Tam Sze Leung and Others v Commissioner of Police

FACV No. 7 of 2023 (10 April 2024)[1]

CFA

Background

1. This case concerned the Appellants' appeal to the CFA from the judgment of the CA which set aside the declaration made by the CFI that, the Letters of No Consent ("LNCs") and the No Consent Regime ("NCR") as operated by the Commissioner of Police ("CP") were *ultra vires* ss. 25[2] and 25A[3] of the Organized and Serious Crimes Ordinance (Cap. 455), and incompatible with BL 6[4] and BL 105[5] because the NCR as operated by the CP was disproportionate and not prescribed by law.

2. The Appellants were suspected by the Securities and Futures Commission ("SFC") for having committed the offence of "stock market manipulation" under the Securities and Futures Ordinance (Cap. 571). It was suspected that the profits of those unlawful transactions had been transferred to the Appellants' accounts with four Hong Kong banks.

3. After the SFC referred the matter to the Police for investigation against the Appellants for suspected money-laundering, the Police informed the banks of their suspicion since late November 2020, requested them to suspend the accounts and to submit suspicious transaction reports ("STR"), and intimated their intention to issue LNCs. The banks complied, submitting STRs to the Joint Financial

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1 Reported at (2024) 27 HKCFAR 288.

2 S. 25 of Cap. 455 provides that:

"(1) Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property.

…"

3 S. 25A of Cap. 455 provides that:

"(1) Where a person knows or suspects that any property—

(a) in whole or in part directly or indirectly represents any person's proceeds of;

(b) was used in connection with; or

(c) is intended to be used in connection with,

an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.

(2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 25(1) (whether before or after such disclosure), and the disclosure relates to that act, he does not commit an offence under that section if —

(a) that disclosure is made before he does that act and he does that act with the consent of an authorized officer; or

(b) that disclosure is made—

(i) after he does that act;
(ii) on his initiative; and
(iii) as soon as it is reasonable for him to make it.

…"

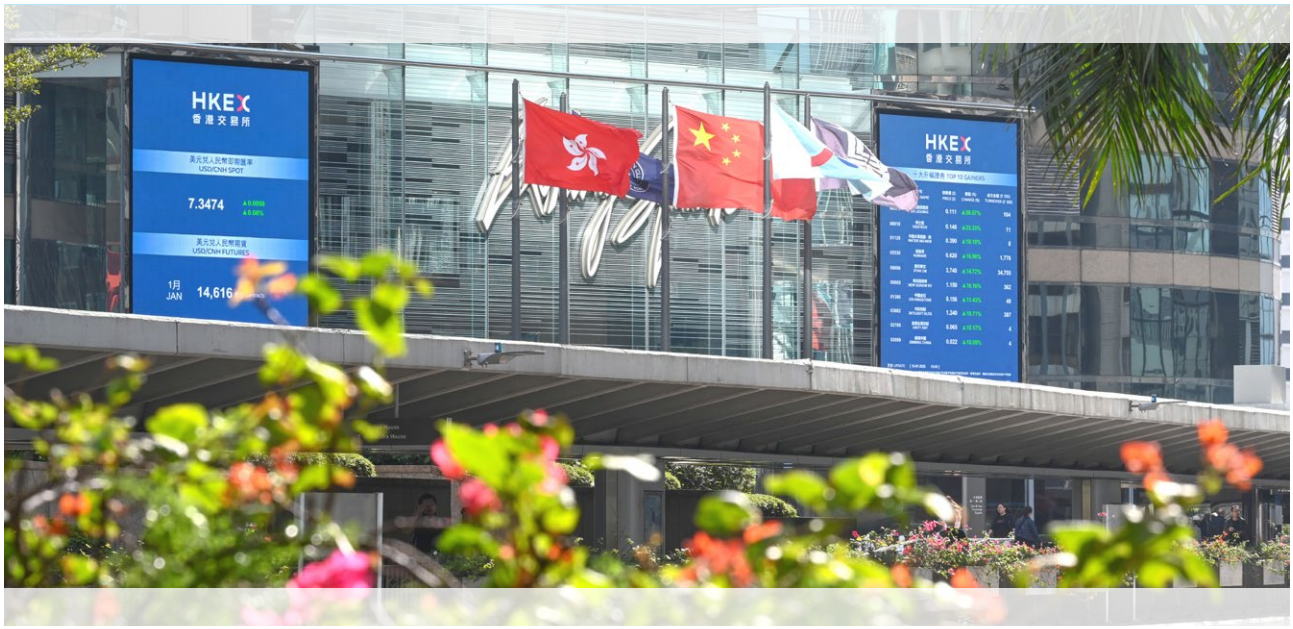
4 BL 6 provides that:

"The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law."

5 BL 105 provides that:

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

…"



Intelligence Unit ("JFIU") under s. 25A of Cap. 455. The JFIU issued LNCs to the banks under the NCR according to s. 25A of Cap. 455 in connection with the Appellants' accounts, which were eventually "frozen" by the banks. The LNCs were maintained upon monthly reviews pursuant to the Force Procedures Manual ("FPM").

4. In March 2021, the Appellants were arrested for the offence of money-laundering. In October 2021, a restraint order against the Appellants' accounts was obtained from the CFI, therefore the LNCs against the Appellants were lifted.

5. The Appellants jointly brought judicial review proceedings to challenge the CP's decision to issue and maintain the LNCs in respect of their respective bank accounts, and his failure or refusal to consent to the withdrawal of any funds from such accounts. They argued that: (1) the issue and maintenance of the LNCs were procedurally improper and unfair; (2) the LNCs were *ultra vires* Cap. 455, which did not confer power to operate a *de facto* property freezing regime; (3) the LNCs interfered with their constitutional rights, specifically to (i) the use of property under BL 6 and BL 105; (ii) a fair hearing under Article 10 of BoR;[6] (iii) access to legal advice and to a court under BL 35[7] and Article 10 of BoR; and (iv) privacy and family under Article 14 of BoR;[8] and such interference was not prescribed by law; (4) the LNCs breached their right to a fair hearing under Article 10 of BoR; (5) the NCR and the LNCs disproportionately interfered with their property

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6 Article 10 of BoR provides that:
"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

7 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.
…"

8 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."

rights under BL 6 and BL 105 and rights to privacy and family under Article 14 of BoR; and (6) decisions to refuse even partial consent to release of funds were unlawful for causing a blanket "freeze" of their funds.

