HKSAR v Hung Chan Wa & Another

FACC No 1 of 2006[1] (August 2006)

Court of Final Appeal

These appeals, heard together with the other appeals, *HKSAR v Lam Kwong Wai & Another* (the possession of an imitation firearm appeals), involve the interpretation of reverse onus provisions. The legal principles relating to reverse onus of proof were dealt with by the CFA in *Lam Kwong Wai's* case. These appeals concerned section 47 of the Dangerous Drugs Ordinance, Cap 134 ("the Ordinance"). The CFA held that the CA was correct to apply a remedial interpretation to section 47 by treating the burdens of proof as an evidential onus only. It stated, however, that the remedial approach is to be based on implied powers conferred upon the courts of HKSAR by the Basic Law itself. These appeals also raised issues on the interpretation of BL 160, the proper approach to deal with applications for extension of time to appeal against conviction and the question of prospective overruling.

BL 160

BL 160(1) provides:

> "Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law."

BL 160 is the last article of the Basic Law and it is the only article in Chapter IX which is headed "Supplementary Provisions". BL 160(1) supplements articles such as BL 8 and 18 in making it clear that laws previously in force shall be adopted except for those which the Standing Committee declares to be in contravention of the Basic Law. Apart from the laws so declared to be in contravention, BL 160 recognizes that there may be laws which are discovered after 1 July 1997 to be in contravention of the Basic Law. In relation to them, BL 160(1) provides that "they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law".

The crucial question is whether the phrase "the procedure as prescribed by this Law" at the end of BL 160(1) covers judicial procedure. If it does, judgments of the courts determining pre-1 July 1997 laws to be in contravention of the Basic Law would only have prospective effect, since the article provides that the law in question "shall cease to have effect" in accordance with the procedure prescribed. This view was rejected by the CFA as leading to a sharp distinction between pre-1 July 1997 laws and post-1 July 1997 laws. Under this view, court judgment determining a post-1 July 1997 law to be in contravention of the Basic Law would operate retrospectively and prospectively in accordance with the common law positions but a court judgment determining a pre-1 July 1997 law to be unconstitutional would only have prospective effect. BL 160 should not be interpreted to lead to such an extraordinary result in the absense of clear words.

The language of BL 160(1) also indicates that the judicial process is not included and that it is only the legislative procedure which is contemplated by the article. The phrase "shall be amended" connotes a legislative procedure. A law is amended by the legislature by an amendment Ordinance. The courts do not amend laws. The phrase "shall cease to have force" also suggests a legislative procedure. It is when the legislature repeals a law that it ceases to have effect so that the phrase "shall cease to have effect" connotes the legislative context. The CFA concluded that BL 160 does not apply to judicial procedure.

The CFA held that the power to engage in prospective overruling, if it exists, is an

[1] Reported at [2006] 3 HKLRD 841.

extraordinary power. The circumstances of these appeals do not justify the exercise of the power even if it exists. It is not necessary to decide the fundamental question whether and to what extent the courts in Hong Kong have such power.

Extension of time

The avenue of appeal is provided for by statute for persons convicted of criminal offences. Various statutory provisions provide for appeals through the hierarchy of the court system. These provisions lay down time limits for appeals and confer on the courts the discretion to extend time. The arrangement is important as it is in the interests of society for there to be finality in the criminal process. The time limits for the purpose of achieving finality are not absolute and the courts have discretion to relax the time limit where it is justifiable. The burden is on the defendant to justify the exercise of that discretion in his favour.

Where a reverse onus provision has been read down by the court to impose merely an evidential, not persuasive, burden, this is not a ground justifying an extension of time by itself for persons previously convicted under the relevant provision. The CFA, however, recognized that there could be exceptional circumstances in a particular case which would justify an extension of time extending for appeal against previous conviction on the ground that a subsequent judgment has held the previous understanding of the law to be incorrect. It is not feasible for the CFA on this occasion to attempt to define what constitutes exceptional circumstances but where the defendant had pleaded guilty would not fall within this exception. The CFA further noted that in dealing with applications for extension of time for appeals against conviction, the courts may have to adopt such summary procedure as may be appropriate for the court concerned.

Prospective overruling

The following points were noted on prospective overruling. Firstly, the question whether judicial power includes a power to engage in prospective overruling in a particular jurisdiction has to be decided in the light of the constitutional framework of the jurisdiction concerned. Secondly, the question whether the power to engage in prospective overruling exists may arise in the context of private law, criminal law or public law. It may have to be considered where the judgment relates to the common law, statutory interpretation or constitutional interpretation or a combination of these areas. Different considerations may apply to different situations as to whether the power exists and its width and the circumstances that may justify its exercise.[1]

Thirdly, in relation to a judgment determining a constitutional issue, the question whether the power exists will have to be considered in the context of the range of remedies that may be available. In *Koo Sze Yiu v CE of HKSAR* [2006] 3 HKLRD 445, the CFA left open the question whether the courts have the power to grant a declaration of temporary validity of a law or executive action which has been declared unconstitutional. However, such a remedy is even more far-reaching than prospective overruling. With prospective overruling, the court's judgment would take effect from the date of the judgment. But where a declaration of temporary validity is made, the judgment would take effect after the expiry of the period as specified in the declaration sometime after the judgment.

Fourthly, it is of the essence of the common law that it evolves to meet the changing needs of the society in which it functions. Judges have the responsibility and indeed the duty to develop the common law to respond to changing needs. Thus, when the House of Lords decided in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 not to follow its previous decision in *Rondel v Worsley* [1969] 1 AC 191 on the question of the advocate's immunity, it did not mean that *Rondel v Worsley* was wrongly decided. Rather, the question was reconsidered over three decades later in the light of changes in the law of negligence, the functioning of the legal profession, the administration of justice and public properties. Where the common law has developed in this way, it is usually unnecessary to decide on the precise point of time when the change occurred.

