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Application No. 1 of 2019

**IN THE ANTI-MONEY LAUNDERING AND  
COUNTER-TERRORIST FINANCING REVIEW TRIBUNAL**

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IN THE MATTER of a Decision made  
by the Commissioner of Customs and  
Excise pursuant to s 30 of the  
Anti-Money Laundering and Counter-  
Terrorist Financing Ordinance, Cap.  
615

and

IN THE MATTER of s 59 of the  
Anti-Money Laundering and Counter-  
Terrorist Financing Ordinance, Cap.  
615

BETWEEN

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LIU PENG FUNG

Applicant

and

COMMISSIONER OF CUSTOMS AND EXCISE

Respondent

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Before : Mr. Paul Shieh Wing-tai, SC, Chairman  
Ms. Lena Chan, Member  
Prof. Tam Kar-yan, Member

Date of hearing : 25 October 2019  
Date of determination : 4 March 2020

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**DETEMINATION**

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1. This is an application for review by the applicant Mr. Liu Peng-fung (“the Applicant”) pursuant to the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615) (“the Ordinance”). The subject matter of the application is the decision of the Commissioner of Customs and Excise (“the Commissioner”) to refuse the Applicant’s application for a money service operator licence (“the Application”) to operate a money exchanging business in the name of 忠信人民幣找換店.

2. The review hearing took place on 25 October 2019. The Applicant appeared in person, while the Commissioner was represented by Mr. Tong Siu-him of the Department of Justice. The Applicant did not testify and did not call any witnesses. The Commissioner called three witnesses namely Mr. Cheng Sze-hing (“Mr. Cheng”), Mr. Yu Fuk-po (“Mr. Yu”) and Madam Li Hoi-yin (“Madam Li”). All three witnesses were cross examined by the Applicant.

Background facts

3. The following background facts are either not controversial, or not seriously open to dispute.

4. The Applicant submitted the Application which was received by the Commissioner on 26 June 2018. Part of the Application consisted of:

|   |   |   |
|---|---|---|
| A |   | A |
| B | (1) Form 3A, which is a “Fit and Proper Person Declaration Form”.       | B |
| C |   | C |
| D | (2) Appendix 1 to Form 3A which is an authorization by the              | D |
| E | Applicant for the Commissioner of Police (“the                          | E |
| F | Authorization”) to disclose the Applicant’s conviction records          | F |
| G | (if any) to the Commissioner or other persons authorized by             | G |
|   | him.  |   |
| H | These two documents were signed by the Applicant on 25 June 2018,       | H |
| I | before the Application was submitted.                                   | I |
| J | 5. After the Application was submitted, it was processed by Mr.         | J |
| K | Cheng. Mr. Cheng testified that he phoned the Applicant on 27 June 2018 | K |
| L | and asked for some outstanding documents. He also reminded the          | L |
| M | Applicant that he was not allowed to carry on money service business    | M |
|   | before obtaining a licence.   |   |
| N | 6. On 15 August 2018 and 14 September 2018 the Applicant                | N |
| O | provided the outstanding documents and Mr. Cheng made an appointment    | O |
| P | for the Applicant to meet with Mr. Cheng.                               | P |
| Q | 7. A meeting took place on 18 September 2018. It was attended           | Q |
| R | by the Applicant, Mr. Cheng and Mr. Lai Chun-on (“Mr. Lai”) (who did    | R |
| S | not testify). After the meeting, the Applicant signed a number of       | S |
| T | documents, including Form 3A and the Authorization. Therefore these two | T |
| U | documents were signed twice by the Applicant – once on 25 June 2018     | U |
| V |   | V |

before the Application was submitted, and then after the meeting on 18 September 2018.

8. Form 3A contained (among other things) a declaration that the Applicant had never been convicted of any offence (other than a traffic offence) in Hong Kong or elsewhere.

