HCAL 1601/2020
[2020] HKCFI 2133

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 1601 OF 2020

BETWEEN

TONG YING KIT (唐英傑) Applicant

and

HKSAR (香港特別行政區) Respondent

Before: Hon Chow and Alex Lee JJ in Court
Date of Hearing: 20 August 2020
Date of Judgment: 21 August 2020

J U D G M E N T

This is the judgment of the Court.

SUMMARY

1. By an application for a writ of *habeas corpus* made on 3 August 2020, the Applicant seeks to challenge his current detention since 6 July 2020 pursuant to an order of Mr So Wai-tak, the Chief Magistrate sitting at the West Kowloon Magistrates' Court, remanding him in custody pending the next hearing scheduled for 6 October 2020 in Case No WKCC 2217/2020 ("**the Order**").

2. The principal point raised by the Applicant is that Article 42(2) of The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("**the National Security Law**") is an unconstitutional "no bail" provision, and it is argued that the Applicant is therefore justified to seek his release by making a *habeas corpus* application instead of an ordinary application for review of refusal of bail under s 9J of the Criminal Procedure Ordinance, Cap 221 ("**the CPO**"). The Applicant also challenges the constitutionality of a few other articles of the National Security Law, in particular Articles 20, 21, 24 and 44 thereof. In what follows, unless the context indicates otherwise, references to "Article" shall be to the National Security Law.

3. In our view:

(1) The Applicant has adopted a wrong procedure to challenge the Order. The Applicant ought properly to have applied for a review of refusal of bail under s 9J of the CPO, instead of making a *habeas corpus* application to seek his release from detention.

(2) In an application for a writ of habeas corpus, the sole consideration of the court is whether the Chief Magistrate had lawful authority to make the Order remanding the Applicant in custody pending the next court hearing, and not whether the Chief Magistrate's decision is correct, the latter being a matter to be determined in a bail review.

(3) The Applicant's detention is pursuant to a court order made by the Chief Magistrate in the discharge of his ordinary

judicial powers, and cannot be said to be without lawful authority.

(4) Article 42(2) is not a "no bail" provision. Upon the true construction of Article 42(2) and its proper application, in the vast majority of cases, the same result should be reached regardless of whether a judge applies the ordinary criterion under s 9G(1)(b) of the CPO (ie, a real or substantial risk that an accused would "commit an offence while on bail") alone, or in conjunction with Article 42(2), when determining whether to grant or refuse bail.

(5) The effect of Article 44 is simply that a number of judges at different levels of the courts in Hong Kong are designated by the Chief Executive to handle cases concerning offences endangering national security. The actual assignment of a judge to hear any particular case remains the sole responsibility of the Judiciary. Judges are duty-bound by the Judicial Oath to discharge their functions strictly in accordance with the law, and to be completely free of any interference from, or influence by, the Government.

(6) The prescription of ranges of sentences by Articles 20, 21 and 24 for persons found guilty of having committed offences under those articles, leaving it open to the judge to determine the appropriate sentence based on the facts and circumstances of any given case, is not objectionable in principle.

(7) The National Security Law is fully accessible to the Applicant and cannot be said to unreasonably restrict his right to choice of counsel, notwithstanding the absence of an authentic English text of the National Security Law.

BACKGROUND FACTS

4. For the purpose of disposing of the present application, the following brief summary of facts should suffice.

5. On 1 July 2020, after the promulgation of the National Security Law, a large number of people went to the Wan Chai and Causeway Bay areas to protest against it. One of them was the Applicant.

6. According to the prosecution:

(1) In the afternoon of 1 July 2020, at around 15:35 hours, the Applicant was seen riding his high-powered motorcycle in the Wan Chai area at speed. At all material times, he was carrying a backpack, from which a black flag containing a slogan in white "光復香港 時代革命" and "LIBERATE HONG KONG REVOLUTION OF OUR TIMES" ("**the Slogan**") was hoisted upwards and displayed to the public as he drove his motorcycle. The public, or some members of the public, responded by cheering loudly to support his conduct.

(2) Some police officers who had formed a checkline at the junction of Hennessy Road and Luard Road ("**Checkline-1**") tried to stop the Applicant, but he continued to ride his motorcycle at speed towards them. The police officers managed to step aside and avoid being crashed into by the motorcycle.

(3) The Applicant escaped from the scene and rode ahead along Hennessy Road. He turned left from Hennessy Road into Fleming Road, then left again into Lockhart Road and

eventually turned right into Luard Road. There, he encountered another police checkline ("**Checkline-2**"), which included more than 10 police officers at the junction of Luard Road and Jaffe Road. Again, the police officers tried to stop the Applicant but to no avail. He turned right into Jaffe Road and continued to drive at speed.

(4) At the junction of O'Brien Road and Jaffe Road, another group of police officers had formed a checkline ("**Checkline-3**") and tried to stop the Applicant. He ignored the police's warning and rammed his motorcycle into the group of police officers, thereby seriously injuring three of them:

(a) one suffered spine collapse and lower limbs abrasion;

(b) the second suffered right thumb subluxation and ribs fracture; and

(c) the third suffered tenderness on right chest wall, and tenderness and abrasion on right thumb.

(5) The Applicant himself fell off his motorcycle and fractured his ankle.

(6) At around 15:40 hours, the Applicant was arrested for the offence of "furious driving" and other offences under the National Security Law.

7. It is the prosecution's case that:

(1) the Applicant committed an offence contrary to Articles 20 and 21 in that, by parading the flag displaying the Slogan in the circumstances as described above, he incited other persons to organize, plan, commit or participate in acts,

whether or not by force or threat of force, with a view to committing secession or undermining national unification, namely, separating the HKSAR from the PRC or altering by unlawful means the legal status of the HKSAR ("**Offence-1**"); and

(2) the Applicant further committed an offence contrary to Article 24 in that, by running his motorcycle into the groups of police officers at the Checkline 1 and Checkline 3 thereby causing serious injuries to three of them, he, with a view to coercing the Central Peoples' Government or the Government of the HKSAR, or intimidating the public in order to pursue political agenda, committed terrorist activities causing or intending to cause grave harm to society, namely, serious violence against persons, or other dangerous activities which seriously jeopardize public safety or security ("**Offence-2**").

8. On 3 July 2020, the Applicant was charged with Offence-1 and Offence-2.

9. On 6 July 2020, the Applicant was brought before the Chief Magistrate. His application for bail was refused by the Chief Magistrate, who made an order remanding him in custody until the next hearing scheduled for 6 October 2020. It would appear from the Chief Magistrate's "Extract of Record of Bail Proceedings" that he refused to grant the Applicant bail because he considered that there were substantial grounds for believing that the Applicant would "fail to surrender to custody as the court may appoint" and "commit an offence

while on bail". In Part IV of that record under the heading "Reasons", the Chief Magistrate put a tick against:

(1) item (a) - "Nature and seriousness of the alleged offence including the likely disposal in the event of conviction"; and

(2) item (j) - "Others", and wrote the following "Article 42 of the [National] Security Law".

