



Overseas King's Counsel appearing remotely before Hong Kong's top court

17 October 2022

Introduction

In an interesting and fully reasoned decision, delivered against the background of “Wave-5” of the Covid-19 pandemic in Hong Kong, a judge of the Court of Final Appeal has given approval for two King's Counsel (based in London) to appear remotely at a final appeal in January 2023¹. While they could have appeared in person, an issue arose as to what would happen if either or both of the London advocates tested positive for Covid-19 while in Hong Kong and/or during the final appeal. While this is not the first time that eminent overseas King's (or Queen's) Counsel have appeared at an appeal in Hong Kong using videoconferencing facilities, the Court's order appears to come with the first fully reasoned decision. The decision is as welcome as it is pragmatic. Leading overseas King's Counsel, whether appearing in person or remotely before the Hong Kong courts, will receive a warm welcome from the local and international community in Hong Kong.

Background

Since approximately February 2022, Hong Kong has arguably experienced its worst phase of the Covid-19 pandemic. It was not until late September 2022 that hotel quarantine requirements on arrival were removed. Under the current “0+3” Covid-19 restrictions, a person who tests negative on arrival in Hong Kong is no longer required to undergo hotel quarantine – there are restrictions on visiting some specified places during their first three days and they are required to test daily for Covid-19.

Notes

1. *Q v Commissioner of Registration and Tse v Commissioner of Registration* (heard together) [2022] HKCFA 20, 3 October 2022.

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Both London advocates are instructed by lawyers in Hong Kong with respect to an important appeal before the Court of Final Appeal (the Court) in January 2023. In short, the final appeal raises important issues concerning the rights of a transgender person in Hong Kong to change their gender identity without having to undergo genital reconstruction. Both London advocates are leading human rights lawyers and they have

sought permission to appear for the purposes of (among other things) the final appeal.

However, given the state of flux with Hong Kong's quarantine restrictions and despite a considerable easing of social distancing measures recently, the lawyers for the parties (the two individual appellants and the Commissioner of Registration) sought a direction from the Court that both London advocates be allowed to attend the final appeal by videoconferencing facilities.

Concerns had been expressed that if either advocate tested positive for Covid-19 while in Hong Kong they would not be able to attend the final appeal physically and might not be able to leave Hong Kong until fully recovered – which could affect their other engagements in London. There were also concerns that the final appeal might be adjourned or, indeed, that the two advocates might not be able to attend at all.

It was against this background that the judge, case managing the case in the Court, was asked to review the matter and consider allowing both London advocates to appear at the final appeal by videoconferencing facilities.

Decision

The judge went to some length to make it clear that physical attendance of the parties' lawyers was the norm for substantive hearings before the Court. This was expected to remain the case given the considerable relaxation of Covid-19 quarantine and social distancing rules, albeit (as the judge noted) there was no telling what restrictions would be in place in January 2023 at the time of the final appeal. Importantly, the Court accepted that quarantine restrictions in January 2023 were likely to apply to persons who tested positive on arrival in Hong Kong. Therefore, the Court considered that the parties' concerns were not unreasonable².

Applying existing appellate case law³, the Court noted that the mode of hearing for a case was a matter of case management for the courts, taking into account all relevant circumstances while not being "too dogmatic"⁴. An application for remote hearing should be applied for in good time and be supported by reasons.

Notes

2. Supra note 1, at para 14.

3. *CSFK v HWH* [2020] 2 HKLRD 586 and [2020] HKCA 207.

4. Supra note 1, at para 12. Also see the draft *Courts (Remote Hearing) Bill*, which proposes (among other things) to codify current practice and put it on a legislative footing – in particular, section 5 ("Court may make remote hearing order"), section 12 ("Attendance at remote hearing") and section 14 ("Attendance at remote hearing deemed to be physical presence").

