FAMC Nos. 24, 25, 26, 27, 28 and 29 of 2023
[2024] HKCFA 4

FAMC No. 24 of 2023

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

MISCELLANEOUS PROCEEDINGS NO. 24 OF 2023 (CRIMINAL)
(ON APPLICATION FOR LEAVE TO APPEAL FROM
CACC NO. 84 OF 2021)

BETWEEN

HKSAR	**Respondent (Applicant)**
and	
LAI CHEE YING (黎智英) (D1)	**1st Applicant**
LEE CHEUK YAN (李卓人) (D2)	**2nd Applicant**
NG NGOI YEE MARGARET (吳靄儀) (D3)	**3rd Applicant**
LEUNG KWOK HUNG (梁國雄) (D4)	**4th Applicant**
HO SAU LAN CYD (何秀蘭) (D5)	**5th Applicant**
HO CHUN YAN (何俊仁) (D6)	**6th Applicant**
LEE CHU MING MARTIN (李柱銘) (D8)	**7th Applicant**
	(Respondents)

FAMC Nos. 25, 26, 27, 28 and 29 of 2023

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

MISCELLANEOUS PROCEEDINGS NOS. 25, 26, 27, 28 AND 29 OF 2023 (CRIMINAL)
(ON APPLICATION FOR LEAVE TO APPEAL FROM
CACC NO. 84 OF 2021)

BETWEEN

HKSAR	**Respondent**
and	
LAI CHEE YING (黎智英) (D1)	**1st Applicant (Applicant in FAMC 29/2023)**
LEE CHEUK YAN (李卓人) (D2)	**2nd Applicant (1st Applicant in FAMC 25/2023)**
NG NGOI YEE MARGARET (吳靄儀) (D3)	**3rd Applicant (Applicant in FAMC 26/2023)**
LEUNG KWOK HUNG (梁國雄) (D4)	**4th Applicant (Applicant in FAMC 27/2023)**
HO SAU LAN CYD (何秀蘭) (D5)	**5th Applicant (2nd Applicant in FAMC 25/2023)**
HO CHUN YAN (何俊仁) (D6)	**6th Applicant (1st Applicant in FAMC 28/2023)**
LEE CHU MING MARTIN (李柱銘) (D8)	**7th Applicant (2nd Applicant in FAMC 28/2023)**

Appeal Committee:	Mr Justice Ribeiro PJ, Mr Justice Fok PJ and Mr Justice Lam PJ
Date of Hearing:	23 February 2024
Date of Determination in FAMC 24/2023:	23 February 2024
Date of Determination in FAMC 25-29/2023:	5 March 2024

DETERMINATION

Mr Justice Ribeiro PJ:

1. Applications for leave to appeal are made by applicants who were referred to as D1, D2, D3, D4, D5, D6 and D8 respectively at trial.[1] We shall continue to refer to them individually as such, and collectively as "the defendants". The prosecution, the HKSAR, is also an applicant, seeking leave to appeal in FAMC 24/2023. The Questions proposed by each of the applicants as meriting leave are set out in the Appendix to this Determination. Certain applications are also made on the substantial and grave injustice ("SGI") basis.

2. The defendants were charged with organizing an unauthorized assembly, contrary to section 17A(3)(b)(i) of the Public Order Ordinance ("POO")[2] (Charge 1); and with knowingly taking part in an unauthorized assembly, contrary to POO section 17A(3)(a) (Charge 2). After trial before HH Judge Woodcock in the District Court,[3] they were all convicted on both charges. However, the Court of Appeal[4] allowed their appeals regarding "organizing" under Charge 1, while upholding their convictions for "taking part" under Charge 2.

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1 The applications were lodged in 2023 by D1 in FAMC 29; by D2 and D5 in FAMC 25; by D3 in FAMC 26; by D4 in FAMC 27; and by D6 and D8 in FAMC 28. D7 and D9 had pleaded guilty and are not concerned with these applications.

