

[English Translation]

## **A Judgment Full of Doubts**

**By Professor Johannes Chan, Senior Counsel  
Dean, University of Hong Kong**

After detained for over 500 days, Ching Cheong was finally convicted by the PRC court of spying offence and sentenced to 5 years imprisonment. If the version of the Judgment circulated in the Internet is genuine, the Judgment is full of rash statements with loopholes everywhere. Many aspects are unconvincing, and one simply cannot find sufficient proof to support a conviction. The justice administered by China's judiciary is still remaining in a disheartening level.

Ching Cheong was convicted by the court under section 110(1) of the PRC Criminal Law. This section pointed out that "accepting jobs from a spying organization or its agents", thereby causing harm to national security, shall be a spying offence. A so-called spying job is presumably to buy and illegally provide state secret or information. To prove this offence, the prosecution shall prove: (1) Chung Hua Euro-Asia Foundation is a spying organization; (2) Ching Cheong has accepted job from the Foundation and provided the Foundation or its members with state secrets or information; (3) Before doing such acts, Ching Cheong knew that the other party is a spying organization; (4) The relevant information is state secret or information, and Ching Cheong knew that such information was state secret or information.

One can see the extreme feeble reasoning from the Judgment as circulated :

### **1. Is Chung Hua Euro-Asia Foundation a spying organization?**

The evidence adduced by the prosecution consisted only of a confirmation letter from the PRC Ministry of National Security. The said letter pointed out that the Foundation is led by Taiwan's National Security Bureau. The Foundation's deputy CEO and Xie Hong-yi and Director of Planning, Dai Dong-qing, were agents of Taiwanese NSB. But, what was the basis of such conclusion the by PRC Ministry of National Security? A conclusion of spying organization stated by a confirmation letter would not have the effect of law. Moreover, the Ministry of National Security is the arresting organization, and the confirmation letter is only a one-sided statement of the arresting organization. What specific spying activities has the Foundation conducted? If this is a spying

organization, why were the members of the Foundations allowed free activities in the Mainland, and to maintain contacts with the academic organizations and scholars of the Mainland and Hong Kong? Famous PRC scholars such as Professor Xu Song-de has led delegation to visit the Foundation. (Profssor Xu need not worry, because this point did not made against him, but to point out the query on the allegation that the Foundation as a spying organization.) The confirmation letter stated that the Foundation is “an organization covered-up by Taiwan spying organization”). The question is : is the Foundation a spying organization, or an organization covered-up by a spying organization? The Judgment stated that an organization covered-up by a spying organization is also a spying organization. Is it the opinion of the Ministry of National Security? Or is it the court’s interpretation on “spying organization”? What is the rationale?

**2. Did Ching Cheong know?**

Even if the Foundation is a spying organization, or that Xie and Dai were spies, did Ching Cheong know that? The Judgment stated that since the end of 2003, Ching Cheong started to suspect the capacity of these 2 persons. In other words, before end of 2003, there was no evidence to prove that Ching Cheong knew that the Foundation was a spying organization. But the prosecution case was that: Ching Cheong started to obtain articles since 2002, that Lu Jian-hua started providing articles to Ching Cheong since March 2000, and that Wang Ying started providing articles to Ching Cheong since summer of 2002. In other words, at least there is no evidence to prove that Ching Cheong knew the spying nature of the Foundation before the end of 2003.

3. The Judgment stated that when Ching Cheong began to suspect the background capacity of Xie and Dai, Ching Cheong verified the background of the Foundation from Xie. Xie replied that the Foundation is merely an independent think tank, and at most a peripheral organization. In other words, there is still no evidence to show that Ching Cheong knew the nature of the Foundation or the capacity of Xie and Dai. Moreover, the Foundation continued to maintain exchanges with reputable PRC academic institutions and scholars. This would have weakened any presumption that Ching Cheong knew the nature of the Foundation. Perhaps Ching Cheong had certain doubt, but a doubt is a far distance from “knowing” as in the Judgment. In criminal law, there is a world of difference between doubting and knowing.

