

Case Summary

Secretary for Justice v Persons conducting themselves in any of the acts prohibited under paragraph 1(a), (b), (c) or (d) of the Indorsement of Claim

[2024] HKCA 442

On appeal from [2023] HKCFI 1950

(Court of Appeal)

(Full text of the Court's ruling in English at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=159920&currpage=T)

Before: Hon Poon CJHC, Chu VP and Anthea Pang JA

Dates of Hearing: 19 December 2023 and 24 February 2024

Date of Judgment: 8 May 2024

Interlocutory injunction in aid of criminal law – Court's equitable jurisdiction – interplay between the Court's duty under NSL 3 and NSL 8 and the exercise of its power under s. 21L of the High Court Ordinance – exceptional power affecting innocent third parties – necessity – whether the injunction will be effective in aid of the criminal law – certainty and proportionality considered

Weight to be accorded by the Court to the executive's assessment regarding national security – when such assessment is within the executive's purview

Whether there are any real and substantial conflicts between contempt proceedings and criminal proceedings

Background

1. The SJ, acting as guardian of public interest, made an application for an interlocutory injunction in aid of criminal law under s. 21L(1) High

Court Ordinance (HCO) to restrain the Defendants from committing four specified acts¹ in connection with the song commonly known as “Glory to Hong Kong” (the Song). The application was refused by the CFI². The SJ appealed to the CA.

2. The violent protests in Hong Kong in 2019 were mainly mobilized via internet platforms. During their height, the Song first emerged in August 2019 in the form of a video publicly accessible on the YouTube. Since its publication, the Song has been widely circulated and used prominently in violent protests and secessionist activities. By June 2023, the Song or its variants had been wrongly represented as the “national anthem of Hong Kong”, including in some international sports events, probably due to the existence of videos of the Song on YouTube titled “Hong Kong National Anthem”.

3. The present proceedings were commenced by the SJ on 5 June 2023. The SJ did not seek a complete ban of the Song, only an interim injunction in aid of criminal law in terms identical to the relief sought in the Indorsement of Claim. His case was that criminal investigation and prosecution alone was ineffective in combating the criminal problems caused by the Song and the injunction would be of high utility. Two main reasons were advanced:

- (i) Based on the police’s experience, unless restrained by a clear court order specifying that the specified acts in respect of the Song are legally prohibited, the Defendants likely will continue with them. There is clear utility of the injunction to make it crystal clear to the public (including parties who may be assisting in the unlawful acts) that the specific acts in connection with the Song are legally prohibited.

¹ Briefly: (a) broadcasting or performing the Song (etc) in any way: (i) with the intent of and in circumstances capable of inciting others to commit secession; or (ii) with a seditious intention as defined in s. 23 of the Safeguarding National Security Ordinance; and in particular to advocate the separation of the HKSAR from the PRC; or (b) broadcasting or performing the Song (etc) in any way, in such a way: (i) as to misrepresent it as the national anthem insofar as the HKSAR is concerned; or as to suggest that the HKSAR is an independent state and has a national anthem of her own; and with intent to insult the national anthem, contrary to s. 7 of the National Anthem Ordinance; or (c) wilfully assisting, aiding, abetting others (etc) to commit or participate in any of the acts as set out in paragraph 1(a) or 1(b); or (d) knowingly authorizing, permitting or allowing others to commit any of the acts or participate in any of the acts as set out in paragraph 1(a) or 1(b).

² HCA 855 of 2023, [2023] HKCFI 1950

(ii) To effectively curb the criminal problems at their root, it is important that internet platform operators (IPOs) would take down problematic videos of the Song, that is, (a) those uploaded or shared with the intent of and in circumstances capable of inciting others to commit secession, or with a seditious intention, and in particular to advocate the separation of the HKSAR from the PRC; and (b) those likely to be mistaken as the national anthem insofar as the HKSAR is concerned or as to suggest that the HKSAR is an independent state and has a national anthem of her own, with intent to insult the national anthem, so that they cannot be further broadcast etc and no one including innocent parties (eg, staff of overseas organisers of sporting events) will be misled into playing the Song as the national anthem again. This is a serious problem because as of 1 June 2023, hyperlinks to YouTube videos/Wikipedia of the Song continue to appear in prominent positions in Google/YouTube/Yahoo/Bing Search results in response to queries to search “Hong Kong National Anthem” and “香港國歌” etc on major search engines. Despite efforts and requests by the HKSAR Government since November 2022, for the removal of the inaccurate contents from services provided by Google on YouTube and Google Search, as the two highly popular online platforms in Hong Kong and worldwide, Google’s position remains that they are unable to accede to the HKSAR Government’s request without the production of a valid court order demonstrating the relevant contents’ violation of Hong Kong law. The injunction will serve the purpose of making it clear to IPOs by way of a court order that the specified contents are prohibited by Hong Kong law, which should therefore be removed and not be allowed to be uploaded to their platforms.

4. The injunction was intended to be *contra mundum*, or in plain language, against the world. If granted, it would bind persons who were not identifiable at the time when the injunction was made and who had not at that time infringed or threatened to infringe it but might do so at a later time.

5. Upon the request by the CFI on 8 July 2023, the CE issued a certificate under NSL 47 (the Certificate). There, the CE, having assessed that the four specific acts pose national security risks and are contrary to the interests of national security, certifies that the four specified acts involve national security.

