

## COMMENTHK

# Jimmy Lai's challenge was doomed to failure

**Grenville Cross** says ruling rightly acknowledges overall authority of Committee for Safeguarding National Security

**O**n May 19, the Court of First Instance of the High Court (CFI) rejected a challenge, by Jimmy Lai Chee-ying, to the authority of the Committee for Safeguarding National Security (NSC). Lai, who is scheduled to face trial in September for three national security offenses involving alleged collusion with foreign forces, had hoped to judicially review the NSC's decision over the admission of an overseas barrister, Timothy Wynn Owen KC, to represent him. The CFI, however, gave him short shrift, making clear it had no jurisdiction over the matter.

The NSC, in exercising its National Security Law for Hong Kong (NSL) duties and functions, had advised the director of immigration that if Owen sought permission to enter Hong Kong for the purpose of representing Lai at his trial, he should be refused entry, as it was "contrary to the interests of national security". It did this in light of the consideration it had given to the matter after an interpretation made by the National People's Congress Standing Committee (NPCSC), on Dec 30, 2022, concerning restrictions on the admission of overseas lawyers to conduct national security cases in Hong Kong.

In acting upon the NSC advice, the immigration director indicated that any application by Owen to appear on Lai's behalf would be rejected, and it is clear why.

There may be grave implications if overseas lawyers acquire crucial information about State secrets or police operations when defending in a national security trial. A foreign intelligence agency could seek to extract the material from them once they return home, which would place them in an invidious position. If, perhaps under pressure, they disclosed restricted national security information, there would be nothing the Hong Kong authorities could do about it, and real damage might be done.

There is, however, despite those concerns, no blanket ban on overseas lawyers conducting national security cases. As the NPCSC's interpretation indicated, the Hong Kong chief executive needs to assess each application to appear separately, undertaking a risk assessment every time. In some cases, there may be no cause for concern, but Lai's case is clearly not in that category, given the nature of the charges he faces.

The restrictions on overseas lawyers do not, however, affect foreign lawyers who live and work in Hong Kong. If they violate confidentiality, they can, unlike overseas lawyers, be held accountable, most obvi-



**Grenville Cross**

*The author is a senior counsel and law professor, and was previously the director of public prosecutions of the HKSAR.*

ously through prosecution.

In an impeccable judgment (HCMP 253/2023), the chief judge of the High Court, Jeremy Poon Shiu-chor, analyzed the various components of both the NSL and the Basic Law and concluded that Lai's challenge was unmeritorious.

He explained that the courts operate within the context of the jurisdiction conferred upon them by the Basic Law, and they have no extra powers derived from elsewhere. Although under the Basic Law (Art.2), the courts have independent judicial power, this can only be exercised within the parameters of the "high degree of autonomy" that the Hong Kong Special Administrative Region enjoys. The courts cannot, that is, step outside the region's high degree of autonomy and challenge the authority of the NPCSC.

The NSL, after all, is a national law that has been applied in the HKSAR in accordance with the Basic Law (Art.18), which allows national laws to be extended to HKSAR when they are listed in the Basic Law's Annex III.

The NSL creates the Committee for Safeguarding National Security (Art.12) and delineates its duties and functions (Art.14 (1)). It stipulates expressly that "no institution, organization or individual in the Region shall interfere with the work of the Committee" (Art.14 (2)), and this could not be clearer. It means it is not open to the local courts to exercise any jurisdiction over the NSC.

Instead, the NSC is "under the supervision of and accountable to the Central People's Government"; and local courts cannot usurp or circumvent the supervisory functions of the CPG. In any event, as Poon explained, "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".

This was because "the courts have neither training nor expertise to deal with them in the exercise of their judicial function", and it was "only logical for NSL 14 to exclude the work of the NSC from the courts' supervisory jurisdiction by way of judicial review". Although Lai sought to challenge the

NSC's decision on the basis of the ultra vires rule (meaning a government body has exceeded the scope of its powers), the clear intent of the NSL cannot be sidestepped in that way. The ultra vires rule, said Poon, can only be invoked in circumstances where a court has the necessary supervisory jurisdiction, and this was absent. This was because, in NSL cases, "the courts have not been vested with any jurisdiction over the work of the NSC".

Quite apart, moreover, from this jurisdictional point, the NSL (Art.62) stipulates that the NSL prevails over local laws in the event of inconsistency. This means the NSL enjoys primacy and the ultra vires rule, as a local device, is inapplicable to the functions of the NSC.

