CACV 293/2021

[2021] HKCA 912

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO. 293 OF 2021
(ON APPEAL FROM HCAL NO. 473 OF 2021)

BETWEEN

TONG YING KIT	Applicant
and	
SECRETARY FOR JUSTICE	Putative Respondent

Before: Hon Poon CJHC, Yeung VP and Lam VP in Court
Date of Hearing: 15 June 2021
Date of Judgment: 22 June 2021

J U D G M E N T

Hon Poon CJHC:

1. Article 46(1) of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("NSL") provides:

> 「對高等法院原訟法庭進行的就危害國家安全犯罪案件提起的刑事檢控程序，律政司長可基於保護國家秘密、案件具有涉外因素或者保障陪審員及其家人的人身安全等理由，發出證書指示相關訴訟毋須在有陪審團的情況下進行審理。凡律政司長發出上述證書，高等法院原訟法庭應當在沒有陪審團的情況下進行審理，並由三名法官組成審判庭。」

Its English translation reads:

> "In criminal proceedings in the Court of First Instance of the High Court concerning offences endangering national security, the Secretary for Justice may issue a certificate directing that the case shall be tried without a jury on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors and their family members. Where the Secretary for Justice has issued the certificate, the case shall be tried in the Court of First Instance without a jury by a panel of three judges."

2. The core issue raised in this appeal is whether a decision by the Secretary for Justice to issue a certificate under NSL 46(1) is amenable to conventional judicial review challenge such as the principle of legality and procedural safeguards.

A. Proceedings below

A1. Prosecution case

3. The applicant is the defendant in HCCC 280/2020. He is facing a count of incitement to secession, contrary to NSL 20 and NSL 21; and another count of terrorist activities, contrary to NSL 24, and an alternative count of causing grievous bodily harm by dangerous driving,

contrary to section 36A of the Road Traffic Ordinance[1]. The prosecution alleged that on 1 July 2020, after NSL was promulgated, a large number of protestors took part in riots in Wanchai and Causeway Bay. Police were deployed to maintain public order there. In the afternoon, the applicant rode his motorcycle at speed in Wanchai, flying a black flag emblazoned with words in white "光復香港時代革命" and "LIBERATE HONG KONG REVOLUTION OF OUR TIMES". The public actively responded to his conduct. The police tried to stop him at several locations but failed. Eventually, the applicant rammed into the police officers at the checkline at the junction of O'Brien Road and Jaffe Road, after ignoring the police's warning, and injured three police officers seriously. He himself fell off his motorcycle and fractured his ankle.

4. On 16 November 2020, the applicant was ordered by a magistrate to be committed to the Court of First Instance for trial. The indictment was preferred on 23 November 2020.

A2. Issue of the certificate under NSL 46(1)

5. On 5 February 2021, the Secretary for Justice pursuant to NSL 46(1) issued a certificate directing that the proceedings in HCCC 280/2020 be tried in the Court of First Instance without a jury ("the Certificate"). The Certificate is written in Chinese and it reads:

> "本人現行使在《2020 年全國性法律公布》(2020 年第 136 號法律公告)附表中的《中華人民共和國香港特別行政區維

[1] Cap 374. This alternative charge was introduced with leave of the court on 7 June 2021.

護國家安全法》第四十六條第一款賦予的權力,對高等法院原訟法庭進行的就危害國家安全犯罪案件提起的上述刑事檢控程序,發出證書指示相關訴訟毋須在有陪審團的情況下進行審理。證書是經顧及並考慮所有相關的情況及資料,為有效防範、制止和懲治危害國家安全犯罪,基於以下理由而發出:

(一) 保障陪審員及其家人的人身安全;及/或

(二) 若審訊在有陪審團的情況下進行,有可能會妨礙司法公義妥爲執行的實際風險。

日期: 2021 年 2 月 5 日

(簽署)

律政司司長

鄭若驊 資深大律師"

Its English translation is:

" In exercise of the power vested in me by Article 46(1) of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region in Schedule to the Promulgation of National Law 2020 (L.N. 136 of 2020), in the above criminal proceedings in the Court of First Instance of the High Court concerning offences endangering national security, I hereby issue a certificate directing that the case shall be tried without a jury. For the effective prevention, suppression and punishment of offences endangering national security, the certificate is issued on the following ground(s) having taken into account and considered all the relevant circumstances and information:

(1) Protection of personal safety of jurors and their family members; and/or

(2) If the trial is to be conducted with a jury, there is a real risk that the due administration of justice might be impaired.

Dated this 5th day of February, 2021

[*Original signed*]

(Ms Teresa Cheng, SC)

Secretary for Justice"

As a result, the case is listed for trial in the Court of First Instance before a panel of three judges. It will commence on 23 June 2021 with 15 days reserved.

A3. The Judge's judgment

6. On 7 April 2021, the applicant applied before Alex Lee J ("the Judge") for leave to judicial review of the decision to issue the Certificate on the ground that it engaged the principle of legality and procedural safeguards which the Secretary for Justice had failed to observe. After a rolled-up hearing on 10 May 2021, the Judge handed down his judgment on 20 May 2021,[2] refusing to grant leave to the applicant to apply for judicial review.

