



Chapter 3
Case of
Public Interest or Concern

Secretary for Justice v Wong Chi Fung, Law Kwun Chung and Chow Yong Kang Alex (FACC Nos. 8-10 of 2017)

As a result of the Tamar Central Government Offices Protests on 26 September 2014, the 1st and 3rd Appellants in FACC 8, 9, 10/2017 were convicted at the Magistracy of taking part in an unlawful assembly contrary to s.18 of the Public Order Ordinance, Cap 245 (“POO”). The 2nd Appellant was convicted of inciting others to take part in an unlawful assembly. The 1st and 2nd Appellants were sentenced to 80 hours and 120 hours of community service respectively; and the 3rd Appellant was sentenced to 3 weeks’ imprisonment suspended for one year.

Upon the Secretary for Justice’s review, the Court of Appeal replaced the sentences with imprisonment of 6, 8 and 7 months for the 3 Appellants respectively. With the assistance of legal aid, all 3 Appellants appealed against the decision of the Court of Appeal. The Court of Final Appeal examined the following issues:

1. The Court of Appeal’s power to review facts on a review of sentence

According to s.81B of Criminal Procedures Ordinance (“CPO”), a review of sentence by the Secretary of Justice differs from an appeal of sentence by a convicted person. The Court of Appeal may only interfere with the sentence under review if it thinks that the sentence was (i) not authorised by law, (ii) wrong in principle, (iii) manifestly excessive, or (iv) manifestly inadequate.

Save where the sentence is manifestly inadequate, the Court of Appeal may not in the review attach a different weight to a factor which was properly taken into account by the sentencing judge in arriving at a sentence that is otherwise within the range of sentences appropriate for the offence.

The Court of Final Appeal did not agree with the Court of Appeal’s view that the Magistrate erred in principle by failing to take into account relevant matters. The Magistrate was aware of the large scale nature of the assembly, the risk of violent clashes, the Appellants’ knowledge of the likelihood of clashes between the participants and the security guards and the police, and the fact that there was a prior lawful assembly and that the protesters did not have an absolute right to enter the forecourt. The weight to be attached to the Appellants’ personal circumstances and their motives, their remorse, were strictly matters within the Magistrate’s discretion unless the sentences the Magistrate imposed were manifestly inadequate or out of line with the range of sentences imposed in practice.



At the time of the sentences, there was no guidance from an appellate court that an immediate custodial sentence was warranted for cases of this nature, and a community service order was a sentence frequently passed in respect of unlawful assemblies. The Court of Final Appeal concluded that the Magistrate's sentences were not manifestly inadequate.

2. Civil disobedience and the exercise of constitutional rights as motive

An offender's motive for committing an offence is a relevant factor when the court considers the appropriate sentence to be imposed and can be a relevant mitigating factor. When an offence arises out of an occasion where constitutional rights to assemble and protest are being exercised, it is relevant to the background and context of the offending, particularly when those rights were exercised peacefully and in accordance with the law up to the point when the offence was committed. However, a conviction of the offence will necessarily mean that the offender had crossed the line separating the lawful exercise of constitutional rights from unlawful activity subject to sanctions and constraints, and so there is little merit in a plea for leniency on the ground that the offender was merely exercising his constitutional rights, since there is no constitutional justification for violent unlawful behaviour.

On civil disobedience as a mitigating factor, which is recognisable in Hong Kong, the Court of Final Appeal ruled that civil disobedience can broadly consist of (a) breaches of a particular law which is believed to be unjust by the offender, or (b) law-breaking done in order to protest against perceived injustice or in order to effect change in either the law or society. The offender's conscientious objections and genuine beliefs attributing either type of behaviour may be taken into consideration as the motive for the offending. Civil disobedience as generally understood also requires the protester to expect and accept punishment, and the action carried out to be peaceful and non-violent.

In the present appeals, the acts of civil disobedience were committed in the course of protesting against the Government's proposals for constitutional reform. The acts involved violence and were not peaceful. Thus, a plea for leniency at the stage of sentencing on the ground of civil disobedience should therefore carry little weight.

