



Summary of Notable Judgment

**Kwok Cheuk Kin & Anr v
Director of Lands,
Secretary for Justice &
Heung Yee Kuk (“Interested Party”)
CACV 234, 317 & 319/2019; [2021] HKCA 54**

Decision : **SJ and Interested Party’s appeals allowed / Applicant’s appeals dismissed**
Date of Hearing : **11-14 August 2020**
Date of Judgment : **13 January 2021**

Background

1. The Small House Policy (“**SHP**”) is a policy allowing an eligible male indigenous inhabitant of the New Territories (“**NTII**”) to apply for permission to build for himself a small house once during his lifetime, by way of:
 - i. a Free Building Licence (“**FBL**”) on land owned by the applicant himself at nil premium;
 - ii. a Private Treaty Grant (“**PTG**”) of Government land at concessionary premium set at approximately two-thirds of the full market value; or
 - iii. a Land Exchange (“**LE**”) at nil premium for the private land portion and concessionary premium for the Government land portion.
2. The Applicants applied for judicial review challenging, inter alia, the decisions of the Director of Lands (“**Director**”) on grounds that:-
 - i. the SHP is unconstitutional in that it discriminates against persons of non-indigenous status in contravention of Articles 25 and 39 of the Basic Law (“**BL 25**” and “**BL 39**”), and/or Article 22 of s.8 of the Bill of Rights (“**BOR 22**”);
 - ii. the SHP is unconstitutional in that it discriminates against female indigenous inhabitants based on sex in contravention of BL 25, BL 39 and BOR 22; and
 - iii. the Government has failed in its duty to manage, use or develop the land in Hong Kong for the benefit of all Hong Kong citizens in contravention of Article 7 of the Basic Law (“**BL 7**”).
3. The Applicants argued that the SHP and the benefits conferred on NTIIs under the SHP did not fall within Article 40 of the Basic Law (“**BL 40**”), which provides that the lawful traditional rights and interests of the NTIIs shall be protected by the HKSAR.
4. By judgment dated 8 April 2019, the Court of First Instance (“**CFI**”) partially allowed the judicial review application as the Court found that one aspect of the SHP, viz FBL is constitutional whereas PTG and LE (for Government land) are unconstitutional.
(Full text of the CFI’s judgment at



https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=121196&QS=%2B&TP=JU

5. All parties appealed to the Court of Appeal (“CA”). By judgment handed down on 13 January 2021, the CA allowed the Government’s and the Interested Party’s appeals and dismissed the Applicants’ appeals.

Issues in dispute

6. The main issues are:-
 - i. whether, on a proper construction, the rights and interests of the NTIIs have under the SHP are “lawful traditional rights and interests of the NTIIs” in BL 40 (Construction Issue);
 - ii. even if SHP, whether wholly or partially, were found to be unconstitutional, whether relief should be refused on lack of standing and delay (Relief Issue).

Department of Justice’s Summary of the CA’s Judgment

(Full text of the CA’s judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132950&QS=%2B&TP=JU&ILAN=en)

Construction Issue

7. In ascertaining the purpose and objective of BL 40, the CA took into account the historical factual matrix regarding the status of NTIIs originated from the New Territories Lease in 1898 (summarized in Part D1 of the judgment) which shows that the NTIIs enjoyed certain traditional rights and interests which were unique to them because of their status. (paragraphs 87-88)
8. The CA held that “lawful traditional rights and interests” in BL 40 mean those which are, as a matter of historical fact, recognized to be the NTIIs’ lawful traditional rights and interests in the Hong Kong legal system at the time of the promulgation of the Basic Law on 4 April 1990. Applying the theme of continuity, BL40 continues and elevates the recognition and protection to a constitutional level for such lawful traditional rights and interests of NTIIs after 1 July 1997. (paragraph 93)
9. On the “traditional” aspect, the CA disagreed with the CFI that “traditional rights and interests” protected by BL 40 were those “traceable” before the commencement of the New Territories Lease in 1898. The CA held that BL 40 does not entail the tracing exercise advocated by the Government and accepted by the CFI for the purpose of determining if an asserted right or interest is a traditional right or interest of NTIIs entitling its protection. (paragraphs 90-91)
10. The rights of a NTII to apply for permission of a small house grant under SHP (“Ding Rights”) were recognized as traditional in that they originated from and



retained the essence of the NTIIs' pre-1898 customs to build a house for their own occupation on their own land despite the change of the land holding system after 1898 and the disruptions caused by World War II. (paragraph 94)

11. On the "lawful" aspect, the Ding Rights were recognized as lawful in that they were embedded in legislation and in the form of a government policy, giving rise to legal consequences enforceable in court. In this regard, the CA rejected the Applicants' submissions that the question of lawfulness of NTII's rights and interests in BL 40 was intended to be left open to be determined by the courts after the Basic Law came into effect by reference to the Qing law or the law before 1 July 1997 including the BOR (paragraphs 92, 94, 96).
12. The CA accepted the Government's submissions that the Basic Law must be read as a coherent whole (including BL 25, BL 39, BL 40, BL 120 and BL 122).
13. When construing BL 40 together with BL 120 and BL 122, small house grants under SHP will continue to be recognized and protected under the law of the HKSAR irrespective of the form and whether they are made before or on 30 June 1997. (paragraphs 99, 102)
14. When read together with BL 25, BL 39 and BOR 22 as a whole, and consistent with the reservations under the Convention on the Elimination of All Forms of Discrimination Against Women excluding a discrimination challenge of SHP based on sex, the CA found that BL 40 must be construed to exclude a discrimination challenge based on other grounds, such as birth or social origin, available in the Basic Law or the BOR. (paragraph 112)
15. Accordingly, the CA held that on a proper construction of BL 40, the Ding Rights fall within the NTIIs' lawful traditional rights and interests entitling them to the constitutional protection in full, despite their inherently discriminatory nature. **SHP is constitutional in its entirety.** (paragraph 116)
16. The CA added that even adopting the CFI's approach on BL 40, they would have reached the same conclusion that the SHP falls within BL 40 and is constitutional as a whole despite its inherently discriminatory nature. (paragraphs 119, 126, 128)

Relief Issue

17. Despite that SHP is found to be constitutional, the CA addressed the relief issue by holding that there is substantial delay in instituting the JR application and the Applicants do not have sufficient standing to bring the JR in any event. The CA held that they would have refused relief even if they were to hold that the SHP was, wholly or partially, unconstitutional.

Civil Division
Department of Justice
13 January 2021