

HCAL 98 & 99/2016
[2018] HKCFI 2517

HCAL 98/2016

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 98 OF 2016**

BETWEEN

HO KAR HEI (何家曦) Applicant

and

DIRECTOR OF INFORMATION SERVICES Putative Respondent

and

INMEDIAHK NETWORK LIMITED Putative Interested Party
(香港獨立媒體網絡有限公司)

AND

HCAL 99/2016

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 99 OF 2016**

BETWEEN

XU FANGWEN

Applicant

and

DIRECTOR OF INFORMATION SERVICES Putative Respondent

and

CHAIRMAN OF THE Putative Interested Party
ELECTORAL AFFAIRS COMMISSION

(heard together)

Before: Hon Au J in Court

Date of Hearing: 16 June 2017

Date of Judgment: 14 November 2018

J U D G M E N T

A. INTRODUCTION

1. This is the respective leave applications of Ms Ho (under HCAL 98/2016) and Ms Xu (under HCAL 99/2016) to apply for judicial review.

2. Ms Ho was the Chief Editor of Varsity, an English magazine run by the staff and students of the School of Journalism and Communication at the Chinese University of Hong Kong. She herself is also a student of the School of Journalism and Communication.

3. Ms Xu was the Deputy Chief Editor of San Po Yan (新報人), a Chinese student news publication of the Baptist University. She is also a student of the Baptist University.

4. In both of the proposed judicial reviews, the applicants seek to challenge the decisions by the Director of Information Services (“the Director”) to refuse the student reporters of Varsity, U-Beat Magazine (大學線月刊)¹ and San Po Yan access to the press area of the designated Media Centre for a by-election of the Legislative Council (“the LegCo”) held in February 2016 and another press event held in August 2016 for the LegCo’s General Election to be held in September 2016. I will deal with these events in greater details below.

5. It is not disputed for the present purposes that at that time, the challenged decisions were made by the Director pursuant to a “policy” (as described by Ms Ho) adopted by him to have a *blanket exclusion* of university student media from, *inter alia*, government press conferences or other official activities.

6. It is noted that Mr Jat SC for the Director prefers to describe the “policy” as a practice adopted by the Director instead of a policy. For present purposes, it does not really matter whether one describes it as a policy or practice. Purely for convenience, I would adopt the term “University Student Media Policy” used by Ms Ho to refer to the Director’s practice at that time.

¹ A Chinese publication of the Chinese University’s School of Journalism and Communication.

7. The existence of the “University Student Media Policy” is supported by, among others, a letter by the Director dated 24 May 2016 in reply to Ms Ho’s email dated 6 May 2016 in seeking explanations as to why the student magazine’s reporters were refused access to the press area in the above events. The Director’s letter stated as follows:

“香港大專院校的新聞系，每年都為本地新聞行業培育不少專業的新聞工作者，政府十分支持它們的教育工作，政府新聞處每年亦會安排新聞及傳理系同學到該處實習。

專上院校所辦的新聞刊物或電子新聞媒體的學生記者，由於是學生身分，並非專業的新聞工作者，而專上院校亦並非大眾新聞傳媒機構，基於整體情況，包括場地條件、出席的大眾新聞傳媒機構的工作需要等因素，政府一向不會安排學生採訪記者會或其他官方活動。

但為了利便專上院校新聞系的教學工作，我們會積極考慮在採訪場地的整體情況許可下，有限度容許新聞系的學生記者參與日後的一些重要採訪活動。我們稍後會與院校商討詳情。

正如本處在三月二十九日回覆你們的函件中指出，特區政府十分重視及尊重新聞自由，亦一直以公開透明的原則，透過傳媒向市民大眾發放有關政府政策及措施的信息。

政府一直積極利用互聯網加強與傳媒及市民的溝通，所有政府新聞稿、圖片、新聞短片，都會即時上載政府新聞處的網頁，主要的記者會亦會在該網頁直播。同學如對政府事宜有任何查詢，亦可與各政策局及部門的新聞組直接聯絡。”
(emphasis added)

8. Both applicants seek an order of *certiorari* to quash the decisions, and a declaration that the decision are unconstitutional as they breached Article 27 of the Basic Law of the HKSAR (“the Basic Law”) and Article 16 of the Hong Kong Bill of Rights (“HKBOR”), which guarantee the right to freedom of expression and freedom of press.

