the burden of proving the elements of the offence under s. 137(1) lies with the prosecution.

23. The Court held that the circumstances in *Shaw* were not dissimilar to those in the present case, except that the medium through which sex workers advertised their sexual services was a printed publication rather than a social website in this case.

24. The Court found that the plain language of s. 137(1) clearly encompasses individuals who financially benefit from businesses promoting or facilitating the prostitution of others. It emphasized that s. 137(1) is part of a framework of offence provisions aimed at regulating and curtailing prostitution and related vice activities. There is no good reason to restrict the natural meaning and scope of the statutory wording to exclude individuals profiting from websites promoting prostitution.

Conclusion

25. The CA unanimously dismissed the appeals in both cases.

HKSAR v Chow Hang Tung

FACC No. 9 of 2023 (25 January 2024)[1]

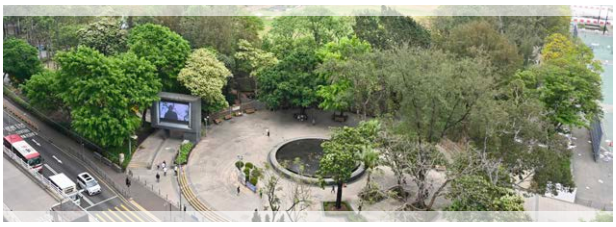
CFA

Background

1. This appeal concerned whether a collateral challenge to the validity of a prohibition of the holding of a public meeting can be mounted by a defendant in a prosecution for inciting others to take part in the prohibited meeting, contrary to s. 17A(3)(a) of the Public Order Ordinance (Cap. 245)[2] and the common law.

2. On 27 April 2021, the Hong Kong Alliance in Support of Patriotic Democratic Movements of China ("Alliance"), as required by ss. 7(1)(a)[3] and 8[4] of Cap. 245, gave a notice to the Commissioner of Police ("CP") of its intention to hold a meeting at Victoria Park on 4 June 2021 to commemorate the 32nd anniversary of "June 4". The Respondent was the Vice Chairman of the Alliance but not named as the organizer of the intended meeting.

3. On 27 May 2021, the CP issued a notice to the Alliance pursuant to s. 9 of Cap. 245,[5] prohibiting the intended meeting ("the prohibition") since he considered this necessary for maintaining public safety and public order, and protecting the rights and freedom of others after taking into account Covid pandemic situations at the time.



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1 Reported at (2024) 27 HKCFAR 71.

2 S. 17A(3)(a) of Cap. 245 provides that:

"(3) Where any public meeting … is an unauthorized assembly by virtue of subsection (2)—

(a) every person who, without lawful authority or reasonable excuse, knowingly takes or continues to take part in or forms or continues to form part of any such unauthorized assembly; …

shall be guilty of an offence and shall be liable—

… on summary conviction, to a fine at level 2 and to imprisonment for 3 years."

3 S. 7(1) of Cap. 245 provides that:

"(1) Subject to this Ordinance, a public meeting may take place if, but only if,—

(a) the Commissioner of Police is notified under section 8 of the intention to hold the meeting; and

(b) the holding of the meeting is not prohibited by the Commissioner of Police under section 9."

4 S. 8 of Cap. 245 provides that:

"(1) For the purposes of section 7, notice of the intention to hold a public meeting shall be given in writing to the Commissioner of Police—

(a) not later than 11 a.m. on the same day of the week in the preceding week as the day on which the meeting is intended to be held; or

(b) where the last day for giving notice under paragraph (a) would fall on a general holiday, not later than 11 a.m. on the first day immediately preceding that day which is not a general holiday.

…"

5 S. 9 of Cap. 245 provides that:

"(1) Subject to this section, the Commissioner of Police may prohibit the holding of any public meeting notified under section 8 where he reasonably considers such prohibition to be necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others.

…

(4) The Commissioner of Police shall not exercise the power conferred by subsection (1) to prohibit the holding of a public meeting in any case where he reasonably considers that the interests of national security or public safety, public order or the protection of the rights and freedoms of others could be met by the imposition of conditions under section 11(2)."

