(中譯本)
(中譯本與英文本如有歧義，以英文本為準)

HCA 855/2023

香港特別行政區
高等法院
原訟法庭
高院民事訴訟 2023 年第 855 號

律政司司長　　原告人

及

作出申索的註明中
第1(a)、(b)、(c)或(d)段
所禁止的行為的人　　被告人

香港法例第4A章)
《高等法院規)
則》第59號命令)
第2B條規則)

傳票

所有有關各方均須於2023年　月　日（星期　）上/下午　時　分到香港特別行政區高等法院陳健強法官席前，出席就原告人作出下述命令的聆訊：

1. 批准原告人就陳健強法官於2023年7月28日駁回原告人2023年6月5日的臨時禁制令傳票申請，按內附的草擬上訴通知書作出上訴；

2. 是次申請的訟費歸於上訴中。

日期：2023年8月7日

司法常務官

本傳票是由代表原告人的律政司發出，其地址為香港中環雪廠街11號律政中心西座地下。

代表原告人的
律政司

估計聆訊需時：30分鐘

致： 香港高等法院
司法常務官

DRAFT

CACV /2023

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL APPEAL NO. OF 2023
(On Appeal from HCA 855/2023)

BETWEEN

SECRETARY FOR JUSTICE	Plaintiff
and	
PERSONS CONDUCTING THEMSELVES IN ANY OF THE ACTS PROHIBITED UNDER PARAGRAPH 1(a), (b), (c) OR (d) OF THE INDORSEMENT OF CLAIM	Defendants

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NOTICE OF APPEAL

TAKE NOTICE that, pursuant to the leave granted by on the day of 2023, the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above-named Plaintiff.

ON APPEAL FROM the Order of the Honourable Mr. Justice Anthony Chan dated 28 July 2023 whereby it was ordered that the Plaintiff's application for interlocutory injunction be dismissed

FOR AN ORDER that

1. The said Order dated 28 July 2023 be set aside; and

2. The Plaintiff's application for the interlocutory injunction (in the terms as reproduced in paragraph 21 of the Judgment handed down by the learned Judge dated 28 July 2023) be granted.

AND FURTHER TAKE NOTICE that the grounds of this appeal are that:

1. The learned Judge erred in failing to take into account the overriding principle that national security is of the highest importance, which must be followed when discharging the Judiciary's constitutional duty to effectively prevent, suppress and impose punishment for any act or activity endangering national security and to fully enforce the NSL [1] and relevant laws of the Hong Kong Special Administrative Region ("**HKSAR**") to safeguard national security effectively (Decision [5]-[8]):

   (1) NSL 3 and 8 impose an express duty on the Judiciary to effectively prevent, suppress and impose punishment for any act or activity endangering national security, and to fully enforce the NSL and relevant laws of the HKSAR to safeguard national security effectively. This is a constitutional duty imposed by a national law enacted for the purposes set out in NSL 1. The safeguarding of national security is a matter of fundamental and utmost importance to the full and faithful implementation of the "one country, two systems" principle (NSL 1 and 2).

   (2) To discharge such constitutional duty, it is wrong in law for the learned Judge to merely accord "significant weight" to matters of national security (Decision [6]), when they are matters of "the highest importance"

[1] The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("**NSL**").

(*Re Timothy Wynn Owen KC* (2022) 25 HKCFAR 288 at [33]).

(3) As the learned Judge found in Decision at [45], the 4 Acts are criminal activities that endanger national security. Specifically, the 4 Acts contravene Articles 1 and 12 of the Basic Law ("**BL**"), which provide that the HKSAR is an inalienable part of People's Republic of China ("**PRC**") and is a local administrative region and comes directly under the Central People's Government ("**CPG**"). NSL 2 refers to BL 1 and 12 as the "*lynchpin for safeguarding national security in the HKSAR*" by providing expressly that these provisions on the legal status of HKSAR are the fundamental provisions in the Basic Law; and no institution, organization or individual in the Region shall contravene these provisions in exercising their rights and freedoms (*Lai Chee Ying v The Committee for Safeguarding National Security of the HKSAR* [2023] HKCFI 1382 at [28]).