2 Cap 245.

3 Reasons for Verdict ("RfV") [2021] HKDC 398 (1 April 2021).

4 Macrae VP, M Poon and A Pang JJA [2023] HKCA 971 (14 August 2023), Macrae VP writing for the Court.

3. On the parties' applications for certification for the purposes of appeal to this Court, the Court of Appeal[5] confined certification to the following question, namely:

> "[Whether] the Court should follow the persuasive, though not binding, decision(s) of the Supreme Court of the United Kingdom in *DPP v Ziegler (SC(E))* [6] and/or *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill*[7] (which clarified some aspects of *Ziegler*) and, if so, in what circumstances, and to what extent, it should conduct an operational proportionality exercise."

4. At the hearing, Ms Priscilia Lam, appearing for the HKSAR, did not press its opposition to the grant of leave on this question. We are satisfied that the question so certified raises issues of great and general importance which would benefit from consideration by the Court and grant leave to appeal to the defendants in respect of their relevant applications. We accordingly certify and grant leave to appeal in the terms of the certified question to D1 regarding D1-Q3&Q4; to D2 and D5 regarding D2&D5-Q3; to D3 regarding D3-Q1; to D4 regarding D4-Q2; and to D6 and D8 regarding D6&D8-Q2.

5. The remaining Questions in the Appendix are proposed by the HKSAR, which seeks leave to appeal with a view to restoring the parties' convictions for "organizing" under Charge 1, and by the defendants who seek leave to appeal against their convictions for "taking part" under Charge 2.

A. The background events

6. The background may be summarised as follows. As required by POO sections 8 and 13, an organisation known as the Civil Human Rights Front ("CHRF") gave notice to the Commissioner of Police ("CP") of its intention to hold a public gathering on 18 August 2019 "to protest against the abuse of

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5 [2023] HKCA 1340 (8 December 2023).

6 [2022] AC 408.

7 [2022] UKSC 32.

power by the Police", anticipating attendance of some 300,000 participants. This was in the midst of the serious social unrest then occurring in Hong Kong.[8] CHRF named one Figo Chan as organizer, with another person nominated as his alternate. The proposed public gathering comprised a public meeting at Victoria Park to be held from 10.00 am to 6.00 pm; then a public procession following a defined route from Victoria Park to Chater Road, to take place from 3.00 pm to 7.00 pm; finishing with a public meeting at Chater Road from 5.00 pm to 11.59 pm.

7. On 15 August 2019, the CP notified CHRF and Figo Chan that he had no objection to the holding of the public meeting at Victoria Park but that he objected to and prohibited the proposed procession and subsequent meeting at Chater Road, citing the interests of public safety, public order and protection of the rights and freedom of others. That decision was upheld the next day by the Appeal Board.[9]

8. CHRF expressed their dissatisfaction with the aforesaid prohibitions and stated at a press conference that since the police had not made arrangements for the dispersal of the crowd at Victoria Park, they would arrange for "pro-democracy legislators and influential people" to help participants to disperse safely.

9. The public assembly was held as had been permitted on 18 August 2019. But it was the prosecution's case that, although prohibited, a public procession from Victoria Park to Chater Road nevertheless took place,

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[8] Which has been described in *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518 at §§89-97; and *Leung Kwok Hung v Secretary for Justice (No 2)* [2020] 2 HKLRD 771 at §§11-17.

[9] Constituted under POO section 44.

beginning shortly after 3.00 pm, constituting an unauthorized assembly by virtue of POO section 17A(2).[10]

10. Under POO section 17A(3), every person who without lawful authority or reasonable excuse, knowingly takes part in any such unauthorized assembly or who organizes any public procession after the same has become an unauthorized assembly is guilty of an offence.

