Press Summary (English)

Press Summary (Chinese)

CACV 274/2023 & CAMP 303/2023, [2024] HKCA 442

On appeal from [2023] HKCFI 1950

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 274 OF 2023 AND

MISCELLANEOUS PROCEEDINGS NO 303 OF 2023

(ON APPEAL FROM HCA NO 855 OF 2023)

BETWEEN

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

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Before: Hon Poon CJHC, Chu VP and Anthea Pang JA in Court

Dates of Hearing: 19 December 2023 and 24 February 2024

Date of Judgment: 8 May 2024

J U D G M E N T

Hon Poon CJHC (giving the Judgment of the Court):

1. In the proceedings below, the Secretary for Justice, as guardian of justice, applied for an interlocutory injunction in aid of criminal law under section 21L(1) of the High Court Ordinance ("HCO"[1]) to restrain the Defendants[2] from committing four specified acts in connection with the song commonly known as "願榮光歸香港" or "Glory to Hong Kong" ("the Song"). His application was refused by Anthony Chan J by a decision dated 28 July 2023.[3] Hence this appeal.[4]

A. BACKGROUND

2. Unless otherwise stated, the summary below is largely taken from the affidavit of Superintendent Margaret Wong dated 5 June 2023 ("Wong's Affidavit"), which was accepted by the Judge and forms the evidential basis for the Secretary's application and also this appeal.

3. As the Court of Final Appeal observed in *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518, at [1], Hong Kong, a city long regarded as safe and peaceful, experienced an exceptional and sustained outbreak of massive violent public lawlessness triggered by the legislative exercise of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill from mid-2019 onwards. The scale and extent of events disrupting public order across the territory and the escalating violence were unprecedented and shocking. The degeneration of law and order was rapid and most alarming. The dire situation posed serious threats to national security and public order in Hong Kong. It eventually led to the implementation of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("NSL") on 30 June 2020.

4. The violent protests were mainly mobilized via internet platforms. During their height, the Song first emerged in August 2019 in the form of a video publicly accessible on a channel "Dgx Music" on the YouTube. The composer of the Song used a pseudonym "Thomas dgx yhl" and the police has so far been unable to ascertain his true identity. However, he had been interviewed by local and international media.[5] He was reported to have said that he was a full-time musician in his mid-twenties; that he recruited performers and other people to help him; that he wrote the Song to boost the morale of the protestors

and to appeal to people's emotions and sentiments; and that while the front-line protestors used umbrellas, bricks, stones and petrol bombs as weapons, the Song was the most important "weapon" he could contribute to the fight.

5. Since its first publication, the Song has been widely circulated and used prominently in violent protests and secessionist activities:

(1) When the above video of the Song first appeared, the link to it was posted on one of the online discussion platforms where strategies for public order events were discussed. The Song was described as an "army song" and an "anthem" of Hong Kong. That post received much support and attracted comments advocating the separation of the Hong Kong Special Administrative Region ("HKSAR") from the People's Republic of China ("PRC").

(2) The Song immediately became popular, with variations emerging on YouTube, and attracted a large number of views and comments, many of which advocated the separation of the HKSAR from the PRC.

(3) In September 2019, the Song was released on major online music platforms. As at 1 June 2023, there were at least 9 videos of the Song available on YouTube, attracting 6 million viewers and over 200,000 "likes". There were 19 other channels on YouTube publishing different variations of the Song. And each of the videos can be "shared", thus allowing further and unrestricted dissemination. Police investigations found 9,118 comments capable of inciting secession.

(4) Between 2019 and 2022, the Song had been sung by protestors in at least 413 public order events, some of which involved violent and other unlawful behaviour and the chanting of secessionist or seditious slogans. Some of the defendants who had since been convicted of offences endangering national security had organized events which involved singing the Song or advocating it as "the Hong Kong's national anthem" as if Hong Kong were an independent state.

(5) As at 1 June 2023, the Song or its variants had been wrongly represented as the "national anthem of Hong Kong" for 887 times, including in some international sports events. This is probably due to the existence of videos of the Song on

YouTube titled "Hong Kong National Anthem". Such incidents were highly embarrassing and hurtful to many people of Hong Kong, not to mention its serious damage to national interests.

(6) The Song has also been sung and promoted by prominent anti-China destabilizing forces and national security offences fugitives in events provoking hatred towards the PRC and the HKSAR Government and advocating sanctions against officials of the Central Government and the HKSAR Government.

6. The Song is still freely available on the internet and on various music platforms and remains prevalent. It is so notwithstanding the fact that the NSL has already applied in Hong Kong since 30 June 2020.

B. THE PROCEEDINGS BELOW

7. On 5 June 2023, the Secretary commenced the present proceedings. The defendants named are "persons conducting themselves in any of the acts prohibited under paragraph 1(a), (b), (c) or (d) of the Indorsement of Claim" ("Defendants"). The relief claimed at paragraph 1 of the Indorsement of Claim is an injunction in aid of criminal law prohibiting the Defendants from committing the following acts (collectively "the 4 Acts"):

"(a) broadcasting, performing, printing, publishing, selling, offering for sale, distributing, dissemination, displaying or reproducing in any way including on the internet and/or any media accessible online and/or any internet-based platform or medium, the Song (including the publications set out in the Schedule ('32 Items')), whether its melody or lyrics or in combination (including any adaption of the Song, the melody and/or lyrics of which are substantially the same as the Song), (i) with the intent or in circumstances capable of inciting others to commit secession contrary to [NSL 21], or (ii) with a seditious intention as defined in section 9 of the Crimes Ordinance;[6] and in particular to advocate the separation of the [HKSAR] from the [PRC];

(b) broadcasting, performing, printing, publishing, selling, offering for sale, distributing, disseminating, displaying or reproducing in any way including on the internet and/or any media accessible online and/or any internet-based platform or medium, the Song (including [the 32 Items]), whether its melody or lyrics or in combination (including any adaption of the Song, the melody and/or lyrics of which are substantially the same as the Song), in such a way: (i) as to be likely to be mistaken as the national anthem insofar as the HKSAR is concerned; or (ii) as to suggest that the HKSAR is an independent state and has a national anthem of her

> own; with intent to insult the national anthem, contrary to section 7 of the National Anthem Ordinance ('NAO');[7]
>
> (c) assisting, causing, procuring, inciting, aiding, abetting others to commit or participate in any of the acts as set out in paragraph 1(a) or (b) above; or
>
> (d) knowingly authorizing, permitting or allowing others to commit any of the acts or participate in any of the acts as set out in 1(a) or (b) above."

8. Paragraph 2 of the Indorsement of Claim states that without limiting the generality of paragraph 1, the injunction sought covers (a) the 32 Items; and (b) any adaptation of the Song, the melody and/or lyrics of which are substantially the same as the Song. Paragraphs 3 and 4 respectively ask for a usual ceasing order and consequential directions and/or relief.

9. Upon the request by the Court of First Instance on 8 July 2023, the Chief Executive issued a certificate under NSL 47 ("the Certificate"). There, the Chief Executive, having assessed that the 4 Acts pose national security risks and are contrary to the interests of national security,[8] certifies that the 4 Acts involve national security. Pursuant to NSL 47, the Certificate is binding on the courts.

10. By a summons dated 5 June 2023, the Secretary applied for an interim injunction in aid of criminal law in terms identical to the relief sought in the Indorsement of Claim. He did not seek a complete ban of the Song. His case was that criminal investigation and prosecution alone was ineffective in combating the criminal problems caused by the Song and the injunction in aid of the criminal law would be of high utility. Two main reasons were advanced:[9]

> (1) Based on the police's experience, unless restrained by a clear court order specifying that the specified acts in respect of the Song are legally prohibited, the Defendants likely will continue with them. Many netizens are under the misconception that they may hide behind their pseudo-names and do whatever they want without proper regard to the law, and some mistakenly think that the mere singing, uploading or sharing of the Song is "harmless" regardless of the message and effect. These misconceptions are exacerbated by the time needed for police's investigation into the identity of each individual perpetrator and prosecute him/her out of the large number of perpetrators, giving the false impression that there is no legal consequence and the acts are not legally prohibited. There is clear utility of the injunction to make it crystal clear

to the public (including parties who may be assisting in the unlawful acts) that the specific acts in connection with the Song are legally prohibited.

