JUDGMENT UPDATE

Gurung Kesh Bahadur v Director of Immigration

[2002] 2 HKLRD 775 (30 July 2002)

FACTS

Gurung Kesh Bahadur ("Bahadur") is a citizen of Nepal. In 1995, he visited Hong Kong and was allowed to change his status from visitor to dependant of his wife. He was granted a limit of stay which was subsequently extended to expire on 9 January 1999. He had no right of abode in the HKSAR but was qualified to obtain a Hong Kong identity card in accordance with the laws of Hong Kong. He was therefore a non-permanent resident.

In October 1997 he left Hong Kong for Nepal. In November 1997, he returned but was refused permission to land notwithstanding his former limit of stay would have, if it had not expired, still subsisted until 1999. He was however kept in Hong Kong and was prosecuted (but acquitted) for offences under the Immigration Ordinance (Cap 115). In December 1998, the Director of Immigration (the "Director") made a removal order against him. The Director succeeded in the CFI but lost in the CA. In the CFA the Director was appealing against the CA's decision in which it was held that the Director's refusal of permission to land and his decision to make the removal order in December 1998 infringed Bahadur's rights under BL 31.

RELEVANT PROVISIONS

The relevant provisions of the Basic Law and the Immigration Ordinance were as follows:

BL 31

> "Hong Kong residents shall have freedom of movement within the [HKSAR] and freedom of emigration to other countries and regions. They shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization."

BL 39

> [The provision of BL 39 is quoted in *The Focus* at p 3].

Section 11(10) of the Immigration Ordinance ("s 11(10)")

> "Any permission given to a person to land or remain in Hong Kong shall, if in force on the day that person departs from Hong Kong, expire immediately after his departure."

ISSUE

A central question in the appeal was whether the application of s 11(10) to Bahadur as a non-permanent resident within his unexpired period of limit of stay was inconsistent with his freedom to travel and to enter guaranteed by BL 31.

THE DIRECTOR'S SUBMISSIONS

(1) The Director's primary submission was that the rights in BL 31 were subject to BL 39. The Director submitted that BL 39(2) permitted restriction of all rights and freedoms enjoyed by residents, provided the two requirements set out in that provision were satisfied, namely, (i) the restrictions should be prescribed by law and (ii) the restrictions should not contravene the ICCPR as applied to Hong Kong. The second requirement was not relevant in that case as the rights in question were not provided for in the ICCPR. The first requirement was satisfied as the restrictions in question were prescribed by law, namely the Immigration Ordinance.

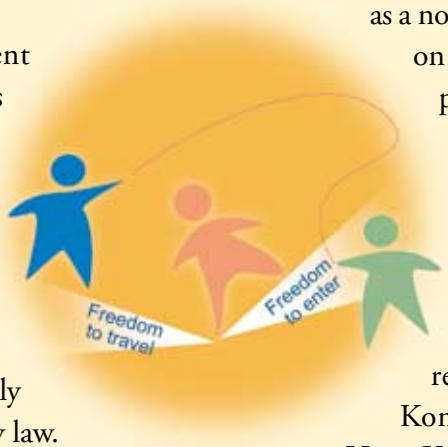
(2) The Directors supplementary submission was that the proportionality principle should apply to restrictions on the right to travel and the right to

enter. That meant that, in the context of each case, the immigration officer should ask himself whether there was sufficiently strong State interest requiring the refusal of permission to enter even though the person concerned was a non-permanent resident who would be returning within the currency of an existing leave but for s 11(10).

BOTH SUBMISSIONS REJECTED

In rejecting the Director's primary submission, the CFA noted that BL 31 providing for the right to travel and right to enter should be generously interpreted. On the other hand, BL 39(2), which dealt with the question of restrictions to rights and freedoms, should be narrowly interpreted.