11. The charges were based on evidence that the defendants, carrying a large banner printed with the words, "Stop the police and gangsters from plunging Hong Kong into chaos, implement the five demands", had led a procession made up of a huge crowd from Victoria Park to Chater Road, following the route which had been proposed but prohibited. As mentioned above, the Judge's decision to convict on both charges on such evidence was reversed in relation to Charge 1 regarding "organizing" but upheld in respect of "taking part" under Charge 2.

B. The HKSAR's leave application

12. The HKSAR now applies for leave to challenge that reversal, submitting that its question set out in the Appendix is of the necessary great and general importance. It also seeks leave on the SGI ground to argue against the Court of Appeal's overturning of the Judge's findings on the "organizing" charge.

13. The HKSAR's application is premised on two propositions: (a) that the meaning of "organize" under POO section 17A should reflect the dictum in

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[10] POO section 17A(2)(a) relevantly provides: "Where ... any ... public procession takes place in contravention of section ... 13; ... the ... public procession ... shall be an unauthorized assembly." POO section 13 materially provides that a public procession may take place if, but only if, the intention to hold it is notified to the CP and he issues a notice of no objection.

the judgment of Lord Goddard CJ in *Flockhart v Robinson*[11] that a person "who organizes the route is the person who organizes the procession";[12] and (b) that on the evidence, the defendants had led the procession throughout, so that the Judge was right to hold that they had "organized" the march.

14. Neither proposition is well-founded. As Macrae VP cogently demonstrated in the Court of Appeal,[13] the finding that the defendant in *Flockhart v Robinson* was the organizer of the procession was based on the special facts of that case and did not rest on a superficial application of the abovementioned dictum. The defendant Flockhart was the senior officer of the organization present and had organized an earlier lawful procession, having issued musical instruments to the band, marched at the head of the procession and given verbal commands to those taking part. As Morris J pointed out, when the second procession spontaneously came into being and the defendant placed himself at its head:

> "... he was placing himself at the head of people who had been organized by him earlier in the day ... There was no band in Piccadilly, but otherwise the defendant there did much the same as he had done earlier in the day when in command of the lawful public procession which he did organize: in each case he marched at the head of the procession and gave words or signs of command which were obeyed. It seems to me that, on the findings of the chief magistrate, there were seven separate occasions when the defendant gave a direction which those behind him followed. ... The organizing by the defendant of this procession which had come into being required very little time because of the circumstances of the day, because of his relationship to those behind him, and because of their common understanding of his leadership. In my opinion, the facts as found by the chief magistrate show that what he was doing did amount to organizing the procession which had come into being."[14]

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11 *Flockhart v Robinson* [1950] 2 KB 498.

12 *Ibid* at p 502.

13 CA§60-74; CA Certification judgment ("CAcert") §§7 and 9.

14 [1950] 2 KB 498 at p 503-504.

15. Thus the abovementioned dictum cannot be treated as providing a definition of the word "organize" for present purposes. As Macrae VP observed (and indeed as acknowledged by Lord Goddard CJ in *Flockhart v Robinson*[15]):

> "... the word 'organize' is not a term of art and has no specialised, technical or legal meaning. It is an ordinary English word, which generally connotes some responsibility for, or active participation in, arranging, planning or managing, an action or event."[16]

We do not consider the contrary reasonably arguable.

16. Regarding the second proposition, as the Court of Appeal noted,[17] *Flockhart v Robinson* is entirely distinguishable on the facts. The present case focuses on the fact that the defendants had marched at the head of the procession which had been planned and notified by CHRF, following a particular route, holding the aforesaid banner and chanting slogans. Such evidence did not support the inference that the defendants had organized the procession (as opposed to taking part in it).

17. We accordingly refuse the HKSAR's application for leave to appeal as not reasonably arguable.

C. Applications based on "dispersal"

18. Several of the defendants' applications are based on the proposition that the defendants had merely involved themselves in helping to disperse the crowd safely at the end of the Victoria Park meeting and thus had not participated in a prohibited procession constituting an unauthorized assembly under Charge 2.

