# FACC No. 5 of 2017

[2018] HKCFA 2

**IN THE COURT OF FINAL APPEAL OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 5 OF 2017 (CRIMINAL)**

(ON APPEAL FROM HCMA NO 229 OF 2016)

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BETWEEN

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| **HKSAR** | **Respondent** |
| **and** |  |
| **LEUNG, HIU YEUNG (梁曉暘)(D1)** | **Appellant** |

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| Before : | | Chief Justice Ma, Mr Justice Ribeiro PJ,  Mr Justice Tang PJ, Mr Justice Fok PJ and  Lord Hoffmann NPJ | | |
| Date of Hearing and Judgment: | | | 10 January 2018 | | |
| Date of Reasons for Judgment: | | | 1 February 2018 | | |
|  | **REASONS FOR JUDGMENT** | | |  | | |

**Chief Justice Ma:**

1. I agree with the Reasons for Judgment of Mr Justice Ribeiro PJ.

**Mr Justice Ribeiro PJ:**

1. At the hearing, the Court unanimously dismissed this appeal with reasons to be provided later. My reasons are as follows.
2. The immediate question raised on this appeal is whether a police officer carrying out duties within the precincts of the Legislative Council (“Legco”) qualifies as an “officer of the Council” so that obstructing him in the execution of his duty constitutes an offence against section 19(b) of the Legislative Council (Powers and Privileges) Ordinance (“LC(PP)O”).[[1]](#footnote-1) That section provides:

“Any person who ... assaults, interferes with, molests, resists or obstructs any officer of the Council while in the execution of his duty ... commits an offence and is liable to a fine of $10,000 and to imprisonment for 12 months.”

1. A broader question also arises as to the circumstances in which police officers may lawfully enter and perform policing duties within Legco’s precincts.

A. The events leading to the present appeal

1. On 13 June 2014, Legco’s Finance Committee was in session, discussing a funding application relating to advanced works at the North East New Territories New Development areas. Persons who objected to such development were demonstrating outside the Chamber, initially at a designated demonstration area. However, some of the protesters rushed to the entrances of the Legco building with a view to gaining entry through glass doors which had been locked and which were barred by metal Mills barriers set up in front of those doors.
2. As the protesters started removing the Mills barriers, ignoring the warnings of Legco security staff against doing so, the Chief Security Officer of Legco became concerned about the developing disorder and sought instructions from Mr Jasper Tsang Yok-sing (“Mr Tsang”), who was the President of Legco and concurrently Chairman of the Legislative Council Commission (“LCC”). Mr Tsang testified that he regarded issues of security and order as falling within the management of the LCC of which he was Chairman; that he believed that dealing with the developing security and crowd control problems was beyond the capacity of Legco’s security personnel and that he, with the agreement of other members of the Commission, decided to seek assistance from the police who entered the lobby to stand by at his request.
3. Using bamboo poles, metal bars and the Mills barriers, wielded with considerable violence, the protesters attempted to force their way into the Legco complex by prising open or battering in the glass doors. Their actions lasted nearly half an hour. A Legco security officer was injured, sustaining fractured toes caused by a falling Mills barrier. Damage costing some $200,000 was occasioned to property at the entrances assaulted.
4. The appellant and one Wong Ho Ming (amongst others) participated in this violent behaviour. And when the police attempted to form a cordon to disperse the protesters from the front entrance, the appellant “vigorously shoved the police officers forming the line”.[[2]](#footnote-2)
5. Both the appellant and Wong Ho Ming were convicted of unlawful assembly contrary to section 18(3) of the Public Order Ordinance.[[3]](#footnote-3) Additionally, because of his actions against the officers forming the police cordon, the appellant was convicted[[4]](#footnote-4) of obstructing an officer of the Council while in the execution of his duty contrary to section 19(b) of the LC(PP)O, the officer in question being named as Inspector of Police Kwok Chun-kit (“Inspector Kwok”).
6. LC(PP)O section 2(1) provides that the phrase “officer of the Council”:

“... means the Clerk or any other officer or person acting within the precincts of the Chamber under the orders of the President and includes any police officer on duty within the precincts of the Chamber.”