The CFA explained that in the present case, it was concerned with rights conferred by the Basic Law, which were not found in and were additional to those provided for by the ICCPR as applied to Hong Kong as incorporated by the BoR. BL 39(2) did not imply that rights found only in the Basic Law might be freely qualified or limited simply by restrictions which were prescribed by law. It could not be the intention of the Basic Law that the rights found only in the Basic Law could be swept away by domestic legislation and would therefore be much less secure than the rights in the BoR.



The question of whether rights found only in the Basic Law could be restricted and if so the test for judging permissible restrictions would depend on the nature and subject matter of the rights in issue. That would turn on the proper interpretation of the Basic Law and was ultimately a matter for the courts.

As regards the supplementary submission, even assuming (without deciding) that having regard to their nature and subject matter, the right to travel and the right to enter in BL 31 could be subject to restrictions and that the test of proportionality was the appropriate test, the CFA held that the restrictions in question were not "prescribed by law" as required by BL 39(2). That was because immigration officials' powers to refuse entry to Hong Kong were based on general discretionary powers for immigration control under the Immigration Ordinance. There was no suitable statutory scheme in place for the purpose of prescribing restrictions on the constitutional rights of non-permanent residents to travel and to enter together with such safeguards as may be thought appropriate.

CONSTITUTIONALITY OF S11(10)

The application of s 11(10) to a non-permanent resident who had been granted permission of stay where the limit of stay had not expired would lead to the inevitable consequence that the exercise of his constitutional rights to travel would destroy his status as a non-permanent resident. That was because on the automatic expiry of the permission previously granted immediately after his departure from Hong Kong, he would cease to be qualified to obtain an identity card which represented the status of a Hong Kong resident.

To deprive such a non-permanent resident of his right to re-enter Hong Kong by reason of his travelling outside Hong Kong was to contravene his rights to travel and to enter under BL 31. Any application of s 11(10) to such a non-permanent resident would contravene those rights and such application would be unconstitutional and invalid.

Section 11(10) itself was not unconstitutional. It was its application to a non-permanent resident, whose permitted limit of stay had not expired, which was inconsistent with his rights under BL 31. Section 11(10) continued validly to apply to persons who were not non-permanent residents with an unexpired limit of stay.

RESULT

The Director's appeal was dismissed. BLB

JUDGMENT UPDATE

Lau Cheong & Another v HKSAR

[2002] 2 HKLRD 612 (16 July 2002)

Lau Cheong and Lau Wong (the "defendants") were convicted of robbery and murder and received mandatory sentences of life imprisonment for murder. Their appeal concerned the legal and constitutional validity of two aspects of the offence of murder, namely, an intention to cause grievous bodily harm as a sufficient form of *mens rea*, and life imprisonment as the mandatory penalty.

HUMAN RIGHTS ISSUES BEFORE THE CFA

The defendants' appeal to the CA was dismissed. Leave to appeal to the CFA was granted on the basis of several questions of law. The following were questions relating to the human rights provisions of the Basic Law:

(1) Whether the grievous bodily harm rule (the "GBH rule") contravened provisions in the Basic Law and the BoR which prohibited arbitrary detention or imprisonment.

(2) Whether mandatory life imprisonment infringed a convicted person's constitutional rights under the Basic Law.

THE GBH RULE

The CFA noted that criminal liability at common law usually required proof of relevant prohibited conduct causing certain prohibited consequences (the *actus reus*) accompanied by a defined state of mind on the part of the accused in relation to that conduct and its consequences (the *mens rea*). In the case of murder, the *actus reus* crucially involved causing the death of another person. However, as the law stood, the accused might be convicted of murder without ever intending or foreseeing death as the consequence of his acts or omissions. It was sufficient if he intended to cause GBH and death in fact resulted. It was that apparent lack of symmetry between what constituted the *mens rea* of the offence and the consequence of death as part of the *actus reus* that was the subject of criticism.

The defendants argued, among other things, that the GBH rule infringed the protection against arbitrary detention or imprisonment under BL 28 and BoR Art 5(1) / ICCPR Art 9(1); equality before the law under BL 25 and BoR Art 10 / ICCPR Art 14(1); and the presumption of innocence under BoR Art 11(1) / ICCPR Art 14(2).

