



Summary of Judgment

Ma Chun Man v Commissioner of Correctional Services

CACV 4/2025

(on appeal from HCAL 979/2024)

[2025] HKCA 585

Decision : Appeal dismissed with costs to the Commissioner

Dates of Hearing : 16 May 2025

Date of Judgment : 24 June 2025

Background

1. This appeal by Ma Chun Man (**Applicant**) from the judgment of the Court of First Instance (**CFI**) dated 6 December 2024 ([2024] HKCFI 3531) concerns the decision made by the Commissioner of Correctional Services (**Commissioner**) dated 25 March 2024 (**Decision**) of not referring the Applicant's case to the Post-Release Supervision Board (**Supervision Board**) for consideration of early release under section 6(3A) of the Post-Release Supervision of Prisoners Ordinance (Cap. 475) (**PRSPO**).
2. The CFI granted leave to apply for judicial review on the ground of procedural unfairness only but dismissed the judicial review. The CFI refused to grant leave on other grounds, finding that none of them is reasonably arguable.
3. The Applicant is a prisoner convicted, after trial, of "Incitement to Secession", an offence endangering national security (**OENS**) contrary to Articles 20 and 21 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region. He was sentenced to 5 years and 9 months' imprisonment, later reduced to 5 years upon appeal.
4. Before the Safeguarding National Security Ordinance (6 of 2024) (**SNSO**) came into effect, the Correctional Services Department (**CSD**) maintained a general practice under the statutory regime for remission of sentence that a person in custody (**PIC**) might be granted remission on the ground of his industry and good conduct after serving two-thirds of his sentence. The practice would have been applicable to the Applicant, who expected that he would be released early on 25 March 2024.



5. Since the SNSO came into effect on 23 March 2024, under section 6(3A) of the PRSPO, the Commissioner must not refer to the Supervision Board for its consideration of remission of cases of PIC serving sentences in respect of their convictions of OENS (**OENS PIC**) unless he is satisfied that it will not be contrary to the interests of national security.
6. On 23 March 2024, the CSD notified the Applicant of the intended recommendation to the Commissioner by the “Board of Assessment on Person in Custody Having Committed Offence Endangering National Security” (**Assessment Board**) which was established at the Commissioner’s direction, that **(a)** the Commissioner should not be satisfied that an early release of the Applicant would not be contrary to the interests of national security, and **(b)** his case should not be referred to the Supervision Board for consideration of early release under supervision under section 6(3A) of the PRSPO.
7. On 25 March 2024, the Applicant submitted a written representation (**Representation**) to the Commissioner. Thereafter, he was given a summary of the Assessment Board’s considerations (**Summary of Considerations**) and he expressed that he had no further representation to make. Later on the same day, the Commissioner, not being satisfied that an early release of the Applicant would not be contrary to the interests of national security, made the Decision that he must not refer the Applicant’s case to the Supervision Board for consideration according to section 6(3A) of the PRSPO.

Issues in Dispute

8. The grounds relied upon by the Applicant for the appeal are: (§5)
 - (1) Section 6(3A) of the PRSPO being **unconstitutional**, infringes his right to liberty in breach of Article 5(1) of the Hong Kong Bill of Rights (**BOR 5(1)**) as it falls foul of the “established by law” requirement;
 - (2) The Decision is in breach of his **legitimate expectation**; and
 - (3) The Decision is tainted by **procedural unfairness**.



