



**Summary of Judicial Decision**

**Leung Chung Hang, Sixtus (Applicant) v President of Legislative Council (Putative Respondent) & Secretary for Justice (Putative Interested Party) (HCAL 1160/2018);**

**Leung Kwok Hung (Applicant) v Secretary for Transport and Housing (Putative Respondent) (HCAL 1164/2018);**

**Kwok Cheuk Kin (Applicant) v Chief Executive of HKSAR (Putative Respondent) (HCAL 1165/2018);**

**Ku Chun Hin Zlato (Applicant) v Secretary for Justice (Putative Respondent) and Secretary for Transport and Housing (Putative Interested Party) (HCAL 1171/2018);**

**Lui Chi Hang, Hendrick (Applicant) v Secretary for Justice (1<sup>st</sup> Putative Respondent) and Chief Executive of the HKSAR (2<sup>nd</sup> Putative Respondent) (HCAL 1178/2018);**

**[Judgment No. [2018] HKCFI 2657] (“Judgment”)**

**Decision : The Applicants’ applications for leave to apply for judicial review were granted but the substantive applications for judicial review were dismissed**

**Date of Hearing : 30-31 October 2018**

**Date of Judgment/Decision : 13 December 2018**

**Background**

1. 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**”)<sup>1</sup> 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**”).

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<sup>1</sup> 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.



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 “*Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Cap. 632)*” (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 service on 23 September 2018.
5. In the rolled-up hearing<sup>2</sup> of the judicial review applications<sup>3</sup>, the Applicants, in essence, challenged that the Ordinance violated, among others, Article 18 of the Basic Law (“**BL 18**”) (i.e., national laws shall not be applied in the MPA being part of the HKSAR) and Article 19 and Article 80 of the Basic Law (“**BL 19**”, “**BL 80**”) (i.e. ousting the jurisdiction of the Hong Kong courts in cases in/arising from the MPA). The Applicants sought, *inter alia*, a declaration that the Ordinance is unconstitutional, and an order of *certiorari* to quash the Co-location Arrangement.

### Issues in dispute

6. The key issues in dispute are:-
  - i. whether the Ordinance is consistent with the Basic Law, in particular, BL 18(1), BL 18(2), BL 19(2) and BL 80;
  - ii. the nature and effect of the NPCSC Decision;
  - iii. whether the Ordinance and the establishment of the MPA infringe the fundamental rights and freedom guaranteed by Chapter III of the Basic Law and the Hong Kong Bill of Rights; and
  - iv. whether the measures taken by the Ordinance for matters regarding the MPA meet with the proportionality test.

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<sup>2</sup> A hearing for both the applications for leave to apply for judicial review and the merits of the substantive applications if leave is granted.

<sup>3</sup> The Applicant in HCAL 1171/2018 (Ku Chun Hin Zlato) applied to withdraw his application on the first day of the hearing on 30 October 2018.



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

(full text of the Judgment at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=119019&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=119019&QS=%2B&TP=JU))

**Issue 1**

7. In coming to his decision in dismissing the applications for judicial review, the Judge held that the Ordinance is consistent with the Basic Law for the following reasons:
  - (i) Upon a fair reading of the Basic Law establishing a broad framework and having regard to the context and purpose of the Basic law (in particular BL 18(1), BL 18(2), BL 19(2) and BL 80), and not approaching the question in a literal or mechanistic manner, the creation of a port within the territory of the HKSAR (for carrying out CIQ) and delineation of jurisdiction at the MPA for facilitation of CIQ is not inconsistent with or intended to be prohibited by the Basic Law. (paras 68 – 69)
  - (ii) The idea or possibility of the Co-location Arrangement is not something that was or could be contemplated when the Basic Law was promulgated in 1990. The Basic Law should be treated as a “living instrument” capable of growth and development to meet new social, economic and political realities over its entire life. (para 70)
  - (iii) The establishment of the MPA and the setting up of CIQ therein is a manifestation of the exercise of a high degree of autonomy by the HKSAR. (paras 71)
  - (iv) The fact that the Co-location Arrangement is beneficial to the overall interest of Hong Kong is a relevant consideration when determining whether such arrangement is prohibited by BL. (para 72)
  - (v) The conclusion that the Co-location Arrangement is consistent with the Basic Law does not mean that such arrangement of delineating a particular area in Hong Kong as being subject to the jurisdiction and laws of the Mainland can necessarily be repeated in any area in Hong Kong. (para 76)

**Issue 2**

8. The Judge accepted the expert evidence of Professor Wang Lei of the Peking University that under PRC law the NPCSC Decision has legal effect and is binding on governmental authorities in the Mainland as well as HKSAR including Hong Kong court. (para 53)



9. In so far as Hong Kong laws are concerned, the Judge held that it is not necessary to go outside the established approach laid down by the Court of Final Appeal to consider the constitutional issue. It would not be appropriate for the Judge to determine questions concerning the status and legal effect of the NPCSC Decision under Hong Kong law which may have far reaching implications but are not strictly necessary for decision. (para 61)
10. The Judge further mentioned that Hong Kong Courts have no power to determine whether the NPCSC Decision is invalid under Hong Kong laws. (para 62)
11. Under Hong Kong laws, the NPCSC Decision must at least rank as “post-enactment materials” which ought to be admitted to assist the construction of the Basic Law if the position is not clear. (paras 61 and 74)
12. The NPCSC Decision should be regarded as having high persuasive value in the particular circumstances of the present case because:
  - (i) The NPCSC Decision was made by the NPCSC in discharge of the solemn constitutional duty under the PRC laws to supervise the implementation of the PRC Constitution including the implementation of the Basic Law.
  - (ii) The NPCSC Decision, as accepted by Professor Fu Hualing of the University of Hong Kong, is in substance (though not in form), and has the function of, an interpretation of the Basic Law.
  - (iii) If and when this case reaches the Court of Final Appeal, subject to the “necessity condition” criterion, a referral to the NPCSC for interpretation would be required and such interpretation would be binding. (para 74)
13. The Judge also remarked that although the PRC Constitution is not part of the Hong Kong laws with direct applications in the adjudication of Hong Kong cases, as illustrated by the present case, the PRC Constitution is not necessarily irrelevant or should be ignored. (para 42)

### Issue 3

14. The HKSARG’s arguments were accepted by the Court that once the Ordinance is held as being consistent with the Basic Law, the consequence is that the fundamental rights enshrined in Chapter III of the Basic Law cannot be relied upon in the MPA. Further, the Court agreed to the HKSARG’s observation that it is a person’s own volition to subject to PRC law when he/she enters the MPA in the exercise of his/her freedom of travel to leave Hong Kong and enter the



Mainland; and that these people intending to enter Mainland have to go through the same procedures at immigration controls and be subject to the same laws irrespective of which control point they choose to use. (para 81)

Issue 4

15. The application of the proportionality analysis to the central question before the Court is not the right approach in the present case as, unlike in a situation where a governmental measure purports to restrict some fundamental rights, it cannot be used to answer the more fundamental question of whether the legislature has power to exclude the application of Hong Kong laws and jurisdiction of the Hong Kong courts over the MPA. (para 80)
  
16. A critical feature of the present case is that the Co-location Arrangement is justified by and limited to the particular circumstances and imperatives arising from the unprecedented port project. The legality of any arrangement will have to be examined on its own facts and circumstances. No useful purpose will be served by generalisations. (para 76)

**Civil Division**

**Department of Justice**

**December 2018**