(2) To effectively curb the criminal problems at their root, it is important that internet platform operators ("IPOs") would take down problematic videos of the Song, that is, (a) those uploaded or shared with the intent of and in circumstances capable of inciting others to commit secession, and in particular to advocate the separation of the HKSAR from the PRC; and (b) those likely to be mistaken as the national anthem insofar as the HKSAR is concerned or as to suggest that the HKSAR is an independent state and has a national anthem of her own, with intent to insult the national anthem, so that they cannot be further broadcast etc and no one including innocent parties (eg, staff of overseas organisers of sporting events) will be misled into playing the Song as the national anthem again. This is a serious problem because as of 1 June 2023, hyperlinks to YouTube videos/Wikipedia of the Song continue to appear in prominent positions in Google/YouTube/Yahoo/Bing Search results in response to queries to search "Hong Kong National Anthem" and "香港國歌" etc on major search engines. Despite efforts and requests by the HKSAR Government since November 2022, for the removal of the inaccurate contents from services provided by Google on YouTube and Google Search, as the two highly popular online platforms in Hong Kong and worldwide, Google's position remains that they are unable to accede to the HKSAR Government's request without the production of a valid court order demonstrating the relevant contents' violation of Hong Kong law. The injunction will serve the purpose of making it clear to IPOs by way of a court order that the specified contents are prohibited by Hong Kong law, which should therefore be removed and not be allowed to be uploaded to their platforms.

11. The injunction was intended to be *contra mundum*, or in plain language, against the world. If granted, it would bind persons who were not identifiable at the time when the injunction was made and who had not at that time infringed or threatened to infringe it but might do so at a later time.

12. By the Decision, the Judge refused to grant the injunction. His reasons may be summarised as below. He first raised concerns about

the *contra mundum* effect of the injunction. It was exceptional to ask the court to depart from the general rule that a person should only be made subject to the court's jurisdiction with the requisite notice of the proceedings. It was alarming that once a newcomer had breached the injunction he would find himself liable to criminal prosecution as well as contempt proceedings for the same act. If granted, the injunction would likely to be a final order because it was unlikely for the action to proceed to trial or for anyone answering the description of the Defendants to contest the action. It was therefore necessary to subject the application to stringent scrutiny with emphasis on safeguarding the fundamental rights of third persons who might be adversely affected.[10]

13. The Judge next noted that the test for an injunction in aid of the criminal law is one of necessity or utility. It must be shown that absent the injunction the Defendant's illegal conduct could not be effectively restrained. The court must consider (1) whether it would actually provide greater deterrence than what the criminal law already imposed; and (2) the ease of enforcement against the law-breakers.[11] With that in mind, the Judge compared the severity of criminal penalties and sanctions for contempt, querying if the targeted act was only lightly penalised under criminal law, it might seem wrong for the civil court to grant injunctions breaches of which might attract unlimited sanctions, thus doing what the legislature had not done; and if the criminal sanction was far more severe than what could be expected in contempt proceedings, like those imposed by NSL 21, whether there was any utility in granting the injunction and whether it was correct as a matter of principle for the court to pass judgment on what was effectively a serious criminal offence, without the procedural safeguards of the criminal justice system.[12]

14. After careful consideration, the Judge was unable to see how an injunction could assist the enforcement of the criminal law. He accepted that whether the 4 Acts endanger national security would best be left to the executive who might assess the risks with sensitive intelligence not available to the court. However, on the utility of the injunction, the court was in a proper position to make a judgment on it based on the evidence. After referring to the Secretary's case on utility, the Judge observed that the evidence contained little in terms of how the injunction would reduce the prevalence of the Song; that it was unlikely for entrenched offenders to be deterred by an additional injunction;[13] and that education appeared to be a more effective tool to remedy misconceptions that the Song might be broadcast etc in whichever manner one wished with impunity.[14]

15. Noting that the evidence was that the Government required a valid court order to show the IPOs that the relevant content of the Song was a violation of the Hong Kong law, the Judge doubted if the injunction would have such effect because it only targeted the use of the Song for unlawful acts.[15] He further reasoned that since the IPOs should be aware of their duties to act within the law and should not act in a way to aid and abet the commission of offences by others, it was difficult to understand how the injunction might add to the deterrence of the criminal law.[16]

16. The Judge next referred to the conflicts and inconsistencies of the injunction with the relevant criminal laws; such as the uncertainty as to how any enforcement action in the civil domain against breaches of the injunction would operate compatibly and coherently with the requirements mandated in the criminal regime under the NSL;[17] the civil court being called upon to pronounce whether a party had committed acts in breach of NSL 21 when the same legal and factual questions would have to be determined in criminal proceedings against the same party;[18] the disparity between the time limits for prosecution of the offence under the NAO and criminal contempt;[19] and double jeopardy.[20]

17. Finally, the Judge observed that, as the Secretary recognized, the right to freedom of expression is engaged. He referred to the "chilling effects" of the injunction, that is, innocent parties not meant to be targeted by the injunction, and conducting their lives as reasonable (not unduly sensitive) lay persons, feel nonetheless dissuaded or compelled to refrain from lawful and constitutionally protected conduct that they would otherwise wish to pursue, for fear of bearing the severe consequences of breach of the injunction if they are mistaken as to the precise scope of legal prohibition. After analysis, he was satisfied that the injunction met the four-stage proportionality test laid down in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372.[21] He would have granted the injunction had he been satisfied that it was of real utility and there existed no conflict with the criminal law.

C. MAIN ISSUES

18. This appeal raises three main issues:

(1) What should be the court's approach to an application for an injunction in aid of the criminal law for safeguarding national security? In particular, what is the interplay between

the court's duty under NSL 3 and NSL 8 and the exercise of its power under section 21L of the HCO?[22]

(2) What is the role of the court where the executive has made an assessment of national security in the predictive exercise of the likely utility of an injunction to prevent activities endangering national security? Specifically, what weight should the court accord to the executive's assessment that unless the injunction is granted, the acts endangering national security will continue, when the national security assessment is within the executive's purview? Can the court come to its own view which may differ from the executive's assessment?[23]

(3) Are there real and substantial conflicts between contempt proceedings and criminal proceedings such that the injunction ought to be refused?[24]

The answers to these issues will become apparent in the discussion in Part D.

D. PROPER APPROACH

19. Section 21L(1) of the HCO provides:

> "The Court of First Instance may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the Court of First Instance to be just or convenient to do so."

As section 21L(1) confirms and restates the court's jurisdiction to grant injunctions in equity, the present application in substance invokes the court's equitable jurisdiction to grant injunctions in aid of the criminal law, specifically the NSL and the NAO, for the purpose of safeguarding national security in the HKSAR. Since it is the first application of its kind, it falls on us to lay down the approach by which the court navigates such unchartered water in a principled manner.

D1. Some first principles

20. Recently, in *Wolverhampton City Council & Others v London Gypsies and Travellers & Others* [2023] UKSC 47, the UK Supreme Court addressed the question whether (and if so, on what basis, and subject to what safeguards) the court has the power to grant a newcomer injunction. In a seminal judgment, the Supreme Court comprehensively reviewed the court's jurisdiction to grant injunctions and traced the developments over the years leading to newcomer injunctions.[25] The

following first principles as reaffirmed by the Supreme Court are pertinent:

> (1) The jurisdiction is rooted in equity, and remains so despite its statutory confirmation, in our case, by section 21L(1) of the HCO: [17].
>
> (2) The jurisdiction is, subject to any relevant statutory restrictions, unlimited: [17]. There is no supposed limiting rule or principle apart from justice and convenience which equity has regarded as sacrosanct over time: [153].
>
> (3) That does not mean that the court has a free rein based on its own subjective perception of the justice and convenience of doing so in a particular case: [145]. Like any judicial power, the jurisdiction must be exercised in accordance with principle and any restrictions established by judicial precedent and rules of the court: [19].
>
> (4) At the same time, it must be recognized that principles and practice governing the exercise of the jurisdiction need to and do evolve over time as circumstances change. The width and flexibility of the jurisdiction are not to be cut down by categories. It cannot be stagnant and must be able to keep pace with changes so as to timely respond to the emergency of problems where the intervention of equity is called for ([19] - [22]), such as cases where equity intervenes to put right defects or inadequacies in the common law ([149]); or where it is perceived that common law remedies are inadequate to protect or enforce the claimant's rights: [150]. In line with its essential flexibility, the precise form and the terms and conditions which may be attached to an injunction are highly flexible: [152].