CONSTITUTIONAL CHALLENGES TO THE GBH RULE FAILED

GBH rule not "arbitrary" under BL 28

The main attack on the GBH rule focused on whether imprisonment of an offender following his conviction for murder on the basis of that rule (without any necessary reference to an intention to kill or to endanger life) amounted to arbitrary imprisonment.

The CFA considered that this question was most appropriately dealt with under BL 28. It found that BL 28 expressly provided a constitutional guarantee against arbitrary "imprisonment", which plainly covered incarceration pursuant to a sentence lawfully imposed by a court after a criminal conviction. Therefore the protection under BL 28 extended to offenders lawfully imprisoned after conviction by a court. Further, BL 28 prohibited "arbitrary or unlawful" imprisonment. It envisaged that a term of imprisonment lawfully ordered might nonetheless be "arbitrary". Such arbitrariness might reside in the substantive rules of criminal liability whose breach led to the imprisonment ordered.

In the context of the GBH debate, the concept of arbitrariness required one to ask: "Could it be said, given the asymmetry resulting from the GBH rule, that such rule was arbitrary in that it was capricious or unreasoned or without reasonable cause? Could the

imprisonment which followed be said to have been imposed without reference to an adequate determining principle?"

In the CFA's view, the answer was clearly "No". It found that a person convicted of murder under the GBH rule was one who acted with the intention of causing someone really serious bodily harm and whose actions in the event caused another's death. A person who took another's life in such circumstances brought to realization the risk which was necessarily inherent in his conduct. There was nothing capricious or unreasonable in classing such conduct as murder as a matter of legal policy.

Other constitutional challenges also failed

The CFA found it unnecessary to consider whether the right of equality under BL 25 and BoR Art 10 / ICCPR Art 14(1) was engaged. The defendants' argument based on those provisions did not add to their argument based on arbitrariness.

The CFA also held that the constitutionality of the GBH rule had nothing to do with the presumption of innocence. It considered that the GBH rule constituted one of two independent heads of *mens rea* for the offence of murder and did not give rise to any presumption. All the elements of the offence required to be established. BoR Art 11(1) / ICCPR Art 14(2) was therefore not engaged.

MANDATORY LIFE SENTENCE

Upon their conviction for murder, the defendants were sentenced to life imprisonment. The trial judge had no choice as the sentence was fixed by law, ie s 2 of the Offences against the Person Ordinance (Cap 212). Being a sentence fixed by law in respect of an indictable offence, a mandatory life sentence could not be appealed independently of an appeal against conviction: s 83G of the Criminal Procedure Ordinance (Cap 221).

The defendants argued that the culpability of those convicted of murder varied greatly. Relying primarily on BL 28, they contended that in depriving the trial judge of all sentencing discretion and compulsorily requiring the imposition of life imprisonment in all murder cases, whatever the degree of culpability of the individual involved, such imprisonment was arbitrary and unconstitutional.

The defendants also contended that such laws and the sentence of life imprisonment constituted cruel, inhuman or degrading punishments contrary to BoR Art 3 / ICCPR Art 7. It was also argued that the right given by BoR Art 5(4) / ICCPR Art 9(4) to persons under detention to contest the lawfulness of his detention was infringed by the mandatory life sentence regime. Further, the statutory exclusion of a right of appeal attracted a challenge under BoR Art 11(4) / ICCPR Art 14(5) which gave persons convicted of a crime the right to have their conviction and sentence reviewed by a higher tribunal according to law. Finally, the mandatory regime was said to infringe the requirement of BoR Art 6(3) / ICCPR Art 10(3) that the treatment of prisoners in our penitentiary system should have as its essential aim their reformation and social rehabilitation.