10. The Applicant now seeks to challenge his continued detention by applying for a writ of *habeas corpus*. Alternatively, he applies for bail under s 9J of the CPO, which will be separately dealt with after we have disposed of the *habeas corpus* application.

THE GROUNDS OF APPLICATION

11. In his "Application for Writ of Habeas Corpus" dated 3 August 2020, the Applicant states that he makes the application on the grounds set out in his affirmation filed on 3 August 2020. In that affirmation, the Applicant states that he has been legally advised that his current detention under the Order is unlawful, but does not distinctly set the grounds of the application, although it would appear from the contents of that affirmation that the following grounds, or complaints, are relied upon:

(1) Article 42 incorporates an assumption of guilt and violates the presumption of innocence and the presumption of bail in Part 1A of the CPO;

(2) Article 42, being "mandatory" in nature, wrongly restricts or interferes with the exercise of the independent judicial power of the HKSAR under the Basic Law to the extent that it

effectively deprives a judge or magistrate from considering bail;

(3) Articles 20, 21 and 24, which impose "mandatory minimum sentences", restrict or interfere with the independent judicial power of the HKSAR in a way that is inconsistent with the provisions of the Basic Law;

(4) Article 44, which provides that only judges designated by the Chief Executive can handle cases concerning offences endangering national security, allows inappropriate interference in the exercise of independent judicial power of the HKSAR under the Basic Law; and

(5) the National Security Law is "inaccessible" because (i) it is promulgated in Chinese, while the English translation, gazetted on 3 July 2020, is not a verified or authentic translation and has no legal status, and (ii) his senior counsel, Mr Philip Dykes, SC, is unable to read the Chinese text of the law, and so cannot interpret the law and advise him on the same save through his other counsel who can read the Chinese text.

12. In Mr Dykes' Skeleton Submissions dated 11 August 2020, he identifies 4 grounds which he says invalidate the authority to detain:

(1) The Applicant's presumptive right to bail, based on the presumption of innocence, under s 9D(1) of the CPO has been taken away by Article 42 - "**Ground 1**";

(2) The Chief Magistrate did not exercise the independent judicial power of the HKSAR under the Basic Law because he had been appointed by the Chief Executive to handle the Applicant's case - "**Ground 2**";

(3) The creation of minimum terms of imprisonment in the National Security Law neutralizes the exercise of the independent judicial power of the HKSAR - "**Ground 3**"; and

(4) The National Security Law has not been rendered into an official or authentic text in English, being the other official language of the HKSAR. The lack of an official or authentic text frustrates the Applicant's right to choice of lawyers under Article 35 of the Basic Law - "**Ground 4**"[1].

THE PROPER AVENUE TO CHALLENGE THE ORDER IS AN APPLICATION FOR REVIEW OF REFUSAL OF BAIL

13. As a matter of substance and reality, the Applicant's challenge is to the Order of the Chief Magistrate refusing to grant him bail pending trial. Such challenge ought to be made in an application for review of refusal of bail to the High Court under s 9J of the CPO, instead of by an application for a writ of habeas corpus. See:

(1) *Re Michael K Ogunade*, HCAL 20/2005 (unreported, 8 February 2005), *per* A Cheung J (as he then was) -

> "[12] In any event, whether the applicant has committed the offences that he is charged with is a matter for trial. As to his liberty pending trial, the proper procedure for the applicant to secure his release whilst awaiting trial after he was first brought before the magistrate's court was and is an application for bail.
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> [13] It must be remembered that the writ of *habeas corpus* is an extraordinary remedy which issues in cases where the ordinary legal remedies are inapplicable or unavailable: *Archbold Hong Kong 2005*, para. 3-2. It has been said that the bail procedure is an 'offspring' of *habeas corpus*, and a bail application is 'nothing more

[1] See §1 of Mr Dykes' Skeleton Submissions dated 11 August 2020.

than a simplified *habeas corpus* application': *Sharpe, The Law of Habeas Corpus* (2nd ed.) 134 (quoted with approval in *HKSAR v. Siu Yat Leung* [2002] 2 HKLRD 147, 151I-152A).

[14] In my view, if the applicant now thinks, having received the latest documents and statements from the prosecution, that he really has a case for his release pending trial, he should follow the normal procedure and make a fresh application for bail, where all relevant factors, including (where appropriate) the merits of the charges he is facing, will be taken into account."

(2) *Darryl Penrice v Secretary for Justice*, HCZZ 39/2015 (unreported, 30 June 2015), at §8 *per* P Li J -

"I entirely agree with the comments by Cheung J (as CJHC then was) in *Re Michael K Ogunade* HCAL 20/2005. The writ of *habeas corpus* is an extraordinary remedy and would only be issued in cases where the ordinary legal remedies are inapplicable or unavailable. The applicant was duly remanded in custody by various courts. He should apply to a court for bail if there is any change of circumstances."

(3) *Re Johnny Mondesir* [2019] HKCFI 2103, at §9 *per* G Lam J -

"[9] As A Cheung J, as he then was, held in the case of *Michael K Ogunade* (unrep, HCAL 20/2005, 8 February 2005), the proper procedure in these circumstances for the applicant to try to secure his release whilst awaiting a criminal trial is an application for bail, where, if appropriate, the court hearing the application can entertain arguments on all relevant factors, including potentially the merits of the case he is facing and the needs of the defence.

[10] For the purpose of the application for a writ of *habeas corpus*, however, the strength of the prosecution and defence cases respectively and the needs of the defence in preparation for the criminal case, are not matters relevant to the legality of the detention…"

14. In Archbold Hong Kong 2020, at §3-2, the editors state that "[a] refusal of court bail cannot be challenged or circumvented by an application for a writ of *habeas corpus*".

15. Although it has been said that bail is an "*offspring of habeas corpus*", where the legislature has provided a simple and quick procedure to challenge an order of a magistrate refusing to grant bail, the person under detention ought generally to make use of the statutory procedure instead applying for a writ of *habeas corpus* because, as noted in the judgment of A Cheung J in *Re Michael K Ogunade*, *ante*, it is "an extraordinary remedy" which should be resorted to only in cases "where the ordinary legal remedies are inapplicable or unavailable". In the present case, the remedy of bail is applicable and available.

16. Mr Dykes argues that the Applicant brings this application under Order 54 of the Rules of the High Court, Cap 4A, because of the effect of mandatory provisions in the National Security Law, including Article 42, which he contends are inconsistent with the rights and freedoms protected by the Basic Law, including the right not to be arbitrarily detained under Article 28 thereof and the presumption of bail[2]. Mr Dykes further argues that a bail application on its own would not assist if, as it appears, Article 42 does not allow the Applicant to make a bail application when he asserts he has the right to be presumed innocent[3]. In short, he argues that Article 42(2) is a "no bail" provision[4].