9. As a result of investigations conducted by his colleagues, Mr. Cheng was informed that the Applicant had a number of convictions that had not been disclosed in Form 3A. Mr. Cheng passed the case to Mr. Yu to further handle.

10. The conviction history of the Applicant is as follows:

|   | <b>Date of Sentence</b> | <b>Description of Offence</b>  | <b>Sentence</b>                                     | <b>Court Ref.</b> |
|---|-------------------------|--|---|-------------------|
| 1 | 1986-06-24              | A. Assisting / Conducting / Operating / Keeping / Managing an unlicensed massage establishment (S. 4 Cap. 266) | FINED \$5000  | NK/18502/86       |
| 2 | 1989-09-25              | A. Taking Conveyance Without Authority (S. 14 Cap. 210)  | FINED \$2000 & COMP \$500                           | TW/3092/89        |
|   | 1989-09-25              | B. Diving Without A Valid Driving Licence (S. 42 Cap. 374)   | FINED \$600   | TW/3092/89        |
|   | 1989-09-25              | C. Using a motor vehicle on a road against third party risks (S. 4 Cap. 272)                                   | FINED \$1000 & DISQ D/L 12 MTH <to be continued...> | TW/3092/89        |
| 3 | 1990-02-12              | A. Possession of an obscene article for the purpose of publication (S. 21(1B) Cap. 390)                        | 4MTH  | C/2340/90         |
|   | 1990-02-12              | B. Publishing An Obscene Article (S. 21(1A) Cap. 390)  | 4MTH CONC A   | C/2340/90         |

|   | Date of Sentence | Description of Offence  | Sentence             | Court Ref.   |
|---|------------------|---|----------------------|--------------|
| 4 | 1995-09-01       | A. Publishing An Obscene Article (S. 21(1A) Cap. 390)                                   | FINED \$2500         | SPK/10089/95 |
|   | 1995-09-01       | B. Possession of an obscene article for the purpose of publication (S. 21(1B) Cap. 390) | 3 MTH SUSP<br>12 MTH | SPK/10089/95 |

11. Mr. Yu telephoned the Applicant to arrange for a meeting, which took place on 30 October 2018. It was attended by the Applicant, Mr. Yu and Madam Chow Yee-man (“Madam Chow”, who did not testify). At the meeting, upon being shown a record of his past convictions, the Applicant became emotional and refused to sign documents which Mr. Yu asked him to sign.

12. By letter dated 28 December 2018, the Commissioner rejected the Application on the ground that the Applicant had a number of previous convictions which he had not disclosed in Form 3A and the Commissioner did not accept that the Applicant was a fit and proper person to carry on a money services business.

13. In January, Mr. Yu passed the case to Madam Li to handle/follow up.

14. Over a period of time from 14 to 26 February 2019, Madam Li (who testified, and whose evidence I accept) conducted surveillance on an address at Shop No. 8, M1/F, Tsui On House, Tsui Ping (North) Estate, 19 Tsui Ping Road, Kwun Tong, Kowloon (“the Business Premises”) where the Applicant appeared to carry on business as 忠信人民幣找換店, obtained a number of marked bank notes for the purpose of an undercover

operation, and applied and obtained a search warrant for the Applicant's home before the operation. On 26 February 2019 Madam Li together with five other colleagues conducted an undercover operation at the Business Premises (Madam Li and her colleague Mr. Leung Kwok-yin ("Mr. Leung")) went into the Business Premises while four other colleagues waited nearby. Madam Li and Mr. Leung exchanged RMB800 into Hong Kong dollars and after the transaction was completed, Madam Li and Mr. Leung disclosed their identities and their colleagues also went into the Business Premises. The Business Premises was searched and Applicant remained silent under caution. His home was also searched later on the same day.

The Tribunal's approach and procedure adopted

15. Under the Ordinance, this Review Tribunal has very wide powers to receive evidence (even though such evidence may not be admissible in court proceedings), affirm, vary or reverse the decision of the Commissioner. The hearing is in the nature of a determination *de novo*, as if the Tribunal is considering the Application afresh.