6. The CFI allowed the judicial review on three grounds and declared that the NCR as operated by the CP: (1) was *ultra vires* ss. 25 and 25A of Cap. 455; (2) was not prescribed by law; and (3) disproportionately interfered with rights, in particular the right to the use of property under BL 6 and BL 105. The CA allowed the CP's appeal, setting aside the orders and declaration made below, and upheld the lawfulness of the Police actions concerned. The Appellants were granted leave to appeal to the CFA on four questions of law.

Issues

7. The issues before the CFA were:

(1) Whether the NCR operated by the CP and LNCs issued in respect of the Appellants' bank accounts are *ultra vires* and/or whether the LNCs were issued for an improper purpose ("Question 1").

(2) Whether the NCR operated by the CP and LNCs issued are consistent with (i) the right to property in BL 6 and BL 105, (ii) rights to privacy and family life in Article 14 of BoR, and (iii) rights to access to legal advice and access to courts in BL 35 and Article 10 of BoR including:

(a) whether they are prescribed by law; and

(b) whether they are proportionate restrictions on such fundamental rights ("Question 2").

(3) Whether the NCR operated by the CP and the issue of LNCs are procedurally unfair at common law and/or violate the right to fair hearing under Article 10 of BoR in that there was (i) no or no adequate notice of the decision to issue the LNCs; (ii) no or no adequate opportunity to provide meaningful representations as to whether the LNCs should be maintained; (iii) no or no adequate reasons given for the issue of LNCs; and (iv) no hearing before an independent and impartial tribunal in terms of Article 10 of BoR ("Question 3").

(4) Whether *Interush Ltd v Commissioner of Police* [2019] 1 HKLRD 892 was correct in holding that the "consent regime" (as defined in that judgment) is a necessary and proportionate restriction on private property right under BL 6 and BL 105 ("Question 4").

The anti-money laundering framework in Hong Kong

8. The CFA discussed the international conventions, as applied to Hong Kong, which have provided an impetus for establishing a legislative and regulatory anti-money laundering framework. Hong Kong regards adherence to those international standards for combating money laundering, which are set by the Financial Action Task Force ("FATF"), as essential for maintaining its status as a major international financial centre of repute.

9. In actively pursuing FATF standards, the HKSAR has enacted Cap. 455 as the main legislation, which targets perpetrators' financial transactions and deprives them of unlawful proceeds, in its statutory anti-money laundering framework.

10. Offences under ss. 25(1) and 25A(1) of Cap. 455 were at the core of this appeal. S. 25(1) creates the money laundering offence and may catch a bank dealing with a customer's property which it knows or has reasonable grounds to believe is proceeds of an indictable offence. S. 25A(1) imposes a duty, *e.g.* on a bank, to report to an authorized officer, *e.g.* a police officer, one's knowledge or suspicion that (*inter alia*) certain property represents the proceeds of crime, and s. 25A(2) confers immunity from liability under s. 25(1) on a person, *e.g.* a bank, who makes disclosure to an authorized officer, *e.g.* a police officer. Further, Cap. 455 enables the court to grant restraint orders securing suspicious property towards satisfying, if the case is established, eventual confiscation orders.

11. Moreover, the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615) and the regulatory guideline published by the Hong Kong Monetary Authority for the operation

of Cap. 615 require banks to monitor their transactions, investigate suspicious circumstances, freeze customers' suspect funds and file an STR. Contravention of specified Cap. 615 provisions can result in criminal sanctions and/or disciplinary actions.

12. The CFA acknowledged that the Police are the main anti-money laundering law enforcement agency. The banks, despite their cooperative working relationship with JFIU, make their own decisions regarding the questioned account in light of their knowledge about the customer.

The operational practice of the Police

13. In rare cases like the present, where the Police received information of possible money laundering from the SFC, the sequence of events involving the use of LNCs is likely as follows:

(1) Funds are deposited in the customer's bank account. The bank incurs a debt to the customer in the amount deposited, representing the customer's property. [Step 1]

(2) The Police intimate their suspicions about an account to the bank. The Police may request the bank to issue an STR to JFIU and may indicate their intention to issue an LNC. [Step 2]

(3) After reviewing its records, the bank disables the account if suspicion is not dispelled and issues an STR to the JFIU. [Step 3]

(4) The JFIU refers the matter to an investigating unit to decide whether the bank should receive consent to deal with those funds. If consent should be given or if it does not make a decision within two working days, the JFIU issues a Consent Letter to the bank enabling it to deal lawfully with the funds. [Step 4]

(5) If the investigating unit decides that there should not be consent pending investigation, it procures the JFIU to issue an LNC to the bank which generally continues to freeze the account. [Step 5]

(6) The FPM requires the JFIU to use its best endeavours to obtain a restraint order from the court under s. 15 of Cap. 455.[9] Pending

[9] S. 15 of Cap. 455 provides that:

"(1) The Court of First Instance may by order (referred to in this Ordinance as a ***restraint order***) prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order.

…"

such an order, the LNC remains in place with monthly reviews. The LNC lapses after 6 months if no court order has been obtained, save where an extension of time is justified in exceptional circumstances. [Step 6]

(7) If a restraint order is obtained, the court assumes supervision of the account, leading either to a confiscation order or discharge of restraint order. If no restraint order is obtained, the JFIU issues a Consent Letter enabling the bank to deal with the property. [Step 7]

14. The CFA stressed that it is the bank which maintains the account throughout the process and the freezing of the account represents the bank's own act, done in compliance with its legal and regulatory duties. The LNC aims to temporarily prevent dissipation of suspect assets pending further investigation and possible invocation of the court's jurisdiction, which is consistent with the powers conferred by the Police Force Ordinance (Cap. 232). The issuance of an LNC means that immunity for the bank against s. 25(1) liability is not granted but does not mean that Police thereby freeze or order the bank to freeze the account. Such freezing is the bank's own decision, not the CP's act.

