

Case Summary

Tong Ying Kit (唐英傑) v Secretary for Justice

CACV 293/2021; [2021] HKCA 912; [2021] 3 HKLRD 350
(Court of Appeal)

(Full text of the Court’s judgment in English at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=136672&QS=%28CACV%7C293%2F2021%29&TP=JU)

Before: Hon Poon CJHC, Yeung VP and Lam VP

Date of Hearing: 15 June 2021

Date of Judgment: 22 June 2021

Judicial review – SJ – decision to issue certificate for trial without jury under NSL 46(1) – prosecutorial independence of SJ under BL 63 – contextual and purposive construction of NSL 46(1) — fairness of trial – no absolute right to jury trial under BL 86

Decision-making process under NSL 46(1) – classified information – public interest against disclosure – no right to be consulted or be heard before issuance of NSL 46(1) certificate

Background

1. The Applicant was charged with one count of incitement to secession, contrary to NSL 20 and 21, and one count of terrorist activities, contrary to NSL 24. After the indictment had been preferred, the SJ issued a certificate under NSL 46(1) directing that the Applicant’s case be tried without a jury on the following grounds: (a) protection of personal safety of jurors and their family members; and/or (b) if the trial was to be conducted with a jury, there was a real risk that the due administration of justice might be impaired (“the Certificate”). As a

result, the case was listed for trial in the CFI before a panel of three judges. The Applicant applied to the CFI for leave to challenge the SJ's decision to issue the Certificate ("the Decision") by way of judicial review. The CFI refused to grant leave in *Tong Ying Kit v Secretary for Justice* [2021] HKCFI 1397 whereupon the Applicant appealed to the CA.

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

- NSL 4, 5, 42(1), 45 and 46(1)
- BL 63, 86 and 87
- BOR 10 and 11

2. The core issue was whether a decision by the SJ to issue a certificate under NSL 46(1) was amenable to conventional judicial review challenge such as the principle of legality and procedural safeguards. In deciding this issue, the CA examined: (a) whether the Applicant had a constitutional right to a jury trial in the CFI under BL 86 which provided that the principle of trial by jury previously practised in Hong Kong should be maintained; (b) whether the SJ's decision to issue a certificate under NSL 46(1) had the effect of depriving him of such a right, therefore engaging the principle of legality and procedural safeguards; and (c) whether the SJ's Decision was a prosecutorial decision protected under BL 63 from interference.

Summary of the Court's judgment

(a) Preliminary observations

3. The Court first identified the following incontestable facts:

- (a) Since the NSL was not subject to review on the basis of any alleged incompatibility as between the NSL and the BL or the ICCPR as applied to Hong Kong, NSL 46(1) could not be reviewed in courts. (para. 26)
- (b) By virtue of the introductory words in NSL 45 ("*Unless otherwise provided by this Law*"), NSL 46(1), if invoked, would allow a non-

jury trial to take precedence. Thus, even assuming that there was a right to jury trial entrenched in BL 86, it was not absolute and might be abrogated by NSL 46(1). (para. 27)

(c) The Applicant accepted that he would still have a fair trial before the panel of three judges even though it was not a jury trial. (para. 28)

(d) The Applicant did not allege that the SJ was motivated by bad faith, dishonesty or other ulterior motives in issuing the Certificate. (para. 29)

4. The Court noted that the parties agreed on the following basic features of NSL 46(1):

(a) NSL 46(1) was a specific provision applicable only to criminal proceedings in the CFI concerning offences endangering national security.

(b) The discretion was vested solely in the SJ.

(c) The discretion was open-ended as the stated grounds are non-exhaustive.

(d) The direction of the SJ for trial without a jury was mandatory.

(e) The decision by the SJ to issue the certificate was not a judicial function.

(f) There was no express reference to an accused's right to jury trial. Nor was there any express provision for an accused to object or to be consulted before the SJ decided to issue a non-jury trial certificate. (para. 36)

(b) Purposive approach to the construction of NSL 46(1)

5. In construing NSL 46(1), the Court applied the same well-established common law technique of purposive and contextual

construction adopted by the CFA in interpreting NSL 42(2) in *HKSAR v Lai Chee Ying* [2021] HKCFA 3. (paras. 31 and 34)

6. The context in which NSL 46(1) operated consisted of the legislative process of the NSL, various articles in the NSL, the relevant articles of the Basic Law and the BOR that shed light on context and purpose, and the corpus of law concerning jury trial and prosecutorial decisions protected by BL 63. (para. 35)

(c) Giving effect to the primary purpose of the NSL

7. As a national law applied to the HKSAR, the NSL had a special constitutional status focusing specifically on safeguarding national security and preventing and suppressing acts endangering national security in the HKSAR. NSL 46(1) sought to give full effect to that primary purpose of the NSL in that: (a) it applied to criminal proceedings in the CFI concerning only offences endangering national security; and (b) the first two stated grounds upon which the SJ might issue a non-jury trial certificate (namely, protection of State secrets and involvement of foreign factors) plainly arose from the special nature and needs of the offences endangering national security. (paras. 37 and 38)

