



## Summary of Judgment

### **Chow Hang Tung v Secretary for Justice**

**HCAL 401/2022; [2022] HKCFI 2225**

**Decision** : **Application for judicial review allowed**  
**Date of Hearing** : **12 July 2022**  
**Date of Judgment** : **2 August 2022**

### Background

1. Together with other co-defendants, the Applicant was charged with “Incitement to Subversion”, contrary to Articles 22 and 23 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (the “NSL”). Committal proceedings have commenced before a magistrate (the “Magistrate”).
2. Under section 87A(1) of the Magistrates Ordinance (Cap. 227), reports of committal proceedings are prohibited. The Applicant applied to the Magistrate to lift the reporting restrictions in respect of the committal proceedings under section 87A(2) of Cap. 227 (the “Application”), which provided that a magistrate “shall” lift the reporting restrictions upon the application of an accused, and contended that the Magistrate was mandated by section 87A(2) to lift the reporting restrictions upon her application.
3. The Magistrate refused the Application (the “Decision”). In gist, the Magistrate considered that he had a discretion to refuse the Application in the interests of fair trial. Taking into account the unique features of the criminal case, which included the intense public and media attention on the case, the disturbances by members of public at the previous hearings, and the potential pressure on witnesses if reporting is allowed, the Magistrate considered that to allow the Application would undermine a fair trial. The Magistrate also considered that no prejudice would be caused to the Applicant’s defence if the Application is refused.

### Issues in dispute

4. The issues in the judicial review are:

(1) Whether the word “shall” in section 87A(2) of Cap. 227 bears its plain and literal meaning so that it imposes a mandatory duty on the Magistrate to lift



the reporting restrictions upon an application by an accused (the “Construction Issue”);

- (2) If the answer to (1) above is in the negative so that the Magistrate has a discretion, whether he had taken into account irrelevant considerations or had failed to take into account relevant considerations in coming to the Decision (the “Exercise of Discretion Issue”).

### **Department of Justice’s Summary of the Court’s rulings**

(Full text of the judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=146190&QS=%2B&TP=JU&ILAN=en](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=146190&QS=%2B&TP=JU&ILAN=en))

### ***The Construction Issue***

5. The court observed the following in respect of section 87A (paragraph 32):
  - (1) The reporting restrictions imposed by section 87A(1) apply only to “committal proceedings”;
  - (2) The restrictions imposed by section 87A(1) are in addition to, and not in derogation from, other similar statutory restrictions (such as section 9P of the Criminal Procedure Ordinance (Cap. 221));
  - (3) Both “shall” and “may” appear throughout the section. Where “shall” is used in contrast to “may”, it is used in a mandatory rather than permissive sense. Such usage is consistent with other sections in Cap. 227 about committal proceedings;
  - (4) Since committal proceedings include a preliminary inquiry, both sections 87A and 80 would be relevant in the event an accused elects a preliminary inquiry.
6. The court also noted that the provisions of section 87A were modelled on section 3 of the UK Criminal Justice Act 1967, and the main purpose of section 87A is to protect an accused from pre-trial adverse publicity which may affect the future jury. (paragraph 33)
7. In response to the Respondent’s submissions on the Construction Issue, the court considered that the various English authorities cited by the Applicant, speaking in one voice on the mandatory meaning and effect of the word “shall”, cannot be dismissed as mere *obiter*. The court also considered the English courts have not



lost sight of the context and purpose of the legislation under consideration in those case authorities. (paragraphs 40-46)

8. The court rejected the Respondent's submission that the local context and legal framework in Hong Kong (including the existing state of our laws, Basic Law, Bill of Rights and NSL) called for an interpretation of section 87A which is different from its plain meaning as found in the English case authorities, for the following reasons (paragraphs 47-54):
  - (1) The right to fair trial was part of the Common Law in Hong Kong even before the Bill of Rights came into operation in 1991. It has always been the case that the prosecution has a legitimate interest in maintaining the fairness of the trial;
  - (2) The Common Law principles of open justice and press freedom also eminently feature in the Basic Law, the Bill of Rights and the NSL. The right to fair trial is entrenched rather than altered by the Basic Law. The Common Law principles of open justice remain the norm after the handover and the NSL does not change that;
  - (3) As seen from the Hansard, the major object of the defaulted reporting restrictions provided for in section 87A(1) is to prevent "prejudice against the accused", which is not different from its English equivalent. Hence the English case law is directly relevant;
  - (4) Both "shall" and "may" are used in section 87A. No doubt the Legislature appreciated at the time that the two words bear different meanings. By enacting section 87A in its present form, it is evident that the Legislature intended section 87A to operate with a similar effect as its English equivalent;
  - (5) The consistent usage of "shall" in all other provisions in Cap. 227 relating to committal proceedings suggests that the "shall" in section 87A(2) should bear the same meaning as it appears elsewhere dealing with committals in Cap. 227;
  - (6) The Respondent's contention that the lifting of reporting restrictions would lead to the frustration of the ultimate aim of doing justice is exaggerated and untenable.
9. The court also rejected the Respondent's submission that the word "shall" in section 87A bears a facultative meaning and confers a power of discretion. (paragraphs 55-57)



10. Adopting a purposive and contextual interpretation of section 87A(2), and upon a consideration of various English case authorities, the court found that the Magistrate is at the instance of the accused under a mandatory duty to lift the reporting restrictions imposed by section 87A(1). The court found the Decision to be *ultra vires*. (paragraphs 34-39, 58)
11. The court refrained from expressing any conclusive view as to whether section 87A(2) is so wide as to violate the fair trial right of the co-accused, as the issue did not arise in the present case, and the issue of whether a “remedial interpretation” could and should be adopted has not been argued before the court. (paragraphs 60-61)

### ***The Exercise of Discretion Issue***

12. Even if the Magistrate did have a discretion under section 87A(2), the court was inclined to the view that a magistrate presiding over committal proceedings should not refuse to accede to the application of an accused under section 87A(2) unless such refusal is “strictly necessary” in the interests of justice. (paragraphs 62-63)
13. What make reporting restrictions “strictly necessary” would be fact and case sensitive, but the court was inclined to the view that the Decision was flawed through its failure to take into account certain relevant considerations, such as the availability of other means to protect the witnesses or to deal with unruly behavior of some members of the public present in court. (paragraph 65)

### **Relief**

14. The court granted an order of certiorari to quash the Decision, and an order of mandamus that the Magistrate shall make an order to lift the reporting restrictions in accordance with section 87A(2) at the Applicant’s next appearance before him, but without prejudice to applicable restrictions on reporting bail proceedings imposed by provisions other than section 87A. (paragraph 66)
15. The court made an order nisi that the Applicant shall have the costs of the judicial review proceedings, with certificate of two counsel, to be taxed if not agreed. (paragraph 67)