

Case Summary

Re Timothy Wynn Owen, KC

HCMP 1402/2022; [2022] HKCFI 3233

(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=148082&currpage=T)

Before: Hon Poon CJHC

Dates of Written Submissions: 3 October, 10 and 14 October 2022

Date of Judgment: 19 October 2022

Application for ad hoc admission under s. 27 of Legal Practitioners Ordinance (Cap. 159) – SJ’s role as guardian of public interest distinct from prosecutorial role – whether in public interest to admit overseas counsel – jurisprudential importance – complexity of issues – construction of NSL 29(1)(4) – constitutionality of ss. 9 and 10 of Crimes Ordinance (Cap. 200) – whether applicant’s expertise and experience added a significant dimension to case – no delay in making application

Background

1. The Applicant applied for *ad hoc* admission pursuant to s. 27 of the Legal Practitioners Ordinance (Cap. 159) (“the Application”) to represent Mr Lai Chee Ying (“Mr. Lai”) for the purpose of the trial in HCCC 51/2022 where he faced one charge concerning a conspiracy in relation to seditious publications, contrary to ss. 10(1)(c), 159A and 159C of the Crimes Ordinance (Cap. 200) and three charges concerning conspiracies to collude with a foreign country or external elements to endanger national security, contrary to NSL 29(1)(4). Mr Lai, the founder of Next Digital Limited and Apply Daily, was represented by a

team of three counsel led by a local Senior Counsel. In addition to the local team, he wished to engage the Applicant, an eminent specialist in criminal, public and human rights law who had appeared before the courts of the HKSAR in a few important cases.

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

- BL 27 and 39
- NSL 4, 5 and 29(1)(4)
- BOR 16
- Crimes Ordinance (Cap.200) (“CO”), ss. 9 and 10

2. The Court discussed the relevant public interest factors in considering the Application, including:

- (a) the importance of the legal issues to Hong Kong’s jurisprudence;
- (b) the complexity and difficulty of the issues;
- (c) whether the overseas counsel would add a significant dimension to the case; and
- (d) the availability of suitable local counsel.

Summary of the Court’s rulings

3. The submission of the Applicant’s counsel that it was unfair for the SJ to engage an overseas counsel to prosecute Mr. Lai for offences contrary to the Public Order Ordinance (Cap. 245) in another case while opposing the present Application had conflated the SJ’s role as guardian of public interest in *ad hoc* admissions and his prosecutorial role in criminal trials, which were distinct. As a matter of fact, the SJ in that application as the guardian of public interest adopted a neutral stance. In any event, comparisons with other *ad hoc* admissions did not serve much purpose, as an application must be determined on its own merits. (para. 9)

4. In determining the Application, the Court applied the general principles governing *ad hoc* admissions that were well-established: see *Re Perry QC* [2016] 2 HKLRD 647. The overriding consideration was whether it was in the public interest to admit the overseas counsel. (para. 10)

5. The Application was opposed by the SJ and the Hong Kong Bar Association, but the Court held that it was clearly in the public interest to admit the Applicant for the purpose of the trial in HCCC 51/2022. (paras. 8 and 28).

Jurisprudential importance and complexity of the issues

6. The trial was the first prosecution brought under NSL 29(1)(4) to be tried by the CFI, involving various novel aspects pertaining to an NSL 29(1)(4) offence and the constitutionality of ss. 9 and 10 of the CO. The issues that would arise at the trial were of great general public importance and were clearly of such significance that warranted the admission of specialist counsel of the highest calibre to argue the case before the court. (paras. 5, 6 and 11)

Construction of NSL 29(1)(4)

7. For the purpose of the trial, the critical question was how to delineate the scope of an NSL 29(1)(4) offence against the specific context of freedom of expression, which was a matter of construction. The construction exercise was to be guided by the purposive and contextual approach laid down by the CFA in *HKSAR v Lai Chee Ying* [2021] HKCFA 3 which highlighted that the legislative intention was for the NSL to operate in tandem with the laws of the HKSAR seeking “convergence, compatibility and complementarity” with local laws, and emphasized that NSL 4 (human rights) and NSL 5 (rule of law principle) were centrally important to the interpretation of the NSL. (paras. 13-14).

8. It followed that the construction exercise would most probably involve an in-depth and rigorous analysis of the intricate interplay between national security and the constitutional right to freedom of expression, to ensure that a proportionate balance was drawn for safeguarding national security on the one hand and protecting freedom of expression on the other. As this was the first prosecution brought under NSL 29(1)(4) to be heard by the CFI, novel points might arise. If they did, it might entail a thorough study and consideration of comparable international jurisprudence such as cases decided by the European Court of Human Rights. The present case would be of immense importance to the development of local jurisprudence on the application of the NSL and the protection of freedom of expression. (para. 15)

9. The construction exercise was neither simple nor straightforward. In terms of legal analysis, how to balance the competing public interests of safeguarding national security and protecting freedom of expression was extremely difficult and delicate. In terms of facts, it required a very close scrutiny of the voluminous evidence to see if any of the NSL 29(1)(4) charges against Mr. Lai was made out. The task was of unusual difficulty. (para.16)

Constitutionality of ss. 9 and 10 of the Crimes Ordinance

10. This issue had yet to be determined by the CFI or above. Although the principle of legality and the proportionality test were well established, the analysis and determination involved were by no means simple or straightforward. The court would most likely need to consult the developments in other common law jurisdictions where nearly identical offence of sedition had been trimmed or even repealed in deciding if, within the legal framework of the HKSAR, the two sections were constitutional in light of the human rights provisions in BL 27, BL 39 and BOR 16. The exercise was of unusual difficulty and would

certainly produce great jurisprudential value to the development of local laws on the subject. (para.18)

11. The issues arising from the construction of NSL 29(1)(4) and the constitutionality of ss. 9 and 10 of the CO would most likely go further to the CA and even the CFA. This was also a powerful factor in favour of admission. (para. 19)

12. In sum, it was clearly in the public interest to admit an overseas specialist as eminent as the Applicant so that the court would have the best assistance to tackle the formidable task at hand in HCCC 51/2022. (para. 20)

Whether the Applicant would add a significant dimension to the case

13. Given the Applicant's undisputed expertise and experience as a specialist in criminal and human rights law, he would undoubtedly add a significant dimension to the case. (para. 22)

Whether suitable local counsel was available and whether there was delay in making the Application

14. Mr. Lai instructed his solicitors to begin the process of identifying overseas leading counsel to lead the local team of counsel shortly after the case was committed to the CFI for trial and before the trial date was fixed. The Application was not made in response to the unavailability of Mr. Lai's local Senior Counsel to appear for the whole of the trial. After the court had fixed the trial dates, Mr. Lai's solicitors immediately started to prepare for the Application. There was thus no delay in making the Application. (paras. 25-26)

15. For the above reasons, the Court allowed the Application.