16. As noted above, while the Commissioner has called three witnesses, the Applicant has not called any witnesses and has not testified himself.

(1) In an earlier preliminary conference held on 7 May 2019, at which the Applicant was present, I gave detailed directions as to timetable for the filing of:

- (a) Witness statements;
- (b) Documentary evidence; and

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## (c) Submissions.

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(2) Apart from a document dated 16 May 2019 (which was an indication that the Applicant was willing to continue to communicate with the Tribunal, but which did not count as a witness statement or submission), the Applicant has not filed any witness statement, documentary evidence or submissions.

(3) On the day of the hearing (25 October 2019), the Applicant provided a document to the Secretariat of the Tribunal, which was dated 23 October 2019. After some discussion at the commencement of the hearing, the Applicant's tendering of the document was treated as an application to adduce it as a witness statement, out of time. This application was opposed by the Commissioner. But the Commissioner did not oppose any application to use the document as a piece of submissions by the Applicant. I rejected the application to adduce the document as a witness statement, but allowed the application to treat it as a piece of submission (out of time), for reasons that I gave *ex tempore* at the hearing.

17. The upshot of all the above is that the Applicant has not given any factual evidence in support of his case. He might put certain matters to the witnesses called by the Commissioner but unless those matters are agreed by the Commissioner's witnesses, they do not constitute evidence in this application merely by reason of the fact that the Applicant uttered them in the course of cross examination.

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The issues

18. The single issue in this case is whether the Applicant has demonstrated that he is a fit and proper person to carry on a money service business. The burden of proof is on the Applicant.

19. The Commissioner relied on four points in opposition to the application for review:

(1) The Applicant's deliberate misstatement as to his criminal records.

(2) His carrying on of a money service business after rejection of the Application.

(3) His criminal records indicated a risk of repetition of illegal activities.

(4) His unco-operative attitude.

20. We shall deal with these in turn.

(1) Deliberate misstatement

21. As mentioned above, Form 3A contained a statement that the Applicant had never been convicted of any offence other than a traffic offence. The Applicant signed Form 3A twice, once on 25 June 2018 and once on 18 September 2018. In fact, the Applicant had a number of convictions which were not traffic offences.

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|---|--|---|
| A |  | A |
| B | 22.  | B |
| C | The statement in Form 3A was in both Chinese and English.                    | C |
| D | The Applicant at least knew written Chinese (based on his communication      | D |
| E | with the Tribunal) and he must have understood what he was signing.          | E |
| F | Ordinarily a criminal conviction is not something that one would lightly     | F |
| G | forget and there is no evidence or suggestion that he had forgotten about    | G |
| H | his previous convictions. In the absence of any explanation to the contrary  | H |
| I | (and the Applicant has not provided any) we find that the Applicant has      | I |
| J | made a misstatement as to the existence of previous convictions and that     | J |
| K | such misstatement was deliberate.  | K |
| L |  | L |
| M | 23.  | M |
| N | There is one point concerning the signing of Form 3A which                   | N |
| O | we should also deal with here. According to Mr. Cheng, on 24 October         | O |
| P | 2018, the Applicant called Mr. Cheng to inquire into the progress of the     | P |
| Q | Application. By then, Mr. Cheng had already learned of the Applicant's       | Q |
| R | failure to disclose his convictions in Form 3A and he told the Applicant     | R |
| S | that the chances of success were not high because of the Applicant's failure | S |
| T | to disclose his previous convictions. On hearing this, the Applicant sought  | T |
| U | to put the blame on Mr. Cheng by alleging that Mr. Cheng had given a         | U |
| V | Form 3A which was full of "devil in the details" for him to sign during      | V |
|   | their earlier meeting in September.  |   |
|   |  |   |
|   | 24.  |   |
|   | This allegation has not been repeated in either the 16 May                   |   |
|   | 2019 document or the 23 October 2019 document submitted by the               |   |
|   | Applicant. There is a reference to "devil in the detail" in the Applicant's  |   |
|   | notice of appeal dated 10 January 2019 but there was no allegation made      |   |
|   | against Mr. Cheng (or indeed any specific individual) in that document.      |   |

