

HKSAR v. ASADUZZAMAN [2010] HKCFI 431; HCMA 314/2009 (7 May 2010)

BETWEEN

IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL MAGISTRACY APPEAL NO. 314 OF 2009 (ON APPEAL FROM KTS 16955 OF 2008) -----

HKSAR and ASADUZZAMAN

----- Before : Hon Stock VP, Lunn J and Saw J in Court

Date of Hearing : 7 May 2010 Date of Judgment : 7 May 2010

----- JUDGMENT -----

Hon Stock VP (giving the judgment of the Court):

1. On the evening of 4 September 2008 the appellant took four live chickens from a poultry cage at the front of his fresh provision shop in Yau Ma Tei, moved them inside, and kept them there overnight. A prosecution was launched because it was said that in keeping live chickens at retail premises overnight, he contravened [s. 30AA](#) of the [Food Business Regulation, Cap. 132](#).

HCMA 314/2009

Respondent Appellant

2. He pleaded not guilty but was convicted by the magistrate. He has appealed against that conviction and Deputy Judge Geiser pursuant to the provisions of [s. 118\(1\)\(d\)](#) of the

Magistrates Ordinance, Cap. 227 has directed that the appeal be heard by this Court.

3. The Public Health and Municipal Services Ordinance, Cap. 132 is, as its name suggests, a statutory vehicle for the protection of public health. It designates the Director of Food and Environmental Hygiene to be the Authority in respect of a variety of powers and duties specified by the Ordinance: see s. 3 and the Third Schedule. The Director is the designated authority in respect of s. 56. Section 56(i) empowers him to make regulations “for securing the observance of sanitary and cleanly conditions and practices and wholesome methods in connection with – (a) the sale of food for human consumption ...; (b) the ... exposure of sale ... of food intended for sale ... for human consumption ... or otherwise for the protection of the public health in connection with any such matters.” Subsection (2)(a) permits regulations to be made:

“(a) for prohibiting, restricting or regulating the sale, or storage, possession or exposure for sale, of any specified food or drug, either generally or in any specified district, area or place or by any specified person or class of persons;”

4. Pursuant to the powers thus conferred, the Food Business Regulation has been promulgated. 5. The effect of s. 31(1)(d) of the Regulation is that save under and in accordance with a licence

granted by the Director, no person shall carry on a fresh provision shop.

6. Section 125(1)(a) of the Ordinance provides that where any public officer is empowered to grant a permit, that permit shall be granted subject to such requirements, conditions or restrictions as the licensing authority may think fit to impose

for the purpose of carrying out the objects of the Ordinance.

7. In September 2007 the appellant was granted a fresh provision shop licence. He was named as the licensee and the premises licensed were the premises in Yau Ma Tei. The licence was specified to remain in force for one year from 29 September 2007 to 28 September 2008. It authorised him to sell at those premises “live poultry and fresh poultry carcass but excluding live water birds and live quails.” The licence stipulated that it was:

“... subject to the provisions of the [Public Health And Municipal Services Ordinance \(Cap. 132\)](#) and Regulations made thereunder, and to such requirements, conditions or restrictions as are notified to the licensee by the Director.”

8. Section 30(1)(a) of the Regulation stipulates that: “(1) Save with the permission in writing of the Director, no person shall-

(a) sell or offer or expose for sale, or possess for sale or for use in the preparation of any article of food for sale, any of the foods specified in items 1 to 5 inclusive, items 9 to 14 inclusive and items 16 to 21 inclusive of Schedule 2 ... ”

9. Item 4 of Schedule 2 refers to:

“4. (a) Live water birds, excluding live water birds on a poultry farm or in a wholesale market

(b) Other live poultry, excluding live poultry on a poultry farm or in a wholesale market (c) Fresh, chilled or frozen poultry carcass.”

10. From time to time, as one would expect, additions are made to the Regulation. One such addition is s. 30AA which came into effect on 2 July 2008. In so far as is relevant to this appeal it provides as follows:

“(1) A permittee shall ensure that—

(a) each day, before 8:00 p.m., all live poultry remaining at the relevant permitted premises (whether sold or unsold) is slaughtered; and

(b) there is no live poultry at the permitted premises between 8:00 p.m. each day and 5:00 a.m. the next day.

...

(2) Without limiting any other powers the Director has in respect of the revocation of a permission, the Director may revoke the relevant permission if subsection (1) is contravened.