7. The Judge rejected the applicant's primary contention that, since an indictment has been preferred against him, he has a constitutional right to a jury trial in the Court of First Instance; and that this right is protected by general principles of legality and other ordinary procedural safeguards. While recognising that the practice in Hong Kong has been for jury trials to be held in criminal proceedings in the Court of First Instance, the Judge held that it does not mean that the

[2] [2021] HKCFI 1397 ("Judgment").

accused has a constitutional right to jury trial. Even if there had been any previous right to a jury trial, such right would have been abrogated by NSL 46(1) and NSL 62 in respect of trial for national security offences[3]. After the enactment of NSL, there are two modes of trial in the Court of First Instance for these offences. The traditional mode is trial by jury, and the new mode is trial by a panel of three judges without jury. This new mode is engaged when a certificate is issued by the Secretary for Justice under NSL 46(1).

8. The Judge observed that the direction in the NSL 46(1) certificate is mandatory, and that the NSL does not provide that the Secretary has a duty to hear or notify an accused before she issues the certificate. The Judge further observed that NSL 46(1) sets out non-exhaustively the grounds for issuing a certificate. These grounds involved matters which the Secretary would reasonably be expected not to engage in discussion with an accused before trial, namely, protection of state secrets, involvement of foreign factors and jury protection.

9. The Judge further held that issuing the certificate directing a trial without jury is a prosecutorial decision, which is to be free from any interference under the Basic Law (BL 63). Thus, the certificate cannot be reviewed by the court on ordinary judicial review grounds. It is only reviewable on the limited grounds such as (i) acting in obedience to political instruction, (ii) bad faith, and (iii) rigid fettering of prosecutorial discretion: see *Re Leung Lai Fun* [2018] 1 HKLRD 523.

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[3] NSL 62 provides that the NSL shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with it.

10. Referring to *Re Hutchings' Application for Judicial Review* [2020] NI 801, the Judge held that there was no requirement to hear from or to inform the applicant before issuing the certificate. He therefore rejected the applicant's challenge on the ground of procedural impropriety or unfairness based on the lack of notice and opportunity to make representation.

11. Following his ruling that issuing the Certificate is a prosecutorial decision, the Judge held that the mere absence of detailed reasons is not sufficient to meet the very high evidential threshold for reviewing such a decision. Absent any allegation of bad faith or dishonesty, there was no basis for the court to interfere. The challenge on the ground of illegality, with the applicant contending that the lack of reasons meant that there was no rational basis for the Certificate (so that the Secretary must have misinterpreted or misapplied the law), was rejected.

12. As for the challenge based on *Wednesbury* unreasonableness, the Judge held that there was nothing inherently unreasonable in directing a trial by a panel of three judges without jury, when, on the face of the Certificate, there is a perceived risk in relation to the safety of jurors or their family, or that due administration of justice might be impaired.

13. Finally, the Judge held that, since the applicant has no right to a trial by jury, and his right to a fair trial is not engaged (as a fair trial can be conducted without a jury), the Certificate does not constitute a restriction of any of his rights. Therefore, the proportionality test as set

out in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 is not engaged.

B. Appeal

B1. The applicant's grounds of appeal and submissions

14. In the notice of appeal, Mr Philip Dykes SC for the applicant[4] put forward numerous grounds of appeal, which can be categorized as two main complaints:

(1) the Judge erred in ruling that there was no constitutional right to a jury trial in the Court of First Instance; and

(2) he erred in ruling that issuing a NSL 46(1) certificate was a prosecutorial decision protected under BL 63 from interference.

15. On constitutional right to jury trial, Mr Dykes submitted that, before the enactment of NSL, an accused was entitled to a verdict from a jury if he were to be tried in the Court of First Instance. Trial before a jury is therefore a right. It was further submitted that it is a right protected under the Basic Law, as the principle of trial by jury is to be maintained under BL 86; and that this right was covered by principles previously applied to criminal proceedings and was a right previously enjoyed in Hong Kong under BL 87. Mr Dykes further pointed out that

[4] Together with Ms Tina Mok (Mr Dykes also appeared for the applicant before the Judge below).

under section 65F of the Criminal Procedure Ordinance ("CPO")[5], a case can be transferred from the Court of First Instance to the District Court or a Magistrates' Court to be tried without a jury. He submitted that this tended to show that there was a right to jury trial, as the prosecution had to make an application for and justify such a transfer.

16. As the constitutional right to jury trial cannot be lightly curtailed or limited, NSL 46(1) should be construed as requiring procedural fairness to be accorded to the applicant before a certificate is issued, counsel reasoned.

17. Regarding the Judge's observation that the Secretary for Justice would not be expected to engage in discussion with an accused before trial on matters set out in NSL 46(1), Mr Dykes submitted that, while standards of procedural fairness may have to be adjusted in respect of matters involving public interest immunity, this does not mean right to jury trial should be affected. He submitted that, in the instant case, the grounds relied on by the Secretary, namely, (i) the safety of jurors and family or (ii) unspecified grounds relating to administration of justice, did not appear to give rise to public interest immunity precluding discussion before trial.

18. Based upon the argument that there is a right to a jury trial, Mr Dykes submitted that the proportionality test was applicable when restrictions are to be imposed on this right.

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[5] Cap 221.

19. As to procedural safeguards, on the basis that there is a right to jury trial, Mr Dykes submitted that the Judge erred in holding that the issue of the Certificate was a prosecutorial decision protected from interference by BL 63. He further pointed out that, unlike other prosecutorial decisions such as a decision to prosecute and a decision on trial venue, there is no public policy or guidelines on issuing a NSL 46(1) certificate. Seeking to distinguish *Re Hutchings' Application for Judicial Review*, Mr Dykes submitted that ordinary procedural fairness requires that the Secretary should hear from the applicant before issuing a certificate and to give reasons for doing so.

