

Case Summary

**Lai Chee Ying (黎智英) v Secretary for Justice
Lai Chee Ying (黎智英) v Committee for Safeguarding National
Security of the HKSAR and Others**

HCMP 253/2023 and HCAL 566/2023;
[2023] HKCFI 1382; [2023] 3 HKLRD 275; [2023] 4 HKC 392
(Court of First Instance)

(Full text of the Court’s judgment in English at
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=152663&currpage=T)

Before: Hon Poon CJHC

Date of Hearing: 28 April 2023

Date of Judgment: 19 May 2023

Judicial review – ad hoc admission of overseas lawyers not qualified to practise generally in HKSAR serving as legal representatives in cases concerning offences endangering national security – whether ad hoc admission of overseas lawyer posed national security risks – NPCSC Interpretation of NSL 14 and 47 – decision of Committee for Safeguarding National Security of HKSAR (“NSC”) regarding Owen KC – decision of Director of Immigration to implement NSC’s decision – whether the two decisions were ultra vires NSL 14

NSC – duties and functions of NSC fell within exclusive purview of CPG – NSC decisions not amenable to judicial review– ultra vires rule not applicable – NSC subject to CPG’s supervision and control

Jurisdiction – prescription of HKSAR courts’ jurisdiction in the BL and NSL – whether HKSAR courts had jurisdiction over the work of NSC in light of NSL 12 and 14

NPCSC Interpretation of NSL – expert reports on Mainland law

admitted – NPCSC Interpretation of NSL effectively the same as NPCSC interpretation of BL – same effect as NSL – having effect from commencement of NSL – HKSAR courts duty bound to follow – effect of NPCSC Interpretation of NSL 14 and 47 on previous judgments concerning Owen KC’s application for ad hoc admission

Background

1. The Applicant faced four charges involving a conspiracy in relation to seditious publications, contrary to ss. 10(1)(c), 159A and 159C of the Crimes Ordinance (Cap. 200) and conspiracies to collude with a foreign country or external elements to endanger national security, contrary to NSL 29(1)(4) in HCCC 51/2022.
2. On 19 October 2022, the CFI granted the *ad hoc* admission of Mr. Timothy Wynn Owen KC (“Mr. Owen”) to represent the Applicant under s. 27(4) of the Legal Practitioners Ordinance (Cap. 159)¹. The appeal by the SJ to the CA was dismissed on 9 November 2022². The SJ’s subsequent application for leave to appeal was first refused by the CA on 21 November 2022³ and thereafter by the Appeal Committee of the CFA on 28 November 2022⁴ (collectively “the Admission Judgments”).
3. In the meantime, Mr Owen applied to the Immigration Department for approval to take up a sideline employment under his employment visa to work as a barrister in another local case to cover the work in respect of HCCC 51/2022 on 11 November 2022. While his application was being processed by the Department, the Hong Kong Bar Association issued a practising certificate to him on 22 November 2022.
4. Following the CFA Appeal Committee’s decision on 28 November 2022, the CE submitted a report to the CPG recommending that a request be made to the NPCSC for an interpretation of the NSL in accordance with NSL 65. The NPCSC adopted an Interpretation of NSL 14 and 47

¹ [2022] HKCFI 3233; HCMP 1402/2022.

² [2022] HKCA 1689; CACV 425/2022; [2022] 5 HKLRD 726.

³ [2022] HKCA 1751.

⁴ [2022] HKCFA 23; FAMV 591/2022; (2022) 25 HKCFAR 288.

on 30 December 2022 (“the Interpretation”). On 3 January 2023, Mr. Owen withdrew his sideline employment approval application on a without prejudice basis.

5. On 17 February 2023, the Applicant commenced proceedings by way of originating summons in HCMP 253/2023 (“the OS Proceedings”), seeking:

- (a) a declaration that the Interpretation did not affect the Admission Judgments concerned;
- (b) alternatively, an order for the Court to request and obtain a certificate from the CE under NSL 47 on the questions as to: (i) whether Mr. Owen who had been admitted as a barrister of the High Court for the purposes of advising or representing the Applicant in HCCC 51/2022 involved national security; and (ii) whether any other overseas lawyer who was not qualified to practise generally in Hong Kong serving as defence counsel or legal representative for the Applicant in HCCC 51/2022 involved national security. (para. 2)

6. In the course of the OS Proceedings, the Director of Immigration (“the Director”) disclosed that at the meeting of the Committee for Safeguarding National Security of the HKSAR (“NSC”) on 11 January 2023, the Committee, after noting that the courts had not requested or obtained a certificate from the CE under NSL 47 in respect of the *ad hoc* admission of Mr Owen in HCCC 51/2022:

- (a) decided that the proposed representation by Mr Owen of the Applicant in HCCC 51/2022 concerned national security which was likely to constitute national security risks, and was contrary to the interests of national security (“the NSC Decision”); and
- (b) advised the Director that, if a fresh sideline employment approval application in relation to the proposed representation was received from Mr. Owen, such application should be refused in view of its judgment above.