4. The Alliance appealed under s. 16 of Cap. 245[6] against the prohibition to the Appeal Board on Public Meetings and Processions ("Appeal Board"). On 29 May 2021, the Appeal Board dismissed the appeal.

5. The government then issued a press release informing the public of the CP's prohibition of the intended public meeting on 4 June 2021. It advised that the intended meeting, if held, would be an unauthorized assembly.

6. That notwithstanding, the Respondent published posts in social media on 29 May 2021, as well as a newspaper article on 4 June 2021 criticizing the prohibition and encouraging others to attend the prohibited meeting. She was charged with the offence of "incitement to knowingly take part in an unauthorized assembly", contrary to s. 17A(3)(a) of Cap. 245 and the common law.

Before the magistrate and CFI

7. The Respondent was convicted after trial by the magistrate who decided that it was not open to the Respondent to challenge the validity of the prohibition by way of defence in criminal prosecution, holding that such a challenge should be mounted by way of judicial review.

8. The Respondent's appeal against conviction was allowed by Barnes J who found the prohibition invalid. She held that the CP had failed to discharge his positive duty under s. 9(4) of Cap. 245 to take the initiative to consider or propose conditions that could be imposed to enable the meeting to be held.

Issues

9. Leave to appeal to the CFA was granted in respect of the following questions:

(1) In a prosecution for an offence of incitement to knowingly take part in an unauthorized assembly contrary to common law and s. 17A(3)(a) of Cap. 245 and punishable under s. 101I of the Criminal Procedure Ordinance (Cap. 221),[7] is it open to a defendant to raise by way of defence the legality of the police's prohibition of the subject public meeting which was subsequently upheld by the Appeal Board? ("Issue 1")

(2) If the answer to Issue 1 is "yes", what is the correct approach that the court should take in considering a defendant's challenge to the legality of the police's prohibition and of the subsequent determination by the Appeal Board? ("Issue 2")

CFA decision

10. The CFA's decision, consisted of four judgments, unanimously allowed the prosecution's appeal. Ribeiro PJ delivered a judgment, with which Fok PJ and Gleeson NPJ concurred in their joint judgment. CJ Cheung and Lam PJ delivered their separate judgments.

Ribeiro PJ, Fok PJ and Gleeson NPJ

(a) The Respondent may challenge the legality of the prohibition by way of defence in criminal proceedings

11. Ribeiro PJ distinguished a collateral attack

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[6] S. 16 of Cap. 245 provides that:

"(1) A person, society or organization—

(a) named in a notice given under section 8 or 13A;

(b) to whom a notice of prohibition is given under section 9; or

…,

who is aggrieved by the decision of the Commissioner of Police to prohibit a public meeting … or to impose conditions on the holding of a public meeting … may appeal to the Appeal Board.

…"

[7] S. 101I(2) of Cap. 221 provides that:

"Where a person is convicted of …

(c) incitement,

to commit an offence for which a maximum penalty is provided by any Ordinance, and no penalty is otherwise provided by any Ordinance for such … incitement, he shall be liable to be sentenced to that maximum penalty."

from a constitutional challenge. A collateral attack is a challenge to the prohibition's legality based on non-constitutional grounds alleging, *e.g.*, that the statutory requirements were not complied with. A constitutional challenge, on the other hand, is one mounted on constitutional grounds. A challenge might be mounted on both grounds.

12. Issue 1 and Issue 2 were therefore elaborated as: is it open for the Respondent to mount a collateral attack and/or a constitutional challenge on the prohibition by way of defence in the criminal proceedings? If so, what are the respective principles for determining when such a challenge is permissible and whether it succeeds?

13. His Lordship highlighted that the above questions arose in the context of two separate processes, firstly, the decision process (involving the process under Cap. 245 which led to the CP's prohibition of the intended meeting by giving the organizers notice to that effect ("Prohibition Order")) and, secondly, the criminal proceedings against the Respondent before the lower courts. These two processes were entirely separate and distinct. They should not be confused as they required the application of different legal principles.

14. Ribeiro PJ held that where, in cases like the present where the Respondent was not a party to the decision process under which the CP made the Prohibition Order, the defendant's challenge of an impugned order by way of defence in criminal proceedings could not properly be excluded on the ground that the defendant ought to have challenged that order at a different forum in an earlier separate process.