B2. The putative respondent's submissions

20. Mr Jenkin Suen SC for the putative respondent[6] submitted that there is no constitutional right in Hong Kong to a jury trial, whether generally or in the limited sense suggested by the applicant. Trial by jury in the Court of First Instance was a practice, not a right. In the context of the NSL, there are competing concerns pertaining to the mode of trial, so that trial by jury cannot be characterized as a right of the accused. In any event, it was submitted that the Judge was correct that any previous right to jury trial would have been abrogated by the NSL. The mechanism under section 65F of the CPO for transfer of cases from the Court of First Instance to lower courts could not assist the applicant.

[6] Together with Ms Leona Cheung and Mr Michael Lok (all of whom also appeared before the Judge below).

21. Mr Suen submitted that issuing a NSL 46(1) certificate was a prosecutorial decision, which could not be reviewed on ordinary judicial review grounds. The applicant was wrong to contend that BL 63 does not apply simply because a trial without jury is directed. He also submitted that, on the face of the Certificate, there was sufficient basis to invoke NSL 46(1), as it referred to (1) a risk of personal safety of the jurors and their family, or that (ii) the due administration of justice might be impaired.

22. Given that no right has been infringed and that the issue of the Certificate was a prosecutorial decision protected from interference, Mr Suen submitted that the applicant's challenge on ordinary judicial review grounds (procedural impropriety, illegality and proportionality) could not succeed.

B3. Respondent's notice

23. By a respondent's notice, it is contended that the application for leave amounted to an inappropriate collateral attack on an underlying criminal proceedings, and that if the applicant were to take issue with the fairness of those proceedings, he should do so within those proceedings, and not through other satellite litigation. It is further contended that the leave application was premature as the Certificate is an intermediate or procedural step dealing with case management, not the substantive or conclusive outcome of the criminal proceedings. If the applicant were concerned that the Certificate would adversely affect the outcome of the criminal trial, it is a matter to be raised in an appeal against conviction.

24. In reply, Mr Dykes submitted that nothing in the NSL excludes or limits the applicant's right to apply for judicial review. The leave application was not an inappropriate collateral attack because there were no suitable alternative remedies to challenge the certificate. The NSL does not provide for an appeal mechanism in respect of the Certificate. The panel of three judges in the criminal trial does not have jurisdiction to entertain an application for a jury trial. Lack of a jury trial is not a ground of appeal against conviction under section 83 of the CPO. Referring to *Re Hutchings' Application for Judicial Review*, supra, he submitted that judicial review is a proper way to challenge the Certificate.

C. The applicant's real complaint

25. It is important to bear in mind the following incontestable facts to remind oneself of what this appeal is really about.

26. In *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, the Court of Final Appeal at [37] held that in light of *Ng Ka Ling v Director of Immigration (No. 2)* (1999) 2 HKCFAR 141, at p.142, the NSL is not subject to review on the basis of any alleged incompatibility as between the NSL and the Basic Law or the ICCPR as applied to Hong Kong. It means that NSL 46(1) cannot be reviewed in courts. Here, Mr Dykes did not mount a constitutional challenge against NSL 46(1). Indeed, any disguised attempt, if raised, to challenge it based on an alleged incompatibility with any article of the Basic Law or ICCPR as applied to Hong Kong would have been firmly rejected.

27. NSL 45 states that:

> "*Unless otherwise provided by this Law*, magistrates' courts, the District Court, the High Court and the Court of Final Appeal shall handle proceedings in relation to the prosecution for offences endangering national security in accordance with the laws of the Hong Kong Special Administrative Region." (Emphasis supplied)

The local laws referred to in NSL 45 plainly cover those concern jury trial. By virtue of the introductory words in NSL 45 (italicized), NSL 46(1), if invoked, will allow a non-jury trial to take precedence. Thus, even assuming that there is a right to jury trial entrenched in BL 86, Mr Dykes accepted, as he must, that it is not absolute and may be abrogated by NSL 46(1). Nor did Mr Dykes contend that a non-jury trial directed by NSL 46(1) case is *per se* unconstitutional.

28. Acknowledging that he could not constitutionally challenge NSL 46(1) which may direct a non-jury trial, Mr Dykes accepted that a trial before a panel of three judges under NSL 46(1) does not impede on the applicant's constitutional right to a fair trial. In other words, Mr Dykes accepted that the applicant will still have a fair trial before the panel of three judges even though it is not a jury trial.

29. Finally, it is not the applicant's case that the Secretary for Justice was motivated by bad faith, dishonesty or other ulterior motives in issuing the Certificate.

30. Properly understood, the applicant's complaint boils down to his assertion that he has a constitutional right to a jury trial under BL 86 and that when the Secretary for Justice issued the Certificate, her decision had the effect of depriving him such a right, therefore engaging the principle of legality and procedural safeguards. As said at the outset, it is eminently a matter of construction of NSL 46(1).

D. Construction of NSL 46(1)

D1. Purposive approach

31. As to the approach to be adopted by Hong Kong courts in construing the NSL, the judgment of the Court of Final appeal in *Lai Chee Ying*, supra, is instructive.

32. There, the respondent was charged with one count of collusion with a foreign country or with external elements to endanger national security, contrary to NSL 29(4). The Chief Magistrate refused bail and remanded him in custody. Upon his application, the Judge granted him bail with special conditions, which was later set aside by the Court of Final Appeal.

