

Bankruptcy and the Basic Law

The case of Official Receiver v.
Charles Zhi and another
(FACV No. 8 of 2015)

The facts

- The respondent is a national of South Korea.
- He worked in Hong Kong from 1993 to 2000 and acquired the status of permanent resident.
- In July 2003, proceedings were commenced against him claiming damages for fraud and misrepresentation in connection with securities transactions
- Default judgment was entered on 8 November 2004
- In August 2003, he left Hong Kong to live in the U.S.A.

- On 3 July 2006 a petition for bankruptcy was presented and eventually the bankruptcy order was made on 20 December 2006.
- Trustees were appointed in April 2007 and proofs of debt totaling HK\$255,190, 535.95 were lodged
- The trustees obtained leave to examine the respondent in July 2011 but the respondent did not attend the examination
- Prohibition order and a warrant for his arrest were issued

- Upon his arrival in Hong Kong on 10 May 2012, the respondent was arrested
- The examination of the respondent was adjourned as he indicated that he would challenge the constitutionality of section 30A(10)(a) of the Bankruptcy Ordinance (Cap. 6)
- But for that section, the automatic discharge from bankruptcy conferred by section 30A(1) and (2) took effect on 21 December 2010

- If the respondent has been discharged from bankruptcy, he could no longer lawfully be examined under section 29
- By summons dated 26 July 2012, the respondent sought declarations to that effect
- Prior to the date of the bankruptcy order, the respondent left for the U.S.A. Although he visited Hong Kong on numerous occasions in 2008, 2009, 2010 and 2011, he did not notify the trustees of his return

The proceedings

- The respondent's summons sought declarations against the trustees and the Official Receiver (OR) to the effect that:-
 - (1) by virtue of section 30A(1) and (2) of Cap. 6, he had been discharged from bankruptcy on and after 21 December 2010;
 - (2) in so far as it is contended that section 30(10)(a) of Cap. 6 has suspended the operation of relevant period for which subsections (1) and (2) provided, section 30A(10)(a) was unconstitutional and therefore of no effect; and

- (3) if it were adjudged that the respondent had been discharged from bankruptcy on and after 21 December 2010, section 29 of Cap. 6 could not be lawfully invoked against him.
- The application was dismissed at the first instance.
- The Court of Appeal reversed the judge's decision and grant a declaration that the provision was unconstitutional and that the bankruptcy had been discharged on 21 December 2010.
- The OR appealed to the CFA on the question of great and general public importance, i.e. whether section 30A(10)(a) is constitutional.

The ratio

- CFA's approach to an issue of constitutionality
 - The first question is whether a constitutional right is engaged
 - If so, the next question is whether the legislative provision or conduct complained of amounts to an interference with, or restriction, of that right
 - If yes, it is then considered whether that right is absolute
 - If not absolute, then whether the relevant infringement or restriction can be justified on the proportionality analysis

The constitutional rights engaged

- The relevant constitutional rights engaged are those contained in Article 31 of the Basic Law (BL31) and Article 8(2) of the Hong Kong Bill of Rights (BoR8(2))
- BL31:
- “Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. They shall have the freedom to travel and to enter and leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization.”

- BoR8(2):
- “8.(1) Everyone lawfully within Hong Kong shall, within Hong Kong, have the right to liberty of movement and freedom to choose his residence.
- (2) Everyone shall be free to leave Hong Kong.
- (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Bill of Rights.

- (4) No one who has the right of abode in Hong Kong shall be arbitrarily deprived of the right to enter Hong Kong.”
- BoR(2) refers to freedom to leave Hong Kong
- The second sentence of BL31 guarantees “the freedom to travel and to enter and leave the region” and “the freedom to travel” on its own in relation to a jurisdiction involves the freedom to depart from and return to that jurisdiction

Is the constitutional right infringed?