7. In his affirmation filed in the OS Proceedings on 20 March 2023, the Director stated that should Mr Owen reapply for sideline employment approval in relation to HCCC 51/2022, the Immigration Department would duly implement the NSC Decision pursuant to NSL 14, paragraph 1 of the Interpretation and the applicable laws and policies, meaning that the Director would refuse any re-application for such sideline employment approval pursuant to the NSC Decision (“the Director’s Decision”).

8. On 11 April 2023, the Applicant applied for leave to apply for judicial review in HCCAL 566/2023 (“the JR Proceedings”), seeking a declaration that the NSC Decision and the Director’s Decision were *ultra vires* NSL 14, and an order of *certiorari* to quash the same. (para. 3)

9. The SJ opposed the OS Proceedings on the ground, inter alia, that it was academic. The NSC, the Director and the SJ (collectively “the Putative Parties”) opposed the JR Proceedings on the ground that pursuant to NSL 14, the NSC Decision was not subject to judicial review (or alternatively that the NSC Decision and the Director’s Decision were not *ultra vires* NSL 14). The two sets of proceedings were heard together on account of the significant overlap of issues involved. (paras. 2-4)

Major provision(s) and issue(s) under consideration

- Constitution of the PRC, Art. 67(4)
- Legislation Law of the PRC (“Legislation Law”), Arts. 48 and 53
- BL 2, 18, 19, 43, 83 and 84
- NSL 2, 3, 11, 12, 14, 47, 62 and 65

10. In the two sets of proceedings, the Court discussed:

- (a) the jurisdictional issue of whether the NSC Decision was amenable to judicial review, with reference to:
 - (i) the constitutional norm for the prescription of the HKSAR courts’ jurisdiction;

- (ii) the prescription of the HKSAR courts' jurisdiction in the NSL: whether the courts had jurisdiction over the work of the NSC under NSL 14;
- (iii) whether NSL 14 was subject to the *ultra vires* rule at common law;
- (b) whether the NSC Decision and the Director's Decision were *ultra vires* NSL 14; and
- (c) whether the Interpretation affected the Admission Judgments.

Summary of the Court's rulings

A. JR Proceedings

Jurisdictional issue: Whether the NSC Decision was amenable to judicial review

11. This raised the fundamental issue of whether the HKSAR courts had jurisdiction over the work of the NSC under NSL 14, which had to be examined by reference to the specific constitutional context in which the HKSAR courts functioned when dealing with cases concerning national security under the NSL. (para. 15)

(a) Constitutional norm for prescription of HKSAR courts' jurisdiction

12. Whatever the legal system might be, the courts did not enjoy unlimited jurisdiction. Their jurisdiction was necessarily restricted by what the constitution or relevant legislations had prescribed in a given legal system. The courts had to accept such jurisdictional limits and could only act within their confines as part of the constitutional order of the legal system in which they operated. (para.16)

13. The HKSAR courts derived their jurisdiction from the BL, which defined and drew the boundary of the courts' jurisdiction at the constitutional level. Reading BL 2 purposively, the HKSAR courts had independent judicial power within the high degree of autonomy conferred on the Region, and to that extent only. The limits of the Region's high degree of autonomy demarcated the parameters of the

courts' jurisdiction and was critical to the determination of this jurisdictional issue. (paras.17-18)

14. Under the constitutional order of the HKSAR and reading BL 83, 84 and 18 as a coherent whole, the HKSAR courts' jurisdiction was prescribed by the BL and the laws of the HKSAR, including the NSL listed in Annex III to the BL which might prescribe the jurisdiction of HKSAR courts. Since the HKSAR courts had no power to hold any provision of the NSL to be unconstitutional or invalid as incompatible with the BL and the BOR as decided by the CFA in *HKSAR v Lai Chee Ying* [2021] HKCFA 3, at [37] and [42], a provision of the NSL prescribing the courts' jurisdiction itself was not amenable to any constitutional challenge or judicial review. This was the constitutional norm of the HKSAR on delineation of the courts' jurisdiction over cases concerning national security under the NSL. (paras. 22-25)