3. Approach when the Court of Appeal gives guidance in sentencing for future cases

Based on the established principle of legal certainty, the sentence for an offence should be in accordance with the sentencing practice prevailing at the time of the commission of the offence. However, the public order offences of which the Appellants were guilty of were offences where there had been no established guidelines or tariffs of sentence. In the Secretary of Justice's application for review of sentence, the Court of Appeal was invited to lay down guidelines in the sentences of such offences. The Court of Final Appeal recognised the Court of Appeal's responsibilities for providing sentencing guidelines for future cases. Although the Court of Appeal did not lay down any fixed starting point of sentence for the offences, it emphasised the need to take a much stricter view where disorder and any degree of violence was involved in large scale unlawful assembly cases. The Court of Appeal sent the message that unlawful assemblies involving violence, even the relatively low degree of violence that occurred in the present appeals, will not be condoned and may justifiably attract sentences of immediate imprisonment in the future. Greater culpability is also to be attached to those who have participated in violent acts, incited others to commit the offence, or have encouraged the unlawful assembly for example by virtue of their status or leadership of others joining the assembly.

The Court of Final Appeal endorsed the sentencing principles laid down by the Court of Appeal and the list of sentencing factors it considered to be relevant for unlawful assembly involving violence. However, The Court of Final Appeal considered it inappropriate to apply the Court of Appeal's guidance to the Appellants in these appeals to avoid imposing significantly more severe sentences on them retrospectively based on the new sentencing guideline.



4. The relevance of youth in sentencing and s.109A of the CPO

This issue solely related to the 1st Appellant's appeal. s.109A of the CPO obliges a sentencing court when considering the appropriate sentence to be imposed on an offender aged between 16 and 21 years of age, to obtain and consider information about the circumstances of the young offender, the offence and his suitability for particular types of punishment, as well as information which is relevant to the young offender's character and physical and mental condition.

The Court of Final Appeal held that the Magistrate was plainly entitled to take s.109A of the CPO into account when sentencing. As the sentencing court, the Court of Appeal was under a duty to consider all non-imprisonment sentencing options if it had been entitled to review the sentences of the Magistrate under s.109A of the CPO.

While the requirement to obtain information is not absolute and there may be circumstances where it will be clear without the need to obtain further information and the only appropriate sentence is imprisonment, the present offence of taking part in an unlawful assembly was certainly not one of those cases. The Court of Appeal therefore erred in dispensing with the need to consider other sentencing options and in not following the requirements of s.109A.

After considering the submission by the parties, the Court of Final Appeal unanimously allowed all three appeals, quashed the sentences of imprisonment imposed by the Court of Appeal and reinstated those imposed by the Magistrate. However, the Court of Final Appeal reminded that offenders in future cases will be subject to the new sentencing guidelines set by the Court of Appeal in large scale unlawful assemblies involving violence.

QT v Director of Immigration (FACV No. 1 of 2018)

QT is a British national. In May 2011, QT and her partner, SS, entered into a same-sex civil partnership in England under the UK's Civil Partnership Act 2004. SS was later offered employment in Hong Kong and was granted an employment visa to come and work here. In late 2011, the couple entered Hong Kong, SS on the strength of the employment visa and QT as a visitor. In 2014, QT submitted an application for a dependant visa but was rejected by the Director of Immigration ("the Director"). The Director found QT ineligible to be considered for the dependant visa because she was outside the existing policy which was to admit a spouse as a dependant only if he or she was a party to a monogamous marriage consisting of one male and one female ("the Policy").

With the assistance of legal aid, QT commenced the judicial review proceedings seeking to quash the Director's decision, arguing, among other things, that the Director's decision was unreasonable in the public law sense as it was discriminatory against her on sexual orientation grounds that were not justified. Her application for judicial review was dismissed by the Court of First Instance.

Legal aid was granted to QT to appeal against the judgment of the Court of First Instance. At the appeal, whilst the Director argued that excluding same-sex married partners or civil partners as spouses under the Policy did not constitute discrimination on any prohibited or suspect ground, the Director contended in the alternative that such differential treatment could be justified in pursuing the legitimate aims of striking a balance between (a) to encourage people with needed skills and talent to join Hong Kong's workforce, accompanied by their dependants; and (b) to maintain a system of effective and stringent immigration control. To achieve the said legitimate aims, the Director adopted the marital status as defined by Hong Kong's matrimonial law as the guideline which provides for legal certainty and administrative workability and convenience. The Court of Appeal found that although the aims of attracting talent and immigration control were legitimate, the Policy which restricted the eligibility requirement to heterosexual married couples and excluded same-sex married partners or civil partners was not rationally connected to that aim and the Director failed to justify the discriminatory treatment. The Court of Appeal unanimously allowed QT's appeal.



