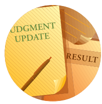


JUDGMENT UPDATE

Yau Kwong Man & Anor v Secretary for Security[1]

HCAL Nos 1595 and 1596 of 2001 (September 2002)[2]

Background

Both applicants were convicted of murder in the 1980s. Because they were under 18 years old at the time of the commission of the offences, each of them was sentenced to an indeterminate term of detention at Her Majesty's pleasure in accordance with section 70 of the Criminal Procedure Ordinance (Cap 221) ("CPO"). Section 4 of the Long-term Prison Sentences Review Ordinance (Cap 524) ("LPSRO") directed that all persons detained at Her Majesty's pleasure shall, from 1 July 1997, be detained at "the discretion of the Chief Executive".

In 1997, the CPO was amended to add section 67C. Section 67C empowered the CE to determine, taking into account the recommendations of the Chief Justice, the minimum term within an indeterminate sentence that an offender had to serve. The CE determined that the minimum terms for the applicants be 15 years and 20 years respectively.

The applicants sought judicial review of the validity of (a) section 67C of the CPO contending that it was inconsistent with BL 80[3], Article 14(1) of the ICCPR[4] (equivalent to Article 10 of the BoR[5]) and BL 8; and (b) section 12(2)[6] of the LPSRO contending that it was inconsistent with Article 9(4) of the ICCPR (equivalent to Article 5(4) of the BoR[7]) and BL 8.

Section 67C of the CPO and BL 80

The judge said that under BL 80, judicial power was vested in those appointed to hold judicial office. Accordingly, what the legislature could not do was to place judicial power in the hands of the executive. The essential question was: "[i]s the determination by the [CE] of a minimum term under section 67C the determination of a punishment, more particularly as to its severity, or is it no more than an integral part of the exercise of his executive power under [BL 48(12)][8] to commute a punishment already lawfully determined and imposed by the courts? If it is the former, section 67C must be inconsistent with [BL 80]. If it is the latter, the legislature has not placed the exercise of judicial power in the hands of the executive and section 67C must be declared constitutionally valid."

[1] See p 19 for an update on the legal development subsequent to the case.

[2] Reported at [2002] 3 HKC 457.

[3] BL 80 : "The courts of the [HKSAR] at all levels shall be the judiciary of the Region, exercising the judicial power of the Region."

[4] As applied to the HKSAR through BL 39.

[5] Article 10 of the BoR : "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 …".

[6] Section 12(2) of the LPSRO : "On reviewing the sentence of a prisoner, the [Long-term Prison Sentences Review Board] is not authorized to order the early release of a prisoner before any minimum term applicable to the prisoner has been served."

[7] Article 5(4) of the BoR : "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if his detention is not lawful."

[8] BL 48(12) : "The [CE] of the [HKSAR] shall exercise the following powers and functions: … (12) [t]o pardon persons convicted of criminal offences or commute their penalties …".

The judge was of the view that the relevant decisions of the European Court of Human Rights and of the English courts supported the universality of the view that the fixing of a period of time that had to be served by an offender to extinguish the retributive and deterrent elements of his sentence was an exercise in determining punishment for that individual offender. While the assessment of a minimum term might not dictate absolutely the final length of sentence to be served, it did (critically) primarily address and primarily determine the period that had to be served to reflect the imperatives of retribution and deterrence. It would be artificial to suggest that it did not thereby, to a material degree, dictate the severity of the sentence.

According to the judge, it was important to remember that the CE, in determining a minimum term, had to look at individual circumstances, ie, the circumstances of the offence, the moral culpability of the prisoner in the commission of the offence and his current personal circumstances. These were all matters inherent in the judicial act of sentencing. The judge rejected the submission that section 67C bestowed on the CE an administrative power only, even if it was a power that had to be exercised judicially, and was satisfied that section 67C, in substance, gave to the CE the power to exercise what was an inherently judicial power and was inconsistent with BL 80.

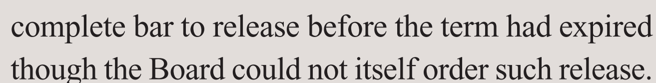
Section 67C of the CPO and Article 10 of the BoR

"Determination of any criminal charge" within the meaning of Article 10 of the BoR described plainly a process for determining a criminal accusation brought against an individual. Section 67C required no determination of a criminal charge (which had already been determined) and was about a review process which was entirely different and was not comparable to charging a person with a criminal offence. The judge was satisfied that Article 10 of the BoR had no reference to the review procedure created in section 67C.

Section 12(2) of the LPSRO and Article 5(4) of the BoR

The applicants contended that, amongst other things, if a young offender was held longer than was justified, whether his minimum term had expired or not, then he was, by the nature of his sentence, held unlawfully. Under Article 5(4) of the BoR, he was entitled to apply to a court at any time during his detention to decide whether his continued detention was lawful or unlawful and, if found to be unlawful, the court had to order his release. They also pointed out that the Long-term Prison Sentences Review Board (the "Board") was not a court because, amongst other things, persons detained had no right to go before it to seek redress when they chose to and that under section 12(2) of the LPSRO it had no power to order the release of a prisoner before that person had served his minimum term. Accordingly, the applicants argued that they were deprived of the right both during their minimum term and thereafter to apply to a court armed with powers sufficient to meet the requirements of Article 5(4) of the BoR.