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[2] See §15 of Mr Dykes' Skeleton Submissions.
[3] See §16 of Mr Dykes' Skeleton Submissions.
[4] See §149 of Mr Dykes' Reply Skeleton Submissions dated 18 August 2020.

17. In our view, the challenge to the constitutionality of various "mandatory" provisions of the National Security Law, including Articles 20, 21, 24 and 42 can be raised before a High Court judge hearing the bail application. It is not the case that constitutional issues can only be resolved in an application for judicial review or an application for a writ of *habeas corpus*. We also do not accept the argument that Article 42 does not permit the Applicant to make a bail application while maintaining his innocence (see §§27 to 49 below).

18. Mr Dykes relies upon the judgment of the Supreme Court of Canada in *R v Pearson* [1992] 3 RCS 665 in support of his argument that it is permissible for the Applicant to apply for a writ of *habeas corpus* instead of a review of refusal of bail in this case. The issue in *Pearson* was whether s 516(6)(d) of the Criminal Code, which placed upon a person accused of having committed specified narcotic offence(s) the onus of showing why a denial of bail pending trial would not be justified[5], was constitutionally objectionable. Lamer CJ, delivering his judgment also on behalf of Sopinka and Iacobucci JJ and with whom L'Heureux-Dubé and Gonthier JJ agreed, affirmed the general principle that *habeas corpus* was not a remedy for a denial of bail, and should not be used to circumvent the appropriate appeal process (in the context of bail, a bail review under s 520 of the Criminal Code in Canada was said to be "the appropriate appeal process"), or become a "costly and unwieldy parallel system of bail review"[6]. Lamer CJ further held that *habeas corpus* was, exceptionally, available in what he described as the "narrow circumstances" of that case, namely, the accused was seeking

[5] In other words, reversing the basic entitlement to bail under s 11(e) of the Charter of Rights and Freedoms and s 515 of the Criminal Code, see pages 691-692.

[6] Pages 680, 681 and 692.

two constitutional remedies: (i) a determination that s 516(6)(d) of the Criminal Code violated the Charter of Rights and Freedoms and therefore was of no force and effect under s 52 of the Constitution Act, 1982[7], and (ii) a remedy under s 24(1)[8], namely, a new bail hearing in accordance with the criteria for determining bail which were constitutionally valid[9]. It is of note that in *Pearson*, the preliminary inquiry judge refused to review his order that the accused person be remanded in custody pending trial under s 523(2)(b) of the Criminal Code[10]. Thus, he had no remedy but to apply for a writ of *habeas corpus*. The present case is different, because it is open to the Applicant to apply for a review of refusal to bail under s 9J of the CPO. Further, the Applicant is not seeking any new bail hearing in the present *habeas corpus* application.

19. We cannot see any good reason why the Applicant does not apply for a review of refusal of bail in the normal way. We accept Mr Benjamin Yu, SC's submission on behalf of the Government that the present *habeas corpus* application is a collateral challenge of criminal proceedings which should not be permitted. On this ground alone, we would dismiss the *habeas corpus* application.

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[7] Section 52(1) states as follows: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

[8] Section 24(1) states as follows: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

[9] Pages 678, 680, 682 and 701.

[10] Page 673.

THE APPLICANT'S DETENTION IS WITH LAWFUL AUTHORITY

20. It is trite that the central issue in an application for a writ of *habeas corpus* is whether there is lawful authority for a detention. Section 22A(1)(a) of the High Court Ordinance, Cap 4, states that "[a]n application may be made to the Court of First Instance alleging that a person named in the application is being detained without lawful justification". In *Fidelis Ahuwaraezeama Emen v Superintendent of Victoria Prison* [1998] 2 HKLRD 448, at 453C-D, Stock J (as he then was) stated that:

> "the purpose of an application of *habeas corpus* is to determine whether there is lawful authority for a detention."

21. An application for a writ of *habeas corpus* is different in nature and substance from an application for bail. A court dealing with an application for a writ of *habeas corpus* focuses on the question of whether the detention is with lawful authority, while a court dealing with an application for bail proceeds on the basis that the detention is lawful, and considers whether, in the exercise of its discretion in accordance with well-established legal principles under s 9G of the CPO, the accused person ought to be admitted to bail.

22. In this case, the Applicant was remanded in custody pursuant to the Order of the Chief Magistrate made on 6 July 2020. There can be no doubt that the Chief Magistrate had lawful power or authority under s 102 of the Magistrates Ordinance (Cap 227) to make an order remanding the Applicant in custody pending the next hearing. Since the Applicant's detention is pursuant to an order of a magistrate made in the ordinary discharge of his judicial functions, there can be no question of

his detention being without lawful authority (see *Re Michael K Ogunade*, *ante*, at §§10 and 11; *Re Johnny Mondesir*, *ante*, at §7).

23. The above discussion is sufficient to dispose of the present application. Out of deference to counsel's careful submissions, we shall deal with the grounds raised by Mr Dykes in support of the Applicant's application for a writ of *habeas corpus*.

GROUND 1 - ARTICLE 42 TAKES AWAY THE PRESUMPTIVE RIGHT TO BAIL

24. Article 42 states as follows:

> "香港特別行政區執法、司法機關在適用香港特別行政區現行法律有關羈押、審理期限等方面的規定時，應當確保危害國家安全犯罪案件公正、及時辦理，有效防範、制止和懲治危害國家安全犯罪。(When applying the laws in force in the Hong Kong Special Administrative Region concerning matters such as the detention and time limit for trial, the law enforcement and judicial authorities of the Region shall ensure that cases concerning offence endangering national security are handled in a fair and timely manner so as to effectively prevent, suppress and impose punishment for such offence.)
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> 對犯罪嫌疑人、被告人，除非法官有充足理由相信其不會繼續實施危害國家安全行為的，不得准予保釋。(No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.)"

25. Mr Dykes argues that Article 42 is constitutionally objectionable on three grounds: (i) it is premised on an assumption of

guilt, (ii) it removes the presumption in favour of granting bail, and (iii) it enables arbitrary detention[11].

26. On the other hand, Mr Yu argues that the court has no jurisdiction to determine whether the National Security Law is unconstitutional or invalid or inconsistent with the Basic Law. The question of the relative status of the Basic Law and the National Security Law, and how any inconsistency between the two which cannot be resolved by applying ordinary techniques of statutory interpretation should be dealt with by the court, is a question of fundamental importance. In this respect, although Article 62 states that "[t]his law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law", the answer to the question of whether the reference to "local laws" included the Basic Law was, understandably, left open by Mr Yu on the basis this question did not arise for determination in the present case. Since the disposition of the present application does not require a determination of this important question, we would leave it for future consideration should it become necessary to do so.