Major provision(s) and issue(s) under consideration

- NSL 3, 4, 8, 47
- High Court Ordinance (Cap. 4), s. 21L(1)

6. In the present case, the three main issues are:

- (i) What should be the court's approach to an application for an injunction in aid of the criminal law for safeguarding national security? In particular, what is the interplay between the court's duty under NSL 3 and NSL 8 and the exercise of its power under s. 21L of the HCO?
- (ii) What is the role of the court where the executive has made an assessment of national security in the predictive exercise of the likely utility of an injunction to prevent activities endangering national security? Specifically, what weight should the court accord to the executive's assessment that unless the injunction is granted, the acts endangering national security will continue, when the national security assessment is within the executive's purview? Can the court come to its own view which may differ from the executive's assessment?
- (iii) Are there real and substantial conflicts between contempt proceedings and criminal proceedings such that the injunction ought to be refused?

Summary of the CA's rulings

7. The CA stated that s. 21L(1) of the HCO confirms and restates the court's jurisdiction to grant injunctions in equity. This is the first application of its kind, it falls on the court to lay down the approach by which the court navigates such uncharted water in a principled manner.

The CA noted that the adaptive flexibility inherent in the equitable jurisdiction enables itself, so long as it acts in accordance with established principles or any logical extension of them, to grant injunctions in new circumstances as justice and convenience dictate. Such jurisdiction to grant injunction is context-driven. (paras. 19, 21 and 23)

8. The CA noted that the injunction sought is essentially preventive in nature, and whether the legislation which the injunction seeks to aid intends criminal proceedings to be the primary means of enforcement or whether criminal proceedings will adequately achieve its public interest purpose are relevant considerations. (paras. 29 and 32)

9. The CA noted that the injunction sought seeks to enjoin offences endangering national security which are not ordinary criminal offences. The NSL being enacted for the same primary purposes as the BL, to ensure the resolute, full and faithful implementation of the “one country, two systems” policy under which the people of Hong Kong administer Hong Kong with a high degree of autonomy, safeguarding national security and maintaining the prosperity and stability of Hong Kong. (paras. 33 and 36)

10. The court recognized its duty under NSL 3(3) to effectively prevent, suppress and impose punishment for any act or activity endangering national security in accordance with the NSL and other relevant laws. In contexts where the court’s discretion to grant an injunction in aid of the criminal law for safeguarding national security is invoked, the court must give the national security considerations raised by the SJ such weight as is commensurate with their highest importance. (paras. 38-39 and 41)

11. The mandate in NSL 8 and its legislative intent is clear. The NSL and all existing local laws, including both criminal law and civil law, work in tandem to safeguard national security. The Court further observed that the criminal law including prosecution is not intended to be the only means of enforcement for safeguarding national security. Where necessary and appropriate, the civil law must come to aid. (paras.

42-43)

12. Most relevantly, the court under the mandate of NSL 8 must fully enforce the equitable jurisprudence in granting injunctions in aid of the criminal law for safeguarding national security because such injunctions, being preventive in nature, pursue the aim of preventing acts or activities endangering national security. This should be firmly borne in mind when considering the court's approach to applications like the present. (para. 44)

13. The CA stated the general principles regarding the application of injunctions in aid of the criminal law for safeguarding national security and summarized the court's approach to the injunction sought as follows:

- (i) First, given its complementary nature, a civil injunction should be granted only if its assistance in terms of prevention of the particular acts or activities endangering national security is necessary to help the criminal law achieve its public interest purpose of safeguarding national security. Necessity does not require proof of certainty that nothing short of the injunction would achieve the purpose or that the injunction would provide greater deterrence than what the criminal law has already provided. Utility of the injunction is a weighty but not conclusive factor in the overall evaluation of its necessity.
- (ii) Second, in deciding if the injunction should be granted:
 - (a) In relation to the assessment of national security by the executive, the court is bound by a certificate issued by the Chief Executive under NSL 47, if any; or in other cases, will give great deference to the assessment.
 - (b) In relation to the injunction as a counter-measure, since it is a legal question to be resolved by the court alone, the court will make its own judgment while giving considerable deference to the executive's decision to invoke the court's jurisdiction. The court will also firmly bear in mind its constitutional duty to safeguard national security and the mandate in the NSL to fully

deploy the equitable jurisdiction to grant injunctions to safeguard national security in the exercise of the discretion.

- (c) Third, if the injunction engages any fundamental right, the court has to be satisfied that the restriction imposed is compatible with the provisions of the Basic Law concerning human rights. The terms of the injunction should be clear and certain; should not be wider than the criminal law; and should not constitute any disproportionate encroachment of the right.
- (d) Fourth, as a newcomer injunction, it should contain clear safeguards to enable any person affected by it or a newcomer to come to the court for setting aside, variation, clarification or to make other representations as appropriate. Further, as an *ex parte* injunction in substance, the SJ as applicant should draw the court's attention to any material points on the available evidence that may affect the court's exercise of the discretion. (paras. 84-87)

14. The CA found that the CFI's view that the injunction was of no real utility, the compatibility with the criminal law, its *contra mundum* effect and his exercise of the discretion to refuse the injunction could not be supported. The Court exercised the discretion afresh and applied the proper approach, and was satisfied that an injunction sought by the SJ should be granted. (paras. 88-89)