1. On any day the Council or a committee is sitting (as was the case on 13 June 2014), the “precincts of the Chamber” are relevantly defined to mean, “the entire building in which the Chamber is situated and any forecourt, yard, garden, enclosure or open space adjoining or appertaining to such building and used or provided for the purposes of the Council”.[[5]](#footnote-5)
2. The applications by the appellant and Wong Ho Ming for leave to appeal to this Court against their convictions for unlawful assembly were dismissed.[[6]](#footnote-6) However, the appellant was granted leave to appeal against his conviction under section 19(b), the following questions of law being certified, namely:

*Question 1*: Do police officers entering the “precincts of the Chamber” as defined in s 2 of LC(PP)O to deal with issues arising under s 8(3) LC(PP)O, require an authority given under s 8(2) or (3) LC(PP)O?

*Question 2*: When a police officer enters the precincts of the Chamber as defined in [s 2 LC(PP)O] but without an authority under s 8(2) or (3) LC(PP)O, is that police officer “on duty within the precincts of the Chamber” and so an “officer of the Council” within the meaning of s 2 LC(PP)O?

B. The appellant’s case

1. The appellant seeks to challenge his conviction on two main grounds. He contends (i) that Inspector Kwok was not an officer of the Council within the meaning of section 19(b); and (ii) that even if Inspector Kwok was such an officer, he was not acting in the execution of his duty when obstructed by the appellant.

C. The first ground: Not an officer of the Council

1. While Mr Philip Dykes SC[[7]](#footnote-7) introduced certain modifications in his oral submissions,[[8]](#footnote-8) the appellant’s reasoning in support of the first ground as set out in his Written Case proceeds as follows:
   1. A police officer is only allowed to enter and remain within the precincts of the Chamber if invited to do so by or on the authority of the President.[[9]](#footnote-9)
   2. Without an invitation, a police officer is not lawfully within those precincts and is therefore not an “officer of the Council”.[[10]](#footnote-10)
   3. Although in the present case, Mr Tsang, the President of Legco, did request police assistance, he did so in a different capacity, namely, as Chairman of the LCC, so that his invitation was ineffective to justify entry of the police officers.[[11]](#footnote-11)
   4. Moreover, in order to qualify the police officers as “officers of the Council”, it was necessary for Mr Tsang to issue an administrative instruction pursuant to LC(PP)O section 8[[12]](#footnote-12) directing the closure of Legco on the evening of 13 June 2014 before seeking the help of the police in enforcing that instruction.[[13]](#footnote-13)
   5. It might have been possible for the President to invite the officers onto the premises without issuing a specific administrative instruction because of apprehended disorder, thus qualifying them as “officers of the Council”, but that did not occur and, in any event, such an invitation would not have met the requirements of the second argument discussed below.[[14]](#footnote-14)
2. The appellant argues that a prior invitation was an essential requirement for lawful entry by police officers because unrestricted entry would be incompatible with the principle of the separation of powers. It would mean that the Commissioner of Police who, subject to orders of the Chief Executive, has the right of “supreme direction” of the police force under section 4 of the Police Force Ordinance (“PFO”),[[15]](#footnote-15) could direct officers to enter Legco premises “when the President had not invited them, or even did not want them to enter.”[[16]](#footnote-16)
3. Support for this argument is sought from Article 78 of the Basic Law (which gives members of Legco immunity from arrest when attending or on their way to a meeting of the Council) on the footing that “[this] must include a power to refuse entry to persons, including police officers, who seek entry to Legco premises to arrest a Member and the power to eject if the police officers are already inside.”[[17]](#footnote-17)
4. It is argued that powers given to police officers at common law and under the PFO, as a matter of construction and for like reasons of policy, provide no basis for police officers to enter and carry out policing duties in the precincts of Legco without a prior invitation.[[18]](#footnote-18)

D. The first ground is untenable

1. This ground of the appellant’s challenge to his conviction cannot be accepted. There is no legal foundation for the premise that a police officer can enter the precincts of Legco only by invitation or on the authority of the President.

D.1 Article 78 of the Basic Law

1. Article 78 of the Basic Law, relied on by the appellant, provides no support. It states:

“Members of the Legislative Council of the Hong Kong Special Administrative Region shall not be subjected to arrest when attending or on their way to a meeting of the Council.”