21. At [22], the Supreme Court summarised the developments of the jurisprudence thus:

> "… [they] illustrate the continuing ability of equity to innovate both in respect of orders designed to protect and enhance the administration of justice, such as freezing injunctions, *Anton Piller* orders, *Norwich Pharmacal* orders and *Bankers Trust* orders … and in respect of orders designed to protect substantive rights, such as internet blocking orders. That is not to undermine the importance of precedent, or to suggest that established categories of injunction are unimportant. But the developments which have taken place over the past half-century demonstrate the continuing flexibility of equitable powers, and are a

> reminder that injunctions may be issued in new circumstances when the principles underlying the existing law so require."

In short, the developments underscore the adaptive flexibility inherent in the equitable jurisdiction which enables the court, so long as it acts in accordance with established principles or any logical extension of them, to grant injunctions in new circumstances as justice and convenience dictate.

22. The UK Supreme Court also laid down important principles for newcomer injunctions, which we will discuss at Part D2.5 below.

D2. Contextual considerations

23. Like any judicial discretion, the jurisdiction to grant injunction is context-driven. Here, the contextual considerations necessitate a more thorough examination of five specific aspects of the injunction sought.

D2.1 An injunction in aid of criminal law

24. The first obvious aspect is that it is an injunction in aid of the criminal law.

25. Applications to seek the assistance of the civil court in aid of the criminal law is a comparatively modern development: *Gouriet v Union of Post Office Workers* [1978] AC 435, per Lord Wilberforce at p 481C; *Stoke on Trent City Council v B & Q* [1984] AC 754, per Lord Templeman at p 776A-F, the two leading cases on this area of the law.[26] *Gouriet* concerned the question whether a private citizen had any *locus* to apply for an injunction to enforce the criminal law when the Attorney General refused to give consent to relator proceedings. In answering the question in the negative, the House of Lords laid down important general principles on the use of civil injunctions in aid of the criminal law. *B & Q* and the line of authorities to follow saw an extension of this jurisprudence to cases in which local authorities applied for injunctions to restrain persistent breaches of local bye-laws: see for example, *City of London Corp v Bovis Construction Ltd* [1992] 3 All ER 697;[27] *Portsmouth City Council v Richards* [1989] 1 CMLR 673; *Guildford BC v Hein* [2005] BLGR 797; and *Birmingham City Council v Shafi*, [2009] 1 WLR 1961.

26. It is unanimously stressed in the authorities that the power to grant injunctions in aid of the criminal law must be exercised with great caution. There are three overlapping primary reasons:

> (1) The injunctions sought are usually in identical or almost identical terms to the criminal law that they seek to aid.

Because of the commonality, when an offender commits a breach of the injunction, he would have also committed a criminal offence. The prospect of him facing both the ensuing contempt proceedings and criminal trial may give rise to difficulties. In *Gouriet* at p 481C-F, Lord Wilberforce acknowledged that granting civil injunctions in aid of the criminal law is an exceptional power confined, in practice, to cases where an offence is frequently repeated in disregard of an, usually, inadequate penalty or to cases of emergency. His Lordship pointed out that because of the difficulties involving the justification for granting civil injunctions which may attract sanctions more severe than the penalty which the legislature has imposed in the criminal statute; determination of guilt of the offender by a civil court in the contempt proceedings without the safeguards in a criminal trial; double jeopardy which the offender may have to face if after punishment for contempt he were to be prosecuted in a criminal court, the power – though proved useful on occasions – is one of great delicacy and is one to be used with caution.[28]

(2) It is open to the legislature to impose legislative measures to tackle the problem. In *B & Q*, ibid, Lord Templeman observed that where the legislature imposes a penalty for an offence, the legislature must consider that the penalty is adequate and it can increase the penalty if it proves to be inadequate; and that it follows that the local authority should be reluctant to seek and the court should be reluctant to grant an injunction which if disobeyed may involve the infringer in sanctions far more onerous than the penalty imposed for the offence. After referring to Lord Wilberforce's observation in *Gouriet*, his Lordship said that "there must certainly be something more than infringement before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area."

(3) Subject to the legislation in question, the criminal law should, ordinarily speaking, be the primary means of enforcement. As Bingham LJ in *Bovis* at p 714b-c reasoned, where the legislature has shown a clear intention that the criminal law should be the means of enforcing compliance with a statute, the reasons for using the power with caution are plain and were fully explained by their Lordships

> in *Gouriet*; and the criminal law should ordinarily be pursued as the primary means of enforcement. In a similar vein, Sir Anthony Clarke MR and Rix LJ in *Shafi* at [36] pointed out that the principles governing the grant of injunctions in aid of the criminal law are subject to any legislation which is designed to deal with the very situation which an injunction is sought to control.

27. In *Bovis*, in the context of a local authority seeking to enforce the criminal law by civil injunctions, Bingham LJ, after reviewing the earlier authorities including *Gouriet* and *B & Q*, stated at p 714g-j three guiding principles:

> (1) The jurisdiction is to be invoked and exercised exceptionally and with great caution.
>
> (2) There must certainly be something more than mere infringement of the criminal law before the assistance of civil proceedings can be invoked and accorded for the protection or promotion of the interests of the inhabitants of the area.
>
> (3) The essential foundation for the exercise of the court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law but the need to draw the inference that the defendant's unlawful operations will continue unless and until effectively restrained by the law and that nothing short of an injunction will be effective to restrain them.

28. Those principles were applied in subsequent cases while this jurisprudence continued to develop. In *Richards*, Kerr LJ, after reviewing the authorities including *Bovis*, expressed at [38] the broad test to be:

> "that injunctions are only permissible if in particular circumstances criminal proceedings are likely to prove ineffective to achieve the public interest purposes for which the legislation in question had been enacted."

By asking if the public interest purposes of the legislation are effectively achieved, the test has to some extent broadened the principles summarized by Bingham LJ: see *Hein*, per Waller LJ at [75]. Waller LJ also observed at [77] that Kerr LJ had cited with approval Millet J's judgment in *Wychavon District Council v Midlands (Special Events) Ltd* (1987) 86 LGR 83, at 87, that if a local council has good grounds for thinking that in any given case compliance with the law will not be secured by prosecution, it is entitled to apply for a *quia timet* injunction.

That said, while the cases since *Bovis* suggest a somewhat broader approach, the essential principles remain those summarized by Bingham LJ: *Shafi*, per Sir Anthony Clarke MR and Rix LJ at [33] - [36].

29. In contrast to the criminal law, the injunction is essentially preventive in nature. As Sir Martin Nourse in *Hein*, at [72], explained:

> "As I see it, the real question is whether the civil court should approach the matter on the basis that in this type of case it must leave the matter to the criminal law, ie wait until an offence has been committed, or whether, where it is obvious that a criminal offence will be committed which will involve suffering or serious disadvantage to those which the criminal law was designed to protect, the civil court should grant relief, preventing the criminal offence taking place."

30. The categories of cases where an injunction in aid of the criminal law may be granted are not closed. In *Richards*, Kerr LJ at [45] and [46] identified from the authorities the two broad categories of cases in which civil injunctions in aid of the criminal law had been granted:

> (1) Cases where the scale of the criminal penalties available, and the past or threatened course of conduct of the defendants and others in a similar position, were such that it was apparent that attempts to enforce the legislation merely by means of prosecutions would not achieve the public interest purpose for which it has been enacted.
>
> (2) Cases comprising emergency situations in which it was essential for the courts to intervene at once to prevent the continuation of an unlawful state of affairs or conduct which might result in irreversible unlawfulness unless an injunction were granted forthwith.

However, his Lordship at [47] emphasized that the two categories are no more than illustrations in different contexts of the broad test he had referred to (see [28] above). It means that the court may grant injunction in aid of the criminal law when new circumstances so warrant. This reflects the width and flexibility of the equitable jurisdiction in granting injunctions.

31. The Secretary has to ensure that it is in the public interest to seek the civil court's assistance. In *Gouriet*, Lord Diplock at p 499C-D emphasized that those matters referred to at [26(1)] may be properly taken into account by the Attorney General in determining whether the public interest is likely be best served by resorting to this exceptional procedure for enforcing the criminal law. At p 481F-H, Lord Wilberforce listed some other policy considerations that the Attorney

General has to take into account, including whether the law will best be served by the threat of the preventive action, and whether the injunction is likely to be effective or may it be futile.

