

## Case Summary

### HKSAR v Lai Chee Ying (黎智英)

HCCC 51/2022; [2023] HKCFI 1440; [2023] 3 HKLRD 534;  
[2023] 4 HKC 660

(Court of First Instance)

(Full text of the Court's ruling in English at

[https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=152847&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=152847&currpage=T))

Before: Hon Toh, D'Almada Remedios and Alex Lee JJ

Date of Hearing: 2 May 2023

Date of Ruling: 29 May 2023

*Application for permanent stay of proceedings – abuse of process – apparent bias – right to a fair trial – law on apparent bias subject to NSL 44 and 46 – “principle of separation of functions” – judicial independence – public confidence in due administration of justice – Mr. Owen’s applications for ad hoc admission and for sideline employment – SJ’s separate role in ad hoc admission proceedings and D1’s criminal trial – trial by designated judges – right to choice of lawyer – public statements made by officials about D1*

*Approach to interpretation of NSL – NPCSC Interpretation of NSL 14 and 47 – CE duty bound to request interpretation of NSL – NSC’s decision to comply with the NPCSC Interpretation – Director of Immigration’s decision to implement NSC’s decision – no duty to disclose NSC’s decision – application for ad hoc admission and immigration control being separate regimes – CE certificates under NSL 47 not Executive intrusion into adjudicative process*

*Designated judges under NSL 44 – qualities and qualification – designation by CE – consultation with CJ – criteria for selection and removal – number of judges CE could designate – public accountability*

– *availability of information about designated judges – security of tenure – public confidence in independence of Judiciary – judicial oath*  
– *assignment of designated judges for a given case*

## **Background**

1. Mr. Lai Chee Ying (“D1”) applied for a permanent stay of the proceedings against him on the basis that allowing the prosecution to continue would constitute an abuse of the Court’s process (“the Application”). He was committed for trial on four counts, including one count of conspiracy to commit sedition under s. 10(1)(c) of the Crimes Ordinance (Cap. 200); two counts of conspiracy to commit collusion with a foreign country or with external elements to endanger national security under NSL 29(1)(4); and one count of collusion with a foreign country or with external elements to endanger national security under NSL 29(1)(4). He was alleged to have conspired with others to use a widely circulated newspaper under his control to publish various seditious materials and committed acts which posed a threat to the security of the HKSAR and the PRC. The trial was to be dealt with by a panel of three judges designated under NSL 44.

2. The following were the major events leading to the Application:

- 19.10.2022 – CJHC granted Mr Tim Owen KC’s application for *ad hoc* admission to represent D1 in the trial.
- 9.11.2022 – CA dismissed SJ’s appeal.
- 11.11.2022 – Mr. Owen applied to Immigration Department for extension of his work visa so that he could take up a “sideline employment” for the trial.
- 28.11.2022 – The Appeal Committee of the CFA (“the Appeal Committee”) refused the SJ leave to appeal to the CFA; thereafter the CE submitted a report to the CPG in accordance with NSL 11, recommending that a request be made to the NPCSC to issue an interpretation of the NSL under NSL 65.
- 30.12.2022 – The NPCSC issued an interpretation of NSL 14 and 47 (“the Interpretation”).
- 3.1.2023 – Mr. Owen withdrew his application for sideline

employment from the Immigration Department on a “without prejudice” basis.

- 11.1.2023 – The Committee for Safeguarding National Security of the HKSAR (“NSC”) decided that the proposed representation of D1 by Mr. Owen in the trial concerned national security which was likely to constitute national security risks and was contrary to the interests of national security, and advised that if a fresh sideline employment approval application in relation to the proposed representation of D1 was received from Mr. Owen, such application should be refused (“the NSC’s Decision”).
- 17.2.2023 – D1 filed an application seeking a declaration that the Interpretation did not affect previous judgments concerning Mr. Owen’s *ad hoc* admission for this case, and alternatively, an order for the Court to request and obtain a certificate from the CE under NSL 47 on whether Mr Owen or any other overseas lawyer who was not qualified to practise generally in Hong Kong serving as a defence counsel or legal representative for D1 involved national security. Director of Immigration later filed an affirmation stating he would duly implement the NSC’s Decision (“the Director’s Decision”).

