



Recent judgment on *ad hoc* admission of overseas counsel tells of wider COVID-19 story

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Introduction

*Re Robertson QC*¹, is the latest reported judgment dealing with an application for *ad hoc* admission to the local bar, pursuant to section 27(4) of the Legal Practitioners Ordinance (Cap. 159). The applicant, a leading Queen's Counsel (barrister advocate) specialising in public and administrative law matters, sought admission for the purpose of advising and representing a local barrister in the defence of disciplinary proceedings before the barristers disciplinary tribunal and in any court challenges arising out of the proceedings. The application was not opposed by the Bar Association but it was opposed by the Secretary for Justice, whose role is to act as the guardian of the public interest in such applications. The court refused the application. There appears to have been fewer applications by Queen's Counsel (QC) based in England for *ad hoc* admission to the local bar in 2021, as was the case in 2020 – therein lies a COVID-19 story of (among other things) ongoing travel and quarantine restrictions for those wanting to visit or return to Hong Kong.

Background

The background to the underlying disciplinary proceedings, in respect of which the applicant sought to appear to defend the barrister, goes back over the course of several years. The applicant appears to have been advising the barrister on a pro bono basis from as early as 2017. The barrister faced a number of disciplinary

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complaints for alleged misconduct, including a complaint that he had allegedly failed to respond promptly to requests for information arising out of earlier disciplinary proceedings and regarding some anonymous complaints made against him for his alleged involvement in the departure from Hong Kong of

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1. [2021] HKCFI 3434, 25 November 2021.

“a person of considerable international interest”². The anonymous complaints had apparently been made in two identical letters from “a large group of exasperated barristers”³.

The applicant applied for permission to be admitted in Hong Kong on an *ad hoc* basis, in order to represent the barrister in his defence before the barristers disciplinary tribunal and in any related court hearings arising out of those proceedings.

Applications for *ad hoc* admission to appear in proceedings in Hong Kong are made pursuant to section 27(4) of the Legal Practitioners Ordinance (the Ordinance) and determined according to the public interest as set out in well-established case law. In short, the courts try to balance the need for a strong and independent local bar with the desirability of allowing eminent visiting QCs to appear before local courts and tribunals in cases that could have a significant impact on the development of local jurisprudence⁴. Section 27(4) of the Ordinance gives the High Court (usually the Chief Judge sitting at first instance) the power to admit an applicant as a barrister on an *ad hoc* basis – namely, to advise and appear with respect to a particular “case or cases” in Hong Kong, including tribunal proceedings.

Up until a few years ago there used to be between approximately 25 to 50 applications per year by English QCs to be admitted on an *ad hoc* basis for the purpose of appearing in proceedings in Hong Kong. While several English QCs have appeared in local proceedings on an *ad hoc* basis since the outbreak of the COVID-19 pandemic in Hong Kong in January 2020, the number of applications appears to have decreased. While a few applications may have proceeded by consent before the courts, with the agreement of the parties (including, the Bar Association and the Secretary for Justice), *Re Robertson QC* is one of the few reported judgments in 2021 arising out of a contested application for *ad hoc* admission by an overseas barrister.

The applicant’s legal representatives advanced the application on several grounds.

Issues of difficulty and complexity

It was contended that the disciplinary tribunal proceedings faced by the barrister would give rise to several complex and important legal issues, including:

- whether the legislative regime underpinning the prosecution of barristers’ disciplinary proceedings in Hong Kong is sufficiently independent and impartial;
- whether the appropriate standard of proof to be applied in disciplinary proceedings should be a criminal standard (of beyond reasonable doubt) as opposed to a civil standard (on a balance of probabilities); and
- whether the barristers disciplinary tribunal chair and members had conflicts of interest.

Difficulty with instructing suitable local barrister

It was argued that the barrister would have difficulty in instructing a local barrister in his defence because:

- a substantial number of local senior barristers had been officers or council members of the Bar Association (and, therefore, had been part of its governing body) at material times⁵;
- several local senior barristers had apparently attended a Bar Association annual general meeting at which adverse remarks had allegedly been made about the barrister;
- given the anonymous nature of some of the complaints it was difficult to determine whether any given local senior barrister was impartial as regards the proceedings against the barrister; and
- given the nature of the barrister’s challenge to the disciplinary proceedings and the tribunal, a local senior barrister may feel inhibited from defending the barrister to the best of their ability. In contrast, the applicant would feel no such inhibition.

Bar Association taking neutral stance

It was also argued on behalf of the applicant that the fact the Bar Association did not oppose the application (and took a neutral stance) and that the applicant had been advising the barrister on a pro bono basis since about 2017, were relevant factors in favour of allowing the application. Normally, in practice, the Bar Association would lead any objections to an application for *ad hoc* admission – although, it does give its consent where it considers that an application meets its own guidelines for *ad hoc* admission⁶. In this case, the Bar Association took a neutral stance given the nature of underlying proceedings for which the applicant sought *ad hoc* admission. However, the Secretary for Justice opposed the application.

