Democratic Republic of the Congo & Others v FG Hemisphere Associates LLC

FACV No 5 of 2010 (8 June 2011)[1] & (8 September 2011)[2] CFA

Issues

The appeal to the CFA was concerned with the nature and scope of state immunity which the courts of the HKSAR should recognize, as a matter of law, as applying to foreign States being sued in the HKSAR. The Democratic Republic of the Congo ("DRC") was being sued by a Delaware company seeking to enforce two arbitration awards obtained against DRC in arbitrations held in Paris and Zurich.

The Majority held that both the common law on state immunity and the relevant provisions of the Basic Law compel the conclusion that the common law principle of state immunity, modified in accordance with the requirements of the Basic Law, to be applied in the courts of the HKSAR is that of "absolute" immunity. This is the principle of state immunity which has been consistently applied by the PRC in its relations with other sovereign States.

At common law it is for the sovereign State to determine the principle of state immunity which applies in its relations with other sovereign States. Once so determined, it is then uniformly applied by all the institutions of the State throughout its territory. There is no scope at all for a region or municipality (lacking the attributes of sovereignty such as the HKSAR) to adopt a principle of state immunity different from that adopted by the State.

The Basic Law reinforces this position. By BL 13, responsibility for foreign affairs is allocated to the CPG. State immunity forms part of foreign affairs. BL 19(3) stipulates that the HKSAR courts have no jurisdiction over "acts of state such as defence and foreign affairs" and that the HKSAR courts are bound to determine questions of fact concerning acts of state in accordance with a certificate issued by the CE based on a certifying document from the CPG. The certificate, however, can only decide questions of fact whereas questions of law have to be decided by the courts.

As the CPG's determination under BL 13 of the principle of "absolute" immunity binds the HKSAR and its institutions, including its courts, and because that determination is also an act of state within BL 19(3) and cannot be reviewed by the HKSAR courts, they are bound to respect and act in conformity with that determination. The reasoning leading to the Majority's conclusions in the case, including the Majority's decision to refer certain questions of interpretation of BL 13 and BL 19 to the NPCSC, is as follows.

[1] Reported at (2011) 14 HKCFAR 95.

[2] Reported at (2011) 14 HKCFAR 395.

History of State Immunity

State immunity has a long history. Both under international law and domestic law, it is acknowledged that state immunity concerns relations between States. It is based on States recognizing each other as equal sovereigns and adopting the policy of not exercising jurisdiction over a foreign State sought to be sued in the courts of the forum State. Traditionally, the immunity mutually granted has been "absolute", that is, granted without regard to the nature of the claim or the transaction underlying it. The only exception traditionally recognized is where the foreign State waives its immunity. In so doing, the foreign State voluntarily submits to the jurisdiction of the courts of the forum State, for example, by itself bringing a claim or counterclaim in the courts of the forum State.

From about the mid-twentieth century, increasing numbers of States have adopted a further exception whereby immunity is not granted to a foreign State which is sued over a transaction which is commercial in nature. The immunity granted under a policy recognizing such an exception is often called "restrictive immunity".

The PRC has never recognized a commercial exception. It has consistently practised absolute immunity as a matter of principle, granting absolute immunity to other States and claiming the same for itself. However, before 1 July 1997, the United Kingdom's State Immunity Act 1978, which provided for a commercial exception to absolute immunity, was extended to Hong Kong. That Act obviously no longer applies to the HKSAR. It was not replaced by any similar local legislation so that the position on state immunity in the HKSAR falls to be determined by the common law, subject to any modifications required by the Basic Law and by Hong Kong's status as a Special Administrative Region of the PRC.

State Immunity under the Basic Law

The fundamental question in this appeal is whether, after the PRC's resumption of the exercise of sovereignty over Hong Kong on 1 July 1997, the courts of the HKSAR can validly adhere to a doctrine of state immunity which adopts a commercial exception and which would therefore be at variance with the principled policy on state immunity consistently applied by the PRC in its relations with foreign States.

The Majority Judgment holds that the answer was certainly "No". Such an inconsistent doctrine is not permissible as a matter of law and constitutional principle. This was a conclusion compelled by the very nature of the doctrine of state immunity, the status of Hong Kong as a special administrative region of the PRC and the material provisions of the Basic Law. At common law, it is unheard of for any region or municipality (exercising no independent sovereign rights) to adopt a state immunity doctrine which is at variance with the state immunity policy adopted by the State of which the region or municipality forms a part. State immunity covers the entire territory over which each State exercises jurisdiction. It has been recognized at common law that each State can only have one state immunity policy. Thus, the courts have accepted that they must speak with "one voice" with the executive authorities having the conduct of foreign affairs. The courts have also accepted as conclusive statements of the executive on what are called "facts of state", that is, the facts which underlie the conduct of the nation's foreign affairs. Damage is obviously likely to be caused to a State's foreign relations if its courts (or the courts of one of its regions) should adopt an inconsistent position on state immunity.

