Secretary for Justice v Lau Kwok Fai and Another
FACV Nos 15 - 16 of 2004 and No 8 of 2005[1] (July 2005)
Court of Final Appeal

The Court of Final Appeal ("the Court") unanimously allowed the Government's appeals and held that sections 4 to 6 and 10 of the Public Officers Pay Adjustment Ordinance (Cap 574) and sections 4 to 11 and 15 of the Public Officers Pay Adjustments (2004/2005) Ordinance (Cap 580) are not inconsistent with BL 100 and 103 and are valid enactments of the Legislative Council.

The Court also ordered that in view of the desirability in the public interest of clarifying the important issues in these cases, there should be no order as to costs in relation to the proceedings in the Court and in the courts below so that each party will bear its or his own costs.

BL 100

The Court held that BL 100 must be given a purposive construction. Before 1 July 1997, the Government possessed plenary legislative power to make laws for the peace, order and good government of Hong Kong. The scope of that plenary power included the alteration of a term, such as a provision governing pay, in a contract of service between the Government and a public officer, as well as the Government's public service pay scales. The plenary legislative powers enjoyed by the Legislative Council since 1 July 1997 are subject to the Basic Law and are no less extensive than those that existed before that date.

The words "no less favourable than before" are significant in two respects. First, the word "before" means before 1 July 1997 so that it is the "pay, allowances, benefits and conditions of service" immediately before that date which are identified as the standard by which the comparison of what is "no less favourable" is to be made. Secondly, the article does not seek to prohibit or inhibit changes to pay, allowances, benefits or conditions of service of public officers appointed before 1 July 1997, except to the extent that such changes are less favourable than those entitlements before that date.

It is also held that BL 100 operates only to preclude a legislative reduction of public officers' pay below the level of pay which prevailed before 1 July 1997. The article does not guarantee any higher level of pay than that.

Section 10 of Cap 574 and section 15 of Cap 580 simply varied the contracts of service of public officers so that the contracts authorized the specific reductions in pay brought about by the legislation in question. Because the contracts contained no implied undertaking against introducing or enacting the legislation, neither the introduction nor the enactment of the legislation required contractual authority in order to avoid a breach by the Government of the contract of service and there was no need to enact sections 10 and 15. The conditions of service, both before and after that date, were exposed to a variation by way of a reduction of pay through legislative action which was not dependent for its validity on contractual authority. Neither section 10 nor section 15 introduced a term into the contracts which made the conditions of service "less favourable" than they were before 1 July 1997, within the meaning of BL 100.

BL 103

The Court held that BL 103 is designed to preserve the continuity of Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service including special bodies for their appointment, pay and conditions of service, excepting provisions for privileged treatment of foreign nationals. Preservation of the system does not entail

[1] Reported at [2005] 3 HKLRD 88.

preservation of all the elements of which the system consists. Some elements may change and be modified or replaced without affecting the continuity of the system as a whole. The broad question is whether the system continues or whether it is so materially changed that it becomes another system. The more specific question is whether the failure to conduct the Pay Trend Survey for the purposes of Cap 580 was such a material change that it resulted in the abandonment of the previous system, involving the prevention of the "special bodies" responsible for pay and conditions from fulfilling their protected functions.

It was held that BL 103 guarantees the continuation of the "special bodies" responsible for public service pay and conditions of service. The Pay Survey and Research Unit and the Pay Trend Survey Committee are not "special bodies" within the meaning of BL 103 and their existence is not guaranteed. The Court also held that the conduct of a pay trend survey was not so inherent an element in the scheme of determining pay adjustment that failure to conduct a survey would of itself, no matter what the circumstances were, constitute a breach of BL 103. It was held that BL 103's guarantee of the continuation of the public service system of "employment and management" does not require that a pay trend survey must be conducted every time that public service pay is to be adjusted and BL 103 was therefore not contravened.

New World Development Company Limited & Others v The Stock Exchange of Hong Kong Limited

(CACV No 170 of 2004)

The Court of Appeal, on 27 May 2005, overturned the judgment of the Court of First Instance in this case (please refer to p. 21 of Issue No. 7 for a summary of the judgment of the CFI). The main Basic Law issue before the court is whether the Disciplinary Committee formed by the Stock Exchange of Hong Kong Limited ("Stock Exchange") to determine whether New World Development Company Limited had committed a breach of the Listing Rules made by the Stock Exchange is a "court" for the purpose of BL 35. The Stock Exchange has applied for leave to appeal to the CFA which has been granted and the appeal will be heard in March 2006.