15. However, the above approach is subject to one exception, *i.e.* the "same person" cases, where the person seeking to mount a collateral attack is the very person against whom the administrative order was specifically directed. Given that such individuals must realize that they will face prosecution if the order is contravened, it would be reasonable to expect them to challenge the order by an available appeal procedure and/or by judicial review. As the current case did not belong to the "same person" category, the exception did not provide a basis for excluding a collateral attack raised by the Respondent by way of defence in the subsequent prosecution.

Collateral challenge

16. Ribeiro PJ held that whether a collateral attack

is available to a defendant in criminal prosecution by way of criminal defence depends on the construction of the relevant statute, asking whether the legislative intent is to exclude a collateral attack and that the formal validity of the order challenged suffices to found criminal liability or whether the legislative intention is that the order's validity might be impugned by way of defence.

17. The starting-point is a strong presumption in favour of allowing the defendant to raise the defence. If successful, the defendant would be acquitted. This led to the proposition that such a collateral attack will only be permitted if, as a matter of construction of the offence-creating provisions, it bears on an essential ingredient of the offence.

Constitutional challenge

18. As with collateral attacks, it is necessary for a constitutional challenge to engage an essential element of the offence charged, so that if successful, it would operate by way of defence.

19. Ribeiro PJ held that the lawfulness of the CP's Prohibition Order is plainly an essential element of the offence created by s. 17A(3)(a) and of the associated charge of incitement.

20. Nevertheless, his Lordship emphasized that unlike a collateral challenge, whether a constitutional challenge to an impugned order may be permitted by way of defence in criminal prosecution cannot be determined simply by construing the offence-creating provision since, by virtue of BL 8,[8] BL 11,[9] BL 18[10] and BL 39,[11] constitutional rights enjoy an entrenched status under the Basic Law. The right of peaceful assembly relied on by the Respondent is guaranteed by Article 17 of BoR,[12] which is entrenched by BL 39. Any statutory provisions or administrative orders made thereunder which are inconsistent with those entrenched rights must give way, unless the restrictions on those rights pass the proportionality test as elaborated in *Hysan Development Co Ltd v Town Planning Board*.[13] The proportionality test extends to constitutional challenges made by way of defence in criminal proceedings.

21. Ribeiro PJ ruled that it was open to the Respondent to raise a collateral challenge by way of defence in the criminal proceedings on the following two bases: first, construction of the offence-creating provision in the context of Part III of Cap. 245 and second, the clear intention that Cap. 245 should operate consistently with the constitutional right of peaceful assembly. It was not the legislative intention that formal validity of such prohibition orders should suffice.

22. Alternatively, if the challenge is based on a

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8 BL 8 provides that:

"The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

9 BL 11 provides that:

"In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practised in the Hong Kong Special Administrative Region, including … the system for safeguarding the fundamental rights and freedoms of its residents, … shall be based on the provisions of this Law.

No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law."

10 BL 18 provides that:

"The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region. …"

11 BL 39 provides that:

"The provisions of the International Covenant on Civil and Political Rights … 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."

12 Article 17 of BoR provides that:

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

13 (2016) 19 HKCFAR 372 at [131]-[141].

constitutional right which is engaged because the Prohibition Order restricts the right of peaceful assembly, that challenge is in principle available, since it bears on an essential element of the s. 17A(3)(a) offence and thus represents a relevant challenge by way of defence. A constitutional challenge cannot be excluded simply on the basis that, as a matter of statutory construction, it was the legislative intention that a formally valid order would be sufficient.

23. Delivering a joint judgment, Fok PJ and Gleeson NPJ agreed with Ribeiro PJ that as a matter of statutory construction, a lawful prohibition of the public meeting is an essential element of the s. 17A(3)(a) offence.

24. In view of the nature and importance of the fundamental rights under BL 27[14] and Article 17 of BoR, other than the "same person" cases, their Lordships found that neither the existence of the s. 16 appeal mechanism, nor the constitution of the Appeal Board, nor the finality of the Appeal Board's determination would require a conclusion that the prosecution need only prove the formal validity of a prohibition notice for a s. 17A(3)(a) prosecution.