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15 *Ibid* at p 502.

16 CA§57 and CAcert§7.

17 CA§74.

19. The points sought to be raised are variously put. For instance, it is submitted that the defendants' common purpose was merely to help in the safe dispersal of the crowd, which did not qualify as a "common purpose" within the definition of "procession" in POO section 2; or which excluded recognition of a dual purpose alongside such common purpose of safe dispersal; or that, being concerned only with such dispersal, the defendants lacked *mens rea* in relation to any qualifying common purpose. It is also argued that their efforts at safe dispersal were performed with lawful authority or reasonable excuse in the context of police inaction regarding such dispersal, thus negating liability for the "taking part" offence.

20. Those arguments are constrained by the careful findings made by HH Judge Woodcock and upheld by the Court of Appeal, rejecting the suggestion that the defendants were merely involved in helping with crowd dispersal. Her Honour held, on compelling grounds, that the defendants had undoubtedly led and knowingly taken part in the prohibited procession, such prohibition having received widespread publicity. Thus, the Judge found (on the basis of the prosecution evidence and extensive video footage) that the defendants had together carried a large banner with a slogan indicating the common purpose of the procession; that they had left Victoria Park leading the crowd out via a single gate (Gate 17), without trying to get them to disperse using other gates; that the timing and the route taken were as CHRF had unsuccessfully proposed to the CP; that there had been no complaints to the police about overcrowding and thus no pressing need for dispersal before the procession started leaving the Park; that dispersal was not mentioned or suggested as the procession passed near various MTR entrances; that persons finding themselves in its path, including foreign domestic workers on their day off, were asked to make way to allow the procession to pass; that when it reached Chater Road, the defendants laid down the banner and the march was

declared to have finished. The defendants all elected not to give or call evidence.

21. Thus, in relation to the defendants "taking part in an unauthorized procession", the Judge held as follows:

> "I am sure after considering the evidence and submissions that there was an unauthorised public assembly from Victoria Park to Chater Road despite an objection to it by the Commissioner of Police. I am satisfied it consisted of more than 30 persons and was organised for a common purpose, a purpose set out in writing on the banner at the head of the procession. I am sure it was a public assembly that took place in contravention of section 13 of the POO." (RfV§159)
>
> "I am sure it was not a dispersal plan born out of necessity but an unauthorised public procession as defined by the POO. I am sure the prosecution can prove beyond reasonable doubt that there was a procession as opposed to a dispersal from the Park. Similarly, I am sure the prosecution can prove there was no lawful authority or reasonable excuse to organise or participate in this [procession]." (RfV§160)
>
> "On the face of it, the news footage shows what can only be described as a public procession with thousands following as the head of the procession chanted slogans relating to the common purpose all the way to what is described as the finish. There was not one word relating to the crowd behind them dispersing safely at MTR stations nearby, be it Causeway Bay, Wanchai or Admiralty. There was no assistance given to the crowd as to how to leave safely. This is contrary to what was described as a water flow dispersal to nearby MTR stations to disperse safely." (RfV§163)
>
> "I have carefully considered all that [was] said by the CHRF and the 2nd, 4th and 9th defendants in press conferences or interviews after the appeal failed and before the procession began and find there was a call to attend the public meeting and show dissatisfaction at the police ban by intentionally defying it in the name of dispersal." (RfV§165)
>
> "Instead of assisting the crowds to disperse safely, those crowds were led head on into other oncoming crowds in Causeway Bay by the banner party forcing the procession to move very slowly and forcing people coming in the opposite direction to move to avoid them. The banner at one stage had to be folded in half lengthways to get through the oncoming crowd. There was also footage of people in front of the banner party being asked politely to clear away for the procession. If safety was paramount and dispersal the object, then this flies in the face of logic and credibility." (RfV§169)
>
> "... It was only a dispersal plan in name and the truth is it was a planned unauthorized assembly." (RfV§170)