32. As seen, whether the legislation which the injunction seeks to aid intends criminal proceedings to be the primary means of enforcement or whether criminal proceedings will adequately achieve its public interest purpose are relevant considerations. Put differently, that legislation assists in informing if and how the court should exercise the discretion. This leads to the second aspect of the injunction sought.

D2.2 For safeguarding national security in the HKSAR

33. What the injunction seeks to enjoin is not ordinary criminal offences. They are offences endangering national security. NSL 21 offences are self-evidently offences endangering national security. So are offences under section 10 of the Crimes Ordinance: *HKSAR v Ng Hau Yi Sidney* (2021) 24 HKCFAR 417, at [30]. In respect of section 7 of the NAO, as the Judge rightly observed, insulting the national anthem in the manner proscribed is a crime aimed at arousing sentiments for the independence of Hong Kong, and thus also endangers national security.[29]

34. The mandates in the NSL for safeguarding national security critically informs how the court should approach the injunction sought. This requires some elaboration.

35. The HKSAR is established in accordance with Article 31 of the Constitution of the PRC to uphold the national unity and territorial integrity and to maintain the prosperity and stability of Hong Kong: see the Preamble to the Basic Law. Those are the primary purposes of the "one country, two systems" policy. Giving them effect, BL 1 declares that the HKSAR is an inalienable part of the PRC; and BL 12 stipulates that the HKSAR shall be a local administrative region of the PRC, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.

36. The NSL is likewise enacted for the same primary purposes of, among others, ensuring the resolute, full and faithful implementation of the "one country, two systems" policy under which the people of Hong Kong administer Hong Kong with a high degree of autonomy, safeguarding national security and maintaining prosperity and stability of the HKSAR: NSL 1.

37. NSL 2 refers to BL 1 and BL 12 as the lynchpin for safeguarding national security in the Region thus:

> "The provisions in [BL 1] and [BL 12] on the legal status of the [HKSAR] are the fundamental provisions in the Basic Law. No institution, organization or individual in the Region shall contravene these provisions in exercising their rights and freedoms."

In so prescribing the constitutional order of the HKSAR, BL 1, BL 12 and NSL 2 underscore the general duty of the Region to safeguard national security: *Lai Chee Ying v Secretary for Justice* [2023] 3 HKLRD 275, per Poon CJHC at [28].

38. The NSL adopts a multi-pronged approach to fleshing out that general constitutional duty of the Region to safeguard national security:

> (1) In relation to the different arms of the government: NSL 3(2) imposes that primary duty on the Region and requires the Region to perform that duty accordingly; NSL 3(3) imposes the specific duty on the executive authorities, legislature and judiciary to effectively prevent, suppress and impose punishment for any act or activities endangering national security; NSL 8 specifically imposes similar duty on law enforcement and judicial authorities; and NSL 7 requires the HKSAR to complete, as soon as possible, the legislation under BL 23[30] and to refine relevant laws.
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> (2) In relation to the Hong Kong society: NSL 6 requires Hong Kong citizens to safeguard the sovereignty, unification and territorial integrity of the PRC; any institution, organization or individual to abide by the NSL and local laws in relation to the safeguarding of national security, and not to engage in any act or activity endangering national security; and a resident standing for election or assuming public office to confirm in writing or taking an oath to uphold the Basic Law and to swear allegiance to the Region.
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> (3) In relation to criminal enforcement: see Chapter III on offences and penalties.
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> (4) In relation to other measures: NSL 9 requires the Region to strengthen its work on safeguarding national security and prevention of terrorist activities and to take necessary measures to strengthen public communication, guidance, supervision and regulation over matters concerning national security, including those relating to schools, universities, social organizations, the media, and the internet; and NSL 10 requires the Region to promote national security education in schools and universities and through social organizations, the

media, the internet and other means to raise the awareness of Hong Kong residents of national security and of the obligation to abide by the law.

39. Focusing on the court's duty, NSL 3(3) provides:

> "The … judiciary of the Region shall effectively prevent, suppress and impose punishment for any act or activity endangering national security in accordance with [the NSL] and other relevant laws."

40. As to how the court should carry out the mandate in NSL 3(3), the Court of Final Appeal emphasized in *Secretary for Justice v Timothy Wynn Owen KC* (2022) 25 HKCFAR 288, at [33]:

> "The courts of the HKSAR are of course fully committed to safeguarding national security and to acting effectively to prevent, suppress and impose punishment for any act or activity endangering national security as required by NSL 3. That duty would unfailingly be carried out whenever national security issues are properly raised and duly explored, enabling the courts to undertake a proper adjudication of those issues."

41. Significantly, the Court of Final Appeal went on to point out that, in relation to the context of that case, namely, *ad hoc* admissions of overseas counsel, where national security considerations properly arise, such considerations are plainly of the highest importance to be taken into account. The same must be equally true in other contexts where the court's discretion is invoked, such as the present. The court must give the national security considerations raised by the Secretary such weight as is commensurate with their highest importance.

42. Further, NSL 8 specifically mandates the court to apply the NSL and all local laws for prevention, suppression and punishment of offences endangering national security as follows:

> "In order to safeguard national security effectively, the … judicial authorities of the [HKSAR] shall fully enforce [the NSL] and the laws in force in the Region concerning the prevention of, suppression of, and imposition of punishment for acts and activities endangering national security."

43. In making that mandate, the legislative intent of NSL 8 is clear. The NSL and all existing local laws, including both criminal law and civil law, work in tandem to safeguard national security. The criminal law alone, including prosecution of offences endangering national security under the NSL or local criminal laws such as those in the present case, NSL 21 or sections 9 and 10 of the Crimes Ordinance, is not adequate to achieve the immensely important public interest of safeguarding national security. Put differently, the criminal law including prosecution

is not intended to be the only means of enforcement for safeguarding national security. Where necessary and appropriate, the civil law must come to aid.

44. Most relevantly, the court under the mandate of NSL 8 must fully enforce the equitable jurisprudence in granting injunctions in aid of the criminal law for safeguarding national security because such injunctions, as seen, being preventive in nature, pursue the aim of preventing acts or activities endangering national security. This should be firmly borne in mind when considering the court's approach to applications like the present.

45. The general principles for injunctions in aid of the criminal law, which originate from non-national security contexts, when applied for safeguarding national security, are necessarily subject to the above mandates in the NSL. Further, in recognition of the legislative intent that the NSL is to operate in tandem with local laws, seeking convergence, compatibility and complementarity, subject to NSL 62 which gives priority to the NSL for inconsistencies (*HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, at [29]), they must evolve, as they are so capable of in equity, to give full effect to those mandates. The general principles thus developed may be stated as follows.

46. First, although the NSL does not intend it to be the only means of enforcement, the criminal regime, especially the NSL itself, covering investigations, pre-trial applications, prosecutions, and penalties, is evidently the most powerful legal means for preventing, suppressing and punishing acts and activities endangering national security. In contrast, a civil injunction in aid of the criminal law primarily aims at one particular aspect, that is, preventing such acts and activities. It complements the criminal regime in that regard as a supplementary tool.

47. Second, that being its essential nature, a civil injunction should be granted only if its assistance in terms of prevention of the particular acts or activities endangering national security is necessary to help the criminal law achieve its public interest purpose of safeguarding national security. Implicit in necessity is utility. For if the injunction is of no or little utility, it will provide no or minimal assistance to the criminal law, rendering it unnecessary. However, utility is not the only criterion although it is no doubt a weighty consideration. The overall question remains whether the injunction, with its utility and playing its complementary role, is necessary to assist the criminal law for safeguarding national security.

48. Under this necessity test, mere infringement of the criminal law is not enough because infringement alone does not necessarily mean that the criminal law is inadequate to achieve its public interest purpose of safeguarding national security. On the other hand, it does not require proof of certainty that nothing short of the injunction would achieve the purpose or that the injunction would provide greater deterrence than what the criminal law has already provided, as the Judge decided. That is too high a threshold for the injunction, as a supplementary tool to complement the criminal law, to meet. Further, it may unduly fetter the court's power to grant the injunction in cases when justice and convenience clearly so warrant, contrary to the mandate in the NSL that the equitable jurisdiction to grant injunctions should be applied in full for safeguarding national security.