Question 1 – *Ultra vires* and improper purpose

15. The Appellants contended that the LNCs were *ultra vires* because Cap. 455 did not confer power to operate a *de facto* property freezing regime by LNCs. Their complaint focused on the alleged freezing of the accounts by the Police through their communications with the banks at [Step 2]; and their issuance of LNCs at [Step 5].

16. This argument was rejected for three reasons:

(1) The argument was erroneously based on the premise that for the Police actions at [Steps 2 and 5] to be *intra vires*, they have to be authorized by Cap. 455. S. 25A(2) of Cap. 455 focuses on the granting or withholding of *immunity*, and only operates post-investigation when Police are in a position to decide whether immunity should be granted. It does not, and is not intended to, supply authority for the Police actions during the investigation stage or earlier.

The Police actions were *intra vires* both under the common law which imposes a duty on Police to take all necessary steps for preventing crime and protecting property from criminal injury[10] and s. 10 of Cap. 232.[11]

(2) It mischaracterized the Police actions as their freezing of the accounts because it is the bank which freezes the accounts when suspicion is not dispelled. Since the Police actions do not involve the freezing of accounts, a search for statutory authorization to operate such a freeze is misguided. The CFA disagreed that banks would regard Police communications of suspicions as instructions which would invariably be obeyed.

(3) The Appellants wrongly contended that the only lawful means of freezing an account is by a restraint order. Otherwise, there would be gaps in the effort to prevent dissipation of the suspect funds as it is difficult to meet the evidential threshold for obtaining a restraint order until investigations are sufficiently advanced.

17. The improper purpose ground was similarly rejected. Firstly, the Police powers at [Steps 2 and 5] derive from s. 10 of Cap. 232 rather than s. 25A(2)(a) of Cap. 455 and are exercised for lawful purposes.

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[10] *Rice v Connolly* [1966] 2 QB 414 at 419.

[11] S. 10 of Cap. 232 provides that:
"The duties of the police force shall be to take lawful measures for—
…
(b) preventing and detecting crimes and offences;
(c) preventing injury to life and property …"

Secondly, the Police actions were mischaracterized as freezing the accounts. Even if the "freezing" was attributable to actions of the Police, such a temporary measure aiming at preventing assets dissipation pending further investigation and possible invocation of the court's jurisdiction is not a misuse of, but consistent with, Cap. 232 powers.

Question 2 – Constitutional challenge

BL 6 and BL 105

18. The Appellants argued that the freezing of their accounts by the Police deprived of their right to use their funds. As explained, the Police's withholding of consent to deal with the funds under s. 25A(2) amounts to the withholding of immunity against s. 25(1) liability. The CP did not by his acts freeze the accounts. His acts did not prevent the Appellants from using their property and thus did not infringe their property rights. BL 6 and BL 105 were not engaged. The constitutional challenge based on property rights failed.

19. Even if the Police actions did "freeze" the accounts, the actions are "prescribed by law" and governed by clear and accessible provisions. Also, the Police actions pass the proportionality analysis: (1) the impugned actions have legitimate aims including to facilitate investigation and crime detection, to comply with international obligations and to maintain HKSAR's international standing as a major financial centre; (2) the impugned measures are rationally connected with those aims; (3) the impugned measures are no more than reasonably necessary assuming that to be the applicable standard of review for present purposes; and (4) given that the interference with the Appellants' use of their funds was temporary and limited, a reasonable balance is struck between anti-money laundering aims and protection of individual property rights.

Article 14 of BoR, BL 35 and Article 10 of BoR

20. The constitutional challenge regarding private and family life failed *in limine*. The CFA observed that the Appellants had adduced no evidence of any hardship. There was no "systemic" challenge to any rule which engages Article 14 of BoR. A constitutional challenge would not be entertained on a merely hypothetical supposition. The same objections applied to the challenge based on the rights to access to legal advice and access to courts under BL 35 and Article 10 of BoR.

Question 3 – Fair hearing

21. The CFA held that neither Article 10 of BoR nor the common law fair hearing rights were engaged. Police investigations of suspected money laundering should not be treated as if the Police

were conducting a "suit at law" involving a public hearing in some adjudicative forum, giving the suspects notice, reasons and an opportunity to make representations. A clear statutory purpose of Cap. 455 is to avoid prejudicing the investigation. The Police were fully entitled to keep sensitive aspects of their investigations confidential. The Appellants also had every opportunity to make representations to dispel the suspicion if they so wished.

Question 4 – The *Interush* question

22. As explained above, none of the constitutional rights invoked by the Appellants was engaged. Question 4 therefore appeared irrelevant.

23. The CFA noted the analytical basis in *Interush* differed substantially from this appeal, where that case concerned a direct challenge to the constitutionality of certain Cap. 455 provisions. Nonetheless, the CFA respectfully queried an important aspect of the CA's reasoning in *Interush*. If the CA accepted that the freezing of accounts was by the financial institution but not by the LNC, the CFA could not easily see how the Police actions were thought to have infringed the applicants' right to use of their property.

Conclusion

24. The answers to the four questions were: Question 1: no; Question 2: yes; Question 3: no; and Question 4: although the CFA did not fully support the analysis in *Interush*, the CA had arrived at the correct result.

25. Accordingly, the CFA unanimously dismissed the appeal.

HKSAR v Ng Ngoi Yee Margaret and Others

FACC Nos. 2, 3, 4, 5 & 6 of 2024 (12 August 2024)[1]

CFA

Background

1. These appeals concerned whether the defendants' conviction of knowingly taking part in an unauthorized assembly, contrary to s. 17A(3)(a) of the Public Order Ordinance (Cap. 245),[2] shall be subject to a separate proportionality assessment.

