**Hong Kong Journalists Ass’n v. Commissioner of Police**

**Summary and Outcome**

The High Court of the Hong Kong Special Administrative Region (HKSAR) held that the Court was ill-equipped to deal with factual allegations of violence against journalists by the Hong Kong Police Force for violating their rights to freedom of speech/expression, freedom of the press and publication; freedom of association and assembly, freedom of the procession and demonstration; and the right and freedom to form and join trade unions and strike under the Basic Law, and the Hong Kong Bill of Rights.

Hong Kong Journalist Association (HKJA) brought an application for the Police's ill-treatment of journalists reporting on the protests that broke out across Hong Kong in June 2019 against the now withdrawn Anti-Extradition Law Amendment Bill 2019. The Hong Kong Police had acted unlawfully in failing to facilitate journalistic activities and hindered such activities during the public order events on and after June 12 2019.

The Court observed that the Police have a negative duty not to hinder lawful journalistic activities and a positive duty to facilitate them. Furthermore, these duties are qualified and subject to reasonable restrictions. However, the Court failed to lay down guidelines on the legal limits and scope of the Police's responsibility to facilitate, and not hinder, lawful journalist activities.

**Facts**

Hong Kong Journalist Association maintained that the Hong Kong Police Force acted unlawfully in addressing the catalogue of operational deficiencies concerning facilitating lawful journalistic activities and hindering such activities during and after the public order events of June 12, 2019, against the withdrawn Anti-Extradition Law Amendment Bill 2019.The Journalists claimed that those covering the protests were shot with rubber bullets, repeatedly struck with truncheons and shields by the Police, targeted with tear gas and pepper sprays, and struck by bursts of water discharged from high-powered water cannons and also subjected to verbal abuse.

The group relying on the statements of 13 journalists ill-treated by the Police for carrying out their reporting duties during the protest and public events and protests, applied in 2019 for judicial review at the Court of First Instance against the Hong Kong Police Force for violating Articles 27 of the Basic Law(freedom of speech, press, and publication; freedom of association, assembly, procession and demonstration; and the right and freedom to form and join trade unions and strike) and Article 16 of the Hong Kong Bill of Rights (Right to freedom of expression). They supported the application with photographs and contemporary video evidence.

**Decision Overview**

Whether the Police had acted unlawfully against the journalists in the course of public order events of June 12 2019.

The first declaration before the Court is that Police had a positive and negative obligation to facilitate, and not hinder, lawful journalistic activities, and a duty to investigate allegations of breaches of those duties. The duties include distinguishing journalists from participants of [public order events] in their operations, ensuring journalists' safety and protecting them and their equipment from harm, and providing journalists' full access to uninhibited reporting 'first-hand. The second alternative declaration sought was that assuming that the facts of the 13 journalist statements were actual, an order that the Police had breached their duties under BOR 16 and BL 27 at an operational level to facilitate and not hinder lawful journalistic activities.

HKJA argued that the actions of the Police violated Article 27 of the BL, which provides that Hong Kong residents shall have freedom of speech, press, and publication; freedom of association, assembly, procession and demonstration; and the right and freedom to form and join trade unions and strike.

While Article 16 of BOR provides for the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers but subject to reasonable and necessary restrictions.

The HKJA argued that these statements were representative of the "consistent, widespread and systemic pattern of police tactics that are adverse to, and interfere with, constitutionally protected journalistic activities violating BL 27 and BOR 16.

HKJA further submitted that the Police is under a positive duty to facilitate uninhibited lawful journalistic activities, including protecting and ensuring the safety of journalists at public order events. A negative duty not to hinder lawful journalistic activities. This includes requirements not to arbitrarily threaten or use force against, arrest or detain journalists or exclude them from or restrict their access to public order events.

They also submitted that the Police had an ancillary positive procedural duty to investigate any breach of those duties to ensure accountability, including where the relevant conduct constitutes torture, cruel, inhuman or degrading treatment or punishment, and criminal sanctions.