1. Article 78 therefore immunises members of Legco from arrest when going about the core business of the legislature – attending meetings of the Council. It has no relevance to persons who are not members, charged with offences such as those for which the appellant was convicted.
2. Provisions with a purpose similar to that of Article 78 can be found in the LC(PP)O, including those safeguarding freedom of speech and debate in the Council;[[19]](#footnote-19) immunising Legco members against civil or criminal proceedings for things said in, or reported in writing to, the Council;[[20]](#footnote-20) protecting members from arrest for any criminal offence whilst attending a sitting of the Council or a committee;[[21]](#footnote-21) and so forth. The object of such provisions is to ensure freedom of speech and debate essential to the legislative process. They provide no basis for suggesting that the presence of police officers in Legco’s precincts, performing their ordinary duties of preserving public order and enforcing the general criminal law,[[22]](#footnote-22) is somehow inconsistent with such constitutional and statutory safeguards.
3. Far from conferring any form of protection for persons in the appellant’s position, the immunities created by Article 78 and the abovementioned LC(PP)O provisions do not restrict the criminal liability even of members of the legislature in respect of ordinary criminal offences whose enforcement has no adverse impact on the core business of Legco. This is in line with the position at common law as explained by the UK Supreme Court in *R v Chaytor*,[[23]](#footnote-23) in connection with parliamentary privilege.[[24]](#footnote-24) The enforcement of the ordinary criminal law within the precincts of Legco does not involve any infringement of the separation of powers principle.
4. Constitutional issues and questions regarding contempt of the legislature might arise if the police were to insist on entering the Legco Chamber contrary to the wishes of the President and the Council, for instance to effect certain arrests. However, no such issues arise in the present case.

D.2 The LC(PP)O provisions

1. The provisions of the LC(PP)O support the proposition that police officers carrying out their ordinary duties within the precincts of Legco qualify as “officers of the Council” without the need for any prior invitation to enter the complex.
2. Thus, LC(PP)O section 2(1) defines “officer of the Council” to include “any police officer on duty within the precincts of the Chamber”. It says nothing about such officer having first to be invited to enter the premises. It provides that as long as the officer is “on duty” within those precincts, he or she qualifies as an “officer of the Council”.
3. The LC(PP)O exempts all officers of the Council from rules restricting admittance without any qualification regarding police officers. Thus, LC(PP)O section 8, while generally providing that sittings of the Council shall be open to the public,[[25]](#footnote-25) stipulates that “[the] right of persons *other than* members or *officers of the Council* to enter or remain within the precincts of the Chamber shall be subject to the Rules of Procedure or any resolution of the Council limiting or prohibiting the enjoyment of such right”.[[26]](#footnote-26) Thus, the rightof officers of the Council to enter or remain within the precincts of the Chamber is enjoyed without being subject to such Rules or resolutions. If it had been intended that police officers should require a prior invitation by or on behalf of the President, one would have expected the exemption to be suitably qualified.
4. Similarly, LC(PP)O section 8(3) provides:

“The President may from time to time, for the purpose of maintaining the security of the precincts of the Chamber, ensuring the proper behaviour and decorum of persons therein and for other administrative purposes, issue such administrative instructions as he may deem necessary or expedient for regulating the admittance of persons (*other than members or officers of the Council*) to, and the conduct of such persons within, the Chamber and the precincts of the Chamber.” (Italics supplied)

Thus, the admittance of officers of the Council to the precincts of the Chamber is not subject to regulation by restrictive administrative instructions. Once again, there is no qualification making the admittance of police officers conditional upon a prior invitation.

1. LC(PP)O section 20, which makes it an offence to enter or attempt to enter the precincts of the Chamber in contravention of rules referred to in section 8(2) or in contravention of instructions regulating admittance under section 8(3), makes it clear that the offence does not apply to officers of the Council in general.
2. Where the President’s permission is necessary – for instance, to enter particular parts of the Legco complex – this is expressly specified in the rules. Thus, for instance, section 4(1) of the Administrative Instructions for Regulating Admittance and Conduct of Persons[[27]](#footnote-27) (“the Administrative Instructions”) provides: “No person other than a Member or an officer of the Council shall enter the antechamber marked as such on the plan or any committee room without the permission of the President.” Administrative Instructions, sections 4(2), 5, 6 and 7 are to similar effect.
3. The LC(PP)O and Administrative Instructions therefore lay down a statutory scheme for regulating admittance which affirms the right of officers of the Council to enter and remain within Legco’s precincts. There is no suggestion that a prior invitation is needed in the case of police officers on duty within those precincts. Of course in practice, if police assistance is required, it is likely that a request will be made by a responsible person in Legco. It is unnecessary for this to be done by the President acting as such. There is no reason, for instance, why a security officer should be precluded from calling the police for help if needed. And entry without such an invitation does not make the presence of a police officer on duty within the precincts of Legco unlawful and does not deprive such an officer of his status as an officer of the Council for the purposes of section 19(b).

