香港終審法院

THE HONG KONG COURT OF FINAL APPEAL

This Summary is prepared by the Court's Judicial Assistants

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The Judgment is available at:

https://www.hkcfa.hk/en/work/cases/index.html

or

https://legalref.judiciary.hk/lrs/common/ju/judgment.jsp

PRESS SUMMARY

HKSAR	Respondent
v	
Tang Ngok Kwan (鄧岳君)	*1st Appellant in FACC 10/2024*
Tsui Hon Kwong (徐 漢 光)	*2nd Appellant in FACC 10/2024*
Chow Hang Tung (鄒 幸 彤)	*Appellant in FACC 11/2024*

FACC Nos 10 & 11 of 2024 on appeal from HCMA No 99 of 2023

[2025] HKCFA 3

APPELLANTS: Tang Ngok Kwan, Tsui Hon Kwong (FACC 10/2024) and Chow Hang Tung (FACC 11/2024)

RESPONDENT: HKSAR

JUDGES: Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Mr Justice Chan NPJ

COURTS BELOW: West Kowloon Magistrates' Court (Principal Magistrate Peter Law); Court of First Instance (Anna Lai J)

DECISION: Appeals unanimously allowed

JUDGMENT: The Court delivering the Judgment

DATE OF HEARING: 8 January 2025

DATE OF JUDGMENT: 6 March 2025

REPRESENTATION:

Mr Robert Pang SC, Mr Albert N B Wong and Mr Esmond Wong, instructed by Kenneth Lam, Solicitors, for the Appellants in FACC 10/2024

The Appellant in FACC 11/2024 appeared in person

Mr Ivan Cheung, ADPP and Ms Karen Ng, SPP, of the Department of Justice, for the Respondent in both appeals

SUMMARY:

Background

1. Where the Commissioner of Police ("**CP**") reasonably believes it necessary to require a "foreign agent" to produce information for the prevention or investigation of an offence endangering national security ("**OENS**"), the CP may issue a notice requiring that agent to provide such information. This power is conferred by section 3(1) of Schedule 5 ("**Schd 5 s 3(1)**") to the Implementation Rules ("**IR**") for Article 43 of the National Security Law ("**NSL43**" and "**NSL**" respectively). Pursuant to Schd 5 s 3(3)(a), where a foreign agent is an organisation, the office-bearers and persons managing or assisting in the management of the organisation will be bound by the same obligations as the foreign agent if such office-bearers or persons are served with the notice under Schd 5 s 3(1). Failure by the agent to comply with such a notice constitutes an offence on the part of such office-bearers or persons under Schd 5 s 3(3).

2. On 25 August 2021, pursuant to Schd 5 s 3(1), the CP issued notices ("**Notices**"), requiring the Hong Kong Alliance in Support of Patriotic Democratic Movements of China ("**HKA**") to provide information. On the same day, the CP served the Notices on the Appellants as the office-bearers of the HKA on the basis that he reasonably believed that the HKA was a "foreign agent". The Notices required the provision of information and documents, some of which dated back to the formation of the HKA in 1989. The Appellants publicly challenged the legality of the Notices on the basis that the HKA was not a "foreign agent" and refused to comply.

3. The Appellants were tried and convicted for failing to comply with Notices contrary to Schd 5 s 3(3). Principal Magistrate Peter Law held that while the Appellants could challenge the legality of the Notices by way of a defence, the prosecution was only required to prove that the HKA was reasonably believed by the CP to be a "foreign agent". The Magistrate also allowed redaction on the grounds of public interest immunity ("**PII**") of large portions of an investigation report on the HKA, as well as of the recommendation to the CP that the Appellants be served with Notices.

4. Madam Justice Anna Lai dismissed the Appellants' appeal, upholding the PII redactions and agreeing that proof that the HKA was in fact a "foreign agent" was unnecessary. Moreover, relying on the case of *HKSAR v Chow Hang Tung* (2024) 27 HKCFAR 71, the Judge held that the Appellants could not mount a collateral challenge against the validity of the Notices as they were the "same persons" identified in and served with the Notices so that any challenge to their validity had to be by way of judicial review.

5. The Appellants appealed to this Court arguing that **(1)** the Schd 5 s 3(3) offence required proof that an organisation required to provide information was in fact a "foreign agent"; **(2)** a defendant who was the same person targeted by the notice could challenge its validity by way of a defence in criminal proceedings; **(3)** the notice could not require the production of information which arose before the promulgation of the NSL; and **(4)** the redactions to the investigation report and recommendation impermissibly resulted in the denial of a fair trial.

Proof that the subject organisation was a "foreign agent" required

6. The Court held that a textual and purposive interpretation of Schd 5 s 3(3) showed that it was necessary to prove, as an element of the offence, that a person or organisation issued with a notice under Schd 5 s 3(1) was in fact (and not merely reasonably believed to be) a "foreign agent".

Challenge to legality of the Notices permitted

7. The Court held that it was permissible for the Appellants to challenge the legality of the Notices by way of a defence since their validity was an essential element of the offence.

8. There was a strong presumption in favour of allowing a defendant to challenge, in criminal proceedings, the validity of an administrative order or decision which was an element of the underlying criminal offence. This presumption was only displaced where the defendant was the "same person" who has been made subject to the relevant order or decision and where it was compellingly clear that the legislative intention required a departure from this strong presumption.

9. Unlike in the case of *HKSAR v Chow Hang Tung* (2024) 27 HKCFAR 71, there was no basis for displacing this strong presumption notwithstanding the fact that the Appellants were the same people named and served with the Notices. Importantly, the IR neither provided any independent procedure for challenging the issuance or validity of the Notices, nor did its legislative intent indicate that criminal courts were unsuitable forums for the hearing of such challenges.

No issue with the production of pre-existing documents

10. While it was not strictly necessary to determine this issue, the Court held that the CP could require the production of information which came into existence even before the NSL came into force on 30 June 2020. Criminalisation of non-compliance with notices issued under Schd 5 s 3(1) would not be retrospective, as the criminal act of failing to comply would only occur after the coming into operation of the NSL.

11. Additionally, pursuant to Sch 5 s 3(1), so long as the court was satisfied that the CP has reasonable grounds to believe that the information sought was necessary for the prevention and investigation of OENS, that information would have to be provided regardless of when it came into existence.

Claim of PII self-defeating and inconsistent with a fair trial

12. In this case the prosecution produced heavily redacted versions of an investigation report and a recommendation to the CP as the bases for charging the Appellants under Schd 5 s 3(3). Both documents concluded that, on the basis of certain assessments which were all redacted, there were reasonable grounds for believing that the HKA were foreign agents and that the Notices were necessary for the prevention and investigation of OENS.

13. The Court held that in such circumstances the redactions were not only self-defeating by removing from evidence the only material relied upon for establishing that the HKA were foreign agents, but also made it impossible for the Appellants to have a fair trial as they were deprived of all knowledge as to the nature of the prosecution's case on an essential element of the offence.

Disposition

14. Accordingly, the Court unanimously allowed the appeals, and quashed the convictions and sentences.