[1] The CFA noted that Lord Scott and Lord Steyn were of the view that the power does not extend to a decision on statutory interpretation (see *In re Spectrum Plus Ltd* [2005] 2 AC 680).

Developing the common law in this way cannot be regarded as an application of the power to prospectively overrule. In relation to a common law question, that power would only be engaged, where contrary to a previous view, a judgment is given that the previous view was incorrect at the time it was held, overruling a previous authority on the point, if there was one. And the court considers whether and if so the extent to which it should confine the retrospective effect of its judgment.

Fifthly, even if the power to engage in prospective overruling is held to exist in any situation, it is an extraordinary power. The courts must approach its exercise with the greatest circumspection.

Reverse onus of proof

The CFA held that the reverse onus under section 47(1) and (2) of the Ordinance derogates from the presumption of innocence protected under the Basic Law and the BoR. The legal principles were the same as those set out in the judgment concurrently made by the CFA in *Lam Kwong Wai's* case. It is possible to apply a remedial interpretation to section 47(1) and (2) by treating the burdens of proof as creating an evidential onus only. In accordance with the approach adopted by the CFA in *Lam Kwong Wai*, that remedial approach is to be based on implied powers conferred upon the courts of the Region by the Basic Law itself.

HKSAR v Lam Kwong Wai & Another

FACC No 4 of 2005[1] (August 2006)

Court of Final Appeal

These appeals involve the interpretation of a "reverse onus" clause under section 20 of the Firearms and Ammunition Ordinance, Cap 238 ("the Ordinance"). Section 20(1) of the Ordinance provides that a person who is in possession of an imitation firearm commits an offence punishable with imprisonment; yet section 20(3) goes on to provide that he does not commit an offence if he satisfies the court the possession is not for an unlawful purpose. A central issue of these appeals is whether the reverse onus clause is consistent with the presumption of innocence protected both under the Basic Law and the BoR and if not, whether the clause could be read down. The CFA held that striking a law down is a course of last resort. The reverse onus clause in section 20 of the Ordinance could be read down as imposing only an evidential, not persuasive, burden to be compatible with the constitutional rights.

The Court of Appeal's judgment

The CA held that the impugned provision was inconsistent with the presumption of innocence and was invalid. The CA concluded that the legislature intended to criminalize more than mere possession, namely possession plus criminal intent, and that section 20(3)(c) imposes a persuasive burden upon the defendants which goes to an essential element of the offence. The CA concluded that it was not possible to read down section 20 in such a way as creating only an evidential burden.

The presumption of innocence

At common law, the presumption of innocence is the central rule of the criminal law which requires the prosecution to prove the defendant's guilt beyond reasonable doubt. The prosecution bears the burden of proving every essential element of the offence including the mens rea of the defendant.

A reverse onus, which places an onus on the defendant to prove all or any of the elements of the offence, appears to be inconsistent with the presumption of innocence because it allows the defendant to be convicted on failing to discharge the reverse onus, even though the prosecution fails to prove all the elements of the offence beyond reasonable doubt. A distinction can be

[1] Reported at [2006] 3 HKLRD 808.

drawn between a persuasive burden and an evidential burden. The distinction is important because an evidential burden is generally regarded as consistent with the presumption of innocence.

An evidential burden, unlike a persuasive burden, does not expose the defendant to the risk of conviction because he fails to prove some matter on which he bears an evidential onus. An evidential burden requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. A persuasive burden, on the other hand, requires a defendant to prove, on a balance of probabilities, an ultimate fact which is necessary to the determination of his guilt or innocence.

The presumption of innocence is protected under BL 87(2) and Article 11(1) of the BoR. Although these articles are expressed in absolute terms, the CFA considered that an encroachment on the constitutional right by a reverse onus may be justified if it has a rational connection with the pursuit of a legitimate aim and if it is no more than necessary for the achievement of that legitimate aim.

Nature of the reverse onus

The CFA held that the onus imposed on the defendant to "satisfy" the magistrate that the purpose of his possession is not an unlawful one under section 20(3)(c) is a persuasive, not evidential, burden. Section 20(1) and (3)(c) create an offence of being in possession of an imitation firearm for a purpose dangerous to the public peace or for the commission of an offence. Section 20(3)(c) throws the onus of proof on to the defendant, the prosecution being required to do no more than proving physical possession plus knowledge of possession. Accordingly, there exists a real risk that a defendant, in failing to satisfy the magistrate of the section 20(3)(c) defence, might nevertheless raise a doubt as to the purpose of his possession, yet be convicted. The reverse onus relates to a critical element going to the moral blameworthiness of the offence. Finally the mere possession of an imitation firearm does not naturally and rationally lead to an inference that the possession is *prima facie* for an unlawful purpose. Accordingly, section 20(3)(c) derogates from the presumption of innocence.

In determining whether the persuasive burden is justifiable, two questions arise. Stated in accordance with the formulation in *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at 253I, they are:

(1) is the derogation rationally connected with the pursuit of a legitimate societal aim; and

(2) are the means employed, the imposition of the reverse persuasive onus, no more than is necessary to achieve that legitimate aim?

Rationality and proportionality

The CFA held that the derogation is rationally connected with a legitimate societal aim. It is clear that the persuasive onus of proof provided for by section 20(3)(c) was imposed in pursuit of a legitimate aim. The aim was the prevention, suppression and punishment of serious crime, being the use of imitation firearms for a purpose dangerous to the public peace or of committing an offence.

On the issue of proportionality, the CFA held that the means employed must be no more than is necessary to achieve the legitimate aim. The burden is on the state to justify a limitation on the constitutional right. The CFA however should give weight to the legislature's view. The weight to be accorded to the legislative judgment will vary from case to case depending upon the nature of the problem, whether the executive and the legislature are better equipped than the courts to understand its ramifications and the means of dealing with it. In matters of serious crime, the courts must recognize that the legislature has the responsibility for determining policy and framing the elements of the criminal offence. However, in matters turning on proof, onus and evidence, the CFA is able to form its own judgment, without labouring under a disadvantage vis-a-vis the legislature.