The Basic Law gives constitutional force to the position just described. By BL 8, the common law previously in force (governing state immunity after the lapse of the 1978 Act) continues to apply in the HKSAR, but it does so subject to such modifications, adaptations, limitations or exceptions as are necessary to bring its rules into conformity with Hong Kong's status as a Special Administrative Region of the PRC and to avoid any inconsistency with the Basic Law. This is the effect of BL 160 and the Decision of the NPCSC dated 23 February 1997 made pursuant to BL 160, and now materially enacted as s. 2A of the Interpretation and General Clauses Ordinance (Cap. 1).

The status of the HKSAR as an inalienable part of the PRC and as a local special administrative region of the Chinese State is spelt out in BL 1 and BL 12. The allocation of responsibility for foreign affairs on the CPG and the exclusion of foreign affairs from the sphere of autonomy of the HKSAR are made clear by BL 13, BL 19(3) and BL 158(3).

BL 13(1) allocates to the CPG responsibility for foreign affairs which have been excluded from the sphere of the HKSAR's autonomy. The Majority recognized that the CPG's responsibility for foreign affairs under the Basic Law is exclusive, subject only to the "external affairs" exception delegated by the CPG under BL 13(3). The institutions of the HKSAR, including the courts of the Region, are bound to respect and

act in conformity with the decisions of the CPG on matters of foreign affairs relating to the PRC as a sovereign state. This is a constitutional imperative. It is made clear from the outset that the high degree of autonomy to be enjoyed by the HKSAR does not encompass the conduct of foreign affairs or defence. The Basic Law's reservation of the conduct of foreign affairs to the CPG is entirely consistent with the proposition that the determination of state immunity policy is a matter concerning relations between states and therefore a matter for the state's central authorities and not for some region or municipality acting separately within the state.

While BL 19(1) gives the HKSAR courts independent judicial power, including the power of final adjudication; and BL 19(2) gives the HKSAR courts jurisdiction over all cases; BL 19(3) removes from the HKSAR courts jurisdiction "over acts of state such as defence and foreign affairs". In so far as questions of fact may arise in the adjudication of cases in relation to such acts of state, BL 19(3) provides for a binding certification of such facts by the CE. BL 19(3), however, does not deprive the courts of jurisdiction to decide the case in which such questions arise. There continues to be jurisdiction under BL 19(2). What BL 19(3) does is to prevent the courts from exercising jurisdiction "over acts of state such as defence and foreign affairs" and requires them to be bound by the facts concerning such acts of state as declared in the CE's certificate. In other words, such facts became "facts of state" binding on the courts, leaving the courts to determine their legal consequences and to decide the case on such basis. While the meaning of the phrase "acts of state such as defence and foreign affairs" is unclear, BL 19(3) and s. 4 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) could be read as consistent with the common law doctrine of act of state. It was a view which found support in the Explanation of the Draft Basic Law given to the Third Session of the Seventh NPC by Mr Ji Pengfei (Chairman of the Drafting Committee for the Basic Law) in March 1990.

The Majority Judgment concludes provisionally that the determination by the CPG of the PRC's policy of state immunity as a policy of absolute immunity is an "act of state such as defence and foreign affairs" within the meaning of BL 19(3). It involves the CPG's determination of the PRC's policy in its dealings with foreign states with regard to state immunity. Accordingly, the

determination by the CPG of the relevant rule of state immunity to be applied in the HKSAR courts is properly viewed as an "act of state such as … foreign affairs" within BL 19(3). It would follow that the plaintiff's submission that determination of such rule is a matter for the HKSAR courts and not the CPG must be rejected. It is a matter over which the HKSAR courts lack jurisdiction.

Waiver

The Majority rejects the plaintiff's suggestion that the DRC has waived its state immunity. As previously stated, state immunity is concerned with relations between States and a State waives its immunity only when it voluntarily submits itself to the exercise of jurisdiction by the courts of the forum State.

The plaintiff argues that the DRC impliedly waived its immunity by entering into the arbitration agreements resulting in the awards sought to be enforced. Those agreements provided for dispute resolution by way of arbitration to be held in Paris and Zurich respectively under International Chambers of Commerce Arbitration Rules. Those Rules provided that "By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." However, that agreement is only a contract between the DRC and the other party to the arbitration agreement. It does not involve any relations between the DRC and another State. Failing to carry out its promise may put the DRC in breach of its contract with the other party. But it has not thereby done anything to submit itself to the jurisdiction of the courts of any other State. On the contrary, when the HKSAR courts were asked to exercise their jurisdiction over the DRC, the DRC has actively resisted such jurisdiction and asserted its immunity. The Majority concludes that there is no basis for saying that the DRC has voluntarily submitted to the jurisdiction of our courts.