2. Pursuant to Cap. 245, the Civil Human Rights Front notified the Commissioner of Police ("CP") of its intention to hold a public assembly at Victoria Park on 18 August 2019, followed by a procession to Chater Road and a public assembly there. That was during the serious public order disturbances in Hong Kong. The CP had no objection to the Victoria Park meeting but objected to the procession and the subsequent meeting. The CP's decision was upheld by the Appeal Board. The procession and the subsequent meeting were therefore prohibited by s. 17A(2) of Cap. 245.[3]

3. The Victoria Park assembly was held as permitted. Nevertheless the prosecution contended that the procession, which took place after the permitted assembly, constituted an unauthorized assembly.

4. The Appellants were subsequently charged with organizing and knowingly taking part in an unauthorized assembly contrary to s. 17A(3)(b)(i) and s. 17A(3)(a) of Cap. 245.

District Court and CA decisions

5. In the District Court and CA, the Appellants objected to the charges and challenged the constitutionality of the offence-creating provisions in Cap. 245 (*i.e.* a rule challenge),[4] arguing that the imposition of criminal sanctions on a peaceful though unauthorized assembly and the maximum sentence of 5 years were disproportionate restrictions on the freedom of assembly protected by BL 27[5] and Article 17

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1 Reported at (2024) 27 HKCFAR 434.

2 S. 17A(3) of Cap. 245 provides that:
"(3) Where any … public procession …, is an unauthorized assembly by virtue of subsection (2)—
(a) every person who, without lawful authority or reasonable excuse, knowingly takes … part in … any such unauthorized assembly; and
(b) every person who—
(i) … organizes … any … public procession referred to in subsection (2)(a); … after the same has become an unauthorized assembly as aforesaid,
shall be guilty of an offence …"

3 S. 17A(2) of Cap. 245 provides that:
"(2) Where—
(a) any … public procession takes place in contravention of section … 13;
…
the … public procession … shall be an unauthorized assembly."
S. 13 of Cap. 245 materially provides that a public procession may take place if, but only if, the intention to hold it is notified to the CP and s/he issues a notice of no objection.

4 See paragraph 13(1) below for further explanation.

5 BL 27 provides that:
"Hong Kong residents shall have freedom … of assembly, of procession…"

of BoR.[6] The rule challenge, however, failed given that the constitutionality of those Cap. 245 provisions had been affirmed by the CFA.[7]

6. The Appellants were all convicted on both charges after trial. The CA allowed their appeals on the "organizing" charge while upholding their convictions for "taking part".

The question before the CFA

7. The Appellants were granted leave to appeal to the CFA on the question:

> "[Whether] the Court should follow the persuasive, though not binding, decision(s) of the Supreme Court ("SC") of the United Kingdom ("UK") in *DPP v Ziegler (SC(E))* ["*Ziegler*"][8] and/or *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* ["*Abortion Services*"][9] (which clarified some aspects of *Ziegler*) and, if so, in what circumstances, and to what extent, it should conduct an operational proportionality exercise." ("Certified Question")

8. Relying on the UKSC's decisions, the Appellants argued that the trial Judge was obliged, but failed, to conduct an "operational proportionality" assessment as to whether their convictions would be proportionate restrictions on their freedom of assembly taking account of various after-the-event matters and that each of their arrest, prosecution, conviction and sentencing required a separate proportionality assessment.

CFA decision

9. Consisted of three judgments, the CFA's decision unanimously dismissed the appeals. CJ Cheung and Ribeiro PJ delivered a joint judgment ("Joint Judgment") with which Fok PJ agreed. Lam PJ and Lord Neuberger NPJ each delivered a separate judgment agreeing with the Joint Judgment.

CJ Cheung and Ribeiro PJ

(a) Constitutional challenges in Hong Kong

10. In Hong Kong, fundamental rights are constitutionally guaranteed in Chapter III of the Basic Law and the BoR. Any inconsistent legislative provisions or executive policies, acts or decisions ("Impugned Measures") are susceptible to a constitutional challenge and, unless justified, must give way. Most constitutional challenges involve a four-step proportionality assessment[10] which operates at the constitutional level.

11. In the UK, proportionality assessment however operates at a statutory level under the Human Rights Act 1998 ("HRA"). If a legislative restriction on a right provided under the European Convention on Human Rights ("ECHR") fails the proportionality test, the UK courts have no power to declare the measure unconstitutional and invalid. Instead, the courts are obliged to read and give effect to that provision, if possible, in a way that is compatible with Convention rights or otherwise may declare its incompatibility. Such a declaration would not affect the validity of the incompatible legislation. The basic quality of the UK scheme is important for an understanding of *Ziegler* and *Abortion Services* and bears on their applicability in Hong Kong.

(b) The approach to constitutional challenges in Hong Kong

12. The approach to constitutional challenges in Hong Kong is well-established and may involve these stages:

(1) Identifying the constitutional right and the Impugned Measure.

(2) Ascertaining whether and on what grounds the Impugned Measure encroaches on and thus engages the relevant right.

(3) Determining whether the encoarchment is suspetible to the *Hysan* proportionality test:

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6 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."

7 *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229.

8 [2022] AC 408.

9 [2022] UKSC 32.

10 *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372.

(i) if the Impugned Measure pursues a legitimate aim;

(ii) if so, whether that measure is rationally connected with advancing that aim;

(iii) if so, whether that measure is no more than reasonably necessary for that purpose; and

(iv) whether a reasonable balance has been struck between the societal benefits of the encroachment on the one hand, and the inroads made into the constitutionally protected rights of the individual on the other, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

(4) If the Impugned Measure fails the test, deciding whether any remedial order should be made to wholly or partly preserve the validity of the Impugned Measure.

(5) Declaring the Impugned Measure unconstitutional and invalid if no remedial possibilities exist.

(c) Rule challenge and decision challenge

13. CJ Cheung and Ribeiro PJ found that the analytical concepts of "systemic proportionality" and "operational proportionality" proposed by the CA in *Leung Kwok Hung v Secretary for Justice (No 2)*[11] should be replaced with the following:

(1) "rule challenge", *i.e.* a challenge to the constitutionality of a rule or policy itself. Rule challenges may be focused on one or more of the five stages mentioned above.