(b) Prescription of HKSAR courts' jurisdiction in the NSL: whether the courts had jurisdiction over the work of NSC under NSL 14

15. The parties' main contention concerned the exact effect of NSL 14. The Court held that NSL 14 had to be understood against the matrix in which it existed and this called for a closer examination of other relevant NSL articles read as a coherent whole. (paras. 26-27)

(a) NSL 2 referred to BL 1 and 12 as the lynchpin for safeguarding national security in the HKSAR. These articles were essential to upholding national unity and territorial integrity. In so prescribing the constitutional order of the HKSAR, they underscored the general constitutional duty of the Region to safeguard national security. (para. 28)

(b) Pursuant to NSL 3, the CPG dealt with national security affairs at the national level while the HKSAR dealt with the same at the local level. The respective roles of the CPG and the HKSAR ensured that the Region worked in tandem with the CPG in safeguarding national security. (para. 31)

- (c) The general duties to be performed by the HKSAR in safeguarding national security were set out in Part 1 of Chapter II of the NSL. NSL 11 tasked the CE as the first person responsible for safeguarding national security in the Region being accountable to the CPG, which followed from the constitutional status of the CE as the head of the HKSAR representing the Region and being accountable to the CPG under BL 43. (para. 32)

16. Reading NSL 12 and 14 together as a coherent whole, by subjecting the NSC to direct supervision and control of the CPG and at the same time prohibiting any interference with NSC's work by institutions, which plainly included the courts, and specifically excluding judicial review of NSC's decisions, the legislative intent was clear. (paras. 35-38)

- (a) The duties and functions of the NSC under NSL 14 fell within the exclusive purview of the CPG having the overarching responsibility for the national security affairs relating to the HKSAR. The supervisory power over the NSC was hence reserved to the CPG exclusively.
- (b) The HKSAR courts, as courts of a local administrative region, were not vested with any role or power over such matters because they clearly fell outside the courts' constitutional competence.
- (c) In contrast to cases concerning offences under the NSL over which the HKSAR had jurisdiction pursuant to NSL 40, the duties and functions of the NSC were matters beyond the HKSAR courts' institutional capacity. The courts had neither training nor expertise to deal with them in the exercise of their judicial function. It was logical for NSL 14 to exclude the work of the NSC from the courts' supervisory jurisdiction by way of judicial review.
- (d) Given the nature of the work of the NSC, NSL 14 prohibited the disclosure of information relating to the same. If the work of the NSC were amenable to judicial review, such information

would inevitably need to be disclosed in the course of the proceedings, thereby defeating the very purpose of the confidentiality requirement.

17. On a proper construction, the NSL had not vested the HKSAR courts with any jurisdiction over the work of the NSC under NSL 14 in the exercise of their judicial function. NSL 14 enjoined in clear and unqualified terms the courts from doing so. This prescribed the jurisdictional limit on the courts' exercise of their judicial function in national security cases under the NSL. (para. 39)

(c) Whether the Ultra Vires Rule was applicable

18. Counsel for the Applicant argued that NSL 14 was subject to the common law rule that a statutory provision which ousted the court's supervisory jurisdiction over a public body did not apply if the impugned decision was made outside its powers ("the *Ultra Vires* Rule"). The Court held that such reliance on the *Ultra Vires* Rule was entirely misplaced. Under the constitutional norm of the HKSAR, the courts had not been vested with any jurisdiction over the work of the NSC under NSL 14 to begin with. The question of NSL 14 ousting the courts' supervisory jurisdiction over the NSC simply did not arise. In any event, in light of NSL 62, priority had to be given to NSL 14 over the *Ultra Vires* Rule, which meant that it could have no application to the work and decisions of the NSC. (paras. 26 and 41)

19. As to the submission that there would be no effective control over the work of the NSC and any person aggrieved by its decision would have no recourse or remedy if the NSC was not subject to judicial review by the HKSAR courts, the Court held that it ignored NSL 12 which subjected the NSC to the direct supervision and control of the CPG. The challenge over the effectiveness of the supervision and control of the CPG over the NSC was also rejected as entirely baseless and wholly unwarranted. (paras. 42-43)

20. Since under NSL 14, the HKSAR courts had no jurisdiction over the work of the NSC and the NSC Decision was not amenable to judicial

review, the Applicant's leave application in this regard was refused by the Court. (para. 44)

