Case Summary

Secretary for Justice v Timothy Wynn Owen, KC

FAMV 591/2022; [2022] HKCFA 23;
(2022) 25 HKCFAR 288; [2023] 1 HKC 429
(Appeal Committee of the Court of Final Appeal)
(Full text of the Appeal Committee's determination in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=149037&currpage=T)

Before: Cheung CJ, Ribeiro and Fok PJJ
Date of Hearing: 25 November 2022
Date of Determination: 28 November 2022

Application by SJ for leave to appeal to CFA – ad hoc admission of overseas counsel under s. 27(4) of Legal Practitioners Ordinance (Cap. 159) – Flywin principle – new issues raised by SJ not examined factually or canvassed in argument on intermediate appeal – CFA not having benefits of the views of intermediate appellate court

Background

1. The Chief Judge of the High Court, sitting in the CFI, granted the application of the Respondent for *ad hoc* admission under s. 27(4) of the Legal Practitioners Ordinance (Cap. 159) to represent Mr. Lai Chee Ying at the trial in HCCC 51/2022, in which Mr. Lai faced four charges involving a conspiracy in relation to seditious publications, contrary to ss. 10(1)(c), 159A and 159C of the Crimes Ordinance (Cap. 200) and conspiracies to collude with a foreign country or external elements to endanger national security, contrary to NSL 29(1)(4).

2. The CA dismissed the SJ's appeal against the Chief Judge's decision. It also refused to grant leave to appeal to the CFA on the basis that insofar as the SJ sought to raise new points, they were not of such an exceptional nature as to justify departing from the *Flywin*[1] principle; and two of the new points sought to be raised were not reasonably arguable in any event.

3. In the present application, the SJ sought leave to appeal from the Appeal Committee of the CFA on an urgent basis against the Orders for *ad hoc* admission granted by the courts below by lodging a Notice of Motion with the questions formulated by the SJ set out in the same terms as the one filed in the CA except that additional matters were raised on the "or otherwise" basis.

Major provision(s) and issue(s) under consideration

- NSL 3, 29(1)(4), 41, 46, 47 and 63
- Legal Practitioners Ordinance (Cap. 159), s. 27(4)

4. In examining the SJ's application, the Appeal Committee of the CFA applied the *Flywin* principle and considered whether the SJ had made out a proper case for the grant of leave to appeal in respect of the radically new points he sought to advance.

Summary of the Court's rulings

The Flywin principle

5. It was well-established that when an application was made for leave to appeal on a new point which had not been considered in the courts below, the *Flywin* doctrine applied as a discretionary principle. That doctrine had two aspects which bore on fairness to the other party and on the court's ability properly to adjudicate upon the matter. (para. 20)

[1] *Flywin Co Ltd v Strong & Associates Ltd* (2002) 5 HKCFAR 356.

(a) The first aspect had been referred to as the "state of the evidence" bar. Where a party had omitted to take a point at the trial and then sought to raise that point on appeal, he would be barred from doing so unless there was no reasonable possibility that the state of the evidence relevant to the point would have been materially more favourable to the other side if the point had been taken at the trial. (para. 21)

(b) The second aspect had been referred to as the "not considered on intermediate appeal" hurdle. It was only in the most exceptional circumstances that the CFA would entertain an appeal on a new issue, not fully explored and argued below, when it involved a major development of the law. (para. 25)

Whether the SJ had made out a proper case for the grant of leave to appeal in respect of the radically new points

6. The SJ's application for leave to appeal, seeking to raise radically new points which had not been mentioned or explored either before the Chief Judge or the CA, notwithstanding their obvious importance, clearly failed to surmount the well-established hurdles posed by *Flywin*. (para. 27)

7. The questions formulated by the SJ (including the matters raised on the "or otherwise" basis) self-evidently gave rise to a host of further issues which had not been examined factually nor canvassed in argument on intermediate appeal. (para. 28)