An absolute liability or a strict liability offence is not automatically open to challenge under the Basic Law or the BoR. But if an offence requires

certain matters to be presumed until the contrary is shown, then the presumption will be difficult to justify, unless the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. Here the substance of the offence is being in possession for an unlawful purpose. Such purpose however cannot be said to be more likely than not to flow from the proved fact of being in possession of an imitation firearm. The defendant is unfairly called upon to disprove his moral blameworthiness.

Even though the CFA agreed that the defendant knows better than anyone else what the purpose of his possession is, the CFA rejected the Appellant's view that, absent a reverse onus, the prosecution would be unable to prove the purpose of a defendant's possession. The existence of the relevant purpose can usually be inferred from the circumstances of the defendant's possession and conduct. The prosecution should have no abnormal difficulty in proving the unlawful purpose of the defendant's possession.

The CFA disagreed that section 20(4), which requires the consent of the Secretary for Justice to initiate proceedings for an offence under section 20(1), is a safeguard supporting justification of the persuasive onus. The provision is simply designed to provide a safeguard against the initiation of proceedings without merits. The CFA concluded that the reverse onus is disproportionate and does not satisfy the proportionality test.

Modern approach to statutory interpretation contrasted with implied constitutional powers to adopt remedial interpretation of legislation

The CA decided that it could not read down section 20 so that it imposes only an evidential burden. Their Lordships were of the view that the courts of the Region are not armed with powers to engage in a re-moulding of the relevant provisions. The CFA disagreed with the conclusions reached by the CA on the matter.

In essence, the question is whether the courts of the Region have power or, indeed, a duty to so construe section 20(1) when read with section 20(3)(c) as to preserve its validity, even if the interpretation is one which would go beyond ordinary common law interpretation because it may involve the use of judicial techniques such as reading down, reading in and striking out. The CFA considered that the Basic Law impliedly confers the necessary powers on the courts to make "a remedial interpretation", which goes beyond ordinary common law interpretation.

The modern approach to statutory interpretation insists that context and purpose be considered in the first instance and not merely at some later stage when ambiguity may be thought to arise. The principles of common law interpretation however do not allow a court to attribute to a statutory provision a meaning which the language, understood in the light of its context and statutory purpose, is incapable of bearing. A court may,

of course, imply words into the statute to give effect to the legislative intention ascertained on a proper application of the interpretation process but it cannot read words into a statute in order to bring about a result which does not accord with the legislative intention properly ascertained.

The Basic Law established the CFA of the HKSAR and invested it, in common with the other courts of the Region, with the judicial power of the HKSAR (BL 8, 11, 18, 19, 80, 85, 158 and 160). That judicial power is independent judicial power (BL 19 and 85). The jurisdiction of the HKSAR courts extends to all cases in the HKSAR, except that restrictions imposed by the legal system and principles previously in force shall be maintained (BL 19(2)).

In common law systems, courts enjoy wide-ranging inherent and implied powers and there is no reason that the courts of the HKSAR stand as an exception to the generality of this statement. The Basic Law recognizes that the courts of the Region are equipped with powers to grant appropriate remedies. As the courts are established by the Basic Law, the powers which they possess and the remedies which they may grant should be characterized primarily as implied under the Basic Law though some powers may be ultimately traced back to the common law. The grant of judicial power and the investing of jurisdiction in a court, carry with them all those powers that are necessary to make effective the exercise of judicial power and jurisdiction so granted including the power to make a remedial interpretation of a statutory provision in order to preserve its validity. Such an interpretation involves the well-known techniques of severance, reading in, reading down and striking out.

In other jurisdictions with a written constitution, the power to employ these techniques often has its source in express powers granted either by a constitution or a statute. The Basic Law does not contain a similar provision. The absence of an express provision however is not a reason for concluding that those powers cannot be implied. The existence of these express powers in other jurisdictions is a powerful indication that it is a necessary power for a court whose responsibility includes the interpretation of entrenched human rights and pronouncing on the validity of a statutory provision in the light of the entrenched rights.

In the context of the Basic Law, the concept of judicial power necessarily includes the making of remedial interpretations. Courts have traditionally been reluctant to engage in remedial interpretation which involves the making of a strained interpretation for fear that this may trespass into legislative activity. The justification for engaging in remedial interpretation is that it enables the courts, in appropriate cases, to uphold the validity of legislation rather than strike it down. To this extent, the courts interfere less with the exercise of legislative power than they would if they could not engage in remedial interpretation. In that event, they would have no option but to declare the legislation unconstitutional and invalid.

The CFA concluded that the courts of the Region possess all necessary powers to deal with all manner of questions which may arise with the interpretation and enforcement of the provisions of the Basic Law, including their impact on Hong Kong legislation. The implied powers include the obligation to adopt a remedial interpretation of a legislative provision which will, so far as it is possible, make it Basic Law-consistent or BoR-consistent. Only when such an interpretation is not possible, will a declaration of contravention be made. The CFA assumed that the Ordinance was a law previously in force in Hong Kong and held that it is possible to treat section 20(1) and 3(c) as imposing a mere evidential burden and did so using its implied powers under the Basic Law.[2]

[2] However, it decided against maintaining the persuasive burden of the provision but restricting the provision's effect to a public place because it thought that approach raised issues better dealt with by the legislature.

So Wai Lun v HKSAR
FACC No 5 of 2005[1] (July 2006)
Court of Final Appeal

The CFA unanimously dismissed the Appellant's appeal against conviction and held that section 124 of the Crimes Ordinance which criminalizes unlawful sexual intercourse with a girl under the age of 16 does not infringe the right to equality and that the absolute liability offence is not arbitrary.