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

- BL 2, 19, 35, 85, 88-92, and 104
- NSL 11, 12, 14, 44-47 and 62

3. In considering whether a continuation of the prosecution against D1 would amount to an abuse of process, the Court discussed:

- (a) whether there was a real possibility that a judge or a panel of judges designated under NSL 44 were biased against D1 and whether D1 would be deprived of a fair hearing (“Ground 1”); and
- (b) whether the “constitutional principle of separation of functions” had collapsed and the ensuing trial would not be free from

political interference, amounting to an abuse of the Court's process ("Ground 2").

## **Summary of the Court's rulings**

### **A. General principles**

#### ***(a) Stay of criminal proceedings***

4. To prevent its own process from being abused, the court had an inherent jurisdiction to stay criminal proceedings in either of the two following exceptional circumstances: (a) a fair trial for the accused was impossible and continuing the prosecution would amount to an abuse of process; and (b) the circumstances involved an abuse of process which so offended the court's sense of justice and propriety that the entire prosecution was tainted as an abuse of process. The accused had the burden to establish the facts which provided the basis for ordering a stay of proceedings. (paras. 21-26)

#### ***(b) Judicial independence and right to a fair trial***

5. Judicial independence in Hong Kong was guaranteed by BL 2, 19 and 85. The right to a fair trial was guaranteed by BOR 10 which provided that in the determination of any criminal charge against a person, everyone should be entitled to a fair and public hearing by "a competent, independent and impartial tribunal" established by law. "Independence" referred to independence of the courts from the parties to the proceedings, the executive and legislative branches, involving considerations as to whether the tribunal had security of tenure, financial security and institutional independence. "Impartiality" denoted a court that was free from actual or apparent bias. (paras. 27-31)

#### ***(c) Interpretation of the NSL***

6. The approach of the HKSAR courts to the interpretation of the NSL had been authoritatively laid down by the CFA in *HKSAR v Lai Chee Ying* [2021] HKCFA 3 which provided a comprehensive review of the

legislative history of the NSL. The Court reiterated that the articles in the NSL had to be read as a coherent whole, taking into account the constitutional basis upon which it was applied to Hong Kong, bearing in mind that the jurisprudence from the European Court of Human Rights had to be approached with great caution as the NSL was a national law designed to safeguard national security in the local context, in particular the “One Country, Two Systems” policy which was the very foundation of the HKSAR. (paras. 33-40)

**B. Ground 1 - Whether judges designated under NSL 44 were biased and whether D1 would be deprived of a fair hearing**

7. D1 contended that there was a real possibility that any judge designated under NSL 44 were biased against him so that he could not receive a fair trial; and in view of the fact that the criminal proceedings against him would necessarily constitute a violation of his right to a hearing before an independent and impartial tribunal, it was an affront to the Court’s sense of justice to be asked to try him. (paras. 5 and 15)

8. D1 submitted that the prosecution of him was an abuse of process *as per* seven “Strands”. After noting that D1 did not rely on “actual bias” as a ground for stay, the Court observed that apart from Strand 7, the Application was a systemic attack to trials by designated judges under NSL 44 through the “backdoor” based on the notion of “apparent bias”. Any of Strands 1 to 6, if correct, could apply to each and every case under the NSL so that no person charged with an offence endangering national security could be tried, or if tried whose appeal could be heard in Hong Kong pursuant to NSL 44(3) and 45. (paras. 7 and 41-42)

9. After considering the seven Strands put forward by D1, the Court held that none of them had any merit. (para. 43)

***Strand 1: Designation of judges by CE under NSL 44***

10. D1 submitted that decisions as to the designation of judges under NSL 44 appeared to be taken by the CE personally, and his consultation with the CJ prior to making a designation was discretionary. (para. 8)