33. In analyzing the issues raised in the appeal, the Court of Final Appeal undertook an interpretative exercise of NSL 42(2), a specific provision on bail in the NSL. The Court at [8] pointed out that determination of the meaning and effect of NSL 42(2) requires that provision to be examined in the light of the context and purpose of the NSL as a whole. In the outline of the legislative process through which

the Standing Committee of the National People's Congress enacted the NSL, the Court referred to the Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for Safeguarding National Security in the Hong Kong Special Administrative Region dated 28 May 2020 and the Explanation of a Draft Decision (which was eventually adopted to be the above Decision) presented to the NPC on 22 May 2020. The Court at [11] emphasized that given the special status of the NSL as a national law applied under Article 18 of the Basic Law, and given the express reference in NSL 1 to that process, regard may properly be had to the Explanations and Decisions made in proceedings of the NPC and the NPCSC regarding promulgation of the NSL as a law of the HKSAR as extrinsic materials relevant to consideration of the *context and purpose* of the NSL. Turning specifically to NSL 42(2), the Court at [42] and [45] highlighted the importance of examining the matrix in which NSL 42(2) exists, consisting of the applicable human rights and rule of law principles, referred to in NSL 4 and NSL 5, the rules regarding bail under HKSAR law and the provisions of the NSL read as a coherent whole, with a view to ascertaining how NSL 42(2) is intended to operate in that context.

34. What the Court of Final Appeal adopted in interpreting NSL 42(2) is evidently the well-established common law technique of purposive and contextual construction. The same must apply to the construction of NSL 46(1) here.

D2. Construing NSL 46(1)

35. Pursuant to the purposive approach, I now examine the context in which NSL 46(1) operates, consisting of the legislative process of the NSL, various articles in the NSL and the relevant articles of the Basic Law and the Hong Kong Bill of Rights ("BOR") that shed light on context and purpose, and the corpus of law concerning jury trial and prosecutorial decisions protected by BL 63. I will distil the interpretative factors that inform the construction exercise as appropriate and construe the provision accordingly.

36. NSL 46(1) has already been set out in full at [1] above. There is a considerable measure of agreement between the parties regarding the following basic features of NSL 46(1):

(1) NSL 46(1) is a specific provision applicable only to criminal proceedings in the Court of First Instance concerning offences endangering national security.

(2) The discretion vested solely in the Secretary for Justice.

(3) The discretion is open-ended as the stated grounds are non-exhaustive.

(4) The direction of the Secretary for Justice for trial without a jury is mandatory.

(5) The decision by the Secretary for Justice to issue the certificate is not a judicial function.

(6) There is no express reference to an accused's right to jury trial. Nor is there any express provision for an accused to object or to be consulted before the Secretary for Justice decides to issue a non-jury trial certificate.

These features set the scene for the construction exercise.

D2.1 Giving effect to the primary purpose of the NSL

37. NSL 46(1) has first to be examined in the light of the general context and purpose of the NSL as a whole, taking into account the constitutional basis upon which the NSL is applied to Hong Kong: *Lai Chee Ying*, supra, at [8]. In this regard, I would respectfully adopt the outline drawn by the Court of Final Appeal at Part B on the genesis and legislative process of the NSL, cumulating in the promulgation by the Chief Executive on 30 June 2020. As pointed out by the Court of Final Appeal, the NSL was enacted to fill the vacuum in the laws of the HKSAR regarding safeguarding national security arising from the failure to enact local legislation under BL 23 for the past 23 years. As a national law applied to the HKSAR, the NSL has a special constitutional status focusing specifically on safeguarding national security and preventing and suppressing acts endangering national security in the Region.

38. NSL 46(1) seeks to give full effect to that primary purpose of the NSL:

(1) It applies to criminal proceedings in the Court of First Instance concerning offences endangering national security and no more.

(2) Of the three stated grounds upon which the Secretary for Justice may issue a non-jury trial certificate, protection of State secrets and involvement of foreign factors plainly arise from the special nature and needs of the offences of endangering national security. If and when it is necessary to issue a certificate on either of those two grounds, it clearly serves the NSL's primary purpose.

The third stated ground concerning personal safety of jurors and their family members has to be understood with fairness of a criminal trial in mind.

D2.2 Ensuring a fair trial

39. NSL 4 mandates respect for and protection of rights and freedoms which the residents of the HKSAR enjoy under the Basic Law and the ICCPR as applied to Hong Kong. Of immediate significance is BL 87, which states:

> "In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained.
>
> Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs."

40. The right to fair trial is also contained in BOR 10 in these terms:

> "In the determination of any criminal charge against him… everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

41. Further, NSL 5 requires the adherence to the rule of law principles in preventing, suppressing, and imposing punishment for offences endangering national security. It expressly provides that a person who has committed an act which constitutes an offence under the law shall be convicted and punished and no one shall be convicted and punished for an act which does not constitute an offence under the law. This is the cardinal principle of conviction and punishment of crimes as prescribed by law. NSL 5 goes on to stipulate:

> "A person is presumed innocent until convicted by a judicial body. The right to defend himself or herself and other rights in judicial proceedings that a criminal suspect, defendant, and other parties in judicial proceedings are entitled to under the law shall be protected. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings."

These principles of presumption of innocence, protection of parties' rights in fair trial and protection against double jeopardy tie in with BL 87 and mirror the similar provisions in BOR 11.

42. NSL 46(1) has to be read together with NSL 4 and NSL 5, and BL 87 and BOR 10 and BOR 11, to ensure that the defendant's constitutional right to a fair trial as embodied in those provisions is not

compromised. The prosecution also has a legitimate interest in maintaining the fairness of the trial.