On Equality

Section 124 of the Crimes Ordinance prohibits a man from having unlawful sexual intercourse with a girl under the age of 16. On conviction, the man shall be liable to imprisonment for 5 years. The Appellant argued that section 124 deprives the male of the right to equality before the law guaranteed by BL 25 and Article 22 of the BoR as entrenched by BL 39 because the section criminalizes the conduct of the male to the exclusion of the female.

The CFA, in dealing with equality, referred to the test developed by Bokhary J (as he then was) in *R v Man Wai-keung* (No 2) [1992] 2 HKCLR 207. Though there is no requirement of literal equality in the sense of unrelentingly identical treatment always, any departure from identical treatment must be justified. To justify such a departure, it must be shown that:

(a) sensible and fair-minded people would recognize a genuine need for some difference of treatment;

(b) the difference embodied in the particular departure selected to meet that need is itself rational;

(c) such departure is proportionate to such need.

After reviewing a line of authorities on challenges of similar provisions in other common law jurisdictions, the CFA observed that various considerations had been canvassed. These included: the problem of teenage pregnancies; not criminalizing the female's conduct because that might deter her from reporting the matter; the legislature's role in resolving issues engaging society's code of sexual morality; and the extent to which it was for the legislature to form a view on issues such as whether the initiative in these matters is generally taken by the male, often older than the female.

The CFA concluded that considerations of that kind are ones which the legislature are entitled to take into account and weigh. It held that section 124 of the Crimes Ordinance, though departing from identical treatment, is justified by reference to genuine need, rationality and proportionality. The section does not violate the equality guarantees of the constitution. In so holding, the CFA stated that it was not deferring to the legislature. Rather it was acknowledging the legislature's proper role.

On arbitrariness

The Appellant further attacked section 124 on the ground that absolute liability under the section is not only harsh but harsh to no useful purpose since the criminal law does not deter people from doing what they believe to be lawful. He relied on BL 28 (freedom of the person and freedom from arbitrary or unlawful arrest, detention or imprisonment) and BoR Art 5(1) (applied by virtue of BL 39) (right to liberty and security of the person and freedom from arbitrary arrest or detention). This argument was rejected by the CFA. The deterrent effect of the criminal law is not confined to deterring people from doing what they know is unlawful. It also encourages them to take care to avoid what may be unlawful.

The CFA held that imposing absolute liability is a strong course which the law is generally if not always reluctant to take. Where the legislature has enacted an absolute offence, the judiciary will not strike down the offence merely on the

[1] Reported at [2006] 3 HKLRD 394.

basis of a view that it would be preferable for the offence to admit of a defence of belief. Having regard to the vital importance of protecting young girls, and in all the circumstances, the CFA felt unable to say that imposing absolute liability for unlawful sexual intercourse with a girl under the age of 16 is arbitrary. It held that it is a choice constitutionally open to the legislature.

SIDELIGHTS

Mutual Legal Assistance between Hong Kong and Macau - the Arrangement for the Transfer of Sentenced Persons between Hong Kong and Macau

BL 93 of the Macau SAR provides the constitutional basis of judicial assistance between Macau and other parts of China, including Hong Kong. It is substantially identical to BL 95 of the HKSAR: Macau may, through consultations and in accordance with law, maintain judicial relations with the judicial organs of other parts of the country, and they may render assistance to each other.

Pursuant to the authorization under BL 93 of the Macau SAR and BL 95 of the HKSAR, Hong Kong and Macau have made efforts to develop mutual legal assistance between them. This resulted in, among other things, the signing of the Arrangement for the Transfer of Sentenced Persons between the two SARs on 20 May 2005.

Under the Arrangement, a sentenced person of either jurisdiction who is a permanent resident of the other jurisdiction or has close ties with it may return to the other jurisdiction to serve out his sentence. By returning sentenced persons to an environment where their friends and relatives can visit them on a regular basis, it is believed that the Arrangement would be conducive to their rehabilitation.

The terms of the Arrangement (including the conditions of transfer, procedures for transfer, retention of jurisdiction and continued enforcement of sentence) are in conformity with the main principles and provisions enshrined in the Transfer of Sentenced Persons Ordinance (Cap 513) ("the Ordinance"), and the agreements on transfer of sentenced persons which Hong Kong has signed with other jurisdictions. For instance, one of the conditions of transfer is the agreement of the transferring and receiving jurisdictions as well as the sentenced person. The Arrangement, though, departs from the previous signed agreements in one major respect. Whereas the latter agreements provide that a sentenced person who wishes to apply for transfer must have a remaining sentence of at least one year, the remaining sentence requirement in the Arrangement is set at six months. This was based on the consideration that due to the close proximity between Hong Kong and Macau, it is likely that the procedures for processing requests for transfer will be completed within a short period of time.

For the purpose of giving effect to the Arrangement, the Transfer of Sentenced Persons (Amendment) (Macau) Ordinance 2005 was enacted to amend the Ordinance which then only provided for transfer of sentenced persons between Hong Kong and places outside China. Macau also gazetted the Arrangement in June 2005 with a view to implementing the Arrangement.

The Arrangement came into effect on 1 December 2005.

The Official Receiver and Trustee in Bankruptcy of Chan Wing Hing, a bankrupt and Lin Hai San, a bankrupt

FACV Nos 7 & 8 of 2006[1] (July 2006)

Court of Final Appeal

The CFA held that section 30A(10)(b)(i) of the Bankruptcy Ordinance (Cap 6) infringed the right to travel protected under both BL 31 and Article 8(2) of the BoR. Section 30A(10)(b)(i) provides that, where a bankrupt leaves Hong Kong without notifying the trustee of his itinerary and where he can be contacted, the relevant period for an automatic discharge shall not continue to run during his absence from Hong Kong and until he notifies the trustee of his return.