11. The Court held that the appointment of judges by the Executive did not *per se* compromise the independence of those judges. All judicial officers in Hong Kong, whether designated under NSL 44 or not, were appointed by the CE under BL 88. Although the CE had a wide discretion under NSL 44 as to designation of judges, he did not have a free rein because the appointment of judges was governed by the Basic Law (BL 85 and 88-92) and relevant local legislation, including the Judicial Officers Recommendation Commission Ordinance (Cap. 92) (“JORCO”). As regards deputy judges and judicial officers at different levels of trial courts<sup>1</sup>, they were all appointed by the CJ without any involvement of the CE. Their appointments were temporary and were usually on short-term basis. So far, the Court was not aware of any lawyers in private practice sitting as deputy judges who had been designated by the CE pursuant to NSL 44. (paras. 44-47)

12. Apart from the qualities and qualification of the person who was appointed to judicial office, the following factors were also conducive to public confidence in the independence of the Judiciary: (paras. 48-49)

- (a) designated judges were subject to the Judicial Oath which all judges were required to take under BL 104;
- (b) the actual assignment of designated judges to hear individual cases remained the responsibility of the court leaders, just like all other types of cases;
- (c) court hearings were generally open to the public and the courts’ reasons were published;
- (d) the verdict of a panel of three designated judges would be given in a fully reasoned judgment published online;
- (e) all current designated judges were holders of substantive judicial office enjoying security of tenure entrenched by the BL.

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<sup>1</sup> There could be no deputy judges in the CA.

***Strand 2: Criteria for selection and removal of designated judges***

13. D1 submitted that the designation of judges was done without any published criteria for their selection, leaving the CE with a near unfettered discretion to appoint, re-appoint or remove designated judges. The Court held: (paras. 50-55)

- (a) The requirement that a judge was not to be designated and, if designated, should be removed from the list of designation, if he had made any statement or behaved in any manner endangering national security was legitimate, reasonable and necessary.
- (b) Judges took their judicial oath seriously and would decide the cases before them solely on the basis of evidence, the applicable laws and the merits. The addition of s. 3AA of the Interpretation and General Clauses Ordinance (Cap. 1) which elaborated on the meaning of “upholding the Basic Law” and “bearing allegiance to the HKSAR” in the judicial oath did not change the substance of the oath. In fact, the relevant requirements so elaborated came from the BL itself and were the very foundation of the HKSAR.
- (c) All judges, whether designated or not, were subject to the “Guide to Judicial Conduct” and were discouraged to have any political membership or affiliation.
- (d) Ma CJ had explained in an open statement on 30 June 2020 that in considering the suitability of judges to be designated, any legal objections would have to be taken into account, such as those set out in NSL 44 or any objections based on bias or reasonable perceptions of bias. Judges of foreign nationality were not excluded from designation.

***Strand 3: Number of judges that CE could designate***

14. D1 submitted that the CE was given free reign as regards the number of judges he designated. The Court held: (paras. 10 and 56-57)

- (a) The setting up of a list of designated judges was conducive to improving the efficiency of trials and consistency.
- (b) NSL 42(1) read with NSL 58(2) required the fair and timely disposal of NSL cases. The CE had to designate sufficient number of judges at different levels of courts so that NSL cases could be dealt with as expeditiously as fairness demanded.
- (c) The size of the pool of designated judges would depend on the number of cases to be dealt with, the numbers of judicial officers with the relevant expertise available, and generally operational needs.
- (d) In view of the number of judges which had already been designated and since assignment of trial judges for any given case was a matter entirely for the court leaders, the CE could not manipulate the allocation of trial judges. Indeed, seven designated judges from three levels of courts which were involved in the matter about Mr. Owen's *ad hoc* admission had ruled in his favour.

