

Case Summary

Lai Chee-Ying (Applicant) v The Committee for Safeguarding National Security of the HKSAR & Others

CACV 166/2023; [2024] HKCA 400

(Court of Appeal)

(Full text of the Court's judgment in English at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=159696&currpage=T)

Before: Hon Kwan VP, Hon Chu VP and Hon Au JA

Date of Hearing: 16 April 2024

Date of Judgment: 16 April 2024

Date of Reasons for Judgment and Decision on Costs: 29 April 2024

NSC Decision is not amenable to judicial review, Court is bound to give effect to the clear meaning of the language of the text in NSL and the NPCSC Interpretation. No basis for CA to disturb the lower Court's judicial exercise of discretion on costs unless the same was wrong in principle or plainly wrong.

Background

1. The Applicant lodged an appeal to the CA against the CFI's refusal to grant leave to apply for judicial review against the decision of the Committee for Safeguarding National Security of the HKSAR ("NSC") and the decision of the Director of Immigration ("Director"), which were made after the interpretation of the NSL by the NPCSC ("Interpretation").

2. By the NSC's Decision and the Director's Decision, it was decided that the proposed representation by Mr Timothy Owen KC of the Applicant in HCCC 51/2022 is contrary to the interests of national security, and that the Director should refuse any reapplication of Mr

Owen for sideline employment approval in relation to HCCC 51/2022.

3. The Applicant challenged both NSC's Decision and the Director's Decision in the CFI by way of taking out an application for leave to apply for judicial review. The CFI refused the Applicant's leave application on the ground that, under NSL 14, the HKSAR courts have no jurisdiction over the work of the NSC and the NSC's Decision is not amenable to judicial review.

4. The Applicant brought an appeal to the CA against CFI's refusal to grant leave to apply for judicial review, as well as to challenge its order for indemnity costs against him.

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

- NSL 14; Interpretation

5. In the present case, the CA discussed:

(a) whether NSC's Decision and the Director's Decision are amenable to judicial review; and

(b) the exercise of judicial discretion on costs and whether it was wrong in principle or plainly wrong for the CFI to award indemnity costs against the Applicant.

Summary of the Court's rulings

(a) Whether NSC's Decision and the Director's Decision are amenable to judicial review

6. The Applicant contended that the Hong Kong courts do have supervisory jurisdiction over both NSC's Decision and the Director's Decision, to ensure that these decisions conform to the principle of legality under the rule of law and hence both are susceptible to judicial review.

7. The CA pointed out that in construing NSL 14, it is necessary to read

its provisions with the Interpretation, and full effect must be given to it. The effect of an interpretation of laws by the NPCSC in exercising its authority under Article 67(4) of the PRC Constitution, in the context of an interpretation of the BL under BL 158(1), applies similarly to an interpretation by the NPCSC of the NSL under NSL 65. The NPCSC has authority under NSL 65 to interpret the provisions of the NSL. Under the civil law system in the Mainland, legislative interpretation by the NPCSC of provisions of the NSL can clarify or supplement laws. The courts of HK are bound to follow the Interpretation under the principle of “one country, two systems”. (paras. 35 and 37-38)

8. The CA held that reading NSL 14 with the Interpretation, the meaning and effect of the language used in the text is most clear. The legislative intent as expressed in the language is that the NPCSC does not intend to confer jurisdiction on the Hong Kong courts to review any judgment, decision and act of the NSC. The combined effect of NSL 14 and the Interpretation leaves no room for any doubt or ambiguity. The meaning of the language is not reasonably capable of sustaining any competing alternative interpretation. The court is bound to give effect to the clear meaning of the language of the text. (paras. 39 and 41)

9. The CA’s reasoning for construing NSL and the Interpretation includes NSL 14 which provides that “Information relating to the work of the Committee shall not be subject to disclosure”. This is repeated in Interpretation §1. This reinforces the rationale that the decisions of the NSC shall not be amenable to judicial review. Given the nature of the work of the NSC, matters of sensitivity may well be involved. Disclosure of such information in the course of proceedings for judicial review would defeat the purpose of the confidentiality requirement. (para. 40(2))

10. The CA held that reading NSL 14 with the Interpretation, there is no justification to construe the provisions in NSL 14 as restricting the performance of the NSC to the three listed “duties and functions”. By the Interpretation, which is a legislative interpretation of the NPCSC that can clarify or supplement laws, the statutory duties and functions of the NSC under NSL 14 are clarified to cover the making of “relevant

judgements and decisions on such situation and question”, namely, where there is a question that requires CE certification under NSL 47 and the courts have not requested or obtained a certificate from the CE. (para. 43)

11. In view of the clear meaning and effect of NSL 14, the CA rejected the contentions of the Applicant and agreed with the CFI that both NSC’s Decision and the Director’s Decision are not amenable to judicial review. (para. 45)

(b) Whether it was wrong in principle or plainly wrong for the CFI to award indemnity costs against the Applicant

12. The CA did not find the reasons of the CFI to award indemnity costs as wrong in principle or plainly wrong, and therefore saw no basis to disturb the CFI’s exercise of discretion to award costs. (paras. 50 and 52)

(c) Other issues

13. The CA found that there is no need to deal with the Applicant’s contention that (1) NSC’s Decision was *ultra vires*, and (2) the Decision was not reasonably incidental to performing a duty or function within the common law rule regarding ancillary powers, as the CA found that NSC’s Decision is not amenable to judicial review. (para. 47)

14. Regarding Applicant’s challenge to the admission of expert evidence on Mainland law, the CA did not think expert evidence is warranted in this instance, in view of the clear language of the provisions to be construed, and which the court can construe without reference to expert opinion. (para. 48)

Conclusion

15. Appeal of the Applicant was dismissed. Applicant was ordered to pay the costs of the appeal of the putative respondents.

Endnote – Lai Chee-Ying (Applicant) v The Committee for

Safeguarding National Security of the HKSAR & Others, CACV 166/2023, [2024] HKCA 611 (Court of Appeal)

(Full text of the Court's Judgment in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=161113&currpage=T)

16. The Applicant applied for leave to appeal to the CFA from the judgment of the CA above, on the ground that the questions involved in the intended appeal are of great general or public importance.

17. Having considered the submissions made on behalf of the Applicant, the CA did not think any of the questions framed are reasonably arguable.

18. The CA therefore refused to grant leave to appeal to the CFA.

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