Case Summary

Tong Ying Kit (唐英傑) v Secretary for Justice

HCAL 473/2021; [2021] HKCFI 1397; [2021] 2 HKLRD 1036
(Court of First Instance)
(Full text of the Court's judgment in English at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=135853&QS=%28HCAL%7C473%2F2021%29&TP=JU)

Before: Hon Alex Lee J
Date of Hearing: 10 May 2021
Date of Judgment: 20 May 2021

Application for leave to judicial review – SJ's decision to issue certificate for trial without jury under NSL 46(1) – new mode of trial before panel of three judges for offences endangering national security in CFI – mandatory once Certificate issued – grounds under NSL 46 not exhaustive

No right to a jury trial – such right inconsistent with legislative scheme before handover in 1997 – two modes of trial in CFI post-NSL after preferment of indictment for offences endangering national security – no duty to hear or notify accused before SJ's decision under NSL 46(1) – proportionality test not applicable

SJ's decision under NSL 46(1) – prosecutorial decision protected by BL 63 – not amenable to judicial review subject to limited exceptions – procedural impropriety – no duty to inform accused of SJ's decision – illegality – no basis to interfere in the absence of bad faith or dishonesty – Wednesbury unreasonableness – decision not inherently unreasonable

Background

1. The Applicant was committed for trial to the CFI on two counts of offences under the NSL, namely "incitement to secession" contrary to NSL 20 and 21, and "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 Applicant's case was listed to be tried in the CFI without a jury by a panel of three judges.

2. The Applicant sought to challenge the SJ's decision to issue the Certificate ("the Decision") by way of judicial review.

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

- BL 63, 86 and 87
- NSL 4, 5, 41, 45, 46 and 62

3. In refusing to grant leave to apply for judicial review[*], the Court discussed:

(a) whether the Applicant had a constitutional right to a jury trial in the CFI once an indictment was preferred against him;
(b) whether the SJ's decision to issue the Certificate was a prosecutorial decision falling within the ambit of BL 63;
(c) whether the Decision could be challenged on the ordinary judicial review grounds of: (i) procedural impropriety; (ii) illegality; and (iii) irrationality; and
(d) whether the Decision could meet the 4-step proportionality test set out in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372.

[*] Editor's Note: The Applicant's appeal against the CFI's decision was dismissed by the CA in *Tong Ying Kit v Secretary for Justice* [2021] HKCA 912.

Summary of the Court's rulings

Preliminary observations

4. Before discussing in detail the above issues, the Court noted that:

(a) the Applicant was not contending that there was a general right to a jury trial in the criminal justice system in Hong Kong;
(b) it was the premise of the Applicant's challenge that an accused had a constitutional right to a trial by jury once the SJ had preferred an indictment;
(c) the Applicant agreed that an accused might have a fair trial without a jury;
(d) there was no dispute that the SJ had the power to make the Decision; and
(e) the present application was not about merits of the Decision. (para. 7)

NSL 46

5. After noting that before the enactment of the NSL, trial before a judge and a jury was the only mode of trial available in the CFI because of the procedural requirement of s. 41(2) of the Criminal Procedure Ordinance (Cap. 221) ("CPO"), the Court made the following observations on NSL 46:

(a) NSL 46 aimed at extant criminal proceedings concerning offences endangering national security in the CFI. Criminal proceedings were not yet in the CFI unless and until the indictment had been preferred;
(b) NSL 46 created a new mode of trial in the CFI for dealing with the aforesaid criminal proceedings;
(c) it was for SJ and SJ alone to decide whether the new mode of trial should be adopted *in a particular case*;
(d) there were no express provisions for the SJ to hear or to notify the accused before issuing a certificate; and
(e) the certificate, once issued, served as a mandatory direction that the case should be tried without a jury by a panel of three judges.