Although Hong Kong Watch, the UK-based anti-China propaganda outfit run by the serial fantasist Benedict Rogers (whose patron is the former governor, Chris Patten), reacted hysterically to Poon's judgment, calling for foreign judges to "resign from the Hong Kong Court of Final Appeal", this was mere pretense. It did not explain why Hong Kong should admit overseas lawyers in national security cases when the UK, the US, and other common law jurisdictions do not. Whereas, moreover, Hong Kong allows overseas lawyers to seek admission in both criminal and civil cases, the UK and its allied jurisdictions confine the right of appearance in all their cases to locally qualified lawyers. In its rush to judgment, therefore, Hong Kong Watch has hypocritically disregarded the situation in its own backyard.

The NSC's decision to bar Owen does not affect Lai's right to legal representation. All it means is that he must, as in the UK and the US, choose a lawyer from the ranks of those who are legally qualified to practice in Hong Kong (whether local or foreign). There is nothing unfair about this, and it simply reflects the practice of the common law world. His trial, moreover, will be fairly conducted, on the basis of traditional common law standards, and he will face conviction only if his guilt is proved beyond a reasonable doubt.

By explaining the constitutional position and the jurisdiction of the courts in NSL cases so authoritatively, Poon has clarified significant issues of law. Apart from legal excellence, his judgment is grounded in common sense, and will serve as a valuable precedent for the future. Everybody, moreover, can now see why Lai's challenge was doomed to failure.

*The views do not necessarily reflect those of China Daily.*

# Make HKSAR a bridge between UK and China

**H**ong Kong is back and has reopened to the world. With a new administration in place, political and social stability restored, and the COVID-19 pandemic at last receding to a painful memory, the special administrative region has reopened for trade, business and tourism.

The city has regained vitality, as evidenced by the surge in activities of various kinds in recent months. A couple of months ago, the iconic Hong Kong Sevens rugby tournament drew tens of thousands of fans to its opening game, with thousands more gathering to watch more than 70 high-quality matches. The Hong Kong Stock Exchange is attracting a steady pipeline of listings, with Alibaba's logistics arm reportedly looking at raising \$2 billion in a Hong Kong initial public offering.

Hong Kong exists and thrives as an outward-looking global city and as an entrepreneurial hub. Like many thousands of fellow residents, I was born and raised in the city, attended school and university in the United Kingdom, started and grew my business there, and then returned home to avail of Hong Kong's unique advantages under "one country, two systems" and as a middleman between the Chinese mainland and the rest of the world.

When China resumed exercise of its sovereignty over Hong Kong on July 1, 1997, then-UK prime minister Tony Blair expressed his hope that henceforth our city would function as a bridge, rather than a barrier, between Britain and China. That hope grew wings and took flight — culminating in the "golden era" of then-prime minister David Cameron. Such a cordial relationship has been good for the Hong Kong Special Administrative Region, Britain and China.

The cooling of relations in the last few years, when we should have come together to meet shared challenges, has not been good for anyone.

So I am encouraged to see the initial signs of improving relations.

Early this month, Brian Davidson, Britain's consul general for Hong Kong and Macao, told the local media: "After some difficult headwinds, ... we are looking to lean back into a constructive engagement to see where we can collaborate."

These were encouraging and overdue words. Immediately following Davidson's remarks, Dominic Johnson, Britain's minister of state in the Department for Business and Trade, visited Hong Kong, becoming the first senior British official to pay an official visit to the city in five years. His discussion with the Hong Kong secretary for financial services and the Treasury,



**Johnny Hon**

*The author is a vice-chairman of the New People's Party, and founder of the Global Group of Companies.*

Christopher Hui Ching-yu, reportedly focused on "our ongoing work to remove market barriers and increase UK-Hong Kong trade".

This is vitally needed. Following Brexit, Britain desperately needs to find new markets for its goods and services. The Hong Kong market is attractive in its own right, and is still the best gateway to the Chinese mainland as well as to the emerging economies of Southeast Asia. In particular, Hong Kong is at the heart of the Guangdong-Hong Kong-Macao Greater Bay Area, whose nine mainland cities and two special administrative regions have a combined population of 86 million in the most prosperous region of China; its regional GDP accounts for 12 percent of the whole of China's and for 37 percent of its total exports. Innovation and the high-tech and healthcare sectors are at the forefront of its economic plans while it also leads in financial services liberalization.

Seventy years ago this July, a group of farsighted British businessmen, overcoming the challenges of the Cold War, passed through Hong Kong on a long journey to Beijing that became known as the Icebreaker Mission. These pioneers went on to create the 48 Group, which has long since become legendary in the business relations between China and the UK and of which I have the honor to serve as a vice-president.

This shared history between China and the UK, in which Hong Kong played its part, reminds us that no matter how thick the ice, there is always a way to dispel misunderstanding and build trust based on dialogue, mutual respect and mutual benefit.

In sending Vice-President Han Zheng, as the special envoy of President Xi Jinping, to attend the recent coronation of King Charles III, China has shown its goodwill and desire to rebuild a constructive relationship with the UK. The British government, too, has shown some interest in returning to a less-confrontational relationship.