***Strand 4: Public accountability for designation of judges***

15. D1 submitted that the designation of judges under NSL 44 was the subject of considerable secrecy and there was no public accountability regarding that process; there was no public information about the criteria for designation of judges, the consultation process, or the number, identity, renewal or removal of designated judges. The Court held: (paras. 58-60)

- (a) If reports of the Judicial Officers Recommendation Commission (“JORC”) to the CE should be privileged and confidential under ss. 9 and 11 of the JORCO, there was no reason why the advice given by the CJ to the CE under NSL 44 should not similarly be confidential.
- (b) NSL 44 on its face did not require the CE to disclose the information sought by D1. In any event, any legal duties on the CE to make such disclosure would be overridden by NSL 62.
- (c) The absence of the information sought in the public domain would not render the trial unfair or apparently unfair:



- (i) designations were only made from serving judicial officers who had already been considered as fit and proper persons to perform judicial function at their respective levels;
- (ii) there was and could be no challenge to the fact that the present panel was properly designated by the CE;
- (iii) D1 had not specified how the availability of such information in the public domain would assist his case;
- (iv) any suggestion that designated judges would not be renewed or would be removed for an illegitimate purpose was based on pure speculation.

***Strand 5: Security of tenure***

16. D1 submitted that designated judges lacked security of tenure in that they were appointed for a one-year term, renewable at the behest of the CE, and their designation might be terminated if the CE considered they had made statements or behaved in a manner likely to endanger national security during their tenure. The Court rejected the submission that the general security of tenure as entrenched by the BL was not sufficient for present purpose. (paras.12 and 61)

- (a) Even if the designation of a judge was not renewed or was revoked, the judge still enjoyed the security of tenure guaranteed by the BL. A designation under NSL 44 gave a judge no advantage and in case of non-renewal the judge suffered no loss. The threshold for revocation of designation (making a statement or behaving in a manner endangering national security) was extremely high.
- (b) The proposition that a judge would be perceived by a reasonable person to be likely to seek to maintain his status as a designated judge by subconsciously favouring the Government bordered on an insinuation about the integrity of members of the Judiciary. NSL cases comprised only a small proportion of all criminal cases, and elevation to a higher judicial post was based on JORC's recommendation.
- (c) The fact that Mr. Owen had been admitted for the purpose of this case at first instance which decision was upheld on appeals

despite the Executive's stance illustrated that the Judiciary in Hong Kong was independent.

***Strand 6: "Executive intrusion" into judicial decision-making***

17. D1 submitted that a designated judge trying a case concerning a national security offence was likely to be required to obtain a certificate from the CE pursuant to NSL 47 which was binding on the courts, thus extending the reach of the CE into the adjudicative process. The Court held that the issue about NSL 47 bore no relation to the designation of judges for criminal cases: (paras. 13 and 62-65)

- (a) NSL 47 was applicable in civil as well as criminal cases and was therefore not restricted to trials by designated judges.
- (b) That the courts were bound as regards certain matters by a certificate from the Executive did not mean that the courts might be biased. It simply meant that their jurisdiction was restricted in relation to those matters, an example of which could be found in BL 19 concerning "acts of state".
- (c) Since there was (and could be) no challenge to the constitutionality of NSL 47, that article could not afford D1 a ground for stay or to support his contention of "apparent bias".
- (d) In any event, the present case involved no State secrets and the prosecution had expressed no intention of invoking NSL 47.