The judge said that although the Board could not order the conditional release of a prisoner be made effective until the minimum term had expired, it might make recommendations to the CE at any time during the serving of the minimum term or after and, if accepted, the CE might exercise his jurisdiction under BL 48(12) to release the prisoner even though the minimum term had not yet expired. The specification of a minimum term was not a



complete bar to release before the term had expired though the Board could not itself order such release.

The judge was of the view that the concept of a minimum term was not designed to provide what in substance was a fixed term of imprisonment in lieu of an indeterminate term. The minimum term constituted only the initial, minimum period that a prisoner had to serve before the determination of the full sentence was assessed on the basis of his rehabilitation. The legislation governing the minimum term split indeterminate sentences into two periods: (a) the initial minimum period to reflect retribution and deterrence; and thereafter (b) the remainder of the sentence in which rehabilitation was demonstrated.

The new statutory scheme (which came into force in 1997) provided a mechanism for the judicial determination of that period of time which had to be served in each case to meet the imperatives of retribution and deterrence. The judge said that for those (the applicants were among them) sentenced under the old regime, once the inconsistency with BL 80 described above (ie, the applicants' minimum terms determined by an administrative process instead of a judicial one) was removed and they had their minimum terms determined by the exercise of judicial power, then there would be no difference between their situation and that of those sentenced under the new statutory scheme. Any supervision by the courts that might be required under Article 5(4) of the BoR would then be incorporated in the exercise of that judicial power.

The applicants did not seek relief as to the manner in which they personally had been denied access to a court under Article 5(4) of the BoR, but sought a declaration in general that section 12(2) of the LPSRO was inconsistent with Article 5(4) of the BoR. The judge was of the view that there was no inconsistency, certainly not in respect of young offenders sentenced under the new statutory scheme. For persons sentenced under the old regime (eg, the applicants), their complaint was that their minimum terms had not be determined by the exercise of judicial power. Once the inconsistency with BL 80 was removed, they would find themselves in exactly the same position as those sentenced under the new statutory regime.

The judge said that even if he was wrong in that regard, in terms of Article 5(4) of the BoR, the applicants (and those in their position) did have recourse to the courts in order to obtain a decision on the lawfulness of their continued detention by way of the ancient prerogative writ of *habeas corpus*. The judge was satisfied that the rights intended to be protected by Article 5(4) of the BoR were the rights contained in the prerogative writ of *habeas corpus* and that, in respect of the "lawfulness" of the continued detention of the applicants (and those in their position), *habeas corpus* proceedings might be employed effectively and fully to protect their rights both under the Basic Law and Hong Kong's municipal statutes.

Result

A declaration was granted that section 67C(2), (4) and (6) of the CPO was inconsistent with BL 80 and was thereby invalid. All other declarations sought were refused.

JUDGMENT UPDATE

New World Development Co Ltd & Others v Stock Exchange of Hong Kong Ltd

HCAL No 79 of 2003 (May 2004)[1]

Background

The Applicants in this case were a public-listed company and its executive directors. They were the subject of disciplinary proceedings instituted pursuant to the terms of the Listing Rules made by the Respondent for the orderly running of the Hong Kong Stock Exchange (the "Stock Exchange"). The Chairman of the Disciplinary Committee formed to determine whether the Applicants had committed a breach of the Listing Rules issued a set of directions as to how the hearing before the Disciplinary Committee would be conducted. The directions included a limitation on the extent to which the Applicants' lawyers would be able to act on behalf of their clients at the hearing.

The Applicants applied, by way of judicial review proceedings, to challenge the Chairman's directions insofar as they limited legal representation before the Disciplinary Committee. At issue was whether the limitation on, as opposed to the denial of, the Applicants' legal representation: (a) breached the right to legal representation under BL 35; (b) offended the Applicants' right to a fair trial under Article 10 of the BoR; and (c) offended any common law rule of procedural fairness.

The Disciplinary Procedures

The Disciplinary Procedures, adopted by the Listing Committee responsible for managing the Stock Exchange, provided that disciplinary proceedings should be informal (para 6.1); the hearing of disciplinary proceedings should be primarily by way of written submissions (para 2.5); and that a party could be accompanied by a legal adviser but that any submissions made by a party and all questions addressed to a party by any member of the Listing Committee had to be answered directly by the party and not through his/her legal advisers (para 5.1).

In the light of the Applicants' submission as to legal representation, the Chairman of the Disciplinary Committee gave the Committee's final direction that oral submissions to the Disciplinary Committee could not be made by legal representatives nor could questions addressed to a party by the Committee be answered by the party's lawyer. Legal representation was to that degree restricted.

