FACC Nos. 2, 3, 4, 5 and 6 of 2024
[2024] HKCFA 24

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NOS. 2, 3, 4, 5 AND 6 OF 2024 (CRIMINAL)
(ON APPEAL FROM CACC NO. 84 OF 2021)

BETWEEN

HKSAR	**Respondent**
and	
NG NGOI YEE MARGARET (吳靄儀) (D3)	**Appellant in FACC 2/2024**
HO CHUN YAN (何俊仁) (D6)	**1st Appellant in FACC 3/2024**
LEE CHU MING MARTIN (李柱銘) (D8)	**2nd Appellant in FACC 3/2024**
LEUNG KWOK HUNG (梁國雄) (D4)	**Appellant in FACC 4/2024**
LEE CHEUK YAN (李卓人) (D2)	**1st Appellant in FACC 5/2024**
HO SAU LAN CYD (何秀蘭) (D5)	**2nd Appellant in FACC 5/2024**
LAI CHEE YING (黎智英) (D1)	**Appellant in FACC 6/2024**

Before: Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Lord Neuberger of Abbotsbury NPJ

Date of Hearing: 24 June 2024

Date of Judgment: 12 August 2024

J U D G M E N T

Chief Justice Cheung and Mr Justice Ribeiro PJ:

A. The background

1. These appeals arise out of a public gathering planned by an organisation known as the Civil Human Rights Front ("CHRF") to be held on 18 August 2019 "to protest against the abuse of power by the Police". This was during the serious public order disturbances then occurring in Hong Kong. In accordance with the Public Order Ordinance ("POO")[1] CHRF had notified the Commissioner of Police ("CP") of its intention to hold a public assembly at Victoria Park to be followed by a procession to Chater Road and a further public assembly to be held there. CHRF's proposal was for the Victoria Park meeting to be held from 10.00 am to 6.00 pm; then a public procession following a defined route from Victoria Park to Chater Road, to take place from 3.00 pm to 7.00 pm; finishing with a public meeting at Chater Road from 5.00 pm to 11.59 pm.

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[1] Cap 245.

2. The CP informed CHRF that he had no objection to the Victoria Park meeting (at which 300,000 participants were said to be expected). But he objected to the procession and subsequent meeting citing the interests of public safety, public order and protection of the rights and freedom of others. The CP's decision was upheld by the Appeal Board.[2] The procession and subsequent meeting were thereby prohibited by virtue of POO section 17A(2).[3]

3. CHRF expressed their discontent at those prohibitions and stated at a press conference that since the police had not made arrangements for the dispersal of the crowd at Victoria Park, they would arrange for "pro-democracy legislators and influential people" to help participants to disperse safely.

4. The public assembly was then held as had been permitted. But it was the prosecution's case that, although prohibited, a public procession from Victoria Park to Chater Road nevertheless took place following upon the public assembly, constituting an unauthorised assembly. Under POO section 17A(3), every person who without lawful authority or reasonable excuse, knowingly takes part in or organizes such an unauthorized assembly or any public procession after the same has become an unauthorized assembly is guilty of an offence.

5. The appellants were referred to as D1, D2, D3, D4, D5, D6 and D8 respectively at trial.[4] To avoid confusion, we shall continue to refer to them individually as such, and collectively as "the defendants". The prosecution alleged

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2 Constituted under POO section 44.

3 POO section 17A(2)(a) relevantly provides: "Where ... any ... public procession takes place in contravention of section ... 13; ... the ... public procession ... shall be an unauthorized assembly." POO section 13 materially provides that a public procession may take place if, but only if, the intention to hold it is notified to the CP and he issues a notice of no objection.

4 D1: Lai Chee Ying; D2: Lee Cheuk Yan; D3: Ng Ngoi Yee Margaret; D4: Leung Kwok Hung; D5: Ho Sau Lan Cyd; D6: Ho Chun Yan; and D8: Lee Chu Ming Martin.

that this unauthorised procession was led by the defendants on the pretext that they were helping to ensure the safe dispersal of the crowd. They were consequently charged with organizing an unauthorised assembly, contrary to POO section 17A(3)(b)(i) and with knowingly taking part in an unauthorised assembly, contrary to POO section 17A(3)(a). Apart from objecting to the charges on constitutional grounds (discussed further below), the defendants denied committing such offences, arguing that they had merely assisted in the safe dispersal of the crowd which had gathered for the authorised public meeting.

6. They were all convicted on both charges after trial before HH Judge Woodcock,[5] but the Court of Appeal allowed their appeals on the "organizing" charge, while upholding their convictions for "taking part".[6] The facts as found by the Judge and set out in her Reasons for Verdict,[7] endorsed by the Court of Appeal,[8] and referred to in the Determination of the Appeal Committee ("Determination"),[9] may be summarised as follows.

7. The Judge found (on the basis of the prosecution evidence and extensive video footage) that the defendants had together carried a large banner printed with the words "Stop the police and gangsters from plunging Hong Kong into chaos, implement the five demands" which she found was a slogan indicating the common purpose of the procession. Her Honour also found that the defendants had left Victoria Park leading the crowd out via a single gate (Gate 17), without

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5 Reasons for Verdict ("RfV") [2021] HKDC 398 (1 April 2021).

6 Macrae VP, M Poon and A Pang JJA [2023] 4 HKLRD 484 ("CA"), Macrae VP writing for the Court.

7 RfV§§4-9, 159-175.

8 CA§97.

9 *HKSAR v Lai Chee Ying & Ors* [2024] HKCFA 4 at §§6-11, 18-23.

trying to get them to disperse using other gates; that the timing and the route taken were as CHRF had unsuccessfully proposed to the CP; that there had been no complaints to the police about overcrowding and thus no pressing need for dispersal before the procession started leaving the Park; that dispersal was not mentioned or suggested as the procession passed near various MTR station entrances; that persons finding themselves in its path were asked to make way to allow the procession to pass; and that when it reached Chater Road, the defendants laid down the banner and the march was declared to have finished. The defendants all elected not to give or call evidence.

8. Thus, in relation to the defendants "taking part in an unauthorized procession", the Judge found as follows:

> "I am sure after considering the evidence and submissions that there was an unauthorised public assembly from Victoria Park to Chater Road despite an objection to it by the Commissioner of Police. I am satisfied it consisted of more than 30 persons and was organised for a common purpose, a purpose set out in writing on the banner at the head of the procession. I am sure it was a public assembly that took place in contravention of section 13 of the POO."[10]
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> "I am sure it was not a dispersal plan born out of necessity but an unauthorised public procession as defined by the POO. I am sure the prosecution can prove beyond reasonable doubt that there was a procession as opposed to a dispersal from the Park. Similarly, I am sure the prosecution can prove there was no lawful authority or reasonable excuse to organise or participate in this [procession]."[11]
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> "On the face of it, the news footage shows what can only be described as a public procession with thousands following as the head of the procession chanted slogans relating to the common purpose all the way to what is described as the finish. There was not one word relating to the crowd behind them dispersing safely at MTR stations nearby, be it Causeway Bay, Wanchai or Admiralty. There was no assistance given to the crowd as to how to leave safely. This is contrary to what was described as a water flow dispersal to nearby MTR stations to disperse safely."[12]

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[10] RfV§159.

[11] RfV§160.

[12] RfV§163.

> "I have carefully considered all that [was] said by the CHRF and the 2nd, 4th and 9th defendants in press conferences or interviews after the appeal failed and before the procession began and find there was a call to attend the public meeting and show dissatisfaction at the police ban by intentionally defying it in the name of dispersal."[13]

> "Instead of assisting the crowds to disperse safely, those crowds were led head on into other oncoming crowds in Causeway Bay by the banner party forcing the procession to move very slowly and forcing people coming in the opposite direction to move to avoid them. The banner at one stage had to be folded in half lengthways to get through the oncoming crowd. There was also footage of people in front of the banner party being asked politely to clear [a way] for the procession. If safety was paramount and dispersal the object, then this flies in the face of logic and credibility."[14]

> "... It was only a dispersal plan in name and the truth is it was a planned unauthorized assembly."[15]

9. The Court of Appeal endorsed those findings, holding that the evidence was overwhelming:

> "In relation to the purely factual complaints, the judge's conclusion that the water flow defence was a ruse to get around the ban cannot be criticised in any way as being wrong. The evidence was overwhelming, as was the evidence of the applicants' participation in the unauthorised assembly."[16]

10. The defendants applied for certification of various questions of law as suitable for leave to appeal to this Court but the Court of Appeal confined certification to the question which is set out below. The Appeal Committee granted the defendants leave to appeal solely in respect of that certified question, dismissing their applications for leave on other grounds, including grounds seeking to challenge the above-mentioned findings.[17] An application by the prosecution for leave to appeal against the quashing of the conviction on the "organizing" charge was also dismissed.

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13 RfV§165.

14 RfV§169.

15 RfV§170.

16 CA§97.

17 Determination §41.

11. The certified question is framed as follows:

> "[Whether] the Court should follow the persuasive, though not binding, decision(s) of the Supreme Court of the United Kingdom in *DPP v Ziegler (SC(E)) ["Ziegler"]*[18] and/or *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill ["Abortion Services"]*[19] (which clarified some aspects of *Ziegler*) and, if so, in what circumstances, and to what extent, it should conduct an operational proportionality exercise."

B. The issues raised by the certified question

12. The certified question refers to *Ziegler* and *Abortion Services* and postulates the possibility that, should Hong Kong follow those decisions, an "operational proportionality exercise" may be called for. It is accordingly necessary to consider what is meant by "operational proportionality" and how it relates to those decisions of the United Kingdom Supreme Court ("UKSC").

13. We will first examine the concept of "operational proportionality", placing it within the framework of constitutional challenges and the doctrine of proportionality in Hong Kong. We shall then discuss what was decided in *Ziegler* and *Abortion Services* and examine the extent to which those decisions ought to be followed in this jurisdiction. Finally, we will turn to consider the defendants' arguments in the light of the foregoing discussion.

C. Constitutional challenges in Hong Kong

14. In Hong Kong, fundamental rights are constitutionally guaranteed. They are set out in Chapter III of the Basic Law[20] and in the Hong Kong Bill of

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[18] [2022] AC 408.

[19] [2022] UKSC 32.

[20] Articles 24 to 42 ("BL24-BL42").

Rights[21] which is accorded constitutional status by Article 39 of the Basic Law ("BL39"). As recently reiterated in *HKSAR v Chow Hang Tung*,[22] they are entrenched fundamental rights so that any inconsistent legislative provisions or executive or administrative policies, acts or decisions ("impugned measures") are susceptible to a constitutional challenge and, unless justified, must give way.

15. An important part of many constitutional challenges is a proportionality assessment.[23] This involves a structured inquiry regarding the nature, purpose and extent of the impugned measure's encroachment upon the fundamental right in question. It involves the four-step inquiry explained in *Hysan Development Co Ltd v Town Planning Board* ("*Hysan*").[24] That inquiry, as part of the overall constitutional challenge, determines whether the impugned measure is a disproportionate restriction of the right and therefore unconstitutional and invalid; or whether, on the other hand, the incursion is legitimate, rational and proportionate so that the measure's validity is preserved, in whole or in part.

16. Thus, the doctrine of proportionality operates in Hong Kong at the constitutional level, demarcating the permissible limits of restrictions on constitutionally guaranteed rights. This contrasts with the position in the United Kingdom where proportionality operates at a statutory level under the Human Rights Act 1998 ("HRA") in relation to those provisions of the European

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[21] Reflecting the International Covenant on Civil and Political Rights ("ICCPR") as applied to Hong Kong and as enacted by the Hong Kong Bill of Rights Ordinance (Cap 383) ("HKBORO").

[22] (2024) 27 HKCFAR 71 at §§155-156.

[23] Except where the fundamental right in question is absolute, such as the right in Art 3 of the Bill of Rights ("BOR3") not to be subject to cruel, inhuman or degrading treatment or punishment: see *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743.

[24] (2016) 19 HKCFAR 372 at §§132-142.

Convention on Human Rights ("ECHR") that have been given legislative effect by that Act. While a very similar proportionality analysis derived from the jurisprudence of the European Court of Human Rights ("ECtHR") is adopted by both the Hong Kong and UK courts, the scope and consequences of its application in the UK differ significantly. If a legislative restriction on a Convention right passes the proportionality test, it is held to be compatible. But if it fails that test, the UK courts do not have power to declare the measure unconstitutional and invalid.[25] Instead, the courts have an interpretative obligation under HRA section 3(1), to read and give effect to that provision, so far as possible, in a way that is compatible with Convention rights. And if a compatible interpretation cannot be achieved, the court may make a declaration of incompatibility under HRA section 4. But, as HRA sections 3(2)(b) and (c) and section 4(6) make clear, such steps taken by the courts do not affect the validity, continuing operation or enforcement of any incompatible legislation.[26] This applies to primary legislation. It also applies to subordinate legislation in so far as the primary legislation prevents removal of the incompatibility of the subordinate provision.[27] This basic quality of the UK scheme is important for an understanding of *Ziegler* and *Abortion Services* and bears on their applicability in Hong Kong as later discussed.

