

Update on Hong Kong's National Security Law: First judgment addressing constitutional matters delivered

25 August 2020

On 21 August 2020, in *Tong Ying Kit v HKSAR [2020] HKCFI 2133* (the Judgment), the Hong Kong Court of First Instance handed down its first judgment addressing important constitutional matters arising under the Law of the People's Republic of China on Safeguarding National Security (NSL) in the Hong Kong Special Administrative Region (HKSAR). This case is the first opportunity for an HKSAR court¹ to assess a constitutional challenge to the detention provisions under Article 42 of the NSL and offers insights into how the HKSAR courts may analyze other provisions of the NSL in the future.

Tong Ying Kit faces charges of various offences including inciting secession and engaging in terrorism under the NSL. This application concerned his writ of habeas corpus challenge to a decision of the Chief Magistrate to deny him bail. Tong Ying Kit argues that he has been unlawfully denied bail on the basis of what he describes as an unconstitutional "no bail" provision in Article 42(2) of the NSL. He also sought to challenge the constitutionality of Articles 20, 21, 24, and 44 of the NSL.

Decision by the court

The judges swiftly dismissed the habeas corpus application. According to the judges, the application should have been brought as an application for review of a refusal of bail under section 9J of the Criminal Procedure Ordinance (CPO). Further, the Chief Magistrate who originally denied bail was not acting outside his lawful authority (the key tenet of a habeas corpus application).

However, the court helpfully took the opportunity to address the constitutional challenges raised by Tong Ying Kit notwithstanding their decision to dismiss the application on essentially procedural grounds.

Crucially, the (admirably clear and typically well-reasoned) Judgment of Anderson Chow J and Alex Lee J has brought welcome clarity in respect of how the NSL is likely to be interpreted and

¹ **Article 40** of the NSL states that the HKSAR shall have jurisdiction over cases concerning offenses under the NSL except under the circumstances specified in **Article 55** (namely: (1) where the case is complex due to involvement of a foreign country or external elements making it difficult for the HKSAR to exercise jurisdiction; (2) a serious situation occurs where the HKSAR Government is unable to effectively enforce the NSL; or (3) a major and imminent threat to national security has occurred).

implemented by the HKSAR. Most importantly, that HKSAR courts will apply common law principles to interpret the text of the NSL.

We summarize the key points below.

Common law interpretation – continuing to be adopted

In our [client alert on 13 July 2020](#), we highlighted the apparent uncertainty as to whether the HKSAR courts would apply a common law approach to interpretation of the NSL or whether the civil law approach would be favored. This has been an area of concern for many organizations operating within HKSAR who have long bestowed the virtues of HKSAR's common law legal system.

In the judges' comments in paragraph 49 of the Judgment the position appears to be clear (at least at first instance).

The judges have confirmed unequivocally that the HKSAR court should apply the common law approach to interpretation of the NSL, consistent with the approach which is applied in respect of the Basic Law. In reaching this view, the judges commented:

...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 [...]. 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 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.

Inconsistencies between Basic Law and NSL

We await the HKSAR court's view as to the appropriate approach for addressing inconsistencies between the Basic Law and the NSL – because on the basis of the specific issues before the court in this case, the judges considered that the Basic Law and NSL were sufficiently well aligned and therefore the question did not arise.

The judges did however take the opportunity to posit the question of whether, for the purposes of Article 62 of the NSL, the Basic Law is properly a "local law," given it is a law which itself was promulgated by the National People's Congress (NPC):

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.

This question may arise for proper judicial treatment at Tong Ying Kit's trial, if not before.

Fundamental rights

As part of their analysis, the judges held that: "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."

Encouragingly, they noted further that:

1. The presumption of innocence along with other fundamental rights enshrined in the Basic Law and the International Covenant on Civil and Political Rights as applied in HKSAR through the Bill of Rights Ordinance, are expressly recognized in the NSL.
2. 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".
3. The court is under a duty to protect the fundamental rights accorded by the Basic Law and the HKSAR Bill of Rights.

Arguments

In his submissions, leading counsel for Tong Ying Kit boiled Tong Ying Kit's constitutional challenges down into four grounds:

1. The presumptive right to bail, based on the presumption of innocence, under section 9D(1) of the CPO has been taken away by Article 42.
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.
3. The creation of minimum terms of imprisonment in the NSL neutralizes the exercise of the independent judicial power of the HKSAR.
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.

Having already dismissed the application on a procedural basis (see above), the court proceeded to dismiss the constitutional challenges as well on the following bases:

Presumptive right to bail

Article 42 states as follows:

1. 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.)
2. 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.)

First, Tong Ying Kit argued that the word "continue" in Article 42(2) presumes guilt and so must be unlawful as it is inconsistent with the Basic Law's presumption of innocence.

The judges dismissed this argument on the basis that: (1) it is clear the NSL envisages that there will be a trial to determine the question of guilt and it would be wholly illogical to read 42(2) as

meaning that a person seeking bail is first required to admit their guilt; and (2) it would be wholly inconsistent with the presumption of innocence expressly recognized in Article 5 of the NSL.

