LC Paper No. CB(2)2537/02-03(02)

Paper by Article 23 Concern Group on
Special Procedures for Appeal
Against Proscription and Arrangements
For Disposal of Assets of Proscribed Organization

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1. The Article 23 Concern Group ("the Group") does not accept that the proposed Special Procedures on Appeal Against Proscription ("the Procedures") and Arrangements of Disposal of Assets of proscribed organizations ("the Arrangements") are either necessary, required by Article 23 of the Basic Law or compatible with basic freedoms safeguarded by the Basic Law. The Group urges the Legislative Council ("LegCo") not to support the proposed Procedures or Arrangements.

2. The following views are therefore put forward subject to the Group's view set out in paragraph 1 above.

I. The Procedures

Section 8D

3. Subsection (3) deals with the burden of proof. As the proceedings were criminal or quasi-criminal in nature, it should be clearly stipulated that the burden should be proportionate to the gravity of the allegation. That means that the Court needs to be satisfied by the Government either beyond reasonable doubt or more than a mere balance of probability.

4. Subsection (6) deals with the admission of evidence not normally admissible in a Court of Law. To safeguard the admission of unreliable evidence, the model used in the **Evidence Ordinance**, Cap. 8 ("the Ordinance") should be adopted. Thus, a proviso in line with section 47(1)(a) and (b) of the Ordinance should be introduced.

5. The Court should also be given the same discretion as to weight as in section 49 of the Ordinance to safeguard the interest of justice. Both sections 47 and 49 are annexed hereto marked "A".

6. Subsection (7)

The limit of the appeal mechanism to a question of law is unjustifiable and should be removed. No credible or justifiable explanation has been put forward for such limitation. The basic right of appeal to a person whose right is likely to be severely curtailed should never be circumscribed.

Section 8E

7. The suggestion that the Secretary for Security ("SS") who is in effect the prosecutor should delineate the limits of any appeal mechanism offends the basic notion of natural justice and the Rule of Law.

8. The Government should establish an independent body comprised of lawyers and academics to advise the Chief Executive in Council to make such regulations.

9. Subsection (3)

The proposed procedure enabling hearings in the absence of the appellant or his legal representative, the withholding of evidence from the appellant or his legal representative is contrary to the Basic Law and the basic notion of natural justice.

10. The reliance on English or Canadian Immigration or anti-terrorist regulations, as has been repeatedly pointed out by eminent lawyers from England and elsewhere, is totally misplaced. In any event, there are sufficient existing safeguards in our law to protect information in the interest of the public.

11. Insofar as the Government insists there should be a special advocate to represent an appellant (which we strongly object as being contrary to Article 35 of the Basic Law) the special advocate should be a barrister to be nominated by the Bar Association to ensure neutrality and competence of the advocate is commensurate with the gravity of the allegation.

II. The Arrangements

12. There is no justification for the seizure or disposal of assets of a proscribed organization. It is a basic principle of our law that assets are not seized and disposed of unless they can be shown to be the proceeds of crime.

13. Furthermore, the employment of the procedure in Part XIIIA of the **Companies Ordinance**, Cap. 32 ("the Ordinance") is ill conceived. This procedure, to our knowledge, has never been invoked. It makes no provision for creditors who missed the short period within which a debt is to be proved. Since section 290 of the Ordinance, which allows a creditor to apply for a declaration that a company's dissolution is void to enable him to bring proceedings to recover a debt within 2 years of the date of dissolution, is expressly excluded by section 360D, there seems to be no remedy for innocent creditors who had nothing to do with the proscribed activities of the company.

14. This is to be contrasted with the striking-off of unregistered companies which can be wound up under Part X of the Ordinance and thus avoid the unreasonable treatment of a section 360C dissolution.

15. Another problem is that it is not clear what "other type of organizations" in section 3 in Schedule 2 refers to. It is quite possible that this reference includes a partnership. If so, under section 3(2), a partnership might be

wound up as an unregistered company under Part X of the Ordinance thereby by-passing the winding up provisions of the **Partnership Ordinance**, Cap. 38. A significant distinction between the two is that partners of a dissolved partnership continue to be liable for a debt incurred while the partnership was still alive; not so if that organization is treated as a company under the Ordinance.

16. In any event, the mechanism of a strike-off must not commence until all legal challenges are exhausted. In this respect, the use of the word "may" in sections 1(2) and 3(2) will simply introduce uncertainty and encourage more unnecessary legal challenges.

17. The interest of third parties also demands that a proper procedure is to complete the process of winding up *before* the final dissolution of the organization so that third party claims can be brought against the organization during the winding up process.

Dated this 19th day of June 2003.

Ronny K.W. Tong S.C.