D. The approach to constitutional challenges in Hong Kong

17. The approach to constitutional challenges is well-established in our jurisprudence. Whenever a party seeks to challenge the constitutionality of some

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[25] Although, as *Abortion Services* illustrates, a finding of incompatibility may result in a law enacted by a devolved legislature being held statutorily to fall outside that Parliament's legislative competence, ie, to be *ultra vires*.

[26] *Abortion Services* at §59.

[27] As discussed in *Bennion, Bailey and Norbury on Statutory Interpretation* (8th Ed, Ch 29).

legislative provision or some executive or administrative policy or act or decision, ie, some impugned measure:

(a) The court identifies the constitutional right relied on and the impugned measure ("Stage 1");

(b) It asks whether and on what grounds the impugned measure is said to encroach upon and thus to engage that right ("Stage 2");

(c) If, there is such encroachment and the ground of the challenge is that the encroachment excessively and unjustifiably infringes that right, the court undertakes the *Hysan* four-step proportionality inquiry[28] ("Stage 3"), asking:

(i) whether the infringing measure pursues a legitimate aim;

(ii) if so, whether that measure is rationally connected with advancing that aim;

(iii) if so, whether that measure is no more than reasonably necessary for that purpose; and

(iv) whether a reasonable balance has been struck between the societal benefits of the encroachment on the one hand, and the inroads made into the constitutionally protected rights of the individual on the other, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual. This part of the assessment is sometimes referred to as involving proportionality "*stricto sensu*".

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[28] (2016) 19 HKCFAR 372 at §§43-80; §§131-141.

(d) The *Hysan s*tep (iii) at Stage 3 above involves positioning the test or standard for reviewing the impugned measure at a point on a spectrum ranging from a "no more than reasonably necessary" test (where only the least intrusive measures reasonably necessary to achieve the legitimate aim are proportionate), to a test which treats only measures which are "manifestly without reasonable foundation" as disproportionate.[29] Where on that spectrum the standard is to be located in a particular case depends on the margin of discretion to be afforded to the originator of the intrusive measure, which in turn depends on factors such as the significance and degree of interference with the right in question; the identity, expertise and any peculiar knowledge of the decision-maker; as well as the nature and features of the encroaching measure.[30]

(e) If the impugned measure passes the proportionality test, it is held to be a permissible derogation of the right in question. If it does not pass that test, the court proceeds ("Stage 4") to consider whether any remedial order (such as for severance, reading in, reading down or striking out) should be made to preserve the validity of the impugned measure in whole or in part.[31]

(f) If no such remedial possibilities exist, the court declares the impugned measure unconstitutional and invalid ("Stage 5").

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[29] *Ibid* at §§136-137. The Court has also, in some cases, assessed the proportionality of the restriction asking whether it impairs "the very essence of the right" in question, eg: *W v Registrar of Marriages* (2013) 16 HKCFAR 112 at §§65-68; *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735 at §§41-42.

[30] *Hysan* at §107.

[31] *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at §§29, 78 and 84.

18. Some encroachments involve grounds which do not raise issues of proportionality. For example, the impugned measure may not satisfy the "prescribed by law" requirement in that it lacks legal certainty. Another example may involve an impugned measure which is of a nature expressly excluded by a constitutional provision. Thus, for instance, BOR16(3) confines permissible restrictions on the right to freedom of expression to such restrictions "as are provided by law and are necessary (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (ordre public), or of public health or morals". Constitutional challenges based on such grounds do not lend themselves to a Stage 3 analysis. In such cases, if the court finds that the infringement is made out, it proceeds directly to Stage 4 and considers whether some remedial order might be appropriate. If not, the court declares the impugned measure unconstitutional and invalid (Stage 5).

19. We hasten to add that we have identified five stages of the constitutional challenge purely for the purposes of exposition. It is not intended to propose any change to the established principles or to suggest that all challenges must go through all five stages.[32] In a given case, the focus may be on one or other of those five stages and some stages, such as Stage 3, may be skipped as unnecessary or inapplicable.

E. Systemic and operational proportionality

20. The reference to "operational proportionality" in the certified question derives from a distinction drawn by the Court of Appeal in *Leung Kwok Hung v*

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[32] See for instance *Official Receiver v Zhi Charles* (2015) 18 HKCFAR 467 at §§22-23 where the sequence of questions arising on a constitutional challenge was discussed.

Secretary for Justice (No 2) ("LKH No 2")[33] between "systemic proportionality" and "operational proportionality". Their Lordships stated:

> " ... the proportionality analysis has to be applied on two different levels: (1) examining the systemic proportionality by reference to the legislation or rules in question; (2) examining the operational proportionality by reference to the actual implementation or enforcement of the relevant rule on the facts and specific circumstances of a case at the operational level."[34]

21. Thus, the Court of Appeal in *LKH No 2* was distinguishing between constitutional challenges at two levels, differentiating between challenges relating to:

(a) legislative rules or provisions which are said to encroach upon a guaranteed right and which are alleged to be unconstitutional in themselves irrespective of any facts ("systemic" challenges); and

(b) acts or decisions of public officials performed or taken pursuant to a relevant legislative or policy rule which are alleged to impinge upon such a right in the circumstances concerned ("operational" challenges).

22. That distinction arose in the following context. *LKH No 2* was concerned with the constitutionality of the Emergency Regulations Ordinance ("ERO")[35] and of the Prohibition on Face Covering Regulation ("PFCR")[36] made thereunder by the Chief Executive in Council at the height of the public order

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[33] Poon CJHC, Lam V-P (as Lam PJ then was) and Au JA [2020] 2 HKLRD 771. Heard together with *Kwok Wing Hang & Ors v Chief Executive in Council & SJ* (CACV 542 and 583/2019).

[34] *LKH No 2* at §182.

[35] Cap 241.

[36] Cap 241K.

disturbances in 2019. The relevant challenges focused on offences created by PFCR sections 3 and 5.

23. PFCR section 3(1) made it an offence to use any facial covering likely to prevent identification while a person was at (a) an unlawful assembly; (b) an unauthorised assembly; (c) a public meeting; or (d) a public procession; with a defence of lawful authority or reasonable excuse provided by section 4. PFCR section 5 empowered a police officer to require a person in any public place to remove a facial covering, and in case of non-compliance, to remove the same, in order to verify that person's identity, failure to comply being an offence.

24. It was contended by the appellants in that case that those provisions were an unconstitutional derogation from rights to privacy, freedom of expression, assembly, procession and demonstration under BL27 and BOR14, BOR16 and BOR17.

25. The Court of Appeal was thus concerned with a constitutional challenge at a "systemic" level, the contention being that those offences were in themselves unconstitutional. It decided that the two offences created by sections 3(1)(a) and (b) were constitutionally valid,[37] but that those created by paragraphs (c) and (d) involved a disproportionate restriction on the guaranteed rights and were thus unconstitutional. It reasoned that while the offences under (a) and (b) catered for persons involved in unlawful public gatherings, those under (c) and (d), covered participants in public meetings or processions which were not prohibited, and that the latter paragraphs went beyond what was reasonably necessary since other legislative provisions sufficiently guarded against the latter gatherings

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[37] *LKH No 2* at §§237-238, 240-241,

turning violent.[38] Similarly, the Court of Appeal held that section 5 was disproportionate,[39] taking the view that ample powers already existed enabling officers to verify persons' identities where this was reasonably believed to be necessary for the prevention, detection or investigation of any offence.[40]

26. It was in that context that the Court of Appeal referred to the "systemic" and "operational" distinction and arrived at different outcomes in respect of paragraphs (a) and (b), as opposed to (c) and (d). As it turns out, on appeal (reported as *Kwok Wing Hang v Chief Executive in Council*[41]), this Court disagreed with the Court of Appeal's proportionality assessment and held that all four offences created by PFCR section 3(1)[42] were proportionate and constitutionally valid. They had the legitimate aim of countering the emboldening effect of facial coverings for persons intent on breaking the law, and of facilitating law enforcement, investigation and prosecution.[43]

F. Modifying the distinction

27. It is evident that the Court of Appeal in *LKH No 2* was not intending to alter any established principles but was aiming at analytical clarity. It is a helpful distinction which operates at Stage 2 of the framework set out in Section D above. Analytical clarity promotes accurate assessment at each stage of the

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38 *Ibid* at §§242-244, 247-248.

39 *Ibid* at §§266-271, 279-282.

40 Under the Police Force Ordinance (Cap 232) section 54(1)(a).

41 (2020) 23 HKCFAR 518.

42 The defendants/appellants did not challenge the validity of PFCR section 3(1)(a) and the respondents did not appeal the Court of Appeal's invalidation of PFCR section 5.

43 (2020) 23 HKCFAR 518 at §§98-126, 146.

challenge. However, in our view, the distinction would benefit from being modified both as to its scope and its terminology.

28. Its scope should be broadened to distinguish between types of constitutional challenges rather than confining itself to "systemic proportionality" and "operational proportionality", ie, challenges which focus only on the *proportionality* inquiry at Stage 3 above. Narrowing the focus in that way creates the risk that other aspects of a constitutional challenge may not be given due attention.

29. And its terminology should be changed to indicate more transparently the nature of the distinction being drawn. It would help if the distinction were drawn between (i) a challenge to the constitutionality of a rule or policy itself (a "rule challenge"); and (ii) a constitutional challenge to an impugned act or decision (a "decision challenge") taken pursuant to the relevant rule. A decision challenge may relate to an act or decision founded on a rule or policy, such as a legislative enabling power, which is not itself susceptible to a constitutional challenge.

G. Rule challenges

30. As this Section seeks to illustrate, rule challenges may be focused on one or more of the five stages mentioned above. The proportionality of the challenged rule at Stage 3 is important in many, but by no means in all, cases.

G.1 Stage 1: What is the constitutional right relied on and what is the impugned measure?

31. Stage 1 is where the analysis starts and in some cases, where it ends. That occurs, for instance, where a rule challenge is expressly excluded as a matter

of law. For instance, section 11 of HKBORO[44] precludes persons not having the right to enter and remain in Hong Kong from relying on rights in the Bill of Rights to challenge any immigration legislation governing entry into, stay in and departure from Hong Kong or its application. Those rules (and decisions thereunder) are thus not capable of being challenged by the specified classes of persons and attempts to do so do not get past Stage 1.[45]

32. An attempt to challenge the validity of HKBORO section 11 itself also failed at Stage 1 because that section was held to operate at the constitutional level and, since it formed part of the constitution, was not susceptible to constitutional review.[46]

33. Other rule challenges similarly failed at Stage 1 because they were excluded expressly or by necessary implication by the Basic Law. Thus, in *HKSAR v Lai Chee Ying*,[47] the bail provisions of the National Security Law, being part of a law promulgated by the National People's Congress Standing Committee ("NPCSC") in accordance with BL18 and listed in BL Annex III, were not subject to constitutional challenge since legislative acts of the NPCSC are not subject to

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[44] Section 11 reflects the reservation originally registered by the UK Government when extending operation of the ICCPR to Hong Kong. That reservation was retained when the ICCPR as implemented by HKBORO was applied to the HKSAR by BL39.

[45] As in *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138 where a Bill of Rights challenge to administrative detention pending a decision on a removal order under section 32(2A)(a) of the Immigration Ordinance (Cap 115) was excluded by section 11. It may be noted that section 11 also affects decision challenges since it covers both the immigration legislation and "its application".

[46] *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743 at §§48-96; As to section 11's constitutional status see: *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138 at §97 and *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59 at §§28-29.

[47] (2021) 24 HKCFAR 33.

review on the basis of any alleged incompatibility with the Basic Law or the ICCPR as applied to Hong Kong.[48]

34. To take another example, in *Chiang Lily v Secretary for Justice*,[49] the Secretary for Justice's power under section 88 of the Magistrates Ordinance[50] to choose the trial venue was held not to be constitutionally reviewable because BL63 vests in the Department of Justice control of criminal prosecutions, free from any interference.

35. Under the UK's HRA 1998, courts are defined as "public authorities",[51] making judicial acts subject to review under that statute. However, the judicial acts of the HKSAR courts are not so reviewable. Under the Basic Law, the HKSAR is vested with independent judicial power, including that of final adjudication,[52] exercised by our courts[53] "independently and free from any interference".[54] Our courts therefore have the constitutional duty and power to review challenged provisions for inconsistency with entrenched rights under the Basic Law[55] and to decide each case independently and without interference. A lower court's ruling may of course be subject to challenge on appeal. Where, for instance, that ruling is made applying a provision which is then held to be

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48 *Ibid* at §§32-37, citing *Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141 at 142.

49 (2010) 13 HKCFAR 208.

50 Cap 227.

51 Sections 6(1) and 6(3)(a).

52 BL19.

53 BL80, BL81.

54 BL85.

55 BL8, BL11, BL18, BL39: see *HKSAR v Chow Hang Tung* (2024) 27 HKCFAR 71 at §155-156.

unconstitutional on appeal, the ruling will be set aside. But in the absence of a successful constitutional challenge impugning the measure enforced by a court, ordinary judicial acts are not subject to challenge on proportionality grounds.

G.2 Stage 2: Does the impugned measure encroach upon the right relied on?

36. Some rule challenges fail at Stage 2 because the impugned measure does not infringe or engage the right relied on.

37. For example, in the Court's recent decision in *Tam Sze Leung v Commissioner of Police*,[56] the constitutional rights invoked, including the right to the use of private property under BL105, were held not to be engaged because the impugned act of freezing the appellants' bank accounts on suspicion of being the proceeds of crime was not the act of the police but that of the banks involved. There was no infringement of those rights by the CP.