(2) "decision challenge", *i.e.* a constitutional challenge to an impugned act or decision taken by public authorities pursuant to the relevant rule. Decision challenges may be mounted where a rule challenge is unsuccessful.

[11] [2020] 2 HKLRD 771.

(d) *Ziegler*

14. In *Ziegler*, the defendant protestors admitted obstructing the highway but claimed a lawful excuse based on their rights to freedom of expression and peaceful assembly under Articles 10 and 11 of ECHR.

15. CJ Cheung and Ribeiro PJ highlighted that *Ziegler*, which was subsequently disapproved in *Abortion Services*, did not involve a rule challenge or decision challenge on ground of a Convention right under the HRA but was an appeal concerning the defence of lawful excuse under the English criminal law.

16. Their Lordships held that *Ziegler's* approach of importing a proportionality analysis when considering a defence of reasonable excuse in public protest-related cases should not be followed in Hong Kong. A proportionality assessment is a structured and sequenced inquiry into whether an Impugned Measure is justified, but not a doctrine designed to assess the reasonableness of the defendant's obstructive conduct.

17. Further, *Ziegler's* approach of deferring to the lower court's conclusion on proportionality and restricting appellate intervention unless an *Edwards v Bairstow*[12] error below is detectable[13] has no application in Hong Kong. In Hong Kong, if an appellate court decides that the lower court's decision on proportionality was wrong, it substitutes its own view.

18. Their Lordships further held that *Ziegler's* suggestion that arrest, prosecution, conviction, and sentence are all "restrictions" under Articles 10 and 11 of ECHR each requiring a separate proportionality assessment even in the absence of a successful rule or decision challenge cannot form part of Hong Kong law.

(e) *Abortion Services*

19. *Abortion Services* was concerned with whether an impugned clause passed by the Northern Ireland Assembly was within the legislative competence of that devolved legislature. The UKSC held that the said clause, which criminalized protesters' pressurizing behaviour within designated zones, was proportionate with the protesters' rights to freedom of conscience, *etc.* under Articles 9, 10 and 11 of ECHR, therefore within the Assembly's legislative competence. Hence, this case did not involve any rule or decision challenge, nor any challenge to the arrest, prosecution, conviction or sentence in an individual case.

20. CJ Cheung and Ribeiro PJ found that *Abortion Services* should not be adopted in Hong Kong.

21. Firstly, given that *Abortion Services* raised a challenge to the legislative provision in advance of its application to the facts of any case, the UKSC propounded the quantitative test of whether disproportionality of the challenged provision might be projected to be established in "all or almost all cases". Hong Kong court, however, does not operate in such abstract but deals with rule and decision challenges mounted in legal proceedings. Therefore, the above quantitative test has no place in Hong Kong.

22. Also, the *obiter dictum* in *Abortion Services* which possibly suggested that a conviction might be subject to a proportionality assessment would not be applicable in Hong Kong. Such a suggestion rested on the HRA's inclusion of "courts" as "public authorities" the acts of which were reviewable. In contrast, in Hong Kong, ordinary judicial acts are not independently reviewable on proportionality grounds.

23. Further, where a challenged provision was held to be disproportionate, a declaration of incompatibility made under the HRA would not affect the validity and continuing operation of such provision. Hence, a challenged provision declared to be incompatible might still found a prosecution, therefore causing further questions as to whether the prosecution, conviction and sentence were independently disproportionate "restrictions" of the Convention rights. In Hong Kong, such questions would not arise because any disproportionate

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[12] [1956] AC 14.

[13] *I.e.* an appeal would only be allowed where there is an error of law material to the decision reached which is apparent on the face of the case, or if the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found.

provision that cannot be cured by a remedial order would be declared invalid and cannot form the basis of any prosecution.

(f) Answer to the Certified Question

24. For the above reasons, *Ziegler* and *Abortion Services* should not be followed in Hong Kong.

(g) The Appellants' arguments

25. The Appellants argued that even though no rule or decision challenge had availed them and it had been found that they had knowingly taken part without lawful authority in the unauthorized assembly, the Judge was nevertheless bound, prior to convicting them, to conduct an additional proportionality assessment to determine whether their conviction would be proportionate. CJ Cheung and Ribeiro PJ held that the Appellants' argument was contrary to all established principles governing constitutional challenges in Hong Kong and especially contrary to accepted principles for assessing proportionality.

26. It was found that the Appellants' convictions and sentence were the result of the Judge applying the law to the evidence and being satisfied individually of their guilt. In the absence of any viable rule or decision challenge to the constitutionality of the law in question, there was no basis for impugning the conviction and sentence which flowed from its enforcement.

27. The same applied to the Appellants' argument that further proportionality assessment should be conducted in respect of their arrest and prosecution. Those acts represented steps taken to enforce particular offence-creating laws. If the law in question is upheld against a rule or decision challenge, the enforcement measures do not require independent or additional constitutional justifications.

28. The Appellants' suggestion that requiring the Judge to consider various after-the-event matters involved the fourth step in the *Hysan* proportionality analysis was unsustainable. There was no room for such an inquiry where the Judge found the charges proved.

29. The Appellants' argument that a decision to prosecute was reviewable for disproportionality

also fell foul of BL 63.[14] Further, judicial decisions made in the ordinary course of the business of the courts are not independently susceptible to a proportionality assessment in Hong Kong.

Subsidiary arguments

30. The Appellants' subsidiary argument that the "proportionality" assessment was necessitated by the defence of lawful authority or reasonable excuse catered for under s. 17A(3) of Cap. 245 cannot be accepted since the statutory defence depends on the reasonableness of the defendants' conduct and provides no basis for importing a proportionality inquiry as an element of the offence.

