

Case Summary

Re Timothy Wynn Owen, KC

CACV 425/2022; [2022] HKCA 1751

(Court of Appeal)

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

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=148852&QS=%2B%7C%28CACV%2C425%2F2022%29&TP=JU)

Before: Hon Kwan VP, Chu VP and Au JA

Dates of Written Submissions: 15, 16, 17 and 18 November 2022

Date of Judgment: 21 November 2022

Application by SJ for leave to appeal to CFA – ad hoc admission of overseas counsel under s. 27(4) of Legal Practitioners Ordinance (Cap. 159) – new points raised by SJ – not exceptional circumstances under the Flywin principle to justify permission be granted – whether ad hoc admission incompatible with overall objective and design of NSL – whether ad hoc admission in cases concerning national security generally be refused save in exceptional circumstances

Background

1. The SJ applied for leave to appeal to the CFA against the Court’s judgment handed down on 9 November 2022 (“the CA Judgment”) dismissing his appeal in opposing the *ad hoc* admission of Mr. Timothy Wynn Owen, KC (“the Respondent”) to represent Mr. Lai Chee Ying (“Mr. Lai”) in his trial in HCCC 51/2022.

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

- NSL 3, 38, 41, 46, 47 and 63
- Legal Practitioners Ordinance (Cap. 159), s. 27(4)

2. The questions formulated for the intended appeal in the Notice of Motion said to be of great general and public importance (“GPI”) included new points raised by counsel for the SJ. The Court discussed:

- (a) whether there were exceptional circumstances under the *Flywin*¹ principles such that the CFA should resolve and clarify the questions of GPI formulated in the Notice of Motion; and
- (b) whether the following two new contentions advanced by the SJ were reasonably arguable:
 - (i) that *ad hoc* admission of overseas counsel in cases concerning national security was incompatible with the overall objective and design of the NSL, and would generally tend to defeat the aim of the NSL, which was enacted to address, *inter alia*, “interference in the HKSAR’s affairs by foreign or external forces” in any form (“the First New Contention”);
 - (ii) that *ad hoc* admission of overseas counsel in cases concerning national security should generally be refused save in exceptional circumstances and the burden was on the applicant to establish exceptional circumstances (“the Second New Contention”).

Summary of the Court’s rulings

Whether there were exceptional circumstances under the Flywin principles

¹ *Flywin Co Ltd v Strong & Associates Ltd* (2002) 5 HKCFAR 356, at paras. 37 to 39.

3. Counsel for the SJ argued that there was no issue of the state of the evidence being any different had his points been argued earlier and given the important points of principle involved, this constituted exceptional circumstances under the *Flywin* principles² such that the CFA should resolve and clarify the questions of GPI he formulated. (para. 5(3))

4. While noting that counsel for the SJ was the fourth Senior Counsel engaged by the SJ to argue this matter, in the absence of unforeseen circumstances and regardless of change of counsel, a party was expected to bring before the court substantially all of his arguments. The importance of the issues sought to be raised and the public interest element did not absolve him from this basic obligation. Yet the arguments presented by the SJ had undergone significant changes when he sought to appeal further to the CFA notwithstanding the tight time frame that the opposite party and the Court had been working under. The Court did not consider the circumstances to be very exceptional under the *Flywin* principles to justify permission to be granted for new points to be raised by the SJ in the intended appeal. (para. 16)

Whether the two new contentions were reasonably arguable

5. In any event, the Court did not consider the two new contentions advanced by counsel for the SJ reasonably arguable. (para. 17)

The First New Contention

6. In respect of the contention that *ad hoc* admission of overseas counsel was incompatible with the overall objective and design of the NSL:

(a) the provisions in the NSL which mentioned the term “State

² Editor’s note: As explained by the CFA in *Re Owen* [2022] HKCFA 23, the *Flywin* doctrine applies as a discretionary principle when an application is made for leave to appeal on a new point which has not been considered in the courts below. This doctrine has two aspects: the “state of the evidence” bar and the “not considered on intermediate appeal” hurdle.

secrets” (i.e. NSL 41, 46, 47 and 63) had no bearing on the facts of the present application;

- (b) the certificate issued by the SJ under NSL 46 directing that HCCC 51/2022 be tried without a jury did not cite “the protection of State secrets” as a ground and no State secrets had been disclosed to Mr. Lai in the criminal prosecution.
- (c) as the issue of State secrets did not arise on the facts of this case, it was irrelevant to the exercise of discretion in the present case to be concerned with a hypothetical situation of possible disclosure of State secrets by some overseas counsel who allegedly might not be subject to meaningful and effective enforcement of the disciplinary regime of the Hong Kong Bar Association and by the law enforcement authorities of the HKSAR;
- (d) there was no proper basis to suggest that the Respondent might breach the requirement of confidentiality of any information within the ambit of NSL 63;
- (e) apart noting NSL 38 which provided that the NSL should apply to offences under the NSL committed against the HKSAR from outside the Region by a person who was not a permanent resident of the Region, all practising barristers in England and Wales were subject to the code of conduct in the Bar Standards Board Handbook which applied to the conduct of barristers in court wherever the courts might be sitting and whatever law they might be applying. It did not appear that any enforcement of breach of the code of conduct governing barristers or the laws of the HKSAR would be meaningless or ineffective once overseas counsel had left the territory;

- (f) the Court was not persuaded that it was reasonably arguable that any nexus between the *ad hoc* admission of the Respondent and any apprehension that his admission might defeat the overall objective and design of the NSL could be established;
- (g) the Court did not consider it possible that the obligation under NSL 3 to safeguard national security might be adversely affected in granting this *ad hoc* admission. (paras. 10 and 18-20)

7. It was important to focus on the particular circumstances of this case and take into consideration in weighing and balancing various aspects of public interest those aspects that were relevant to the application before the court; otherwise the court would fall into error in taking into account irrelevant matters and this would be a ground for setting aside the exercise of discretion for *ad hoc* admission. (para. 21)

The Second New Contention

8. The proposition that *ad hoc* admission of overseas counsel in cases concerning national security should generally be refused save in exceptional circumstances was untenable and not reasonably arguable. (para. 23)

- (a) The contention sought to fetter and curtail the statutory discretion of the court in the *ad hoc* admission of overseas counsel, contrary to the established law that the statutory discretion was to be exercised in a judicial manner as assisted by relevant principles and guidelines laid down in the authorities over time.
- (b) If the contention was upheld, the court would no longer be required to carry out a balancing exercise of the relevant aspects of public interest in a particular situation in a flexible and sensible manner to arrive at a decision that best suited the public

interest in the application. Its discretion could only be exercised in a particular way.

- (c) Contrary to counsel for the SJ's submission that he sought to establish matters of principle, this was an unprincipled approach and went against the grain of guiding principles for the exercise of judicial discretion.

Other grounds

9. The Court did not go through the other grounds which had been ventilated on appeal and dealt with in the CA Judgment. Nor did the Court find it necessary to deal with counsel for the SJ's submission that public perception of fairness of criminal trial was irrelevant in this situation or needed to be supported by evidence, save that the authority he cited provided no support. It had not been demonstrated that it was reasonably arguable that grounds for interfering with the exercise of judicial discretion had been established to warrant consideration by the CFA. (para. 24)

10. For all the above reasons, the Court refused to grant leave to the SJ to appeal to the CFA on any of the questions formulated in the Notice of Motion. (para. 26)

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