49. Referring to NSL 3 and NSL 8, Mr Benjamin Yu, SC, for the Secretary,[31] submits that the overall approach is to grant the injunction unless the court considers that it would not have any effect in preventing, suppressing or punishing the act or activity endangering national security in question. Put another way, counsel argues, insofar as the court accepts that the injunction *may contribute in some way* towards preventing, suppressing or punishing the act or activity endangering national security, in order to discharge its duty to *fully enforce the law* in discharge of its constitutional duty to safeguard national security, the injunction ought to be granted. That approach focuses solely on utility. It does not ask the central question if it is necessary to invoke the assistance of the injunction, thereby missing the fundamental point that it is a supplementary tool to complement the criminal law in achieving its public interest purpose of safeguarding national security. Moreover, it appears to be a wholesale displacement of the well-established common law principles for injunctions in aid of the criminal law. Such a drastic step is unwarranted when those principles can be suitably developed to give effect to the mandates in the NSL for safeguarding national security.

50. Third, necessity of the injunction is a context-specific question, entailing a careful evaluation of all the relevant circumstances. Since circumstances vary, the categories of cases where the injunction may be granted are not closed. Based on the authorities discussed above, it can be readily inferred that the injunction is necessary:

> (1) where the past or threatened conduct of the defendants, such as wide-spread, persistent flouting of the criminal law, clearly shows that enforcement by prosecutions alone will not

achieve the public interest purpose of safeguarding national security; or

(2) where there are situations in which it is imperative for the court to intervene at once to prevent the continuation of an unlawful state of affairs or conduct which might give rise to imminent threats to national security; or result in further, serious or even irreparable damage to national security.

51. We turn next to the question of deference.

52. The concept of judicial deference to the executive's evaluative assessment on national security is well-established at common law. For more recent authorities, see *CCSU v Minister for Civil Service* [1985] AC 374; *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153; *R (Begum) v SIAC* [2021] AC 765. It is based on both constitutional and institutional reasons. For constitutional reasons, it is the executive (and not the court) which has the responsibility for assessing and addressing risks to national security. The court is tasked to uphold the rule of law, administer justice and adjudicate disputes independently. In exercising its judicial function, the court must recognize the constitutional boundaries between executive, legislative and judicial power. It reflects the allocation of different functions to the executive and the court under the constitutional design. For institutional reasons, the executive (and not the court) has the requisite experience, expertise, resources and access to information and intelligence which make it best suited to making evaluative judgments on those matters. The court's expertise lies in the law, interpreting and applying the law, and resolving constitutional and legal issues in accordance with the law. It is a recognition of the differences in institutional capacities and expertise possessed by the executive and the court.

53. When national security is at stake, the executive's decision process to address the risks ordinarily takes two steps: (1) making an assessment based on the relevant national security considerations; and (2) devising measures in response. The counter-measures necessarily vary according to the needs and circumstances, including the nature, level and extent of the risks involved, the effectiveness of the means available to address them; and the acceptability or otherwise of the consequent danger. These are all evaluative judgment incapable of objectively verifiable assessment best left to the executive. As Lord Parker of Waddington in *The Zamora* [1916] 2 AC 77, at p 107, quoted by Lord Scarman in *CCSU* at p 405E, famously observed: "Those who are responsible for the national security must be the sole judges of what the national security requires".

54. That is what the Government did in the present case. The Chief Executive first by the Certificate made the assessment that the 4 Acts involve national security as they pose national security risks and are contrary to the interests of national security. The executive next assessed and decided that the measure of a civil injunction in aid of the criminal law would be of utility and indeed necessary to reduce or eliminate the risks posed to national security by the 4 Acts.

55. The same two-step approach was also adopted by the UK Government in *A v Secretary of State for the Home Department* [2005] 2 AC 68. There, following large scale terrorist attacks in the USA on 11 September 2001, the UK Government concluded that there was a public emergency threatening the life of the nation within the meaning of article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms. That formed the assessment at the first step. Accordingly, it made the Human Rights Act 1998 (Designated Derogation) Order 2001, designating the UK's proposed derogation, under article 15, from the right to personal liberty guaranteed by article 5(1) of the Convention, as scheduled to the Human Rights Act 1998, and, by section 23 of the Anti-terrorism, Crime and Security Act 2001, provided for the detention of non-nationals if the Home Secretary believed that their presence in the United Kingdom was a risk to national security and he suspected that they were terrorists who, for the time being, could not be deported because of fears for their safety or other practical considerations. The promulgation of the measure was made at the second step.

56. As both the assessment made at the first step and the counter-measure devised at the second step are matters of judgment and policy entrusted to the executive, the court, in adjudicating disputes arising from or involving them, will give deference to the executive's decision in each of the two steps. This gives rise to two related issues. For each of the two steps: (1) what is the appropriate extent of judicial deference to be given to the executive's decision; and (2) in light of the deference given, what is the judicial role, if any, in examining the executive's decision.

57. In respect of the first step, as in the present case, when the Chief Executive issues a certificate under NSL 47 certifying that an act involves national security when that question arises in the adjudication of a case, that certificate is binding on the court. The court must fully accept the assessment in the certificate. That is deference in its absolute sense. If the assessment is made by the executive by some other means, as noted at [41] above, the court will give great deference to it as is

commensurate with its highest importance. Similarly, in *A*, the majority of the House of Lords held that great weight was to be accorded by the court to the assessment by the UK Government that there was a public emergency threatening the life of the nation within the meaning of article 15 of the Convention because it was a judgment pre-eminently political in character entrusted to the executive and Parliament: see in particular, Lord Bingham at [29].

58. In respect of the second step, in *CCSU*, the House of Lords held that because of deference, once the factual basis is established that national security is a factor relevant to the determination of a case, the court will accept the opinion of the executive on what is required to protect it, unless no reasonable executive could have come to such a conclusion in the circumstances of the case; and that this is not abdication of judicial duties but is an acknowledgement that the court is not in a position to substitute its opinion for the opinion of those responsible for national security: per Lord Fraser at p 402C; per Lord Scarman at pp 404E, 405E, 406B-G; per Lord Diplock at p 412F; and per Lord Roskill at p 420E. On the facts, their Lordships held that it was for the executive to decide whether the requirements of national security outweighed those of fairness for the consultation process with trade unions. Giving deference to the executive, the court approached it as a matter of evidence to consider if the factual basis of the decision had been established.

59. In *Rehman*, the Home Secretary refused the appellant's application for indefinite leave to remain in the UK and gave him a deportation notice on the ground that his association with an organization involved in terrorist activities in the Indian subcontinent. Lord Hoffmann at [50] said that whether something is or is not in the interests of national security is not a matter of judicial decision but is entrusted to the executive. He observed at [53] that the decision as to whether support for a particular movement in a foreign country would be prejudicial to UK's national security might involve delicate questions of foreign policy. They were all within the competence of responsible ministers and not the court. The court was not entitled to substitute its own view for that of the decision-maker on questions of pure expediency. At [54], he listed three functions of the court in national security cases. First, the court must ensure that the factual basis for the executive's opinion that the decision is in the interests of national security is established by evidence. Second, the court may reject the executive's opinion on the ground that it is one which no reasonable minister can in the circumstances reasonably have held. Third, where the issues do not lie within the exclusive province of the executive.[32] For such issues, he

gave as an example the question as to whether deporting someone would infringe his fundamental right against torture or inhuman treatment, over which question the executive has no constitutional prerogative.

60. Based on the above authorities, Mr Yu submits that the executive's decision based on national security considerations is not immune from judicial scrutiny in that there must be evidence to prove that, in fact, such a decision was truly based on national security considerations. But once this fact has been proved, the court will not substitute its own views on what is required in the interests of national security, or what action is needed to protect such interests, such as an injunction in the present case, unless it is one that no reasonable executive authority could have made.

61. We agree but subject to one important caveat. As seen from the third judicial function outlined by Lord Hoffmann in *Rehman* at [54], where an issue arising from the measure adopted by the executive in combating national security risks does not lie within its exclusive province, the executive enjoys no constitutional prerogative. In discharging its judicial function, the court will give appropriate deference to the executive but will make its own judgment on the issue as required. The authorities show that there are at least three areas where the court has been held to be qualified to make its own judgment while giving the executive deference. They involve issues with constitutional or legal nature or content:

> (1) Where a fundamental right of the person affected by the measure is engaged.[33] In *A*, the majority of the House of Lords held that although the response necessary to protect national security was a matter of political judgment for the executive and Parliament, where Convention rights were in issue, national courts were required to afford the appellants under detention effective protection by adopting an intensive review of whether such a right had been impugned, and the courts were not precluded by any doctrine of deference from examining the proportionality of a measure taken to restrict such a right; that the right to personal liberty was among the most fundamental rights protected and the restrictions imposed by section 23 of the 2001 Act called for close scrutiny. On the facts, they held that the measure did not satisfy the proportionality test and amounted to discrimination.