38. To take another example, as pointed out in *HKSAR v Chow Nok Hang*,[57] only non-violent exercise of the rights of free expression, demonstration and cognate rights is constitutionally protected. Thus, where a person taking part in a demonstration indulges in conduct involving violence or the threat of violence or unlawful interference with the rights of others, those guaranteed rights are not engaged and cannot be relied on when that person is prosecuted.

39. There are obviously many possible reasons why an invoked right may not be engaged. Thus, in *Lau Cheong v HKSAR*,[58] a challenge relying on freedom

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[56] [2024] HKCFA 8.

[57] (2013) 16 HKCFAR 837 at §39.

[58] (2002) 5 HKCFAR 415.

from arbitrary arrest, detention or imprisonment under BL28 and BOR5 was mounted against the common law rule that an intention to cause grievous bodily harm is sufficient to establish the *mens rea* of murder, arguing that the rule was arbitrary. The mandatory sentence of life imprisonment for murder was likewise criticised as arbitrary. Those challenges failed, the Court holding that those freedoms were not engaged since the impugned measures did not involve any such arbitrariness.

40. In *HKSAR v Tsim Sum Kit, Ada*,[59] recently handed down, a challenge was mounted against section 3(2) of the Homicide Ordinance[60] on the ground that, by placing on a defendant seeking to rely on diminished responsibility the onus of proving that partial defence, it infringed the defendant's constitutional right to the presumption of innocence. The Court rejected that challenge, holding that the right was not engaged: A defendant raising diminished responsibility is *ex hypothesi* liable to be convicted of murder if that plea fails, meaning that the prosecution will already have done enough to prove the elements of murder beyond reasonable doubt so that the defendant would not be presumed innocent at the point of invoking the partial defence.[61]

41. In *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Others*,[62] the right to choice of lawyers for representation in the courts under BL35 was not engaged because the Disciplinary Committee of the Stock Exchange was not a "court". And in *Medical Council of Hong Kong v Helen Chan*,[63] the

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59 [2024] HKCFA 14.

60 Cap 339.

61 [2024] HKCFA 14 at §§38 and 48.

62 (2006) 9 HKCFAR 234.

63 (2010) 13 HKCFAR 248.

right to a competent, independent and impartial tribunal under BOR10 was held not to be infringed since the practice of the legal adviser retiring with the disciplinary committee during its deliberations did not compromise the committee's independence or impartiality. A like conclusion was reached in *Koon Wing Yee v Insider Dealing Trib0unal*.[64]

G.3 Stage 3: Does the challenged rule satisfy the four-step proportionality inquiry?

42. The *Hysan* four-step proportionality inquiry[65] outlined in Section D above is well known and has been routinely applied both to rule challenges and decision challenges that call into question the proportionality of the impugned measure. Its details do not require reiteration. A failure of the rule challenge at Stage 3 means that the impugned measure meets all the proportionality requirements of the four-step inquiry. The challenge succeeds if the impugned measure fails to measure up to one or other of those requirements.

43. Thus, for example, rule challenges based on freedom of expression[66] failed where offences penalising flag desecration[67] were held to be proportionate.[68] Similarly, rule challenges failed in a series of cases invoking freedom of expression and peaceful assembly when the impugned measures were held to be

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64 (2010) 13 HKCFAR 133.

65 (2016) 19 HKCFAR 372.

66 Invoking BL27 and BOR 16(3)(b).

67 Under the National Flag and National Emblem Ordinance, section 7; Regional Flag and Regional Emblem Ordinance, section 7.

68 *HKSAR v Ng Kung Siu & Anr* (1999) 2 HKCFAR 442; and *HKSAR v Koo Sze Yiu* (2014) 17 HKCFAR 811.

proportionate.[69] Equally, challenges to restrictive procedural provisions in electoral laws failed for the same reason.[70]

44. Challenges to different rules made relying on the same protected right have led to different outcomes in the proportionality analysis. Thus, proportionality challenges to finality provisions alleging inconsistency with the Basic Law's vesting of the power of final adjudication in the Court of Final Appeal[71] have failed in relation to the Arbitration Ordinance[72] and in relation to the finality of the Court of Appeal's refusal of leave to appeal from District Court decisions.[73] However, the challenge succeeded where provisions excluding appeals from the Solicitors Disciplinary Tribunal decisions[74] were held to be more than reasonably necessary.[75] Similarly, challenges mounted against criminal offences allegedly infringing equality rights[76] have had different outcomes on the basis of proportionality assessments. In *So Wai Lun v HKSAR*,[77] the Court held

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69 *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248 (doctor disciplined for engaging in commercial promotion); *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425 (demonstration in public gallery of Legislative Council); *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518 (offences concerning use of facial coverings).

70 *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735; *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353.

71 By BL82.

72 Arbitration Ordinance (Cap 609) section 81(4) and High Court Ordinance (Cap 4) section 14(3)(ea)(iv): *American International Group Inc v Huaxia Life Insurance Co Ltd* (2017) 20 HKCFAR 503.

73 District Court Ordinance (Cap 336) section 63B: *Incorporated Owners of Po Hang Building v Sam Woo Marine Works Ltd* (2017) 20 HKCFAR 240.

74 Under Legal Practitioners Ordinance (Cap 159) section 13.

75 *A Solicitor v Law Society of Hong Kong & SJ (Intervener)* (2003) 6 HKCFAR 570.

76 Under BL25 and BOR22.

77 (2006) 9 HKCFAR 530.

that the offence of unlawful sexual intercourse with a girl under the age of 16[78] (without there being any male counterpart offence) pursued a legitimate aim and was proportionate. But a challenge to provisions[79] criminalising homosexual buggery between males otherwise than in private without penalising similar heterosexual behaviour succeeded on the basis that no legitimate aim had been shown for such differential treatment.[80]

45. An example of a rule challenge succeeding on proportionality grounds is *Kong Yunming v Director of Social Welfare*,[81] where the Government's adoption of a policy increasing the residence eligibility requirement for Comprehensive Social Security Assistance from 1 year to 7 years was held to be an unjustifiable infringement of the right to social welfare.[82] It was held that no legitimate aim had been shown for the change which also lacked any rational connection with its alleged aims. And in *Lam Siu Po v Commissioner of Police*,[83] Police disciplinary regulations[84] were held to be disproportionate and to infringe the right to a fair hearing[85] in preventing the tribunal from permitting legal representation where the same was demanded as a matter of fairness. To take another example,[86] certain

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78 Crimes Ordinance (Cap 200) section 124.

79 Crimes Ordinance (Cap 200) section 118F(1).

80 *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 at §27.

81 (2013) 16 HKCFAR 950.

82 Under BL36 and BL145.

83 (2009) 12 HKCFAR 237.

84 Police (Discipline) Regulations (Cap 232A), regulation 9(11) and (12).

85 Under BOR10.

86 *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing & Another v Chan Wing Hing & Another & Secretary for Justice* (2006) 9 HKCFAR 545; *Official Receiver v Zhi Charles* (2015) 18 HKCFAR 467.

rules delaying the discharge of bankrupts were held to be disproportionate restrictions on the freedom to travel and to enter or leave Hong Kong.[87]

G.4 Stage 4: Is a remedial order indicated?

46. As indicated above, when an impugned measure is susceptible to a proportionality assessment, the court generally considers possible remedial orders only if an encroaching measure is found to be disproportionate at Stage 3. This has been the approach, for instance, in cases[88] where a rule imposing the burden of proof on a criminal defendant was held to derogate from the presumption of innocence protected by BL87(2) and BOR11(1). Such a reverse onus provision is permissible only if it passes the proportionality test. Where that burden was held to be disproportionate, the Court has generally gone on to read down the rule (at Stage 4) so that it takes effect instead as imposing an evidential burden on the defendant, with the legal burden remaining throughout on the prosecution, thereby eliminating the constitutional objection.

47. However, as mentioned above, some impugned measures do not raise issues of proportionality. In such cases, a Stage 3 analysis is not called for and the court proceeds to Stage 4, considering whether any remedial order should be made. *Leung Kwok Hung v HKSAR* ("*LKH 2005*")[89] is an example. Leaving aside a proportionality analysis which is not presently relevant,[90] the Court held that the

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87 Under BL31 and BOR8(2).

88 *HKSAR v Lam Kwong Wai & Another* (2006) 9 HKCFAR 574 at §§43-54 (possession of firearms); *HKSAR v Hung Chan Wa & Anr* (2006) 9 HKCFAR 614 at §§81, 85-86 (possession of dangerous drugs); *HKSAR v Ng Po On* (2008) 11 HKCFAR 91 at §§76-78 (prevention of bribery, explaining assets); *Lee To Nei v HKSAR* (2012) 15 HKCFAR 162 at §§40, 51-52 (possession of goods bearing forged trademarks).

89 (2005) 8 HKCFAR 229.

90 *Ibid* at §§90-94.

CP's statutory discretion[91] to restrict the right of peaceful assembly in the interests of "public order (*ordre public*)"[92] did not satisfy the constitutional requirement[93] that the discretionary power had to be "prescribed by law". This was because the element "*ordre public*" was not sufficiently certain in law. The Court proceeded to Stage 4 and severed that uncertain element, holding that the narrowed-down discretionary rule was constitutionally valid.[94] A Stage 3 proportionality assessment was not involved.

48. *W v Registrar of Marriages*,[95] provides another example where a Stage 3 assessment did not arise. The appellant was a post-operative male to female transsexual person who wished to marry her male partner. The Registrar, however, refused her application for a marriage licence on the basis that she did not qualify as a "woman" under section 40 of the Marriage Ordinance,[96] which provides that marriage is "the voluntary union for life of one man and one woman to the exclusion of all others". Criteria adopted in a 1971 English authority for determining gender for marriage purposes were applied.[97] The majority of the Court held that those criteria were too restrictive and had the effect of impairing the very essence of the right to marry guaranteed by BL37 and BOR19(2).[98] There was no attempt on the part of the Registrar to justify the impairment by a proportionality analysis. The constitutional challenge was thus made out. By way

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91 POO sections 14, 15 and 17A.

92 POO sections 14(1), 14(5) and 15(2).

93 Under BL39 and BOR17.

94 *LKH 2005* at §95.

95 (2013) 16 HKCFAR 112.

96 Cap 181. Also Matrimonial Causes Ordinance (Cap 179) section 20(1)(d).

97 *Corbett v Corbett (otherwise Ashley)* [1971] P 83.

98 (2013) 16 HKCFAR 112 at §§108-111.

of relief, the statutory provisions were given a remedial interpretation whereby the references to "woman" and "female" were read as capable of accommodating post-operative male-to-female transsexual persons for marriage purposes and as allowing account to be taken of the full range of criteria for assessing sexual identity, viewed at the date of the marriage or proposed marriage.[99]

49. A further example of such an encroachment involves a failure to take a constitutionally required step. Thus, *Koo Sze Yiu v Chief Executive of the HKSAR*[100] concerned the system of covert surveillance by law enforcement agencies which was made subject to administrative supervision under the Law Enforcement (Covert Surveillance Procedure) Order. This scheme was held to be inconsistent with BL30 which guaranteed the freedom of privacy and communication and permitted relevant authorities to inspect private communications to meet the needs of public security or of investigation into criminal offences only "in accordance with legal procedures". The Court declared interception of communications under the administrative scheme unconstitutional since the existing arrangements were not "legal procedures". As no remedial order could be made to preserve the validity of the existing system of covert surveillance, the Court suspended operation of the declaration for six months to afford the authorities time to cure the defect.[101] The proportionality of the existing scheme was not analysed, as there would have been no point in embarking on that exercise.

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[99] *Ibid* at §§121-124.

[100] (2006) 9 HKCFAR 441.

[101] *Ibid* at §63. Legislation aimed at rectifying the position, namely, the Interception of Communications Ordinance (Cap 532) was enacted and subsequently replaced by the Interception of Communications and Surveillance Ordinance (Cap 589).

H. Decision challenges

50. Challenges to decisions or acts by public authorities may be mounted on constitutional grounds where the validity of the legislative or policy rule which empowers the challenged act or decision is not successfully called into question. It is accepted, in other words, that an exercise of the power may, depending on the factual circumstances, be constitutionally valid. The decision challenge focuses on the specific decision or act identified as the impugned measure.

51. All five stages of the constitutional challenge set out in Section D above apply equally to decision challenges. Thus at Stages 1 and 2, the court asks what constitutional right is relied on and how it is engaged. As with rule challenges, it may be that certain impugned decisions or acts are not reviewable, such as the Secretary for Justice's decision to prosecute;[102] or a decision of the Director of Immigration covered by HKBORO section 11.[103]

52. At Stage 3, the decision is assessed for proportionality also by applying the *Hysan* four-step inquiry. Thus, in *Chow Hang Tung*,[104] a challenge to the decision of the CP taken pursuant to section 9 of POO, prohibiting a public meeting on grounds of public safety to avoid the spread of the COVID-19 virus failed on the ground that his decision to restrict freedom of public assembly[105] was legitimate, rational and proportionate in the circumstances of the pandemic.

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[102] *Chiang Lily v Secretary for Justice* (2010) 13 HKCFAR 208, unreviewable by virtue of BL63.