(a) First argument: Article 42 premised upon an assumption of guilt

27. Mr Dykes' first argument that Article 42 is premised on an assumption of guilt is difficult to understand. According to Mr Dykes, "[t]o be bailed, the Applicant must acknowledge that he has already committed such acts or the judge or magistrate must form a view that the Applicant had committed relevant acts and that he would not continue to

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[11] See §51 of Mr Dykes' Skeleton Submissions.

commit them"[12]. With respect, this is an unreasonable reading of the article.

28. The construction of a statute is not a linguistic exercise. A purposive and contextual approach is required. Article 42 is part of Chapter IV of the National Security Law under the sub-heading "Jurisdiction, Applicable Law and Procedure". Articles 40, 41 and 42 state as follows:

> "**Article 40** The Hong Kong Special Administrative Region shall have jurisdiction over cases concerning offences under this Law, except under the circumstances specified in Article 55 of this Law.
>
> **Article 41** This Law and the laws of the Hong Kong Special Administrative Region shall apply to procedural matters, including those related to criminal investigation, prosecution, trial, and execution of penalty, in respect of cases concerning offence endangering national security over which the Region exercises jurisdiction.
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> No prosecution shall be instituted in respect of an offence endangering national security without the written consent of the Secretary for Justice. This provision shall not prejudice the arrest and detention of a person who is suspected of having committed the offence or the application for bail by the person in accordance with the law.
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> Cases concerning offence endangering national security within the jurisdiction of the Hong Kong Special Administrative Region shall be tried on indictment.
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> The trial shall be conducted in an open court. When circumstances arise such as the trial involving State secrets or public order, all or part of the trial shall be closed to the media and the public but the judgment shall be delivered in an open court.
>
> **Article 42** When applying the laws in force in the Hong Kong Special Administrative Region concerning matters such as the detention and time limit for trial, the law enforcement and judicial authorities of the Region shall ensure

[12] See §54 of Mr Dykes' Skeleton Submissions.

> that cases concerning offence endangering national security are handled in a fair and timely manner so as to effectively prevent, suppress and impose punishment for such offence.
>
> No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security."

29. It is clear that Chapter IV of the National Security Law envisages that there will be a trial to determine the question of guilt of a person accused of having committed an offence under the National Security Law. Article 42(2) is a provision which concerns the question of bail of such a person pending his trial in Hong Kong. It would be wholly illogical to read Article 42(2) as meaning that the person seeking bail is first required to admit his guilt. Mr Dykes' construction of Article 42(2) would be wholly inconsistent with the presumption of innocence, which is expressly recognized in Article 5.

30. We do not consider it to be a proper approach to the construction of Article 42(2) to fasten upon the word "繼續 (continue)" and use it to arrive at the unreasonable construction advanced by Mr Dykes on behalf of the Applicant. We accept Mr Yu's construction that the word "continue" in Article 42(2) merely means "for a continuing period, ie for the future if bail is granted". In other words, all that Article 42(2) does is to direct the judge dealing with an application for bail to consider the question of whether an accused person may, if bail is granted and while on bail, commit acts endangering national security. There is no question of the accused person being required to acknowledge, or admit, guilt before he can make an application for bail. Neither is the judge required to first form a view that the accused person has already

committed acts endangering national security before considering the question of whether that person may commit such acts in future.

(b) Second argument: presumption of bail removed

31. Section 9D(1) of the CPO provides that, subject to s 9G thereof, "a court shall order an accused person to be admitted to bail, whether he has been committed for trial or not..." [emphasis added]

32. Section 9G(1) of the CPO states as follows:

> "The court need not admit an accused person to bail if it appears to the court that there are substantial grounds for believing, whether or not an admission were to be subject to conditions under section 9D(2), that the accused person would -
>
> (a) fail to surrender to custody as the court may appoint; or
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> (b) commit an offence while on bail; or
>
> (c) interfere with a witness or pervert or obstruct the course of justice."

33. There are other specified circumstances under s 9G(3) to (9) of the CPO where the court may refuse to grant bail, including the situation where bail is withheld for the protection of the accused person, or where he is subject to a deportation order, etc. Under s 9G(10), an accused person charged with murder or treason may only be granted bail by a judge (including a deputy judge) of the High Court, but not by a magistrate.

34. The effect of these provisions is that an accused person is, *prima facie*, entitled to be granted bail pending trial. However, the court may refuse to grant bail in any given case under s 9G. In most cases, the

question of whether to admit an accused person to bail falls to be determined by reference to the criteria referred to in s 9G(1)(a) to (c).

35. The aforesaid presumption of bail applies generally to any person who has been charged with any criminal offence. However, in the case of a person charged with an offence endangering national security under the National Security Law, it is necessary also to take into account Article 42, the text of which has already been set out in §24 above.

36. It is immediately apparent that Article 42(2) does not preclude bail being granted to a person accused of having committed an offence endangering national security. What it does is to provide for a specific situation where bail shall not be granted, namely, no bail shall be granted unless "the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security".

37. The restriction against bail being granted under Article 42 is a narrow one. Although the provision is couched in a double negative form, the substantive question which a judge has to ask, when considering the question of bail of a person charged with an offence endangering national security, is whether there are grounds, or reasons, to believe that the accused person will continue to commit "acts endangering national security", ie offences under the National Security Law and not just any act which may in some way be said to endanger national security. It is not helpful to approach this question by reference to considerations such as the burden, or standard, of proof (cf the

approach to analogous questions adopted by Lord Bingham of Cornhill in *R v Lichniak* [2003] 1 AC 903, at §16, and by Lord Steyn in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787, at §37, referred to by Lord Carswell in *R (O) v Crown Court at Harrow* [2007] 1 AC 249, at §9). The judge has to form a view on what the accused person may or may not do in the future. This is not something which is susceptible to exact proof as a matter of fact, but is a matter of judgment which the judge has to make upon an overall assessment of the relevant materials and circumstances before him.

38. When carrying out such assessment, Article 42 ought, in our view, to be construed and applied, so far as reasonably possible, in a manner which is consistent with the protection of fundamental rights, including the right to liberty of the person under Article 28 of the Basic Law and Article 5 of the Hong Kong Bill of Rights[13]. There are three reasons for adopting this approach.

39. First, it is important to have regard to other provisions of the National Security Law, in particular, Articles 4 and 5, which state as follows:

> "**Article 4** Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region. The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law of the Hong Kong Special Administrative Region and the provisions of the International Covenant on Civil and Political Rights and the

[13] Article 65 of the National Security Law provides that "The power of interpretation of this Law shall be vested in the Standing Committee of the national People's Congress". Since there is no relevant interpretation of Article 42, it is not necessary to consider the effect of Article 65 in the present case.