22. The Court of Appeal endorsed those findings, holding that the evidence was overwhelming:

> "In relation to the purely factual complaints, the judge's conclusion that the water flow defence was a ruse to get around the ban cannot be criticised in any way as being wrong. The evidence was overwhelming, as was the evidence of the applicants' participation in the unauthorised assembly." (CA§97)

23. We respectfully agree. The "organizing" charge having fallen away, the case simply required the prosecution to prove that (i) there was an unauthorized procession; and (ii) that each defendant had knowingly taken part in it (iii) without lawful authority or reasonable excuse. The defendants' main challenge was to element (i), arguing that it was not an unauthorized procession but merely an orderly dispersal of the earlier meeting. As we have seen, the Judge carefully and convincingly rejected that submission and also found that the necessary *mens rea* was proved and that there was no lawful authority or reasonable excuse.

24. The proposed grounds of appeal (including those advanced on the SGI basis) which depend upon ignoring or successfully challenging the aforesaid findings are not reasonably arguable and do not constitute grounds appropriate for consideration by the Court. Accordingly, we refuse leave in respect of D1-Q1&Q2 and SGI; D3 SGI; and D6&D8 SGI as set out in the Appendix.

D. Systemic challenge to section 17A

25. The next grouping of leave applications involves the relevant defendants seeking to mount what is referred to as a "systemic proportionality challenge" to the constitutionality of section 17A(3) and inviting the Court to re-visit its decision in *Leung Kwok Hung v HKSAR*[18] ("*LKH 2005*").

26. The reference to such a "systemic challenge" derives from a distinction drawn by the Court of Appeal in *Leung Kwok Hung v Secretary for*

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[18] (2005) 8 HKCFAR 229.

Justice (No 2)[19] ("*LKH No 2*") between a constitutional challenge at the "systemic" versus the "operational" level:

> "... the proportionality analysis has to be applied on two different levels: (1) examining the systemic proportionality by reference to the legislation or rules in question; (2) examining the operational proportionality by reference to the actual implementation or enforcement of the relevant rule on the facts and specific circumstances of a case at the operational level."[20]

27. Thus, the relevant applications focus on the constitutionality of the legislative provisions themselves, ie, the provisions of POO section 17A(3), and not on the constitutionality of decisions made or acts performed in their implementation. There may of course be different reasons why such a provision may be in itself unconstitutional, eg, it may be legally uncertain, or it may not pursue an aim qualifying as legitimate, and so forth. However, the defendants here seek to argue that the "taking part" offence is itself unconstitutional because it is systemically disproportionate.

28. These defendants' submissions were sparse as to why they say such systemic disproportionality exists. At the hearing, the submissions made on behalf of D3, D4, D6 and D8 boiled down to the argument that the maximum sentence of 5 years' imprisonment on conviction on indictment under POO section 17A(3)(a) was disproportionate since the "taking part" offence does not entail any violence or disorder and the maximum sentence has a chilling effect on the exercise of the rights of free expression and peaceful assembly.[21]

29. That argument cannot be accepted. The statutory maximum gives the court a discretion as to possible sentences ranging from non-custodial measures to the five-year maximum (only on a trial on indictment). There is no

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[19] [2020] 2 HKLRD 771.

[20] *Ibid* at §182.

[21] D3 Form B§§36, 37(2), D3 Skel§§13-17, 23-24; D4 Form B§9, D4 Skel§§2(1), 9, 13-14; D6&D8 Form B§79, D6&D8 Skel§57.

basis for saying that such a provision makes the offence systemically disproportionate. In *LKH No 2*, the Court of Appeal made this point in holding that it could not be said that the Chief Executive's broad discretion to issue regulations under the Emergency Regulation Ordinance was systemically disproportionate. Until the power was exercised, no fundamental rights were restricted and no meaningful proportionality analysis could be carried out on the enabling provision in the abstract.[22] The same applies to a section providing for a range of possible sentences. In the present case, it is notable that D3, D6 and D8 (who seek to make the systemic challenge) were all given non-custodial suspended sentences.