[103] *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59; unreviewable by virtue of HKBORO section 11.

[104] [2024] HKCFA 2.

[105] Guaranteed by BL27 and BOR17.

53. On the other hand, in *Q and Tse Henry Edward v Commissioner of Registration*,[106] a challenge to the Commissioner's refusal to alter the gender marker on the transgender applicant's ID card pursuant to a policy requiring full sex reassignment surgery before effecting such alteration, succeeded since that decision and that policy were held to involve a disproportionate restriction on the right to privacy.[107]

54. However, at Stage 4, which concerns remedial orders, the distinction between rule and decision challenges is likely to be more pronounced. While, as we have seen, a remedial order made on a successful rule challenge might involve severance, reading in, reading down or striking out orders, the consequences of a successful decision challenge are more limited. Assuming that the enabling rule or policy is itself constitutionally unobjectionable, the court may simply declare the decision invalid, with whatever legal consequences that declaration may entail. Or it may remit the decision to the decision-maker, as it did in *Hysan*,[108] where the Town Planning Board was directed to reconsider its decision. Cases may arise involving either or both rule and decision challenges where the Court orders that the operation of its declaration of invalidity be suspended to give the public authority time to ensure constitutional compliance.

I. Ziegler

I.1 The majority judgment

55. *Ziegler* involved an obstruction charge in circumstances where protesters' rights to freedom of expression and peaceful assembly under Articles

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[106] (2023) 26 HKCFAR 25.

[107] Under BOR14.

[108] (2016) 19 HKCFAR 372 at §143.

10 and 11 of the ECHR ("ECHR10" and "ECHR11") were engaged. The defendants were protesting against an arms fair and lay down in the approach road, attaching themselves to lockboxes and thus obstructed traffic heading towards the arms fair venue. It took 90 minutes to remove them from the road and they were charged with obstruction of the highway contrary to section 137 of the Highways Act 1980. That section provided that a person who, without lawful authority or excuse, wilfully obstructs the free passage along a highway is guilty of an offence. The defendants admitted obstructing the highway but claimed to have a lawful excuse on the basis that their Convention rights were engaged.

56. In the Magistrates' Court, the District Judge dismissed the charges on the basis that, having regard to the Convention rights, the prosecution had failed to prove that the limited, targeted and peaceful action was unreasonable. The prosecution appealed successfully to the Divisional Court by way of case stated,[109] that Court then certifying two points of law for the UKSC's determination, namely:

> (1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter?
>
> (2) Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the 1980 Act, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway?[110]

57. In their judgment, the majority in the UKSC held as follows:[111]

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[109] [2020] QB 253.

[110] *Ziegler* [2022] AC 408 at §7.

[111] Lord Hamblen & Lord Stephens JJSC, with Lady Arden JSC delivering a concurring judgment. Lord Sales JSC and Lord Hodge DPSC dissented in part.

(a) The availability of the "lawful excuse" defence depended on a proportionality assessment: if the protesters were subjected to disproportionate interference with their said Convention rights, the defence would apply.[112]

(b) Such a proportionality assessment imported the provisions of the HRA including the court's obligation as a "public authority" to interpret the offence-creating provision, so far as possible, compatibly with Convention rights.[113] Whether the lower court had properly assessed proportionality in connection with the lawful excuse defence was subject to appellate review.

(c) The test for such appellate review was "that applicable generally to appeals on questions of law in a case stated ... [as] set out in *Edwards v Bairstow*."[114] This meant that an appeal would only be allowed "where there is an error of law material to the decision reached which is apparent on the face of the case, or if the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found."[115]

(d) In the light of the HRA's inclusion of a court as a "public authority",[116] the majority held that "[arrest], prosecution, conviction, and sentence are all 'restrictions' within both articles" subject to a

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[112] *Ziegler* at §§16, 58.

[113] *Ibid*.

[114] [1956] AC 14.

[115] *Ziegler* at §54.

[116] HRA section 6(3)(a).

proportionality assessment.[117] Lady Arden JSC, considered the more appropriate question to be whether the convictions under section 137(1) were justified restrictions on the right to freedom of assembly under ECHR 11. Her Ladyship therefore treated the judicial act of convicting the defendants as the relevant reviewable measure.[118] This aspect of *Ziegler* is particularly relied upon by the defendants in these appeals. We return to discuss it further in Section L below.

I.2 Inappropriate for adoption in Hong Kong

58. *Ziegler* did not involve a challenge to a rule or decision for its incompatibility with a Convention right under the HRA. It was obviously not a constitutional challenge such as might arise in Hong Kong. It was an appeal concerning the ingredients of the obstruction offence and the defence of lawful excuse, as well as the applicable standard of appellate review, all questions of English domestic criminal law.

59. Crucially, it was common ground and accepted by the UKSC that "lawful excuse" imported a proportionality assessment into the scheme of the statutory offence. Adopting the Divisional Court's approach, the Court held that where "an interference would be unlawful under section 6(1) of the HRA, a person will by definition have 'lawful excuse'". [119]

60. It was noted in *Abortion Services* that such was *Ziegler's* approach to "lawful excuse" but since that approach was not in issue, the *Abortion Services*

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[117] *Ziegler* at §57.

[118] *Ibid* at §94.

[119] *Ziegler* at §§16, 58.

Court expressly made no comment on it.[120] However, *Ziegler's* treatment of the obstruction offence was called into question. As Lord Reed PSC pointed out, liability under section 137 and its predecessor provisions had long been construed as depending on whether the activity carried on in the highway was or was not reasonable. This was a question of fact, with common law rights of freedom of speech and freedom of assembly, if engaged, being regarded as an important factor in the assessment of reasonableness.[121]

61. A very similar approach, giving substantial weight to constitutional rights in assessing reasonableness, was adopted by this Court in 2005 in *Yeung May Wan & Others v HKSAR*, stating:

> "Where the obstruction in question results from a peaceful demonstration, a constitutionally protected right is introduced into the equation. In such cases, it is essential that the protection given by the Basic Law to that right is recognized and given substantial weight when assessing the reasonableness of the obstruction. While the interests of those exercising their right of passage along the highway obviously remain important, and while exercise of the right to demonstrate must not cause an obstruction exceeding the bounds of what is reasonable in the circumstances, such bounds must not be so narrowly defined as to devalue, or unduly impair the ability to exercise, the constitutional right."[122]

62. However, as Lord Reed PSC observed, the traditional approach, which pre-dated the HRA and continued to be followed after that Act's enactment, was not followed in *Ziegler*. Instead, the Court embarked on an interpretative exercise under HRA section 3(1) with a view to ensuring compliance with the

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[120] *Abortion Services* at §26.

[121] *Abortion Services* at §22

[122] (2005) 8 HKCFAR 137 at §44.

ECHR without first considering whether, applying the established construction of section 137, Convention rights would have been infringed.[123]

63. *Ziegler's* endorsement of the Divisional Court's approach of importing a proportionality analysis when considering a defence of reasonable excuse in public protest-related cases should not be followed in Hong Kong. With respect, it is hard to see how a proportionality inquiry is appropriate as a defensive ingredient of the substantive offence. It is the defendant's case that user of the highway was reasonable. It is easy to understand that in arguing for such reasonableness, the defendant might assert that the obstruction was caused in the exercise of Convention rights (or constitutionally protected rights in Hong Kong as in *Yeung May Wan*). But a proportionality assessment is a different matter. It involves a structured and sequenced inquiry designed to assess whether an impugned measure, ie, some rule, or official act or decision impinging upon an individual's protected rights, is justified. It is not a doctrine designed to assess the reasonableness of the defendant's obstructive conduct.

64. A further difficulty posed by *Ziegler* involves the majority's decision on the standard of appellate review of a lower court's conclusion regarding proportionality. If an appellate court in this jurisdiction decides that the lower court's decision on proportionality was wrong, it substitutes its own view, it being the court's duty to decide for itself whether entrenched rights and freedoms have been infringed. That was what occurred, for instance, in *Kwok Wing Hang v Chief Executive in Council*[124] on appeal from *LKH No 2*. Accordingly, *Ziegler's* approach of deferring to the lower court's conclusion as to proportionality and

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[123] *Abortion Services* at §§22-23.

[124] (2020) 23 HKCFAR 518.

refraining from appellate intervention unless an *Edwards v Bairstow* error by the lower court is detectable has no application in Hong Kong.

65. And as further discussed in Section L below, the suggestion in *Ziegler* that "[arrest], prosecution, conviction, and sentence are all 'restrictions' within both articles" each requiring a separate proportionality assessment even in the absence of a successful rule or decision challenge cannot be accepted as part of the law in Hong Kong.

J. Abortion Services

J.1 Treatment of Ziegler

66. The authority of the *Ziegler* decision was also undermined by subsequent disapproval in *Abortion Services*. As we have seen, Lord Reed PSC faulted *Ziegler's* failure to apply the traditional "reasonable user" approach to obstruction offences. The Court in *Abortion Services* also disagreed with the *Ziegler* majority's view that proportionality is a question of fact, leading to much of the majority's reasoning being undone. Thus, it was held in *Abortion Services*:

(a) that where rights under ECHR9 to ECHR11 were invoked by the defendant in a criminal prosecution, it was not correct to hold that there must always be a proportionality assessment on the facts of the individual case;[125]

(b) that it was incorrect to hold that where an offence is liable to give rise to an interference with the aforesaid Convention rights, it is necessary for the ingredients of the offence to include (or be interpreted as

[125] [2022] UKSC 32 at §§29, 34-41, 63.

including) the absence of reasonable or lawful excuse in order for a conviction to be compatible with those rights;[126]

(c) that it is possible for the ingredients of an offence in themselves to ensure the compatibility of a conviction with the said Convention rights (this being a point to which we shall return in Section J.3b below);[127]

(d) that a proportionality assessment is not a question of fact;[128]

(e) that an appellate court is not required to defer to a lower court's proportionality assessment on *Edwards v Bairstow* principles, but should intervene simply if that assessment was wrong;[129] and,

(f) that it is incorrect to hold that an assessment of proportionality in criminal proceedings must necessarily be carried out by the body responsible for determining the facts at the trial of the offence.[130]

J.2 What Abortion Services decided

67. The context of the *Abortion Services* decision is far distant from any context in which questions of proportionality arise in Hong Kong. The Court was concerned with whether clause 5(2)(a) of a Bill[131] passed by the Northern Ireland

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[126] *Ibid* at §§44-55, 64.

[127] *Ibid* at §§34-41, 45-51, 55, 65.

[128] *Ibid* at §§30-34, 66.

[129] *Ibid* at §33.

[130] *Ibid* at §67.

[131] The Abortion Services (Safe Access Zones) (Northern Ireland) Bill, clause 5(2): "It is an offence for D to do an act in a safe access zone with the intent of, or reckless as to whether it has the effect of— (a) influencing a protected person, whether directly or indirectly, (b)

Assembly ("the Assembly") was within the legislative competence of that devolved legislature as authorised by the Northern Ireland Act 1998 ("NIA").[132] It was a Bill intended to protect the rights of women to access services relating to the lawful termination of pregnancy in circumstances where anti-abortion protesters had subjected such women to pressure and had prevented some of them from accessing those services. The Bill designated "safe access zones" adjacent to premises where such services were provided, prohibiting certain types of pressurising behaviour within those zones, and Clause 5(2)(a), the clause in question, made such conduct an offence.

68. Under the NIA,[133] a provision was outside the Assembly's legislative competence if it was incompatible with any of the applicable ECHR Convention rights[134] and the Attorney General for Northern Ireland referred the following question to the UKSC, namely:

> "... whether the penal sanction with no provision for reasonable excuse created by clause 5(2)(a) of the Bill is outside the legislative competence of the Northern Ireland Assembly by virtue of section 6(2)(c) of the Northern Ireland Act as it involves a disproportionate interference with the article 9, 10 and 11 rights of those who seek to express opposition to the provision of abortion treatment services in Northern Ireland."

69. The certified question therefore raised what Lord Reed PSC called "an *ab ante* challenge to a legislative provision", meaning "a challenge to the provision in advance of its application to any particular facts".[135] Thus, *Abortion Services*

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preventing or impeding access by a protected person, or (c) causing harassment, alarm or distress to a protected person, in connection with the protected person attending protected premises for a purpose mentioned in section 3."

[132] Section 5(1).

[133] NIA section 6(2)(c).

[134] Under NIA section 11(1).

[135] *Abortion Services* at §14.

was not concerned with any underlying judicial proceedings. The Court was not addressing any rule or decision challenge, nor was it addressing any challenge to an arrest, prosecution, conviction or sentence in an individual case. It held that such a provision could only be struck down *ab ante* as outside the Assembly's legislative competence:

> "... if the court is satisfied that it is incapable of being applied in a way which is compatible with the Convention rights, whatever the facts may be. If the legislation is capable of being applied compatibly with the Convention, then it will survive an *ab ante* challenge."[136]

70. Such compatibility involved the issue of proportionality. Hence, the question was whether the impugned clause 5(2)(a) should be held incompatible because it was incapable of satisfying the proportionality requirements regarding the Convention rights engaged, (ie, the freedom of conscience, speech and assembly of the anti-abortion protesters protected by ECHR9, 10 and 11 and given effect in domestic law by the HRA) "*in all or almost all cases*". We shall return to this *ab ante* test in Section J.3b below.