25. The test of what is "necessary" in ss. 9(1) and 11(2)[15] should correspond with the proportionality test that applies under Article 17 of BoR. As to s. 44A(7),[16] the "finality" of the Appeal Board's determination reflects the end of an administrative process but s. 44A(7) does not have the effect that the prohibition, if upheld by the Appeal Board, is deemed to be lawful as the prohibition could be subject to judicial review.

26. Their Lordships concluded that the Respondent was entitled to raise a collateral attack to the lawfulness of the prohibition in question, including a constitutional challenge, by way of defence in criminal prosecution.

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[14] BL 27 provides that:
"Hong Kong residents shall have freedom … of assembly, of procession and of demonstration …."

[15] S. 11(2) of Cap. 245 provides that:
"The Commissioner of Police may, where he reasonably considers it necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others, impose conditions in respect of any public meeting notified under section 8 …."

[16] S. 44A(7) of Cap. 245 provides that:
"The determination of an appeal by the Appeal Board shall be final."

(b) The Respondent's collateral attack and constitutional challenge failed

27. Ribeiro PJ held that the Respondent's collateral attack had failed. Firstly, on proper construction, s. 9(4) would not impose a proactive duty on the CP but merely oblige him to give genuine and reasonable consideration to any pertinent conditions. Secondly, the conditions suggested by the Respondent before the CFI could not be "obviously" considered as potentially meeting the public health concerns. Thirdly, the CP and the Appeal Board did consider possible conditions that might be imposed.

28. As for the constitutional challenge, his Lordship found that it also failed. Whilst the aim of the Prohibition Order, *i.e.* protection of public health, is one of the legitimate aims listed in Article 17 of BoR,[17] and the prohibition during the Covid-19 pandemic was plainly rationally connected with that objective, the Prohibition Order was a proportionate measure, which represented a reasonable balance between the restriction on the right of peaceful assembly and the societal benefits of the prohibition.

29. Fok PJ and Gleeson NPJ concurred with the above.

CJ Cheung

30. Cheung CJ held that whether a collateral challenge may be mounted in a criminal court is a matter of statutory construction of the relevant legislation. A more focused and accurate way of putting it is whether on a proper construction, the validity of the administrative act in question (the prohibition in the present case) is an essential element of the offence or a statutory defence. If the answer is "yes", the criminal court will necessarily have to deal with the issue when trying the prosecution. If the collateral challenge based on constitutional grounds does not go to any of the elements of the offence or defence(s), it is simply not an issue that the criminal court needs or has jurisdiction to deal with. If it is contended that the offence, as constituted, is not constitutional, a direct challenge against the offence-creating provision may always be made before the criminal court hearing the prosecution of the offence.

31. Under Cap. 245, the strong emphasis on time regarding the giving of notification of an intended meeting, the notification of a prohibition, and the hearing and disposal of an appeal, coupled with the expressly provided "finality" of the Appeal Board's determination, is highly indicative of a statutory intent to ensure that everyone clearly knows where they stand in relation to the proposed meeting. If the s. 17A(3) offence permits a defendant to re-open in criminal prosecution the validity of a prohibition even though it has been upheld by the Appeal Board, this would weaken the authority of the prohibition and might result in uncertainty and confusion among members of the public as to whether they could attend the intended meeting.

32. The legislative intent that the Appeal Board's decision cannot be re-opened in a s. 17A(3) prosecution can be further demonstrated by the stringent qualification requirement for the Chairman of the Appeal Board, the "finality" of the Appeal Board's decision under s. 44A(7) and the s. 44A(6)[18] requirement that the Appeal Board shall determine an appeal "with the greatest expedition possible".

33. It would be legitimate to assume that the legislature intended the intending participants to rely on the organizers to challenge the prohibition. If the organizers do not appeal a prohibition and the meeting is still proceeded with, a participant, if arrested or prosecuted, may still challenge the prohibition by judicial review.

34. Thus, a balance is well struck under Cap. 245 between achieving the object of the Ordinance (that is, protecting the interests of national security, public safety, public order or the rights and freedoms of

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[17] See the italized text in note 12 above.