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25. Taken on its own, to say that a document has “devil in its details” means very little. Many documents have “details” in the sense that there are points of detail which, if agreed to, could carry adverse consequences. However, if the signatory to that document genuinely understood what he was signing and realized the point of detail in question, then he is bound by it and takes all the consequences. In the present case there is no evidence that the Applicant did not know what he was signing, or that he was misled or coerced into signing Form 3A which contained the incorrect statement concerning his previous conviction. That being the case, it cannot construe a valid defense to say that the devil was in the detail, or even that Mr. Cheng had given him Form 3A to sign with “devil in the detail”.

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26. In the document dated 23 October 2019, the Applicant complained that it was an infringement of privacy law for one to bypass the Personal Data Privacy Commissioner to “steal” personal data in the name of the Police. By signing the Authorization, the Applicant has authorized the Commissioner of Police to disclose the Applicant’s conviction records to the Commissioner and there was no breach of any law or rules concerning protection of privacy.

27. Having found that the Applicant has knowingly signed an incorrect statement in Form 3A, we now proceed to consider its relevance.

28. The objective of the Ordinance is to combat money laundering and to uphold Hong Kong’s status as an international finance centre. In considering what matters are relevant for the purpose of the fit and proper criteria, we must have regard to this legislative objective.

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29. In order to further the legislative objective, it is crucial that persons operating money services business must possess a high degree of honesty, reliability and integrity, and can be trusted and relied upon to fulfil the stringent requirements of due diligence, record keeping and other licensing requirements, and assist the authorities in tracing the whereabouts of proceeds, and to ensure that money service businesses do not become accomplices in illegal activities.

30. The deliberate making of an incorrect statement as to one's previous conviction is a serious matter impinging directly on one's honesty or integrity and hence operates adversely against granting a licence.

31. This is not to say that once a person had a previous conviction, he is forever doomed in his future prospects of obtaining a licence under the Ordinance. Each case must turn on its own facts. In this regard we can do no better than to set out the observations of Mr. Justice Lam VP in the case of Re A (admission as a barrister) [2018] 2 HKLRD 1245 at §22(a) to (c) and (g) to (i):

*“22. Whilst each case must depend on its own facts (as it is a multi-factorial fact-sensitive assessment), as general guidance, apart from the above propositions and comments, it is appropriate to bear the following considerations in mind:*

*(a) The burden is on the applicant to satisfy the court that he is a fit and proper person for admission to the Bar;*

*(b) The inquiry is directed to the present character and integrity of the applicant, not the character of him at the time when the offence was committed;*

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(c) *Though it is relevant to consider if he has reformed himself, and the admission of a past misdeed is one indication of acceptance of responsibility, it is not immutable that the process of rehabilitation must be accompanied by a public admission of guilt. Depending on the circumstances, a long period of honest and responsible living since the conviction may also serve as evidence of rehabilitation;*

...

(g) *In the authorities cited to us, some judges took the view that there are convictions which are so serious and reflected so badly on the character of the offenders that such persons can never be considered as fit and proper for admission to the Bar. As we are plainly not concerned with such a case, we need not express any final conclusion in that regard;*

(h) *For cases not falling within that category, in cases where a single conviction took place many years in the past, either in circumstances out of juvenile or adolescent folly or being out of character, the court should pay more regard to the subsequent development of the person in assessing whether he satisfies the fit and proper criterion. This does not mean that the past conviction is not relevant. It remains part of the history of the applicant which must be disclosed candidly. However, the significance of that conviction has to be assessed with a proper perspective;*