71. Undertaking a proportionality assessment on the basis of generally known facts rather than evidence in extant proceedings, the Court held that clause 5(2)(a) was proportionate and compliant with the relevant Convention rights. It held:

(a) that while some of the protesters' activities (such as "holding a vigil, praying, and engaging in other non-violent demonstrations") came within those protected freedoms, other conduct (such as "spitting at individuals, chasing them, threatening them, assaulting them, and

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[136] *Ibid* at §14.

subjecting them to verbal abuse") fell outside the scope of the protections;[137]

(b) that the offence was clearly "prescribed by law" and had a legitimate aim ("to ensure that women have access to premises at which treatment or advice concerning the lawful termination of pregnancy is provided, under conditions which respect their privacy and their dignity, thereby enabling them to access the healthcare they require, and promoting public health" and to protect staff working at the premises);[138]

(c) that clause 5(2)(a) protected the rights of such women to access healthcare in conditions of privacy and dignity, and of the staff to the right to pursue employment, protected by ECHR8;[139]

(d) that the restrictions imposed by clause 5(2)(a) were rationally connected with achieving that legitimate aim;[140]

(e) that those restrictions were no more than reasonably necessary, targeting only intentional or reckless acts taking the form of influencing the behaviour of protected persons, physically obstructing their access to the premises, or causing them harassment, alarm or distress with a view to stopping women who may be in a vulnerable condition from accessing the healthcare services in question, and only

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137 *Ibid* at §§111-112.

138 *Ibid* at §§113-114.

139 *Ibid* at §115.

140 *Ibid* at §118.

limiting the protesters from exercising those freedoms in particular places, leaving them free to do so elsewhere;[141]

(f) that this was a case involving competing Convention rights, so that there was a wide margin of appreciation as to how the balance should be struck.[142]

72. The Court accordingly concluded that clause 5(2)(a) of the Bill was not incompatible with the Convention rights of the protesters seeking to express opposition to the provision of abortion services, and that it was therefore not outside the legislative competence of the Assembly.[143]

J.3 Should Abortion Services be followed in Hong Kong?

73. We have set out our approach to constitutional challenges in Sections D, G and H above. While the approach of the Court in *Abortion Services* overlaps to some degree with the aforesaid approach, significant differences exist. In *Abortion Services*, Lord Reed PSC identified three questions to be addressed in cases involving public protest-related offences, namely:[144]

(1) Whether Articles 9, 10 or 11 of the ECHR are engaged ("the first question");

(2) Whether the offence is one where the ingredients strike the proportionality balance so that if they are proven and the defendant is

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[141] *Ibid* at §§119-127.

[142] *Ibid* at §131.

[143] *Ibid* at §157.

[144] *Ibid* §§54-57.

convicted, there can be no breach of his Convention rights ("the second question"); and

(3) Where the rights are engaged and the ingredients are not inherently proportionate, whether there is a means to ensure proportionality, for instance, by means of an interpretation to achieve compliance under HRA section 3 ("the third question").

J.3a The first question

74. It is evident that the first question mirrors Stage 1 of the framework set out in Section D above, involving the court identifying the constitutional right relied on and the impugned measure. These aspects of both approaches overlap.

J.3b The second question

75. Expanding on the second question, Lord Reed PSC stated:

> "If articles 9, 10 or 11 are engaged, the second question which arises is whether the offence is one where the ingredients of the offence themselves strike the proportionality balance, so that if the ingredients are made out, and the defendant is convicted, there can have been no breach of his or her Convention rights. If the offence is so defined as to ensure that any conviction will meet the requirements of proportionality, the court does not have to go through the process of verifying that a conviction would be proportionate on the facts of every individual case."[145]

76. In a case where the UK court concludes that "the ingredients of the offence themselves strike the proportionality balance" so that its enforcement involves no breach of the individual's Convention rights, there is an overlap with the situation where a Hong Kong court decides that a particular rule challenge fails. If the offence-creating provision is proportionate (and compliant with other

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[145] *Ibid* at §55. See also §§34-41, 45-51 and 65

Convention or constitutional requirements), it would follow that conviction after trial would not infringe the defendant's rights under either system.

77. However, in stating that where the ingredients of the offence are inherently proportionate, the court is relieved from having "to go through the process of verifying that a *conviction* would be proportionate on the facts of every individual case" (italics supplied), Lord Reed PSC appears possibly to be suggesting that it may otherwise be necessary to go through that process. If that is the intended suggestion (necessarily *obiter* since *Abortion Services* was not concerned with any contested conviction), that dictum would be inapplicable in Hong Kong. Such a suggestion would rest on the HRA's inclusion of courts as "public authorities" whose acts are subject to review;[146] and with the alleged unlawfulness of such acts capable of being relied on by persons claiming to be "victims" of such acts.[147] In contrast, as we have seen, in our system, ordinary judicial acts, including decisions to convict, are not independently reviewable on proportionality grounds where the provisions being applied are constitutionally secure.

78. A further distinction flows from the *ab ante* nature of the UKSC's decision in *Abortion Services*. The Court had to decide, in advance of applying the questioned clause to the facts of any individual case, whether that clause was consistent with the relevant ECHR rights and so within the Assembly's legislative competence. The Court therefore had to confine its proportionality analysis to the ingredients of the offence viewed in the abstract. This was acknowledged by Lord Reed PSC who stated:

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[146] HRA sections 6(1) and 6(3)(a).

[147] HRA section 7(1)(b).

> "... the European court confines itself, as far as possible, to an examination of the concrete case before it. As it has often said, its task is not to review legal provisions and practice *in abstracto*, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention. Domestic courts are not required to proceed on the same basis, and this court cannot do so on a reference of the present kind." [148]

79. Proceeding *in abstracto*, the UKSC propounded the test of whether the challenged provision was capable of satisfying the proportionality requirements regarding the Convention rights engaged in that it would not be disproportionate "*in all or almost all cases*".[149]

80. Like the ECtHR, the Hong Kong court (with very rare exceptions[150]) does not operate in the abstract but deals with rule and decision challenges which are mounted in legal proceedings. On an issue of proportionality, it applies the *Hysan* four-step test, applying a standard of review located at an appropriate point on the spectrum between "no more than necessary" and "manifestly without reasonable foundation". A quantitative test asking whether disproportionality of the challenged rule may be projected to be established in "all or almost all cases" has no place in our jurisprudence.

J.3c The third question

81. The third question involves considering possible remedial measures to achieve compatibility where a challenged provision is held to be disproportionate. Such issues arise under both the *Abortion Services* and the Hong Kong approaches.

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[148] *Abortion Services* at §40.

[149] (Italics supplied) Lord Reed PSC, *Abortion Services* at §§12-19, applying *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29; after explaining away *dicta* of Baroness Hale PSC in *In re McLaughlin* [2018] 1 WLR 4250 at §43.

[150] *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518; and *Leung v Secretary for Justice* [2006] 4 HKLRD 211; are examples that come to mind.

However, as we observed in Section C above, there are important qualitative differences regarding the available remedial measures.

82. As discussed above, at Stage 4 of a rule challenge in our system, the court may consider remedial orders such as severance, reading in, reading down and striking out in relation to the objectionable provision. And if such orders are not feasible, it may declare the impugned measure invalid, possibly deferring operation of the declaration to permit compliance by the authority concerned. Such remedial orders may be made in respect of provisions of primary and subordinate legislation as well as rules of the common law and administrative policies, acts and decisions.

83. The range of remedial options open to the UK court under the HRA (which frames the reasoning in *Abortion Services*) appears to be considerably more restricted. Faced with a disproportionate provision, it has an interpretative duty under HRA section 3(1), so far as possible, to construe that provision so that it is consistent with the relevant Convention rights. That power, as Lord Reed PSC pointed out, relates only to primary and subordinate legislation[151] and, in the event that a remedial interpretation cannot be achieved and, in the case of subordinate legislation, if the primary legislation prevents removal of an incompatibility in a provision of subordinate legislation, the Court may make a declaration of incompatibility in accordance with HRA section 4. But the validity, continuing operation and enforcement of the impugned legislative provision is unaffected, as provided by HRA section 3(2)(b) and (c) and section 4(6) as explained in §16

[151] *Abortion Services* at §57. Where a common law rule is involved, the court must see if it can develop the common law so as to render the offence Convention-compatible "either on ordinary principles or by virtue of the duty imposed by section 6(1)" of the HRA. *Ibid* at §61.

above. Moreover, under HRA section 4(6)(b), a declaration of incompatibility is not binding on the parties to the proceedings in which it is made.

84. Thus, whereas in Hong Kong, a disproportionate legislative measure that cannot be cured by a remedial order will be struck down as invalid, in the UK an impugned provision that is declared to be incompatible may still found a prosecution, thereby possibly giving rise to further questions as to whether the prosecution, conviction and sentence are independently disproportionate "restrictions" of the Convention rights. Such questions do not arise in Hong Kong because the disproportionate provision is declared invalid and cannot form the basis of a prosecution.

85. Accordingly, while there is some overlap between aspects of *Abortion Services* and the approach to constitutional review in this jurisdiction, important differences arise, deriving from the HRA and *ab ante* parameters of the UKSC's decision. Given those differences, little would be served by adopting the *Abortion Services* decision in Hong Kong.

K. Answer to the certified question

86. For the foregoing reasons, the Court should not follow either *Ziegler* or *Abortion Services*. The established approach to rule and decision challenges is as set out in Sections D, G and H above. As we seek to demonstrate in the Section which follows, those decisions do not in any event provide any support for a so-called proportionality inquiry along the lines suggested by the defendants.

L. The defendants' arguments

L.1 The nature of the defendants' constitutional challenge

87. As the appellants succeeded on their appeal against the "organizing" charges, the present focus is on their conviction for taking part in an unauthorised assembly contrary to POO section 17A(3)(a).

88. In the courts below, the defendants sought to raise a rule challenge against the offence-creating provisions in the POO. It was principally contended that the imposition of criminal sanctions in respect of an unauthorised assembly which was peaceful was a disproportionate restriction on the freedom of assembly protected by BL27 and BOR17.[152] They also sought to argue that the maximum penalty of imprisonment for 5 years created a chilling effect which disproportionately infringed that freedom.[153]

89. That rule challenge was rejected on the ground that the constitutionality of those POO provisions had been authoritatively affirmed by the Court of Final Appeal in *LKH 2005*[154] so that the point was not open to the defendants.[155] The Appeal Committee agreed and dismissed the defendants' application for leave to appeal on that ground.[156]

90. It would have been open to the defendants, if so advised, to mount a decision challenge against the CP's decision to ban the march. Such decision, made pursuant to his powers under the POO and a necessary ingredient of the "taking part" offence, prima facie engaged the public assembly freedoms relied on by the defendants and could have been made subject to a proportionality

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[152] RfV§§210-213.

[153] RfV§§214-219.

[154] *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229.

[155] RfV§§265, 281, 314; CA§§89-90.

[156] [2024] HKCFA 4 at §§30-33.

assessment. As the majority in *HKSAR v Chow Hang Tung*,[157] held, it would have been open to the defendants to challenge the constitutionality of the CP's decision at their trial by way of defence. Such a challenge, based on a decision taken in the circumstances obtaining in 2019, would not have been precluded by this Court's decision in *LKH 2005*. But a decision challenge was not raised.

91. That is not to suggest that such a challenge would have succeeded. On the contrary, there are compelling reasons to accept that the CP's decision was constitutionally sound and proportionate. The point we make is that a decision challenge of the kind discussed in Section H above, was not mounted by the defendants.

92. Since the rule challenge failed and no decision challenge was raised, on the principles discussed above, no constitutional challenge was left. The issue which remained was whether criminal liability under POO section 17A(3)(a) had been proved by the prosecution beyond reasonable doubt. That required proof that (i) the procession took place in contravention of section 13 (having been objected to by the CP) and so constituted an unauthorised assembly; (ii) that the defendants knowingly took part in that procession; and (iii) that they did so without lawful authority or reasonable excuse.

93. As noted in Section A of this judgment,[158] the defendants' main contention was that they had merely helped to disperse the crowd safely at the end of the Victoria Park meeting and had not participated in any prohibited procession. They argued that their purpose in helping with the safe dispersal of the crowd did not qualify as a "common purpose" within the definition of "procession" in POO

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[157] [2024] HKCFA 2.

[158] Determination §§18-19.

section 2; and that, being concerned only with such dispersal, they lacked *mens rea* in relation to any qualifying common purpose. It was also argued that their efforts at safe dispersal were acts performed with lawful authority or reasonable excuse in the context of police inaction, thus negating liability for the "taking part" offence.

94. As we have seen, those arguments failed and leave to appeal on those grounds was refused on the basis that they were not reasonably arguable in the light of the Judge's detailed and well-grounded findings, confirmed by the Court of Appeal.[159]

95. Since the established grounds for a constitutional challenge at both the rule and decision challenge levels did not avail them and their defence against criminal liability failed on the facts, the defendants have sought in these appeals to break new ground by mounting a novel kind of constitutional challenge. This is done mainly by relying on *Ziegler* and on the decision of the Grand Chamber of the ECtHR in *Kudrevičius v Lithuania ("Kudrevičius")*,[160] as interpreted by them.