BL 158(3) reference

Notwithstanding the provisional conclusion reached on the basis of the relevant Articles of the Basic Law, the Majority Judgment recognizes that the meaning of the words "acts of state such as defence and foreign affairs" is unclear and that it is arguable whether, on its proper interpretation, state immunity comes within BL 19. The plaintiff has also argued that while state immunity falls within BL 13, that Article has no bearing on the courts' powers, raising an issue as to the proper interpretation of BL 13.

Under BL 158(3), the CFA has a duty to seek an interpretation from the NPCSC if, in adjudicating a case, it needs to decide a question which involves interpreting provisions of the Basic Law which concern affairs which are the responsibility of the CPG or which concern the relationship between the Central Authorities and the Region. The Majority holds that certain questions have arisen in the adjudication of this appeal in relation to BL 13 concerning foreign affairs which are the responsibility of the CPG; and that certain questions have arisen regarding BL 19 which falls within the "relationship" category. Accordingly, the Majority refers the following questions to the NPCSC under BL 158(3), namely:

(1) whether on the true interpretation of BL 13(1), the CPG has the power to determine the rule or policy of the PRC on state immunity;

(2) if so, whether, on the true interpretation of BL 13(1) and BL 19, the HKSAR, including the courts of the HKSAR:

(a) is bound to apply or give effect to the rule or policy on state immunity determined by the CPG under BL 13(1); or

(b) on the other hand, is at liberty to depart from the rule or policy on state immunity determined by the CPG under BL 13(1) and to adopt a different rule;

(3) whether the determination by the CPG as to the rule or policy on state immunity falls within "acts of state such as defence and foreign affairs" in the first sentence of BL 19(3); and

(4) whether, upon the establishment of the HKSAR, the effect of BL 13(1), BL 19 and the status of Hong Kong as a Special Administrative Region of the PRC upon the common law on state immunity previously in force in Hong Kong (that is, before 1 July 1997), to the extent that such common law was inconsistent with the rule or policy on state immunity as determined by the CPG pursuant to BL 13(1), was to require such common law to be applied subject to such modifications, adaptations, limitations or exceptions as were necessary to ensure that such common law is consistent with the rule or policy on state immunity as determined by the CPG, in accordance with BL 8 and BL 160 and the Decision of the NPCSC dated 23 February 1997 made pursuant to BL 160.

NPCSC Interpretation

On 26 August 2011, the NPCSC issued an interpretation of BL 13(1) and BL 19 ("the Interpretation"). The effect of the Interpretation is to answer the four questions referred to by the CFA as follows:

As to Question (1): that on the true interpretation of BL 13(1), the CPG has the power to determine the rules or policies of the PRC on state immunity to be given effect uniformly in the territory of the PRC.

As to Question (2): that on the true interpretation of BL 13(1) and BL 19, the courts of the HKSAR must apply and give effect to the rules or policies on state immunity determined by the CPG and must not depart from such rules or policies nor

adopt a rule that is inconsistent with the same.

As to Question (3): that the words "acts of state such as defence and foreign affairs" in BL 19(3) include the determination by the CPG as to rules or policies on state immunity.

As to Question (4): (i) that according to BL 8 and BL 160, the laws previously in force in Hong Kong shall be maintained except for any that contravene the Basic Law; (ii) that according to paragraph 4 of the Decision of the NPCSC dated 23 February 1997 made pursuant to BL 160, laws previously in force which have been adopted as the laws of the HKSAR shall be applied as from 1 July 1997 subject to such modifications, adaptations, limitations or exceptions as are necessary to bring them into conformity with the status of Hong Kong after resumption of the PRC of the exercise of sovereignty over Hong Kong, and to bring them into conformity with the relevant provisions of the Basic Law; (iii) that accordingly, the laws previously in force in Hong Kong relating to the rules of state immunity may continue to be applied after 1 July 1997 only in accordance with the aforesaid requirements; (iv) that in consequence, the laws previously in force concerning the rules on state immunity as adopted in the HKSAR must be applied as from 1 July 1997 subject to such modifications, adaptations, limitations or exceptions as are necessary to make them consistent with the rules or policies on state immunity that the CPG has determined.

The Majority declared the provisional judgment final on 8 September 2011. The Minority recognised that the appeal must be decided in conformity with the Interpretation and accepted that the appeal by the DRC must be allowed.