Second, Tong Ying Kit argued that the CPO provides a presumption that bail will be granted.

Again, the judges dismissed this argument on the basis that:

1. Under the CPO 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.
2. 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. It merely provides 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."
3. It is for the judge to make that assessment based on the information before them.

Third, Tong Ying Kit argued that Article 42 enables arbitrary detention.

The judges swiftly dismissed this argument on the basis that it is a proper ground to withhold bail where there is a real risk of the accused committing offences while on bail (and this is already law under the CPO) and they could not see how withholding bail in such a situation would give rise to arbitrary detention.

Mandatory terms of imprisonment vs exercise of independent judicial powers

Tong Ying Kit argued that the creation of minimum terms of imprisonment in the NSL neutralizes the exercise of the independent judicial power of the HKSAR. The judges rejected this argument, noting that mandatory fixed punishments and ranges of sentences are already permissible under HKSAR law and it is clear that Articles 20, 21, and 24 only prescribe ranges of sentences. They stated:

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.

As such, they did 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."

Independence of Chief Magistrate

The judges rejected Tong Ying Kit's argument that the Chief Magistrate is not "independent" merely because he is one of the designated judges appointed by the Chief Executive to handle cases concerning offences endangering national security under Article 44.

Noting that judges are ordinarily appointed by the Chief Executive (albeit on the recommendation of the Judicial Officers Recommendation Commission), they stated: "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 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."

They held that the effect of Article 44 is simply that a number of judges at different levels of the courts in HKSAR are designated by the Chief Executive to handle cases concerning offences endangering national security, but the actual assignment of a judge to hear any particular case remains the sole responsibility of the Judiciary. They stated further that:

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.

Inaccessible law

Finally, the judges rejected Tong Ying Kit's argument that the NSL is inaccessible because it is only (formally) rendered in the Chinese language. They noted that it is not the only law in HKSAR that is rendered formally in Chinese only and in any event, whilst English is an official language in HKSAR, Article 9 of the Basic Law merely states that in addition to the Chinese language, English "may also be used as an official language" (and of course, in the event of discrepancy between the Chinese and English language versions of the Basic Law, the Chinese version prevails).

Conclusion

These determinations are only the beginning of the legal analysis of the NSL, both in this and future cases. It remains to be seen how the HKSAR Courts of Appeal and Final Appeal and the NPC might view the analysis and conclusions of the Court of First Instance if given the opportunity. Moreover, questions of the constitutionality of the NSL and how it interacts with the Basic Law will no doubt be examined further and more extensively in October at Tong Ying Kit's trial.

For now, this case provides early insights into how the HKSAR judiciary will use common law principles to address constitutional challenges regarding the NSL and a fascinating forensic interpretive analysis by the learned judges.

Background

Tong Ying Kit is accused of, during a protest against the NSL on 1 July 2020, displaying a flag/banner with the slogan "Liberate Hong Kong; Revolution of our Times" and riding a motorcycle into groups of, and injuring, police officers.

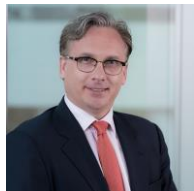
He was arrested and charged with the following offences:

1. An offence contrary to Articles 20 and 21 in that 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.
2. 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.

His trial is listed for October this year.

Authored by Byron Phillips, Tommy Liu, and Benjamin Kostrzewa.

Contacts



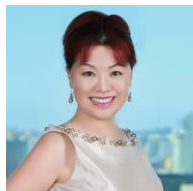
Mark Parsons
Partner, Hong Kong
T +852 2840 5033
mark.parsons@hoganlovells.com



Mark Lin
Partner, Hong Kong
T +852 2840 5091
mark.lin@hoganlovells.com



Roy G. Zou
Office Managing Partner, Beijing
T +86 10 6582 9596
roy.zou@hoganlovells.com



Jun Wei
Chair of the Greater China Practice
T +86 21 6122 3808 (Shanghai)
T +86 10 6582 9501 (Beijing)
jun.wei@hoganlovells.com



Ajay Kuntamukkala
Partner, Washington, D.C.
T +1 202 637 5552
ajay.kuntamukkala@hoganlovells.com

Kelly Ann Shaw
Partner*, Washington, D.C.
T +1 202 637 5743
kelly.ann.shaw@hoganlovells.com
*Admitted only in California. Supervised by principals of the firm.



Byron Phillips
Senior Associate, Hong Kong
T +852 2840 5960
byron.phillips@hoganlovells.com



Tommy Liu
Senior Associate, Hong Kong
T +852 2840 5072
tommy.liu@hoganlovells.com



Benjamin Kostrzewa
Registered Foreign Lawyer, Hong Kong,
Washington, D.C.
T +852 2840 5080 (Hong Kong)
T +1 202 637 5600 (Washington, D.C.)
ben.kostrzewa@hoganlovells.com

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses. The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members. For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com. Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.
© Hogan Lovells 2020. All rights reserved.