[18] S. 44A(6) of Cap. 245 provides that:
"Where any notice of an appeal is given the Appeal Board shall consider and determine the appeal with the greatest expedition possible so as to ensure that the appeal is not frustrated by reason of the decision of the Appeal Board being delayed until after the date on which the public meeting … is proposed to be held."

others) and upholding the rights to freedom of assembly, and also between the need for effective enforcement of a prohibition on the one hand and upholding the rule of law by affording those affected by it a means to challenge the prohibition on the other.

35. Accordingly, Cheung CJ construed s. 17A(2) when it refers to a public meeting taking place "in contravention of section 7" to mean a public meeting of over 50 persons taking place despite a formally valid prohibition by the CP under s. 9. It would be a formally valid prohibition under s. 9 if on the face of it, it complies with the requirements of that section and has not been reversed by the Appeal Board or quashed by judicial review before the conclusion of the criminal proceedings.

36. Given that the validity of the prohibition is not relevant to any issues facing the criminal court, the CJ held that no collateral challenge to its validity, whether on conventional public law grounds, or on constitutional grounds, may be mounted in a prosecution under s. 17A(3)(a). Cheung CJ's answer to Issue 1 was a "no".

37. The CJ considered it not necessary to answer Issue 2.

Lam PJ

38. Lam PJ agreed with Cheung CJ on Issue 1. Although Issue 2 would then be disposed, Lam PJ agreed with Ribeiro PJ that the judge wrongly held that the prohibition had failed to satisfy s. 9(4) of Cap. 245. His Lordship also agreed that even assuming that there is scope for the CFA to conduct a *Hysan* proportionality assessment, the prohibition should be upheld.

39. Lam PJ found that given the statutory intention and the purpose behind the offences, the finality of a prohibition shall have effect in both the statutory decision process and the subsequent criminal proceedings.

40. Under the Cap. 245 regime, both s. 8 notice and s. 9 prohibition are only effective in respect of the holding of the public meeting by *the named* organizer, and s. 7 only permits public meeting involving a large number of participants when there is an organizer accountable for the safe conduct of the meeting. That organizer must give a s. 8 notice of *his/her* intention to hold the meeting.

41. Hence, when the organizer who had previously given notice of his/her intention to hold the meeting

subsequently abandoned such intention in light of a prohibition, the prohibition has no relevance in any subsequent criminal proceedings against others. The meeting was unauthorized because no person took up the role of an organizer to give a notice to the CP with regard to his/her intention to hold the meeting. A participant who took part in such an unauthorized meeting is therefore not deprived of any opportunity to challenge any relevant element of the offence in criminal prosecution.

42. For the reasons given by Cheung CJ and in light of the other features in the Cap. 245 regime mentioned above, Lam PJ agreed that the substantive validity of a prohibition should only be challenged by judicial review but not in criminal proceedings. His Lordship supported the CJ's construction of s. 17A(2) and (3)(a).

43. As for the constitutional challenge, the close resemblance of wording of Article 17 of BoR and s. 9(1) and (4) of Cap. 245 suggested that the relevant concepts under Article 17 of BoR have been incorporated into Cap. 245 and the Cap. 245 restrictions on freedom of assembly are inherently proportionate.

Conclusion

44. The CFA unanimously allowed the appeal, restored the Respondent's conviction and remitted the appeal against sentence to the judge for determination.

MK v Director of Legal Aid

FACV No. 8 of 2023 (22 March 2024)[1]

CFA

Background

1. This appeal concerns the application of legal professional privilege ("LPP") in relation to the relationship between a person who has been granted legal aid, the lawyers assigned to conduct the litigation, and the Director of Legal Aid ("the Director").

2. The Appellant and her same-sex partner attended a conference in June 2018 ("the conference") with Mr Hectar Pun SC ("Mr Pun") and other counsel including a Mr Wong concerning a judicial review application. The Appellant revealed her financial status in the conference, *i.e.* the Appellant and her same-sex partner jointly owned and operated a pet shop ("financial status").