> International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong, shall be protected in accordance with the law.
>
> **Article 5** The principle of the rule of law shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security. A person who commits an act which constitutes an offence under the law shall be convicted and punished in accordance with the law. No one shall be convicted and punished for an act which does not constitute an offence under the law.
>
> A person is presumed innocent until convicted by a judicial body. The right to defend himself or herself and other rights in judicial proceedings that a criminal suspect, defendant, and other parties in judicial proceedings are entitled to under the law shall be protected. No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in judicial proceedings."

40. It can be seen that the presumption of innocence is expressly recognized, as are other rights protected by the Basic Law and the International Covenant on Civil and Political Rights as applied in Hong Kong through the Hong Kong Bill of Rights Ordinance by virtue of Article 39 of the Basic Law. Article 5(3) of the Hong Kong Bill of Rights expressly provides that it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, while Article 11(1) of the Hong Kong Bill of Rights expressly provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. It is this presumption of innocence, which represents the "golden thread"[14] of our criminal justice system, that underpins the presumption of bail[15] which is given effect by s 9D of the CPO. The court is bound to give full force and effect to the presumption of

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[14] *Woolmington v DPP* [1935] AC 462, at 481.

[15] See *HKSAR v Vu Thang Duong* [2015] 2 HKLRD 502, at §13.

innocence when considering the application of Article 42 of the National Security Law in any given case.

41. Second, the well-established approach of the court is to give a generous interpretation to the constitutional guarantee of rights, and a narrow interpretation to statutory provisions which impair liberty or restrict fundamental rights: see *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, at 455; *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, at §24; and *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, at §16.

42. Third, the court is under a duty to protect the fundamental rights accorded by the Basic Law and Hong Kong Bill of Rights: see Robert Ribeiro PJ, The Influence of the Strasbourg Court's Jurisprudence in Hong Kong[16].

43. Hence, when determining where there are sufficient grounds for believing that a person accused of having committed an offence contrary to the National Security Law will not continue to commit acts endangering national security, a judge should resolve any reasonable doubt in favour of the accused person. Viewed in this perspective, we consider that, in the vast majority of cases, an accused person who would otherwise be granted bail under s 9D of the CPO will continue to be granted bail notwithstanding Article 42, and vice versa. This is because, under s 9G(1)(b) of the CPO, one of the grounds for withholding bail is that there are substantial grounds for believing that the accused person

[16] Published in "Human Rights in Contemporary World - Essays in Honour of Professor Leszek Garlicki" (Ed Marek Zubik) (Wydawnictwo Sejmowe, Warszawa 2017), at pp 3-4.

"would commit an offence while on bail". If the judge is minded to grant bail to an accused person, with or without conditions attached, it ordinarily means that he does not consider that there are substantial grounds for believing that the accused person would commit a serious offence while on bail. This consideration must now include an offence endangering national security which, by definition, is a serious one. In a situation where the judge does not consider that there are substantial grounds for believing that the accused person would commit an offence endangering national security if granted bail, there would be no reason for bail to be denied under Article 42.

44. On the other hand, in any case where the judge considers that the accused may commit a serious offence while on bail, it is, in practice, unlikely that bail would be granted (even though bail is not precluded as a matter of law). Hence, if the court considers that there are substantial grounds for believing that the accused person would commit an offence endangering national security if granted bail, it is unlikely that the court would be minded to grant bail under s 9D of the CPO, regardless of Article 42.

45. In short, while there may a difference of emphasis between s 9G(1) of the CPO and Article 42 of the National Security Law, the impact of Article 42 is more apparent than real. The practical application of Article 42 is unlikely to result in any different outcome of a bail application in the vast majority of cases.

46. We do not rule out the possibility that, in some exceptional cases, a different outcome on the question of bail may be reached as a

result of the application of Article 42. However, it needs to be emphasized that although there is a presumption in favour of granting bail under s 9D of the CPO, an accused person does not have an absolute right to bail. We have been referred to a number of cases where the courts in different jurisdictions have come to different conclusions on whether a provision which denied bail or restricted or limited the presumption of bail was constitutionally objectionable:

(1) On one side are cases such as *State of Mauritius v Khoyratty* [2007] 1 AC 80 (where a provision which denied bail pending trial where the relevant offence was one of a number relating to terrorism or drugs and the suspect had already been charged with or convicted of a similar offence was held to be inconsistent with the Constitution of Mauritius), and *Re Application for Bail by Islam* [2010] ACTSC 147 (where a provision which placed upon a person accused of having committed the offence of attempted murder to show special or unusual circumstances favouring bail before the court might consider granting bail was held to be incompatible with the Human Rights Act 2004 (ACT)).

(2) On the other side are cases such as *R v Pearson* [1992] 3 RCS 665 (where a provision which placed upon a person accused of having committed specified narcotic offence(s) the onus of showing why a denial of bail pending trial would not be justified was held to be compatible with the Canadian Charter of Rights and Freedoms, including the presumption of innocence under s 11(d) of the Charter, *per* Lamer CJ and Sopinka and Iacobucci JJ[17]), and *R (O) v Crown Court at Harrow* [2007] 1 AC 249 (where a provision which required

[17] At page 701.

> an accused person who was charged with an offence within a specified class, including murder, attempted murder, manslaughter, rape, and other sexual offences and who had previously been convicted of any such offence, to show exceptional circumstances before he might be granted bail, was construed as placing an evidential burden on the accused person to justify the granting of bail and, so construed, was held not to violate the right of an accused person to trial within a reasonable time or to release pending trial protected under the Human Rights Act 1998).

47. These cases must, of course, be read in the context of the relevant constitutional regimes and the specific provisions under challenge, and cannot be applied to Hong Kong directly. The following statement of principle by Lord Rodger of Earlsferry in *State of Mauritius v Khoyratty*, *ante*, at §30 is, however, instructive:

> "I have come to the view that section 2 of the 1994 Act did indeed purport to make a fundamental, albeit limited, change to this component of the democratic state envisaged by section 1 of the Constitution. The crucial problem lies in the absolute nature of section 5(3A). Where applicable, it would completely remove any power of the judges to consider the question of bail, however compelling the circumstances of any particular case might be. By contrast, a provision, for example, that persons of the type envisaged in the subsection should not be admitted to bail unless in exceptional circumstances would not create the same problems because the judges would still have a significant, even if more restricted, role in deciding questions of bail and of the freedom of the individual. Unfortunately, however, as Mr Guthrie stressed on behalf of the respondent, precisely because it is absolute in form and effect, subsection 5(3A) is liable to operate arbitrarily and so, it may well be, to create potential difficulties in relation to section 3(a) of the Constitution." [emphasis added]

48. In other words, while an absolute prohibition against bail is objectionable, a provision which gives a judge a significant role to determine whether to grant bail to specified classes of offenders based on their individual circumstances is not to be viewed in the same light. In the present case, Article 42(2) does not, in our view, impose any absolute prohibition against bail. It should not even be read as imposing a presumption against bail. If Article 42(2) is given a proper construction and applied in the manner suggested in §§36 to 45 above, we do not believe Article 42(2) to be inconsistent with the various rights under the Basic Law and the Hong Kong Bill of Rights referred to by Mr Dykes, in particular the presumption of innocence and the presumption of bail.

