Chapter 3

Case of Public Interest or Concern

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Leung Kwok Hung also known as "Long Hair" v Commissioner of Correctional Services FACV 8/2019

Mr. Leung Kwok Hung (the "Appellant") in this case is a political activist widely known as "Long Hair". He was convicted for certain offence and sentenced to imprisonment. At the Lai Chi Kok Reception centre, he was required to have his hair cut ("the Decision") pursuant to a Standing Order issued by the Commissioner of Correctional Services under Rule 77(4) of the Prison Rules, Cap 234A of the Laws of Hong Kong.

According to Standing Order 41-05 ("SO 41-05"), for the purposes of health and cleanliness, the hair of all male prisoners would be kept cut sufficiently close, but not close clipped, unless the prisoner himself requested it. The Appellant complained that he was treated less favourably than female prisoners. According to the same Standing Order, the hair of female prisoners were not to be cut shorter than the style on admission, without her consent except as recommended by a medical officer. Male prisoners were not given the choice female prisoners had.

In the Court of First Instance, the judicial review challenge was based on four grounds, namely, discrimination under the Sex Discrimination Ordinance, breach of Article 25 of the Basic Law which provides that all Hong Kong residents shall be equal before the law, Wednesbury unreasonableness and breach of Article 6(1) of the Bill of Rights which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The Court of First Instance held in favour of the Appellant on the first two grounds and an order was made quashing the Decision ("the Order").

The Order was reversed on appeal. Leave to appeal to the Court of Final Appeal was refused by the Court of Appeal, but the Appeal Committee granted leave to the Appellant to appeal to the Court of Final Appeal on the following question of law, namely, whether SO 41-05 constitutes direct discrimination under the Sex Discrimination Ordinance, and whether SO 41-05 is inconsistent with Article 25 of the Basic Law.

Sex Discrimination under the Sex Discrimination Ordinance

The Court of Final Appeal adopted the 4-step approach contained in R (European Roma Rights) v Prague Immigration Officer [2004] UKHL 55, [2005] 2AC1 to the facts of the present case in determining whether direct sex discrimination has been established:-

(1) There must be a difference in treatment between one person, the complainant (in our case male prisoners; more specifically the appellant) and another person, real or hypothetical, from a different sex group, the compared person (in our case, female prisoners).

(2) The relevant circumstances between the complainant and the compared person are the same or at least not materially different.

(3) It must then be shown that the treatment given to the complainant is less favourable than that given to the compared person.

(4) The difference in treatment is on the basis of sex.

There was no dispute between the parties regarding the requirements in (1), (2) and (4). The answers to the three questions were all in the affirmative. The main difference dividing the parties was on point (3), i.e. whether less favourable treatment had been given to male prisoners like the Appellant.

The Respondent argued that SO 41-05 served to ensure custodial discipline through the imposition of reasonable uniformity and conformity in appearance among prisoners, and argued that when determining discrimination, one had to take into account the whole context in a packaged approach. The Respondent further explained the difference in treatment for male and female prisoners by reference to the underlying conventional standards of appearance in society for men and women. The Court of Final Appeal, however, rejected this argument and held that the evidence in this case did not support this contention, namely in the Hong Kong society, the conventional hairstyle for men is short, whilst it may be long or short for women.

The Court of Final Appeal concluded that all the four requirements are satisfied and a case of sex discrimination is made out. In view of this finding, the Court of Final Appeal found it unnecessary to deal with the constitutional issue under Article 25 of the Basic Law. However, the Court of Final Appeal observed that on the facts of the present case, the outcome of the appeal would not be different if Article 25 of the Basic Law was considered.

The appeal was therefore allowed.

Sham Wing Kan v Commissioner of Police v Yeung Ching Yin, Chan Sin Ying, Hung Hiu Han & Chan Siu Ping (Interested Parties) CACV 270/2017

The Applicant and the four interested parties in this case took part in a protest that was organized by the Civil Human Rights Front on 1 July 2014 on Hong Kong Island (the Protest). A few days after the Protest, they were arrested for offences allegedly committed in connection with the Protest. Their mobile phones were seized by the police upon their arrest. The police asserted that the mobile phones were seized in order to preserve the potential evidence contained in them.

The Applicant and the Interested Parties all claimed that their phones contained materials that were subject to legal professional privilege. As a result of such claim, the police returned the mobile phones to their owners without inspection.

With the assistance of legal aid, the Applicant applied for leave for judicial review to seek (a) a declaration that section 50(6) of the Police Force Ordinance (Cap.232) (PFO) does not authorize police officers to search without warrant the contents of mobile phones seized on arrest, or (b) alternatively if such search power is so authorized, a declaration that section 50(6) is unconstitutional.

Notwithstanding the return of the mobile phones, the Honourable Au J (as he then was) proceeded to hear the judicial review application. He found that on a proper construction of the PFO, section 50(6) authorizes the police officers to search the digital contents of a mobile phone (or a similar device) seized on arrest without warrant only in "exigent circumstances", and in so authorizing the warrantless search, section 50(6) is constitutional.