31. Another subsidiary argument put forward by the Appellants was that judicial decisions and thus convictions were reviewable because the courts, being part of "the Government", were subject to the Hong Kong Bill of Rights Ordinance (Cap. 383) must be rejected. "Government" is defined in s. 3 of the Interpretation and General Clauses Ordinance (Cap. 1) to mean "the [HKSARG]". BL 59 states that "the [HKSARG] shall be the executive authorities of the Region", which are dealt with under Section 2 in Chapter IV of the Basic Law. The Judiciary and the courts, however, are covered by Section 4 of Chapter IV. Thus, reading Cap. 383 coherently with the above Basic Law provisions, the expression "the Government" in Cap. 383 plainly does not include the Judiciary or the courts.

32. The courts are bound by the law, including Cap. 383. However, there is no basis for suggesting that Cap. 383 should be construed as providing that judicial decisions are reviewable on proportionality grounds.

A separate proportionality assessment of arrest, prosecution, conviction and sentence would be unhelpful and unwarranted

33. The Appellants' suggestion that arrest, prosecution, conviction and sentence each required independent proportionality assessment was rejected. Those processes are governed by well-developed rules of law and procedure which have their own logic and justifications.

34. An arrest may be challenged as wrongful as a matter of domestic (and not constitutional) law if the reasonable belief required by the Police Force Ordinance (Cap. 232) is not made out. The suggested proportionality inquiry added nothing to an obviously lawful arrest.

35. The non-reviewability of prosecutions by virtue of BL 63 has already been mentioned. Also, in our accusatorial system, if a prosecution should not have been brought, the remedy would be dismissing the case on its merits at the trial.

36. In respect of convictions, the court's decision is governed by comprehensive criminal law, evidence and procedure evolved over centuries with common law doctrines, statutes, precedents, in-built logic and safeguards. If the defendant is properly convicted, the court having duly applied the law, it is hard to see how that conviction may sensibly be subject to a further "proportionality" inquiry.

37. As for sentencing decisions, a statutory maximum gives the court a discretion as to possible sentences ranging from non-custodial measures to the prescribed maximum so that the rule cannot be said to be disproportionate. Further, well-developed sentencing principles taking account of the characteristics of the crime and of the offender are applicable, requiring the exercise of a nuanced judgment in each case. It is difficult to see any benefit in burdening such sentencing decisions with an additional proportionality inquiry.

38. Fok PJ concurred with the CJ and Ribeiro PJ.

Lam PJ

39. Lam PJ, fully concurring with the Joint Judgment, rejected the Appellants' underlying submission that where no serious public disorder or violence occurred, those taking part in the unauthorized assembly should not be prosecuted or convicted because such prosecution or conviction

[14] BL 63 provides that:

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

would be disproportionate restrictions on the freedom of assembly. Such submission suggested that the CP's objection might simply be disregarded, thus was tantamount to a rewriting of the careful balance struck by the legislature in Cap. 245.

40. His Lordship agreed that there is no basis in Hong Kong to regard the prosecution, conviction and sentence as distinct restrictions from the rule creating the offence in respect of the freedom of assembly. The proportionality test as applied in Hong Kong has already built into it the proportionality of a prosecution and conviction under the rule in question.

Lord Neuberger NPJ

41. Lord Neuberger NPJ also agreed with the Joint Judgment and observed that, in Hong Kong, fundamental rights are constitutional "basic rights", whereas in the UK, fundamental rights are statutory "Convention rights". Given that the UK constitution is based on parliamentary supremacy, the powers of the UK courts are in some respects more limited than those of the Hong Kong courts.

42. These constitutional differences do not mandate a different approach when considering whether a restriction on the right of assembly is proportionate, but do require a different approach if the court concludes that the restriction is not proportionate. His Lordship further opined that when it comes to considering whether a restriction on a fundamental right is proportionate, the approach adopted in the Joint Judgment is effectively no different from that laid down in *Abortion Services*.

Conclusion

43. The CFA unanimously dismissed the appeals.

Judgment Update

The Hong Kong Housing Authority v Infinger, Nick and Others

FACV Nos. 2 & 3 of 2024 (26 November 2024)[1]

CFA

Background

1. Both appeals concern the policies of the Hong Kong Housing Authority ("HA"), namely the HA's family provision policies for public rental housing ("PRH") and the addition and transfer policies under the Home Ownership Scheme ("HOS", collectively the "PRH and HOS Policies") as they apply to same-sex couples lawfully married abroad ("same-sex married couples").

The facts and the proceedings below

2. Established under s. 3 of the Housing Ordinance (Cap. 283), the HA's main responsibility is to ensure the availability of affordable housing for low-income families. In discharging these responsibilities, the HA administers two schemes, with the PRH scheme allocating PRH units to needy applicants whose financial circumstances preclude them from entering the private rental market; and the HOS which encourages the purchase of HOS flats by low-to-middle income families at concessional prices.

3. To ensure the fair and rational distribution of limited housing resources, the HA runs the PRH application system, which provides two major categories with one of them being the "General Applications" category. There are four sub-categories under this category: (i) the "Ordinary Families"; (ii) the "Single Elderly Persons Priority Scheme"; (iii) the "Elderly Persons Priority Scheme"; and (iv) the "Harmonious Families Priority Scheme". This appeal concerns the "Ordinary Families" sub-category, which only recognizes specific types of familial relationships. These include husband and wife, parent and child, grandparent and grandchild, but not same-sex married couples ("PRH Policy"). Such couples could only apply as separate individuals.

4. As for the HOS, applications to purchase such flats are limited only to households consisting of persons in a "blood or legal relationship". Similar to the restriction under the PRH application, same-sex spouses of HOS flat owners cannot be added as authorized occupants nor be included as joint owners via a transfer of ownership without a premium ("Addition and Transfer Policies"). Same-sex married couples also cannot purchase HOS flats as couples ("Purchase Policy").

5. Mr Infinger and Mr Ng (collectively "the Respondents") were lawfully married to their respective partners overseas. Following their marriages, Mr Infinger applied for an PRH unit under the "Ordinary Families" sub-category. His application was rejected by the HA in accordance with its PRH Policy. In Mr Ng's case, despite successfully acquiring an HOS flat in his own name, he could not include his partner, Mr Li, as an authorized occupant or a joint owner. Mr Infinger and Mr Ng (later substituted by Mr Li following Mr Ng's death) each commenced separate judicial review proceedings against the HA to challenge the PRH and HOS Policies on grounds including discrimination.