49. In passing, we should mention that there is an argument raised by Mr Yu on whether this court should construe the National Security Law using common law construction technique, exclusively or otherwise, having regard to the fact that the National Security Law is a national law enacted by the NPCSC under the civil law system and the National Security Law is an aspect of the interface of "one country, two systems"[18]. On this issue, we consider that, as far as Hong Kong courts are concerned, we should continue to adopt the common law approach in the construction of the National Security Law. As authoritatively held by the Court of Final Appeal, the Basic Law, which is also a national law enacted by the NPC under the civil law system, should be construed using the common law approach (see *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, at 221G-H, 222C-E and 223F-224D). If the Basic Law, which is right at the interface of "one country, two systems", is to be construed using the common law approach (a

[18] See §43 of Mr Yu's Skeleton Submissions dated 14 August 2020.

proposition that we are duty-bound to accept), we can see no valid basis to adopt any other approach in the construction of the National Security Law.

(c) Third argument: Article 42 enables arbitrary detention

50. In respect of the third argument, Mr Dykes contends that Article 42 enables arbitrary detention since it prevents the release of a person where there are no grounds for withholding bail, ie no risk of not attending trial or committing offences on bail or interfering with witnesses or perverting the course of justice[19]. Inherent in this argument is the acceptance that it is a proper ground to withhold bail where there is a real risk of the accused person committing offences while on bail. Article 42(2), in substance, targets such risk in respect of offences endangering national security. We do not see how it can be said that withholding bail in such a situation would give rise to arbitrary detention.

GROUND 2 - THE CHIEF MAGISTRATE WAS NOT "INDEPENDENT"

51. Article 44 states as follows:

> " The Chief Executive shall designate a number of judges from the magistrates, the judges of the District Court, the judges of the Court of First Instance and the Court of Appeal of the High Court, and the judges of the Court of Final Appeal, and may also designate a number of judges from deputy judges or recorders, to handle cases concerning offence endangering national security. Before making such designation, the Chief Executive may consult the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region and the Chief Justice of the Court of Final Appeal. The term of office of the aforementioned designated judges shall be one year.

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[19] See §51.3 of Mr Dykes' Skeleton Submissions.

> A person shall not be designated as a judge to adjudicate a case concerning offence endangering national security if he or she has made any statement or behaved in any manner endangering national security. A designated judge shall be removed from the designation list if he or she makes any statement or behaves in any manner endangering national security during the term of office.
>
> The proceedings in relation to the prosecution for offences endangering national security in the magistrates' courts, the District Court, the High Court and the Court of Final Appeal shall be handled by the designated judges in the respective courts."

52. Mr Dykes accepts that "[a]ppointed judges and magistrates are likely to be impartial in adjudicating national security cases", but argues that "they are not independent because they are selected and appointed by the Chief Executive"[20].

53. In support of this argument, Mr Dykes relies upon the commentary of the United Nations Office on Drugs and Crime on "The Bangalore Principles of Judicial Conduct", in particular §26(c), which states as follows:

> "In order to establish whether the judiciary can be considered 'independent' of the other branches of government, regard is usually had, among other things, to the manner of appointment of its members, to their term of office, to the conditions of service, to the existence of guarantees against outside pressures, and to the question whether the court presents an appearance of independence. Three minimum conditions for judicial independence are:
>
> (c) Institutional independence: i.e. independence with respect to matters of administration that relate directly to the exercise of the judicial function. An external force must not be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must of

[20] See §101 of Mr Dykes' Reply Skeleton Submissions.

> necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the constitution."[21]

54. It is important to emphasise that in relation to cases concerning offences under the National Security Law, the Chief Executive does not assign or nominate any particular judge to hear any particular case. Under Article 44, the Chief Executive is given the power to designate a number of judges, including magistrates, judges of the District Court, judges of the High Court (comprising the Court of First Instance and the Court of Appeal) and judges of the Court of Final Appeal, to handle cases concerning offences endangering national security. However, the question of which judge is assigned to hear any given case remains a matter for the Judiciary, not the Chief Executive or the Government: see the Statement by the Chief Justice of the Court of Final Appeal dated 2 July 2020, in particular §5:

> "The listing and handling of cases, the assignment of which judge or judges are to handle cases or appeals will be determined by the court leader of the relevant level of court. These are matters within the sole responsibility of the Judiciary."

55. There is no proper or sufficient basis to contend that, in relation to cases concerning offences under the National Security Law, the Chief Executive or the Government is in a position "to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists", or that the liberty of any member of the Judiciary in

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[21] See §82 of Mr Dykes' Skeleton Submissions.

Hong Kong "in adjudicating individual disputes and in upholding the law and values of the constitution" is, or will be, interfered with by the Chief Executive exercising her power under Article 44.

56. In the "Guide on Article 6 of the European Convention on Human Rights[22]: Right to a Fair Trial (Criminal Limb)" (updated 30 April 2020) published by the European Court of Human Rights, at §83, it is stated that "appointment of judges by the executive is permissible, provided that appointees are free from influence or pressure when carrying out their adjudicatory role." We can see nothing to suggest that the Chief Magistrate was not free from influence or pressure when considering the question of whether the Applicant should be granted bail in this case.

57. Mr Dykes argues that "while actual independence is important, another crucial facet of judicial independence is 'perceived independence'"[23]. We accept the general proposition that, when discharging its judicial functions, the Judiciary must not only be independent, but must also be seen to be independent (see The Bangalore Principles of Judicial Conduct 2002, at §1.3; Guide to Judicial Conduct published by the Judiciary of the HKSAR, Preface, at §1). As in relation to apparent bias, the question of perceived independence must be looked at from the point of view of a reasonable, "fair-minded and

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[22] Article 6(1) of the ECHR states as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." This article is equivalent to Article 10 of the Hong Kong Bill of Rights.

[23] See §110 of Mr Dykes' Reply Skeleton Submissions.

well-informed observer" (see *Deacons v White & Case* (2003) 6 HKCFAR 322, at §§20-21).