3. Legal aid was granted to the Appellant on 25 July 2018. Mr Pun, but not Mr Wong, was assigned as counsel for the Appellant in the judicial review application. The Director received an anonymous email on 22 January 2019 revealing the Appellant's financial status. Mr Wong informed the Director by an email of 31 January 2019 that the legal team was informed during the conference about the Appellant's financial status. In response to the Director's request to provide information, Mr Pun wrote to the Director confirming the same on 3 May 2019.

4. The Director revoked the Appellant's legal aid certificate on 9 May 2019 on ground that she had willfully failed to disclose her financial resources. The Appellant lodged a legal aid appeal to a Master of the High Court arguing that the information on her finance was provided prior to the legal aid application and should not be considered by the Director but the appeal was dismissed by the Master in his administrative capacity.

CFI and CA decisions

5. The Appellant lodged a judicial review application to challenge the Master's decision. The CFI allowed the judicial review on the basis that the information provided by Mr Pun and Mr Wong should not have been considered, as Regulation 21(1) of the Legal Aid Regulations (Cap. 91A)[2] did not apply to privileged communications made before an application for legal aid. The Director's appeal to the CA was allowed. The CA held that LPP had been abrogated by Regulation 21(1)(b) of Cap. 91A and would not have protected the information, namely, the Appellant's financial status, disclosed by Mr Pun to the Director.

The question before the CFA

6. The Appellant appealed to the CFA in respect of the following question of law:

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[1] Reported at (2024) 27 HKCFAR 204.

[2] Regulation 21 of Cap. 91A provides that:

"(1) Where an aided person's solicitor or counsel has reason to believe that the aided person—

(a) has required his case to be conducted unreasonably so as to incur unjustifiable expense or has required unreasonably that the case be continued; or

(b) has willfully failed to comply with any regulation requiring him to provide information or in furnishing such information has knowingly made a false statement or a false representation,

the solicitor or counsel shall forthwith report the fact to the Director.

(2) Where the solicitor or counsel is uncertain whether it would be reasonable for him to continue acting for an aided person, he shall report the circumstances to the Director."

> Upon proper interpretation of Regulation 21(1)(b) of the Legal Aid Regulations, Cap. 91A, what is the extent, if any, of the abrogating effect by necessary implication against LLP at common law which is a right guaranteed constitutionally under BL 35?[3] In particular, does the abrogation by necessary implication extend to communications protected by LLP prior to the application for and/or granting of legal aid to the client?

7. The CFA also invited the parties to make submissions as to whether waiver of LPP might be relevant in considering disclosure of the Appellant's financial status.

The legal aid scheme

8. The statutory scheme of legal aid has two aims: first, to provide legal assistance to litigants who have limited financial means; second, to ensure that this assistance is not abused by litigants who fail to make true disclosure of their means. The Legal Aid Ordinance (Cap. 91) came into force in 1967. It deals with the application for and the grant of legal aid, creating the tripartite relationship between the person who has been granted legal aid ("the aided person"), the lawyers assigned to the aided person and the Director. Cap. 91 deals with the manner in which LPP and other duties of confidentiality arise out of that relationship.

9. Cap. 91A, which came into force in the same year, deals with the customary duties of the assigned lawyers in relation to the conduct of the litigation on behalf of the aided person. Cap. 91A also imposes on the assigned lawyers a duty to report to the Director the progress of the litigation and, in particular, to act as the Director's watchdog in relation to possible abuse by the aided person ("watchdog duties").

Waiver

10. Although LPP is a fundamental right under BL 35, the CFA held that it is subject to exceptions and can be waived. The test of whether LPP has been waived is an objective one. It is not material whether the litigant, or indeed the legal representative, intends to waive or appreciates that his or her conduct amounts to waiver. The CFA held that privilege will be waived if it will be unfair to permit the aided person to rely upon the portion disclosed without taking into consideration the balance of the material.