Leung Kwok Hung and Others v HKSAR

FACC Nos 1 & 2 of 2005[1] (July 2005)

Court of Final Appeal

On 25 November 2002, the Chief Magistrate convicted the 1st appellant of the offence of holding an unauthorized assembly and the 2nd and 3rd appellants of the offence of assisting the holding of such unauthorized assembly. These were offences under section 17A(3)(b)(i) of the Public Order Ordinance (Cap 245).

The constitutional requirements for restricting the right to freedom of peaceful assembly

The Court of Final Appeal ("CFA") held that freedom of peaceful assembly was a fundamental right. It was closely associated with the fundamental right of the freedom of speech. Freedom of speech and freedom of peaceful assembly lay at the foundation of a democratic society. These freedoms were of cardinal importance for the stability and progress of society.

However, the exercise of the right of peaceful assembly, whether under BL 27 or Article 17 of the BoR, might be subject to restrictions provided two requirements were satisfied:

(a) the restriction was prescribed by law; and

(b) the restriction was 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 ("the necessity requirement").

The Court recalled that the "prescribed by law" requirement mandated the principle of legal certainty. To satisfy this principle, the law must be adequately accessible to the citizen and must be formulated with sufficient precision to enable the citizen to regulate his conduct. A law which conferred discretionary powers on public officials, the exercise of which might interfere with

fundamental rights, must give an adequate indication of the scope of the discretion with a degree of precision appropriate to the subject matter.

As regards the constitutional requirement of necessity, the CFA accepted that it involved the application of a proportionality test, which should be formulated in these terms:

(a) the restriction must be rationally connected with one or more of the legitimate purposes; and

(b) the means used to impair the right of peaceful assembly must be no more than was necessary to accomplish the legitimate purpose in question.

[1] Reported at [2005] 3 HKLRD 164.

The statutory scheme under the Public Order Ordinance

The Public Order Ordinance only regulated public processions consisting of more than 30 persons on a public highway or thoroughfare or in a public park. A public procession subject to the statutory scheme might take place if and only if:

(a) the Commissioner of Police ("the Commissioner") had been notified of the intention to hold the procession ("the notification requirement");

(b) the Commissioner had notified that he had no objection to the procession taking place or was taken to have issued a notice of no objection; and

(c) the requirements under section 15 of the Ordinance were complied with.

Section 14(1) of the Ordinance conferred on the Commissioner a discretion to object to the public procession being held "if he reasonably considers that the objection is necessary in the interests of national security or public safety, public order (*ordre public*) or the protection of the rights and freedom of others."

The Commissioner was obliged not to object if he reasonably considered that the relevant statutory legitimate purpose could be met by imposing conditions: section 14(5). The test for the exercise of his discretion to impose conditions was in identical terms to that of his discretion to object.

Where the Commissioner decided to impose any condition, he must give written notice to the organizer and state the reasons why such condition was considered necessary: section 15(2).

Notification requirement

As far as the notification requirement is concerned, the CFA noted that the right of peaceful assembly involved a positive duty on the part of the Government to take reasonable and appropriate measures to enable lawful assemblies and demonstrations to take place peacefully. Notification was required to enable the police to fulfil this duty. A legal requirement for notification was also widespread in other countries. The Court therefore held that the statutory requirement for notification was constitutional.

The constitutional requirement of "prescribed by law"

The appellants contended that the Commissioner's discretion to restrict the right of peaceful assembly for the purpose of "public order (*ordre public*)" failed to satisfy the two constitutional requirements for restriction: (a) the "prescribed by law" requirement; and (b) the necessity requirement, on the ground that the concept of "public order (*ordre public*)" was too wide and uncertain.

The CFA pointed out that in considering whether the Commissioner's discretion in relation to "public order (*ordre public*)" satisfied the constitutional requirement of "prescribed by law", it was essential to distinguish between the use of the concept at the constitutional level on the one hand and its use at the statutory level on the other.

The concept of "public order (*ordre public*)" operated at the constitutional level in Hong Kong because BL 39(2) required any restriction of rights and freedoms to comply with the provisions of the International Covenant on Civil and Political Rights ("ICCPR") as applied to Hong Kong, and the concept was specified in a number of articles in the ICCPR as a legitimate purpose for the restriction of rights, including the right of peaceful assembly.

The Court agreed that the concept of "public order (*ordre public*)" included public order in the law and order sense, that is, the maintenance of public order and prevention of public disorder. However, it also noted that the concept was not so limited. It was an imprecise and elusive concept, and its boundaries beyond public order in the law and order sense could not be clearly defined. Nonetheless, since a constitutional norm was usually and advisedly expressed in relatively abstract terms, the Court accepted the concept of "public order (*ordre public*)" as a constitutional norm.