The Catholic Diocese of Hong Kong also known as The Bishop of The Roman Catholic Church in Hong Kong Incorporation v Secretary for Justice

FACV No. 1 of 2011 (3, 13 October 2011)[1]
CFA

Background

The appellant was a corporation sole led by the Roman Catholic Bishop of Hong Kong, which had been sponsoring schools and providing education in Hong Kong for a long period. Under the appellant's sponsorship, there were 80 aided schools (26 secondary, 53 primary and one "secondary cum primary"). Aided schools were operated by non-governmental sponsoring bodies through management committees within the framework of the Education Ordinance (Cap. 279) ("the Ordinance") and received public funds.

On 8 July 2004, the Ordinance was amended by the Education (Amendment) Ordinance 2004, which commenced on 1 January 2005. The amendments changed the way in which schools must be managed. They require each aided school to draft and submit for approval by the Permanent Secretary for Education a constitution regulating the operation of its management committee, and the committee is to be registered as an incorporated body. The incorporated management committee ("IMC") is to manage the school according to the vision and mission set by the sponsoring body and pursuant to the constitution drafted by the sponsoring body.

The amendments also added requirements regarding the composition of the IMC, which had to be made up in accordance with the approved constitution. The IMC must include as managers – in addition to those appointed by the sponsoring body and the principal – at least one teacher, one parent and one independent manager. The amendments limited the number of managers which the sponsoring body could appoint to 60% of the maximum number of managers under the constitution. The Permanent Secretary could refuse approval of a draft constitution if she was not satisfied that the operation of the committee in accordance with the constitution is likely to be satisfactory. If a school failed to establish an IMC or if it appeared to the Permanent Secretary that the school was not being satisfactorily managed or that the composition of the committee was such that the school was unlikely to be managed satisfactorily, she was empowered to put in her own managers to run the school.

[1] Reported at [2012] 1 HKC 301.

Issues

The appellant objected to the requirement that the IMC should include managers beyond those appointed by the appellant. The appellant also objected to the amendments that removed the provisions permitting the sponsoring body to override the views of an aided school's IMC or to require the Permanent Secretary to give effect to the sponsoring body's view in preference to those of the committee regarding approval or rejection of managers and supervisors.

The appellant submitted that the amendments were inconsistent with BL 136(1), BL 137(1) and BL 141(3) of the HKSAR, which concern education policies, schools run by religious organisations and the affairs of religious organisations, and were therefore unconstitutional. The appellant abandoned reliance on BL 137(1) at the hearing of the final appeal.

The nature of the appellant's complaint involved a focus on its previous practice and not any assertion of previous legal rights or privileges. Thus the appellant sought to strike down statutory provisions forming part of the 2004 amendments not on the basis that it enjoyed certain protected legal rights but because its previous practice qualified as such for constitutional protection. As a matter of law, the appellant never enjoyed "absolute control" over the management of Diocesan schools, and in particular, such control over the composition and constitution of their management committees.

BL 136(1)

BL 136(1) provides:

> "On the basis of the previous educational system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of education, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational qualifications."

The appellant argued that BL 136(1) places a constitutional limit on the kinds of educational policy the government is allowed to formulate. Such policies must rest on the basis of "the previous education system", meaning the system in place just before 1 July 1997. It contended that the policy leading to the enactment of the 2004 amendments was "a brand new policy", thus was not one "based on the previous educational system". The Government therefore acted beyond those constitutional limits in promoting the 2004 amendments so that they must be struck down as unconstitutional.

The CA held that no violation of BL 136(1) had been made out. The CFA agreed with the CA and held that:

(i) The educational system before 1 July 1997 included powers given to the Director of Education by the Ordinance and by the Codes of Aid to require binding constitutions to be drawn up and to appoint managers to management committees if he was of the opinion that the composition of such committees made it unlikely that the relevant schools would be managed satisfactorily. Such external powers always existed before the 2004 amendments. The powers in the 2004 amendments objected to by the appellant were not new requirements.

(ii) The policy underlying the 2004 amendments was not a brand new policy as argued by the appellant. It was first formulated in 1991 and evolved in a continuous process which culminated in the enactment of those amendments. It is a policy which not only rested on the previous educational system but also elaborated and developed as part of that very system and carried over into the present.

(iii) BL 136(1) specifically authorises the HKSAR Government to "formulate policies on the development and improvement of education", meaning that it contemplates that changes may be made to elements of the previously existing system. The CFA applied the same approach as in its decision in *Secretary for Justice v Lau Kwok Fai* (2005) 8 HKCFAR 304, para. 66 on BL 103, which provides for the "previous system of recruitment, employment, assessment, discipline, training and management for the

public service" to be maintained. On the interpretation of what is meant by the phrase "based on the previous educational system", a constitutional provision in such terms would only inhibit a development which was such a material change that it resulted in the abandonment of the previous system. The 2004 amendments do not involve abandonment of the pre-1997 educational system and thus are not inconsistent with BL 136(1).

