

# 立法會

## *Legislative Council*

LC Paper No. LS35/05-06

### **Paper for the Special Meeting of the Panel on Security on 16 February 2006**

#### **Leung Kwok Hung and Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region (HCAL 107/2005)**

The case is an application for judicial review in which the applicants challenged the validity of existing legislative and administrative framework authorising and regulating secret monitoring. Judgment was handed down on 9 February 2006. The Clerk to the Panel has circulated a copy to members of the Panel via LegCo Paper No. CB(2)1097/05-06(01). This paper highlights the issues which may be relevant to the Panel to assist members.

2. The court summarized the issues involved in paragraphs 39 to 42 of the judgment:

#### **(I) First issue**

Section 1(2) of the Interception of Communications Ordinance (Cap. 532) imposes a duty on the Chief Executive to determine an appropriate date for the Ordinance to come into operation. In failing to determine a date, the Chief Executive has acted unlawfully;

#### **(II) Second issue**

The constitutionality of section 33 of the Telecommunications Ordinance in so far as it gives a general power, free of any legislative safeguards, to the Chief Executive to order the interception of private communications;

#### **(III) Third issue**

The constitutionality of the Executive Order which the Applicants have said purports to have legislative effect in that it seeks to meet the requirements of articles 30 and 39 of the Basic Law by laying down 'legal procedures' in terms of which covert surveillance and the interception of private communications is authorised.

#### **(IV) Temporary validity**

On behalf of the Chief Executive, it was submitted that should the court declare section 33 of the Telecommunications Ordinance and/or the Executive Order to be invalid, law enforcement agencies would be deprived of a vital weapon in combating crime and ensuring public security.

3. The determinations of the court are reproduced in full in the Appendix. The views of the court on the four issues set out in paragraph 2 above which may be of interest to members are extracted below for members' reference.

#### **Appointment of commencement date for the Interception of Communications Ordinance**

4. The court recognized there is a need for preparation before the commencement of a piece of legislation. This would include drafting of subsidiary legislation, consultation with affected parties, and guidance to officials and the public. The court noted that in various papers submitted to the Legislative Council, the Government had stated that the matter was under review. The court held that in deciding the commencement date the Chief Executive is entitled, in matters of Hong Kong's security, to take into account the changing nature and extent of any threats to that security.

5. The court noted that should the Legislative Council intend to restrict the discretion in appointing the commencement date, there were various options such as providing for a specified date, or for a period of time by which the legislation must commence operation.

6. The court held that section 1(2) conferred on the Chief Executive a discretion as to *when* but not *whether* the Ordinance was to come into force. There could be no implied restriction that there is a time when that discretion is exhausted and that, whatever the change of circumstances since the Ordinance was passed, the Chief Executive is bound to bring it into force. The Chief Executive, while not bound by any finite timetable, has at all times remained under a statutory duty, to be discharged in good faith, to actively keep under consideration whether or not an appropriate time has come to bring the Ordinance into operation. That duty cannot be abrogated. It would amount to an intentional frustration of that duty and would be an act outside of his powers for the Chief Executive to procure events to take place which would prevent him from discharging his statutory duty.

7. After reviewing what was said on behalf of the Government at Second Reading debate and subsequent to the passing of the Ordinance, the court held that it has not been demonstrated that the Chief Executive, in failing to appoint a date for the implementation of the Ordinance, has exceeded his powers and thereby acted

unlawfully. The court remarked that as to the *manner* in which the Chief Executive has discharged his statutory obligations under section 1(2), that is a matter for the Legislative Council and the Chief Executive, not the court (para. 98 of the judgment).

### **Section 33 of the Telecommunications Ordinance**

8. The court noted that the power of the Chief Executive to order the interception and examination of private communications under section 33 of the Telecommunications Ordinance is not qualified by any subsidiary legislation made under the Ordinance nor by any other Hong Kong legislation. The power is open-ended and not subject to any judicial or other independent oversight. On the other hand, Article 30 of the Basic Law requires that the fundamental right to freely and privately communicate with others shall be protected ‘by law’. The Basic Law allows for the right to freely and privately communicate with others to be subject to limitations. The court was of the view that when the framework of Article 30 is considered as a whole, the requirement that the right to freely and privately communicate with others ‘shall be protected by law’ must be read as being complemented by the provision that any limitation of the right must be ‘in accordance with legal procedures’.