2. Accordingly, the learned Judge erred in law in applying the wrong test in considering whether an interlocutory injunction ought to be granted in aid of criminal law, especially in the present context of criminal law for safeguarding national security (Decision [43], [51]):

(1) For reasons stated under Ground 1, for an injunction in aid of criminal law for safeguarding national security, the question is whether the Court should, in order to discharge the constitutional duties of the judicial authorities to effectively prevent or suppress or impose punishment for

any act or activity endangering national security, and to fully enforce the NSL and relevant laws of the HKSAR to safeguard national security effectively, grant the Injunction so as to assist in the effective prevention or suppression or imposition of punishment against the specific acts endangering national security in issue (i.e. the 4 Acts).

(2) Having regard to NSL 3 and 8, the test to be applied in the application for an injunction in aid of the NSL and national security-related criminal law is different materially from the usual test applied to an injunction granted in aid of criminal law which does not concern national security. Unless the Court considers that the Injunction would not have any effect in assisting in the prevention or suppression or imposition of punishment against the 4 Acts, the balance should be in favour of granting the Injunction.

(3) *A fortiori*, where the application before the learned Judge was for an interlocutory (rather than final) injunction, the threshold is lower and the Court should look to see whether there are serious issues to be tried, whether damages would be an adequate remedy, and where the balance of convenience lies. In the present case, the learned Judge ought to have considered whether the legal and/or factual issues raise serious issues to be tried, and (since damages would obviously not be an adequate remedy) where the balance of convenience lies. All these should be done bearing in mind the need and duty to safeguard national security which are considerations of fundamental importance underpinned by NSL 1, 2, 3

and 8. The learned Judge failed to adopt the correct approach for an application for interlocutory injunction in the context of an injunction in aid of the NSL and other criminal law concerning the prevention, suppression and imposition of punishment for acts and activities endangering national security.

(4) The learned Judge erred in adopting as the test that it *"must be shown that absent the Injunction the Defendants' illegal conduct cannot be effectively restrained"* and that the Court must consider whether the Injunction *"would actually provide greater deterrence than what the criminal law already imposes"* (Decision [51]). This is an overly stringent and erroneous test. The learned Judge erred in law in failing to apply either the correct approach for interlocutory injunctions, or that for a final injunction (even assuming it would be appropriate to consider the approach that should be adopted in the determination for a final injunction order) in aid of criminal law for safeguarding national security.

(5) Even applying the common law test for civil injunctions in aid of general criminal law, namely, whether criminal proceedings are likely to prove ineffective to achieve the public interest purposes for which the legislation in question has been enacted (see *Portsmouth City Council v Richards* [1989] 1 CMLR 673 at [38]), the test in Decision [51] also erred in law and is still an overly stringent one:

(i) In adopting the test at Decision [51] and [52], the learned Judge

erroneously applied the outdated approach in older cases such as *Gouriet v AG* [1978] AC 435, whereas as pointed out in *Guildford Borough Council v Hein* [2005] LGR 797 at [44], [75]-[77] the common law principles have been broadened and there is no longer a narrow requirement that nothing short of an injunction would be effective.

(ii) In this case, the public interest purposes to be served by the NSL, ss.9 and 10 of the Crimes Ordinance and the National Anthem Ordinance are *inter alia* the effective prevention, suppression and imposition of punishment for acts or activities endangering national security, and preservation of the dignity of the national anthem as a symbol and sign of the PRC. The Court is required to consider whether the grant of the Injunction may assist in achieving the public interest purposes which underpinned the NSL and the related legislations, especially the purpose of prevention, whereas the Judge erroneously searched for certainty and narrowly focused on "greater deterrence than what the criminal law already imposes" rather than a consideration of whether the grant of the Injunction would assist in achieving the various public interest purposes of the laws in question.

3. Further or alternatively, in considering the utility of the Injunction for the prevention, suppression and imposition of punishment of the 4 Acts, the learned Judge erred in failing (whichever is the correct test) to give any or sufficient

deference to the executive's assessment on the necessity, effectiveness and utility of the Injunction:

(1) In the CE Certificate, the CE certified that the 4 Acts involve national security based on his assessment that they pose national security risks and are contrary to the interests of national security (Decision [46]) . NSL 47 provides that the certificate shall be binding on the courts. Under the NSL, the CE is accountable to the CPG for affairs relating to safeguarding national security (NSL 11), and is the chairperson of the Committee for Safeguarding National Security of the HKSAR (NSL 13) which assumes primary responsibility for safeguarding national security in the HKSAR (NSL 12). As such, the assessment of the CE, who is also the head of the HKSAR (BL 43) and the head of the Government of the HKSAR (BL 61), should be given the greatest weight and deference in national security matters.