11. In this case, as the Appellant had through another counsel, Ms Mok, informed the Director that she had the permission of the Appellant to give an account of the conference "*in order to assist your Department*", and as the Appellant had never denied giving the consent, the CFA held that this was a clear waiver of privilege in relation to what was said at the conference. Further, when the Appellant selected Mr Pun to be assigned to act for her under her legal aid certificate, she knew or must be deemed to have known that Mr Pun would be under the reporting duty imposed by Regulation 21(1) of Cap. 91A upon his assignment. As such, the Appellant had clearly waived LPP in relation to the discussion of her financial status at the conference. The Appellant's appeal was dismissed on the basis of waiver.

Tripartite relationship

12. The CFA held that prior to the grant of legal aid, information conveyed within the bipartite relationship between lawyer and client is protected by LPP against the outside world. After the grant of the legal aid and the assignment of lawyers, the relationship becomes tripartite, made up of the aided person, the lawyers and the Director. The lawyers are paid by the Director and owe duties not only to the aided person but also to the Director. The tripartite relationship with the Director being part of the relation brings with it a change in the operation of LPP. The privilege does not afford protection from disclosure within the tripartite relationship and does not prevent the assigned lawyers from passing on information derived from the aided person to the Director. This is especially so given that the assigned lawyers owe watchdog duties under Cap. 91A to report abuses of legal aid to the Director.

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[3] BL 35 provides that:

"Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel."

Watchdog duties

13. The CFA held that lawyers are subject to watchdog duties under the legal aid scheme. A proper understanding of such watchdog duties would leave no scope of debate on the question whether LPP has been abrogated by Regulation 21(1)(b) by way of necessary implication. The watchdog duties were originally introduced only by Regulations 12(7) and (8) of Cap. 91A.[4] They give solicitor and counsel the right to give up a case on the ground of specified abuses of legal aid by the aided person. If the assigned lawyers exercise that right, they are required to "make a report to the Director of the circumstances in which that right was exercised." This report will necessarily set out the abuse that caused the solicitor or counsel to give up the case.

14. The watchdog duties have been strengthened by Regulation 21, the effect of which is to advance the time which solicitor and counsel have a duty to report to the Director the abuses referred to in Regulations 12(7) and (8). These have to be reported "forthwith" once solicitor or counsel has "reason to believe" that such abuses have occurred.

15. The CFA, however, considered the effect of Regulation 12(10) lies at the heart of this case.[5] This is because Regulation 12(10) is an express provision which abrogates LPP. The CFA held that the wording of Regulation 12(10) is very wide. On its natural meaning, it covers information imparted to the

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[4] Regulation 12 is headed "Conduct of proceedings by solicitors". Regulations 12(7) and (8) provide that:

"(7) Without prejudice to the right of solicitor or counsel to give up a case for good reason, any solicitor or counsel may give up an aided person's case if, in his opinion, the aided person has required the proceedings to be conducted unreasonably so as to incur an unjustifiable expense to the Director or has required unreasonably that the proceedings be continued.

(8) Where any solicitor or counsel exercises the right to give up an aided person's case—

(a) under the provisions of paragraph (7); or

(b) on the ground that the aided person has willfully failed to provide the information to be furnished by him or in furnishing such information has knowingly made a false representation,

the solicitor or counsel shall make a report to the Director of the circumstances in which that right was exercised."

[5] Regulation 12(10) provides that:

"A solicitor shall not be precluded, by reason of any privilege arising out of the relationship between solicitor and client from disclosing to the Director any information or from giving any opinion which may enable the Director to perform his functions under the Ordinance."

Director pursuant not merely to Regulation 12(9)[6] but Regulation 12(8) and Regulation 21. The CFA found that any report made by a solicitor to the Director under Regulation 21 will, if it would otherwise have included information subject to LPP, nonetheless be lawfully made to the Director by reason of Regulation 12(10), provided that Regulation 12(10) is not *ultra vires*.

The *ultra vires* issue

16. As to whether the abrogation of LPP by Regulation 12(10) is *ultra vires* because it involves an abrogation of a fundamental right, the CFA held that Regulation 12(10) is a qualification on the right to LPP that is *sui generis*. It is designed to resolve a conflict between the assigned lawyers' duties not to disclose communications between them and the aided person, and their reporting duties to the Director including the watchdog obligations. Regulation 12(10) resolves this conflict by abrogating LPP.