9. Ms Ho (in HCAL 98/2016) further seeks separate declarations that (a) the University Student Media Policy (which underlined the above decisions); and (b) the “policy” said to be also adopted by the Director to deny online media reporters from access to public activities conducted by government departments (for convenience, I adopt Ms Ho’s description of this as the “Online Media Policy”), are similarly unconstitutional as they are similarly in breach of Article 27 of the Basic Law and Article 16 of the HKBOR.

10. Pursuant to the court’s directions, the Director as putative respondent filed a Consolidated Initial Response dated 18 October 2016 to oppose leave.

11. At the forefront of the grounds of opposition is that the intended judicial reviews seeking to challenge the decisions, and the Student Media Policy that underlined the decisions, have already been rendered academic and would serve no useful purpose. This is so because the Director has since September 2016 adopted a new practice (or a policy) regarding student reporters’ access to government press events. Further, Ms Ho in any event simply has no sufficient *locus* or interest to bring a challenge against the Online Media Policy. Finally, and in any event, the grounds of challenge have no arguable merits as the rights to freedom of expression and press (which are not absolute rights) had not been demonstrated to be infringed by reason of the decisions.

B. BACKGROUND

12. Both cases arise out from the same background. They can be shortly summarised as follows.

13. The 2016 Legislative Council New Territories East Geographical Constituency By-Election (“the By-Election”) was held on 28 February 2016. On that day, a media centre was set up at Tiu King Leng Sports Centre. Inside that media centre is a designated media working area (“the DMWA”).

14. It is alleged by the applicants that the reporters of Varsity, U-Beat Magazine, San Po Yan and Inmediahk were refused access to the DMWA after presenting their press credentials. The staff members allegedly told them that “only invited media” could enter the DMWA, “no entry for those without media accreditation”, and “student newspapers should queue in the public area queue”.

15. It is not in dispute that Varsity, U-Beat Magazine and San Po Yan were duly registered under the relevant provisions of the Registration of Local Newspapers Ordinance (Cap 268) and paid the prescribed annual fees stipulated in the Newspaper Registration and Distribution Regulations (Cap 268B). On the other hand, Inmediahk (the putative interested party in HCAL 98/2016) is an online only media not registered under Cap 268, and solely disseminates information via the Internet.

16. Following various complaint letters and the LegCo questions, the government replied the following:

(1) On 29 March 2016, Mr Yu Chi-wai Terrence, on behalf of the Director, replied to a complaint letter by Ms Chan Hoi Ching Gloria, Chief Editor of San Po Yan, stating that:

“Access to Government press conferences or media events is generally granted to registered or licensed mass news media organisations which include registered printed newspapers, periodicals, licensed TV and radio stations, as well as new agencies. However, not all the registered media organisations will be granted access to Government press conferences or media events having taken into consideration the overall situation, including capacity constraints, security requirements and on-site order. We are also unable to accede to your request for granting access to student reporters to Government press conferences or media events.”

(2) On 1 April 2016, Mr Yu replied to a complaint letter by Mr Wong Chun Pong, editor of Inmediahk.net (managed by the putative interested party in HCAL 98/2016), in substantially the same terms as above in Chinese. It also stated that the Information Services Department (“the ISD”)’s position is that in the absence of a legally binding registration or licensing regime as in the case of the mainstream media, they are neither in a position to distinguish among a wide range of “online media”, nor is it possible for them to grant access to all those who claim themselves as “online media” for on-the-spot reporting due to practical arrangements.

(3) On 19 April 2016, Mr Yu replied to another complaint letter by the Journalism Educators for Press Freedom in substantially the same terms as in the letter on 29 March 2016.