On the Director's application, the Court of Appeal granted leave to appeal on the ground that the appeal involved questions of great general or public importance. Legal aid was further granted to QT to defend the appeal. Those questions were summarised as follows:

"(1) Given that same-sex marriage or civil partnership is not legally recognized in Hong Kong on all levels (constitutional, statutory and common law), and accordingly the denial of the right to marry to same-sex couples does not constitute discrimination on account of sexual orientation, whether this is an absolute bar to a claim of discrimination on account of sexual orientation when the differential treatment is based on marital status (as recognized under Hong Kong law) in all contexts.

(2) Given that the status of marriage (as recognized under Hong Kong law) carries with it certain special and privileged rights and obligations unique to and inherent in marriage ('core rights and obligations'), which are not open to all other persons including unmarried same-sex couples who cannot get married under Hong Kong law, and any differential treatment based on marital status in the context of such core rights and obligations requires no justification, whether immigration (in particular, the eligibility of a person in a same-sex marriage or civil partnership recognized under a system of foreign law for a dependent visa based necessarily on a spousal relationship with the sponsor) falls within these core rights and obligations.

(3) If justification for a differential treatment in the context of immigration (in particular, the eligibility of a person in a same-sex marriage or civil partnership recognized under a system of foreign law for a dependent visa based necessarily on a spousal relationship with the sponsor) based on marital status is required: (a) what is the appropriate standard of scrutiny to be applied; and (b) whether the Director of Immigration has justified the difference in treatment for eligibility for dependant visa."

The Court of Final Appeal made it clear that this appeal did not involve any claim that same-sex couples have a right to marry under Hong Kong law. The Court recognized that a valid marriage is a "voluntary union for life of one man and one woman to the exclusion of all others". Marriage in this jurisdiction is therefore heterosexual and monogamous. Rather, the two main contested issues were: (i) whether there was a differential treatment of QT under the Policy which was discriminatory; and (ii) if so, whether such discriminatory treatment could be justified.

The Director is vested with powers to impose time limits and other conditions on a person's stay in Hong Kong. It is pursuant to those powers that the Director operates the Policy. Although his powers are expressed in very wide terms, the Director accepted that in implementing the Policy, he was constrained to exercise them in accordance with what had been referred to as "the principle of equality". However, the Director's primary stance was that there was an obvious difference that exists between marriage and a civil partnership and the discriminatory treatment under the Policy needed no justification.

The Court of Final Appeal found that discrimination is the antithesis of rational equal treatment and unlawful discrimination is fundamentally unacceptable. The task of the courts has been to establish principles for determining when distinctions drawn by legal or administrative measures are rational and fair and when such distinctions constitute unlawful discrimination. The Court examined in details three main categories of discrimination and the Civil Partnership Act 2004 which governs the relationship between QT and SS under English law and accepted that the Act confers on those who have entered into a civil partnership similar rights, benefits and material advantages to those enjoyed by married couples. The Court rejected the Director's assertion that an obvious difference existed between marriage and a civil partnership and it was untenable as a basis for precluding scrutiny of the Policy's justification.

In answering the three questions raised at the appeal, the Court of Final Appeal found that the relevance and weight to be attributed to a person's marital status was taken into account in considering whether a particular difference in treatment was justified as fair and rational, and that a person's marital condition could not determine presumptively that discrimination did not exist and is not an absolute bar to a claim of discrimination.

On the second and third questions regarding the approach to the need for justification for differential treatment, the Court of Final Appeal held that the Court of Appeal's approach which was based on marital status and 'core rights and obligations' should not be followed. Instead, the correct approach is to examine every alleged case of discrimination to see if the difference in treatment can be justified by applying the proportionality test and in the present case would be the standard of reasonable necessity. It was found that the Director had not justified the differential treatment in the present case.

The Court of Final Appeal held that denying homosexual workers the ability to bring their partners with them ran counter against the aim of encouraging people with skills and talent to come to Hong Kong. As was evident from the attempted intervention of a group of financial institutions and law firms for leave to file submissions in support of the Court of Appeal's judgment, the ability to bring in dependants is an important issue for persons deciding whether to move to Hong Kong. The policy was counter-productive and plainly not rationally connected to advancing the "talent" or "immigration control" aims. The Court of Final Appeal unanimously dismissed the Director's appeal.