(2) Where the requirement of fair trial is in issue: *A*, per Lord Bingham at [39].

(3) Where the question of open justice is raised. In *Attorney General v BBC* [2022] EWHC 380, the Attorney General sought an injunction to restrain BBC from broadcasting a programme on national security ground. The Attorney General argued that the hearing should proceed in private invoking, among others, national security. Chamberlain J, after noting that the appropriate extent of deference is context-specific, held at [45] that the decision in *Begum* was one which Parliament entrusted to the executive whereas the question whether to permit a private hearing was one which involved a balancing exercise between the public interest in open justice and the public interests relied upon in favour of privacy; and that the Civil Procedure Rules, for equally good constitutional reasons, allocates the performance of that balancing exercise to the court, and not the executive. He further noted at [46] that in striking the balance, the court should give appropriate (and considerable) respect to properly reasoned national security assessments but the court must also be astute to consider and probe such assessment with care. On the facts, he was not satisfied that the Attorney General had discharged the burden of establishing by clear and cogent evidence that the derogation from the principle of open justice was required or justified.

62. In so performing its judicial role, the court does not cross the constitutional boundary and trespass into the province of national security exclusively entrusted to the executive. Nor does it attempt to substitute its view over the executive's for what national security interests best require. On the contrary, the court is very much aware of the heavy burden resting on the Government to protect national security and all who live in the HKSAR. The court is also acutely conscious that the Government alone is able to evaluate and decide what counter-measures are needed and what steps will suffice. The court is neither equipped to make such decisions nor charged with that onerous responsibility. Hence the court must give appropriate deference to the executive as primary decision maker. But at the same time, when constitutional or legal issues arise, under the constitutional design of the Region, it is the function of the court, and not the executive, to resolve them: see *A*, per Lord Nicholls at [79] - [80]; per Lord Bingham at [29].

63. Here, the issue is whether an injunction is necessary to aid the criminal law in addressing the national security risks. Since an injunction is a form of judicial remedy which only the court can grant, that issue does not lie within the exclusive province of the executive. Rather, it is eminently a legal question for the court, and the court alone, to decide. The court will have to make its own judgment guided by the approach and the principles as expounded in this judgment, while giving considerable deference to the executive's decision to invoke the court's jurisdiction. In answering the question, the court no doubt bears firmly in mind its constitutional duty to safeguard national security and the mandate in the NSL to deploy the equitable jurisdiction to grant injunctions in full to safeguard national security.

D2.3 Concerns of potential unfairness in contempt proceedings

64. The third aspect of the injunction also arises from how it is going to work in tandem with the NSL for safeguarding national security.

65. As noted, cautions had been expressed in the authorities on perceived unfairness arising from contempt proceedings and criminal proceedings involving the same facts.[34] This explains why the court must exercise great caution before granting the injunction. Echoing those cautions and accepting the submissions of Mr Abraham Chan SC, amicus curiae,[35] the Judge concluded that there are conflicts and inconsistencies between the injunction and the NSL regime that the former would not operate coherently with the latter. With respect, and despite Mr Chan's submissions to the contrary, we have difficulty in agreeing with the Judge.

66. As a general proposition, the perceived unfairness is inherent in any injunction granted in aid of the criminal law. However, that alone would not render the contempt proceedings incompatible or incoherent with the criminal regime. Otherwise, no such injunction could ever be granted. So as a matter of principle, the perceived unfairness *per se* is not a ground for refusing to grant the injunction.

67. It is settled that contempt proceedings are distinct from criminal proceedings although they may arise from the same facts: *Director of Public Prosecutions v Tweddell* [2002] 2 FLR 400, per Latham LJ at [14]. Contempt proceedings are founded on the inherent jurisdiction of the court to enforce its orders with the primary purpose of preventing interference with the due administration of justice, which is different from criminal proceedings for maintenance of law and order. Mr Chan submits that civil contempt had been historically regarded as a common law misdemeanor. As such, committal proceedings could potentially be

regarded as prosecution in the NSL context. He further argues that offences endangering national security in the NSL cover contempt proceedings in relation to violation of the injunction. However, it is well established that given the clear distinction between contempt proceedings and criminal proceedings, both in terms of jurisdiction and procedure, the former are not criminal prosecution as such: *Chu Kong v Sun Min* (2022) 25 HKCFAR 318, at [67].

68. Referring to the civil nature of contempt proceedings (*Secretary for Justice v Cheung Kai Yin* [2016] 4 HKLRD 367), Mr Chan submits that the contemnor would be deprived of the procedural safeguards in the NSL criminal regime. However, the court, acutely mindful of the serious consequence that an alleged contemnor is facing, will ensure that his right to a fair trial is fully protected at every stage of the contempt proceedings.

69. In principle, contempt proceedings should be dealt with swiftly and decisively. On the other hand, the court has a discretion to adjourn contempt proceedings pending the outcome of the criminal proceedings where it is satisfied that there would otherwise be a real risk of prejudice which might lead to injustice. In an extreme case, the court may even stay either the contempt proceedings or criminal proceedings. See *M v M (Contempt: Committal)* [1997] 1 FLR 762, per Lord Bingham at p 764B-D; *Barnet London Borough Council v Hurst* [2003] 1 WLR 722, per Brooke LJ at [33]. These safeguards minimize any real risk of prejudice that an offender may face in two sets of parallel proceedings, and address any concern about the impression as regards the proper and fair administration of justice by the Secretary bringing both proceedings against the same person for precisely the same circumstances.

70. Further, in terms of punishment for contempt, it is well-established that the court will avoid punishing the offender twice for the same events: *Hale v Tanner (Practice Note)* [2000] 1 WLR 2377, per Hale LJ (as she then was) at p 2381. Contempt proceedings are ordinarily dealt with first, which would ensure that, if proved, the contemnor would be punished before any sentence in parallel criminal proceedings: *Secretary for Justice v Chan Po Hong* [2022] 5 HKLRD 185, per Coleman J at [67]. In *Slade v Slade (CA)* [2010] 1 WLR 1262, Wall LJ at [35] - [38] identified three guiding principles for punishing the contemnor:

> (1) The court is not sentencing for the criminal equivalent of what the contemnor has done. (If that occurred, the sentence would be reduced by the appellate court: *Smith v Smith* [1991]

2 FLR 55, per Neill LJ at p 63E-F, and per Balcombe LJ at p 64F-G; *Tweddell*, ibid.)

(2) The court should know and should have as much information as possible about the parties and any concurrent criminal proceedings relating to the same or similar facts.

(3) Sentences for contempt of court should not be manifestly discrepant with sentences passed in criminal proceedings for comparable offences.

These principles ensure that the contemnor is punished for the contempt and not the criminal aspect of the same conduct and the sentence is commensurate with the severity of the contempt.

71. Turning to procedure, the Judge accepted Mr Chan's submission that the court must be satisfied as to the compatibility and workability of the civil process in enforcing the injunction as regards the features of the NSL regime that he identified. Noting some differences in procedure, the Judge doubted if contempt proceedings would operate compatibly and coherently with the procedural requirements mandated by the NSL.[36] However, by their very nature and as prescribed by Order 52 of the Rules of the High Court,[37] contempt proceedings must be conducted under different rules and procedure from those prescribed by the NSL. Seeking compatibility between two different sets of rules and procedure designed for different purposes is by definition quite impossible. More importantly, it misses the mark. The real question to ask is whether contempt proceedings would, in substance and not as a matter of procedure, work compatibly with the NSL regime for safeguarding national security.

72. The Judge highlighted two specific areas as examples of the purported conflicts or inconsistences:

(1) The court in its civil jurisdiction is called upon to pronounce whether a party had committed criminal acts in breach of the NSL when the same legal and factual questions would have to be determined in criminal proceedings against him.[38] The Judge seemed to have been troubled by three matters. First, double jeopardy, which we have already dealt with above. Second, standard of proof applied in contempt proceedings. But it is settled that the court will apply the criminal standard, that is, proof beyond reasonable doubt, because of the penal consequences: *Kao Lee & Yip v Donald Koo* (2009) 12 HKCFAR 830, at [30]; *Cheung Kai Yin* per Lam VP (as Lam PJ then was) at [24] - [27]. Third, risks of

inconsistent findings. However, it is well-established that subject to any statutory provision, a decision by a previous court, be it civil or criminal, has no relevance and is inadmissible in a subsequent court adjudicating on another cause or matter on the same facts. The second court simply proceeds in light of the evidence placed before it and reaches its own findings: *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, per Goddard LJ at pp 594-595; and *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1, per Sir Andrew Morritt VC at [18]. And there is no such statutory exception in the present case.