At the statutory level, the Court considered that the Commissioner's discretion to restrict the right of peaceful assembly for the statutory purpose of "public order (*ordre public*)" "plainly" did not give an adequate indication of the scope of that discretion. This was because of the inappropriateness of the concept taken from the ICCPR as the basis of the exercise of such a discretionary power vested in the executive authorities. That being so, the Commissioner's discretion to restrict the right for the purpose of "public order (*ordre public*)" fell foul of the constitutional requirement of "prescribed by law". Accordingly, the Commissioner's discretion in relation to the purpose of "public order (*ordre public*)" in sections 14(1), 14(5) and 15(2) of the Ordinance was held to be unconstitutional.

Nonetheless, it was beyond doubt that the concept covered public order in the law and order sense, that is, the maintenance of public order and prevention of public disorder. Public order in this sense would simply be referred to as "public order" as distinguished from "public order (*ordre public*)". The Court therefore decided that the proper remedy was to sever "public order" from "public order (*ordre public*)" in sections 14(1), 14(5) and 15(2) of the Ordinance.

The constitutional requirement of necessity

The Court further held that the Commissioner's statutory discretion to restrict the right of peaceful assembly for the purpose of "public order" (as opposed to "public order (*ordre public*)") was rationally connected with the wider constitutional legitimate purpose of "public order (*ordre public*)".

It also found that the Commissioner's discretion to restrict the right in relation to "public order" was no more than was necessary to accomplish the constitutional legitimate purpose of "public order (*ordre public*)":

- It was limited to public processions consisting of more than 30 persons on a public highway or thoroughfare or in a public park.
- The discretion was of assistance in enabling the Government to fulfil its positive duty.
- It was a limited discretion, constrained by the proportionality test.
- Adequate reasons had to be given for any objection or imposition of conditions.
- There was a right of appeal to the Appeal Board on Public Meetings and Processions and a right of recourse to judicial review.

Accordingly, the Commissioner's statutory discretion to restrict the right of peaceful assembly for the purpose of "public order" satisfied the constitutional necessity requirement.

Conclusion

However, the offences for which the appellants were convicted did not relate to the statutory provisions conferring on the Commissioner the discretion to object or to impose conditions on a public procession where he reasonably considered that it was necessary in the interests of "public order (*ordre public*)". The offences arose out of the holding of a public procession without complying with the statutory notification requirement. The above conclusions did not affect the convictions. The appeal was therefore dismissed.

Yeung May Wan and Others v HKSAR

FACC No 19 of 2004[1] (May 2005)

Court of Final Appeal

The appellants were part of a group of 16 members of the Falun Gong who held a peaceful demonstration on the public pavement outside the main entrance to the Liaison Office of the Central People's Government on 14 March 2002. After ignoring police warnings to move away, they were arrested and charged with: (a) the offence of obstructing a public place contrary to section 4A of the Summary Offences Ordinance (Cap 228) ("SOO") by setting out a banner; and (b) the offence of doing an act whereby obstruction might accrue to a public place contrary to section 4(28) of the SOO by assembling together and displaying the banner.

After being taken to the police station, the appellants refused to alight and resisted being removed from the police vehicle. They were therefore additionally charged with wilfully obstructing a police officer acting in the due execution of his duty.[2] Two of them were also charged with assaulting police officers acting in the due execution of their duty.[3]

The Magistrate convicted them on all charges. The Court of Appeal quashed the public place obstruction convictions but upheld the wilful obstruction and assault convictions. The appeal to the CFA was against the remaining convictions.

Freedom of demonstration

The CFA held that since the appellants were at the time of arrest engaged in a peaceful demonstration, the constitutionally protected right to demonstrate under BL 27 was engaged.[4] The CFA held:

> *"The freedom to demonstrate is a constitutional right. It is closely associated with the freedom of speech. These freedoms of course involve the freedom to express views which may be found to be disagreeable or even offensive to others or which may be critical of persons in authority. These freedoms are at the heart of Hong Kong's system ... ."*

1 Reported at [2005] 2 HKLRD 212.
2 Contrary to section 36(b) of the Offences Against the Person Ordinance (Cap 212).
3 Contrary to section 63 of the Police Force Ordinance (Cap 232).
4 BL 27 provides: "Hong Kong residents shall have freedom of speech, ... of assembly, ... and of demonstration ... ."

It was accepted by all parties that the restrictions under sections 4A and 4(28) of the SOO did not themselves exceed the scope of the constitutionally permitted restrictions.

Court of Appeal decisions

The CFA agreed with the Court of Appeal that the convictions under section 4A of the SOO should be quashed on the basis that the suggestion that the banner itself could constitute an unreasonable obstruction was "nonsensical".