Facts

Bankruptcy orders were made against the two bankrupts in 2000. Both were adjudged bankrupt for the first time and, under the Bankruptcy Ordinance as amended in 1996, both could be discharged automatically after the expiration of 4 years ("the prescribed period"), subject to the court ordering extension of the prescribed period. The Official Receiver was their trustee in bankruptcy. After the making of the bankruptcy orders, both made frequent trips to the Mainland without notifying the Official Receiver.

The Official Receiver applied for an order under section 30A(3) of the Bankruptcy Ordinance that the respective prescribed periods should cease to run shortly before the expiration of the relevant periods. The Master dismissed the applications. He held that, on the proper interpretation of section 30A(10)(b)(i), a bankrupt is required to notify his trustee of his itinerary and where he can be contacted, if he intends to leave Hong Kong for whatever period, failing which the prescribed period would cease to run until the bankrupt physically returns to Hong Kong and notifies the trustee of his return. As the two bankrupts had left Hong Kong frequently without notification of their departure or return, the relevant prescribed periods had ceased to run from the very first day they left. Accordingly, their periods of bankruptcy had not expired and the applications were premature. On appeal, the CA held that the Master's interpretation of the section was essentially correct. However, absences of less than a day should not be counted. The CA also held that the section is constitutional, since the restriction on the freedom to travel is not disproportionate to the need to protect the rights of others. Leave to appeal was obtained by the Official Receiver from the CA. A central issue of the appeal was whether section 30A(10)(b)(i) infringed the right to travel guaranteed both under the Basic Law and the BoR.

The Official Receiver's argument

The Official Receiver argued that the operation of section 30A(10)(b)(i) as interpreted by the CA would mean that in every bankruptcy the relevant facts would have to be investigated in order to determine when the prescribed period would expire. This would involve an exceedingly onerous administrative burden on the Official Receiver. The Official Receiver contended that: (1) the CA's interpretation of section 30A(10)(b)(i) is incorrect ("the interpretation issue"); and (2) if contrary to its contention, such interpretation is correct, then the provision is unconstitutional ("the constitutionality issue").

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[1] Reported at [2006] 3 HKLRD 687.

The interpretation issue

The CFA held that, in interpreting a statute, the court's task is to ascertain the intention of the Legislature as expressed in the statute. There can be no doubt that section 10A(10)(b)(i) overrides sections 30A(1), (2) and (3) which provide for the bankrupt's automatic discharge after the expiration of the prescribed period.

Section 30A(10)(b)(i) would be triggered if the bankrupt departs Hong Kong without notifying the trustee of his itinerary and where he can be contacted. In computing time, the law usually ignores fractions of a day, so absences of less than a day should be disregarded. Once section 30A(10)(b)(i) is triggered, the prescribed period shall not continue to run during the period he is absent from Hong Kong and until he notifies the trustee of his return. Where the bankrupt does not notify the trustee of his return, the prescribed period continues to be suspended indefinitely until he does.

The constitutionality issue

The right to travel is guaranteed by both the Basic Law and the BoR, by virtue of BL 39(2), and any restriction on the right must satisfy two requirements. Firstly, it must be prescribed by law. Secondly, any restriction must be necessary to protect the rights of others, which is a legitimate purpose for restricting the right specified in Article 8(3) of the BoR.

As the legitimate purpose for restricting the right to travel is constitutionally specified, the following proportionality test should be applied in considering whether the restriction is necessary: (1) The restriction must be rationally connected to the protection of the rights of others. (2) The means used to impair the right to travel must be no more than is necessary to protect the rights of others. In considering the constitutional issue, it is important to bear in mind the well established approach that a generous interpretation should be given to the constitutional right whilst any restriction on the right should be narrowly construed.

Nature of restriction

Where a bankrupt leaves Hong Kong, section 30A(10)(b)(i) does not impose on him an express duty to notify the trustee of his itinerary and where he can be contacted. The bankrupt may freely leave without giving the notification. What the provision does is to impose a sanction for non-notification, namely, the relevant period for automatic discharge shall cease to run during the period of his absence and until he notifies the trustee of his return. The restriction on the right consists not only of the need to notify but also the sanction for failure to notify.

Rational connection

The purpose of the restriction is to ensure that the bankrupt stays within the radar of the trustee so that the trustee could, if required, obtain his co-operation in the administration of his estate. Discharge would obviously affect the rights of creditors. So it is important that the trustee is able to administer the bankrupt's estate effectively with his co-operation. Having the bankrupt on the trustee's radar would facilitate effective administration of the bankrupt's estate. The restriction on the right to travel for the purpose of keeping the bankrupt on the trustee's radar is rationally connected to the protection of the rights of creditors.

Necessary

The CFA held that, in considering whether the restriction is no more than is necessary, it is important to bear in mind that, leaving section 30A(10)(b)(i) aside, there are weapons available to the trustee and the creditors when faced with the bankrupt's failure to co-operate in the context of the scheme regulating discharge. Under the scheme, the trustee or any creditor may object to the discharge of the bankrupt at the expiration of the relevant period on the grounds specified in section 30A(4). Depending on the facts in a particular case, the circumstances that may be relied on to establish the grounds of objection under the subsection may include the bankrupt's conduct in leaving Hong Kong without notifying the trustee of his itinerary and where he can be contacted. The court has power to determine whether the ground of objection is established and period of suspension up to the prescribed maximum period.

The CFA reiterated that it is the need to notify together with the sanction for failure to notify which constitute the restriction on the right to travel. Section 30A(10)(b)(i) operates indiscriminately at all times and irrespective of the circumstances. The CFA made three points in this regard.

