



Summary of Judgment

Lai Chee-ying v Secretary for Justice

HCMP 253/2023

**Lai Chee-ying v The Committee for Safeguarding National Security of the HKSAR
("NSC") and Director of Immigration ("Director") (collectively "Putative Parties")**

(Secretary for Justice as Putative Interested Party)

HCAL 566/2023

(Heard Together)

[2023] HKCFI 1382

**Decisions : (HCMP 253/2023) Originating Summons dismissed
(HCAL 566/2023) Leave to apply for judicial review refused**

Date of Hearing : 28 April 2023

Date of Decision : 19 May 2023

Background

1. LAI faces four charges of sedition and collusion offences in HCCC 51/2022, the trial of which was due to commence on 1 December 2022. On 19 October 2022, Mr Tim Owen KC ("**OWEN**") was granted *ad hoc* admission by the High Court to represent LAI in HCCC 51/2022. On 11 November 2022, OWEN applied to the Director for approval to take up sideline employment under his employment visa to work as LAI's barrister in HCCC 51/2022.
2. SJ's subsequent appeal against the *ad hoc* admission failed and leave to appeal further to the CFA was refused.
3. On 30 December 2022, the Standing Committee of the National People's Congress ("**NPCSC**") issued an Interpretation relating to NSL 14 and 47. On 3 January 2023, OWEN withdrew his sideline employment application.
4. On 11 January 2023, the NSC held a meeting to discuss implementation of the Interpretation. Noting that the courts had not requested or obtained a certificate from the Chief Executive under NSL 47 in respect of OWEN's *ad hoc* admission in HCCC 51/2022, the NSC decided that:



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- (i) OWEN's representation of LAI in HCCC 51/2022 concerns national security which is likely to constitute national security risks, and is contrary to the interests of national security;
 - (ii) NSC advises the Director that, if a fresh sideline employment application is received from OWEN in relation to his representation of LAI in HCCC 51/2022, it should be refused in view of the above ("**NSC Decision**").
5. On 17 February 2023, LAI applied by Originating Summons for declaratory relief under HCMP 253/2023 ("**OS Proceedings**"), that:
- (a) The Interpretation does not affect the courts' judgments in OWEN's admission proceedings; or
 - (b) Alternatively, an order for the CFI to request and obtain a certificate from the Chief Executive under NSL 47 on (i) whether OWEN serving as LAI's defence counsel or legal representative in HCCC 51/2022 involves national security; and (ii) whether any other overseas lawyer not qualified to practise locally serving as LAI's defence counsel or legal representative in HCCC 51/2022 involves national security.
6. On 11 April 2023, LAI commenced HCAL 566/2023 seeking leave to judicially review (a) the NSC Decision, and (b) the Director's decision to refuse OWEN's sideline employment application ("**Director's Decision**").
7. HCMP 253/2023 and HCAL 566/2023 were heard together before the CFI on 28 April 2023.

Issues for determination

8. The issues for CFI's determination were:
- (a) Whether the NSC Decision is amenable to judicial review; and
 - (b) Whether the NSC Decision and the Director's Decision are *ultra vires*.

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

(Full text of the CFI's Decision at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=152663&currpage=T)



Jurisdictional Issue

9. The HKSAR courts have independent judicial power within the high degree of autonomy conferred on the HKSAR, and to that extent only (§18). Under the constitutional order of the HKSAR, the HKSAR courts' jurisdiction is prescribed by the Basic Law and the laws of the HKSAR including, where applicable, a provision of the NSL as a national law listed in Annex III of the Basic Law. A provision of the NSL prescribing the courts' jurisdiction itself is not amenable to any constitutional challenge or judicial review (§§24-25).

10. Safeguarding national security is a matter outside the limits of the HKSAR's high degree of autonomy. It is within the purview of the CPG. NSL 3(2) expressly authorizes and requires the HKSAR to take up the constitutional duty for safeguarding national security and the HKSAR shall perform the duty accordingly (§31).

11. The NSC is specifically created by NSL 12 to be responsible for affairs relating to and assume primary responsibility of safeguarding national security in the HKSAR. NSL 12 subjects it under the supervision of and accountability towards the CPG directly. The supervisory power over the NSC is reserved to the CPG exclusively. The HKSAR courts are not vested with any role or power over such matters of the CPG because they clearly fall outside the courts' constitutional competence assigned to them under the constitutional order of the HKSAR (§§34-35).

12. Moreover, it is self-evident that the duties and functions of the NSC as enumerated in NSL 14 are matters well beyond the HKSAR courts' institutional capacity. The HKSAR courts have neither training nor expertise to deal with them in the exercise of their judicial function. It is logical for NSL 14 to exclude them from the HKSAR courts' supervisory jurisdiction by way of judicial review (§36). If the work of the NSC were amenable to judicial review, information relating to its work would inevitably need to be disclosed in the course of the proceedings, thereby defeating the very purpose of the confidentiality requirement under NSL 14 (§38).

13. On proper construction, the NSL has not vested the HKSAR courts with any jurisdiction over the work of the NSC under NSL 14 in the exercise of their judicial function, and NSL 14 enjoins in clear and unqualified terms the HKSAR courts from doing so, which prescribes the jurisdictional limit on the HKSAR courts' exercise of



their judicial function in national security cases under the NSL (§39).

14. It therefore follows that LAI's reliance on the *Ultra Vires* Rule under the common law (which presupposes that the court has the requisite supervisory jurisdiction over a public body which is ousted by a statutory provision) is entirely misplaced. As the courts have not been vested with any jurisdiction over the work of the NSC under NSL 14, the question of NSL 14 ousting the courts' supervisory jurisdiction over the NSC simply does not arise (§41).

NSC Decision and the Director's Decision not *ultra vires*

15. The CFI accepted the undisputed evidence of Professor Han Dayuan adduced by the SJ and the Putative Parties in properly understanding the Interpretation. As a legal interpretation by the NPCSC, the Interpretation has the same effect as the NSL as at the date when the NSL came into effect (i.e. 30 June 2020). It declares what the law has always been (§§51, 53). The Interpretation is binding in and part of the system in the HKSAR (§54).

16. In this case, the Interpretation caters specifically for the scenario where the HKSAR courts have not requested or obtained a certificate from the Chief Executive in relation to OWEN's *ad hoc* admission to represent LAI in HCCC 51/2022. Thus, the NSC must make judgements and decisions on the question if OWEN's proposed representation of LAI may pose national security risks, and the NSC did so by way of the NSC Decision within its power under NSL 14 as interpreted by the Interpretation (§§57-58).

17. As the Director must implement the NSC Decision faithfully as required by paragraph 1 of the Interpretation, the Director's Decision is undoubtedly a lawful exercise of his power in discharging his duty for safeguarding national security under the NSL (§59).

Conclusion

18. The intended judicial review against the NSC Decision and the Director's Decision is plainly and wholly unarguable. The leave application is dismissed.

19. The Interpretation does not have the consequence of invalidating, overruling or reversing any of the HKSAR courts' judgments in the Admissions Proceedings but



does apply to the subject matter of those judgments, namely, OWEN's proposed representation of LAI in HCCC 51/2022. The OS Proceedings thus become academic when leave to apply for judicial review is refused (§61). The OS Proceedings is thus dismissed.

20. Parties are directed to file written submissions on costs within 14 days for paper disposal.

Department of Justice

May 2023