(a) For instance, the new principle that the SJ contended for to deal with *ad hoc* admissions involving NSL cases prompted the questions as to: (i) why there should be effectively a blanket ban on *ad hoc* admissions of *all* overseas counsel in relation to *all* NSL cases without differentiation; (ii) what kinds of matters would constitute "exceptional

circumstances" to justify admissions; and (iii) how the applicant would be required to discharge the burden of establishing the exception. However, counsel for the SJ declined the invitation to indicate the nature of such "exceptional circumstances" contemplated. (para. 28)

(b) Aspects of the question in which the SJ repeated his main arguments for adopting the fundamentally different approach raised factual issues that had not been explored in argument or supported by evidence. (paras. 29-30)

(i) The suggestion that admission of any overseas counsel would tend to defeat the aim of countering "interference in the HKSAR's affairs by foreign or external forces" cried out for elaboration and evidential support, such as how any particular *ad hoc* admission would result in such interference.

(ii) The involvement of any State secrets and other confidential information ought to have been properly raised and fairly explored factually and as a matter of law in the Courts below, rather than being first raised as an unsubstantiated new point when applying for leave to appeal to the CFA.

(iii) Similarly, the suggestion regarding some "possible attempt to use the legal process to compromise the protection of national security" cried out for elaboration, factual support and a fair exploration of the issue in the Courts below if it was to provide a basis for leave to appeal at the present stage.

8. The SJ's submission that the CA had in substance dealt with the new

points in its leave judgment[2] so that the CFA did have the benefit of the views of the intermediate appellate court was untenable. The new points generated numerous issues that had not been explored below, whether factually or as a matter of law. (para. 31)

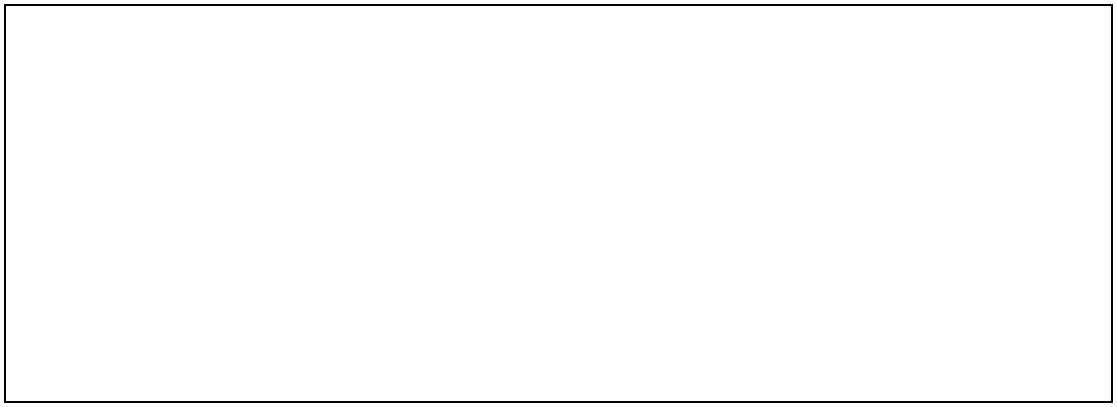
9. Accordingly, the Appeal Committee held that the SJ had not made out a proper case for the grant of leave to appeal in respect of the radically new points he sought to advance and his application must be dismissed. In the circumstances, it was unnecessary to enter into discussion of the CA's ruling that certain questions raised by the SJ were not reasonably arguable. The CA's refusal of leave to appeal was entirely case-specific and did not constitute a precedent. (para. 32)

10. The Appeal Committee added that the courts of the HKSAR were fully committed to safeguarding national security and to acting effectively to prevent, suppress and impose punishment for any act or activity endangering national security as required by NSL 3. That duty would unfailingly be carried out whenever national security issues were properly raised and duly explored, enabling the courts to undertake a proper adjudication of those issues. In relation to *ad hoc* admissions where national security considerations properly arose, such considerations were plainly of the highest importance to be taken into account. (para.33)

11. In the present case, however, the SJ had fundamentally changed his case only at the stage of seeking leave to appeal to the CFA, raising undefined and unsubstantiated issues said to involve national security which were not mentioned or explored in the courts below. No appropriate basis had been made out for the grant of leave to appeal. (para.33)

12. Accordingly, the application was dismissed. (para. 34)

[2] [2022] HKCA 1751.



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