6. At the CFI, Chow JA held that the PRH and HOS Policies discriminated against same-sex married couples. On this basis, they were declared unconstitutional. On appeal, the CA upheld Chow JA's ruling. The HA subsequently sought leave to appeal to the CFA on the ground that questions of great general or public importance were involved. The CA granted the HA's applications.

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[1] Reported at (2024) 27 HKCFAR 498.

Questions before the CFA

7. The six questions before the CFA were summarized below:

> ***Question 1***: Does BL 36 confer on opposite-sex married couples a constitutional right, as defined by the eligibility rules in existence as at 1 July 1997, to exclusively apply for PRH units as spouses under the "Ordinary Families" category; or apply to purchase HOS units as spouses?
>
> ***Question 2***: Is the Respondents' reliance on BL 25 and Article 22 of BoR precluded by a coherent and holistic interpretation of the Basic Law in line with BL 36, BL 37 and Article 19 of BoR?
>
> ***Question 3***: Are same-sex couples and opposite-sex couples proper comparators in relation to the differential treatment conferred by the PRH and HOS Policies under challenge?
>
> ***Question 4***: If there is a logical connection between the Family Aim and the HOS's Addition and Transfer Policies, is it open to the court to nonetheless find that the connection is "*de minimis*", especially where there is no affirmative evidence to that effect?
>
> ***Question 5***: Where the HOS's Purchase Policy has not been challenged or found unlawful, is the administrative coherence between the HOS's Addition and Transfer Policies and the HOS's Purchase Policy a relevant factor

in assessing the proportionality of the HOS's Addition and Transfer Policies?

Question 6: In assessing the proportionality of the PRH and HOS Policies: (i) should the court consider the BL 36 right to social welfare enjoyed by opposite-sex married couples, as well as such couples' interest in being able to apply exclusively for PRH and/or HOS units as spouses? (ii) Is empirical or statistical evidence necessary when considering whether such policies would increase the number of PRH and HOS units available to opposite-sex married couples?

Decision of the CFA

Question 1: Is BL 36 engaged?

8. The HA's argument based on BL 36[2] was twofold. Firstly, it contended that BL 36 entrenched all pre-1997 social welfare benefits and entitlements, including opposite-sex married couples' exclusive rights to apply for PRH units and HOS flats, as protected rights. Such exclusive rights could not be diluted by extending the same privileges to same-sex married couples. Secondly, the HA argued that the *lex specialis* doctrine applied, in which BL 36 safeguarded those pre-1997 benefits and entitlements free from the interference of BL 25[3] and Article 22 of BoR[4] ("the Equality Provisions") in the same way as how BL 40[5] operated to exclude the application of the Equality Provisions. Thus, the PRH and HOS Policies, which implemented the opposite-sex married couples' exclusive rights to apply under BL 36, were also exempt from scrutiny under the Equality Provisions. The Respondents' constitutional challenge, therefore, must fail.

9. The CFA considered that opposite-sex married couples' pre-existing rights to apply would not be diluted even if same-sex married couples were also given the same rights. The fact was that there never existed a separate and exclusive queue for opposite-sex married couples for PRH units. The dilution claim would have more force if such a queue was available such that a substantial number of same-sex married couples joining the queue would significantly lengthen the average waiting time ("AWT") for opposite-sex married couples.

10. The HA's contention that opposite-sex married couples' rights to apply were "exclusive" was also rejected on the basis that the relationship was just one of the several familial relationships recognized under the "Ordinary Families" sub-category. Further, the CFA observed that the "Ordinary Families" sub-category was not a closed list. The fact that a particular familial relationship was included before 1997 also did not mean that such relationship had any "exclusive" entitlement to being in the queue, to the exclusion of other new familial relationships. The same reasoning applied to the HA's overall HOS policy. The argument based on dilution and exclusivity, therefore could not stand. Additionally, the CFA held that since there was no constitutional guarantee on the AWT, BL 36 would not be engaged at all.

Question 2: Does BL 36 override the Equality Provisions?

11. The CFA rejected the argument that BL 36 overrides the Equality Provisions. While the principle of constitutional interpretation indicates that Basic Law should be read as a coherent whole, this, however, could not only be achieved by interpreting

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[2] BL 36 provides that:

"Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits and retirement security of the labour force shall be protected by law."

[3] BL 25 provides that:

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

[4] Article 22 of BoR provides that:

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

[5] BL 40 provides that:

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

a Basic Law guarantee on pre-existing social welfare rights as trumping the constitutional protection under BL 25 and Article 22 of BoR. The CFA stated that compelling justifications and unequivocal language are required to displace equality, a central tenet of the rule of law.

12. The CFA further found the HA's argument that a pre-1997 social welfare benefit was constitutionally entrenched and free from the scrutiny of the Equality Provisions baseless. Contrary to HA's interpretation, BL 145[6] suggested that the pre-existing social welfare system may be modified to remove unjustifiable differential treatment to reflect prevailing social values and conditions. In relation to the HA's argument that BL 36, like BL 40, is a specific provision, the CFA distinguished its decision in *Kwok Cheuk Kin v Director of Lands (No 2)*.[7] The Court explained that despite the inherently discriminatory nature of BL 40, the drafting materials clearly demonstrated that the drafters exceptionally intended to accord favourable differential treatment to the male indigenous inhabitants of the New Territories. However, no such drafting intention can be found in BL 36's case.

13. Similarly, the CFA held that BL 37[8] did not apply to save the PRH and HOS Policies from the Equality Provisions. While BL 37 is a constitutional guarantee of the marriage institution to opposite-sex couples, the provision is not concerned with legal rights and obligations customarily based on or associated with the status of marriage, such as the entitlement

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6 BL 145 provides that:
"On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs."

7 (2021) 24 HKCFAR 349.

8 BL 37 provides that:
"The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law."

to apply for PRH units and HOS flats. HA's reliance on BL 37 to displace the application of the Equality Provisions, therefore, also fell apart.

