

## Case Summary

### **HKSAR v Tam Tak Chi (譚得志)**

DCCC 927, 928 and 930/2020; [2020] HKDC 1153

(District Court)

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

[https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=132202&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=132202&currpage=T))

Before: HH Judge Ko

Date: 2 December 2020

*Listing of cases – application for sedition case to be listed before designated judge under NSL 44(3) – possibility of ultra vires if application determined by non-designated judge – doctrine of de facto judge not applicable – function of listing judge – application to be heard by a designated judge*

#### **Background**

1. The Defendant faced a total of 14 charges, including seven counts of uttering seditious words, contrary to s. 10(1)(b) of the Crimes Ordinance (Cap. 200), and one count of conspiracy to utter seditious words.
2. Under NSL 44(3), all proceedings in relation to the prosecution for “offences endangering national security” in the District Court should be handled by “designated judges” in the District Court. The Prosecution applied for the assignment of a designated judge to handle the proceedings against the Defendant based on, inter alia, NSL 44(3) (“the Application”). The Defence contended that the NSL was not applicable to these cases, arguing that the sedition offences under s. 10 of the Crimes Ordinance were not “offences endangering national security” under the NSL.

3. As there was a dispute between the parties which had to be determined by the court, the Prosecution further sought a direction that the Application be listed before a designated judge for argument. This was also disputed by the Defence who contended that allowing the direction sought by the Prosecution would mean granting what the Prosecution had applied for at the outset.

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

- NSL 44(3)
- Crimes Ordinance (Cap. 200), s. 10(1)(b)

4. In performing the administrative function of a listing judge, the Court considered whether a “designated judge” should be assigned to determine the Application.

**Summary of the Court’s rulings**

5. The Court recognized that there was a possibility of ultra vires if the Application was not determined by a designated judge: (para 5)

(a) If a non-designated judge ruled in favour of the Prosecution, he would in effect be confirming that he personally lacked jurisdiction to handle the argument in the first place, and his decision might be subject to challenge by way of judicial review.

(b) On the other hand, if the non-designated judge ruled in favour of the Defence, the Prosecution could persist in arguing the jurisdiction point on appeal or judicial review.

6. The Defence sought to rely on the doctrine of *de facto* judge according to which the public must be able to rely on the acts of judges so long as there was no reason to suppose that they were not validly appointed. The Court considered that this doctrine would not avail the Defence: (para. 6)

(a) If the Court refused to give the direction sought, it would in effect

be confirming that the judge presiding over the argument would not be a designated judge and the doctrine would not apply.

(b) The doctrine would not apply to someone who knew (even if the world knew not) that he was not qualified to hold the office he was exercising. A non-designated judge would certainly know that he had not been designated.

7. The Court stated that the listing and handling of cases and the assignment of which judge to handle a case were matters within the sole responsibility of the Judiciary. The function of a listing judge was to ensure that cases were listed before appropriate judges with minimum delay. (para. 7)

8. After expressing the view that it was undesirable to leave a blemish on such an important issue so early in the proceedings, the Court decided to list the substantive argument before a designated judge to avoid any potential *ultra vires* problems and so that the parties could focus on their substantive argument without being sidetracked by collateral matters. (para. 7)

#584411v3C