4. The only concrete evidence by the prosecution is Xie's request that Ching Cheong provide photographs of the Chinese navy fleet's visit to Hong Kong at the end of 2004. This is used to infer that Ching Cheong knew Xie is an espionage personnel and the Foundation was a spying organization. But the Judgment did not point out any evidence to show that those photographs were state secret. If what Xie wanted were merely ordinary news photos, then how can one infer that Ching Cheong thereby knew that the other party was a spying organization? The Judgment did not point out that Ching Cheong knew that Xie and Dai were members of the Taiwanese National Security Bureau. Ching Cheong only learnt from newspapers that Tsang Wing Yin, CEO of the Foundation, was member of Kwok On Wui (and not Taiwan's NSB). Then, how could only one single request enable the PRC court to conclude that Ching Cheong knew that Xie and Dai were spies? Moreover, if Ching Cheong had obvious suspicion about the Foundation, and with Xie denying that the Foundation was a spying organization, a spy with any common sense would not conduct further acts to further arouse Ching Cheong's suspicion during this period. Then, why will the Foundation seek from Ching Cheong "sensitive" information that would arouse his suspicion further? The Judgment did not give any account as to what change took place during this one month period. The spying organization was portrayed as a child-like organization. Nor did the Judgment explain why Ching Cheong, originally adopting a doubting attitude and refused further co-operation, suddenly changed to a "mentally ascertained" to be willing to grab information for the Foundation by end of April 2004. This change of attitude is the whole crux of the prosecution case. But the Judgment was rather elusive and the deduction is unconvincing.
5. Ching Cheong was accused of accepting jobs from the agent of a spying organization. But the Judgment is elusive as to the details of what those "jobs" were. The only direct description is that Xie ask Ching Cheong to provide photos of the navy fleet's visit. But even if a spying organization should solicit news photos from a journalist, this cannot be concluded as "accepting" the jobs. The Judgment also said that Ching Cheong bought state secrets, but the Judgment only pointed out that Ching Cheong paid Wang Ying merely \$300 Singaporean Dollars as article fees, and did not specify how much (if any) article fees was paid by Ching Cheong to Lu Jian-hua. But the articles containing state secrets were chiefly supplied by Lu Jian-hua. Thus, the issue on buying state states is very elusive. Moreover, if state secrets could be purchased by a mere S\$300, it would be rather

cheap! There must be a vast distinction between news reporting and spying activity which the Judgment failed to address. The Judgment also said that Ching Cheong was paid by the Foundation for gathering state secrets. But Ching Cheong has been writing articles for the Foundation since 2000. The allegation of leakage of state secrets by the articles took place in 2004 by the articles took place in 2004 to 2005. Then, what was the relationship between Ching Cheong and the Foundation in between 2000 and 2004? Why and how did such relationship suddenly change in 2004? Did Ching Cheong accept the “jobs”, or was he merely performing a journalist’s job of obtaining news information?

6. Was Ching Cheong purchasing and gathering state secret, or was he simply doing an ordinary journalist’s job? This essentially depends on how Ching Cheong contacted Wang Ying and Lu Jian-hua and persuaded them to disclose information. Why were Wang and Lu willing to deliver articles to Ching Cheong? Why were they willing to provide state secrets? Was Ching Cheong merely inviting them to provide information for writing news articles? Ching Cheong admitted asking Lu Jian-hua for articles. The testimony of Wang and Lu confirmed that they agreed to write articles for Strait Times, and this is apparently journalist activities. The testimony of Wang Ying in fact tallied with that of Ching Cheong. Not a single word was mentioned in the Judgment on such important issue as to how Ching Cheong purchased state secrets from Wang and Lu. The role played by Wang Yin was rather vague. There was an utter lack of concrete evidence to support of a guilty verdict.
7. Did Ching Cheong know that the material provided by Wang and Lu was state secret? The material may well be classified as state secret. But whether the involved parties knew that the material was state secret would be a wholly different matter. The distinction assumes particular importance as under PRC law, there is no clear demarcation and definition as to what constitutes state secret. During the period from 2000 to 2004, Wang and Lu provided a total of 170 articles to Ching Cheong for Strait Times. Knowing full well that those articles would be published, will they continue to provide those “top state secret” and “information”? Throughout the 4-year long exchanges and nearly 170 articles, only 9 articles were alleged to involve top state secret and information. It seems that it is only upon a subsequent prosecution of the charge, that the Ministry of National Security made an ex post-facto classification as state secret. The question is: at the time when Ching Cheong obtained such

information, did he know that the same was state secret? Was Ching Cheong only use as a pawn by Lu Jian-hua to disseminate state secret?

### **Justice under the PRC judiciary system**

As the PRC judiciary is still not independent, and as a spying charge wears a political colour, it would be most difficult to overturn the verdict by the appeal court even if there is insufficient evidence. But the reasoning in the Judgment that Ching Cheong knowingly provided information to spying organization is appallingly fragile and unconvincing. The PRC appeal court may well rule that Ching Cheong accidentally stepped on a land mine, and contravened Section 398 of the Criminal Law in negligently leaking state secret. The conviction of spying can be changed to a lesser offence and thereby remitting Ching Cheong's 5-year sentence or even immediate release. Such arrangement would enable both sides to best exit this entangling scenario.