43. The third of the stated grounds for issuing a non-jury trial certificate in NSL 46(1) concerns the protection of personal safety of jurors and their family members. When the personal safety of jurors or their family members is under threat, it will seriously undermine the integrity of the criminal process. This is where the paramount importance of a fair trial comes into play. Granted jury trial is the conventional mode of trial in the Court of First Instance, it should not be assumed that it is the only means of achieving fairness in the criminal process. Neither BL 87 nor BOR 10 specifies trial by jury as an indispensable element of a fair trial in the determination of a criminal charge. When there is a real risk that the goal of a fair trial by jury will be put in peril by reason of the circumstances mentioned in the third ground, the only assured means for achieving a fair trial is a non-jury trial, one conducted by a panel of three judges as mandated by NSL 46(1).[7] Such a mode of trial serves the prosecution's legitimate interest in maintaining a fair trial and safeguards the accused's constitutional right to a fair trial.

44. In the present case, the Certificate specified two reasons. The first is self-evidently based on the third stated ground. The second concerns the risk of impairment to due administration of justice. Both reasons are amply supported by the considerations of fair trial discussed

[7] Cf: In England, in the case of jury tampering, sections 44 and 46 of the Criminal Justice Act 2003 provides for a trial before a single judge in lieu of a jury trial.

above. The trial by a panel of three judges now mandated by NSL 46 (1) is to ensure that the applicant will have a fair trial. It is therefore not surprising that the applicant did not say that he would be deprived of a fair trial even if it is not a jury trial.

D2.3 Reading with BL 63 and BL 86 coherently

45. NSL 1 states that the NSL is enacted in accordance with the Constitution and the Basic Law. Thus, there can be no inconsistency between the NSL and the Basic Law. It follows that there can be no inconsistency or incompatibility between NSL 46(1) with BL 63 or BL 86. This requires the court to read NSL 46(1), BL 63 and BL 86 as a coherent whole.

46. BL 63 provides:

> "The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference."

BL 86 stipulates that:

> "The principle of trial by jury previously practised in Hong Kong shall be maintained."

The parties hotly disputed about the scope of BL 63 and BL 86.

47. To recap, Mr Dykes argued that the right to jury trial in the Court of First Instance is entrenched in BL 86. Since a certificate issued under NSL 46(1) removes that right, the Secretary for Justice's decision, unlike ordinary prosecutorial decisions protected by BL 63, engages the

principle of legality, and because NSL 46 does not abrogate common law protections, her decision attracts procedural safeguards. Mr Suen argued that no such right to jury trial is entrenched in BL 86. The decision by the Secretary for Justice made under NSL 46(1) is protected by BL 63 and is not open to judicial review on the grounds advanced by the applicant.

48. Taking BL 86 first, counsel spent considerable efforts in making good their respective contention. I only need to deal with their submissions briefly as the answer to this question does not in my view impact on the construction issue in any substantial way.

49. In support of his argument, Mr Dykes relied on numerous overseas authorities, including *Newell v R* [1936] 55 CLR 707, per Latham CJ at pp.710-712; *Kingswell v R* [1985] 159 CLR 264, per Deane J at pp.299-300, 303; *AK v State of Western Australia* (2008) 232 CLR 438, per Heydon J at [93]-[98]; and *R v Mirza* [2004] 1 AC 1118, per Lord Steyn at [7] and Lord Hobhouse at [144]. Those authorities described the immense value and unique features of jury trial in the administration of criminal justice in the common law system and invariably referred to it as a right. But even as a right, the authorities recognized that it is not absolute and may be amended or circumscribed by express legislation: *R v Twomey* [2010] 1 WLR 630, per Lord Judge CJ at [10];[8] *Re Hutchings' Application*, supra, per Lord Kerr at [37].[9]

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[8] In that case, the legislation in question is the 2003 Act which imposes restrictions on jury trial in case of, among others, jury tampering.

50. In Hong Kong, it would appear that older cases did not speak unanimously on the matter. For example, in *Re David Lam Shu-tsang* [1977] HKLR 393, the Full Bench at pp.393-400 expressed some doubt if there was a common law right to elect trial by jury. When the case reached the Court of Appeal (CACV 42 & 43/1977, 7 November 1977, unreported), Pickering JA (at pp.6-7), Li J (at p.14) and Cons J (at pp.19-20) all regarded trial by jury as a common law right. Both the Full Bench and the Court of Appeal confirmed that such a right could be abrogated by the District Court Ordinance.[10]

51. However, modern appellate authorities relied on by Mr Suen suggest that there is no free-standing right to jury trial in Hong Kong. In *Chiang Lily v Secretary for Justice* [2009] 6 HKC 234, Ma CJHC (as he then was) at [24] disavowed Pickering JA's observation in *Re David Lam Shu-tsang*, ibid, and stated in unambiguous terms that no right to jury trial exists in Hong Kong. In a similar vein, Li CJ in *Chiang Lily v Secretary for Justice* (2010) 13 HKCFAR 208, at [9], reiterated that there is no right to trial by jury in Hong Kong. In *HKSAR v Chan Huandai* [2016] 2 HKLRD 384, in the context of addressing jury irregularities, this Court, in referring to jury trial as a tradition deeply rooted in the common law, observed that it is an integral and indispensable feature of the criminal justice system and has been entrenched in BL 86. There was however no reference to trial by jury as a right as such.

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[9] There, the legislation in question is the Justice and Security (Northern Ireland) Act 2007.
[10] Cap 336.