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2. *Supra* note 1, at paras 4(3) and 9(4).
3. *Supra* note 1, at para 5.
4. For example, *Re Flesch QC* [1999] 1 HKLRD 506, *Re Perry QC* [2016] 2 HKLRD 647.
5. At present, there are approximately 105 “Senior Counsel” (SC) in Hong Kong.
6. “Revised Practice Guidelines for Ad Hoc Admission of Overseas Counsel” (July 2015). While the Bar Association consents to most applications, all applications are required to be approved by court.

Judgment

The court dismissed the application for *ad hoc* admission and does not appear to have accepted any of the arguments put forward on behalf of the applicant.

Issues of difficulty and complexity

The court noted that the underlying proceedings for which the applicant sought to be admitted concerned a disciplinary tribunal and not a court. This had a bearing on the court's approach to whether the proceedings were likely to give rise to difficult and complex issues and make a significant contribution to local jurisprudence.

As regards the constitutionality of the legislative framework for barristers' disciplinary proceedings, the court stated:

"In the first place, it does not seem to me that the Barristers Disciplinary Tribunal would be a suitable or appropriate forum for the making of such a challenge. Nor does it seem to be, on the materials put before me, that such a challenge would have realistic prospects of success. I therefore do not attach much weight to it".

As regards the appropriate standard of proof, the court did not think that it could seriously be disputed that the appropriate standard was a civil standard and, in this regard, the applicant's legal representatives' arguments appear to have been tentative.

The court also noted that as regards alleged conflicts of interest on the part of a tribunal member, these were matters that could be dealt with by established principles and did not appear to raise issues of unusual difficulty or complexity.

Difficulty with instructing suitable local barrister

The court acknowledged that any senior barrister who had served as an officer or a council member of the Bar Association at relevant times would have a conflict of interest and could not act for the barrister in the disciplinary proceedings and neither, in practice, could any barrister who had taken a position that was adverse to the barrister's interests. However, the court did not consider that this meant that there were no available local senior barristers to represent the barrister.

In response to a suggestion that approximately 80-90% of local senior barristers would be unable to act properly for the barrister (because all senior barristers who were in the same chambers as officers or council members of the Bar Association at relevant times would allegedly have a conflict of interest), the court stated:

"I do not agree that this is the correct basis on which to proceed. It is well known that barristers operate as sole practitioners, and that membership of the same chambers does not give rise to a conflict of interest between them when it comes to acting for opposing parties in legal proceedings, so that it is quite proper (and indeed common) for opposing parties to be represented by barristers from the same set of chambers".

The court was equally dismissive of the argument that the nature of the anonymous remarks about the barrister or the alleged inhibitions of local senior barristers made it impossible for the barrister to safely instruct a local senior barrister to defend him.

Bar Association taking neutral stance

The court rejected the argument that the Bar Association's neutral stance was a factor in favour of granting the application. Indeed, the court considered that given the underlying proceedings before the barristers disciplinary tribunal would be brought by the Bar Association it was proper for it to take a neutral stance as regards the application. The fact that the applicant was willing to act for the barrister on a pro bono basis was not a significant factor.

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7. Supra note 1, at para 13.
8. Supra note 1, at para 24.

Comment

Applications for *ad hoc* admission, pursuant to section 27(4) of the Ordinance, are fact dependent and the relevant legal principles are well-established. The application of these principles in *Re Robertson QC*, in the context of an application to appear before a professional disciplinary tribunal, is interesting even if the outcome is unsurprising. The disciplinary proceedings of themselves are unlikely to raise unusually difficult and complex legal issues that will (at the disciplinary stage) significantly contribute to local jurisprudence. A barrister dissatisfied with the findings or order of the barristers disciplinary tribunal has a right of appeal to the Court of Appeal⁹ – the applicant is not prevented from applying again to represent the barrister at an appeal stage, in the event that (for example) complex legal issues arise that would benefit from the significant contribution of a leading QC specialising in public and administrative law.

In the meantime, while *Re Robertson QC* is an application for *ad hoc* admission (and no more), the court's general observation that membership of the same set of chambers did not give rise to a conflict of interest such as to make it inappropriate for a particular senior barrister (who was not an officer or a council member of the Bar Association at relevant times) to act for a barrister in disciplinary proceedings, should be welcomed by the profession – confirming, as it does, what is the conventional thinking¹⁰. The court's other general observation that, on the materials before it, a legal challenge to the constitutionality or legality of the legislative framework for barristers' disciplinary proceedings did not appear to have a realistic prospect of success is also worth noting¹¹.

Contact us

Please contact [Samuel Hung](#) 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.

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9. Section 37B ("Appeal to Court of Appeal") of the Legal Practitioners Ordinance.
10. *Supra* note 1, at para 24.
11. *Supra* note 1, at para 13.