(i) *The authorities also show that non-disclosure of a past conviction by itself may be a ground for holding an applicant to be not fit and proper. Yet the extent of information to be provided is a matter of judgment. We shall come back to this issue in our discussion below."*

32. It is entirely open to the Applicant to have "come clean" about his convictions (in the sense of disclosing them in Form 3A) and to have provide materials and evidence with a view to persuading that despite the convictions he had (for example) turned over a new leaf and lived a responsible life and can be relied upon. However, not only has he not disclosed the convictions and provided explanations in Form 3A at the time of the Application, up till the time of the hearing he still has not provided any evidence to explain his failure to disclose, or as to why despite the

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convictions and his failure to disclose, the Application should still be approved.

33. In our view, the Applicant's inaccurate statement as to his past convictions is a highly relevant factor to be taken into account against the Applicant in terms of whether he is a fit and proper person.

(2) Operation of money service business after rejection of the Application

34. The evidence of Madam Li (which we accept) shows that the Applicant has carried on a money service business after the rejection of the Application, on 26 February 2019. Her evidence as to the events of 26 February 2019 has not been challenged by the Applicant in cross examination. The only point made by the Applicant in cross examination was that he had not cheated Madam Li in the exchange rate he adopted that day, which is wholly beside the point.

35. The fact that the Applicant had carried on a money service business despite the rejection of the Application is relevant to our evaluation. It shows a tendency to do what is prohibited by the law and reflects adversely on his reliability, integrity and law-abiding character.

36. There can be no doubt that the Applicant was aware that he could not carry a money service business without a licence under the Ordinance: (i) Mr. Cheng had told the Applicant over the phone on 27 June 2018, (ii) Mr. Cheng gave the Applicant a set of "licence guidelines" on 18 September 2018 (which stated that it is an offence to carry on a money service business without a licence - §1.2, §2.11); (iii) the Applicant called (24 October 2018) and met (30 October 2018) to talk about the progress of

A the Application (despite the fact that he already had a business registration  
B for the business), thereby showing that the Applicant knew that in addition  
C to applying for business registration, he ALSO needed a licence under the  
D Ordinance.

E 37. The fact that the incident occurred after the application has  
F been rejected by the Commissioner does not prevent us from taking it into  
G account in this review hearing. As we mentioned above, our function in  
H this hearing is to consider the matter afresh, and we are not confined to  
I examining the materials placed before the Commissioner at the time of the  
J rejection.

K 38. As to whether the Applicant was a fit and proper person, we  
L note that the criminal prosecution arising out of that incident remained  
M outstanding. We have concluded that it is open to us to take it into account,  
N for the following reasons:

O (1) The standard of proof is different: The standard of proof in  
P this review is on “a balance of probabilities”, whereas the  
Q standard of proof in a criminal prosecution is “beyond  
R reasonable doubt”. The ingredients of the criminal offence  
S may also be different.

T (2) Section 62(2) of the Ordinance protects the Applicant from  
U having what he said in these proceedings being used against  
V him in the criminal prosecution. There can therefore be no  
inhibition for him to speak and testify freely about the incident,  
to explain or to rebut the evidence given about the incident,  
but he did not do so.

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(3) If the incident is otherwise relevant for us to take into account, the fact that criminal proceedings (with a different standard of proof) are pending should not deprive this Tribunal of its ability to consider a relevant factor.

(3) Nature of the Applicant’s previous convictions

39. Section 30(4)(a) and (b) of the Ordinance provide that in considering whether a person is a fit and proper person, the Commissioner must have regard to whether an applicant has been convicted of certain specified offences set out in the Ordinance. The offences in respect of which the Applicant had been convicted were not among those specified offences and hence not ones which the Commissioner must take into account.

40. However, in our view, this does not mean that on the facts of a particular case the Commissioner may not take into account the nature of previous convictions which did not fall within section 30(4)(a) or (b) of the Ordinance.