(4) On 11 May 2016, in a reply to a question raised by Legislative Councillor Claudia Mo, the Home Affairs

Bureau stated that student reporters were “not professional journalists” and therefore are not ordinarily allowed to attend press conferences or other official government business. It also stated that tertiary institutions were “not mass media organisations”. However, it stated that “for educational purposes” they would, if the overall situation permits, grant “limited access” to journalism students to participate in reporting activities in future important occasions.

(5) On 24 May 2016, Mr Yu replied to the further questions posed by the applicant and the Executive Editor of U-Beat Magazine, Mr Lau Ho Ting, in substantially the same terms as in the reply on 11 May 2016.

17. The two notices of application for leave to apply for judicial review were taken out on 27 May 2016.

C. THESE LEAVE APPLICATIONS

C1. Are the proposed intended judicial reviews academic

18. It is well established that the court generally would not deal with public law challenges in judicial review the issues of which have been rendered academic. See: *Chit Fai Motors Co Ltd v Commissioner for Transport* [2004] 1 HKC 465, paragraph 20; *Kwok Cheuk Kin v Chief Executive of Hong Kong & Another* [2015] 6 HKC 22.

19. In this respect, it is however also well recognised that the court can in certain circumstances entertain a judicial review which has become “academic” following the principles laid down in *Chit Fai Motors v Commissioner for Transport* at paragraph 20(2) - (4):

- (1) The court has jurisdiction to hear and determine a question in which the dispute was real and the relevant facts had taken place, but no longer happens to be in existence at the time of the hearing.
- (2) Whether the court does so or not requires one to examine the utility of the decision.
- (3) In public law cases, the duties of public bodies fall to be exercised on a continuing basis not only in relation to the parties before the court but also perhaps to others in the future.
- (4) Examples include, a discrete point of statutory construction which does not involve detailed consideration of the facts, where a large number of similar cases exist or will most likely need to be resolved in the near future; where the same point is likely or may arise as between the same parties or those in positions similar to the parties, where there are conflicting situations.

20. As mentioned above, it is the Director's position that he has since September 2016 adopted a new practice (or in Ms Ho's words, a new policy) (for convenience, I would call this "the New Policy") in relation to allowing university journalism students access to major government press conferences and medial events. The New Policy is that for selected government media events of considerable public importance, with prior notification by the ISD, a total of not more than four journalism students from each of the seven local post-secondary institutions will be admitted into designated press areas at any one point in time.

21. In fact, as pointed out by Mr Jat for the Director, the New Policy has since been applied in various events, namely, the 2016 LegCo General Election which took place on 4 September 2016, the Policy Address in January 2017, the Budget in February 2017 and the Chief Executive Election in March 2017.

22. As such, Mr Jat submits that no useful purpose would be served for the court to continue to hear and determine a challenge against the constitutionality of the University Student Media Policy, which since September 2016 is no longer in existence and applied. The same applies to any challenge against the Director's decisions which were made pursuant to the then University Student Media Policy.

23. These are persuasive submissions.

24. However, Mr Pun SC (for Ms Ho) and Mr McCoy SC (for Ms Xu) both submit that the proposed challenges are not academic. I will deal with their submissions in turn below.

25. Mr Pun's arguments run on the following lines:

- (1) Properly read and construed, the New Policy is *not* a new policy but only an exception now adopted by the Director for the University Student Media Policy. The University Student Media Policy is therefore still in existence and applied by the Director, but only that he has, in so applying this policy, introduced an exception to allow student reporters to access only some selected government events which have considerable public importance.

(2) This is supported by the wordings of the exception, which reads “for *selected* government media events of *considerable public importance...*” (*emphasis added*). It shows that university student media are still in general excluded from most government media events, and such exclusion is arbitrary and unconstitutional.

(3) Moreover, the alleged new practice is only applicable for journalism students but not university student media in general. There may be other kinds of university student media, which, unlike the present applicants’ magazines, run by non-journalism students. They remain excluded.