5. Supra note 1, at para 11.

6. Supra note 1, at para 18.

On a cautionary note, the Court stated:

*"One should not work on a presumption that attendance by remote facilities will invariably be permitted solely because overseas counsel are engaged and they would be subject to quarantine restrictions if they were required to come to Hong Kong physically."*⁵

With respect to the circumstances of the particular appeal, the Court took into account:

- the desirability of the London advocates providing assistance to the Court with respect to important points of law;
- the current practical difficulties that an overseas advocate may experience in Hong Kong if required to attend a hearing in person (having been admitted to do so);
- that two leading London advocates had represented the parties in the Court of Appeal through remote attendance and one of them was due to appear at the final appeal. While the other had not appeared in the Court of Appeal, he too was a leading specialist who would provide the Court with invaluable assistance;
- that junior members of the local Bar had been instructed to assist both London advocates and engaged in the proceedings throughout – the junior advocates and their instructing solicitors would attend the final appeal in person; and
- that adjournments of appeals were a last resort and not granted lightly and, in an ordinary commercial case, the unavailability of a party's advocate did not necessarily change that. However, the judge observed:

*"On the other hand, in light of the general public importance of the questions raised in these appeals, this Court is naturally disinclined to deprive itself of the assistance from specialist counsel who have a wealth of experience in the relevant Hong Kong legal regime."*⁶

Therefore, the Court granted permission for both London advocates to attend the final appeal remotely using videoconferencing facilities.

Comment

The Court's decision and the supporting written reasons show a lot of common sense. Both London advocates are leading lawyers in their area of practice and can provide Hong Kong's "top court" with considerable assistance in an important final appeal. It should also be stressed that the final appeal will largely depend on legal submissions.

It is worth highlighting that the local lawyers will attend the final appeal in person and that the Court of Final Appeal and other courts in Hong Kong are getting used to using videoconferencing facilities for all or parts of some civil hearings. Indeed, overseas non-permanent judges of the Court of Final Appeal have participated remotely in final appeals during the pandemic – it will be interesting to see whether the overseas non-permanent judge due to sit, as part of the five-judge panel in the final appeal, does so remotely or in person. Subject to the Court's roster, that overseas non-permanent judge may be Lord Sumption – a judge who has been steadfast in his support for the Court of Final Appeal and who is much respected by the local and international community in Hong Kong⁷.

The Court's decision is also welcome because during the pandemic the number of leading King's (and Queen's) Counsel from England and Wales appearing ad hoc in Hong Kong court proceedings appears to have declined to something of an all-time low since 1997. This is unfortunate – particularly because some of the best proponents for the successful working of the courts in Hong Kong are (for example) those same overseas advocates. As the governing body of the largest local lawyers' organisation stated in June 2018, with respect to the Court of Final Appeal: "[s]ince its establishment in 1997, the CFA has been an unqualified success as part of the HKSAR legal system."⁸ This remains the position.

Finally, on a more historical note, the two London advocates in the final appeal will be some of the first overseas "King's Counsel" to appear ad hoc before the courts in Hong Kong – but not the first; it is understood that at least two leading overseas King's Counsel appeared (in person or remotely) before the courts in September 2022. As for which King's Counsel was the first to be admitted ad hoc for proceedings in Hong Kong that "honour" may go to a London advocate due to appear in person on 19 October 2022 at a substantial case management conference in connection with a retrial of a criminal case.

Contact us

Please contact [Antony Sassi](#), [Warren Ganesh](#) or [James Lee](#) if you have any queries regarding the issues raised in this article, or if you wish to consider any commercial dispute resolution matters in Hong Kong.

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This article is intended to give general information only. It is not a complete statement of the law. It is not intended to be relied upon or to be a substitute for legal advice in relation to particular circumstances.

Notes

7. On 7 October 2022, the extension of the terms of office of the Honourable Mr Justice Patrick Chan Siu-oi, GBM and the Right Honourable Lord Jonathan Sumption, respectively as Non-Permanent Hong Kong Judge and Overseas Non-Permanent Judge of the Court of Final Appeal, for a period of three years, was announced.
8. Para 6 of a statement by The Law Society of Hong Kong on the Appointment of Judges, 28 June 2018.