L.2 The alleged duty to conduct an "operational proportionality" assessment

96. The defendants' central argument on this new initiative is that the trial Judge erred in that she was obliged, but failed, to conduct an "operational proportionality" assessment in respect of their convictions. They contend that each of a defendant's *arrest, prosecution, conviction and sentence* – especially

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[159] Determination §§20-24.

[160] (2016) 62 EHRR 34.

conviction – requires separately to be justified as proportionate.[161] We shall refer to this as "the defendants' proposition".

97. It is important to note that although the defendants refer to the need for an "operational proportionality" assessment with respect to the aforesaid actions, what they mean by that phrase is quite different from what the Court of Appeal meant by "operational proportionality" in *LKH No 2*. There, the Court distinguished between:

> "... (1) examining the systemic proportionality by reference to the legislation or rules in question; (2) examining the operational proportionality by reference to the actual implementation or enforcement of the relevant rule on the facts and specific circumstances of a case at the operational level."[162]

98. The Court of Appeal was addressing a decision challenge in the second part of the cited passage. It was referring to a case where an act or decision founded on "the relevant rule" is challenged as infringing the guaranteed right. As we have pointed out, such a challenge might have been, but was never mounted by the defendants.

99. In oral argument, the defendants' proposition was further developed along the following lines. It was contended that even though no rule or decision challenge had availed them and it had been found that they had knowingly taken part without lawful authority or reasonable excuse in the unauthorized assembly, the trial judge was nevertheless bound, prior to convicting them, to conduct a further proportionality assessment to determine whether their *conviction* would be proportionate.

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[161] D1 Printed Case ("PC")§§3(2), 4, 7, 13; D2 & D5 PC§§12, 17, 33; D3 PC§§4, 5.4, 13, 18, 20, 21.1, 21.2; D4 PC§§3(3), 3(4), 10, 27, 35, 40; D6 & D8 PC§§6, 7, 9, 16, 18, 22.2, 31, 61, 108.

[162] *LKH No 2* at §182.

100. When pressed as to how this additional proportionality assessment could be carried out, it was argued that the trial judge had to examine "the facts on the ground" as known at the time of the trial. It was mainly argued that the trial judge should, with the benefit of hindsight, have taken into account the fact that, as it turned out, the procession did not descend into violence (however justified the CP's risk assessment regarding potential violence might have been when he objected to the march). It was suggested on D4's behalf (with the support or acquiescence of the other defendants) that his and the other convictions ought to have been held to be disproportionate in the light of the following matters, namely:

> (a) the entirely peaceful and non-violent nature of the public procession;
>
> (b) the relatively short period of time of [D4's] participation in the public procession;
>
> (c) the lack of warning given and/or enforcement action taken by the Police against the public procession at the scene at the material times;
>
> (d) the public procession did not give rise, directly or indirectly, to any form of disorder;
>
> (e) [D4's] behaviour did not involve the commission of any other offences; and
>
> (f) the public procession related to a matter of general concern.[163]

101. When asked how this approach constituted a *Hysan* four-step inquiry, it was suggested that it reflected the fourth step involving proportionality *stricto sensu*.

L.3 The defendants' proposition is contrary to principle

102. The defendants' proposition, developed as aforesaid, is contrary to all known principles in our jurisdiction. We have laid out the established approach to

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[163] D4 PC§36 (footnotes citing *Ziegler* omitted). The other defendants made similar submissions or adopted this approach.

constitutional challenges in Sections D, G and H above. Applying that approach, the court plainly has to consider the merits of any rule or decision challenge by reference to the time when exercise of the guaranteed right was allegedly infringed by the impugned measure. And if that rule or decision challenge is not made good, the court has to determine whether the prosecution has proved that the defendant committed the offence at the time and place and in the circumstances charged.

103. It is impossible to see any basis for contending that, having decided that the charges, based on constitutionally valid provisions, had been proved, the trial Judge was somehow obliged to refrain from convicting the defendants, but had to conduct an independent "proportionality" exercise regarding the proposed conviction by reference to certain after-the-event considerations. We place quotation marks around "proportionality" because the suggested exercise does not recognisably involve a *Hysan* four-step inquiry. At best, the miscellaneous factors listed as requiring consideration read like points that might be raised by way of mitigation.

104. The defendants' convictions and consequent sentences do not stand alone. They are the result of the Judge applying the law to the evidence and being satisfied individually of their guilt. In the absence of any viable rule or decision challenge to the constitutionality of the law so applied, there is no basis for impugning the conviction and sentence which flowed from its enforcement.

105. The same pertains to the defendants' proposition in respect of arrest and prosecution. Those actions similarly do not occur in isolation. They represent steps taken to enforce particular offence-creating laws. Whatever law is being enforced may of course be subject to a rule or decision challenge, which if successful, may invalidate the steps taken by way of enforcement. But if the law in

question is secure against any such attack, the enforcement measures are not susceptible to a separate constitutional challenge.

106. One may take for instance, the arrest of someone suspected of taking part in an unauthorised assembly. Under the Police Force Ordinance,[164] a police officer may arrest a person if that officer "reasonably believes [that the person arrested] will be charged with or whom he reasonably suspects of being guilty of" a relevant offence. The power of arrest is a general power applicable to all arrestable offences. When exercised in this illustrative example, it is a step taken towards enforcing a suspected "taking part" offence under the POO. If the constitutional validity of that offence is not in doubt, the arrest, as a step towards enforcing that offence, does not separately engage or infringe any guaranteed right or require independent constitutional justification.

107. The suggestion that requiring the Judge to take account of the miscellaneous factors referred to above involves the fourth step in the *Hysan* proportionality analysis is unsustainable. The fourth step too does not stand alone. It is part of a structured analysis which involves a sequenced inquiry as discussed in Sections D, G.3 and G.4 above. There is no room for such an inquiry where the Judge has found the charges proved, enforcing laws which are not vulnerable to constitutional challenge.

108. There are additional obstacles in the way of the defendants' proposition. Thus, the suggestion that a decision to prosecute or the act of prosecution is reviewable for disproportionality falls foul of BL63, as decided in *Chiang Lily v Secretary for Justice*,[165] and, as explained above, judicial decisions

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[164] (Cap 232) section 50(1).

[165] (2010) 13 HKCFAR 208.

made in the ordinary course of the business of the courts are not independently susceptible to a proportionality assessment in our jurisdiction.

L.4 Subsidiary arguments raised by the defendants

109. A subsidiary argument advanced by the defendants was that the novel "proportionality" assessment was necessitated or enabled by the defence of lawful authority or reasonable excuse catered for under POO section 17A(3). As it was put on behalf of D6 and D8:

> "... in the context of this Offence, the [statutory defence] is established where a defendant was exercising his constitutional rights to freedom of expression and peaceful assembly, and it was disproportionate to restrict his rights by way of a conviction. As in *Ziegler*, if the interference is disproportionate in the circumstances of the case, 'a person will "by definition" have lawful authority or reasonable excuse': *Ziegler*, §16".[166]

110. That argument cannot be accepted. It is based on the approach of the majority in *Ziegler* which we have held to be inapplicable in Hong Kong, as discussed in Section I.2 above. The statutory defence depends on the reasonableness of the defendants' conduct and provides no basis for requiring a structured proportionality inquiry to be imported as an element of the offence. Much less does the argument justify independent constitutional reviews of the separate processes of arrest, prosecution, conviction and sentence.

111. Another subsidiary argument advanced on behalf of D4 (and adopted by other defendants) is that judicial decisions – and thus convictions – are reviewable because the courts are "part of the Government" and so are reviewable by virtue of the HKBORO.[167] Section 7(1) is relied on. It states:

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[166] D6&D8 PC§71, see also §§12, 66, 69-70. Similar points were made at D1 PC§23 and D2&D5 PC§11.

[167] Cap 383.

> "(1) This Ordinance binds only (a) the Government and all public authorities; and (b) any person acting on behalf of the Government or a public authority".

112. A dictum of Keith J in *Hong Kong Polytechnic University and Others v Next Magazine Publishing Limited and Another*,[168] is cited in support, his Lordship having stated: "I take the phrase 'the government' to refer to the legislative, executive and judicial organs of the state."[169]

113. Also relied on is HKBORO section 6 which provides:

> "(1) A court or tribunal-
>
> (a) in proceedings within its jurisdiction in an action for breach of this Ordinance; and
>
> (b) in other proceedings within its jurisdiction in which a violation or threatened violation of the Bill of Rights is relevant,
>
> may grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances.
>
> (2) No proceedings shall be held to be outside the jurisdiction of any court or tribunal on the ground that they relate to the Bill of Rights."

114. That argument must be rejected. "Government" is defined in section 3 of the Interpretation and General Clauses Ordinance,[170] to mean "the Government of the Hong Kong Special Administrative Region". Article 59 of the Basic Law states that "the Government of the Hong Kong Special Administrative Region shall be the executive authorities of the Region", which are dealt with under Section 2 in Chapter IV of the Basic Law. The Judiciary and the courts, on the other hand, are covered by Section 4 of Chapter IV. As this Court held in *Comilang Milagros Tecson v Director of Immigration*, "the scheme of

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[168] [1996] 2 HKLR 260.

[169] *Ibid* at 264.

[170] Cap 1.

constitutional rights laid down by the Basic Law, both in its Chapter III and in the [Bill of Rights] incorporated via BL39, must be interpreted as a coherent whole..."[171] Thus, reading sections 6 and 7 of HKBORO coherently with the aforesaid Basic Law provisions, it is plain that the expression "the Government" in those sections does not include the Judiciary or the courts.

115. Furthermore, contrary to D4's case, HKBORO section 6 empowers the courts to grant remedies in respect of a violation or threatened violation of the Bill of Rights. Far from making judicial decisions subject to review, section 6 empowers the courts to review the acts of the Government and public authorities which are bound by HKBORO. The courts are the constitutional reviewing agency and the Government and public authorities are subject to review. Of course, in broad terms, the courts, like everyone else, are bound by the law, including HKBORO. However, there is no basis for suggesting that HKBORO should be construed as providing that judicial decisions are reviewable on proportionality grounds.

L.5 The authorities relied on by the defendants

116. Neither *LKH No 2* nor any of the authorities regarding constitutional challenges discussed in Sections D, G and H above, support the suggestion that where a rule challenge fails and a decision challenge either fails or is not made, some residual requirement nevertheless exists for subjecting the defendant's arrest, prosecution and ultimate conviction and sentence to a separate proportionality assessment.

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[171] (2019) 22 HKCFAR 59 at §30.

117. The defendants' proposition appears largely to be based on paragraph 57 of the majority judgment in *Ziegler* which materially states:

> "The second certified question relates to both the right to freedom of expression in article 10 and the right to freedom of assembly in article 11. Both rights are qualified in the manner set out respectively in articles 10(2) and 11(2)... Article 11(2) states that 'No restrictions shall be placed' except 'such as are prescribed by law and are necessary in a democratic society…'. In *Kudrevičius v Lithuania* (2016) 62 EHRR 34, para 100 the European Court of Human Rights ('ECtHR') stated that 'The term 'restrictions' in article 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards' so that it accepted at para 101 'that the applicants' *conviction* for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly'. *Arrest, prosecution, conviction, and sentence* are all 'restrictions' within both articles." (Italics supplied)

118. In Section I.2 above, we have stated why we consider that much of the authority *Ziegler* has been undermined by the decision in *Abortion Services* and why that decision should not be adopted in Hong Kong. It is *a fortiori* the position that it provides no support for the unorthodoxy of the defendants' proposition.

119. The defendants also rely on *Kudrevičius*, where the Grand Chamber of the ECtHR was "prepared to accept that the applicants' conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly".[172] The Grand Chamber was therefore prepared to find that such interference might constitute a breach of ECHR11 unless it was "prescribed by law", and pursued one or more legitimate aims under ECHR11(2) and was "'necessary in a democratic society' for the achievement of the aim or aims in question." In the event, it held that these conditions were satisfied and upheld the defendants' convictions.

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[172] *Kudrevičius* at §101.

120. It is important to note that *Kudrevičius* and similar ECtHR cases are decisions of a supra-national court reviewing the proportionality of a domestic court's decision under the ECHR, treating the court as a reviewable "national authority" of a High Contracting Party. As the Grand Chamber explained:

> "When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under art.11 the decisions they took. This does not mean that it has to confine itself to ascertaining whether the state exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine, after having established that it pursued a 'legitimate aim', whether it answered a 'pressing social need' and, in particular, whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it were 'relevant and sufficient'. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in art.11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts."[173]

121. While the Strasbourg Court has often provided valuable guidance in the development of our constitutional jurisprudence, the role of our courts in the present context is obviously entirely different. Complaints of error by a lower court are subject to appeal to a higher court, but no basis exists for suggesting that our courts are required to review the decisions of other domestic courts on the basis of proportionality.

L.6 A proportionality assessment of arrest, prosecution, conviction and sentence would be unhelpful and unwarranted

122. Quite apart from the objections to the defendants' proposition already discussed, the suggestion that the processes of arrest, prosecution, conviction and sentence require independent proportionality assessments has little to recommend it. Those processes are governed by well-developed rules of law and procedure which have their own logic and justification.

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[173] *Kudrevičius* at §143.