58. Under Article 88 of the Basic Law, judges of the courts of the HKSAR are appointed by the Chief Executive on the recommendation of an independent commission, namely, the Judicial Officers Recommendation Commission. There is thus already some degree of institutional relations between the Chief Executive and the Judiciary. This does not, however, prevent the Judiciary from being independent, and being seen as independent, from the Government. It must be borne in mind that a judge is bound by the Judicial Oath taken by him upon his appointment, which requires him to, *inter alia*, discharge his judicial duties in full accordance with the law and without fear or favour. Also, although the concepts of impartiality and independence are distinct, there is a degree of overlap between the two. As earlier noted, Mr Dykes accepts that judges designated by the Chief Executive to handle cases concerning offences endangering national security are likely to be impartial in discharging their judicial functions in relation to such cases. We do not believe that a reasonable, fair-minded and well-informed observer would think that those judges are, or may be, no longer be independent of the Government.

59. Mr Dykes argues that "[s]ome pressure is on a designated judge or magistrate when handling national security cases. He or she does not have security of tenure (12 months appointment only)"[24]. With respect, the appointment and termination of a judge's designation to handle cases concerning offences endangering national security under

[24] See §103 of Mr Dykes' Reply Skeleton Submissions.

Article 44 has nothing to do with his security of tenure. A judge's appointment is up to the applicable retirement age in accordance with the Judicial Officers (Extension of Retirement Age) (Amendment) Ordinance 2019. His security of tenure is protected by Article 89(1) of the Basic Law, which states as follows:

> "A judge of a court of the Hong Kong Special Administrative Region may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges."

60. In the same vein, Mr Dykes says that "[i]t may be perceived that members of the judiciary already on the list would be subconsciously influenced by the prospect of not being appointed"[25]. Implicit in this argument is that it is somehow advantageous or beneficial for a judge to be designated to handle cases concerning offences endangering national security. This is completely unfounded.

61. The case of *Liyanage v The Queen* [1967] 1 AC 259 relied upon by Mr Dykes also does not assist the Applicant. The history of that case is a little complicated. Essentially, what happened was that after an abortive *coup d'etat* in January 1962, the legislature of Ceylon passed an act called the Criminal Law (Special Provisions) Act, No 1 of 1962 ("the First 1962 Act"), which was directed towards the participants in the coup. Under s 404 of the Criminal Procedure Code, the Minister of Justice could direct that the defendant be tried by three judges without a jury in the case of the offence of sedition and any other offence in which such a mode of trial would be appropriate by reason of civil

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[25] See 118.5 of Mr Dykes' Reply Skeleton Submissions.

commotion, disturbance of public feeling or any other similar cause. That clause was amended so that s 404 of the Criminal Procedure Code would include the offences for which the defendants in that case were charged. Further, s 9 of the First 1962 Act provided that, in cases in which the Minister of Justice directed a trial by three judges without a jury, "the three judges should be nominated" by the Minister[26]. It was held by the Supreme Court of Ceylon that this power of nomination of judges was an interference with the exercise by the Judges of Supreme Court of the judicial power of the State vested in them by virtue of their appointment under s 52 of the Ceylon (Constitution) Order and thus was *ultra vires* the Constitution. That conclusion was not challenged by an appeal to the Privy Council[27]. Instead, the legislature of Ceylon passed a new Act, namely, the Criminal Law Act, No 31 of 1962 ("the Second 1962 Act"), amending the above provision such that the three judges before whom the trial should be held were to be nominated by the Chief Justice instead of by the Minister of Justice. Eventually, 11 persons were convicted and sentenced to 10 years' rigorous imprisonment and forfeiture of all their properties. Upon their appeals, the Privy Council held that the First and Second 1962 Acts were unconstitutional for a different reason, namely, that they were directed to the trial of particular prisoners charged with particular offences on a particular occasion, and thus involved a usurpation and infringement by the legislature of judicial powers inconsistent with the written Constitution of Ceylon. At p 289E-G, the Board stated the following:

> "It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the

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[26] Page 279D-E.
[27] Page 282A-D.

> Acts of 1962 had no such general intention. They were clearly aimed at particular known individuals who had been named in a While Paper and were in prison awaiting their fate… That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup and that, after these had been dealt with by the judges, the law should revert back to its normal state."

62. The Board's conclusions can be found in the following passages:

> "As has been indicated already, legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity. The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial." (pp 290E-291A); and
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> "If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges… Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were ultra vires and invalid." (291F-292A)

63. Leaving aside for the moment that the Board's decision in *Liyanage* was given in the context of the Constitution of Ceylon and thus the above reasoning cannot be directly transposed to the HKSAR, it is clear that the circumstances in *Liyanage* are vastly different from the

present case. In particular, there is no power of "nomination" of judges to hear cases concerning offences endangering national security vested in the Chief Executive by Article 44. Also, the National Security Law is of general application, and cannot be said to have been enacted to deal only with a number of identified individuals in respect of some particular offences on a particular occasion, after which the law will cease to have effect.

64. In all, we reject the argument that the Chief Magistrate is not "independent" merely because he is one of the designated judges to handle cases concerning offences endangering national security under Article 44.

GROUND 3 - MANDATORY TERMS OF IMPRISONMENT NEUTRALIZE THE EXERCISE OF INDEPENDENT JUDICIAL POWERS

65. Articles 20, 21 and 24 prescribe ranges of sentences for persons who are found guilty of having committed offences under those articles, depending on the circumstances of the case or the seriousness of the conduct in question:

(1) Article 20(2), relating to the offence of secession or undermining national unification, states as follows -

> "A person who is a principal offender or a person who commits an offence of a grave nature shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years; a person who actively participates in the offence shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years; and other participants shall be sentenced to fixed-term imprisonment of not more than three years, short-term detention or restriction."

(2) Article 21, relating to the offence of, *inter alia*, incitement of other persons to commit an offence under Article 20, states as follows -

> "If the circumstances of the offence committed by a person are of a serious nature, the person shall be sentenced to fixed-term imprisonment of not less than five years but not more than ten years; if the circumstances of the offence committed by a person are of a minor nature, the person shall be sentenced to fixed-term imprisonment of not more than five years, short-term detention or restriction."

(3) Article 24(2), relating to the offence of terrorist activities, states as follows -

> "A person who commits the offence causing serious bodily injury, death or significant loss of public or private property shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years; in other circumstances, a person who commits the offence shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years."

66. As a matter of principle, it is not objectionable for the legislature to prescribe a fixed punishment (eg life imprisonment in the case of murder in the HKSAR), or a range of sentences (including a maximum and minimum sentence) for any particular offence, leaving it to the judge to determine the appropriate sentence on the facts of any given case. In *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, at §38, Hartmann J (as he then was) quoted the following statement of principle by Lord Diplock in *Hinds v R* [1977] AC 195 at 226-227:

> "In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence - as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to

> the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.
>
> Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case… In this connection their Lordships would not seek to improve on what was said by the Supreme Court of Ireland in *Deaton v. Attorney-General and the Revenue Commissioners [1963] I.R. 170*, 182-183, a case which concerned a law in which the choice of alternative penalties was left to the executive.
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> > 'There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case.... The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts... the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive...'
>
> This was said in relation to the Constitution of the Irish Republic, which is also based upon the separation of powers. In their Lordships' view it applies with even greater force to constitutions on the Westminster model. They would only add that under such constitutions the legislature not only does not, but it *can* not, prescribe the penalty to be imposed in an individual citizen's case: *Liyanage v. The Queen [1967] 1 A.C. 259*."