30. In any event, the systemic proportionality of the offences under section 17A(3) was implicitly accepted by this Court in *LKH 2005* and no basis has been made out for that conclusion to be re-visited.

31. While the ultimate focus of that judgment was on the question of legal certainty regarding the statutory "ordre public" basis for restricting the rights, the certified question was framed very broadly: "Is the scheme which the Ordinance lays down for notification and control of public processions constitutional?"[23]

32. The Court did indeed review the notification scheme as a whole and noted the existence of the section 17A(3) offences and the prescribed maximum sentence without raising any question regarding their proportionality.[24] Those offences are part and parcel of the scheme, providing the means for its enforcement. In holding that the scheme, after severance of

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22 *LKH No 2* at §§298-300; 315-316; 320.

23 *LKH 2005* at §10.

24 *LKH 2005* at §63.

the reference to "ordre public", was constitutionally valid, the CFA implicitly accepted the systemic proportionality of the offences.

33. As the Court of Appeal observed in *LKH No 2*:[25]

> "... though on the facts of the case the conviction was due to the failure to give notification, the Court of Final Appeal also examined the full range of discretionary powers that the Commissioner and the police could exercise in restricting the freedom of assembly and procession: see the analysis of the statutory scheme and the statutory discretion at [43]-[63]. In light of that, it would be surprising if after the severance of *ordre public* from the relevant provisions, the majority of the Court of Final Appeal still regarded some aspects of the statutory discretion concerning unauthorised assembly other than the requirement to give notification to be unconstitutional and made no comment on the same."

34. Accordingly, the questions D3-Q2, D4-Q1 and D6&D8-Q1 are not reasonably arguable and we refuse leave in respect thereof.

E. D4's SGI application that his sentence is manifestly excessive

35. After his appeal on Charge 1 was allowed, D4 was left subject to a sentence of 12 months' imprisonment on Charge 2, which he has now served. He seeks leave to appeal on the basis that such sentence was manifestly excessive.

36. The Judge provided full reasons for that sentence, holding that D4 had deliberately defied the law and circumvented the ban on the procession on the "dispersal" pretext, causing citywide disruption to traffic and public transport.[26] Although the procession turned out to be peaceful it plainly carried a significant risk of violent disorder. It was mounted on a massive scale as a protest against alleged police brutality at a time of highly-charged social unrest and anti-police emotion. Officers gave evidence that they had faced intolerable abuse from the crowd so that three platoons were withdrawn from the scene to

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[25] At §206.

[26] Reasons for Sentence ("RfS") §§10, 13, 51.

avoid sparking conflict and violence.[27] The Judge concluded that while in other circumstances, taking part in a peaceful unauthorized assembly might well be dealt with leniently by a non-custodial sentence, in the present case, a deterrent sentence was called for. Unlike some of the other defendants, D4's personal circumstances did not call for a reduction from the starting-point sentences determined by the Judge.

37. The Court of Appeal noted the Judge's careful reasoning in deciding upon an appropriate sentence and held that "the starting point for, and the sentences in respect of, Charge 2 are unimpeachable",[28] commenting:

> "... the judge approached sentence in exactly the right way, determining first the seriousness of the offence and the defendant's individual role and culpability before assessing the effect of his/her mitigating factors. We can see nothing wrong in either her approach to sentence or the way she exercised her discretion in this matter."[29]

38. The Final Court's policy on sentence appeals has consistently been made clear. Thus, Chan PJ noted in *Chu Yiu Keung v HKSAR*:[30]

> "As the Appeal Committee said in *HKSAR v Tam Wa Lun*, FAMC 56 of 2010, it is only in extremely rare and utterly exceptional circumstances that leave would be granted to appeal against a sentence which has been seriously considered by the trial judge and the intermediate appeal court."