The Commissioner of Police contended that such isolated instances of breach of Police duty could not signify that the Police had breached their duties on a systemic level and should investigate these instances of police violence in other proceedings or forums. Further, the Commissioner stated that journalists were placed under lawful arrest only on reasonable suspicion of committing an offence. The imposition of certain restrictions and limitations on press activities were not arbitrary but were in place due to safety concerns, operational needs, and other practical reasons. The Police also claimed using necessary and proportionate force while dealing with journalists. A dedicated cadre, namely, the Force Media Liaison Cadre, was also established to facilitate media activities on the ground and handle journalistic activities issues.

The Commissioner of Police, on the other hand, contended that though some police officers may have breached their duty in specific instances, their actions would not be indicative of the Police having breached their duty on a systematic level.

The Commissioner agreed that the Police did have a 'negative duty' not to restrict freedom of the press and a 'positive duty to facilitate lawful journalistic activities, but argued that these duties were not absolute. Concerning both duties, the Commissioner contended that the Police have a wide discretion of choices and determine what is necessary.

On December 21, 2020, Judge Chow delivery the judgment for the Court, agreed with the Commissioner's position that no determination of factual allegations of violence against journalists by the Police could be made in this present application for judicial review since the Court is ill-equipped to deal with such factual allegations. The declaration sought were imprecise and vague-assumed facts. Disputes of police violence should be resolved through writ actions on a case-to-case basis.

According to the Court, the Police were under a duty to respect lawful journalistic activities as a general rule. The Court highlighted the findings of Leung Kwok Hung v. HKSAR [2005] 8 HKCFAR 229. It stressed that the negative duty not to hinder lawful journalistic activities arises from the express terms of BL 27 and BOR 16. In contrast, the positive duty to facilitate them is a necessary corollary to give full measure to the freedom of the press. [para. 55] The Court provided that the abovementioned duties were not absolute but restricted under BOR 16(3).

The Court, citing Leung Kwok Hung v. HKSAR [2005], 8 HKCFAR 229 and Kwok Wing Hang v. Chief Executive in Council [2019] 6 HKC 452, stressed that the Police has a broad discretion in the choice of reasonable and appropriate measures to facilitate lawful journalistic activities concerning the positive duty. With regards to the Police's negative duty, the Court cited T v. Commissioner of Police [2014] 17 HKCFAR 593 and stated that the lawfulness of any measure adopted by the Police which may be said to have restricted the freedom of the press has to be determined by reference to the proportionality test." [para. 55(3)]

The Court further stated the Police have a general duty to distinguish journalists from participants of public order events-duty to ensure journalists' safety and protection and their equipment from harm, and a duty to provide journalists' reasonable access and uninhibited reporting first-hand. However, such duties were not absolute and subject to these considerations: the Police's responsibility to maintain law and order, the lawfulness of the conduct of the protestors and journalists, whether the protester used any violence, and if so, the degree of violence used, by the protestors, and all other relevant circumstances on the ground. [para. 56]

Breach of duties by the Police officers has to be determined on an individual basis concerning particular facts and circumstances in that case in ordinary writ petitions. In similar terms, the Court could not declare the breach of duty by the police force based on "assumed facts, i.e., based on the assumption of the truth of the 13 journalists' statements since these facts would require adjudication by a court. It could not determine these matters in an application for judicial review.

There was no examination of particular facts and circumstances of the breach of relevant duties by the Police in the present judgment; it would be misleading to make declarations of legal duties in unqualified terms without identifying the possible limits or qualifications of the relevant duties. The Court rejected the HKJA's judicial review application with these observations.

**Decision Direction**

In this judgment, the Court outrightly refused to examine the multitude of evidence regarding police brutality against journalists. While the Court agreed that, in principle, there exist positive and negative duties on the Police to facilitate and not hinder lawful journalistic activities, respectively; however, such duties are not absolute. Despite mainly agreeing with the HKJA's contentions, the Court refrained from passing a declaration. Instead of providing concrete guidelines to limit unnecessary conflicts between the Police and journalists during public order events, the Court held that HKJA ought to have initiated writ action to settle disputes of facts. Given that the Court, in principle, agreed with HKJA's contentions about the positive and negative duties of the Police qua journalists, given a general declaration to this effect, rather than mere observation, would have gone a long way in giving the journalistic free speech, and reporting without fear, an impetus.