BL 35

According to the judge, BL 35 did not guarantee Hong Kong residents the right to legal representation before all bodies which might exercise powers determinative of their rights. BL 35 only guaranteed the right to legal representation "in the courts". Accordingly, the Applicants must demonstrate that the Disciplinary Committee was a "court" within

[1] Reported at [2004] 2 HKLRD 1027.

the meaning of BL 35 in order to be entitled to legal representation before the Committee pursuant to BL 35.

In terms of BL 35, a court was not restricted to courts of law (or judicature) which formed part of the established judicial system of Hong Kong and to which the public at large was subject. A court might include tribunals (by whatever name they are known) which performed judicial functions in respect of a limited class of persons. As to what constituted the performance of a judicial function, the judge noted that the fact that a tribunal, empowered to determine the rights to individuals, was required to exercise a judicial function by finding facts and objectively applying a given set of rules to them could not be exhaustive in defining that tribunal as a court in terms of BL 35. If a tribunal was to be recognized as a court, it should have been created by the state, invariably by means of statute. Such a statutory tribunal was to be distinguished from a "domestic tribunal" which was created by agreement between private persons, one that derived its authority from contract or some similar form of consensus.

In the present case, the Disciplinary Committee, when viewed in the round, was a domestic tribunal. In particular, the Disciplinary Committee was not a creation of statute; and it derived its authority from contract not statute. While the Respondent was obliged by statute to create and to monitor the Listing Rules, it could not be said that such rules were thereby statutory rules. They remained rules compiled by the Respondent, as it had deemed best for the orderly regulation of a free-market business to which persons wishing to participate in that business bound themselves by way of agreement only. The procedures for disciplinary matters, while subject to the monitoring of the Securities and Futures Commission, were procedures created solely by the Respondent as it had deemed best and were adhered to by consensus. It was also noted that there was no right of appeal to a judge of first instance or to the CA. The judicial machinery of the state was not integral to the disciplinary process.

While BL 35, which secured fundamental rights, must be read purposively, that did not mean that the clear wording of the article could be stretched out of shape. BL 35 spoke only of "courts". Accordingly, the judge concluded that the Listing Committee sitting as a disciplinary tribunal was not and could not be classified as a court for the purposes of BL 35. As such, the applicants were unable to avail themselves of the rights guaranteed under BL 35.

Article 10 of the BoR

It was part of the Applicants' case that the limitation on their right to legal representation offended Article 10 of the BoR, which referred to the right to a fair trial in the determination of any criminal charge or in the determination of rights and obligations in a "suit at law". The judge raised doubts as to whether disciplinary proceedings before a domestic tribunal, exercising its authority on the basis of consensus, would constitute a "suit at law". Even assuming that the Applicants were parties to a "suit at law", the second question was whether Article 10 in any way guaranteed a right of legal representation.

While Article 10 in specific terms enshrined the principles of access to Hong Kong's courts and tribunals and to a fair hearing, it was silent on the matter of legal representation. In the present case, if a right to legal representation was to be found in Article 10, it had to flow from the concept of a fair hearing, in particular the right to "equality of arms".

According to the judge, such a right to legal representation for the Applicants was not found in

the present case. It was noted that the Listing Rules related solely to market matters. Persons brought before the Disciplinary Committee were representatives of or directors of listed companies. They were persons reasonably presumed to have experience in and knowledge of the market and the rules that regulated the market. Such persons were not lay persons, ignorant of the issues. It was also important to consider the nature of the disciplinary process. The Disciplinary Procedures made it plain that disciplinary hearings were not to be burdened with the rules of evidence, that the procedures were to be informal and that the emphasis was on written submissions exchanged in accordance with a procedural timetable. The persons who were brought before the Committee might be accompanied by legal representatives and might take advice from them before answering questions or making final "limited" oral submissions.

Conclusion

In addition to the above, the Applicants' argument based on the common law rule of procedural fairness also failed. Accordingly, the application for judicial review was dismissed.

SIDELIGHTS

Air services

BL 128 to BL 135 provide for matters related to HKSAR's civil aviation. BL 128 stipulates that the HKSARG shall provide conditions and take measures for the maintenance of the status of Hong Kong as a centre of international and regional aviation. In this regard, the HKSAR aims at ensuring the provision of air links to a wide range of destinations to meet the needs of the traveling public and shippers.

To achieve these objectives, the HKSAR adopts an approach of progressive liberalization of air services under the bilateral regime. Under this approach, the HKSARG continues to negotiate air service agreements and arrangements with new aviation partners and to review the arrangements with existing partners from time to time in the light of market development.

In accordance with international practices, air services between the HKSAR and foreign countries are governed by bilateral air service agreements ("ASAs") which are international treaties and provide the framework for scheduled air services between two bilateral partners.

Air service agreements

Under BL 133, acting under specific authorizations from the CPG, the HKSARG may negotiate and conclude new air service agreements providing routes for airlines incorporated and having their principal place