41. We accept the Commissioner’s submission that there were two features in the Applicant’s previous convictions (leaving aside the traffic-related convictions in 1989):

(1) In 1986 he was convicted of an offence concerning the operation of unlicensed massage establishment. The relevance is that his operation of a money service business in February 2019 (described above) without a licence is not the

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|---|--|--|---|
| A |  |  | A |
| B | first time the Applicant had acted in disregard of licensing requirement in Hong Kong.   |  | B |
| C |  |  | C |
| D | (2) He had four convictions concerning obscene articles between 1990 and 1995. He was aged 30 and 35 at the material time, long after any adolescent years when one could have excused the offences by references to youthfulness or ignorance. In our view the timing and pattern of these convictions is indicative of a tendency to repeat past offences. |  | D |
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| F |  |  | F |
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| H | 42. In our view these two features (propensity to disregard licensing requirement, and tendency to repeat past offences) are relevant to one's integrity, honesty and respect for the law, and hence they reflect negatively on our evaluation of whether the Applicant is a fit and proper person to carry on a money service business.                     |  | H |
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| L | (4) <u>Unco-operative attitude</u>   |  | L |
| M |  |  | M |
| N | 43. The Commissioner complained that upon being told that his previous convictions had come to light, the Applicant evinced an unco-operative and even belligerent attitude:   |  | N |
| O |  |  | O |
| P | (1) On 24 October 2019, he accused Mr. Cheng of giving a document with "devil in the details" for him to sign.   |  | P |
| Q |  |  | Q |
| R | (2) On 30 October 2018 when he met with Mr. Yu and Madam Chow, he became emotional upon being shown his criminal records and spoke loudly.   |  | R |
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44. We are not minded to place weight on the above factors in considering whether the Applicant is a fit and proper person, for the following reasons:

(1) In considering factor (1) discussed above, we have already taken into account the absence of evidence/explanation from the Applicant in relation to his previous conviction and his misstatement. To take into account the minutiae of the details of his reaction on individual occasions would risk double counting the same factor of “lack of explanation”.

(2) In the context of the incident of 30 October 2018, on the same occasion a caution was administered to the Applicant and he was asked to sign a statement which the Applicant refused to sign (exhibit A1). His refusal to sign (or remaining silent) on that occasion should be viewed in the light of the fact that (as per the caution) he was not obliged to say anything in response to what was put to him by Mr. Yu or Madam Chow. For us to take into account his silence during an investigative process would undermine his right of silence on that occasion.

(3) If it is said that it is not the “silence” or lack of co-operation that the Commissioner presses upon us but the *attitude* or *manner* displayed by the Applicant on those two occasions, we regard that as something too trivial or personal to be taken into account. On a broad level, we have already taken into account the fact that he had not provided any “exculpatory” evidence or explanation about his mis-statement or convictions. Even if the Applicant may have reacted rudely

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or aggressively “on the spot” when confronted with his past, such may have to do with matters of personality, background or upbringing. On the facts of this case we do not think it is fair for us to take these matters into account in addition against the Applicant.


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45. Looking at the matter in the round and even disregarding feature (4) discussed above, we are of the view that factors (1) to (3) above are relevant and weighty factors against the Applicant in the context of evaluating whether he was a fit and proper person. We have reached the conclusion that the Applicant has failed to persuade us, on the balance of probabilities, that he is a fit and proper person to carry on a money service business.

46. For the reasons discussed above, we hereby dismiss the Applicant’s application for review.

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(Mr. Paul Shieh Wing-tai, SC)

Chairman,  
Anti-Money Laundering and  
Counter-Terrorist Financing Review Tribunal



(Ms. Lena Chan)  
Member



(Prof. Tam Kar-yan)

Member

The Applicant, Mr. Liu Peng-fung, present and unrepresented

Mr. Tong Siu-him, Government Counsel, instructed by Commissioner of  
Customs & Excise for the Respondent