



Summary of Judgment

Lai Chee-ying (“Lai”) v The Committee for Safeguarding National Security of the HKSAR (“NSC”), Director of Immigration (“Director”), and Secretary for Justice (“SJ”) (collectively as “Putative Parties”)

CACV 166/2023

[2024] HKCA 400

Decision : Appeal dismissed with costs to the Putative Parties
Date of Hearing : 16 April 2024
Date of Judgment : 16 April 2024
Date of Reasons : 29 April 2024
for Judgment and
Decision on Costs

Background

1. By an application for leave to apply for judicial review under HCAL 566/2023, Lai sought to challenge the NSC’s decision dated 11 January 2023 concerning the national security risk constituted by the proposed representation by an overseas counsel Timothy Owen KC (“**Owen**”) of Lai in the criminal proceedings under HCCC 51/2022 (“**NSC Decision**”) and the Director’s decision to respect and implement the NSC Decision. The Court of First Instance (“**CFI**”) dismissed the application for leave and ordered indemnity costs in favour of the Putative Parties. This is Lai’s appeal before the Court of Appeal (“**CA**”) in relation to the CFI’s dismissal of leave and the indemnity costs order.
2. Lai’s criminal trial in HCCC 51/2022 was due to commence on 1 December 2022, in which Owen was granted *ad hoc* admission to represent him. On 11 November 2022, Owen applied to the Director for approval to take up sideline employment under his employment visa to represent Lai, which was later withdrawn on 3 January 2023. On 28 November 2022, the Chief Executive (“**CE**”) submitted a report to the Central People’s Government (“**CPG**”). On 30 December 2022, the Standing Committee of the National People’s Government (“**NPCSC**”) issued an interpretation relating to NSL 14 and NSL 47 (“**Interpretation**”). In view of the Interpretation, the NSC Decision was made on 11 January 2023, and the Director indicated that the Immigration Department would duly respect and implement the same.



Department of Justice's Summary of the Court's Decision

(Full text of the Court's Decision at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=159696&currpage=T)

Issues in Dispute

3. Lai appealed against the CFI's judgment on the following grounds:-

- (i) Ground 1: Lai contends that the NSC Decision and the Director's Decision are amenable to judicial review;
- (ii) Ground 2: Lai contends that the NSC Decision was *ultra vires*;
- (iii) Ground 3: Lai challenges the CFI's admission of two expert reports on Mainland law adduced by the Putative Parties to assist the court in properly understanding the nature of the Interpretation under Mainland law; and
- (iv) Ground 4: Lai attacks the order of indemnity costs against him.

Ground 1

4. It is pertinent to bear in mind that **(i)** the presumption against clauses ousting the court's jurisdiction in judicial review is a technique in interpretation and is not conclusive, and if the language used is "most clear and explicit", it is possible to exclude the judgments and decisions of the NSC from the recourse of judicial review; and **(ii)** in construing NSL 14, it is necessary to read its provisions with the Interpretation, and full effect must be given to it. (§§34-35)
5. The NPCSC has authority under the NSL to interpret the provisions of the NSL. Under the civil law system in the Mainland, legislative interpretation by the NPCSC of provisions of the NSL can clarify or supplement the laws. The courts of Hong Kong are bound to follow the Interpretation under the principle of "one country, two systems". (§38)
6. When NSL 14 is read with the Interpretation, the meaning and effect of the language used in the text is most clear. The legislative intent as expressed in the language is that the NPCSC does not intend to confer jurisdiction on the Hong Kong courts to review any judgment, decision and act of the NSC, including the NSC Decision. (§39)
7. The reasoning for construing the NSL and the Interpretation is as follows (§40):



- (i) NSL 14 clearly states that “No institution, organisation or individual in the Region shall interfere with the work of the Committee”, which as Interpretation §1 clarifies, “institution” includes “the executive authorities, legislature and judiciary” and specifically provides that under NSL 14, the NSC “has the power to make judgements and decisions on the question whether national security is involved” and decisions made by the NSC “are not amenable to judicial review and have enforceable legal effect”.
- (ii) NSL 14 provides that “Information relating to the work of the Committee shall not be subject to disclosure” which reinforces the rationale that the decisions of the NSC shall not be amenable to judicial review. Given the nature of the work of the NSC, matters of sensitivity may well be involved. Disclosure of such information in the course of proceedings for judicial review would defeat the purpose of the confidentiality requirement.
- (iii) Interpretation §2 spells out the requirements in NSL 47, namely that the Hong Kong courts shall “request and obtain” a certificate from the CE to certify whether an act involves national security or whether the relevant evidence involves State secrets when such questions arise in the adjudication of a case concerning an offence endangering national security and the certificate shall be binding on the courts.
- (iv) Interpretation §3 refers to the CE’s report to the CPG on 28 November 2022 and mentions the view taken in the report, namely that “overseas lawyers not qualified to practise generally in the HKSAR may pose national security risks when serving as defence counsel or legal representatives in cases concerning an offence endangering national security”. Interpretation §3 goes on to state that the question “whether overseas lawyers not qualified to practise generally in the HKSAR may serve as defence counsel or legal representatives in cases concerning an offence endangering national security” is a question that requires certification under NSL 47, and a certificate from the CE shall be obtained. Importantly, Interpretation §3 then states “If the courts of the HKSAR have not requested or obtained a certificate on such question from the Chief Executive”, the NSC “shall perform its statutory duties and functions in accordance with the provisions of [NSL 14] to make relevant judgements and decisions on such situation and question.”

8. With the above in mind, the combined effect of NSL 14 and the Interpretation



leaves no room for any doubt or ambiguity. The meaning of the language is not reasonably capable of sustaining any competing alternative interpretation. The court is bound to give effect to the clear meaning of the language of the text. (§41)

9. Reading NSL 14 with the Interpretation, there is no justification to construe NSL 14 as restricting the performance of the NSC to the three listed “duties and functions”. By the Interpretation, which is a legislative interpretation of the NPCSC that can clarify or supplement laws, the statutory duties and functions of the NSC under NSL 14 are clarified to cover the making of “relevant judgements and decisions on such situation and question”, namely, where there is a question that requires CE certification under NSL 47 and the courts have not requested or obtained a certificate from the CE. (§43)

Ground 2

10. Given that the NSC Decision and the Director’s Decision are not amenable to judicial review, the CA did not see the need to deal with Ground 2. (§47)

Ground 3

11. Noting the clear language of NSL 14 and NSL 47 in which the court can construe without reference to expert opinion, expert evidence was not warranted on this occasion. In any event, the CA held that this ground is of little importance to the present appeal. (§48)

Ground 4

12. In view of the established grounds for appellate intervention regarding the exercise of discretion on costs, the CA cannot say that the CFI was wrong in principle or plainly wrong. The CA thus saw no basis to disturb the CFI’s award of costs on indemnity basis. (§§49-52)

Conclusion

13. The appeal was dismissed with costs to the Putative Parties on a party and party basis, with a certificate for two counsel. (§§53-55)