39. And as the Court stated in *Secretary for Justice v Wong Chi Fung*:[31]

> "The Court of Final Appeal is not a sentencing court and appeals to this Court on points of sentencing principle are among 'the rarest of cases'. The function of sentencing is primarily that of the convicting court of trial, subject to review by the Court of Appeal, whether on an appeal by the convicted person or on review on the application of the Secretary for Justice. The Court of Appeal is therefore the appropriate court to determine if there is a need for appellate guidance as to the levels of sentence for a particular offence and, if so, to set those levels of sentence." (Footnote omitted)

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27 RfV§§46-48, 60-61; RfS§§55-56, 61.

28 CA§107.

29 CA§103.

30 FAMC 19 & 20/2011 (20 October 2011), §19.

31 (2018) 21 HKCFAR 35 at §115.

40. It is accordingly only in the extremely rare and exceptional case where an important question of sentencing principle arises that the Court may contemplate entertaining an appeal.[32] The present is not such a case and D4's application on the SGI basis must be refused.

F. Conclusion

41. For the foregoing reasons, we grant leave to appeal to the applicants named in paragraph 4 solely in respect of the Question certified by the Court of Appeal in the terms set out in paragraph 3 of this Determination. All the other applications for leave to appeal are dismissed.

42. The appeal will be heard on 24 June 2024.

(R A V Ribeiro)	(Joseph Fok)	(M H Lam)
Permanent Judge	Permanent Judge	Permanent Judge

FAMC 24/2023

Ms Priscilia Lam, counsel on fiat, Ms Karen Ng SPP and Mr Edward Lau SPP, of the Department of Justice, for the Respondent (Applicant)

FAMC 25/2023

Mr Chris Ng, instructed by JCC Cheung & Co. Solicitors, for D2/2nd Applicant and D5/5th Applicant (Applicants)

FAMC 26/2023

Mr Ambrose Ho SC, Mr Isaac Chan and Mr Jason Ko, instructed by Ho Tse Wai & Partners, for D3/3rd Applicant (Applicant)

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[32] For example in *Wong Chun Cheong v HKSAR* (2001) 4 HKCFAR 12; and *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415.

FAMC 27/2023

Mr Hectar Pun SC and Mr Anson Wong Yu Yat, instructed by Kenneth Lam, Solicitors, for D4/4th Applicant (Applicant)

FAMC 28/2023

Mr Robert Pang SC and Mr Simon Kwok, instructed by Ho Tse Wai & Partners, for D6/6th Applicant and D8/7th Applicant (Applicants)

FAMC 29/2023

Ms Audrey Eu SC, Mr Jeffrey Tam and Mr Ernie Tung, instructed by Robertsons, for D1/1st Applicant (Applicant)

APPENDIX

Proposed Questions and SGI grounds

The Prosecution – the HKSAR

In a prosecution for an offence of organizing an unauthorized assembly, on a proper interpretation of section 17A(3)(b)(i) of the Public Order Ordinance, Cap 245, (a) what is the meaning of 'organizing'? (b) in particular, irrespective of any prior planning, arrangement or management, can the act of heading, leading and/or directing the procession amount to 'organizing' under the said offence?

D1 – Lai Chee Ying

1. Whether a defendant is guilty of the offence of knowingly taking part in an unauthorized assembly under 17A(3)(a) of the Public Order Ordinance, Cap 245 ('POO') where the assembly has more than one purpose (**D1-Q1**);

2. What is the correct test for 'lawful authority' and 'reasonable excuse' in section 17A(3)(a) of the POO, in particular whether the principles as elucidated in *DPP v Ziegler* (SC(E)) [2022] AC 408 are applicable and whether the safe dispersal of an authorized public assembly can amount to 'lawful authority' or 'reasonable excuse' (**D1-Q2**);

3. Whether, independent of any systemic constitutional challenge, the Court can or should assess the operational proportionality on the facts and circumstances of each case before convicting or sentencing a defendant of the offence of knowingly taking part in an unauthorized assembly under 17A(3)(a) of the POO (**D1-Q3**);

4. If the answer to the above question is in the affirmative, whether the assessment of the operational proportionality is applicable in a case of

delayed enforcement or where there was no enforcement at the time of the offence (**D1-Q4**).