(2) The binding effect of the CE Certificate must be considered in tandem with the common law principle that, as utility of the Injunction involves a prospective risk assessment concerning law enforcement and national security, the Court should generally defer to the executives on the predictive evaluations on *inter alia*: (i) the existence of national security risks and the weight to be ascribed to this important public interest; and (ii) the necessity, effectiveness and utility of a particular legal or law enforcement measure to address such national security risk and safeguard national security. The reason for deference is not merely because of the

Court's lack of sensitive intelligence (Decision [54]), but also the lack of institutional capacity and expertise to make such evaluative judgement: *Begum v Home Secretary* [2021] AC 765 (UKSC) at [70]; *Lai Chee Ying v The Committee for Safeguarding National Security of the HKSAR* [2023] HKCFI 1382 at [28]. The NSL's allocation of respective functions and accountability to the judiciary and the executive is also a highly relevant matter which the learned Judge failed to take into account: NSL 3, 8, 11-15, 45, 48; *Lai Chee Ying, ibid.*, at [31]-[33].

(3) Hence, where it is the assessment of the executive authorities that a proposed measure is necessary or may be effective or have utility, the Court should accord due weight and deference to such assessment and grant the injunction unless the Court is satisfied that it shall have no effect.

(4) The learned Judge erred in law in failing to apply the principle enunciated in *Attorney-General v Bastow* [1957] QB 514, 522-523 that where the Attorney General (or here the Secretary for Justice) seeks an injunction in the High Court as being the most effective method open to him of enforcing a public right, the Court should only refuse to grant the injunction only in exceptional circumstances.

(5) The learned Judge was wrong to hold that the Court is in a proper position as if it were in as good a position as the executive authorities to make the assessment in this respect (Decision [54]).

4. Further or alternatively, irrespective of the errors in principle referred to in

Grounds 1, 2 and 3, and whichever is the correct test, the learned Judge was wrong in holding that the Injunction is of no real utility because he has failed to take into account relevant considerations, and has taken into account irrelevant considerations or considerations without evidential or rational basis, or alternatively, the learned Judge has come to a conclusion which no reasonable judge properly directing himself could have arrived at:

(1) In assessing utility, the learned Judge failed to do so properly by reference to the following important considerations which he accepted as facts:

(a) The CE issued the CE Certificate under NSL 47 certifying that the 4 Acts involve national security, on the basis of his assessment that the 4 Acts pose national security risks and are contrary to the interests of national security. The CE Certificate is binding on the Court as to the matter it certifies (Decision [46]).

(b) The Song was used and used effectively by people with intention to incite secession and/or sedition (Decision [15]).

(c) The Song was designed to arouse anti-establishment sentiment and belief in the separation of the HKSAR from the PRC (Decision [16]).

(d) Insulting the national anthem in the manner proscribed (paragraph 1(b) of the Injunction) is a crime aimed at arousing emotion for

the independence of Hong Kong and thus also endangers national security (Decision [45]).

(e) Notwithstanding that the Song remains freely available in the internet and remains prevalent (Decision [18]) even after the passing of the NSL (Affidavit of Superintendent Wong at paragraphs 37-38, 62), there are only a small number of arrests and successful prosecution (Decision [19]). One of the reasons, if not the prime reason, for the small number of cases brought before the Court is the difficulty and time required for investigations, e.g. many of the people who disseminate the Song used pseudo-names (Decision [20]).

(f) It would appear that the existence of the criminal law and possible criminal enforcement have provided little, if any, deterrence to many of those persons who have used the internet to commit the 4 Acts. This is so notwithstanding that the NSL, the Crimes Ordinance and the National Anthem Ordinance can be described as extensive and robust in both their substantive provisions and the support of the criminal law enforcement agencies (Decision [47]).