D.3 The police were in any event invited to enter

1. Even if, contrary to the foregoing analysis, the appellant is correct in his submission that in order to qualify as officers of the Council, police officers like Inspector Kwok needed an invitation to enter issued by the President of Legco, the police officers concerned did in fact receive such an invitation. It was issued by Mr Tsang, who served simultaneously as President of Legco and Chairman of the LCC.
2. It cannot matter that Mr Tsang considered himself to be acting as Chairman of the LCC when requesting police assistance, since objectively and as a matter of law, he was also President of Legco when he sought police intervention. Indeed, pursuant to section 4(1)(a) of the Legislative Council Commission Ordinance,[[28]](#footnote-28) Mr Tsang was *ex officio* Chairman of the LCC because he was President of Legco.

*D.4 The appellant’s modified stance*

1. At the hearing, Mr Dykes SC retreated from the position taken in the Written Case that police officers may not lawfully enter Legco’s precincts at all unless invited to do so by on or behalf of the President. He submitted that police officers could lawfully enter and perform their ordinary duties in those precincts but that, unless they had been invited to do so, they would only be acting as police officers, but not as officers of the Council. He accepted that a person obstructing them in the execution of their duty in such circumstances could properly be convicted of an offence of resisting a police officer acting in the execution of his duty under PFO section 63, but not of the offence under LC(PP)O section 19(b).
2. This modified approach seriously undermines the first ground of the appellant’s appeal. Once it is accepted that no invitation is needed to enable a police officer lawfully to enter Legco’s precincts to perform his ordinary duties, it is difficult to see how one can deny that such an officer comes within the definition of an “officer of the Council” in LC(PP)O section 2(1) since he would be a “police officer on duty within the precincts of the Chamber”. Obstructing him in the execution of his duty would thus trigger liability under section 19(b).

E. The second ground: Inspector Kwok was not acting in the execution of his duty

1. This argument runs as follows:
   1. The appellant was convicted on the basis that he obstructed Inspector Kwok who, along with other police officers, purported to be acting in the execution of their duty by preventing the appellant and other protesters from gaining access to Legco.
   2. However, there is a public right of access to the Council which can only be suspended or abrogated by a written authority such as a Legco Rule of Procedure, a Council Resolution or an administrative instruction issued by the President.[[29]](#footnote-29) Thus, for instance, the President might have issued an administrative instruction under LC(PP)O section 8(3) closing Legco on the evening of 13 June 2014.[[30]](#footnote-30) But he did not do so.
   3. Since there was no written authority to restrict access to the Council in place, Inspector Kwok and the other officers were not acting in the execution of their duty in purporting to deny the protesters entry through the entrances to Legco.[[31]](#footnote-31)
2. That argument is without merit. A lawful restriction on access to Legco was plainly in place and the police officers were assisting security staff to enforce such restriction in the execution of their duty when obstructed by the appellant.
3. As we have seen, LC(PP)O section 8(3) authorises the President from time to time, for the purpose of maintaining the security of the precincts of the Chamber, to issue such administrative instructions as he may deem necessary or expedient for regulating the admittance of persons (other than members or officers of the Council) to those precincts. Two administrative instructions issued by the President were in force on 13 June 2014 and were relevant in the circumstances then obtaining.
4. Section 11 of the Administrative Instructions provides:

“Persons entering or within the precincts of the Chamber shall behave in an orderly manner and comply with any direction given by any officer of the Council for the purpose of keeping order.”

1. Legco security staff, who were officers of the Council, had blocked off the entrances to the building and refused the protesters access. The protesters, who were behaving in a disorderly manner, refused to comply with their directions to desist from removing the Mills barriers or trying to force their way into the premises. The police officers were acting in the execution of their duty (both under the PFO and as officers of the Council under LC(PP)O section 19(b)) in helping to enforce those directions, given for the purpose of keeping order pursuant to section 11 of the Administrative Instructions.
2. Secondly, section 12(3) of the Administrative Instructions authorises an officer of the Council:

“... [to] refuse admission to a press or public gallery to any person ... who, in the opinion of an officer of the Council, ... may ... behave in a disorderly manner.”

1. The protesters were evidently intent on entering the Legco building to disrupt the Committee meeting in progress, possibly involving disruption from a press or public gallery. Legco’s security officers were acting lawfully pursuant to section 12(3) in refusing them admission to the complex on the footing that they were behaving, and likely to behave, in a disorderly manner. Inspector Kwok and the other officers were acting lawfully in the execution of their duty (as police officers and officers of the Council) in helping to enforce such refusal of entry.