9. The protection of the law demanded by both Article 30 of the Basic Law and Article 14 of the Bill of Rights does not mean that legislation only will be sufficient, even though legislation invariably is employed. Purely administrative directions which are not themselves part of any framework of substantive law, and therefore have no general effect, will not be sufficient.

10. The court is of the view that Article 30 of the Basic Law and Article 14 of the Bill of Rights (both as read with Article 39(2) of the Basic Law) incorporate into their constitutional requirements the need for the existence of laws which make for legal certainty and require that any limitations on the right be proportionate. On that basis, section 33 does not meet the requirements of those constitutional articles. Section 33, as enacted, does not in any detail regulate the scope of the Chief Executive’s discretion or the manner in which it may be exercised. It has not been formulated with sufficient precision to enable Hong Kong residents to foresee to a degree that is reasonable in the circumstances the consequences of any telecommunication intercourse they may have with others.

### **The Executive Order**

11. The court’s view of the Executive Order is that it no more than a set of administrative directions given to employees of the Government by the head of the Government. It does not bind Hong Kong residents generally. It does not purport to be legislation, nor can it be taken to be legislation. However, the court noted in the explanatory note of the Order that the Order purported to be a set of ‘legal procedures’. The court did not agree with the argument of the Government that

‘legal procedures’ include procedures that are legally established under a statutory or other legal power, duty or function, and pointed out that the context in which the phrase is to be interpreted in Article 30 is very different from that in Article 48(7) in *The Association of Expatriate Civil Servants of Hong Kong v. The Chief Executive* [1998] 1 HKLRD 615, in that Article 30 goes to fundamental rights guaranteed to all Hong Kong residents.

12. The court held that the use of the phrase ‘in accordance with legal procedures’ in Article 30 means procedures which are laid down by law in the sense that they form part of substantive law, invariably, in order to comply with the requirements of legal certainty, within legislation, primary and/or secondary. The court also held that while the Executive Order is entirely legitimate and of value as an administrative tool in regulating the internal conduct of law enforcement agencies, it is not capable of constituting a set of ‘legal procedures’ for the purposes of Article 30.

### **“Temporary validity”**

13. The court was informed that should section 33 of the Telecommunications Ordinance be found inconsistent with the Basic Law, and the Executive Order be found not ‘legal procedures’ for the purposes of Article 30 of the Basic Law, then until a new or amended body of law is made effective there would be no operative body of law which is in compliance with the Basic Law to regulate covert surveillance by law enforcement agencies. It would mean that for an extended period of time (the Government submitted to be six months) it will be unlawful for Hong Kong’s law enforcement agencies to conduct many forms of covert surveillance. In this context the Government applied for an order to the effect that section 33 of the Telecommunications Ordinance and the Executive Order are valid and of legal effect for six months notwithstanding the judgment of the court.

14. Referring to international jurisprudence, the court was of the view that in constitutional matters, laws declared to be in violation of a constitution may nevertheless be declared temporarily valid in situations where danger, disorder or deprivation would be caused by an immediate declaration of invalidity. The court was satisfied that any immediate declaration of invalidity in the present case would give rise to the probability of danger to Hong Kong residents, disorder by way of a threat to the rule of law and deprivation to Hong Kong residents generally. The court is also satisfied that the six month period named was proportionate, and that an order of temporary validity for six months should be made.

### **Relevant Information**

15. This is a decision of the Court of First Instance, it is subject to appeal. The time for appealing under Order 59 rule 4 of the Rules of the High Court is 28 days beginning on the date immediately following the date on which the judgment or order was sealed or otherwise perfected.