BL 141(3)

BL 141 provides:

"(1) The Government of the Hong Kong Special Administrative Region shall not restrict the freedom of religious belief, interfere in the internal affairs of religious organisations or restrict religious activities which do not contravene the laws of the Region.

(2) Religious organisations shall, in accordance with law, enjoy the rights to acquire, use, dispose of and inherit property and the right to receive financial assistance. Their previous property rights and interests shall be maintained and protected.

(3) Religious organisations may, according to their previous practice, continue to run seminaries and other schools, hospitals and welfare institutions and to provide other social services.

(4) Religious organisations and believers in the Hong Kong Special Administrative Region may maintain and develop their relations with religious organisations and believers elsewhere."

The CFA explained that when, as in the present case, a constitutional challenge is made to a piece of legislation or to certain executive or administrative conduct, the court must generally begin by ascertaining what, if any, constitutional rights are engaged. If no such constitutional rights can be identified, the challenge necessarily fails *in limine*. If certain constitutional rights are engaged, the court considers whether the legislation or conduct complained of amount to interference with those rights. If they do, the court has to consider whether those rights are absolute and if not, whether the interference can be justified on a proportionality analysis.

The appellant contended that the words "according to their previous practice" in BL 141(3), entitle it to claim constitutional protection for what constituted its "practice". In other words, the manner in which the appellant had run schools prior to 1 July 1997. It argued that its previous practice allowed it to exercise sole and exclusive authority to appoint 100% of each school's management committee and of similarly appointing the supervisor and principal.

The CFA held that the appellant has failed the first step of identifying the protected constitutional right and disagreed with the appellant's interpretation of the words "according to their previous practice":

(i) Differences may exist in the practices of individual schools run by the same religious organisation. Such differences are even more likely to exist as between schools run by religious organisations professing different faiths or as between religious and purely secular schools. If the appellant's argument is to be followed, it would mean that whenever the Government wishes to impose an education policy on schools run by religious organizations, the Government would first have to make enquiries of each school to ascertain what policies BL 141(3) will permit it to devise in respect of that school. It would mean that the Government could not formulate policies on the development and improvement of education to be applied uniformly to all schools in Hong Kong. It is impossible to imagine that the framers of the Basic Law could have intended such a dysfunctional situation.

(ii) The meaning of the phrase "according to their previous practice" should be given by reading BL 141(3) in the

context of BL 141 as a whole. The CFA ruled that the CA's interpretation of BL 141(3) of the HKSAR, identifying the constitutional right solely in terms of protection against discrimination, effectively treated the phrase "according to their previous practice" as otiose. BL 141(1) lays down the core constitutional right to freedom of religious belief, freedom from interference in internal affairs and freedom to take part in lawful religious activities in relation to religious organisations. The other parts of the Basic Law are ancillary and shore up that core right. BL 141(3) is similarly ancillary to that core right. It seeks, like the other provisions of BL 141, to make that freedom an effective right in the context of educational, hospital and welfare institutions operated by religious organizations. Thus, BL 141(3)'s provision that religious organizations "may, according to their previous practice, continue to run ... schools...", read purposively, should be taken to mean that religious organizations "may, according to their previous practice *in so far as it involves the exercise of their right to freedom of religious belief and religious activity*, continue to run ... schools (etc)".

The appellant further submitted that the reading of the words "previous practice" in BL 141(3) in the manner the CFA has set out would be unjustified by virtue of BL 137(1) and BL 141(1). The CFA disagreed and held that its interpretation of BL 141(3) would not be unjustified by virtue of BL 137(1) because the protection given by that provision had a more limited reach than the protection conferred by BL 141(3) in at least two respects:

(i) BL 137(1) was confined to conferring protection in relation to the running of schools, while BL 141(3) protected the right of religious organisations to continue to run not merely schools, but also hospitals and welfare institutions. The previous practice involved in running such other institutions was

very likely also to have a religious dimension, which, on the interpretation adopted above, received protection;

(ii) What BL 137(1) protects is the provision of religious education, including courses in religion. The formulation in BL 137(1) was apt to cover religious lessons but not morning prayers. Religious freedom might be exercised and manifested in numerous ways that did not amount to the provision of religious education or the giving of religious instruction. Such activities would not be characterised as "giving religious instruction" and would not receive protection under BL 137(1).

The CFA held that this interpretation of BL 141(3) would not be unjustified by virtue of BL 141(1). BL 141(1) laid down the core constitutional right to freedom of religious belief and religious activity in relation to religious organisations. BL 141(3) provided not merely that religious organisations could continue to run schools, but that they could do so according to their previous practice in so far as such practice involved the exercise of their right to freedom of religious belief and religious activity. The CFA rejected the submission that BL 141(1) already protected freedom of religious belief and activity so that BL 141(3) should not be read as covering the same ground, but interpreted as giving constitutional protection to an amorphous "previous practice" without religious content.