F. Conclusion

1. For the foregoing reasons I concluded that this appeal had to be dismissed.
2. My answer to Question 1 is “No” subject to the observation that entry may be to carry out the police officers’ ordinary duties, not necessarily confined to dealing with issues arising under section 8(3). My answer is “Yes” to Question 2, assuming that the officer enters the precincts of the Chamber in order to carry out his ordinary policing duties.

**Mr Justice Tang PJ:**

1. I agree with the Reasons for Judgment of Mr Justice Ribeiro PJ.

**Mr Justice Fok PJ:**

1. I agree with the Reasons for Judgment of Mr Justice Ribeiro PJ.

**Lord Hoffmann NPJ:**

1. I agree with the Reasons for Judgment of Mr Justice Ribeiro PJ.

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| (Geoffrey Ma)  Chief Justice | (R A V Ribeiro)  Permanent Judge | (Robert Tang)  Permanent Judge |

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| (Joseph Fok)  Permanent Judge | (Lord Hoffmann)  Non-Permanent Judge |

Mr Philip Dykes, SC and Mr Douglas Kwok, instructed by Bond Ng Solicitors, assigned by the Director of Legal Aid, for the Appellant

Mr Jonathan Man, SADPP and Mr Derek Lau, SPP of the Department of Justice, for the Respondent

1. Cap 382. [↑](#footnote-ref-1)
2. Magistrate’s Statement of Findings, §10. [↑](#footnote-ref-2)
3. Cap 245. [↑](#footnote-ref-3)
4. Before the Magistrate Mr Jason Wan Siu-ming, ESCC 3658/2014 (30 December 2015), upheld by Wong J, HCMA 229/2016 (25 January 2017). [↑](#footnote-ref-4)
5. Section 2(1) of the LC(PP)O. [↑](#footnote-ref-5)
6. Ma CJ, Ribeiro and Tang PJJ, FAMC 18/2017 (15 August 2017). [↑](#footnote-ref-6)
7. Appearing with Mr Douglas Kwok for the appellant. [↑](#footnote-ref-7)
8. Discussed in Section D.4 of this judgment. [↑](#footnote-ref-8)
9. Appellant’s written case (“AWC”) §7. [↑](#footnote-ref-9)
10. *Ibid*. [↑](#footnote-ref-10)
11. AWC§§10, 72 and 73. [↑](#footnote-ref-11)
12. Set out in Section D.2 below. [↑](#footnote-ref-12)
13. AWC§§69-70. [↑](#footnote-ref-13)
14. AWC§71. [↑](#footnote-ref-14)
15. Cap 232. [↑](#footnote-ref-15)
16. AWC§13. [↑](#footnote-ref-16)
17. AWC§64. [↑](#footnote-ref-17)
18. AWC§§11, 39-58. [↑](#footnote-ref-18)
19. LC(PP)O section 3. [↑](#footnote-ref-19)
20. LC(PP)O section 4. [↑](#footnote-ref-20)
21. LC(PP)O section 5. [↑](#footnote-ref-21)
22. PFO section 10 relevantly includes among the general duties of the police force, duties “to take lawful measures for - (a) preserving the public peace; (b) preventing and detecting crimes and offences; (c) preventing injury to life and property; (d) apprehending all persons whom it is lawful to apprehend and for whose apprehension sufficient grounds exists; (e) regulating processions and assemblies in public places or places of public resort; ... (g) preserving order in public places and places of public resort, at public meetings and in assemblies for public amusements, for which purpose any police officer on duty shall have free admission to all such places and meetings and assemblies while open to any of the public; ... (o) protecting public property from loss or injury; ...(r) executing such other duties as may by law be imposed on a police officer.” Section 10(r) preserves the common law powers and duties of police officers, for example, the power of arrest without warrant where there is a breach of the peace or reasonable apprehension of an imminent breach of the peace: *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at §80. [↑](#footnote-ref-22)
23. [2011] 1 AC 684. [↑](#footnote-ref-23)
24. Derived from Article 9 of the Bill of Rights 1689 and the customary recognition of matters within the exclusive cognisance of Parliament. [↑](#footnote-ref-24)
25. LC(PP)O section 8(1). [↑](#footnote-ref-25)
26. LC(PP)O section 8(2) (italics supplied). [↑](#footnote-ref-26)
27. Cap 382A. [↑](#footnote-ref-27)
28. Cap 443. Section 4(1)(a): “The Commission shall consist of the following members ... the President of the Council, who shall be Chairman of the Commission”. [↑](#footnote-ref-28)
29. AWC§6. [↑](#footnote-ref-29)
30. AWC§69. [↑](#footnote-ref-30)
31. AWC§71 and §76(1). [↑](#footnote-ref-31)