Whether the NSC Decision and the Director's Decision were *ultra vires* NSL 14

(a) NSC Decision

21. Although it was not strictly necessary for the Court to deal with the Applicant's case that the NSC Decision was *ultra vires* NSL 14, it proceeded to consider whether his complaint was meritorious with a view to dispelling any misunderstanding about the Interpretation. (para. 45)

22. The Court admitted two expert reports on relevant Mainland law prepared by an eminent jurist on Mainland law, Prof. Han Dayuan (韓大元), to assist it in properly understanding the Interpretation. The Court accepted the undisputed evidence of Prof. Han. Reading it together with the relevant local case law, the Court arrived at the following propositions. (paras. 49-51)

(a) Apart from NSL 65, the NPCSC also had the authority to make the Interpretation under Art. 67(4) of the Constitution and Art. 48 of the Legislation Law. Since the issues concerning an application by an overseas counsel to represent the Applicant in HCCC 51/2022 were new circumstances that arose after the promulgation of the NSL, the NPCSC might make the Interpretation under both limbs of Art. 48 of the Legislation Law. (para. 52)

(b) Pursuant to Art. 53 of the Legislation Law, the Interpretation (as an interpretation of a law enacted by the NPCSC, i.e. the NSL) had the same effect as the NSL as at the date when the NSL came into effect. It declared what the law had always been. (para. 53)

(c) The Interpretation was effectively the same in terms of

substance and for all practical purposes as an interpretation of the BL by the NPCSC. Pursuant to the “one country, two systems” principle, with both systems being in one country, the Interpretation made by the NPCSC in conformity with the authorization in the Constitution and the NSL under the Mainland system was binding in and part of the system in the HKSAR. The HKSAR courts were duty bound to follow it. (para. 54)

- (d) The Interpretation was applicable to the issues concerning the application to have an overseas counsel representing the Applicant in HCCC 51/2022. (para. 55)

23. The Interpretation catered for the specific scenario where the HKSAR courts had not requested or obtained a certificate from the CE on the Question (i.e. whether overseas lawyers not qualified to practise generally in the HKSAR serving as defence counsel or legal representatives in cases concerning an offence endangering national security might pose national security risks) under NSL 47. In this situation, the NSC should make relevant judgments and decisions on the Question under NSL 14. It was beyond doubt that the Question fell within the purview of the NSC. (paras. 46 and 57)

24. Applying the Interpretation to the present case where the courts in the Admission Judgments had not requested and obtained an NSL 47 certificate from the CE on the *ad hoc* admission of Mr Owen in HCCC 51/2022, the NSC had to make judgments and decisions on the Question whether his proposed representation of the Applicant might pose national security risks; and it did so by way of the NSC Decision which laid squarely within its power under NSL 14 as interpreted by the Interpretation. (para. 58)

25. Accordingly, the Applicant’s complaint that the NSC Decision was *ultra vires* NSL 14 was wholly unmeritorious. (para. 45)

(b) The Director’s Decision

26. The Applicant had not advanced any separate or independent ground to dispute the Director's Decision. In any event, as required by paragraph 1 of the Interpretation, the Director had to implement the NSC Decision faithfully. Making the Director's Decision for that purpose was a lawful exercise of his power in discharging his duty for safeguarding national security under the NSL. In the circumstances, the leave application for judicial review against the Director's Decision was also refused. (para. 59)

(c) Conclusion

27. Based on the above, the Court held that the intended judicial review against the NSC Decision and the Director's Decision was plainly and wholly unarguable. The leave application was therefore dismissed. (para. 60)

B. OS Proceedings: Whether the Interpretation affected the Admission Judgments

28. Although the Interpretation had the same effect as the NSL as at 30 June 2020, it did not have the consequence of invalidating, overruling or reversing any of the Admission Judgments as its paragraph 3 expressly provided for a mechanism to address the extant situation where the courts had not requested and obtained the requisite NSL 47 certificate. However, the Interpretation applied to the subject matter of the Admission Judgments, namely, the proposed representation by Mr. Owen of the Applicant in HCCC 51/2022. What governed the present situation was the Interpretation, the NSC Decision and the Director's Decision. The OS Proceedings thus became academic when leave to apply for judicial review was refused in the JR Proceedings. (para.61)

29. In conclusion, the Court dismissed both the JR Proceedings and the OS Proceedings. (para. 62)