# FAMC Nos. 13 and 14 of 2024

**[2024] HKCFA 22**

# FAMC No. 13 of 2024

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

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**MISCELLANEOUS PROCEEDINGS NO. 13 OF 2024 (CRIMINAL)**

(ON APPLICATION FOR LEAVE TO APPEAL

FROM HCMA NO. 99 OF 2023)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

BETWEEN

|  |  |  |
| --- | --- | --- |
|  | **HKSAR** | **Respondent** |
|  | **and** |  |
|  | **TANG NGOK KWAN (鄧岳君)** | **1st Applicant** |
|  | **TSUI HON KWONG (徐漢光)** | **2nd Applicant** |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# FAMC No. 14 of 2024

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

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**MISCELLANEOUS PROCEEDINGS NO. 14 OF 2024 (CRIMINAL)**

(ON APPLICATION FOR LEAVE TO APPEAL

FROM HCMA NO. 99 OF 2023)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

BETWEEN

|  |  |  |
| --- | --- | --- |
|  | **HKSAR** | **Respondent** |
|  | **and** |  |
|  | **CHOW HANG TUNG (鄒幸彤)** | **Applicant** |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

|  |  |
| --- | --- |
| Appeal Committee: | Mr Justice Ribeiro Acting CJ, Mr Justice Fok PJ and Mr Justice Lam PJ |
| Date of Hearing and Determination: | 31 July 2024 |

|  |  |  |
| --- | --- | --- |
|  | **DETERMINATION** |  |

**The Appeal Committee:**

1. We refer to the applicants in these applications for leave to appeal individually as A1 (Tang Ngok Kwan), A2 (Tsui Hon Kwong)[[1]](#footnote-1) and A3 (Chow Hang Tung),[[2]](#footnote-2) and as “the applicants” collectively.
2. On 25 August 2021, the Commissioner of Police (“CP”) served a Notice (“the Notice”) on the applicants requiring them to provide specified information and documents within 14 days. The Notice stated that it was served pursuant to section 3(1) of Schedule 5 (“Schd 5 s 3(1)”) of the Implementation Rules (“IR”) made under Article 43(5) of the National Security Law (“NSL”).
3. The applicants declined to provide the information and were charged with and convicted of an offence under IR Schd 5 s 3(3)(b) of failing to comply with the Notice.[[3]](#footnote-3)
4. They now seek leave to appeal on points of law as well as on the substantial and grave injustice (“SGI”) basis. The questions and SGI issues formulated by them are set out below in the Appendix to this Determination. Question (7), proposed by A1 and A2, was only placed before the Appeal Committee at the start of the hearing.
5. We are satisfied that leave to appeal should be granted to all the applicants in respect of Questions 1, 2 and 3 set out below as being of the requisite importance and reasonably arguable. They are based on the applicants’ Questions, re-formulated as deemed necessary. The Questions on which leave is granted are as follows:

Question 1

What are the elements of the offence under IR Schd 5 s 3(3) and in particular, was it necessary for the prosecution to prove that the Hong Kong Alliance in Support of Patriotic Democratic Movements of China was in fact a “foreign agent” as defined by IR Schd 5 s 1, as opposed to an organization which the Commissioner of Police had reasonable grounds to believe was such a “foreign agent”?

Question 2

Was a challenge by way of defence to the validity of the Notice and its service on the applicants excluded by the “same person” test referred to in *HKSAR v Chow Hang Tung* [2024] HKCFA 2?

Question 3

Could the Notice validly require the production of information which came into existence before the promulgation of the NSL or the making of IR Schd 5?”

1. We refuse leave to appeal in respect of Questions 4, 5 and 7 proposed by A1 and A2, set out in the Appendix. We do not consider Question 4 reasonably arguable and do not consider that Question 5 arises in the appeal. Mr Robert Pang SC, appearing for A1 and A2 did not press for leave on those two Questions.
2. Leave to appeal is also refused in respect of Question 7 which raises potentially far-reaching issues not mentioned or considered below. We are not prepared to entertain such an application when introduced for the first time at this stage.
3. We grant leave to appeal on the SGI basis confined to the issue of whether the upholding of public interest immunity by the Courts below was erroneous and/or resulted in the denial of a fair trial for the applicants.
4. The appeal will be listed for hearing on 8 January 2025.