47. 傳聞證據的可接納性

(1) 在民事法律程序中，不得以任何證據屬傳聞為理由而摒除該證據，但在以下條件均獲符合的情況下，則屬例外——

(*a*) 將予援引的該證據是用以針對某一方的，而該一方反對該證據獲接納；及

(*b*) 法庭在顧及該個案的情況下，信納該證據的摒除並不損害秉行公正的原則。

(2) 法庭——

(*a*) (如屬在陪審團席前進行的民事法律程序) 可在有關法律程序開始時並在陪審團不在場的情況下；

(*b*) (如屬任何其他民事法律程序) 可在有關法律程序完結時，

裁定是否以任何證據屬傳聞為理由而摒除該證據。

(3) 如任何證據在沒有本條的情況下仍會屬可接納的證據，則本部並不影響該證據的可接納性。

(4) 如任何證據在沒有本條的情況下仍會屬可接納的證據，則儘管該證據憑藉本條亦屬可接納的證據，第 48 至 51 條的條文並不適用於該證據。

(由 1999 年第 2 號第 2 條代替)

[比照 1995 c. 38 s. 1(1), (3) & (4) U.K.]

47A. 擬援引傳聞證據的通知

(1) 法院規則可訂立條文——

(*a*) 指明第 (2) 款所適用的傳聞證據；及

(*b*) 規定在第 (2) 款適用的情況下，該款所施加的責任須以何種方式履行 (包括履行該責任的時限)。

(2) 除第 (3) 款另有規定外及在不抵觸第 (4) 款的條文下，在民事法律程序中擬援引屬第 (1)(*a*) 款指明的傳聞證據的一方，須向該法律程序中的另一方或其他各方——

(*a*) 發出載有該事實的通知；及

(*b*) (在接獲請求時) 提供該證據的詳情或與該證據有關的詳情，

而所須發出的通知或提供的詳情，須限於為使上述另一方或其他各方能處理任何因該證據屬傳聞而引起的事宜並且在有關情況下屬合理及切實可行者。

(3) 第 (2) 款的規定，可藉各方的協議摒除，而無論在任何情況下，須獲發給通知的人均可免除任何人履行發出該通知的責任。

47. Admissibility of hearsay evidence

(1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay unless—

(*a*) a party against whom the evidence is to be adduced objects to the admission of the evidence; and

(*b*) the court is satisfied, having regard to the circumstances of the case, that the exclusion of the evidence is not prejudicial to the interests of justice.

(2) The court may determine whether or not to exclude evidence on the ground that it is hearsay—

(*a*) in the case of civil proceedings before a jury, at the beginning of the proceedings and in the absence of the jury;

(*b*) in the case of any other civil proceedings, at the conclusion of the proceedings.

(3) Nothing in this Part shall affect the admissibility of evidence admissible apart from this section.

(4) The provisions of sections 48 to 51 shall not apply in relation to hearsay evidence admissible apart from this section, notwithstanding that it may also be admissible by virtue of this section.

(Replaced 2 of 1999 s. 2)

[cf. 1995 c. 38 s. 1(1), (3) & (4) U.K.]

47A. Notice of proposal to adduce hearsay evidence

(1) Provision may be made by rules of court—

(*a*) specifying hearsay evidence in relation to which subsection (2) shall apply; and

(*b*) as to the manner in which (including the time within which) the duties imposed by that subsection shall be complied with in the cases where it does apply.

(2) A party proposing to adduce in civil proceedings hearsay evidence which falls within subsection (1)(*a*) shall, subject to subsections (3) and (4), give to the other party or parties to the proceedings—

(*a*) such notice, if any, of that fact; and

(*b*) on request, such particulars of or relating to the evidence,

as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay.

(3) Subsection (2) may be excluded by agreement of the parties, and compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given.

(4) 沒有遵從第(2)款的規定，或沒有遵從根據第(1)(*b*)款訂立的規則，並不影響有關證據的可接納性，但法庭——

(*a*) 於考慮行使其在法律程序的過程方面及訟費方面的權力時，可顧及沒有遵從規定或規則此一事；及

(*b*) 可將沒有遵從規定或規則此一事，作為對按照第49條而給予有關證據的分量有負面影響的事宜而予以顧及。

(由1999年第2號第2條增補)

[比照1995 c. 38 s. 2 U.K.]

8. 傳召證人就傳聞陳述進行盤問等權力

法院規則可規定凡民事法律程序的一方援引由某人作出的任何陳述的傳聞證據，而並不傳召該人作證人，則——

(*a*) 該法律程序的其他任何一方在法庭許可下，可傳召該人作證人，並可就該陳述盤問他，猶如他已被首述一方傳召作證人一樣，並猶如該傳聞陳述是他的主問證據一樣；

(*b*) 該法律程序的任何一方可提出其他證據，以打擊或支持該傳聞陳述的可靠性，或打擊或支持該等其他證據的可靠性。

(由1999年第2號第2條代替)

[比照1995 c. 38 s. 3 U.K.]