67. In relation to Articles 20, 21 and 24, it is clear that they only prescribe ranges of sentences for persons found guilty of having committed offences under those articles, but do not prescribe the penalty to be imposed in any particular case. Applying the principle as explained by Lord Diplock in *Hinds*, we do not consider that Articles 20, 21 and 24 impermissibly interfere with the exercise of judicial powers in

the HKSAR in relation to the sentencing of persons charged with and convicted of offences under those articles. In any event, the question of sentencing of the Applicant has not yet arisen in the present case.

68. Mr Dykes argues that the minimum compulsory terms "affect decisions about bail"[28]. We accept that the possible sentences which may be passed on an accused person should he be convicted of the offence for which he has been charged is a consideration relevant to the question of whether he should be admitted to bail pending trial. We do not, however, consider it to be wrong in principle for the Chief Magistrate, when deciding whether to grant bail to the Applicant who had been charged with offences under Articles 20, 21 or 24, to take into account the prescribed ranges of sentences should he ultimately be convicted of those offences.

GROUND 4 - INACCESSIBLE LAW

69. Mr Dykes' argument that the Nationality Security Law is an "inaccessible" law because it is promulgated in the Chinese language and the English version as gazetted is not verified or authentic but issued for "information" only, is obviously untenable. There is no law that we are aware of which requires a national law promulgated in the Chinese language to be accompanied by an authentic English text.

70. Under Article 9 of the Basic Law, in addition to the Chinese language, English "may also be used as an official language", while under s 3 of the Official Languages Ordinance (Cap 5), both the English and Chinese languages are declared to be the official languages of

[28] See §72 of Mr Dykes' Skeleton Submissions.

Hong Kong and enjoy equal status. Although s 4 of the Official Languages Ordinance provides that all Ordinances shall be enacted and published in both official languages, this provision has no application to the National Security Law which is not an "Ordinance" as that term is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1):

> "Ordinance means -
>
> (a) any Ordinance enacted by the Legislative Council;
>
> (b) any Ordinance adopted by virtue of Article 160 of the Basic Law as a law of the Hong Kong Special Administrative Region;
>
> (c) any subsidiary legislation made under any such Ordinance except any such subsidiary legislation which has pursuant to Article 160 of the Basic Law been declared to be in contravention of the Basic Law; and
>
> (d) any provision or provisions of any such Ordinance or subsidiary legislation."

71. We note that the application of the provisions of the Interpretation and General Clauses Ordinance is subject to any "contrary intention" appearing either from that Ordinance or any other Ordinance in force[29]. We cannot, however, see any such contrary intention which would lead us to construe the word "Ordinance" in the Official Languages Ordinance to include the National Security Law.

72. As pointed out by Mr Yu, there are other national laws enacted by the NPC and applied in Hong Kong, notably the Basic Law itself and the Nationality Law of the PRC, where the Chinese text represents the authoritative version:

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[29] See s 2(1) of the Interpretation and General Clauses Ordinance.

(1) In respect of the Basic Law, it was enacted and promulgated by the NPC on 4 April 1990 originally in the Chinese language only. An official English text was adopted by the NPCSC on 28 June 1990. However, in the case of discrepancy between the two texts, the Chinese text prevails.

(2) In respect of the Nationality Law of the PRC, it was adopted by the NPC and became effective on 10 September 1980. By virtue of Article 18 of the Basic Law and its inclusion in Annex III thereto, the Nationality Law has application in the HKSAR with effect from 1 July 1997. The English translation appearing in "Instrument A402 Promulgation of National Laws 1997" is for reference only.

73. It has never been argued, and cannot sensibly be argued, that either the Basic Law or the Nationality Law of the PRC is unconstitutional because it is not an "accessible" law.

74. As a matter of fact, the Applicant himself is Chinese. It is not suggested that he does not read or understand the Chinese language. Before the Magistrate, he was represented by Mr Lawrence Lau. In the present application, he is represented not only by Mr Dykes, but also Ms Queenie Ng, Ms Linda Wong and Ms Tessa Chan. It is also not suggested that the Applicant's other counsel do not read or understand the Chinese language. The Applicant says that his right to choice of counsel is restricted because Mr Dykes is unable to read Chinese and therefore cannot make submissions directly on the National Security Law[30]. However, Mr Dykes is ably assisted by his team of junior counsel. Submissions on the Chinese text of the National Security Law were made

[30] See §93 of Mr Dykes' Skeleton Submissions.

by Ms Wong in the course of the hearing before us. Moreover, it is well established that there is no absolute right to choice of counsel under Article 35 of the Basic Law. We do not see that the Applicant's right to choice of counsel has been unlawfully impaired. The impairment, if any, is the consequence of his preferred counsel being unable to read or understand one of the two official languages of the jurisdiction. It is, ultimately, a matter for the Applicant to retain a suitable and appropriate barrister to represent him in the present case. It is a fact that there is a large pool of competent senior counsel in Hong Kong who can read and understand Chinese, and who can represent the Applicant in this case.

75. Article 58 relied upon by the Applicant is irrelevant to the present case, because that article relates to the situation where The Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region, upon approval by the Central People's Government of a request made by the Government of the Hong Kong Special Administrative Region or by the Office itself, exercises jurisdiction over a case under Article 55 of the National Security Law. This is not such a case.

76. The case of *Re Manitoba Language Rights* [1985] 1 SCR 721 relied upon by the Applicant is distinguishable, because s 133 of the Constitution Act 1867 of Canada expressly provides that "The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both [the English and the French] Languages", and s 23 of the Manitoba Act 1870 similarly provides that "The Acts of the Legislature shall be printed and published in both those languages" [emphasis added].

77. In all, we reject the contention that the National Security Law is not "accessible".

DISPOSITION

78. The Applicant's application for a writ of *habeas corpus* is dismissed. We also make an order *nisi* that the Applicant shall pay the Respondent's costs, to be taxed if not agreed, with certificate for two counsel.

79. The question of whether the Applicant ought to be admitted to bail will be considered separately by the court.

(Anderson Chow)
Judge of the Court
of First Instance

(Alex Lee)
Judge of the Court
of First Instance

Mr Philip Dykes, SC, Ms Queenie W S Ng, Ms Linda Wong & Ms Tessa Chan, instructed by Bond Ng Solicitors, for the Applicant

Mr Benjamin Yu, SC and Mr Jenkin Suen, SC instructed by Department of Justice, for the Respondent