17. The CFA held that LPP is not an absolute right and can be subject to exceptions. Regulation 12(10) is an exception with very good reasons:

(1) The grant of legal aid was a dramatic social measure that involved a heavy charge on public funds. It necessarily involved putting in place measures designed to protect those funds. These measures were introduced by Cap. 91A pursuant to the very general provision in s. 28(1) of Cap. 91,[7] being "generally for the better carrying out of this Ordinance". The *vires* of these measures has not been questioned.

(2) Imposing reporting duties on the lawyers assigned to act for the aided party was an obvious measure to take as part of the arrangements for protecting the legal aid fund. Again the *vires* of this have not been challenged.

(3) Inherent in the reporting obligations was the possibility of the conflict. Putting in place Regulation 12(10) was necessary to deal with this contingency.

(4) The abrogation of LPP effected by Regulation 12(10) is very limited. Disclosure is permitted only to the Director, who is part of the aided person's legal team but not other parties.

(5) The limited abrogation of LPP effected by Regulation 12(10) is imposed as a result of the aided person's own decision to apply for legal aid, thereby accepting the rigorous disclosure obligations imposed by Cap. 91.

(6) By selecting, or accepting, the assignment of the assigned lawyers the aided person accepts that they will be subject to the reporting obligations and acquiesces in this.

18. Regulation 12(10) formed part of the original Cap. 91A and has stood for over half a century without challenge. The exception made by Regulation 12(10) to LPP was well established by the time that the Basic Law came into effect. BL 35 must be read subject to that exception.

19. Whilst Regulation 12(10) is only expressed to apply to "solicitor", reading Regulation 12(10) in light of the watchdog obligations imposed by Regulation 12(8) and Regulation 21(1) which apply to both solicitor and counsel, the CFA held that, by necessary implication, Regulation 12(10) also applies to assigned solicitors and counsel.

The live issues to be resolved

20. The CFA held that the live issues in this case were temporal ones:

(1) Does Regulation 21(1) impose a duty to

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[6] Regulation 12(9) of Cap. 91A provides that:
"An aided person's solicitor shall give the Director such information regarding the progress and disposal of proceedings to which the certificate relates as the Director may from time to time require for the purpose of performing his functions under the Ordinance and without prejudice to the generality of the preceding words, a solicitor who has acted or is acting for an aided person, on being satisfied that the aided person has died or has had a receiving order made against him, shall report the facts to the Director."

[7] S. 28(1) of Cap. 91 provides that:
"The Chief Executive in Council may make regulations prescribing any matter which by this Ordinance is to be or may be prescribed and generally for the better carrying out of this Ordinance."

report matters that pre-date the assignment of the solicitor or counsel? If "yes",

(2) Does the abrogation of LPP extend to those matters?

(3) Did the reporting duty imposed by Regulation 21(1) apply to Mr Pun, notwithstanding that he had ceased to be an assigned lawyer at the time that he communicated the information, namely, the Appellant's financial status to the Director?

21. The CFA held that the answer to question (1) is plainly "yes". Regulation 21(1) requires the solicitor or counsel to report "forthwith" on having "reason to believe" that a specified abuse of legal aid has occurred. The "reason to believe" may well be based on facts pre-dating and post-dating the assignment of solicitor or counsel. Hence, the duty to report to the Director covers both pre-dating and post-dating assignment periods.

22. As to question (2) above, the CFA held that the answer is plainly "yes". The express abrogation under Regulation 12(10) would apply to the information "which may enable the Director to perform his function under the Ordinance". There is no reason why the abrogation of LPP should not apply to the information arising from pre-dating assignment and it would plainly be desirable that the Director should learn of such information.

23. The CFA held that the answer to question (3) above is clear. Regulation 21(1) imposes a duty to report on "an aided person's solicitor or counsel". The natural meaning of this provision is that the duty is imposed on a solicitor or counsel who is currently acting as such, but does not include those who has ceased to act in a case. Accordingly, Mr Pun was not subject to statutory abrogation of the duty of confidentiality imposed under Regulation 21(1) when he reported the Appellant's financial status to the Director.

Conclusion

24. The CFA unanimously dismissed the appeal.