|  |  |  |
| --- | --- | --- |
| (R A V Ribeiro) | (Joseph Fok) | (M H Lam) |
| Acting Chief Justice | Permanent Judge | Permanent Judge |

***FAMC 13/2024***

Mr Robert Pang SC and Mr Esmond Wong, instructed by Kenneth Lam, Solicitors, for the 1st and 2nd Applicants

***FAMC 14/2024***

The Applicant appeared in person

***Department of Justice***

Mr Jonathan Man DDPP, Mr Ivan Cheung ADPP and Ms Karen Ng SPP, of the Department of Justice, for the Respondent

APPENDIX

A1 & A2 (Tang Ngok Kwan & Tsui Hon Kwong, FAMC 13/2024)

Points of law

(1) “When prosecuting the offence of a failure on the part of a foreign or Taiwan agent to comply with a notice served under section 3(1)(b) of Schedule 5 of the Implementation Rules (‘Notice’ and ‘IR’ respectively) made under Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (‘Schedule 5’ and ‘NSL’ respectively), contrary to sections 3(3)(a) and 3(3)(b) of Schedule 5 respectively, is the prosecution required to prove that the Notice was, as a matter of fact, served on a foreign or Taiwan agent as defined in section 1 of Schedule 5?”

(2) “In determining if a defendant can raise a collateral challenge in non-constitutional challenges in a criminal prosecution, whether the ‘same person’ test stated in *HKSAR v Chow Hang Tung* [2024] HKCFA 2 (‘CHT’) applies in all such cases or it depends on the construction of all the relevant offence-creating statutory provisions?”

(3) “If the answer to question (2) is that the ‘same person’ test is not conclusive, can a defendant challenge a Notice's legality by way of defence to an information alleging an offence of non-compliance under sections 3(3)(a) and 3(3)(b) of Schedule 5 (the ‘Offence’)?”

(4) “Did the Notice go beyond requiring ‘information’ by requiring the production of ‘documents’?”

(5) “Whether Schedule 5 is exempt from data protection principle 3 under Schedule 1 of the Personal Data (Privacy) Ordinance, Cap. 486 regarding the use of personal data held by a foreign or Taiwan agent?”

(6) “Could the Notice require the production of information which existed before the promulgation of the NSL or the making of Schedule 5?”

(7) “Whether the judge or magistrate considering Public Interest Immunity Claims in criminal proceedings according to the procedure set out in *R v Davis* [1993] 1 WLR 613, *R v Turner* [1995] 1 WLR 264 and *HKSAR v Agara* [2014] 2 HKLRD 648, can also act as the tribunal of fact in the trial having considered unredacted material unavailable to the defence?”

Substantial and grave injustice

A2 and A3 allege that they have “suffered a substantial and grave injustice as the Judge departed from accepted norms in conducting the rehearing of the case, which led to the Judge's decision to dismiss the appeal against the conviction.”

A3 (Chow Hang Tung, FAMC 14/2024)

Points of law

“For the offence of failing to comply with a notice served on a foreign agent or Taiwan agent to provide information contrary to section 3(3)(b) of Schedule 5 to the Implementation Rules for Article 43 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (Instrument A406A) (the “Offence”) what are the elements of the offence?

In particular,

* 1. Is it an element of the offence that the subject organization involved was a foreign agent or Taiwan agent?
  2. Is the legality of the subject notice an element of the offence that is open to challenge by way of defence?”

Substantial and grave injustice

And further or in the alternative that a substantial and grave injustice has been done to the Applicant as:

1. She was convicted and sentence under a law regulating foreign agent when the subject organization was not a foreign agent;
2. She was sentenced to near the maximum sentence allowed in the first ever prosecution under the offence when she was merely conducting herself in accordance with a plain and honest rending of the law and could not have predicted the Courts’ creative interpretation of the relevant provisions.
3. The Judge’s dismissal of the appeal against sentence was made on the mistaken premise that the maximum sentence for the offence is 2 years imprisonment instead of 6 months.

1. Applicants in FAMC 13/2024. [↑](#footnote-ref-1)
2. Applicant in FAMC 14/2024. [↑](#footnote-ref-2)
3. Before Mr Peter Law, Principal Magistrate, [2023] HKMagC 2 (4 March 2023). Their appeal before Anna Lai J was dismissed, [2024] HKCFI 553 (14 March 2024). [↑](#footnote-ref-3)