(3) In this section—

“permission” (准許) means a permission granted under section 30(1)(a) in respect of any food specified in item 4(a) and (b) of Schedule 2;

“permitted premises” (獲准許處所), in relation to a permission, means the premises at which the relevant permittee is permitted to sell or offer or expose for sale, or possess for sale or for use in the preparation of any article of food for sale, any food specified in item 4(a) and (b) of Schedule 2;

“permittee” (獲准許人士) means a person who has been granted a permission.”

11. It was an admitted fact in the Magistrates Court, that shortly before 8 p.m. on 4 September 2008 the defendant took four live chickens from the front of his fresh provision shop and moved them inside; that the live chickens belonged to him; and that he failed to ensure that no live

poultry was kept in the premises overnight. It was also an admitted fact that at the material time the premises were “permitted premises” within the meaning of s. 30AA and that he was a “permittee” within the meaning of that section.

12. The information upon which the appellant’s trial proceeded alleged that he:

“between 4 September 2008 and 5 September 2008, in Hong Kong, being the permittee of the permitted premises at G/F, 18 Reclamation Street, Yau Ma Tei, Kowloon, failed to ensure that there was no live poultry at the said permitted premises between 8:00 p.m. on 4 September 2008 and 5:00 a.m. on 5 September 2008, namely 4 live chickens were found at the permitted premises during the period between 8:00 p.m. on 4 September 2008 and 5:00 a.m. on 5 September 2008 contrary to Regulations 30AA(1)(b), 35(1)(a) and 35(3)(b) of the Food Business Regulations made under the [Public Health and Municipal Services Ordinance, Cap. 132](#)”

13. [Section 35](#) there referred to, is the offence creating provision and it provides for “a fine at level 5 and imprisonment for 6 months”.

14. In the circumstances thus described, it may be thought that the case against the appellant was cut and dried. But Mr Ross, on the appellant’s behalf, has advanced a number of arguments, here as in the court below, with which we can deal with relative brevity.

15. The first ground of appeal as framed is not altogether easy to follow or to reconcile with the submissions made in support of it. The ground of appeal says that insofar as the licence purported to apply to regulations made after the licence was granted, the licence “was invalid for uncertainty”.

The written argument asserts that section 30AA “cannot apply to the appellant’s licence which was granted before section 30AA came into force.” The submission is that “the reference to a permit being subject to conditions in [s. 125\(1\)\(a\)](#) of the Ordinance are to matters in existence at the time the permit is granted.”

16. None of these arguments is tenable. Section 30AA of the Regulation governed any person who was, at and after the date upon which that section came into effect, a permittee. On the night of 4-5 September 2008, which was a date after that section came into effect, the appellant was a permittee and he had live chickens on premises which were, at that date, permitted premises. It mattered not what his permit said or did not say; and it mattered not what he anticipated when he applied for and obtained the licence. It was not open to him to claim ignorance of the law; and that, so far as these arguments are concerned, is the end of the matter.

17. Ground 2 contends that s. 30AA applies prospectively and not retrospectively and that therefore it cannot apply to permits granted before 2 July 2008. No one contends that this section applies retrospectively. Everyone agrees that it applies only prospectively. It applied on 4-5 September 2008 which is the date upon which the appellant kept his live chickens, the date upon which he was a permittee and the date upon which his premises were permitted premises.

18. Ground 3 says that s. 30AA is ultra vires the Ordinance. There was some argument, canvassed before the judge as requiring referral to this Court and included in the written submissions placed before us, about s. 30AA being out of kilter with the scheme of the Ordinance. That is a particular argument which is no longer pursued, which is as well, for it had no traction.

19. But the ultra vires argument is pursued and it is said first, that s. 55(1A)(b) “would have been the proper regulation making power for s. 30AA” because, so the argument appears to go, s. 55(1A)(b) is a power directed at regulations designed for the protection of public health and, according to Mr Ross this morning, is designed to enable retrospective regulations to be made. We have answered the argument about retrospectivity. The point can in any event not run for it suffices to refer to s. 57 of the Ordinance which provides that:

“Regulations made under section 55 or 56 may include provision for the prohibition, restriction or regulation of the sale, or the possession, offer or exposure for sale or consignment or delivery for sale, of live poultry, live reptiles and live fish in the same manner as if such live poultry, live reptiles and live fish were food.”

20. The second limb of the ultra vires argument is by reference to s. 125(1B)(a)(ii) of the Ordinance which, insofar as may conceivably be relevant, provides that the renewal of a permit shall not be subject to additional or alternative conditions to those already in the permit unless not less than 90 days prior notice in writing is given to the permit holder of the licensing authority’s intention to impose those additional or alternative conditions. So it is said that s. 30AA effectively places a fresh condition on the “operating permit”, a result that sits ill at ease with the notice provision. And s. 30AA is in this way said to be inconsistent with the scheme of the Ordinance.