Firstly, the sanction operates irrespective of the reasons for the bankrupt's failure to notify which triggers it, including reasons that may be wholly innocent (eg family emergency). Secondly, the sanction applies indiscriminately to all situations irrespective of the stage already reached in the prescribed period. And it is imposed irrespective of whether it has occasioned any prejudice to the administration of the estate. Thirdly, the sweeping application of the sanction means that there is no discretion vested in the court to disapply the sanction or to mitigate its consequences, however deserving the circumstances. Nor could the trustee or the creditors assist the bankrupt in this regard.

Applying a generous approach to the interpretation of the right to travel, having regard to the harshness of the sanction, the restriction on the right cannot be regarded as no more than is necessary to protect primarily the rights of creditors. Taking into account that the trustee and the creditors are already able to object to the bankrupt's discharge at the expiration of the prescribed period, the harshness cannot be justified. The restriction goes beyond what is necessary for the protection of the rights of creditors. The CFA thus held that section 30A(10)(b)(i) is unconstitutional.

Lam Yuk Fai, Steve v HKSAR

FACC No 12 of 2005[1] (April 2006)

Court of Final Appeal

The appellant was tried for the offences of (1) conspiracy to possess an unlawfully obtained travel document, contrary to section 159A of the Crimes Ordinance (Cap 200) and section 42(2)(c)(i) of the Immigration Ordinance (Cap 115); (2) possession of a false travel document, contrary to the same section of the Immigration Ordinance; and (3) conspiracy to transfer diplomatic passports of the Government of the Democratic Republic of Sao Tomé and Principe without reasonable excuse, contrary to section 159A of Cap 200 and section 42(2)(a)(ii) of Cap 115.

The appellant appealed in relation to the third offence on the following two points:

(1) What is the meaning of the word "transfer" in section 42(2)(a)(ii) of the Immigration Ordinance (Cap 115)? ("the Interpretation Point")

(2) Under that subsection of the Immigration Ordinance, who has the burden of proof in relation to "without reasonable excuse" and, depending on the answer, is that provision "constitutional"? ("the Constitutional Point")

The Interpretation Point

The CFA held that the Immigration Ordinance established an offence that has two limbs. The first limb involving the *transfer* of a travel document and the second limb being the requirement that the transfer should be *without reasonable excuse*. The two limbs have to be considered together. It is only a transfer that is without reasonable excuse that is an offence. The second limb constrains what would otherwise be the ambit of the word "transfer".

[1] Reported at [2006] 2 HKLRD 165.

As to the constraining effect of the words "without reasonable excuse", they are to be treated as limiting the transfers that constitute an offence to those made knowingly by the alleged offender to facilitate the travel document being used for an unlawful or dishonest purpose. This last requirement establishes the need for there to be intent, that is *mens rea* on the part of the alleged offender. The CFA considered that this is a desirable requirement for an offence of this gravity.

As to the ordinary meaning of the word "transfer", the judge at the lower court directed the jury that it means move, take or convey from one place or person or situation or time of occurrence to another, and it can mean transmit, transport or hand over from one to another. The CFA noted that the judge's language was almost identical to that used by the Shorter Oxford Dictionary in giving its first meaning of the word "transfer". That meaning does indeed coincide with the ordinary meaning of that word, but it has to be read subject to the fact that the word "transfer" does not stand alone. It is only a transfer "*to another*" that can be an offence, so to that extent the judge's direction has to be qualified.

The Constitutional Point

In relation to the second limb of the offence, the judge directed the jury that although the burden of proving these charges remains on the prosecution throughout the trial, the burden shifts slightly in relation only to the question of reasonable excuse. In giving this direction the judge was not only placing an evidential reverse burden of proof on the appellant, she was placing a legal or persuasive burden on him to establish a reasonable excuse. In doing this, the judge had no doubt in mind section 94A, Criminal Procedure Ordinance (Cap 221).[2]

The appellant submitted that a reverse burden is not properly imposed on the accused, as it is not proportionate and it has not been demonstrated that it went no further than was necessary to secure the stated object. He submitted that this contravened the appellant's constitutional rights as being incompatible with the presumption of innocence contrary to Art 11(1) of the BoR (based on Art 14.2 of the ICCPR) as applied by BL 39.

The question is whether the second limb constitutes an "exception or exemption from or qualification to the operation of the law creating the offence" referred to in section 94A(1). The answer to this question is no. It is both limbs that are "the law creating the offence". Although reasonable excuse is referred to in section 94A(4), that subsection is only relevant if the offence is one to which section 94A(1) applies. Many, if not most offences, that create an offence and then provide that there will be no offence if the defendant has a reasonable excuse for his offending conduct no doubt place at least an evidential burden on the defendant to raise the defence if not a persuasive or legal burden. The offence in this case is unusual in that the reference to without reasonable excuse is part of the particulars of a count of conspiracy. The position is the same as it would be if the section had described the conspiracy as to transfer a travel document knowing it would be used for an unlawful purpose.

The task of the prosecution was to prove in the normal way the nature of the conspiracy; namely that (a) there was an agreement alleged; and (b) the purpose of the agreement which, on the case for the prosecution, was that the passport should be used for an unlawful purpose and so without reasonable excuse. This conspiracy could not either under section 94A or at common law give rise to any reverse burden. In view of the ingredients of the offence of conspiracy it is unlikely that any charge of conspiracy should give rise to any burden being placed on a defendant.

The result is that in relation to the second point the burden remains on the prosecution and the provision is not unconstitutional.

[2] Section 94A of the Criminal Procedure Ordinance, Cap 221 provides that "(1) It shall not be necessary in an indictment, charge, complaint or information alleging an offence to negative any exception or exemption from or qualification to the operation of the law creating the offence. (2) For the avoidance of doubt it is hereby declared that in criminal proceedings - (a) it is not necessary for the prosecution to negative by evidence any matter to which this subsection applies; and (b) the burden of proving the same lies on the person seeking to avail himself thereof. (3) This section applies to criminal proceedings in the District Court or a magistrate's court. (4) The matters to which subsection (2) applies are any licence, permit, certificate, authorization, permission, lawful or reasonable authority, purpose, cause or excuse, exception, exemption, qualification or other similar matter."