***Strand 7: Public statements made by CE about D1***

18. D1 submitted that certain statements made by the incumbent CE when he was Secretary for Security carried the implication that D1 was guilty of the charges he faced, thus giving rise to an obvious fear that designated judges might be biased. The Court held that the statements were only general appeals to the public not to engage in any acts endangering national security. It reiterated that the general security of tenure was sufficient to protect judges, designated or not, from Executive interference. If a jury could be trusted not to be affected by any newspaper reports they had read which might be prejudicial to the

accused, more could be expected of professional judges. (paras. 14, 67-69)

***Overall consideration on “apparent bias”***

19. The contention based on “bias” or “apparent bias” was not made out. All the “strands”, whether taken individually or as a whole, was insufficient to cause a fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that *any* judge designated under NSL 44 would be biased, actually or apparently, against D1. In all the circumstances, it would not be an affront to the court’s sense of justice to be asked to try D1, as D1 could and would receive a fair trial before a panel of designated judges. (para. 70)

20. Even if the Court was wrong about its conclusion on “apparent bias”, the Application had to be rejected on the basis that: (para. 71)

- (a) D1 did not (and in fact could not) challenge the constitutionality of NSL 44;
- (b) the present panel of three judges were duly designated under NSL 44;
- (c) no actual bias was alleged nor could it be shown;
- (d) by virtue of NSL 62, the law on “apparent bias” had to be subject to NSL 44 and 46 so that a systemic attack on trials by designated judges could not be entertained; and
- (e) D1’s contention, if correct, would mean that he could not be tried by any HKSAR courts, regardless of the seriousness of the allegations against him, which would plainly be contrary to public interests and the legislative intent of the NSL.

**C. Ground 2 - Whether there had been a collapse of “separation of functions” and an attempt to erode judicial independence**

21. D1 referred to the events leading to the adoption of the Interpretation and its aftermath (including the NSC’s Decision and the Director’s Decision) and submitted that the “constitutional principle of separation of functions” had collapsed and that the ensuing trial was an

abuse of process. In particular, D1 complained about the breakdown of political neutrality in prosecuting him, the NSC's refusal to issue a visa to Mr. Owen even before he applied, the concerted effort (on the part of the CE, the SJ, the Director and other persons purporting to represent the views of the State) to obstruct D1 from having the availability of counsel of his choice, and the loss of confidence in the due administration of justice. (paras. 6 and 16-18)

22. Since Poon CJHC had given judgment<sup>2</sup> in favour of the SJ and NSC, the Application was proceeded on the basis that the NSC's Decision was within its power and the exercise of that power was not unlawful. The Court focused on the fact-sensitive issue as to whether the conduct of the authorities and the people D1 complained of as regards Mr. Owen's applications for admission and for sideline employment, would be such that "the court's sense of justice and propriety" or public confidence in the proper administration of justice was or would be offended, *whether or not* Mr. Owen would eventually be able to represent D1 in the coming trial. (para. 74)

23. Before dealing with Ground 2, the Court had borne firmly in mind the following: (para.75)

- (a) The SJ's role as the guardian of public interest in the *ad hoc* admission proceedings and his prosecutorial role in criminal trials were separate and distinct and could not be conflated.
- (b) The right to choice of lawyers under BL 35 was not absolute. It meant no more than that a litigant was free to choose his counsel from those available to represent him. A person had no right to insist on being represented by a lawyer who did not have a general right to practise in Hong Kong.
- (c) National security was the responsibility of the Executive and the Government had much greater expertise in assessment of risks to national security.

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<sup>2</sup> *Lai Chee Ying v Secretary for Justice; Lai Chee Ying v Committee for Safeguarding National Security of the HKSAR and Others* [2023] HKCFI 1382.

- (d) Mr. Owen's *ad hoc* admission for the present case had been granted without any consideration of implications under NSL 14 and 47.
- (e) While the Appeal Committee had stressed that national security considerations, where properly arose, were considerations of the highest importance to be taken into account in *ad hoc* admissions, it found that no appropriate basis had been made out for the grant of leave to appeal.