52. Mr Dykes accepted that there is no free-standing right for jury trial. He further accepted that any common law right to jury trial could be abrogated by statute and had in fact been abrogated by the District Court Ordinance back in 1953. However, Mr Dykes argued that once an indictment is preferred and the case has been committed to the Court of First Instance for trial, the accused is entitled, as his right, to a trial by jury until and unless the Secretary for Justice offers no evidence or otherwise discontinues the prosecution. Mr Dykes relied on the combined effect of section 14A(2) and section 41 of the CPO that a trial on indictment in the Court of First Instance is by way of jury trial. He augmented his contention by relying on the transfer mechanism in section 65F of the same Ordinance. That section provides for the mechanism whereby the Secretary for Justice may, on grounds shown, apply for a transfer of the proceedings on indictment pending in the Court of First Instance to the District Court and the judge may allow the application having regard to the interests of justice.

53. However, what appears to contradict Mr Dykes's submission is Ma CJHC's observation in *Chiang Lily*, supra, at [42(1)] that there is no absolute right to a jury trial in Hong Kong although where the venue chosen in the Court of First Instance, there is in that instance a requirement for jury trial. A requirement for jury trial refers to the mode of the criminal trial that must be adopted in the Court of First Instance. Whether it entails a right the accused enjoys as such is open to debate.

54. In short, Mr Dykes's contention that there is a right to jury trial in the Court of First Instance does not appear to sit well with the

modern local appellate authorities on the subject. However, as said, it is not necessary for me to come to a definitive view on the matter. The reason is this. Even assuming that BL 86 has entrenched a right to jury trial in the Court of First Instance, it does not encompass the principle of legality or procedural safeguards as contended. It is because, as elaborated below, a decision made by the Secretary for Justice which results in a non-jury trial under the relevant enactment is a prosecutorial decision protected by BL 63.

55. Section 88 of the Magistrates Ordinance[11] mandates the magistrate, upon an application by the Secretary for Justice, to transfer the charge or complaint relating to indictable offences an accused is facing to the District Court. In *Chiang Lily*, supra, the defendant applied for judicial review of the decision of the Secretary for Justice to transfer several charges against her to the District Court. She wished to have a trial by jury and made no constitutional challenge to section 88. The judge dismissed her application and a magistrate made an order under section 88. The defendant then mounted a second judicial review of the magistrate's decision, arguing that section 88 was unconstitutional as its effect was to confer the judicial power to select the venue for a criminal trial exclusively on the executive. That application was also dismissed by the lower courts. The defendant sought leave to appeal to the Court of Final Appeal, which was dismissed by the Appeal Committee. Li CJ first held that the question of constitutionality of section 88 could and should have been raised in the first application. His Lordship in any

[11] Cap 227.

event held that the defendant's contention was not reasonably arguable. He at [15]-[18] held that choice of venue for a prosecution is clearly a matter covered by BL 63 which gives control of prosecutions to the Secretary for Justice, having regard to the context and basis of such decision.

56. It follows from the Appeal Committee's judgment in *Chiang Lily* that the Secretary for Justice's decision on venue, which results in a non-jury trial by the operation of a statutory provision, is a prosecutorial decision protected under BL 63 and is not reviewable on conventional judicial review grounds. Likewise, issuing a certificate under NSL 46(1) is undeniably a prosecutorial decision made by the Secretary for Justice in the criminal process. NSL 46(1) then mandates a non-jury trial. Applying *Chiang Lily*, BL 63 shields the decision to issue a NSL 46(1) certificate from any conventional judicial review challenge.

57. Support for the conclusion that the decision of the Secretary for Justice to issue a NSL 46(1) certificate is a prosecutorial decision may also be derived from the comparable case law in England. As already alluded to, although jury trial is regarded as a right there, it is not absolute and can be circumscribed by express legislation. There are cases in which statutory provisions enable the Attorney General to make a decision, including issuing a certificate, directing or resulting in a trial by a judge without a jury. For present purpose, it will be sufficient to look at three appellate judgments.

58. In *Shuker's Application* [2004] NIQB 20, each of the applicants was charged with an offence that is "scheduled", that is of a type specified in Schedule 9 of the Terrorism Act 2000. By virtue of section 75(1) of the 2000 Act, such offences are tried by a judge sitting without a jury. Certain offences are stated to be subject to Note 1 of the Schedule. Those offences shall not be scheduled offences when the Attorney General certifies that they are not to be treated as such. The offences with which the applicants were charged are subject to Note 1 and may therefore be certified, or "de-scheduled", resulting in a jury trial. The applicants applied for judicial review to challenge the decision of the Attorney General not to exercise his power to certify the offences with which they have been charged. One of the issues is whether the Attorney General's decision was justiciable.

59. In determining this issue, Kerr LCJ drew on the well-established limitations on the review of prosecutorial decisions. He then drew an analogy between the Attorney General's decision not to "de-schedule" and the decision whether to prosecute in these terms:

> "[25] …What the various cases that deal with the reviewability of prosecutors' decisions have in common is an approach to the question that is firmly based on the practical implications of permitting judicial review of the decision, whether it is a decision not to prosecute or a decision to withhold reasons. Ultimately, therefore, the question whether the Attorney General should be subject to judicial review in respect of decisions about de-scheduling must be answered in a way that takes account of the particular features of this process of decision-making. We have concluded that it is not a process which is suitable for the full panoply of judicial review superintendence. In particular, we do not consider that the decision is amenable to review on

> the basis that it failed to comply with the requirements of procedural fairness.
>
> [26] The exercise involved in deciding whether offences should be de-scheduled is in some respects akin to the decision whether to prosecute. It involves the evaluation of material that will frequently be of a sensitive nature and the assessment of recommendations made by or on behalf of the Director of Public Prosecutions based on his appraisal of matters that may not be admissible in evidence or whose disclosure would be against the public interest. This is *par excellence* a procedure on which the courts should be reluctant to intrude. It is, moreover, a task that has been entrusted by Parliament to the Attorney General and while this will not in all circumstances render judicial review impermissible, it signifies a further reason for reticence."