D2 & D5 – Lee Cheuk Yan & Ho Sau Lan Cyd

3. Should the Court conduct an assessment of proportionality at the operational level before convicting a defendant of an offence under section 17A(3)(a) of the POO, taking into account the fundamental rights of freedom of expression and freedom of assembly involved? (**D2&D5-Q3**)[33]

D3 – Ng Ngoi Yee Margaret

1. In light of the fundamental rights of freedom of expression and freedom of assembly being engaged when the impugned procession was peaceful in nature:-

(a) whether the offence under section 17A(3)(a) of the Public Order Ordinance (Cap 245) ('POO') is constituted in the absence of:-

> (aa) any assessment by the Court as to whether the measures taken (or not taken) by the authority before, during and/or after the impugned procession (including the subsequent arrest, charging and conviction of the 3rd Applicant) were operationally proportional vis-à-vis her fundamental rights aforesaid; or
>
> (ab) any assessment whether such measures amounted to a disproportionate interference of her said rights;

and in this connection,

(b) whether the Court was correct or entitled to regard the elements of the said offence under the regime in the POO as already embodying the requisite

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[33] D2&D5-Q1 and Q2 have not been pursued.

proportionality analysis, and if not, how the proportionality analysis should be conducted. (**D3-Q1**)

2. Whether:-

(a) in light of (1) above, section 17A of the POO (and in particular, section 17A(3)(a)) is systemically unconstitutional for being a disproportionate interference of the fundamental rights of freedom of expression and freedom of assembly, particularly in light of the chilling effect resulting from the imposition of criminal sanction on a peaceful assembly, and further by the maximum sentence of 5 years for its breach;

and in this connection,

(b) it is appropriate for the decision in *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 to be reviewed by the CFA. (**D3-Q2**)

D4 – Leung Kwok Hung

1. Whether section 17A(3) of the Public Order Ordinance, Cap 245 ("POO") constitutes a disproportionate interference with the right of peaceful assembly and is therefore unconstitutional on a *systemic* level? (**D4-Q1**)

2. If Question 1 is answered in the negative, in determining whether a defendant should be convicted of an offence under section 17A(3) of the POO, should the Court consider whether the conviction would constitute a disproportionate interference with the defendant's right of peaceful assembly and is therefore unconstitutional on an *operational* level? (**D4-Q2**)

D6 and D8 – Ho Chun Yan and Martin Lee Chu Ming SC

1. Whether the provisions in creating the offence of knowingly taking part in an unauthorized assembly under section 17A(3)(a) of the Public Order Ordinance (Cap 245) ('POO') are unconstitutional by reason of their being incompatible with fundamental human rights including the freedom of peaceful assembly. (**D6&D8-Q1**)

2. Whether in trying a defendant for the offence under section 17A(3)(a) of the POO, the court is required to conduct an assessment of the operational proportionality of a conviction of the defendant in the circumstances of that particular case, whether by reason of 'lawful authority or reasonable excuse' or otherwise. (**D6&D8-Q2**)

Substantial and grave injustice

Leave to appeal is also applied for on the substantial and grave injustice basis by the HKSAR, D1, D3, D6&D8 who seek to challenge the findings of the Judge and the Court of Appeal relating to various elements or aspects of the "organizing" and "taking part" offences. Arguments include the complaint that the Judge and/or the Court of Appeal failed properly to evaluate the evidence or to articulate reasons for their judgments. D4 seeks leave on the substantial and grave injustice basis with a view to arguing that the sentence imposed on him is manifestly excessive.