The CFA held that nothing in the 2004 amendments impedes the appellant from setting a Roman Catholic vision and mission for each sponsored school. And as long as religious organisations were free to nominate the majority of the persons on the IMCs of schools which they sponsored, religious activities at such schools were acceptably safe from indirect attack and from erosion.

The appellant's asserted authority to appoint 100% of a school's management committee, as well as the school's supervisor and principal according to its previous practice, is not a constitutional right protected by the Basic Law. Modification of that practice by the 2004 amendments involves no infringement of any constitutional right protected by BL 141(3).

Chan Yu Nam v Secretary for Justice & Lo Hom Chau v Secretary for Justice

CACV Nos. 2 & 3 of 2010 (7 December 2010)[1]
CA

FAMV Nos. 39 & 40 of 2011 (18 January 2012)
CFA

Issues

In *Chan Yu Nam v Secretary for Justice* and *Lo Hom Chau v Secretary for Justice*, the applicants launched a judicial review to challenge the constitutionality of corporate voting in an election for functional constituencies ("FCs") of the LegCo.

The applicants were a taxi driver and a renovation worker who were not entitled to vote at any election for FCs of the LegCo. They sought a declaration that ss. 25 and 26 of the Legislative Council Ordinance (Cap. 542) ("ss. 25 and 26") to the extent that they provide for corporate voting in LegCo elections are unconstitutional and of no effect.

The applicants challenged the constitutionality of ss. 25 and 26 on the following grounds:

(i) the sections were in breach of BL 26 which granted the right to vote to permanent residents of the HKSAR only ("1st Ground");

(ii) the sections were contrary to BL 25 which guaranteed equality before the law ("2nd Ground").

1st Ground – Right to Vote for Permanent Residents Only

The Applicants' Argument

The applicants argued that ss. 25 and 26 were contrary to BL 26 which on a plain reading not only gives the right to vote to permanent residents of the HKSAR, but also precludes the legislature from conferring that right on anyone other than HKSAR permanent residents. However, ss. 25 and 26 empower corporate bodies to vote. It was then contended that ss. 25 and 26 were unconstitutional since corporate bodies are not natural persons and therefore could never be permanent residents of the HKSAR.

The CA's Approach

The CA rejected this plain reading approach, and held that a purposive approach should be adopted. In particular, the CA held that BL 26 was not to be construed in isolation, but should be considered in its full context including other parts of the Basic Law and the history of the

[1] Reported at [2012] 3 HKC 38.

constitutional developments in the HKSAR. Given this approach, the CA framed the issue as whether the Basic Law, including BL 26, intends to permit corporate voting at elections to the LegCo.

The CA first described in depth the historical developments of the electoral systems for the FCs of the LegCo, and emphasized that the use of authorized representatives in the case of corporate voting was a well established part of the electoral arrangements when FCs were introduced back in 1985. Second, the CA opined that by allowing corporate bodies to vote actually reflected the theme of making gradual progress from a Governor-appointed legislature to the goal of universal suffrage. Third, it was also suggested that the Basic Law in general reflected the need for a smooth transition and the idea of assumption of continuity, and specifically BL 68 required that electoral privilege be given to key corporate bodies in light of the then "actual situation" in Hong Kong.

The CA moved on to discuss whether corporate voting is compatible with BL 26. Whilst the CFI held that BL 26 was not intended to apply to elections for FCs, the CA offered an "alternative and tenable view" of BL 26. The CA held that BL 26 does not say that the right to vote is exclusive to permanent residents of the HKSAR. Also, the fact that BL 26 was put within Chapter III "Fundamental Rights and Duties of the Residents" but not Chapter IV "Political Structure" suggests that the legislature is not precluded from conferring a right to vote on others to take part in elections. Therefore, ss. 25 and 26 did not contradict BL 26.

An Alternative Approach

The CA also discussed, *obiter*, a second approach which was not taken by the respondent. It might be said that BL 26 is not breached because the votes are always cast by the corporation's authorized representatives who must be permanent residents of the HKSAR, but not the corporation itself. However, the CA

recognized that this is an unattractive approach for it presupposes form over substance.

2nd Ground – Offending the Right to Equality

The Applicants' Argument

Turning to this second ground, the applicants essentially argued that allowing corporate bodies to vote at LegCo elections would discriminate against those individuals who do not have the financial means to form a company. It was then contended that this is contrary to BL 25 which provides for equality before the law.

The CA's Approach

The CA found it difficult to see how this subsidiary argument based on equality could lead to a declaration that rendered corporate voting unconstitutional. The relevant qualification for corporate voting was not wealth or the ability to form a company, but rather the recognition of a company as a key player or stakeholder within a particular sector in society. The mere formation of a corporate body by an individual did not automatically grant that individual the right to vote in an election for FC.