60. In *Arthurs' Application* [2010] NIQB 75, the applicants sought judicial review of a decision made by the Director of Public Prosecutions whereby he certified that their trial be conducted without a jury under the Justice and Security (Northern Ireland) Act 2007 ("2007 Act"). After rejecting the applicants' argument that the right to fair trial under Article 6 of the European Convention on Human Rights, Girvan LJ adopted Kerr LCJ's reasons in *Shuker's Application* and rejected the procedural arguments relied on by the applicants. Referring to section 7 of the 2007 Act, which limits the grounds of challenge to the DPP's decision to dishonesty, bad faith and other exceptional circumstances, he at [25] observed that the language is inspired by the principle of exceptionality applicable in the context of prosecutorial decisions and section 7 gives statutory recognition to the common law reticence in the scrutiny of decisions made in the field of prosecutorial decision-making.

61. Similarly, in *Re Hutchings' Application*, supra, the UK Supreme Court had to grapple with a challenge against the certificate issued by the Attorney General under section 1 of the 2007 Act that the trial on indictment of the applicant was to be conducted without a jury on the ground that he was satisfied that there was a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

62. One of the arguments raised by the applicant was procedural. He argued that he should have been provided with the reasons that the DPP had been minded to issue a certificate and with the material on which his consideration of that question was based, and that the applicant should have been given the opportunity to make representations on whether the certificate should be issued, in advance of any decision, and furthermore that effective representations could not be made in the absence of that information. The applicant also argued that he had a right to jury trial and because of that, his case fell within the exceptionality clause of section 7 of the 2007 Act.

63. In rejecting those arguments, Lord Kerr disposed of the applicant's reliance on section 7 by observing at [54] that a curtailment of the full spectrum of judicial review challenge was obviously intended by section 7; and ruling at [55] and [56] that the right to jury trial alone was not enough to shift the applicant's case into a condition of exceptionality; and that something more was required beyond a claim that there is right to a jury trial to qualify for exceptionality clause. Relevantly, he went on to say:

> "[57] Quite apart from the statutory imperative requiring that there be exceptional circumstances in the absence of bad faith or dishonesty, the decision whether to issue a certificate is obviously one which should not be subject to the full spectrum of conventional judicial review challenge. Unlike most decisions taken in the public law arena, it is not founded exclusively on the evaluation and weighing of hard evidence. It will usually be motivated by sensitive information which cannot be disclosed. It is a decision which the Director of Public Prosecutions must take according to his personal reaction to the material with which he has been presented and his own estimation of the matters at stake. In sum, a decision to issue a certificate does not readily admit of scrutiny of the reasoning underlying it because it will usually be of the impressionistic and instinctual variety, for the reasons earlier explained."

Lord Kerr then referred to the parallels drawn in the cases including *Shuker's Application*, supra, and *Arthurs' Application*, supra between this species of decisions and decisions whether to prosecute and endorsed it by observing at [60] that the parallels between them are obvious.

64. Plainly, when one considers the context and process in which a decision to issue a non-jury trial certificate under NSL 46(1) is made, the same considerations and evaluative assessment undertaken by the Attorney General as described in the English authorities are involved. The decision-making process undertaken by the Secretary for Justice under NSL 46(1) may 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 are ordinarily of such a nature that it would not be in the public interest to disclose. Or for the Secretary for Justice to reveal to or

discuss with the accused before trial. The Secretary for Justice has to take into account all the relevant circumstances in assessing all the materials available to her, some of which may not be admissible in evidence, and make a judgment call. It is usually, as aptly described by Lord Kerr, of the impressionistic and instinctual variety. And NSL 46(1) entrusts the Secretary for Justice alone with this enormous task. The reasons articulated in the English authorities as to why the Attorney General's decision or certificate is a prosecutorial decision not amenable to conventional judicial review challenge are equally apposite to the decision by the Secretary for Justice to issue a certificate under NSL 46(1).

65. In his attempt to distinguish the English authorities, Mr Dykes took two points.

66. He first submitted that they were decided against their own statutory scheme, which is different from ours. But such differences do not detract from the cogent reasoning in the English authorities which clearly have general application in terms of common law, and should be adopted for present purpose.

67. Mr Dykes next submitted that in England the right to jury trial is not constitutionally entrenched, unlike BL 86. But in England, the right to jury trial is jealously guarded and has been regarded as a hallowed principle of the administration of the criminal justice. In the circumstances, whether it is entrenched is quite irrelevant. It does not

detract from the cogency and weight of the reasoning in the English cases and their applicability to the issues in this appeal.

68. In sum, reading NSL 46(1), BL 86 and BL 63 as a coherent whole with the relevant case law in mind, even if there is a right to jury trial in the Court of First Instance entrenched in BL 86, the decision by the Secretary for Justice to issue a non-jury trial certificate under NSL 46(1) is a prosecutorial decision protected by BL 63. Like other prosecutorial decisions, it is not amenable to conventional judicial review challenge. The contrary submissions by Mr Dykes are all rejected.