(d) Ensuring a fair trial

8. The third ground stated in NSL 46(1) (namely, protection of personal safety of jurors and their family members) had to be understood with fairness of a criminal trial in mind. When the personal safety of jurors or their family members was under threat, it would seriously undermine the integrity of the criminal process. (paras. 38 and 43)

9. NSL 46(1) had to be read together with NSL 4 and 5, BL 87, and BOR 10 and 11, to ensure that the accused's constitutional right to a fair trial as embodied in those provisions was not compromised. The prosecution also had a legitimate interest in maintaining the fairness of the trial. (para. 42)

10. Jury trial was not the only means of achieving fairness in the criminal process. Neither BL 87 nor BOR 10 specified trial by jury as an

indispensable element of a fair trial in the determination of a criminal charge. When there was a real risk that the goal of a fair trial by jury would be put in peril by reason of the circumstances mentioned in the third ground, the only assured means for achieving a fair trial was a non-jury trial. A non-jury trial by a panel of three judges as mandated by NSL 46(1) served the prosecution's legitimate interest in maintaining a fair trial and safeguarded the accused's constitutional right to a fair trial. The two reasons specified in the Certificate (namely, the threat to personal safety of jurors and their family members and the risk of impairment to due administration of justice) were amply supported by considerations of fair trial. (paras. 43 and 44)

(e) Reading NSL 46(1) with BL 63 and 86 coherently

11. As the NSL was consistent with the Basic Law, there could be no inconsistency or incompatibility between NSL 46(1) and BL 63 or 86. The court must read NSL 46(1), BL 63 and BL 86 as a coherent whole. (para. 45)

12. The CA had observed in *Chiang Lily v Secretary for Justice* [2009] 6 HKC 234 that there was no absolute right to a jury trial in Hong Kong although where the venue chosen was the CFI, there was in that instance a requirement for jury trial. Whether that requirement entailed a right the accused enjoyed as such was open to debate. (para. 53)

13. The Appeal Committee of the CFA had decided in *Chiang Lily v Secretary for Justice* (2010) 13 HKCFAR 208 that the SJ's decision on venue, which resulted in a non-jury trial by operation of a statutory provision, was a prosecutorial decision protected under BL 63 and was not reviewable on conventional judicial review grounds. Likewise, issuing a certificate under NSL 46(1) was undeniably a prosecutorial decision made by the SJ in the criminal process, and BL 63 shielded that decision from any conventional judicial review challenge. (para. 56)

14. The decision-making process undertaken by the SJ under NSL 46(1) might involve classified information such as State secrets, confidential intelligence concerning involvement of foreign factors, sensitive materials on risks of personal safety of jurors or their family members or

threats to due administration of justice. The information or materials were ordinarily of such a nature that it would not be in the public interest to disclose, or for the SJ to reveal to, or discuss with, the accused before trial. The SJ had to take into account all the relevant circumstances in assessing all the materials available to her, some of which might not be admissible in evidence, and made a judgment call. It was usually of the impressionistic and instinctual variety. NSL 46(1) entrusted the SJ alone with this enormous task. (para. 64)

(f) Timely disposal of NSL cases

15. The direction for timely disposal of the trial under NSL 42(1) strongly militated against the Applicant's contention that the Decision was amenable to conventional judicial review challenge. Such a challenge would definitely breed elaborate and protracted satellite proceedings, thereby frustrating the directive of NSL 42(1) by delaying if not derailing the criminal process. (paras. 69 and 70)

(g) Conclusion

16. Even if there was a right to jury trial in the CFI entrenched in BL 86, it did not encompass the principle of legality or procedural safeguards as contended by the Applicant. It was because the SJ's decision to issue a non-jury trial certificate under NSL 46(1) was a prosecutorial decision protected by BL 63. Like other prosecutorial decisions, the SJ's decision was not amenable to conventional judicial review challenge such as the principle of legality and procedural safeguards. It was only amenable to judicial review on the limited grounds of dishonesty, bad faith and exceptional circumstances. By definition and as confirmed in the case law, these challenges were rare. (paras. 54, 68, 71 and 73)

17. Since the Applicant did not allege dishonesty or bad faith on the part of the SJ and the Applicant's asserted right to jury trial was, by itself, insufficient to amount to exceptional circumstances, the Applicant's case must fail on the facts. Accordingly, the appeal was dismissed by the Court. (paras. 74 and 75)

18. A right to be consulted or be heard before the SJ issued her certificate

under NSL 46(1) could not be derived from BL 86. Just as BL 86 could not be relied upon to mount a conventional judicial review against the SJ's decision on venue, neither could it be relied upon to mount such challenge against the decision to issue a certificate under NSL 46(1). The policy considerations leading to the restricted ambit of judicial review were essentially the same. (*per* Lam VP, paras. 78 and 83)

19. It was provided in NSL 45 and NSL 62 that in respect of the procedure for trials of NSL offences, the provisions in the NSL should prevail over other laws in Hong Kong. Hence, insofar as there was conflict between s. 41(2) of the Criminal Procedure Ordinance (Cap. 221) and NSL 46, the latter should prevail. Even assuming that there was any right to jury trial under s. 41(2) of the Criminal Procedure Ordinance for prosecution brought by way of indictment, such right had been curtailed by NSL 46 because of NSL 45 and 62. (*per* Lam VP, paras. 79-82)

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