123. An arrest may be challenged as wrongful as a matter of domestic (and not constitutional) law if the reasonable belief required by the Police Force Ordinance is not made out. What does importing a proportionality inquiry add to that practical and common sense test? Even ignoring the essential difficulty the defendant faces where the law being enforced by the arrest (eg, the offence of taking part in an unauthorized assembly) is not constitutionally vulnerable, what would be the point of such a proportionality analysis? One would presumably ask whether the decision to arrest had a legitimate aim, to which the answer would evidently be: Yes, to bring someone suspected of a relevant offence within the power of a law enforcement agency. To the question whether the arrest was rationally connected to that aim, the answer plainly would be: Yes, since the officer reasonably suspected the person arrested would be charged or was guilty of the relevant offence. As to whether that step was no more than necessary, the answer would be that the arrest involved only a temporary restraint and was a necessary step as part of the law's enforcement. And an arrest in such circumstances, with judicial safeguards, would meet the balancing requirements of proportionality *stricto sensu*. Such a proportionality inquiry essentially adds nothing to the obvious incidents of a lawful arrest. At its core is the simple requirement that the officer must have reasonable grounds to suspect the person arrested of being guilty of a relevant offence.

124. The non-reviewability of prosecutions by virtue of BL63 has already been mentioned. Even if that constitutional bar did not exist, the notion that a court ought to review whether a decision to prosecute is proportionate seems wholly inappropriate. In our accusatorial system, the court's role is impartially to judge cases brought by the prosecution, not to second-guess the prosecution's decision to proceed. If it turns out that, for whatever reason, a prosecution should

not have been brought – whether for lack of evidence or some constitutional or domestic law objection – the remedy would be for the case to be dismissed on its merits at the trial.

125. In respect of convictions, the defendants' proposition again makes little sense. The court's role is to decide whether the charges have been made good. That decision is governed by the comprehensive panoply of the criminal law, evidence and procedure evolved over centuries with common law doctrines, statutes, precedents, in-built logic and safeguards. If, at the end of the trial process, the defendant is properly convicted, the court having duly applied the law, it is hard to see how that conviction may sensibly be subjected to a further "proportionality" inquiry.

126. Turning to sentencing decisions, a rule challenge against the maximum sentence of five years under section 17A(3)(a) was rejected in the present case on the basis that its constitutionality had been affirmed by *LKH 2005*. Moreover, as the Appeal Committee pointed out, a statutory maximum gives the court a discretion as to possible sentences ranging from non-custodial measures to the prescribed maximum so that the rule cannot be said to be disproportionate. Indeed, in the present case, three of the defendants received non-custodial suspended sentences.[174] As to decision challenges, well-developed sentencing principles taking account of the characteristics of the crime and of the offender are applicable, requiring the exercise of a nuanced judgment in each case. Those principles have their own logic and justification. If the sentence at first instance is considered manifestly excessive, it can be appealed. It is difficult to see any

[174] D3, D6 and D8: [2021] HKDC 457 (16 April 2021) at §113.

benefit in burdening such sentencing decisions with an additional proportionality inquiry.

M. Summary and disposal of these appeals

127. The conclusions reached in this judgment may be summarized as follows:

(a) The reference to "operational proportionality" in the certified question has to be considered in the context of well-established principles governing constitutional challenges in this jurisdiction. (Sections C and D)

(b) Such challenges may involve five stages, identifying the constitutional right and the impugned measure concerned; ascertaining whether and in what way the impugned measure encroaches upon and so engages that right; determining whether the encroachment is susceptible to, and if so whether it satisfies, the *Hysan* four-stage proportionality assessment; and deciding whether any remedial order is called for and whether the impugned measure should be declared unconstitutional. (Section D)

(c) The analytical concepts of "operational proportionality" and "systemic proportionality" proposed by the Court of Appeal in *LKH No 2* should be replaced with the concepts of "rule challenges" and "decision challenges". (Sections E, F)

(d) Rule and decision challenges employed at each stage of the constitutional challenge are explained and illustrated by the well-developed case-law. (Sections G and H)

(e) *Ziegler* was concerned with the ingredients of the highway obstruction offence in the UK. In Hong Kong, the traditional reasonable user approach is applied giving weight to any fundamental rights engaged, an approach which *Abortion Services* faulted *Ziegler* for not following. Other aspects of the *Ziegler* decision, such as the erroneous view that proportionality was a question of fact and the inapt application of *Edwards v Bairstow* as the standard of appellate review, were disapproved in *Abortion Services* and are inapplicable in this jurisdiction. There is no reason to follow *Ziegler* in Hong Kong. (Section I)

(f) *Abortion Services* was concerned with the legislative competence of a devolved legislature, viewed through the framework of the HRA. There was a partial overlap with aspects of the Hong Kong approach. However, the principles of constitutional review in this jurisdiction are well-settled and should be adhered to. Other aspects of *Abortion Services*, arising out of the HRA and *ab ante* parameters of that decision, including a test projecting whether disproportionality of the challenged rule is likely to be established in "all or almost all cases"; and (possibly) the separate reviewability of judicial acts; are inapplicable in this jurisdiction. There is no reason to adopt *Abortion Services* in Hong Kong. (Sections J and K)

(g) The defendants' attempt at a rule challenge against the "taking part" offence was rejected. They have not mounted any decision challenge against the CP's objection to the march. They were convicted of the "taking part" offence and their appeal against conviction was

dismissed. Leave to appeal against their convictions was refused. (Sections A and L.1)

(h) The defendants seek to argue that notwithstanding those events, the trial Judge was obliged, but failed, to refrain from convicting them before conducting their version of an "operational proportionality" assessment to decide whether their conviction would be proportionate. They submit (on their version) that the Judge ought to have considered proportionality of the proposed conviction taking account of various after-the-event matters. They contend that the actions of arrest, prosecution, conviction and sentence each require separate justification on such a "proportionality" assessment. We have called this "the defendants' proposition". (Section L.2)

(i) The defendants' proposition is unsustainable. It is contrary to all established principles governing constitutional challenges in Hong Kong and especially contrary to accepted principles for assessing proportionality. It is unsupported by legal authority. The UKSC and the ECtHR cases cited provide no support and have no material bearing on the constitutional issues under discussion. A separate proportionality inquiry in relation to arrest, prosecution, conviction and sentence is inappropriate and un-called for. (Sections L.3, L.4, L.5 and L.6)

128. For the foregoing reasons, we would dismiss these appeals.

Mr Justice Fok PJ :

129. I am in respectful agreement with the joint judgment of the Chief Justice and Mr Justice Ribeiro PJ and would answer the certified question and dismiss the appeals for the clear and comprehensive reasons they have given.

Mr Justice Lam PJ :

130. I fully concur with the joint judgment of the Chief Justice and Ribeiro PJ ("the Joint Judgment") which discusses comprehensively the approach to constitutional challenges adopted in Hong Kong with admirable clarity.

131. Freedom of expression and freedom of peaceful assembly are fundamental rights protected under Article 27 of the Basic Law and Articles 16 and 17 of the Hong Kong Bill of Rights ("BL 27 and BOR 16 and 17"). Restrictions on such freedoms are subject to judicial scrutiny in this jurisdiction through a rule challenge and/or a decision challenge as explained in the Joint Judgment. Such challenges can be raised (and are frequently raised) in applications for judicial review as well as in criminal proceedings in which a defendant is charged with an offence under the Public Order Ordinance ("the POO"), Cap 245. In considering the challenges, the courts examine whether a restriction is prescribed by law and whether it is necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

132. In the present case, the appellants had exercised their rights to peaceful assembly without objection from the Commissioner of Police ("CP") in respect of the assembly at Victoria Park. The CP's objection was confined to the public procession due to the high risk of public disorder in light of the then highly

charged circumstances in Hong Kong. The appellants were able to air their views at a large scale public assembly at Victoria Park. In addition to that, they insisted on continuing with a large scale procession. As it happened, the procession lasted from 3:00 pm in the afternoon to about 8:55 pm in the late evening. During that time, many roads were temporarily closed and public transport routes had to be truncated or diverted. The Judge found that the appellants committed the offence deliberately to flout the law on a massive scale. She also found that the procession led by the appellants caused serious citywide disruptions to traffic and public transport.

133. The underlying premise of the appellants' submissions is this: where an unauthorized assembly did not lead to serious public disorder or violence, there should not be any prosecution or conviction of those taking part in the assembly because such prosecution or conviction would be disproportionate restrictions on the freedom of assembly. According to the appellants, BL 27 and BOR 16 and 17 require the court to dismiss the charges in such circumstances.

134. These submissions must be rejected. As explained in the Joint Judgment, a rule challenge in Hong Kong is not subject to the approach discussed in *Christian Institute v Lord Advocate*[175]. Thus, the proportionality test as applied in Hong Kong has already built into it the proportionality of a prosecution and conviction under the rule in question. This is particularly so when a rule and/or a decision challenge can be brought in the defence of a charge of taking part in an unauthorized assembly. Therefore, unlike the position in the UK as expounded in *Abortion Services*[176] [54]-[57], there is no room in our jurisprudence to conduct yet

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[175] 2017 SC (UKSC) 29.

[176] [2022] UKSC 32.

another round of proportionality analysis regarding the prosecution, conviction or sentence.

135. In this connection, I reiterate that it is open to an applicant to challenge, by way of judicial review or defence in criminal proceedings, the decision of the CP objecting to the holding of an assembly or a public procession[177]. In a decision challenge, the court would examine the legality, rationality, procedural fairness as well as the proportionality of the decision against the specific circumstances in which the notification of an assembly or a procession was given, including the assessment on the risk of public disorder arising from the intended assembly or public procession.

136. Prosecution and conviction are different stages of the criminal process which emanates from a contravention of the rule. The prosecutorial authority and the court have to perform their respective roles by assessing the available evidence with reference to the ingredients of the offence charged. In cases where there is a rule and/or decision challenge, the courts would conduct a constitutional review in accordance with the approach set out in the Joint Judgment.

137. Conviction cannot be regarded as a standalone restriction. The effects of a conviction stem from the penal consequences of the relevant statutory provisions or common law rule. An analysis of the proportionality of such interference cannot be segregated from the analysis of the proportionality of the relevant rule and the relevant decision of the CP. Proportionality challenges against the rule and the decision are open to a defendant facing a charge of knowingly taking part in an unauthorized assembly.

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[177] See *HKSAR v Chow Hang Tung* (2024) 27 HKCFAR 71.

138. Whilst the appellants advocated that BL 27 and BOR 16 and 17 require separate rounds of proportionality assessment for the prosecution, conviction and sentence, they did not actually examine conviction as a standalone restriction in their submissions. Instead, their analysis focused on conviction as the legal sanction imposed by Section 17A(3)(a) of the POO. In so doing, the appellants disguised what might have been a challenge to the legal consequences of the POO as a separate challenge to the judicial determination of guilt in accordance with the law and evidence.

139. In crude terms, the appellants invited this Court to hold that where no serious public disorder or violence occurred, those taking part in the assembly should not be prosecuted or convicted for the exercise of their rights to peaceful assembly. If the appellants were correct, a person who disagrees with an objection of the CP or an order or direction from a police officer under Section 6 or Section 17 may simply disregard such actions. This is tantamount to a rewriting of the careful balance struck by the legislature in the POO - a balance upheld by this Court in *Leung Kwok Hung 2005*[178].

140. The social unrest and public disorder in 2019 during which protests and demonstrations rapidly degenerated into riots and rampant damage to public facilities and violent clashes with the police[179] vividly highlight the necessity for effective measures to be in place for the proper maintenance of public order. The power of the CP to object is circumscribed by Section 9 of the POO which tracks the criteria for permissible restriction under BOR 17. In the present case, the decision of the CP was made in dire circumstances of public disorder and it was

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[178] (2005) 8 HKCFAR 229.

[179] See *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518 at [88] to [97] and *Leung Kwok Hung v Secretary for Justice (No 2)* [2020] 2 HKLRD 771 at [11] to [17].

subject to review by an independent Appeal Board under section 16 of the POO. Further, the decision was amenable to judicial scrutiny in a decision challenge.

141. Thus, there is no basis in Hong Kong to regard the prosecution, conviction and sentence as distinct restrictions from the rule creating the offence in respect of the freedom of assembly. *Leung Kwok Hung v Secretary for Justice (No 2)*[180] does not support the case of the appellants. The Court of Appeal in that case reversed the conclusion of the Court of First Instance on the proportionality of the prohibition against the use of facial covering when taking part in an unauthorized assembly. Due to the interaction between Section 15(2), 17(1)(b) and 17(3) of the POO, the Court of Appeal discussed the concept of "operational proportionality" in relation to the dispersal of an assembly or procession[181]. The issue of separate proportionality assessment for the prosecution, conviction and sentence regarding taking part in an unauthorized assembly did not arise in that case.

142. Though there were references to prosecutions or convictions as restrictions on the freedom of assembly in the cases cited by the appellants, in substance the relevant challenges can be adequately addressed in Hong Kong under a rule challenge and/or a decision challenge. Those authorities do not support the proposition that there should be a separate round of proportionality assessment ***in addition to*** the proportionality assessment over the rule and the relevant decision of the CP.

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[180] [2020] 2 HKLRD 771.

