



Summary of Judicial Decision

**Kwok Cheuk Kin (Applicant) v
Secretary for Justice (Respondent)
(CACV 8/2019)
(On Appeal from HCAL 1165 of 2018)**

**Lui Chi Hang, Hendrick (Applicant) v
Secretary for Justice (1st Respondent) and
Chief Executive of the HKSAR (2nd Respondent) (CACV 10/2019)
(On Appeal from HCAL 1178 of 2018)**

**Leung Chung Hang, Sixtus (Applicant) v
Secretary for Justice (Respondent)
(CACV 87/2019)
(On Appeal from HCAL 1160 of 2018)**

**Leung Kwok Hung (Applicant) v
Secretary for Transport and Housing (Respondent)
(CACV 88/2019)
(On Appeal from HCAL 1164 of 2018)**

Judgment No. [2021] HKCA 871 (“Judgment”)

Decision : Appeals dismissed

Date of Hearing : 19-20 January 2021

Date of Judgment/Decision : 11 June 2021



Background

1. These appeals concern the constitutionality of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance, Cap. 632 (“**the Ordinance**”). The Guangzhou-Shenzhen-Hong Kong Express Rail Link (“**XRL**”) is a high-speed rail system with a total length of about 140 kilometres (“**km**”) linking Hong Kong with Guangzhou. The Hong Kong Section of the XRL is a 26-km long underground railway system running from the boundary at Huanggang to the West Kowloon Station (“**WKS**”), connecting Hong Kong with the national high-speed rail network in the Mainland.
2. Within the WKS, a co-location arrangement of customs, immigration and quarantine clearance procedures (“**CIQ**”) has been put in place by the establishment of the Mainland Port Area (“**MPA**”)¹ in which passengers can complete the respective CIQ required by the Government of the Hong Kong Special Administrative Region (“**HKSARG**”) and the Mainland successively in one place (“**Co-location Arrangement**”).
3. The implementation of the Co-location Arrangement has followed the “Three-step Process” consisting of (i) an agreement on the co-location arrangement signed between the Mainland and the HKSARG as co-parties on 18 November 2017 (“**Co-operation Agreement**”); (ii) the decision by the Standing Committee of the National People’s Congress made on 27 December 2017 (“**NPCSC Decision**”) approving the Co-operation Agreement as being consistent with both the Constitution of the People’s Republic of China (“**PRC Constitution**”) and the Basic Law; and (iii) the HKSARG introducing and the Legislative Council enacting the Ordinance to give effect to the Co-operation Agreement. The Ordinance was gazetted on 22 June 2018 and had come into operation on 4 September 2018.
4. Section 6 of the Ordinance provides that except for 6 reserved matters, the MPA is to be regarded as an area lying outside Hong Kong but lying within the Mainland for the purposes of (i) the application of Mainland laws (over non-reserved matters) and Hong Kong laws (over the 6 reserved matters) in the MPA; and (ii) delineation of jurisdiction (including jurisdiction of the courts) in the MPA. The XRL commenced operation on 23 September 2018.
5. By judgment dated 13 December 2018, the Court of First Instance (“**CFI**”) dismissed the applications for judicial review. (full text of the CFI judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=119019&QS=%2B&TP=JU&ILAN=en)

¹ The MPA includes Mainland clearance area and back offices of the Mainland authorities, the waiting hall for departure passengers, the platforms (including connecting passageways), and the XRL train compartments in operation.



6. The Applicants appeal to the Court of Appeal (“CA”) and the Respondents filed a Respondent’s Notice contending that CFI ought to have applied the proportionality analysis to uphold the constitutionality of the Ordinance if the relevant articles of the Basic Law (“BL”) are engaged. By the judgment dated 11 June 2021, CA dismissed the appeals.

Grounds of Appeal

7. The major grounds of appeal are as follows:-
 - i. The CFI erred in relying on or placing excessive reliance on the principle that the Basic Law should be treated as a “living instrument”. **(Ground 1)**
 - ii. The CFI erred in taking into account the NPCSC Decision and/or finding it to be highly persuasive. **(Ground 2)**
 - iii. The CFI erred in finding that the Ordinance is consistent with the BL, contrary to BL 18 and BL 19 and the basic purposes and policies of the BL. **(Ground 3)**
 - iv. The CFI erred in finding that the establishment of the MPA in the WKS is itself a manifestation of the exercise of Hong Kong’s high degree of autonomy and recognition of the two distinct and separate systems being practiced in Hong Kong and the Mainland. **(Ground 4)**

Core issue

8. CA considered the following issue the core of these appeals:-

“Whether except for the reserved matters as defined, in deeming the [MPA] at the [WKS] as an area lying outside Hong Kong but lying within the Mainland for the purpose of applying the Mainland law and the delineation of jurisdiction (including jurisdiction of the courts) over the [MPA], the Ordinance contravenes articles 18 and 19 of the [BL] (BL 18 and BL 19), thereby infringing the basic policies of establishing the Hong Kong Special Administrative Region under the ‘one country, two systems’ principle; and diminishes the high degree of autonomy enjoyed by the HKSAR.” (para 2)