D2.4 Timely disposal of NSL cases

69. Finally, NSL 42(1) directs the law enforcement and judicial authorities of the Region to ensure that, when applying the laws concerning matters such as the detention and time limit for trial, cases concerning offence endangering national security are handled in a fair and timely manner so as to effectively prevent, suppress and impose punishment for such offence. This direction for timely disposal of the trial strongly militates against the applicant's contention that the decision by the Secretary for Justice to issue a certificate is amenable to conventional judicial review challenge. It is because such a challenge will definitely breed elaborate and protracted satellite proceedings, thereby frustrating the directive of NSL 42(1) by delaying if not derailing the criminal process.

70. NSL 46(1) contains no express provision for an accused to mount a conventional judicial review against the issue of a certificate. Allowing such a challenge by way of construction would defeat the purpose of NSL 42(1). It cannot possibly be the intent of NSL 46(1) read with NSL 42(1).

D2.5 Conclusion

71. For the reasons I have given, on a proper construction, NSL 46(1) does not admit of a conventional judicial review as contended by the applicant. The decision of the Secretary for Justice to issue a certificate under NSL 46(1) is a prosecutorial decision protected by BL 63. It is only amenable to judicial review on the limited grounds of dishonesty, bad faith and exceptional circumstances as explained in the case law. I would therefore answer the core issue identified at [2] with a "No".

72. This concludes the discussion on construction.

E. The applicant's challenge must fail on facts

73. Under the common law, a prosecutorial decision is amenable only on limited grounds under the rubric of dishonesty, bad faith or other exceptional circumstances: *R v DPP (Ex p. Kebilene)* [2000] 2 AC 326, per Lord Hope at p.376B-C; see also *Re Leung Lai Fun*, supra, at [10]. Mr Suen accepted, and rightly so in my view, that a decision by the Secretary for Justice to issue a certificate under NSL 46(1) is subject to these limited grounds of review. By definition and as confirmed in the

case law, these challenges are rare: see *Re Hutchings' Application*, supra, at [58].

74. Applying the principle here, as said, the applicant did not allege dishonest or bad faith. Mr Dykes availed himself of the exceptionality ground by harking back to his contention that the applicant has a constitutional right to jury trial in the Court of First Instance under BL 86. However, a similar argument was rejected in *Re Hutchings' Application*, supra, at [55]-[56] in the context of section 7 of the 2007 Act. Since section 7 reflects the common law exceptionality principle applicable to the scrutiny of prosecutorial decisions (*Arthurs' Application*, ibid), the applicant's asserted right to jury trial alone is not sufficient to render his circumstances exceptional for the purpose of challenging the Certificate. It follows that the applicant's case must fail on the facts.

F. Disposition

75. In consequence, I agree with the Judge that the applicant's case is not reasonably arguable and he is right in refusing to grant the applicant leave to apply for judicial review. I would dismiss the appeal.

Hon Yeung VP:

76. I have the advantage of reading the judgment of the Chief Judge in draft and I agree with it entirely. I, too, would dismiss the appeal.

Hon Lam VP:

77. I also agree respectfully with the judgment of the Chief Judge and for the reasons given by him the appeal should be dismissed.

78. In addition, I am unable to accept Mr Dykes' submission that a right of being consulted or heard before the Secretary for Justice issued her certificate under NSL 46(1) can be derived from BL 86. If such contention were correct, similar argument could be mounted with regard to the choice of venue by the prosecution for a criminal trial as between the District Court and the High Court. This line of argument must be rejected in light of the Appeal Committee's holding in *Chiang Lily*, supra that choice of venue is a matter covered by BL 63.

79. Mr Dykes tried to overcome such difficulty by arguing that since the prosecution is proceeded by way of indictment, it gives rise to a right of a defendant to be tried by jury. In this connection, counsel referred us to section 41(2) of the CPO.

80. In my judgment, this argument fails to give full effect to the provisions in the NSL. Though NSL 41(3) prescribes that prosecution of NSL offences shall be brought by way of indictment, NSL 46(1) and (2) clearly provides that apart from trial before a judge and jury, another possible mode of trial in the Court of First Instance is a trial before three judges without a jury. Construing these provisions together in a coherent manner, it is not possible to imply from the way in which prosecution is

brought under NSL 41(3) by indictment that the trial can only be conducted before a judge and a jury.

81. It is provided in NSL 45 and NSL 62 that in respect of the procedure for trials of NSL offences the provisions in NSL shall prevail over other laws in Hong Kong. Hence, insofar as there is conflict between section 41(2) of CPO and NSL 46, the latter shall prevail.

82. In light of this analysis, even assuming that there is any right to jury trial for prosecution brought by way of indictment, such right had been curtailed by NSL 46. I do not accept Mr Dykes' submission that such right was not curtailed by NSL 46 but by the decision of the Secretary for Justice. In this connection, the position is not materially different from that Lord Kerr alluded to in *Re Hutchings' Application for Judicial Review*, supra at [64].

83. Thus, properly understood, the decision of the Secretary for Justice to issue the certificate under NSL 46(1) is no different in nature from a decision on the venue of trial. Just as BL 86 cannot be relied upon to mount a conventional judicial review against the decision on venue, neither can 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 are essentially the same.

Hon Poon CJHC:

84. The appeal is accordingly dismissed. The parties are directed to file written submissions (limited to no more than 3 pages) on costs within 14 days. We will then dispose of it on paper.

(Jeremy Poon) Chief Judge of the High Court	(W Yeung) Vice President	(M H Lam) Vice President

Mr Philip J Dykes SC and Ms Tina Mok, instructed by Bond Ng Solicitors, for the applicant

Mr Jenkin Suen SC and Mr Michael Lok, instructed by the Department of Justice and Ms Leona Cheung PGC (Ag), of the Department of Justice, for the putative respondent