24. The Court considered the following matters in determining whether there had been any abuse of process.

- (a) In the matter of Mr. Owen's *ad hoc* admission, the SJ had all along been represented by different senior counsel outside the Department of Justice and there was nothing to show that the prosecution team had any input in that matter. There was also no evidence to suggest that any of those senior counsel had anything to do with the prosecution of this case. (para. 76)
- (b) There was no actual conflict between the determination of the Appeal Committee and the CE's subsequent request for an interpretation of the NSL from the NPCSC. The CE was duty bound to seek the interpretation under NSL 11 and 12; the *ad hoc* admission of Mr. Owen in this case raised an important issue about the operation of the NSL which needed to be resolved as a matter of urgency. (para. 77)
- (c) Judicial independence was guaranteed by BL 85. Professional judges would not be affected in any way by public statements concerning this case which were attributed to people or entities perceived to represent the views of the authorities. D1's case was to be determined according to applicable laws and solely on the basis of available evidence of which those public statements formed no part. (para. 78)

- (d) Application for *ad hoc* admission and immigration control were two separate regimes involving different policies and considerations. Poon CJHC had decided in *Lai Chee Ying v Secretary for Justice* [2023] HKCFI 1382 that the HKSAR courts had no jurisdiction over the work of the NSC and that the NSC’s Decision was not amenable to judicial review. The Director could not be criticized for taking a more cautious approach in processing Mr. Owen’s application for approval to take up a sideline employment in the present case. (paras. 80-81)
- (e) As to D1’s complaint that the NSC’s Decision circumvented the procedure of obtaining a certificate under NSL 47, the Court agreed with Poon CJHC’s observations on the Interpretation in *Lai Chee Ying v Secretary for Justice*, including that paragraph 2 of the Interpretation only required the HKSAR courts to request and obtain a certificate from the CE as to whether an act involves national security “when such a question arises in the adjudication of a case concerning an offence endangering national security”, and that paragraph 3 expressly provided for a mechanism to address the extant situation where the courts had not requested and obtained the requisite NSL 47 certificate, with the result that what currently governed the proposed representation by Mr. Owen of D1 was the Interpretation, the NSC’s Decision and the Director’s Decision. (para. 82)
- (f) The prosecution submitted that decisions made by the NSC could not constitute a ground for stay as this would amount to a “backdoor challenge” to those decisions which should not be amenable to judicial review under NSL 14(2). The Court rejected this argument on the ground that it had a duty not to allow any abuse of its own procedure. Nonetheless, the NSC could not be criticized for complying with the Interpretation and performing their statutory duty under the NSL. There was then no pending sideline employment application from Mr. Owen as his application had already been withdrawn. There was no evidence that the NSC was acting in bad faith. (paras. 83-84)

- (g) As to D1's complaint that the SJ had failed to disclose to him the NSC's Decision until after he had filed an application for a declaration that the Interpretation did not affect the previous judgments, the Court held that neither the SJ nor the Director owed a duty to inform Mr. Owen or D1's solicitors of the NSC's Decision in the first place, particularly when information relating to the work of the NSC was protected from disclosure under NSL 14(2). (para. 85)

25. Having considered the matter in the round, the Court was not satisfied that a case had been made out that there had been a collapse of the principle of "separation of functions", that the Executive had disregarded the ruling of the Court, or that there had been an attempt to erode judicial independence. The Court was not satisfied that there had been any abuse of process or affront to the Court's sense of justice and propriety. (para. 86)

26. Furthermore, the following factors clearly tipped in favour of a trial being held: (para. 87)

- (a) the serious nature (where national security was involved) and the gravity (in terms of duration, scale, organization and possible consequences) of the alleged offence;
- (b) the NSC was acting with the authority bestowed on them under the NSL in making the NSC's Decision and there was no evidence of bad faith;
- (c) D1's right to "choice of counsel" was not absolute and Mr. Owen did not have the full right to practise as a barrister in Hong Kong;
- (d) D1 was not left without adequate and competent legal representation: he had the service of a firm of solicitors and a team of six counsel consisting a local senior counsel and senior

juniors who had among them extensive experience in criminal cases; and

(e) D1 could have a fair trial.

27. For the above reasons, the Court concluded that the grounds relied upon by D1, whether taken individually or as a whole, could not justify a stay of proceedings, and rejected the Application accordingly. (para. 88)

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