(2) There are time limits for prosecution of offences under sections 7(2) and (4) of the NAO and section 10 whereas there is no such time limits for contempt proceedings. The Judge queried if the injunction had the effect of overriding the statutory limits, which is a matter for the legislature.[39] With respect, such a view conflates the very different purposes contempt proceedings and criminal proceedings seek to achieve which determine the time limits. Contempt proceedings have no time limit because the due administration of justice is at stake, which goes to the root of the rule of law. The time limits prescribed by the NAO are plainly dictated by its own underlying legislative policy considerations. There is no question of the injunction seeking to override the statutory limits.

73. For the above reasons, the Judge's finding of conflict or inconsistency that would render it inappropriate to grant the injunction cannot be supported.

D2.4 Potentially engaging the right to freedom of expression

74. Relating to the judicial function of the court discussed at Part D2.2 above is the fourth aspect of the injunction, namely, it may potentially engage the fundamental right to freedom of expression. We used the word "potentially" advisedly. It is because strictly speaking, the right to free expression is not or cannot possibly be engaged by the 4 Acts that the injunction seeks to enjoin. For the right is not a licence to commit any criminal offence, let alone the 4 Acts. However, as the Judge rightly observed, potential "chilling effects" as described above, though not intended by the injunction, may arise.[40]

75. Under both the Basic Law and the NSL, the court has the duty to ensure that the injunction does not unjustifiably interfere with that right.

NSL 4 provides that fundamental rights guaranteed under the Basic Law and the Hong Kong Bill of Rights Ordinance shall be protected in accordance with the law. Its legislative intent is to apply the constitutional principles developed at common law under BL 39 and BOR 16 on restricting fundamental rights for the protection of national security, such as legality and proportionality tests, to determine if any measure engaging fundamental rights is justified: *HKSAR v Tam Tak Chi* [2024] HKCA 231, at [103] - [111]; see also *R (Lord Carlile of Berriew and others) v Secretary of State for the Home Department* [2015] AC 945, per Lord Sumption JSC at [34].

76. Thus, as a general proposition, if an injunction in aid of the criminal law for safeguarding national security engages a fundamental right, the court must scrutinize it to see if it is constitutionally justified. While the exercise depends on the actual circumstances, three obvious general points can be made:

(1) The terms of the injunction should be clear and certain.

(2) Its scope should not be wider than that of the criminal law.

(3) It is not an open-end exercise testing the injunction against every fundamental right listed in the Basic Law and the BOR on a hypothetical basis. The court only needs to consider the fundamental right said to be engaged on the facts of the case.

77. The Judge found that subject to utility, the injunction satisfied the proportionality test. We disagree with his view on utility but otherwise agree with his analysis and conclusion on proportionality. As is entirely consistent with the Secretary's stance throughout that he does not seek to ban the Song *per se* but only targets the 4 Acts, Mr Yu fairly accepts that the injunction should contain exceptions to make it crystal clear that legitimate acts and activities in connection with the Song will not be prohibited.

D2.5 With contra mundum effect binding on newcomers

78. The fifth aspect of the injunction is its *contra mundum* effect. For it to be truly effective, the injunction applies to everyone in Hong Kong. It binds not only the Defendants but also "newcomers", that is, persons who are not parties to the proceedings. They are neither the Defendants nor identifiable, and who have not yet committed or threatened to commit the prohibited acts, but may do so in the future.

79. In this regard, Mr Chan draws our attention to the perceived lack of opportunity for a non-party to be heard and make contrary representations prior to being made subject to the injunction, and possible liability for contempt irrespective of whether he knows of its contents when it has been served by alternative means. His submissions largely echo the Judge's concerns summarized at [12] above.

80. In *Wolverhampton*, after reviewing the authorities of the lower courts, some of which support the Judge's and Mr Chan's concerns, such as *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802 (CA), the UK Supreme Court clarified the law in relation to newcomer injunctions and authoritatively put them on a firm juridical basis in equity. For present purposes, the following main points made by the Supreme Court will suffice:

> (1) Equity recognizes that injunctions may have a coercive effect which extends well beyond the persons named as defendants in the relevant order: [155]. There are well-established situations in which the court grants orders against non-parties in the interests of justice: [23] - [42]. Newcomer injunctions can be regarded as being analogous to other injunctions or orders which have a binding effect upon the public at large: [109].
>
> (2) The difficulty which has been experienced in the authorities arise from treating newcomer injunctions as a particular type of conventional injunction *inter partes*, subject to the requirements as to service: [132]. However, a newcomer injunction is a wholly new type of injunction with no very closely related ancestor from which it might be described as evolutionary offspring, although analogies can be drawn with some established forms of orders: [144].
>
> (3) Newcomer injunctions are typically neither interim or final: [139]. They are all in substance *ex parte*, or without notice, injunctions. The ordinary rule that "you cannot have an injunction except against a party to the suit" does not apply, and in which well-established safeguards exist for anyone affected by it to have it varied or discharged: [26], [40], [132] and [151].
>
> (4) In considering whether a newcomer injunction complies with procedural and substantive fairness, it is the compliant (law-abiding) newcomer, not the contemptuous breaker of the injunction, who ought to be regarded as the paradigm. The

evaluation of potential injustice inherent in the process of granting newcomer injunctions is more likely to be reliable if there is no assumption that the newcomers affected by the injunction are persons so regardless of the law that they will breach it, even if the grant necessarily assumes a real risk that a significant number would, but for the injunction, violate the public rights sought to be protected by the injunction: [141].

(5) An ordinary law-abiding newcomer, once notified of the existence of the injunction, may be expected to comply with it rather than act in breach of it. At the point of compliance, that person will not be a defendant, and unless they apply to do so they will never become a defendant: [140]. It means that the injunction will not have the effect of depriving such law-abiding person of the right to make representation to the court, or risking their exposure to contempt for breach.

(6) For a newcomer who wishes to take further action which would be in breach of the injunction, the proper course is not to take such action but to apply to court for an order varying it or setting it aside: [40]. He would then be at liberty to advance any reasons which could have advanced in opposition to the grant of the injunction when it was first made: [178]. It means that the injunction will not deprive a newcomer of the right to make contrary representations to the court.

81. These latest authoritative statements of principle have adequately addressed the concerns raised by the Judge and Mr Chan on the *contra mundum* effect of the injunction. Provided that there are sufficient safeguards in the injunction to enable any person affected by it or a newcomer to apply to the court for setting aside, variation, clarification or to make other representations as appropriate, its *contra mundum* effect alone is not a ground for not granting it.

82. Further, as Mr Yu agrees, since it is in substance an *ex parte* injunction, the Secretary, as the applicant discharging his duty of full and frank disclosure, should draw the court's attention to any real points based on the available evidence that may affect the court's exercise of the discretion, such as the potential engagement of the right of free expression in the present case.

D2.6 Summary

83. Drawing the above considerations together, the court's approach to the injunction sought can be shortly stated as follows.

84. First, given its complementary nature, a civil injunction should be granted only if its assistance in terms of prevention of the particular acts or activities endangering national security is necessary to help the criminal law achieve its public interest purpose of safeguarding national security. Necessity does not require proof of certainty that nothing short of the injunction would achieve the purpose or that the injunction would provide greater deterrence than what the criminal law has already provided. Utility of the injunction is a weighty but not conclusive factor in the overall evaluation of its necessity.

85. Second, in deciding if the injunction should be granted:

> (1) In relation to the assessment of national security by the executive, the court is bound by a certificate issued by the Chief Executive under NSL 47, if any; or in other cases, will give great deference to the assessment.
>
> (2) In relation to the injunction as a counter-measure, since it is a legal question to be resolved by the court alone, the court will make its own judgment while giving considerable deference to the executive's decision to invoke the court's jurisdiction. The court will also firmly bear in mind its constitutional duty to safeguard national security and the mandate in the NSL to fully deploy the equitable jurisdiction to grant injunctions to safeguard national security in the exercise of the discretion.

86. Third, if the injunction engages any fundamental right, the court has to be satisfied that the restriction imposed is constitutionally justified. The terms of the injunction should be clear and certain; should not be wider than the criminal law; and should not constitute any disproportionate encroachment of the right.