Koo Sze Yiu and Another v CE of HKSAR
FACV Nos 12 & 13 of 2006[1] (July 2006)
Court of Final Appeal

Background

This case concerns the constitutionality of an order of the CFI according temporary validity to section 33 of the Telecommunications Ordinance (Cap 106) and the Law Enforcement (Covert Surveillance Procedure) Order (the "Executive Order") issued by the Chief Executive.

On 27 June 1997, the Interception of Communications Ordinance (Cap 532) ("the IOCO") was passed. It is, according to its long title, "[a]n Ordinance to provide laws on and in connection with the interception of communications transmitted by post or by means of a telecommunication system and to repeal section 33 of the Telecommunications Ordinance". Broadly stated, the proposed scheme of the IOCO is one for the prohibition of any interception of communication by post or telecommunications save where such interception is authorized by the order of a High Court judge. Section 1(2) of the IOCO provides that "[t]his Ordinance shall come into operation on a day to be appointed by the Governor by notice in the Gazette". But neither the Governor prior to the handover nor the Chief Executive has appointed such a day.[2]

Doubts over the constitutionality of covert surveillance as practised by law enforcement agencies in Hong Kong had been growing over the years. Such doubts developed into an acute problem by reason of what the District Court said in two criminal cases in 2005. On 5 August 2005, with a view to coping with this problem by way of an interim measure pending corrective legislation, the Chief Executive published an executive order meant to serve as a set of "legal procedures" for the purposes of BL 30.[3] In this regard, BL 48 provides that the powers and functions of the CE include issuing executive orders.

The Executive Order required that covert surveillance be conducted only where authorized at a fairly senior level, and be kept under regular review at an even more senior level. The Executive Order came under challenge in the judicial review proceedings.

Temporary Validity

The CFI ruled that the Executive Order comprised administrative directions only and did not constitute a set of "legal procedures" for the purposes of BL 30. And section 33 of the Telecommunications Ordinance is unconstitutional in so far as it authorizes access to or the disclosure of the contents of any message or class of messages. The CFI made a "temporary validity order" to provide a six-month stop-gap measure pending corrective legislation.

The Appellants appealed to the CA against the temporary validity order and the Respondent cross-appealed against the declaration that the Executive Order did not constitute a set of "legal procedures" for the purposes of BL 30. The CA dismissed the appeals and the cross-appeal.

The Appellants then appealed to the CFA. The CFA was of the view that BL 160 does not preclude temporary validity orders or suspension and does not go to whether temporary validity or suspension can be accorded. If temporary validity or suspension is to be justified, that will have to be done on considerations so fundamental as to

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1 Reported at [2006] 3 HKLRD 455.

2 By way of background information, the IOCO originated from a Member's Bill which was not supported by the then Administration because of the latter's concern over issues of law enforcement.

3 BL 30 provides that "[n]o department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences."

transcend the distinction between legislation and executive action.

Concerning the court's jurisdiction to grant temporary validity/ suspension orders, the CFA referred mainly to six cases from Canada, Pakistan and the UK and devised that they were used in exceptional circumstances or dire necessity to preserve the State and maintain its government. In some circumstances, the doctrine of necessity is involved as a source of jurisdiction, and confers on the court powers that are exceptional to the point of being anomalous. However, in other circumstances, necessity comes into the picture only in the sense of providing justification for exercising jurisdiction that the court has without recourse to the doctrine of necessity. The rule of law involves meeting the needs of law and order. It involves providing a legal system able to function effectively. In order to meet those needs and preserve that ability, it must be recognized that exceptional circumstances may call for exceptional judicial measures.

From the decided cases, temporary validity was granted in scenarios such as virtual legal vacuum or a virtually blank statute book. However, this case was by no means as serious as that and there was nothing to justify temporary validity. That being the case, the CFA left open the question of whether there can be scenarios in which it would be right for the courts to accord temporary validity to a law or executive action which has been declared unconstitutional.

On the difference between temporary validity and suspension, where temporary validity is accorded, the executive is permitted, during such temporary validity period, to function pursuant to what has been declared unconstitutional and is shielded from legal liability for so functioning, but a suspension order would not involve such shield.

Suspension

Regarding the question of suspension, the judicial power to suspend the operation of a declaration is a concomitant of the power to make the declaration in the first place. It is within the inherent jurisdiction. There is no need to resort to the doctrine of necessity for the power. Suspension would not be accorded if it is unnecessary and would not be accorded for longer than necessary. The CFA agreed that bringing the IOCO into operation is not a viable alternative. Taking all things into account, the CFA was of the view that the danger to be averted in this case was of a sufficient magnitude to justify suspension.

The CFA allowed the appeal and set aside the temporary validity order. In its place, the CFA substituted suspension of the declarations of unconstitutionality so as to postpone their coming into operation, such postponement to be for six months from the date of the CFI judgment on 9 February 2006.

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

FACV No 22 of 2005[1] (April 2006)

Court of Final Appeal

This appeal arose out of the respondents' challenge, mounted by way of judicial review, against certain procedural directions issued by the chairman of a Disciplinary Committee of the Stock Exchange. The directions were given before the start of the disciplinary hearing which, as a result, had been held in abeyance. The respondents claimed to be entitled to full legal representation by lawyers at the hearing for the purposes of examining and cross-examining witnesses and making oral submissions. Whether BL 35 confers such an entitlement upon them fell to be determined. The CFA also had to decide whether the directions in question infringed the respondents' right to a fair hearing under Article 10 of the BoR and the common law principles of procedural fairness.