Leave to Appeal

In dismissing the applicants' appeal against the CFI's decision, the CA held that ss. 25 and 26 sit comfortably with the Basic Law, and so are constitutional.

The applicants then sought leave to appeal to the CFA from CA on the grounds that the appeal raises questions of great, general or public importance or otherwise ought to be submitted to the CFA. However, the application was refused by the CA. The applicants then applied for leave from the Appeal Committee on the same grounds. Agreeing with the CA, the Appeal Committee refused leave to appeal on both grounds.

Fok Chun Wa & Anor v Hospital Authority & Anor

FACV No. 10 of 2011 (2 April 2012)[1]
CFA

Background

The first applicant was the husband of the second applicant. He was at all material time a Hong Kong permanent resident. The second applicant was from the Mainland and is married to the first applicant. She was not a Hong Kong resident at the material time. The second applicant was representative of a number of women from the Mainland in a similar situation called for convenience the "A2 Group".

A2 Group

The first respondent was the Hospital Authority, a statutory body with responsibility for managing and controlling public hospitals in Hong Kong. The second respondent (formerly the Secretary for Health, Welfare and Food) was the government official responsible for the formulation of medical and health policies (including policies on fees chargeable in public hospitals) and the monitoring of the first respondent.

Main Issue

The applicants sought to impugn three decisions made by the first and second respondents between 2003 and 2007, which together had the effect of raising the fees for obstetric services

in public hospitals for non-residents. Their main complaint was that the A2 Group had been subjected to unlawful discrimination since the level of fees payable by them for obstetric services in public hospitals in Hong Kong was substantially higher than those payable by Hong Kong resident women. The two groups of women were distinguished by their residence status, namely, Hong Kong residents (holding a Hong Kong ID card) and non-Hong Kong residents, to which group the second applicant and the A2 Group belonged. The applicants contended that this distinction breached the right to equal treatment guaranteed under BL 25 and Article 22 of the BoR. They argued that the constitutional duty imposed on the respondents was to ensure equality among analogous groups of pregnant women.

[1] Reported at [2012] 2 HKC 413.

Counsel for the applicants submitted that the main issue was the question of equality. The applicants relied on the similarities their family share with a Hong Kong resident family. For example, the women in the A2 Group had close connection with Hong Kong, unlike other Non-Eligible Persons ("NEPs") who wish to obtain subsidised obstetric services, but have little or no connection with Hong Kong. The applicants argued that the respondents failed to draw this distinction between the A2 Group and other NEPs.

The Legal Approach

The relevant equality provisions are contained in BL 25 and Article 22 of the BoR: -

(1) BL 25

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

(2) Article 22 of the BoR

"Equality before and equal protection of law

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

The CFA considered that the starting point on the legal approach to questions regarding equality was the decision of the CFA in *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335. In that case, the Chief Justice stated that the law, in general, should usually accord identical treatment to comparable situations. However, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment may be justified for good reason. In order for differential treatment to be justified, a justification test has to be passed. It must be shown that the difference in treatment pursues a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established. The difference in treatment must be rationally connected to the legitimate aim. The difference in treatment must be no more than is necessary to accomplish the legitimate aim. Where one is concerned with differential treatment based on grounds such as race, sex or sexual orientation, the court will scrutinize with intensity whether the difference in treatment is justified.

The CFA commented on the approach by the lower courts to rely on a two-stage test to first identify the comparators (that is, the claimant and someone said to be in a comparable or analogous position) and then to determine whether a differentiation between the comparators could be justified. The CFA considered that it was important that the two-stage approach should not be regarded as if it were a statute and treated as such. The two stages often overlapped, leading to complicated and unproductive argument. Where the two-stage approach was unhelpful, the CFA preferred the approach in the case of *R (Carson) v Secretary of State of*

Works and Pensions [2006] 1 AC 173 and asked the question, "is there enough of a relevant difference between X and Y [the comparators] to justify differential treatment?" Where there is not such an obvious and relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous, the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.

Furthermore, the CFA emphasized the relevance of what was known as the aspect of margin of appreciation, particularly in circumstances where the court was asked to examine issues involving socio-economic policy. The concept of margin of appreciation is derived from the jurisprudence of the European Court of Human Rights and has been applied in a number of Hong Kong cases such as *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415 and *Mok Charles v Tam Wai Ho* (2010) 13 HKCFAR 762. The CFA referred to the judgment of *R v Director of Public Prosecutions ex p Kebilene* [2000] 2 AC 326 where it was said that "In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention."