In relation to the second charge under section 4(28) of the SOO, the CFA observed that the offence created by that section had two limbs:

(a) there must be an act which directly or consequentially caused an obstruction to a public place; and

(b) that act must have been done without lawful authority or excuse.

A person who created an obstruction could not be said to be acting without lawful excuse if his conduct involved a reasonable use of the public place. What was reasonable was a question of fact and degree depending on all the circumstances, including the obstruction's extent, duration, time, place and purpose. Where the obstruction resulted from a peaceful demonstration, the protection afforded to the constitutionally protected right to demonstrate had to be given substantial weight when assessing the reasonableness of the obstruction.

The Court of Appeal quashed the convictions on the second charge because the fact and the centrality of the requirement of showing an unreasonable impediment to the primary right of passage had not been sufficiently appreciated by the police officers. It found that there was ample room for pedestrians to pass and to gain access to the building safely. That situation was not likely to change materially. The magistrate had also accorded too little regard to the right of assembly and protest, and had applied too restrictive a test to the issue of reasonableness as it arose when two fundamental rights competed for space on a highway.

Given that the public place obstruction convictions had been quashed, the question arose as to:

(a) whether the arrests which had been based on suspicion of those offences were lawful; and

(b) if they were not lawful, whether the act of removing the appellants from the police vehicle was action taken by the police officers in the due execution of their duty. If not, an essential element of the wilful obstruction and assault offences for which the appellants were convicted would be missing.

Freedom of the person

The CFA pointed out that every resident was entitled to freedom of the person. Anyone who sought to interfere with that freedom could only do so with proper legal justification. This was well-established at common law and was laid down in BL 28.[5] The Court said:

> *"If a person is subjected to an unlawful arrest by a police officer, the continued detention of that person pursuant to the arrest perpetuates the unlawfulness and constitutes a false imprisonment. ... The act of maintaining custody which is unlawful forms no part of the duty of any police officer and if he is obstructed or assaulted while doing so, he is not obstructed or assaulted while acting in the due execution of his duty. On the contrary, persons unlawfully in custody are entitled to use reasonable force to free themselves."*

Principles in relation to police officers' power of arrest

The Court of Appeal had reasoned that the original arrests were lawful so that the subsequent actions were taken in the due execution of the officers' duty. This argument related to the power of arrest

[5] BL 28 provides: "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. ... ."

conferred on police officers by section 50(1) of the Police Force Ordinance (Cap 232) ("PFO") which provides:

> *"It shall be lawful for any police officer to apprehend any person who he reasonably believes will be charged with or whom he reasonably suspects of being guilty of:*
>
> *(a) any offence for which the sentence is fixed by law or for which a person may (on a first conviction for that offence) be sentenced to imprisonment; ... ."*

This provision appeared to provide two alternative bases for the exercise of the power of arrest: (a) where the officer reasonably believed that the arrested person would be charged with a relevant offence; and (b) where the officer reasonably suspected that person of being guilty of a relevant offence.

However, BL 28 and Article 5 of the BoR prohibit arbitrary arrest. To protect residents from arbitrary arrest, the provision authorising a police officer to apprehend a person "who he reasonably believes will be charged" under the first limb of section 50(1) must be read to mean "who he reasonably believes will be charged *on the basis of a reasonable suspicion that the arrested person is guilty of the offence to be charged"*.

The CFA also laid down the following principles:

(a) An arresting officer must have both a genuine suspicion that the offence in question has been committed and objectively reasonable grounds for that suspicion.

(b) The facts reasonably suspected by the arresting officer to exist must be such that, if true, they would constitute the necessary elements of the offence for which the power of arrest is sought to be exercised.

(c) In relation to a public place obstruction offence, a material element is that the obstruction was unreasonable and the fact that the constitutional right to demonstrate was being exercised has to be given substantial weight when assessing reasonableness.

(d) Whilst the focus remains on the mind of the arresting officer, his reasonable suspicion may properly be based upon hearsay information provided that such information leads him to form a genuine suspicion on grounds which an objective observer would regard as reasonable. He may properly form a reasonable suspicion based on what he has been told at a briefing, supplemented, if necessary, by what he sees at the scene.

The CFA concluded that the objective requirement of reasonable suspicion of a public place obstruction without lawful excuse could not be made out either on the basis of what had been said at the briefings or of what was self-evident at the scene. It followed that the arrests for obstruction contrary to section 4(28) of the SOO were unlawful. This meant that the actions taken by the officers to remove the appellants from the vehicle while keeping them in police detention were not performed in the due execution of their duty. The Court therefore allowed the appeal.