16. According to paragraph 46 of the judgment, the terms of the order of ‘temporary validity’ would be “Section 33 of the Telecommunications Ordinance and the Executive Order, notwithstanding the judgment of the court, are valid and of legal effect for a period of six months from the date hereof, the parties having liberty to apply.”. In granting this order, the court relied on a Canadian case Reference by the Governor in Council concerning certain language rights under Section 23 of the Manitoba Act 1870 and Section 133 of the Constitution Act, 1867(1985) 19 D.L.R (4th)1 and the inherent jurisdiction of the court. In the said case, all the Acts of the Province of Manitoba in Canada were held to have no legal force and effect because they were not enacted, printed and published in English and French. Also, according to the order, the parties may go back to the court for variation or extension of the period.

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**REPRODUCTION OF THE DETERMINATIONS OF THE COURT**

*“(i) The [Interception of Communications] Ordinance*

178. The Ordinance was enacted in June 1997. In terms of s.1(2), the Chief Executive has the duty to bring it into effect on a day to be appointed by him. The applicants claim that, by failing to set a day, the Chief Executive has acted in breach of that duty and therefore unlawfully. The applicants have sought a declaration to that effect together with a declaration that the Chief Executive has a legal obligation forthwith to appoint a day to bring it into effect in its present form.

179. It has not been demonstrated, however, that the Chief Executive has acted in breach of his statutory duty nor that he is in breach of it at this time. The application for declaratory relief is therefore dismissed.

*(ii) The Telecommunications Ordinance*

180. S.33 of the Ordinance gives the power to the Chief Executive, when he considers it to be in the public interest, to order the interception of telecommunication messages. This power is not subject to any legislative controls. The applicants claim that s.33, in so far as it authorises such interception, is inconsistent with arts.30 and 39 of the Basic Law which guarantee the right to freely and privately communicate with others. They claim that s.33 is unconstitutional, void and of no effect. They have sought a declaration to that effect.

181. I am satisfied that s.33, in so far as it authorises or allows access to, or the disclosure of, the contents of telecommunication messages is inconsistent with arts.30 and 39 of the Basic Law and, through art.39, with art.14 of the Bill of Rights. The applicants are granted a declaration to that effect in the terms of the declaration contained in para.26 of this judgment.

*[i.e. ‘That, insofar as s.33 of the Telecommunications Ordinance, Cap. 106, authorises or allows access to or disclosure of the contents of any message or any class of messages, it is unconstitutional, void and of no legal effect in that it violates arts.30 and 39 of the Basic Law and art.17 of the International Covenant on Civil and Political Rights, 1966/art.14 of the Hong Kong Bill of Rights Ordinance, Cap. 383.’]*

*(iii) The Executive Order*

182. The Executive Order was made in August 2005 pursuant to the powers of the Chief Executive under art.48(4) of the Basic Law. It is an administrative order having no legislative effect. Its purpose is to lay down 'legal procedures' governing all forms of covert surveillance. The applicants claim that the Order, insofar as it purports to authorise and regulate covert surveillance by law enforcement agencies, purports to have legislative effect and in that regard is inconsistent with arts.30 and 39 of the Basic Law and, through art.39, with art.14 of the Bill of Rights. They have sought a declaration to that effect together with an order of *certiorari* to quash the Order.

183. I am satisfied that the Executive Order does not purport to have legislative effect. I am satisfied that it is no more than an administrative order and, being such, is lawfully made.

184. That being said, however, I am also satisfied that the contention made on behalf of the Chief Executive that the Executive Order, in laying down a body of 'legal procedures', complies with the requirements of art.30 of the Basic Law is incorrect. The Executive Order, as an administrative order, does not comply with art.30 nor is it capable of doing so. For the purposes of clarity, there will be a declaration to this effect.

*(iv) The remedy of temporary validity*

185. I am satisfied that any legal vacuum brought about by the declarations I make will constitute a real threat to the rule of law in Hong Kong if law enforcement agencies are unable to conduct covert surveillance, including the interception of private communications, until corrective legislation can be put in place. I am informed that it may take six months to put that corrective legislation into place.

186. That being the case, I order that the effect of the declarations that I have made will be suspended for a period of six months. There will therefore be an order in terms of the order contained in para.46 of this judgment.

*[i.e. 'S.33 of the Telecommunications Ordinance and the Executive Order, notwithstanding the judgment of the court, are valid and of legal effect for a period of six months from the date hereof, the parties having liberty to apply.']*

187. The orders made under this judgment include an order that there be liberty to apply."