CONSTITUTIONAL CHALLENGES TO THE MANDATORY LIFE SENTENCE FAILED

For the reasons given below, the CFA held that the challenges to the constitutionality of the mandatory life sentence for murder failed.

Views of the legislature

The question of weight which the court should give to the view of the legislature in the context of the constitutional debate in that appeal was an important facet of that debate. The CFA took the view that the Basic Law enshrined the principle that there had to be a separation of powers as between the executive,

the legislature and the judiciary. The legislature was constitutionally entitled to prescribe by legislation what conduct should constitute criminal offences and what punishment those found guilty by the courts should suffer. But in the exercise of their independent judicial power, the courts had the duty to decide whether legislation enacted was consistent with the Basic Law and the BoR.

It was established that when deciding constitutional issues, the context in which such issues arose might make it appropriate for the courts to give particular weight to the views and policies adopted by the legislature. That approach had been compared to the doctrine of according a "margin of appreciation" to national institutions, adopted by the supra-national European Court of Human Rights in exercising its supervisory function. The context and circumstances of that appeal justified the courts to give proper weight to the decision of the legislature.

As was clear from the legislative history of the mandatory life sentence provisions, the question of the appropriate punishment for murder, the most serious crime, was a controversial matter of policy involving differing views on the moral and social issues involved. The legislature had to make a difficult collective judgment taking into account the rights of individuals as well as the interests of society. It had to strike a balance bearing in mind the conditions and needs of the society it served, including its culture and traditions and the need to maintain public confidence in the criminal justice system.

The Hong Kong legislature, continuing the position at common law, had always provided for a mandatory sentence in respect of adult murderers. The legislative history also indicated that the legislature's intention was to mark out murder as a uniquely serious offence by attaching only to that offence the mandatory life sentence. The CFA ought to give proper weight to the above matters and also to the fact that it was part and parcel of the legislature's decision that a statutory regime for the individualized review of each sentence after its mandatory imposition should be put in place. That scheme was embodied in the Long-term Prison Sentences Review Ordinance (Cap 524).

Mandatory life sentence not "arbitrary" under BL 28

Taking into account the inherent and unique gravity of the offence and the sentencing objectives of a mandatory life sentence as a whole, the CFA was unable to accept that mandatory life imprisonment represented a manifestly disproportionate sentence so as to contravene BL 28 on the grounds of arbitrariness.

The legislative judgment that the offence of murder, having regard to its gravity, called for a sentence of mandatory life imprisonment, even allowing for the different circumstances in which it might be committed, was tenable and rational. As such it was a legislative judgment which the CFA should respect. In accepting the legislative judgment, the CFA gave particular weight to the legislature's insistence on a statute-based regime for review by an independent board of all life sentences, with power to recommend conversion of such sentences to fixed terms and to direct conditional releases in appropriate cases.

BoR Art 3 / ICCPR Art 7 not infringed

The CFA found that punishments which were "grossly disproportionate" to what would have been appropriate having regard to the circumstances of the offence and of the particular offender and the general deterrence or other penological purposes in determining a sentence fell to be treated as within the class of cruel, inhuman or degrading punishments. The threshold for establishing such disproportionality as would suffice to make a punishment which was prescribed by law cruel, inhuman or degrading was either the same or higher than the threshold for arbitrariness. Having fallen at the hurdle of arbitrariness, the defendants faced an equal or higher obstacle in seeking to establish that the mandatory life sentence was cruel, inhuman or degrading punishment.

BoR Art 5(4) / ICCPR Art 9(4) not infringed

Detention of prisoners serving mandatory life sentences was made pursuant to the lawful order of the court made at the trial and on any subsequent appeal. Such proceedings satisfied the requirements of BoR Art 5(4) / ICCPR Art 9(4).

BoR Art 6(3) / ICCPR Art 10(3)

There were no materials before the CFA to suggest that the penitentiary system did not meet the requirements of BoR Art 6(3) / ICCPR Art 10(3).