21. The argument is, with respect, again bereft of merit. Section 125(1B) addresses one small and discrete aspect of the whole, namely, certain requirements when permits are renewed. This case has nothing to do with the renewal of permits. The scheme of the Ordinance as a whole is the

protection of public health. The purpose of s. 30AA is the protection of public health. The point taken by Mr Ross is misconceived. It suffices to say that s. 125(1)(B) does not preclude the making of regulations under s. 56 of the Ordinance applicable with immediate effect to those who at the date of their making are permittees. There is no inconsistency whatsoever between the requirements of s. 125 and the applicability of s. 30AA of the Regulation to those who at the date of the Regulation's making are permittees.

22. The fourth and final ground of appeal concerns art. 105 of the Basic Law, paragraph 1 of which provides that:

“The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.”

23. The assertion is that “s.30AA [is] contrary to Article 105 of the Basic Law in that it does not protect the appellant's right to the use of his property namely, live chickens, in accordance with law.”

24. What we are concerned with in this case is a regulatory law imposed in the public interest which restricts the way in which certain property may be used. That is not a deprivation of property for which compensation is payable: see *Grape Bay Ltd v Attorney General of Bermuda* [2000] 1 WLR 574 at 583; also *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277.

25. The issue of compensation is not now pursued on the appellant's behalf. Mr Ross's complaint is more specific. He

correctly says that any restriction imposed by law upon the right to hold property must satisfy the well-known proportionality test, namely, that the restriction pursues a legitimate aim; that the restriction is rationally connected to the legitimate aim; and that the restriction is no more than is necessary to accomplish the aim. The regulation in question was promulgated as part of the battle to combat the danger of avian flu . Mr Ross concedes, we believe, that s. 30AA pursues a legitimate aim. He would be hard-pressed, we think, successfully to argue that the measure is other than rationally connected to that legitimate aim. But what he says is that the law is not “fair or equitable”. This is because, he contends, it does not apply to wholesalers or farmers of live poultry. In his written submissions, he puts it this way, that “while the restriction on keeping a stock of live poultry is designed to prevent one bird from infecting others, birds arriving from farms or wholesalers may already be infected as there is no statutory stock limitation on them. ... The scheme cannot rationally work unless all those in contact with live poultry have their stock restricted.”

26. Section 30AA is not the only legislative measure to combat the risks of avian flu . It is not suggested by Mr Ross that it is the only legislative measure and that being so, it seems to us impossible for him to mount an argument based on some suggested irrationality of the regulation. Insofar as the claim may be said to imply that more could be done to combat the dangers of avian flu by extending s. 30AA to others, that may or may not be so; but some steps must be taken and this is one of them. If the measures taken overall do not go far enough – and we are not for a moment saying that that is the case – then it hardly follows that this particular measure goes further than is necessary to achieve the objective. It is inevitable that measures to combat

avian flu , or indeed any other threats to public health, will vary according to groups of individuals and their occupations and the stock they keep. It will be a complex process. Different groups will be treated differently. So, for example, the Legislative Council brief which preceded the promulgation of the Food Business (Amendment) Regulation

“Since 1998, the Government has put in 2008 stated: place a comprehensive preventive and surveillance programme to reduce the risk of avian influenza outbreaks in Hong Kong. These measures included tightened biosecurity measures at local farms, enhanced import control and hygiene requirements for wholesale and retail markets, etc. In 2003, we introduced a vaccination programme for all local chicken farms and we also required all imported live chickens to be vaccinated against the disease. The World Health Organisation has publicly commented that our preventive and surveillance programme is one of the most advanced systems that they have seen.”

This illustrates albeit in part that extensive measures are in place and Mr. Ross’s argument depends upon looking at his client’s position through an unacceptably narrow prism.

27. There is no basis, whether evidential or otherwise, upon which we could properly conclude that s. 30AA was either in itself or in the grand scheme of the battle against avian flu , irrational or lacking in proportionality. So this ground also fails.

28. For these reasons, the appeal is dismissed. We add only that this is a straightforward case with no merit at all and, with respect, was, as the respondent submitted in the court below, not a case that required referral to this Court.

(Frank Stock) (Michael Lunn) Justice of Appeal Judge of the

Court of First Instance

(Darryl Saw)

Judge of the Court of First Instance

Mr Robert S K Lee, SC, DDPP & Ms Betty Fu, PP of the
Department of Justice for the Respondent

Mr Phillip Ross, instructed by Messrs Haldanes for the
Appellant