(4) There is no evidence to support the alleged new practice. In any case, even if the court finds a new practice has taken effect, such a policy is still unconstitutional as the accreditation scheme does not have an “transparent” application of “specific, fair and reasonable” criteria.

26. With respect, I am unable to agree with Mr Pun.

27. In my view, in whichever way one looks at it, the New Policy is *a different* policy or practice from the University Student Media Policy. Under the New Policy, university journalism students are permitted to have access to various major government press conference or media events, when under the previous policy, *no* such students would be allowed access to *any* government press conference or media.

28. Mr Pun’s contention that the New Policy is only the Director’s application of exception to the University Student Media Policy is without merit. It is firstly inconsistent with Mr Pun’s

fundamental complaint in the proposed grounds of judicial review that the old policy amounted to a *blanket* refusal (meaning *no* discretion and *no* exception) to allow student journalists to access government press events (and hence a disproportionate unjustified restriction of freedom of press). Secondly, it is also incorrect as a matter of analysis for the same observations I have made at paragraph 27 above.

29. Mr Pun seeks also in his submissions to demonstrate why the New Policy in any event may arguably still amount to unjustified infringement of the freedom of expression and press.

30. With respect to Mr Pun, I do not think these submissions assist him:

(1) The New Policy is *not* under challenge in these intended judicial reviews.

(2) It is also *not* open to the applicants to challenge it under the present proceedings, since their rights in the subject events were not allegedly infringed by reasons of the application of the New Policy.

(3) In any event, whether the New Policy amounts to unjustified restriction of freedom of expression and press falling foul of the proportionality test must be a fact-sensitive question, which can only be properly assessed and debated in a relevant factual context, which is not the present ones.

31. I therefore reject Mr Pun's arguments.

32. Mr McCoy SC accepts that there is a new practice under the New Policy. However, leading counsel submits that the new practice still infringes the freedom of press protected under Article 16(2) of HKBOR and Article 27 of the Basic Law.

33. Mr McCoy has further sought to argue that the determination under Ms Xu's present proposed judicial review in relation to the now replaced University Student Media Policy "will have legal consequences regarding future government conduct". He argues that given that the Government has adopted a "flip-flop" position and changed its practice apparently due to the present intended judicial reviews, it may well revert back to the old practice at a later time. Mr McCoy therefore says that the declarations currently sought in the proposed judicial review have their constitutional importance to guide the *future* conduct of the government by declaring "the illegality of past". The proposed judicial review will still serve useful purpose. The court should entertain it.

34. With respect, I am also not persuaded by these submissions.

35. In relation to the contention that the present judicial reviews should still be entertained to challenge the New Policy, I repeat my reasons at paragraph 30 above and reject it.

36. Insofar as the argument that based on the alleged Government's "flip-flop" practice and thus there is a chance that it would go back to the old policy is concerned, this is nothing more than a mere speculation and assertion. I do not think the court should entertain these

proposed judicial reviews for the speculated allegation that the government *may* in the future “flip-flop” or return to its previous practice.

37. In the premises, I agree with Mr Jat that, by the time of this leave application hearing, the proposed judicial review challenges against the University Student Media Policy have already been rendered academic, and the court should not entertain it.

38. Having reached such conclusion, it is both unnecessary and inappropriate for me to consider the other substantial arguments advanced by the parties relating to the merits of the proposed grounds of challenge.

39. Leave to apply for judicial review to challenge the University Student Media Policy under both applications should therefore be refused.

C.2 The Online Media Policy

40. This is a challenge made only by Ms Ho in HCAL 98/2016.

41. Mr Jat opposes the leave application in relation to Ms Ho’s proposed challenge to the Online Media Policy firstly on the ground of lack of standing. Leading counsel submits that Ms Ho is a student journalist, and not a member of an online media organisation. Hence she simply does not have the necessary “sufficient interest” required under Order 53, rule 3(7) of the Rules of the High Court to challenge the Online Media Policy.

