**Case Summary**

**HKSAR V Chow Hang Tung (鄒幸彤), Tang Ngok Kwan (鄧岳君) & Tsui Hon Kwong (徐漢光) ("Appellants", or A1/A2/A3)**

HCMA 99/2023; [2024] HKCFI 553
(Court of First Instance)
(Full text of the Court's judgment in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=158780&currpage=T)

Before: Hon Anna Lai J
Date of Hearing: 6 and 7 September 2023
Date of Judgment: 14 March 2024

***Commissioner of Police's notice issued and served under s. 3(1) of Sch. 5 to IR for provision of information – failure for an organization to comply with notice to provide information is an offence for the office-bearer of that organization under s. 3(3)(b) – legality of the notice is not an element of the offence – statutory construction – legislative intent – legality of the notice may be challenged by way of judicial review – Appellants must have realized that they might be prosecuted for non-compliance with the notice – collateral challenge by way of defence in the criminal proceedings impermissible***

***"Foreign agent" is also not an element of the offence s. 3(3)(b) – Sch. 5 to IR is a specific scheme directed against "Collusion with a foreign country or with external elements to endanger national security in relation to the HKSAR" – it cannot be the legislative intent to impose any requirement of criminal standard before the police can be allowed to take effective measure stipulated in Sch. 5***

**Background**

1. At the material time, A1 was the vice-chairperson of Hong Kong Alliance in Support of Patriotic Democratic Movements of China in Hong Kong ("HKA"), while A2 and A3 were its committee members.

2. On 25 August 2021, pursuant to s. 3(1) of Sch. 5 to the IR, the Commissioner of Police ("CP") issued and served notices on the Appellants and others requiring for some specified information in writing with supporting documents within 14 days, i.e. on or before 7 September 2021 ("Notices").

3. Before the expiration of the prescribed period, the Appellants held a press conference announcing their non-compliance with the Notices and subsequently presented an open letter to the CP on 7 September 2021, the last day of the prescribed period, to show their dogged determination of non-compliance.

4. On 4 March 2023, the Appellants were convicted before a Magistrate of the offence of "Failing to comply with notice to provide information", contrary to s. 3(3)(b) of Sch. 5 to the IR and were sentenced to 4 ½ months' imprisonment on 11 March 2023.

5. The Appellants appealed to the CFI against both conviction and sentence.

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

- NSL 43
- IR, Sch. 5, s. 3(3)

6. In dismissing the appeal, the Court considered *inter alia*, on the true construction of s. 3(3) of Sch. 5 to the IR, whether the legality of the Notices is an element of the offence of "Failing to comply with notice to provide

information" that is open to challenge by way of defence in the criminal proceedings, and whether "foreign agent" is an element of the said offence.

**Summary of the Court's rulings**

***(a) Whether the legality of the Notices is an element of the offence of "Failing to comply with notice to provide information" that is open to challenge by way of defence in the criminal proceedings***

7. In the first instance, the Magistrate ruled as a matter of law that the defence was not barred from challenging the legality of the Notices in the criminal proceedings. The CFI overturned such ruling: s. 3(3) of Sch. 5 to the IR merely requires a Notice which appears to be valid on its face and has not been quashed by judicial review. The legality of the Notices is not an element of the offence that is open to challenge by way of defence in the criminal proceedings. (paras. 14 and 23)

8. According to the judgment of Ribeiro PJ (which was agreed by Fok PJ and Gleeson NPJ) in the CFA case *HKSAR v Chow Hang Tung* FACC 9/2023, [2024] HKCFA 2, when an administrative order sought to be impugned is, in accordance with the legislative purpose of the enabling statute, directed distinctively at the individual or individuals concerned (and not generally at members of the public or members of a class of individuals) requiring them to comply with the order, such individuals must realise that they will face prosecution if the order is contravened. If aggrieved by the order, it is reasonable to expect those persons to challenge the administrative order by an available appeal procedure and/or by judicial review. Where such a challenge has been unsuccessful (or not resorted to) and they go ahead with contravening the order, an attempt by them to mount a collateral attack against the order's legality by way of defence in a consequent prosecution is generally held to be precluded as a matter of statutory construction ("same person cases"). (paras. 18-19)

9. Further, according to Cheung CJ's judgment in the same CFA case, whether a collateral challenge may be mounted in a criminal court is a

matter of statutory construction of the relevant legislation. Statutory language should be construed in light of its context and purpose. (paras. 20-21)