- The parties agreed that the right to travel includes the freedom to leave Hong Kong and this must include the **freedom to stay away** from Hong Kong
- It is not contended by the parties that the right to travel is absolute
- The parties also agreed that the restriction on the right to travel constituted by section 30A(10)(a) pursues a legitimate aim, i.e. to keep the bankrupt on the trustees' radar in order to facilitate the effective administration of his estate and that the restriction in question is rationally connected primarily to the protection of the rights of creditors and to the public interest in the proper administration of bankrupts' estates

The sole question

- The sole question for determination by CFA is whether section 30A(10)(a) is proportionate as being no more than necessary to protect primarily the rights of creditors

The decision in Chan Wing Hing

- In *Chan Wing Hing*, CFA decided by a majority that section 30A(10)(b)(i) of Cap. 6 was unconstitutional as it constituted a disproportionate impairment of the right to travel.
- It was disproportionate because:
 - (1) there were other weapons available to the trustees and creditors when faced with the bankrupt's failure to cooperate in the context of the scheme regulating discharge.
 - (2) the sanction under section 30A(10)(b)(i) was a harsh one as once triggered it operated indiscriminately at all times and irrespective of the circumstances

The Court of Appeal's judgment

- The only issue before the Court of Appeal in this case was the proportionality of the restriction in section 30A(10)(a). It was held that the reasoning of CFA in relation to section 30A(10)(b)(i) in *Chan Wing Hing's* case applied equally to section 30A(10)(a).
- CA rejected the argument that there was a distinction between section 30A(10)(b)(i) and 30A(10)(a). It was of the view that the latter section was even more onerous than the former.

CFA's view

- The two sections are not relevantly distinguishable.
- Although it is clear that section 30A(10) was intended to catch absconding bankrupts and the injustice of absconding bankrupts taking advantage of the period of automatic discharge from bankruptcy might be a reason justifying legislative intervention to prevent abuse, it cannot justify a provision which catches all bankrupts outside Hong Kong regardless of the circumstances that lead to their being absent from Hong Kong and unable to return.

- Section 30A(10)(a) cannot be regarded as no more than necessary to protect the rights of creditors and does not satisfy the proportionality test. Accordingly, it is unconstitutional.

Caveat (1)

- CFA expressly stated that the case has been adjudicated upon the assumption agreed to by the parties that the scope of the right to travel in BL31 and BoR8(2) includes a right to stay away and that the operation of section 30A(10)(a) amounts to an infringement of that right. The Court acknowledged that this assumption might well be **debatable**. (para. 33)
- A bankrupt who is absent from Hong Kong at the date when a bankruptcy order is made against him is not exercising a right to leave Hong Kong because he has already departed.

- It is only if one treats the right to travel as encompassing a continuous act of staying away from Hong Kong that there can be nexus between any adverse consequences attached to being absent from Hong Kong and the exercise of the right. This judgment should not be taken to have settled that issue.
- ◆ Question: Has OR made a wrong concession by choosing not to argue against such an assumption?

Caveat (2)

- The Bankruptcy (Amendment) Bill 2015 has been introduced into the Legislative Council. If passed, section 30A(10) will be repealed and replaced by a scheme of suspension that operates by court order upon application by trustees.
- The new law will not apply to bankruptcy orders already made.

Query

- ◆ Has CFA the power to declare any primary legislation unconstitutional under BL?
- This is not a question that would arise within the legal system of Hong Kong. That is because CFA has adjudicated the current case as any other judicial review case on the basis of the doctrine of *ultra vires*.
- The *rationale* is that since any legislation contravening BL should have no effect, it is for CFA to adjudicate whether there is any such contravention. The procedural context is judicial review. The fact that BL is engaged is just a material fact of the case.

- From the perspective of the Chinese jurisprudence, the declaration of certain legislation unconstitutional is not within the ambit of judicial power (審判權).
- Such declaration presumes that CFA has the power to examine contravention of BL (違反基本法審查權) which BL has reserved exclusively to the Standing Committee of the National People's Congress.
- To common law lawyers such thinking may seem a mincing of words, but is there a conflict of legal culture more than just words?



PLEASE NOTE

The law and procedure on this subject are very specialised. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our solicitors.

請注意

本題目之法律及程序十分專門。此文章只屬一般性之解釋，供你參考，而不應被依賴為關於任何特定事件之法律意見。如需法律意見，請與我所律師聯絡。

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