Department of Justice’s Summary of the Court’s rulings

(full text of the Judgment at

https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2019/CACV000008_2019.doc)



Ground 1

9. CA held that BL is a living instrument given its unique characteristics of a constitutional document in its purposive construction. The BL was drafted with an eye to the future. (para 40)
10. The courts are entitled to and must approach the BL as a living instrument in determining the constitutionality of the Ordinance, which is a novel matter not envisaged when the BL was promulgated. In doing so, the courts are still guided and bound by the purpose of the Basic Law and the relevant articles, and its language in light of its context. (para 42)
11. The fact that the co-location arrangement is beneficial to the overall interests of Hong Kong is a relevant factor in determining whether it is prohibited by the Basic Law. It is abundantly clear that the CFI Judge did not overly rely on the concept of living instrument as complained. (paras 44 and 45)

Ground 2

12. Court of Appeal accepted the evidence of the Mainland law expert engaged by the Government and held that the NPCSC Decision lies squarely at the interface of the two systems. It addresses specifically the question of the consistency of the Co-operation Agreement with the Basic Law and has legal effect and is binding on governmental authorities in the Mainland. (para 62(4))
13. As a matter of the Mainland law, the NPCSC Decision is also binding on the HKSAR, including the Hong Kong courts, because (i) the Standing Committee exercises the will of the State, (ii) the Standing Committee has the power to supervise the implementation of the Constitution, and (iii) the Standing Committee is an organ of the sovereign body which authorized the establishment of the HKSAR and its governmental authorities. (para 62(5))
14. As to whether the NPCSC Decision is binding under Hong Kong law, one may argue that under both the Constitution and the BL, the NPCSC has the ultimate authority and power to decide if a subject matter lying at the interface of the two systems conforms with the Constitution and the BL. The authority of the NPCSC to make such decision must be fully acknowledged and respected in Hong Kong. As both the Mainland and Hong Kong systems are within one country



and one national constitutional order, such decision made in conformity with the Constitution and the BL under the Mainland system is binding in Hong Kong. CA left this issue open.

15. CA also held that the CFI was right in holding that the NPCSC Decision is highly persuasive for the construction exercise to determine if the Ordinance contravenes the Basic Law, although not treated as post-enactment extrinsic materials as the CFI Judge did. (para 68)
16. CA added that common sense dictates that in all probabilities, the Standing Committee, after consulting the Basic Law Committee, would give the same answer in its interpretation. (para 70)

Grounds 3 and 4

17. CA dismissed Grounds 3 and 4 by the analysis below.
18. Hong Kong, in exercising the high degree of autonomy bestowed on it by the Basic Law, plainly has ample powers to establish the MPA within the WKS. The HKSARG may exercise its own immigration controls on the entry to and exit from the Region as part of the executive power that it enjoys pursuant to the authorization by the NPC. Establishing the MPA at the WKS for the purpose of immigration control and related matters is well within the executive power of the HKSARG. Enacting the Ordinance to give statutory backing to its establishment likewise falls within the legislative power of the Legislative Council. (para 92)
19. Deeming the MPA as an area lying outside Hong Kong and within the Mainland in terms of legal jurisdiction does not alter the boundary of the HKSAR, as section 6(2) makes plain. It certainly does not have the effect of “surrendering” a part of the HKSAR back to the Mainland, contrary to the applicants’ emotive suggestion. It meets the special needs and circumstances arising from the Co-operation Arrangement, and no more. (para 96)
20. The purpose of the Ordinance is to establish a port in the WKS where immigration controls and related measures are to be implemented to facilitate passengers who choose to travel between Hong Kong and the Mainland by using the XRL with the associated convenience and advantages provided by the co-location arrangement. The deeming provision in the Ordinance gives effect to



this purpose, and no more. (para 97)

21. CA gave full weight to the NPCSC Decision confirming that the Ordinance, including the deeming provision, conforms with the BL. (para 98)
22. To sum up, in terms of constitutional purpose and context, given its specific purpose, its unique characteristics, and its limited applicability in terms of geographical location and classes of individuals, in deeming the Mainland Port Area as an area lying outside the HKSAR and lying within the Mainland for the purpose of applying the Mainland law and jurisdiction except for the reserved matters, the Ordinance. It does not diminish the high degree of autonomy enjoyed by the HKSAR as authorized by the NPC. It does not impermissibly allow the Mainland system to pass the demarcation line between the two systems jealously guarded by the BL and encroach upon the Hong Kong system. (para 102)
23. The Co-operation Arrangement, though a novel matter, satisfies the socio-economic policy of the BL. They provide strong support why the Ordinance conforms to the BL in terms of its socio-economical purpose and context. (para 104)
24. CA accepted that if the relevant provisions of the BL are engaged, the Ordinance clearly satisfies the proportionality assessment. If necessary, CA will uphold the Ordinance of its constitutionality on proportionality as well. (para 107)

Conclusion

25. Applying the purposive construction to the Basic Law and treating it as a living instrument, CA held that although the Ordinance is a novel matter, it conforms with the Basic Law. CA therefore upheld the CFI Judge's judgment and dismiss the applicants' appeals. (para 108)

Civil Division
Department of Justice

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