(para 22)

6. The Court made the following observations on NSL 46 read together with NSL 41 and 45:

(a) after the enactment of the NSL, there were two possible ways to deal with criminal proceedings concerning offences endangering national security in the CFI: (i) the conventional mode of having a trial before a judge and a jury; and (ii) the new mode of having a trial before a panel of three judges;
(b) the grounds given in NSL 46(1) for invoking the new mode were non-exhaustive, and there could be grounds other than the three given which might justify a trial without jury;
(c) the new mode could be used if and only if the SJ genuinely believed that the grounds stated in the certificate existed; and
(d) in the absence of a certificate issued under NSL 46(1), the procedural requirements contained in the local legislation including those of the Magistrates Ordinance (Cap. 227), the District Court Ordinance (Cap. 336) and the CPO were to be followed. (para. 23)

Whether the Applicant had a constitutional right to a jury trial in the CFI

7. Notwithstanding BL 86 and 87, the preferment of an indictment on its own did not confer on an accused the right (let alone a constitutional right) to a jury trial:

(a) The existence of such a right was inconsistent with the legislative scheme introduced well before the handover in 1997 which enabled transfer of cases between different levels of courts and in particular s. 65F of the CPO.

(b) The preferment of an indictment signified the SJ's decision that the case should be tried in the CFI. Before the enactment of the NSL, once that decision was made it would inevitably result in a trial before a judge and a jury, which was the only mode of trial then available. However, the same was no longer true after the

enactment of the NSL, which catered for two possible modes of trial in the CFI as regards criminal proceedings concerning offences endangering national security.

(c) Despite the high human rights content of the NSL because of NSL 4 and 5, there was a notable absence of any provisions in the NSL which suggested that the SJ had a general duty to hear or at least to notify an accused before she could exercise her power under NSL 46(1). (paras. 26 and 27)

8. Even if "the principle of trial by jury previously practised in Hong Kong" in BL 86 would include the right to a jury trial in the CFI, that right would have been abrogated by the combined operation of NSL 46(1) and 62 as a matter of necessary implication. Taking away such a right, if it had ever existed at all, was not incompatible with BL 86. (para. 28)

Whether the SJ's decision to issue the Certificate was a prosecutorial decision falling within the ambit of BL 63

9. The SJ's decision to issue the Certificate was a prosecutorial decision covered and protected by BL 63: *Chiang Lily v Secretary for Justice* (2010) 13 HKCFAR 208 and *Re Hutchings' Application for Judicial Review* [2020] NI 801 followed. The express grounds given in NSL 46(1) were those that it would neither be reasonable nor appropriate for SJ to seek an accused's views on them before trial. It would be unwise to have a mini-trial (before verdict) for the parties to argue whether the case would involve State secrets; whether there were foreign factors; whether there was any attempt (by the accused or someone else) to interfere with jury and so forth. (paras. 30-33)

Whether the Decision could be challenged on ordinary judicial review grounds

10. It was well established that prosecutorial independence of the SJ should not be put on the same footing as an ordinary exercise of discretion by an administrator, and thus her prosecutorial decision could not be reviewed by the court based on ordinary judicial review grounds.

However, there were three particular types of cases where the SJ would be regarded as having acted outside the constitutional limits when making a prosecutorial decision, namely: (i) acting in obedience to political instruction; (ii) bad faith; and (iii) rigid fettering of prosecutorial discretion. (para. 35)

11. As regards the ground of procedural impropriety or unfairness, although there was a modern judicial trend in favour of giving of reasons by administrative decision-makers for their decisions, in the circumstances of the present case there was no requirement for the SJ to hear from or to inform the Applicant before the Decision was made. (paras. 36 and 41)

12. There might be occasions where some information could be provided which would assist in the making of representations by a person affected by the issue of an NSL 46(1) certificate. That would very much depend on the grounds which were given for the issue of the certificate. (para. 42)

13. As regards the ground of illegality, absent any allegations of "bad faith" or "dishonesty", there was no basis for the Court to interfere the Decision. The mere absence of any or any detailed reasons given in the Certificate was plainly insufficient to meet the very high evidential threshold for reviewing a prosecutorial decision. (paras. 43 and 44)

14. As regards the ground that the Decision was unreasonable in the *Wednesbury* sense, there was nothing inherently unreasonable in directing a trial by a panel of three judges sitting without a jury when there was a perceived risk in relation to the personal safety of jurors and their family or that due administration of justice might be impaired. (para. 45)

Whether the Decision could meet the proportionality test

15. As the Applicant's right to a fair trial was not engaged and the Applicant did not have a right to a jury trial, the Decision did not constitute a restriction of any of his rights. The 4-step proportionality test set out in *Hysan Development Co Ltd v Town Planning Board* was

simply not engaged. (para. 46)

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