BoR Art 11(4) / ICCPR Art 14(5) not infringed

As the mandatory life sentence was fixed by law, there was no right of appeal *solely* against sentence. BoR Art 11(4) / ICCPR Art 14(5) did not confer a separate right to launch an appeal limited to an appeal against sentence so as to prohibit sentences fixed by law. The requirements of the Article were satisfied by the existing procedure for appeal to the CA which might, on allowing the appeal, overturn the conviction and sentence.

RESULT

The appeal was dismissed. BLB

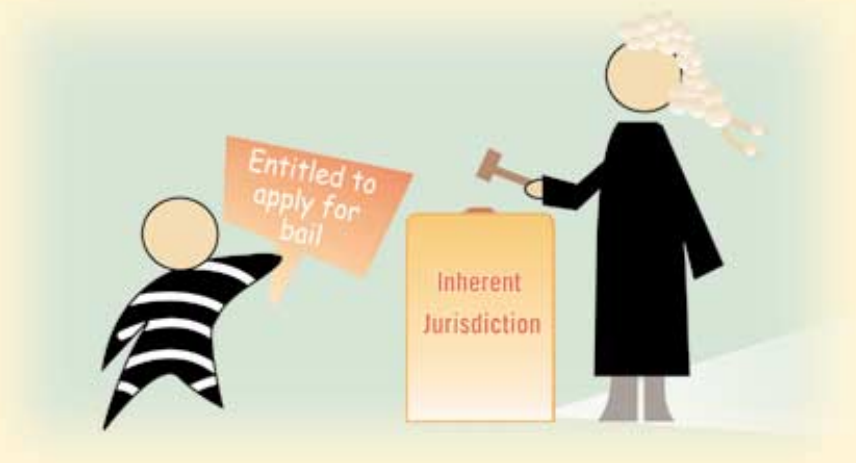
JUDGMENT UPDATE

HKSAR v Siu Yat Leung

[2002] 2 HKLRD 147 (19 April 2002)

ISSUE

In this case, after the Magistrate refused the bail application of Siu Yat Leung ("Siu") pursuant to s 9D of the Criminal Procedure Ordinance (Cap 221) (the "Ordinance") and the subsequent unsuccessful review of the Magistrate's decision by the CFI pursuant to s 9J of the Ordinance, the CFI concluded that the present application for bail pending trial purportedly pursuant to s 9J of the Ordinance failed for want of statutory jurisdiction. However, the CFI also considered whether Siu would have been entitled to apply to the CFI for bail under, among other things, its inherent jurisdiction.



INHERENT JURISDICTION TO GRANT BAIL

The CFI considered that there could be no doubt that Part IA of the Ordinance (including ss 9D and 9J) relating to bail applications was not a code. Further it would take unmistakably clear and precise language to abrogate the inherent jurisdiction of the CFI to grant bail.

As a matter of constitutional law, the CFI could never be lawfully denied, by the Legislature, its quintessential power of adjudication in relation to liberty because of the overriding imperatives in (a) BL 28;[1] (b) Art 5(3) of the BoR;[2] and (c) the nature of a bail application which was a vestigial form of *habeas corpus* under common law. The very right to grant bail was innate in a superior court of unlimited jurisdiction. There was, and remained, a general right to bail at common law, independent of statute. It was a residual jurisdiction and was not therefore parallel to Part IA of the Ordinance.

CONCLUSION

It followed that, between the CFI's decision of review under s 9J of the Ordinance and the completion of Siu's committal under s 85A of the Magistrates Ordinance (Cap 227), Siu would have been entitled to apply to the CFI for bail under its inherent jurisdiction even though no application had been made to any magistrate. However, the CFI would, as a matter of jurisdiction (not discretion) during that period, have required Siu to establish "a material change in relevant circumstances" ~~–~~the enduring common law test which would continue to apply to an application for bail to the CFI brought under its inherent jurisdiction. BLB

[1] BL 28: "The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment …"

[2] Art 5(3) of the BoR:" … It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."