Question 3: Comparability of same-sex and opposite-sex married couples

14. As to the comparability of same-sex and opposite-sex married couples, the HA argued that they were not comparable in the PRH and HOS context for two reasons. Firstly, there was a "general biological disparity" between these couples. Only opposite-sex couples had "reproductive capacities and procreative potential", which supported the government's policy objective to facilitate population growth (the "Procreative Potential Argument"). Secondly, the HA argued that as a policy-maker, it enjoyed a margin of discretion in deciding who was and who was not a true comparator ("the Margin of Discretion Argument").

15. The CFA endorsed the CA's rejection of these arguments. It first noted that the HA's primary objective was to address the pressing housing needs of the underprivileged, rather than supporting the government's policy objective in population. Further, a same-sex marriage that was lawful and valid according to the law of the place of its celebration can similarly demonstrate "publicity" and "exclusivity", the essential characteristics that distinguish a heterosexual marriage.

16. With regard to HA's Procreative Potential Argument, the CFA highlighted the artificiality of the distinction given the inclusion of other familial relationships without procreative potential in the PRH and HOS Policies. Regarding the Margin of Discretion Argument, the CFA found that the question of comparability in a discrimination case was a legal one, and reserved specifically for the court to decide. There was no room for according any margin of discretion to the policy-maker.

17. Finding that opposite-sex and same-sex married couples were comparable and that there was an undisputable differential treatment of opposite-sex and same-sex married couples under the PRH and HOS Policies, the CFA proceeded to scrutinize the HA's justifications in accordance with the four-stage proportionality analysis in *Hysan Development Co Ltd v Town Planning Board*.[9] The four stages include:

(1) identifying a legitimate aim;

(2) establishing a rational connection between the impugned measure and its aim;

(3) reviewing whether the measure is proportionate; and

(4) verifying that a reasonable balance is struck between the societal benefits of the measure and the inroads made into the rights of the affected individuals.

Family Aim as legitimate aim (Stage 1)

18. The HA stated that the chief aim of the PRH and HOS Policies was to support traditional families founded on opposite-sex marriages ("Family Aim"). This chief aim had three connected aspects, which were (i) to support existing traditional families constituted by opposite-sex married couples; (ii) to support existing traditional families constituted by opposite-sex married couples along with their existing children; and (iii) to support the institution of traditional family for the benefit of (a) opposite-sex unmarried couples whose marriage plans may be influenced by housing availability, and (b) opposite-sex married couples whose procreative plans may similarly be influenced. The CFA held that the legitimacy of the Family Aim was not in dispute.

Question 4: Rational connection (Stage 2)

19. The CFA considered the question of rational connection for HA's PRH and HOS Policies separately. The Court held that the threshold for establishing a rational connection is relatively low. A rational connection may be established based on common sense, reason or logic without requiring further proof. The CFA also highlighted the need to allow room for the exercise of judgment by the executive or legislature where the challenged measure was based on an evaluation of complex facts, or considerations which were contestable or may be

[9] (2016) 19 HKCFAR 372.

controversial. The CFA was prepared to accept that the favorable treatment of opposite-sex married couples in PRH Policy was rationally connected to the promotion of Family Aim.

20. In the context of the HOS's Addition and Transfer Policies, the CFA considered that they were both integral components of the overarching HOS policy under which same-sex couples are disentitled from purchasing/owning or occupying HOS flats as couples. Nevertheless the CFA was prepared to accept that the overall HOS policy aimed at the promotion of the Family Aim and was rationally connected to it.

Question 6: Proportionality and striking a reasonable balance (Stages 3 and 4)

21. The HA contended that the PRH and HOS Policies were justified by their promotion of the Family Aim. By excluding same-sex married couples from these policies, opposite-sex married couples could benefit from the increased supply of PRH units and HOS flats. Existing traditional families and the institution of traditional families were therefore supported.

22. Noting that the differential treatment in the appeals was based on the suspect ground of sexual orientation, the CFA held that the PRH and HOS Policies would be subject to intensive scrutiny, nearing the top end of the continuous spectrum of the standard of review. However, sufficient regard must be had to the fact that the impugned Policies concern the allocation of limited societal resources in subsidized housing and the pursuit of the legitimate aim in supporting traditional families. Hence, the HA should enjoy an appropriate margin of discretion.

23. Citing *R (Lumsdon & others) v Legal Services Board*,[10] the CFA recognized that justifications grounded in moral or political considerations may not be capable of being established by evidence. By contrast, justifications of an economic or social nature would typically require evidential substantiation. However, the HA had not adduced any evidence on the likely effect on supply of subsidized units and the potential impact on opposite-sex couples if the PRH and HOS Policies were relaxed, making it impossible

[10] [2016] AC 697.

for the Court to conclude that the PRH and HOS Policies were reasonably necessary to promote the Family Aim, or that a reasonable balance had been struck. Further, HA's inability to explain why a less restrictive measure such as prioritizing the applications of opposite-sex married couples with small children, whilst still allowing same-sex married couples to apply, could not be reasonably pursued. This further weakened the HA's case. Consequently, the CFA held that the PRH and HOS Policies could not pass the two final stages of the proportionality analysis.

Question 5: HA's administrative coherence argument

24. As an additional argument, the HA contended that the coherence of its overall HOS policy on excluding same-sex married couples from purchasing, owning or occupying HOS flats as couples should attract significant weight when assessing the proportionality of the Addition and Transfer Policies.

25. The CFA found that this argument carried little weight. The argument was flawed from the outset, as it would lead to the conclusion that individual component of a policy could not be separately challenged unless and until an applicant had the standing and practical reason to challenge each and every aspect of the policy. Furthermore, the CFA opined that a change to the challenged Addition and Transfer Policies would merely leave an unchallenged policy on purchase in place. That policy would obviously be treated as vulnerable and of doubtful validity given the outcome of the HOS appeal. This simply shows the superficiality of the alleged "incoherence".

Conclusion

26. The CFA unanimously dismissed the appeals.