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

(Full text of the Court's Judgment at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=169856&currpage=T)

9. The PRSPO scheme serves the dual purposes of, on the one hand, helping prisoners to rehabilitate and re-integrate into society, thereby discouraging them from re-offending; and on the other, offering reasonable protection to the public from threats to public safety by hard-core criminals or recidivists after discharge, by a supervision order (§28).
10. After 23 March 2024, the case of an OENS PIC is governed by sections 6(3A) to (3C) of PRSPO in addition to section 6(3) thereof. The legislative intent of those provisions is that an OENS PIC is to be treated differently from other PICs to whom the PRSPO applies because of the immense importance to safeguard the interests of national security that may be threatened or put to risk by his early release (§§33-34).
11. Reading subsections (3) and (3A) together purposively, the statutory right of an OENS PIC to a referral under subsection (3) is not engaged until and unless the Commissioner is satisfied that his early release will not be contrary to the interests of national security under subsection (3A) (§35).
12. Under subsection (3A), the Commissioner carries out an evaluative and predictive assessment according to all the relevant information available to determine if the early release of an OENS PIC, even on supervision, would or would not be contrary to the interests of national security (which is the determining factor), and then decide to or not to refer his case to the Supervision Board. If the Commissioner is not satisfied, he must not make the referral (§36).
13. It is well-established that early release on supervision is not a sentence as such but a measure of executing a sentence. The former involves the court's exercising its judicial power in its sentencing jurisdiction. The latter involves executive clemency, as a form of justified non-judicial intervention in appropriate cases to pursue legitimate policy aims, to encourage rehabilitation and re-integration into society of offenders who have been sufficiently punished and who no longer continue to be a risk to the public. It is entirely a matter of the executive's discretion and, in the present context, to be exercised by the Supervision Board under the PRSPO scheme. As a form of indulgence, the executive clemency to grant early release does not confer on a prisoner any right



or automatic entitlement to early release or remission upon serving two-thirds of the actual term of his sentence (§§39-40).

14. The Applicant's **constitutional challenge** against section 6(3A) of the PRSPO must fail *in limine*:

- (1) BOR 5(1) is not engaged. An imprisonment which the Applicant is serving is incarceration pursuant to a sentence lawfully imposed by the court after a criminal conviction. The resultant deprivation of his liberty pursuant to the imprisonment is lawful. As such, it will not *per se* engage BOR 5(1) (§51).
- (2) The Applicant's statutory right to a referral under section 6(3) of the PRSPO is not engaged until and unless the Commissioner is satisfied that his early release will not be contrary to the interests of national security under section 6(3A). It does not involve any loss of the statutory right as contended (§54).
- (3) Whether the Supervision Board will grant an early release is discretionary and does not confer on the Applicant any right or entitlement to early release upon serving two-thirds of his sentence. Even if the Supervision Board were to consider his case and decide not to grant an early release, it would not engage his right to liberty. *A fortiori*, the alleged loss of the statutory right to referral thereby depriving him the opportunity for the Supervision Board to consider his case would not engage his right to liberty either (§55).
- (4) The "established by law" requirement is satisfied even if BOR 5(1) is engaged.
- (5) The statutory definition of "national interest" in section 4 of SNSO is broad but not inherently vague or arbitrary. Its purpose is clear. It covers the four key constituents of the state: (1) its political regime; (2) its sovereignty; (3) its unity and territorial integrity; and (4) its people and the society that they live in. It embraces and protects national sovereignty; territorial unity; development, sustainability, economic and other major societal interests; and the well-being of its people. Although it is broadly framed (for good reasons and provides flexibility), the definition has a sufficiently and clearly formulated core to enable a person, with advice if necessary, to understand what national security covers and to regulate his conduct accordingly (§66).

15. The alleged **legitimate expectation**, even if established, is wholly irrelevant to the assessment based on the interests of national security under section 6(3A) (§77).



16. The complaint that there was **procedural unfairness**, while justifying leave to apply for judicial review be granted, must fail in substance, as the Applicant had in fact been provided with the Summary of Considerations before the Commissioner made the Decision and was also given time to consider it and to make further submission if necessary. His right to sufficient information in the process had not been compromised (§79).

Conclusion

17. The Applicant's appeal is dismissed, with an order *nisi* that the Applicant is to pay the Commissioner's costs of the appeal.

Department of Justice

June 2025