It is the responsibility of the executive to devise and implement socio-economic policies of a government, as stated in BL 48(4) and BL 62. In the context of healthcare and the setting of fees chargeable in public hospitals, the Hospital Authority Ordinance (Cap.113) sets out the obligation of the respondents to recommend and devise appropriate policies, for example in ss. 4, 5 and 18 of the Ordinance. Accordingly, it would not usually be within the province of the courts to adjudicate on the merits or demerits of such government socio-economic policies. However, it has been the consistent position of the courts that, where appropriate, the court would intervene as part of its responsibility to ensure that any measure or policy was lawful and constitutional.

The CFA also quoted the judgment of *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, at 844E-G, where it was pointed out that "…courts should have in mind that theirs is a reviewing role. Parliament is charged with the primary responsibility for deciding whether the means chosen to deal with a social problem are both necessary and appropriate. Assessment of the

advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified… The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene."

The CFA held that the particular facet of socio-economic policy this case is concerned with was the distribution of public funds. In the area of healthcare, where resources are limited and the demands from many different interests heavy, the margin of appreciation would be even wider. It was held that where governments had at their disposal only finite resources with which to devise an economic or social strategy, they should be left to decide (i) whether to have any social or welfare scheme in the first place, (ii) the extent of such a scheme and (iii) where such a scheme is devised, to choose who is to benefit under it. The CFA also held that when a line was drawn between those who were entitled to a benefit and those who were not, the court could legitimately take into account the clarity of the line and the administrative convenience of the implementing of the policy or scheme thereunder. The CFA considered that this factor must be weighed against other factors, but where, for instance, the line was drawn so vaguely or ambiguously that the underlying policy or scheme might effectively be undermined, this was a factor that could be considered by the courts.

Where there were a number of alternative solutions to deal with a social problem, the CFA explained the position as to how far must the court go in inquiring as to the alternative that is least intrusive into the constitutional protected right in question. When comparing between the different options that may be available, the purpose is to see whether what has been done or decided is a proportionate response to the legitimate aim. When applying the justification test, the margin of appreciation is relevant at all three stages of the test. Where the option chosen is clearly further than necessary to deal with the problem, it fails the third limb of the justification test. It is only then that the court will interfere. Attempts to search for more and more alternatives to the solution that was adopted in any one case are not the role of the court and should be discouraged.

Outside the area of socio-economic or other general policy matters, where fundamental concepts or core-values are involved, the court will be particularly stringent or intense in the application of the justification test. Fundamental concepts are those that relate to personal or human characteristics such as race, colour, gender, sexual orientation, religion, politics, or social origin. Examples are the right to life, the right not to be tortured, the right not to be held in slavery, the freedom of expression and opinion, freedom of religion, the right to a fair trial and the presumption of innocence. The entitlement to social welfare or to subsidised health services was not a fundamental concept. It was a right that was inextricably bound with socio-economic considerations and therefore to be considered in such light. The subject matter of the present case involved entitlement to subsidized obstetric services in public hospitals in Hong Kong. While the applicants had made reference to the right to family life and family unity, this argument

had obvious limits. The three decisions did not prevent women in the A2 Group having children. There had been no real suggestion of this. After all, no evidence had been put forward to the effect that women in the A2 Group could not give birth in the Mainland if they chose to. The applicants' case was that the A2 Group women simply desired to give birth in Hong Kong.

Application to the Present Case

The CFA considered that the fundamental basis, the dividing line, used by the respondents was that of residence status - Hong Kong residents (holding a Hong Kong ID card) were to be treated as eligible persons while non-residents, including the A2 Group, were to be treated as NEPs. The CFA held that, as a matter of law, this difference in status was of course sufficient to engage the application of Article 22 of the BoR. The critical question was whether there had been a breach of the right to equality. The CFA held that drawing the line at residence status was justifiable in the present case.

The CFA considered that there were a number of reasons why such a line had to be drawn:

(1) the need to give due regard to the long-term sustainability of Hong Kong's social services in the context of limited public resources;

(2) hard decisions had to be made regarding the entitlement of persons to social or health benefits;

(3) many of the obstetric services in Hong Kong were utilised by Mainland women, of which a sizeable proportion belong to the A2 Group;

(4) there was also the problem of dangerous behaviour among Mainland women giving birth;

(5) the obstetric services provided to Mainland women (including the A2 Group) adversely affected Hong Kong resident mothers; and

(6) accordingly, in order to deal with these problems (many of which were caused by the A2 Group) and to ensure that preference was given to Hong Kong residents rather than non-residents, the three decisions came to be made.

The CFA considered that the decisions were made as part of the Government's socio-economic responsibilities and represented the implementation of policies in those areas. The CFA considered it no part of the court's role to second-guess the wisdom of the policies and measures in the circumstances. It was also not the court's role in such matters of socio-economic policy to examine whether better alternative solutions could have been devised. The CFA held that in the present case the line drawn by the respondents at residence status was entirely within the spectrum of reasonableness; hence the challenge based on equality failed.