(g) Hong Kong people are generally law abiding and would not even contemplate the commission of a serious criminal offence (Decision [2]).

By reference to these indisputable facts, preventing and suppressing the 4 Acts are of the highest importance.

(2) The learned Judge failed to give due consideration to the importance of the preventive nature of the Injunction against those who have not committed, but may commit, any of the 4 Acts. In particular, the learned Judge failed to take into account the utility of removing any mistaken belief of members of the public as regards the nature of the 4 Acts and/or that there would be no consequence in committing any of the 4 Acts. Given the findings that Hong Kong people are generally law abiding (Decision [2]) and some may be ill-intentioned while some may be mere curious "net surfers" (Decision [14]), it was plainly wrong for the Judge to dismiss the preventive or deterrent effect that may and can be produced by the Injunction, especially when the Judge appeared to have failed to take judicial notice and to take account of the fact that the injunctions to restrain criminal and unlawful conduct in the MTR injunction case and the Airport injunction case had been effective.

(3) The learned Judge also failed to give due consideration to the importance of the suppressive effect of the Injunction against those who intend to commit, or are committing, the 4 Acts. Even for "entrenched offenders" (Decision [57]), while one cannot say with certainty that all of them will be suppressed (or deterred by) an additional legal sanction (i.e. civil contempt for breach of the Injunction), the learned Judge has overlooked the real possibility that some may.

(4) The learned Judge also failed to give due consideration to the likely effect of the Injunction in facilitating enforcement action against the criminal offences in that, with ordinary citizens and some or even the vast majority of the "less entrenched" people deterred by the Injunction, the resources of the law enforcement authorities could be focused on detecting and investigating the "entrenched offenders".

(5) The finding that "*the more effective tool may be one of education*" (Decision [58]) is without evidential basis and divorced from reality. Public education cannot be compared to a court order which has the force of the law and is far more effective in commanding the public's attention and compliance; and hence achieving the requisite preventive and suppressive effect.

(6) By equating the knowing authorisation, permission or allowance of the criminal acts (paragraph 1(d) of the Injunction) with the criminal accessorial liability of aiding and abetting (paragraph 1(c) of the Injunction) (Decision [60]), the learned Judge also erred by overlooking the utility of the Injunction where such authorization, permission or allowance may not necessarily *per se* constitute criminal offences.

(7) The finding concerning the utility of the Injunction in relation to internet platform operators ("**IPOs**") at Decision [63], based on a finding that *"the contents referred to were the contents of the Song"*, is a plainly

wrong reading of the relevant evidence at paragraph 74 of the Affidavit of Superintendent Wong in which "*contents*" referred to "*inaccurate contents*" on the internet platforms where the Song is misrepresented as the national anthem of Hong Kong (*cf* paragraph 1(b) of the Injunction). The learned Judge erroneously misread or disregarded the clear and undisputed evidence on the utility of the Injunction in that the policies of major IPOs are only willing to remove such inaccurate contents from their platforms with the production of a valid court order demonstrating that such inaccurate contents (namely, misrepresentation of the Song as the national anthem of Hong Kong) broadcasted on their platforms is unlawful (*cf* Decision [17]).

(8) The learned Judge also erroneously took into account the irrelevant consideration of the maximum penalty of life imprisonment for secession under NSL 20 (Decision [52]) when the Injunction was sought in aid of NSL 21 (incitement to secession) carrying with it a much lighter sentence.

5. The learned Judge erred in law in finding that there is a real risk that the Injunction would conflict with the criminal regime in terms of enforcement (Decision [73]) and/or erred in taking into account irrelevant considerations:

(1) The features of the NSL regime set out in Decision [67] only apply to criminal prosecution and not in an enforcement action of the Injunction by way of contempt proceedings. There is no question of incompatibility or issue of workability. The matters identified in Decision [67] are

irrelevant to the consideration of whether an injunction should be granted in aid of the criminal law.

(2) Contrary to Decision [68]:

(a) A committal application under O.52 of the Rules of the High Court, Cap.4A, for contempt of the Injunction would not contravene NSL 41(2) and (3), when the latter provisions only apply to prosecution of offences endangering national security. There is no scope for conflict or inconsistency when the Court's jurisdiction in contempt is distinct from its jurisdiction in criminal proceedings even if they may arise out of the same facts: *Hong Kong Civil Procedure 2023* §52/1/15.