42. Ms Ho (in her Form 86 at paragraphs 66 - 69) seeks to justify her standing to challenge the Online Media Policy by the following reasons:

- (1) She is interested to join online media in Hong Kong as a reporter during summer holidays, or upon her graduation as she considers that online media is the current trend in news reporting and that the print media is a “sunset industry”.
- (2) She will find suitable employment with online media in Hong Kong easier if online media reporters are allowed to attend government events (thus making online media recruit more reporters).
- (3) She has great interest in seeing that the freedom of the press enjoyed by online media be protected, as well as the recognition of online media’s status in Hong Kong in line with the international trend.

43. However, at the hearing, Mr Pun has confirmed that he will no longer pursue this challenge against the Online Media Policy, given the existence of another set of proceedings under HCAL 96/2017, whereby the Hong Kong Journalists Association has been granted leave to challenge, among others, also the Online Media Policy.

44. In light of this latest position at the hearing, it is not necessary for the court to further consider this ground.

45. However, I would like to emphasize that, had it been necessary for the court to deal with this issue, applying the principles laid down in *Re Wong Chi Kin* (CACV 80/2014, Lam VP, Cheung and

Yuen JJA, 26 September 2014) at paragraph 11, I would be inclined to conclude that Ms Ho lacks the necessary sufficient interest to bring a challenge against the Online Media Policy in this proposed judicial review for the following reasons:

(1) A mere possibility on the intention of Ms Ho to join an online media organisation to work *in the future* is a most tenacious and remote way that Ms Ho can say she is somehow indirectly affected by the Online Media Policy. I do not think this by itself can satisfy the *locus* requirement. *Cf: Ng Wing Hung v Hong Kong Examinations and Assessment Authority* (HCAL 79/2010, Au J, 22 September 2010) at paragraphs 12 - 17.

(2) This is particularly so since, in the factual context raised in this proposed judicial review, Ms Ho was simply not affected at all by the Online Media Policy. Plainly, that policy has *nothing* to do with her in the factual context raised in this proposed judicial review.

(3) Moreover, there exists clearly other better-placed challenger to mount a challenge against the Online Media Policy. As pointed out by Mr Jat, the putative interested party Inmediahk is clearly such a better-placed challenger than Ms Ho, where its representative was excluded from the press area at the By-Election. The fact that Immediahk is joined as a putative interested party is at best irrelevant to the question of whether the *the applicant herself* (ie, Ms Ho) has a sufficient interest in the matter to which the judicial review application relates as required under the rules.

D. DISPOSITION

46. For all the above reasons, I refuse the leave applications of both Ms Ho and Ms Xu.

47. As to costs, the principles guiding the court's exercise of discretion in costs in an unsuccessful contested leave application have been laid down in *Leung Kwok Hung v President of the Legislative Council (No 2)* (2014) 17 HKCFAR 841, 852 at paragraphs 17(1) - (6) *per* Ribeiro PJ. The general rule is that the starting position should be that there is no order as to costs unless there are good reasons to justify an adverse costs order.

48. I do not find any good reasons to depart from the general starting position, in particular given I have refused the leave applications substantially on the basis that the matters under the proposed challenge have become academic in relation to events that happened after the filing of the leave applications. I therefore further make an order *nisi* that there be no order as to costs in these applications. Unless any of the parties applies to vary it by summons, this order shall become absolute after 14 days.

49. Lastly, I thank counsel for their assistance.

(Thomas Au)
Judge of the Court of First Instance
High Court

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Mr Hectar Pun SC and Mr Anson Wong Yu Yat, instructed by Ho, Tse,
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Mr Gerard McCoy SC and Mr Albert NB Wong, instructed by Ho, Tse,
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Mr Jat Sew-tong SC and Mr Jin Pao, instructed by the Department of
Justice, for the putative respondent in HCAL 98/2016 and
HCAL 99/2016

The putative interested parties in both actions, absent

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