[181] The non-compliance with Section 15(2) does not per se turn an authorized assembly into an unauthorized one. Upon such a non-compliance, any police officer may stop or disperse the public procession under Section 17(1)(b). For that purpose, a police officer has the power to give such orders as he may consider necessary or expedient under Section 17(3). If three or more persons in the procession refuse or wilfully neglect to obey a Section 17(3) order, the procession would become an unauthorized assembly. See [2020] 2 HKLRD 771 at [193] to [197] and [212] to [217].

143. Take the case of *Lashmankin v Russia*[182] as an example. The grounds on which the Strasbourg Court held that the restrictions imposed by the authorities were not justified[183] could be addressed under a decision challenge mounted together with a rule challenge under the Hong Kong framework[184]. Likewise, the overly broad nature of the relevant legal provisions in *Navalnyy v Russia*[185] could form the basis of a rule challenge in Hong Kong. The same can be said in respect of the successful challenges before the United Nations Human Rights Committee in *Popova v Russian Federation*[186], *Praded v Belarus*[187] and *Toregozhina v Kazakhstan*[188].

Lord Neuberger of Abbotsbury NPJ:

144. These appeals come before this Court on a constitutionally significant, but limited and technical, issue, namely the certified question set out in paragraph 11 above:

> Whether the Court should follow the persuasive, though not binding, decision(s) of the Supreme Court of the United Kingdom ["UKSC"] in *DPP v Ziegler (SC(E))* ["*Ziegler*"][189] and/or *Reference by the Attorney General for Northern Ireland – Abortion*

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[182] (2019) 68 EHRR 1.

[183] *Ibid* at [413] to [442] (which pertained to matters that could be considered under a decision challenge in Hong Kong) and [443] to [458] and [464] to [470] (which pertained to matters that could be considered under a rule challenge in Hong Kong).

[184] The same observations apply to the challenges in *Primov v Russia* ECtHR Application No.17391/06 (13/10/2014) and *Kuznetsov v Russia* ECtHR Application No.10877/04 (23/01/2009).

[185] (2019) 68 EHRR 25 at [116] to [118].

[186] CCPR/C/122/D/2217/2012 at [7.4] to [7.6].

[187] CCPR/C/112/D/2029/2011 at [7.7] to [7.9].

[188] CCPR/C/112/D/2137/2012 at [7.3] to [7.5].

[189] [2022] AC 408.

> *Services (Safe Access Zones) (Northern Ireland) Bill* ["*Abortion Services*"][190] (which clarified some aspects of *Ziegler*) and, if so, in what circumstances, and to what extent, it should conduct an operational proportionality exercise.

145. That issue has been fully and impressively considered in the judgment of the Chief Justice and Ribeiro PJ ("the main judgment"), which gives important guidance as to the proper approach to what has been called "operational proportionality". I agree with that judgment, and add this postscript largely because the certified question relates to two decisions of the UKSC which themselves involve consideration of other English cases.

146. The certified question arises from a concern as to how a court should deal with an alleged offence of knowingly taking part in a procession which has not been authorised in accordance with the Public Order Ordinance ("POO"), where the defendant contends that a conviction would be a disproportionate restriction on his or her fundamental right of freedom of assembly.

147. The right of "peaceful assembly" is recognised by Bill of Rights Article 17 ("BOR Article 17"), subject only to "restrictions … imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, [public order (ordre public),][191] the protection of public health or morals or the protection of the rights and freedoms of others".

148. The relevant restriction in the present case arises under POO, sections 13 to 15 of which provide that (subject to certain exceptions) a "public procession may take place if, but only if" it is notified to the Commissioner of Police ("the

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[190] [2022] UKSC 32.

[191] These words should be treated as deleted – see *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, [97].

Commissioner"), and the Commissioner does not object on grounds which reflect BOR Article 17. Sections 7 to 9 have similar provisions with regard to public meetings. Section 16 gives a right of appeal to an Appeal Board against the Commissioner's objection to a procession or a meeting (an "assembly") taking place. Section 17A(3)(a) renders it an offence for a person "without lawful authority or reasonable excuse, knowingly… to take part in or… to form part of any such unauthorized assembly", and provides for a maximum sentence of imprisonment for five years on indictment and for three years (and a fine) on summary conviction.

149. In this case, the assembly in question consisted of a very large public meeting ("Meeting"), followed by a procession ("Procession"). Permission for the Meeting was granted by the Commissioner, but he objected to the Procession, and his objection was upheld by the Appeal Board.

150. The Meeting took place as did the Procession, and the defendants were all convicted of knowingly taking part in an unauthorized procession.

151. Both the fundamental right of freedom of assembly and the proposition that that right may be restricted by specific domestic laws, are recognised in English law as in Hong Kong law (and presumably in the law of all democratic societies). It may therefore be helpful to consider the approach of English courts to the issue, while recognising that care must be taken in that connection as the constitutional arrangements in the United Kingdom differ from those in Hong Kong. As explained more fully in the main judgment, Hong Kong fundamental rights are constitutional "basic rights", whereas UK fundamental rights are statutory "Convention rights" (the Convention of course being the European Convention on Human Rights), and, given that the UK constitution is

based on parliamentary supremacy, the powers of the UK courts are in some respects more limited than those of the courts of Hong Kong.

152. As I see it at any rate, these constitutional differences (i) do not mandate a different approach when considering whether a restriction on the right of assembly is proportionate, but (ii) do require a different approach if the court concludes that the restriction is or may not be proportionate. Of course, point (i) does not mean that the courts in this jurisdiction should simply follow the UK courts any more than the UK courts should follow this court, but as the certified question recognises, there is often value in seeing how courts in other common law jurisdictions have approached an issue which is being addressed here.

153. Having said that, the UKSC does seem to have had some difficulty with the issue. To describe *Abortion Services* as having "clarified some aspects of *Ziegler*", as it is put in the certified question, is rather kind to the majority judgment in *Ziegler*. A central feature of the reasoning in *Ziegler*[192], and the generally understood effect of *Ziegler*[193], were each described in *Abortion Services* as "mistaken". The two decisions are fully considered in the main judgment, and all I need say at this stage is that I would respectfully but unhesitatingly adopt the approach laid down in *Abortion Services*[194].

154. The main judgment (if I may say so, rightly) approaches the certified question primarily by reference to the Hong Kong constitutional framework.

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[192] *Abortion Services*, [29], and see the following twelve paragraphs as to the effect of the mistake.

[193] *Ibid* [42] and again see the ensuing paragraphs as to the effect of the mistake.

[194] To be fair to the Court in *Ziegler*, they were to a significant extent constrained by the way in which the case had been decided below and argued in the Supreme Court (see [2022] AC 408, [18] to [28] and pp 411-413.

However, when it comes to considering whether a restriction on a fundamental right is proportionate. I believe that the approach is effectively no different from that laid down by Lord Reed PSC, who gave the sole judgment in *Abortion Services*.

155. Given that it is common ground that the fundamental right of freedom of assembly is engaged in this case, the question which *Abortion Services* suggests [195] should be considered is "whether the offence is one where the ingredients of the offence themselves strike the proportionality balance, so that if the ingredients are made out, and the defendant is convicted, there can have been no breach of his or her Convention rights".

156. The ingredients of the offence in this case are (i) knowingly (ii) taking part in or forming part of (iii) an assembly, (iv) which is unauthorized, (v) and doing so without lawful authority or excuse. In this case, Judge Woodcock concluded that all those ingredients were established against each of the defendants and convicted them (sentencing them to varying terms of imprisonment, some of them suspended). The Court of Appeal had no hesitation in deciding that her conclusions were fully justified (although they quashed the defendants' convictions on the additional charge of organizing an unauthorized assembly contrary to POO section 17A(3)(b)(i), and accordingly reduced the sentences).

157. Adopting the approach adopted in *Abortion Services*, it seems to me that the Constitutional challenge in this case would have required the defendants to concentrate on ingredient (iv) – and arguably on ingredient (v) – to show that "the ingredients of the offence themselves [do not] strike the proportionality balance", as the other ingredients are purely factual.

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[195] At [55].

158. So far as ingredient (iv) is concerned, as the main judgment says, the defendants would have had to establish that (a) the provisions of POO represented a disproportionate interference with the constitutional right of freedom of assembly, and/or (b) the decision of the Commissioner to object to the Procession represented a disproportionate interference with the constitutional right of freedom of assembly.

159. The argument that the provisions of POO are disproportionate was not open to the defendants in light of the decision of this court in *Leung Kwok Hung v HKSAR*[196] (and leave to appeal on this ground was therefore refused).

160. The argument that the decision of the Commissioner to object to the Procession was disproportionate was not a contention raised at trial, or, as far as I can see on appeal. That is not to imply a criticism of the defendants' advisers, as, at least on the facts as set out in the judgments below, it does not strike me as even a remotely promising line of attack.

161. That leaves the question, founded on ingredient (v), whether it would have been open to the defendants to argue that they can invoke their constitutional right to freedom of assembly as "lawful authority or reasonable excuse". It would be rather strange if those words did have such an effect in the light of the conclusions expressed in the preceding two paragraphs. If the law criminalising unauthorized processions, and the decision to object to this Procession were each proportionate restrictions of the basic right to freedom of assembly, it is hard to see how the defendants could simply rely on that basic right as "lawful authority or reasonable excuse" for taking part in the Procession. And, in my view, there were no other factors which could be relied on by the defendants in this connection. The fact that a procession, which was unauthorized partly or wholly due to fear of

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[196] (2005) 8 HKCFAR 229.

violence, was in the event peaceful, although relied on in argument, is plainly insufficient, although it is obviously potentially relevant when it comes to sentencing.

162. The conclusion that the "reasonable excuse" provision is of no assistance to the defendants is supported by the statement in *Abortion Services*[197] that "where the ingredients of the offence in themselves do strike the appropriate balance, there is no need for a Convention proportionality assessment when considering the lawful excuse defence". It is fair to say that in a slightly earlier passage Lord Reed observed that "a defence of lawful or reasonable excuse may provide a route by which a proportionality assessment can be carried out"[198]. However, two points must be made about that observation. First, it was said only to apply where "proof of the ingredients of the offence does not in itself ensure the proportionality of a conviction"[199], so it does not appear to apply here. Secondly, it was said to be invocable "having recourse if need be to section 3 of the Human Rights Act"[200], which implies that it would not be the natural meaning of "reasonable excuse".

163. Further there is nothing in the reasoning of this court in *Leung Kwok Hung* which even gets close to suggesting that the reference to "lawful authority or reasonable excuse" played any part in the reasoning which led to the conclusion that POO was proportionate.

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197 At [58].

198 *Ibid* at [57].

199 *Ibid* at [56].

200 *Ibid* at [57]. Section 3 of the Human Rights Act provides that "So far as it is possible to do so, … legislation must be read and given effect in a way which is compatible with the Convention rights".

164. It is perhaps for these reasons that the arguments on behalf of the defendants concentrated on contending that, before deciding to convict the defendants, the court should have satisfied itself of the proportionality of the decisions to arrest and/or to charge and/or to convict the defendants. For the reasons given in the main judgment, those arguments appear to me to be misconceived. As explained, they also appear to be inconsistent with the reasoning in *Abortion Services*.

165. However, as the submissions made by the defendants in this Court largely rested on those arguments, it is perhaps worth referring to the decision of the English Divisional Court in *James v Director of Public Prosecutions*[201], a decision which was considered and approved in *Abortion Services*[202]. In *James*, the defendant had been convicted of knowingly failing to comply with a police officer's direction imposing a condition on those taking part in a public assembly, a condition provided for by statute if it appeared to the police officer "necessary to prevent … disorder".

166. After considering a number of earlier cases, Ouseley J (with whom Davis LJ agreed) said "[t]he proportionality, for the purposes of articles 10 or 11, of a decision to prosecute is simply not an issue for the trial Courts to deal with"[203].

167. The Divisional Court then went on to consider an alternative argument that the defendant's rights of freedom of speech and/or assembly under article 10 or 11 of the Convention should have been taken into account by the court when deciding whether to convict. Ouseley J said that, if it had genuinely and

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[201] [2016] 1 WLR 2118.

[202] At [48]; it was also discussed at [52] and [53], and inferentially approved at [64] and [65].

[203] [2016] 1 WLR 2118, [25].

reasonably[204] appeared necessary to the police officer concerned to give the direction, he had "some difficulty envisaging the circumstances in which the qualifications to article 10 and 11 would not also inevitably be satisfied.", so that "proof of the ingredients of the offence itself would demonstrate the proportionality of the condition, non-compliance with which underlies the offence"[205].

168. In my view, these observations, in a case with many similarities to the present and approved by the UKSC, provides strong specific support for the rejection in the main judgment of the contention that, before convicting the defendants, the court should have satisfied itself of the proportionality of the decisions to arrest and/or to charge and/or to convict the defendants.

Chief Justice Cheung:

169. The Court accordingly unanimously dismisses these appeals.

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[204] The requirement of reasonableness comes later in paragraph [40] and is emphasised in [41] and [42].

[205] *Ibid* [40]. These qualifications are similar to the requirements on restrictions in BOR Article 17.

(Andrew Cheung)	(R A V Ribeiro)	(Joseph Fok)
Chief Justice	Permanent Judge	Permanent Judge

(M H Lam)	(Lord Neuberger of Abbotsbury)
Permanent Judge	Non-Permanent Judge

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FACC 5/2024

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