(b) The NSL does not prescribe that conduct that may amount to offences endangering national security must be exclusively prevented, suppressed or punished by way of criminal prosecution under the NSL. To the contrary, NSL 3 and 8 provide that the judicial authorities shall fully enforce the NSL and other relevant laws in force in the HKSAR. The NSL therefore operates in tandem with the laws of the HKSAR (Decision [8]). There is no incompatibility between the Court's civil and criminal jurisdictions in matters relating to the NSL. Rather, the availability of criminal prosecution (with its relevant procedures) and the availability of civil injunctions and contempt proceedings in aid of

criminal law, together, form a cohesive whole in the HKSAR's laws in safeguarding national security. The learned Judge erred when he considered there is incompatibility arising from the existence of different procedures and thereby refused to grant an injunction in aid of criminal law; and erred in taking into consideration the features of the NSL pertaining to criminal prosecution set out in the Decision.

(3) Contrary to Decision [69], there is no *"inconsistency"* in the enforcement of the Injunction with the criminal prosecution of the offences under s.10 of Cap 200 and s.7(2) and (4) of A405 arising from the existence of a time limit for prosecution for these offences, and the Injunction does not have the effect of *"overriding the prescribed prosecution periods"*:

(a) Most of the less serious offences are subject to time limit for prosecution (see e.g. the general time bar for summary offences under s.26 of the Magistrates Ordinance Cap 227). But these offences are most likely the criminal law that can be aided by a civil injunction because of their inadequacies. If the existence of time limit for prosecution is an inherent objection against the grant of a civil injunction in aid of criminal law, one can hardly imagine a case where such injunction would ever be considered appropriate.

(b) Indeed, a civil injunction will have real utility in such circumstances where, for reasons without the fault on the part of

the law enforcement agencies and the prosecuting authorities (e.g. genuine difficulties in ascertaining the identity of the perpetrator because of anonymity in the internet), prosecution of the offence may be time-barred.

(c) What is required to be done within the prescribed period for commencement of criminal prosecution is not the same exercise that is required in order to commence a committal for contempt, and any analogy between the two is impracticable and unrealistic when one is not comparing like with like: *Secretary for Justice v Cheung Kai Yin (No 2)* [2016] 5 HKLRD 370 at [30]-[62].

(d) The existence of time limit for prosecution is not a relevant consideration to whether an injunction in aid of criminal law should be granted.

(4) The Judge was wrong in law to hold that there would be a violation of the principle against double jeopardy (Decision [71]). The principle is not engaged: *R v Green (Bryan Gwyn)* [1993] Crim LR 46 cited in *London Borough of Barnet v Hurst* [2003] 1 WLR 722 at [34]-[35]. In any event, there are various ways which the court, in the exercise of its inherent discretion in the judicial process, may take to avoid any unfair treatment to a defendant due to concurrent contempt and criminal proceedings. See e.g. *London Borough of Barnet v Hurst* [33]-[44]; *Lomas v Parle (Practice Note)* [2004] 1 WLR 1642 at [48].

(5) If the learned Judge's reasoning is correct, it is inconceivable how an injunction can possibly be granted in aid of any criminal law at all as there are bound to be differences in the legal practice and procedure of enforcing an injunction and a criminal law based on the same facts.

(6) For the above reasons, there will not be any conflict between the Injunction and the criminal regime. On the contrary, their co-existence, complementing each other and running in parallel, will be more effective to prevent, suppress and impose punishment against the 4 Acts than the criminal regime alone. In particular, as stated in Ground 4 above, the Injunction can supplement the criminal regime (which is of a punitive nature focusing on imposing punishments on those relatively small number of offenders who can be caught) in ***preventing*** and ***suppressing*** the 4 Acts. The learned Judge failed to take into account all these relevant considerations, owing to the legally erroneous and/or irrelevant consideration of there being conflict between the Injunction and the criminal regime.

6. The learned Judge failed to give separate consideration to the grant of the Injunction in relation to restraining insult to the National Anthem by misrepresenting the Song as the national anthem (paragraph 1(b) of the Injunction read together with paragraphs 1(c), (d), 2 and 3 thereof).