9. 與衡量傳聞證據有關的考慮

(1) 在評估民事法律程序中某項傳聞證據的分量(如有的話)時，法庭須顧及任何能據以合理推斷該證據的可靠程度或不可靠程度的有關情況。

(2) 就第(1)款而言，法庭可尤其顧及以下各項——

(*a*) 設若要由援引有關證據的一方在援引該證據時交出作出原陳述的人為證人會否屬合理和切實可行；

(*b*) 原陳述是否在所述事宜發生或存在的同時作出；

(*c*) 該證據是否涉及多重傳聞；

(4) A failure to comply with subsection (2), or with rules under subsection (1)(*b*), shall not affect the admissibility of the evidence but may be taken into account by the court—

(*a*) in considering the exercise of its powers with respect to the course of proceedings and costs; and

(*b*) as a matter adversely affecting the weight to be given to the evidence in accordance with section 49.

(Added 2 of 1999 s. 2)

[cf. 1995 c. 38 s. 2 U.K.]

48. Power to call witness for cross-examination on hearsay statement, etc.

Rules of court may provide that where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness—

(*a*) any other party to the proceedings may, with the leave of the court, call that person as a witness and cross-examine him on the statement as if he had been called by the first-mentioned party and as if the hearsay statement were his evidence in chief;

(*b*) any party to the proceedings may call additional evidence to attack or support the reliability of the hearsay statement or to attack or support the reliability of that additional evidence.

(Replaced 2 of 1999 s. 2)

[cf. 1995 c. 38 s. 3 U.K.]

49. Considerations relevant to weighing of hearsay evidence

(1) In estimating the weight, if any, to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

(2) For the purposes of subsection (1), regard may be had, in particular, to the following—

(*a*) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(*b*) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(*c*) whether the evidence involves multiple hearsay;

(*d*) 所涉人士是否有任何動機將事實隱瞞或作失實陳述；
(*e*) 原陳述是否經過編選，或是否聯同他人作出或是為某特別目的而作出的；
(*f*) 援引有關傳聞證據的情況，是否使人聯想到有人企圖妨礙該證據的分量的適當評估；
(*g*) 該一方援引的證據是否與其以往援引的任何證據相符。

(由 1999 年第 2 號第 2 條代替)
[比照 1995 c. 38 s. 4 U.K.]

50. 作證資格及可信性

(1) 傳聞證據在下述情況下，或在已顯示包含 (*a*) 段所述陳述的範圍內，或在其將由 (*b*) 段所述陳述加以證明的範圍內，不得在民事法律程序中獲得接納——

(*a*) 已顯示該證據包含一項陳述，而作出陳述的人在作出該項陳述時是沒有資格作證人的；或
(*b*) 該證據將由一項陳述加以證明，而作出陳述的人在作出該項陳述時是沒有資格作證人的。

(2) 除第 (3) 款另有規定外，凡在民事法律程序中援引傳聞證據而作出原陳述或作出藉以證明另一陳述的任何陳述的人並沒有被傳召作證人，則——

(*a*) 在該人被傳召作證人的情況下本可接納為打擊或支持該人作為證人的可信性的證據，可在該法律程序中為該目的而獲得接納；及
(*b*) 傾向於證明該人曾在作出上述陳述之前或之後作出與該陳述不相符的其他陳述的任何證據，可為顯示該人自相矛盾此一目的而獲得接納。

(3) 如在第 (2) 款所提述的人被傳召作證人而該人在接受盤問過程時否認某事的情況下，進行盤問的一方是不能夠就該事援引證據的，則不得根據該款就該事提供證據。

(4) 在第 (1) 款中，"沒有資格作證人" (not competent as a witness) 指任何人在心智或身體方面無行為能力，或對事物缺乏了解，以致該人在民事法律程序中沒有資格作證人。

(由 1999 年第 2 號第 2 條代替)
[比照 1995 c. 38 s. 5 U.K.]

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(*d*) whether any person involved had any motive to conceal or misrepresent matters;
(*e*) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
(*f*) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight;
(*g*) whether or not the evidence adduced by the party is consistent with any evidence previously adduced by the party.

(Replaced 2 of 1999 s. 2)
[cf. 1995 c. 38 s. 4 U.K.]

50. Competence and credibility

(1) Hearsay evidence shall not be admitted in civil proceedings if or to the extent that it is—

(*a*) shown to consist of; or
(*b*) to be proved by means of,

a statement made by a person who at the time he made the statement was not competent as a witness.

(2) Subject to subsection (3), where in civil proceedings hearsay evidence is adduced and the maker of the original statement, or of any statement relied upon to prove another statement, is not called as a witness—

(*a*) evidence which if he had been so called would be admissible for the purpose of attacking or supporting his credibility as a witness is admissible for that purpose in the proceedings; and
(*b*) evidence tending to prove that, whether before or after he made the statement, he made any other statement inconsistent with it is admissible for the purpose of showing that he had contradicted himself.

(3) Evidence shall not be given under subsection (2) of any matter of which, if the maker referred to in that subsection had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

(4) In subsection (1), "not competent as a witness" (沒有資格作證人) means suffering from such mental or physical incapacity, or lack of understanding, as would render a person incompetent as a witness in civil proceedings.

(Replaced 2 of 1999 s. 2)
[cf. 1995 c. 38 s. 5 U.K.]

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