Let's work together to build on this so that Hong Kong can once again become a bridge, not a barrier.

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# Three-tier system can manage external threats to national security

**P**romulgation of the National Security Law for Hong Kong (NSL) in 2020 and the overhaul of the city's electoral system in 2021 have effectively kept the political agitators at bay. Many of the anti-China individuals in Hong Kong have been arrested, with some pending justice remaining, while a sizable portion of those who absconded abroad still endeavor to jeopardize China's security.

Back in 2021, in the run-up to the Legislative Council election, some individuals who were barred from participating in the election under the principle of "patriots administering Hong Kong" launched a campaign to incite voters to boycott the election or cast a blank vote, intending to weaken the legitimacy of the election, and thereby the governing institutions of the Hong Kong Special Administrative Region. The HKSAR government responded by amending the Elections (Corrupt and Illegal Conduct) Ordinance to regulate acts that manipulate or sabotage elections. The amendment prevented many individuals from disseminating such information. However, it was apparent that posts that can manipulate or sabotage the election were still circulating freely on social media platforms. With closer examination of the material, many of the individuals who were most influential in raising that proposition on Facebook had already absconded abroad. In addition, an overseas newspaper published an article in November 2021, less than one month



**Brian Chan**

*The author is a researcher at the Silk Road Institute.*

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before the polling day, attempting to misguide Hong Kong voters into not voting or casting blank votes.

The role of shaping public opinion to jeopardize national security has predominantly been passed to foreign entities beyond Hong Kong's jurisdiction. The primary efforts in mitigating the impact of foreign entities on domestic public opinion should concentrate on curbing local transmission of illegal information instigated from aboard. This should help cut

down the network of harmful material.

Today we live in an age in which the circulation of information goes beyond physical geographic barriers. Since we share a common online space, and once material is disseminated on social media platforms, it generates a comparable impact, regardless of the origin of the message. Local agencies do not possess law enforcement power on foreign soil; however, the HKSAR government can command its own jurisdiction. I hereby propose a "three-tier system" to manage forces manipulating wrongful public opinion from aboard. It would consist of the following: Tier one, "detective and preventive"; tier two, "mitigation directives"; and tier three, "disincentives to be uncooperative".

First, under the "detective and preventive" phase, the government should order specific agencies, with the assistance of filtering algorithms, to perpetually monitor unlawful content online. Furthermore, the law should obligate local online platform service providers or those that have set up local branches in Hong Kong to establish mechanisms to make reasonable efforts to ensure all their online content complies with Hong Kong regulations. The law should delegate power to the authority to inspect the adequacy of such mechanisms.

Since no computer model is perfect, in the event of unlawful content infiltration, tier two of the system — the mitigation phase — will be triggered. This phase focuses on mitigating damage done to

national security relating to unlawful information, thus eradicating the unlawful message from the online platform is imperative. To achieve this, the agency should be conferred legal power to instruct local online platform service providers or those that have set up local branches in Hong Kong to remove specific content in a timely manner. If the entities fail to act accordingly, the agency may impose a circumscription directive on online platform providers from providing certain services. If the harm persists, the agency may grant a circumscription directive on access providers to ban platform service providers from accessing the network. In emergency cases, where the nature and severity of the danger to national security are such that it would be inappropriate to wait to establish the failure before applying for the directive, an interim circumscription directive on either or both instances thereof may be issued by the agency. The agency should obtain a certificate from the chief executive in advance of granting any circumscription directives.

Circumscription directives should be regarded as a final resort since ideally, online platform service providers should have complied in the first place. To discourage service providers from being uncooperative, the law should comprise appropriate disincentives. First, the agency should be granted the authority to hold accountable local online platform service providers or those that have established branches in Hong Kong. In the event that

employees have intentionally failed to take all reasonable steps to follow directives, the employees should also be held liable. If companies or individuals fail to comply, penalties in the form of a percentage of their income, a single amount, or an hourly rate, may be imposed. Penalties may be imposed in conjunction with measures in tier two. However, discretion should be used in determining any penalties. The amount should deter the companies from being uncooperative, but not beyond reasonably necessary. In more serious scenarios, the agency can restrain companies' business activities in Hong Kong, or in the most severe cases, cease companies from operating in a timely manner to safeguard national security.

Promulgation of the NSL has helped restore social stability, filling some of the loopholes in preserving national security in the special administrative region, and ensuring the prospect of prosperity for Hong Kong. Nevertheless, some anti-China forces are trying to manipulate public opinion to jeopardize national security by passing such roles on to entities abroad, out of the reach of Hong Kong law enforcement. Thus, there is a need for a "three-tier system" in response. As the HKSAR government prepares to legislate according to Article 23 of the Basic Law, the authorities can learn lessons from the implementation of the NSL.

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