7. Owing to the grounds set out above, the Judge's exercise of discretion was

wrong and the Court of Appeal should exercise it afresh. In doing so, and insofar as necessary, and notwithstanding the learned Judge's conclusion at Decision [84], he was wrong in holding that the Injunction will produce a "chilling effects" (Decision [78]-[81]):

(1) The learned Judge was wrong in finding that the "chilling effects" cannot be dismissed when the Injunction is aimed at acts and activities which are unlawful and endanger national security (Decision [45] & [80]). The prohibition under the criminal regime has been there and will continue to be there even if no injunction is granted. It is thus plainly wrong to take into account that perfectly innocent people would distance themselves from what may be lawful acts involving the Song if the Injunction is granted. (Decision [80]) The criminal law has already carried a deterrent effect. Those sailing close to the wind in case of doubt should not do it. (Decision [58]) The Injunction only serves to amplify the same deterrent effect under the criminal law as a measure to more effectively prevent or suppress the 4 Acts for the purpose of safeguarding national security.

(2) The learned Judge was wrong in finding that the Injunction is not an easy document to understand (Decision [81]). What a person may or may not do is clear from the terms of the Injunction, namely committing any of the specified conducts with the requisite intent or knowledge, which are criminal or unlawful acts in the first place. It is irrelevant (and in any event unsupported by evidence) that there are *"many inaccurate reports that the Song would be banned under the Injunction"*. With the requisite

criminal intent and knowledge clearly embedded in the terms of the Injunction, there is no basis for the Judge to find that there may be "chilling effects" on people who are not caught by the Injunction in their pursuit of legitimate activities.

(3) It is an irrelevant consideration that (i) some Hong Kong people may be too busy to spend the time to get to know the precise scope of the Injunction, or (ii) some may only learn of the Injunction from secondary source which may or may not be accurate (Decision [79]). The discharge of the duties of the judicial authorities and exercise of the Court's discretion should not proceed on such assumptions. To the contrary, it behoves any person to regulate his own conduct by properly ascertaining, if need be with appropriate legal advice, the limits of what can and cannot be lawfully done. It is the common responsibility of all the people in Hong Kong to safeguard the sovereignty, unification and territorial integrity of the PRC, and any institution, organization or individual in the HKSAR shall abide by the NSL and the laws of the HKSAR in relation to the safeguarding of national security (NSL 6).

(4) The learned Judge erred in taking into consideration the fact that the SJ agreed to the inclusion of paragraph 4 of the Injunction. The inclusion of paragraph 4 of the Injunction does not illustrate the potential "chilling effect" of the Injunction (Decision [80]). It is clear from the terms of the Injunction (before adding paragraph 4) that lawful journalistic activities are not and could not be caught by the Injunction given those conducting

such activities would, by definition, not have the intent to incite secession or sedition, to insult the national anthem, or to aid and abet, or authorise others in doing so. Paragraph 4 was only proposed to be added to the Injunction to avoid argument with the Hong Kong Journalistic Association so that the Court can focus on the key disputes at the substantive hearing.

AND FURTHER TAKE NOTICE THAT the Plaintiff proposes that this appeal be assigned to the List of Interlocutory Appeals.

Dated this day of 2023.

Department of Justice
Solicitors for the Plaintiff

To: The Registrar of Civil Appeals
High Court
Hong Kong

DRAFT

CACV /2023

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL APPEAL NO. OF 2023
(On Appeal from HCA 855/2023)

BETWEEN

SECRETARY FOR JUSTICE	Plaintiff
and	
PERSONS CONDUCTING THEMSELVES IN ANY OF THE ACTS PROHIBITED UNDER PARAGRAPH 1(a), (b), (c) OR (d) OF THE INDORSEMENT OF CLAIM	Defendants

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NOTICE OF APPEAL

Dated this day of 2023

Filed on this day of 2023

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#1973931

(中譯本)

HCA 855/2023

香港特別行政區
高等法院
原訟法庭
高院民事訴訟 2023 年第 855 號

律政司司長　　原告人

及

作出申索的註明中第1(a)、(b)、(c)或(d)段所禁止的行為的人　　被告人

傳票

日期：　2023年8月7日

存檔日期：2023年8月7日

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