10. The Appellants' cases are considered "same person cases". The Notices were specifically directed at them who had clear and ample opportunity to challenge their legality by judicial review. They were well aware of the consequence that they might be prosecuted for non-compliance with the requirement. They may always apply for judicial review against it. It was not the case that the Appellants had had no opportunity to challenge the Notices until they were prosecuted. (para. 22(1))

11. The interests of national security have always been an important and proper issue that require serious consideration and addressing. The IR is intended to provide an effective administrative procedure to facilitate the implementation of the NSL, in particular NSL 43(5). To put NSL 43 into effect, the clear intent of the legislative body (in the case of IR, the CE, in conjunction with the CSNS in the HKSAR) is to confer upon the CP wide powers to investigate into the offences endangering national security. In particular, in the case of territorial investigation, such powers must be given a wide ambit so as to give full use and effect to the same for the purposes of resolutely safeguarding national security and opposing external interference. It cannot possibly be the legislative intent that the underlying merits and / or information of the ongoing investigation which form the basis of the CP / Secretary of Security's decision may be examined in a criminal trial. Taking into account the nature of the information in support of the Notice and the likelihood of confidential/privileged materials involved, it also cannot be the legislative intent to have the validity of the Notices determined by way of collateral challenges in a busy magistrate's court. It would be more appropriate to have the matter dealt with before the superior court by way of judicial review. (paras. 22(2)-(6))

***(b) Whether "foreign agent" is an element of the offence of "Failing to comply with notice to provide information"***

12. The Magistrate accepted that 'foreign agent' is not an element of the offence that has to be proved by the prosecution to the requisite standard. The CFI agreed with the Magistrate. (para. 30)

13. The CFI held that the basic fact is that the offence is one of failing to comply with the Notice as required. Sch. 5 is a specific scheme directed against "Collusion with a foreign country or with external elements to endanger national security in relation to the HKSAR". It cannot be the legislative intent to impose any requirement of criminal standard before the police can be allowed to take effective measures stipulated in Sch. 5. To rule otherwise would be contrary to all the intent and purpose of the NSL (para. 30). This is reinforced by the similar provision in s. 2 of Sch. 5 which relates to the requirement of similar information from a foreign political organization or Taiwan political organization by way of a Notice. Obviously, it is unreasonable to require the CP to be able to prove as a fact to the criminal standard that the said organization is a foreign or Taiwan political organization before a Notice can be issued. Likewise, the same rationale should apply concerning the issue of the s. 3 notice. (para. 31)

14. The CFI concluded that the Appellants were precluded from complaining that the prosecution adduced no evaluable evidence to show that HKA had any form of relationship with any identifiable foreign government/political organization, or it carried on its activities for the benefit of any identifiable foreign government/political organization. Also, the Appellants were precluded from raising a collateral attack on the legality of the Notices, and whether the HKA as a matter of fact was a foreign agent was not an element of the appeal. (paras. 34-35)

***(c) Other matters***

15. On the Appellants' complaint that the Magistrate erred in ruling that the Appellants could have a fair trial despite the redactions of certain exhibits and permitting the chief prosecution witness to choose not to answer any question put to him by A1, the CFI was satisfied that the Magistrate had kept the disclosure and the development of the trial under

review from time to time to ensure the fairness of the trial, which was not prejudiced by the aforesaid matters complained by the Appellants. (paras. 37-40)

16. On the Appellants' complaints that the Notices were *ultra vires* as the information sought placed impossible burden on the Appellants, the CFI agreed with the Magistrate that, on the facts of the case, there was no room for any claims of hardship or oppression. (paras. 41-42)

17. On the Appellant's complaint that the sentence of 4½ months' imprisonment was manifestly excessive, the CFI considered that immediate custodial sentence was inevitable for deterrence effect. The Appellants were clearly determined from the outset not to comply with the requirement of the Notices. They were also working in concert in that they held a high-profile press conference and presented the open letter to the CP. The 4½ months' starting point adopted by the Magistrate was neither wrong in principle nor manifestly excessive. (paras. 45-48)

***Endnote – HKSAR v Chow Hang Tung, Tang Ngok Kwan & Tsui Hon Kwong*, FAMC 13&14/2024, [2024] HKCFA 22 (CFA Appeal Committee) (Full text of the Court's Determination in English at** https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=161742&currpage=T**)**

18. On 31 July 2024, upon the Appellants' applications, the Appeal Committee granted leave to appeal to the CFA on a few issues raising points of law which are of great and general importance and also on the ground of "substantial and grave injustice" (on the issue of public interest immunity). The appeal is listed for hearing on 8 January 2025.

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