The Respondent took the learned Judge's decision to the Court of Appeal. With the assistance of legal aid, the Applicant and the 2nd Interested Party defended their position in the appeal.

Issues before the Court of Appeal

While recognizing that the police's power to search upon arrest reflects important law enforcement objectives, the Court of Appeal agreed that the power is also necessarily an intrusion into an arrestee's privacy, which is protected by Article 14 of the Hong Kong Bill of Rights Ordinance (BOR 14) and Article 30 of the Basic Law (BL 30).

The Court of Appeal found the central issue of the case to be this: how is a search of the digital contents of a mobile phone (or similar devices) seized from an arrestee to be conducted in a manner that is compatible with BOR 14 and BL 30? More specifically, is a judicial warrant always required before such a search can be carried out? If a judicial warrant is not always required, how is the warrantless search to be conducted in order to make it compatible with BOR 14 and BL 30?

The power of search

In approaching these issues, the Court of Appeal took the view that a search of the digital contents of a mobile phone (as opposed to the mobile phone itself as an object) was governed by the common law, rather than section 50(6) of PFO. Further, the Court of Appeal found that it was not necessary to have the doctrine of "exigent circumstances" under the common law in Hong Kong and the concept of reasonable practicality should be a guide for a warrantless search of digital contents when such power is to be exercised.

The Court of Appeal referred to the case of Keen Lloyd Holdings Ltd & Ors v Commissioner of Customs and Excise & Anor [2016] 2 HKLRD 1372 which held that any warrantless search must be subject to scrutiny under the proportionality test: a warrantless search must serve legitimate interests, rationally connected with such interests and the permitted search should be no more than necessary to accomplish such interests. Further, as has been adopted in the Court of Final Appeal's decision in Hysan Development Co. Ltd v Town Planning Board (2016) 19 HKCFAR 372, the proportionality test must also take into account the severity of the deleterious effects of a measure on the individual concerned so that a fair balance is struck between the societal benefits of the encroachment and the inroads on the privacy interest of the individual.

Striking a balance

There is no doubt that mobile phones are now being used as multifunctional minicomputers and they are capable of providing a very detailed and accurate profile of their users. The privacy interest involved in a search of the digital contents of an arrestee's mobile phone would certainly and significantly go beyond the ordinary level of privacy that would be intruded upon in a traditional search of things found on his person on arrest. On the other hand, the security features equipped in mobile phones present a great deal of difficulties for the law enforcement agents to have timely access to the digital contents stored on or accessible by the device. In this regard, the Court of Appeal stressed that the law should recognize the new challenges presented by the use of mobile phones as instruments of crime and the legitimate need for law enforcement officers to search such phones in appropriate circumstances with appropriate safeguards.

On the one hand, the Court of Appeal was adamant that the right of privacy must not operate to shield incriminating evidence from legitimate criminal investigation process. On the other hand, one's privacy interest in the digital data stored on his phone outside the proper and legitimate scope of such search must remain intact and the law must protect him against any disproportionate intrusion into his privacy interest in such other data.

Formulation of the guidelines to conduct searches

In striking a balance between the protection of privacy and the need for law enforcement officers to legitimately conduct searches of the digital contents in a mobile device, having found that a Magistrate has the power to issue a warrant under section 50(7) of PFO to authorize a search of the digital contents of a mobile device, the Court of Appeal held that a police officer cannot search the contents of a mobile phone of an arrestee without warrant unless it is not reasonably practicable to obtain a warrant under section 50(7) of PFO before doing so.

As a matter of guidance, the Court of Appeal set out the power to conduct a mobile phone search upon arrest as follows:

(1) The primary position is that a warrant shall always be obtained before a search is conducted, unless it is not reasonably practicable to obtain one.

(2) When it is not reasonably practicable to obtain such warrant before a search is conducted, the police officer conducting the search must have a reasonable basis for having to conduct the search immediately as being necessary (i) for investigation of the offence(s) for which the arrestee was suspected to be involved, including procurement and preservation of information or evidence connected with such offences; or (ii) for the protection of safety of persons.

(3) When such a warrantless search has to be conducted, other than a cursory examination for filtering purpose, the scope of the detail examination should be limited to items relevant to objectives identified in the paragraph above.

(4) After the search, an adequate written record of the purpose and scope of the warrantless search should as soon as reasonably practicable be supplied to the arrestee unless to do so would jeopardize the ongoing process of criminal investigation.

Disposition

As such, the Court of Appeal allowed the Respondent's appeal, setting aside the declaration granted by Au J and granted instead a declaration that a police officer can conduct a search of the digital contents of a mobile phone found on an arrestee in accordance with the guidance set out above, and such power is held by the Court of Appeal to be compatible with BOR 14 and BL 30.

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