Background

The 1st respondent ("New World") was a company listed on the stock exchange operated by the appellant ("SEHK"). The other four respondents were executive directors of New World (collectively "the directors").

The Listing Division asserted that the directors were in breach of their undertaking by failing to cause New World to put appropriate controls in place to prevent improper disclosure of price sensitive information. The directors denied that allegation.

In May 2003, the chairman of the Disciplinary Committee sent to the parties draft procedural directions for the hearing, inviting comments. The draft proposed limiting the role of legal advisers at the hearing "in accordance with the usual practice provided for in the disciplinary procedures", such advisers not being permitted "to address the Committee (whether in respect of oral submission, the examination of witnesses of fact or otherwise)."

The Listing Division had indicated that if witnesses were to be called, it would be appropriate for them all to be examined and cross-examined by counsel, adding "although ... this is a matter for the Listing Committee". The respondents wrote seeking to persuade the chairman to make various changes to the draft directions, including permitting unrestricted use of lawyers at the hearing, but without success.

In June 2003, the Chairman gave the procedural directions which triggered the respondent's application for judicial review.

BL 35

BL 35 provides:

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

In considering whether the Disciplinary Committee is a "court" within the meaning of BL 35, the CFA does "not look at the language of the article in question in isolation" but considers the language "in the light of its context and purpose". The Basic Law contains numerous other provisions making reference to "the courts" which form the context in which BL 35 is found and which may provide important guidance as to what the provisions of BL 35 intend.

The first evident objective of the Basic Law is the establishment of the HKSAR as a Region having a legal system which is separate from the legal system of the Mainland in accordance with the

[1] Reported at [2006] 2 HKLRD 518.

principle of "one country two systems". Thus:

(a) By BL 2, the National People's Congress authorizes the Region "to exercise a high degree of autonomy and to enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law".

(b) BL 19 elaborates, making it plain that such independent judicial power is to be exercised by our courts.

(c) BL 80 then makes it clear that the courts in question are the courts of judicature, constituting the judicial system of the Region.

(d) BL 81 specifically identifies the courts in question.

Secondly, the Basic Law aims to provide for continuity between the pre-existing and the present courts and judicial systems. Thus, for example:

(a) BL 81 states that "... The judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the [HKSAR]."; and

(b) BL 87 provides that "In criminal or civil proceedings in the [HKSAR], the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained" with the courts adjudicating cases in accordance with the laws previously in force in Hong Kong (BL 8 and 18), referring to precedents of "other common law jurisdictions" (BL 84) and with judges and other members of the judiciary remaining in employment and retaining their seniority, pay and so forth (BL 93).

A third evident purpose of the Basic Law in relation to the courts is to entrench the independence of the judiciary who operate those courts.

(a) This is made express by BL 85 which provides:

"The courts of the [HKSAR] shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions."

(b) It is also reflected in provisions such as BL 88 which lays down the machinery for appointing judges; BL 92 which stresses that judges must be chosen on the basis of their judicial and professional qualities; and BL 89 which establishes that judges can only be removed on limited grounds.

It is therefore entirely clear that when, in such articles, the Basic Law refers to "the courts" it is referring to the courts of judicature: the institutions which constitute the judicial system, entrusted with the exercise of the judicial power in the HKSAR. The purpose of the Basic Law provisions referred to is to establish the constitutional architecture of that system revolving around the courts of law, catering for the system's separation from that of the Mainland, its continuity with what went before and safeguarding the independence of the judiciary.

The Disciplinary Committee plainly does not exercise the independent judicial power conferred on the Region by the Basic Law. It is therefore perfectly plain that the provisions discussed above do not apply to that tribunal notwithstanding any judicial functions it may perform.

There are two dimensions to BL 35 that should be noted for present purposes. In the first place, it lays down constitutional rights which need have nothing to do with court proceedings. Thus, for instance, the right to confidential legal advice is

a right which is protected even where such advice does not bear on any existing or contemplated court proceedings.

What is of prime relevance to this appeal is the second dimension of BL 35. As appears from its language, BL 35 is also concerned with entrenching the individual's rights in relation to "the courts": individuals are to have the right of "access to the courts", the right of "choice of lawyers ... for representation in the courts", the right "to judicial remedies" and "the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel".

This is a crucial additional feature of the constitutional architecture of the Basic Law in relation to the judicial system of the Region. BL 35 ensures that the fundamental rights conferred by the Basic Law as well as the legal rights and obligations previously in force and carried through to apply in the HKSAR are enforceable by individuals and justiciable in the courts. It gives life and practical effect to the provisions which establish the courts as the institutions charged with exercising the independent judicial power in the Region. This dimension of BL 35 is therefore concerned with ensuring access to the courts for such purposes, buttressed by provisions aimed at making such access effective. The "courts" in this context are plainly the courts of law. They are the same bodies as those referred to in the other provisions of the Basic Law discussed above.

As a matter of constitutional interpretation, the Basic Law is plainly not concerned in BL 35 with entrenching rights to legal representation in respect of tribunals which are not courts of law. No measure of generosity in the interpretation process can extend its width to the point required by the respondents.

It follows that the Disciplinary Committee, not being a court of law, is *not* a "court" within the meaning of BL 35.

Article 14 of the ICCPR, enacted as Article 10 of BoR, is expressly incorporated by BL 39. It is therefore through BL 39 that the Basic Law addresses the relevant international obligations and gives constitutional status to Article 14 of the ICCPR implemented in Hong Kong as Article 10. BL 35 is plainly concerned with other issues. It is concerned with the constitutional architecture of the courts entrusted by the Basic Law with the exercise of the judicial power in the HKSAR. Tribunals like the Medical Council and the Solicitors Disciplinary Tribunal are not part of that architecture and Article 14 of the ICCPR is not relevant in this context.