87. Fourth, as a newcomer injunction, it should contain clear safeguards to enable any person affected by it or a newcomer to come to the court for setting aside, variation, clarification or to make other representations as appropriate. Further, as an *ex parte* injunction in substance, the Secretary as applicant should draw the court's attention to any material points on the available evidence that may affect the court's exercise of the discretion.

E. THE PRESENT CASE

88. The Judge refused to grant the injunction mainly because he considered that it was of no real utility and conflicted with the criminal law. He also had concern over the *contra mundum* effect of the

injunction. For the analysis and reasons given above, we are of the view that the Judge's findings and reasoning on the utility of the injunction, its compatibility with the criminal law and its *contra mundum* effect, and accordingly his exercise of discretion cannot be supported. We do not consider it necessary to dwell on the complaints that Mr Yu has raised against the Judge's reasoning, except this. Although we differ from the Judge, we do not accept the criticism that the Judge failed in his duty to safeguard national security merely because he did not adopt the test or approach that counsel advocated and, for the reasons that he gave, came to his own conclusion not to grant the injunction.

89. In exercising our discretion afresh and adopting the proper approach, we are satisfied that an injunction should be granted.

90. The composer of the Song has intended it to be a "weapon" and so it had become. It had been used as an impetus to propel the violent protests plaguing Hong Kong since 2019. It is powerful in arousing emotions among certain fractions of the society. It has the effect of justifying and even romanticizing and glorifying the unlawful and violent acts inflicted on Hong Kong in the past few years, arousing and rekindling strong emotions and the desire to violent confrontations. Further, in the hands of those with the intention to incite secession and sedition, the Song can be deployed to arouse anti-establishment sentiments and belief in the separation of the HKSAR from the PRC.

91. Moreover, as is the case of any national anthem, the national anthem of the PRC is a symbol and sign of the State. It represents the country with her sovereignty, dignity, unity and territorial integrity and is the identity of the Chinese people. Misrepresenting the Song as the national anthem of the HKSAR in the manner proscribed is both an offence under the NAO and, importantly too, constitutes an act endangering national security as it misrepresents Hong Kong as an independent state or arouses the sentiments for the independence of Hong Kong.

92. By the Certificate, the Chief Executive has assessed that the 4 Acts pose national security risks and are contrary to the interests of national security. The Certificate is binding on the court. Further, as explained above, the same conclusion can be reached on the evidence.

93. Plainly, there is an immediate need to stop the 4 Acts. However, the Song is still freely available on the internet and remains prevalent. Having regard to the reasons advanced on behalf of the Secretary at [10] above, we accept the assessment of the executive that prosecutions alone are clearly not adequate to tackle the acute criminal problems and

that there is a compelling need for an injunction, as a counter-measure, to aid the criminal law for safeguarding national security.

94. First, the past and threatened conduct of the Defendants as seen in the wide-spread, persistent flouting of the criminal law before and especially after the NSL came into force, exacerbated by the misconceptions harboured by many members of the public about the unlawful activities in connection with the Song, clearly shows that the criminal law alone will not achieve the public interest purpose of safeguarding national security. The injunction must come to aid in terms of enhancing prevention by providing additional deterrence to actual or potential offenders and dispelling the misconceptions held by the public.

95. Second, such is the seriousness of the criminal problems that the court must intervene immediately to prevent the continuation of the prevailing unlawful state of affairs; otherwise any further damage to national security would likely to be irreparable.

96. Third, an injunction is necessary to persuade the IPOs to remove the problematic videos in connection with the Song on their platforms. In this connection, a useful analogy may be drawn from internet blocking orders.

97. As observed in *Wolverhampton*, at [49], an internet blocking order is a new type of injunction granted in the absence of a cause of action against the defendant, developed to address the problems arising from the infringement of intellectual property rights via the internet. It is granted to compel the internet service providers, who are themselves innocent of any wrongdoing, to prevent their facilities from being used to commit or facilitate a wrong. The UK Supreme Court observed:

> "161. But internet blocking orders (para 49 above) stand in a different category. The applicant intellectual property owner does not seek assistance from internet service providers ('ISPs') to enable it to identify and then sue the wrongdoers. It seeks an injunction against the ISP because it is a much more efficient way of protecting its intellectual property rights than suing the numerous wrongdoers, even though it is no part of its case against the ISP that it is, or has even threatened to be, itself a wrongdoer. The injunction is based upon the application of 'ordinary principles of equity': see *Cartier* (para 20 above) per Lord Sumption at para 15. Specifically, the principle is that, once notified of the selling of infringing goods through its network, the ISP comes under a duty, but only if so requested by the court, to prevent the use of its facilities to facilitate a wrong by the sellers. The proceedings against the ISP may be the only proceedings which the intellectual property owner intends to take. Proceedings directly against the wrongdoers are usually impracticable, because of difficulty in identifying the operators of the infringing websites, their number and their location, typically in places

outside the jurisdiction of the court: see per Arnold J at first instance in *Cartier* [2014] EWHC 3354 (Ch); [2015] Bus LR 298; [2015] RPC 7 at para 198.

162. The effect of an internet blocking order, or the cumulative effect of such orders against ISPs which share most of the relevant market, is therefore to hinder the wrongdoers from pursuing their infringing sales on the internet, without them ever being named or joined as defendants in the proceedings or otherwise given a procedural opportunity to advance any defence, other than by way of liberty to apply to vary or discharge the order: see again per Arnold J at para 262.

163. Although therefore internet blocking orders are not in form injunctions against persons unknown, they do in substance share many of the supposedly objectionable features of newcomer injunctions, if viewed from the perspective of those (the infringers) whose wrongdoings are in substance sought to be restrained. They are, quoad the wrongdoers, made without notice. They are not granted to hold the ring pending joinder of the wrongdoers and a subsequent interim hearing on notice, still less a trial. The proceedings in which they are made are, albeit in a sense indirectly, a form of enforcement of rights which are not seriously in dispute, rather than a means of dispute resolution. They have the effect, when made against the ISPs who control almost the whole market, of preventing the infringers carrying on their business from any location in the world on the primary digital platform through which they seek to market their infringing goods. The infringers whose activities are impeded by the injunctions are usually beyond the territorial jurisdiction of the English court. Indeed that is a principal justification for the grant of an injunction against the ISPs.

164. Viewed in that way, internet blocking orders are in substance more of a precedent or jumping-off point for the development of newcomer injunctions than might at first sight appear. They demonstrate the imaginative way in which equity has provided an effective remedy for the protection and enforcement of civil rights, where conventional means of proceeding against the wrongdoers are impracticable or ineffective, where the objective of protecting the integrity or effectiveness of related court process is absent, and where the risk of injustice of a without notice order as against alleged wrongdoers is regarded as sufficiently met by the preservation of liberty to them to apply to have the order discharged."

98. Although the injunction is not an internet blocking order as such and does not name the IPOs as defendants, most of the principles discussed by the Supreme Court are apposite. The evidence before us shows how in light of the way the criminal acts in connection with the Song are conducted on the internet by various unidentifiable persons, it is impracticable to bring proceedings against each of the wrongdoers. A much more effective way to safeguard national security in such circumstances is to ask the IPOs to stop facilitating the acts being

carried out on their platforms, to break the circuit as submitted by Mr Yu. Although the IPOs have not taken part in these proceedings, they have indicated that they are ready to accede to the Government's request if there is a court order. The injunction is therefore necessary. For completeness, it should be noted that the evidence before us does not indicate that the IPOs have concerns over or difficulties in complying with the injunction.

99. The Judge considered that education might be more effective in remedying the public's misconceptions about broadcasting etc of the Song. As seen, education is one of the tools to be deployed for safeguarding national security under the multi-pronged approach in the NSL. Its primary purpose is to instil in the public values and norms for national security. It will help dispel the public's misconception about broadcasting etc of the Song, but that will take time. However, as explained, in terms of a forceful, immediate response to aid the criminal law in tackling the damage and threats to national security caused by the 4 Acts and the public misconceptions, injunction, as a preventive measure backed by the regime for contempt, is clearly more effective than education.

100. We finally come to the terms of the injunction.

101. For the prohibition of the 4 Acts, accepting that the injunction should not be wider than the criminal law, Mr Yu agrees with our observation that in respect of the NAO, the prohibition should be revised to address misrepresentation of the Song as the national anthem insofar as the HKSAR is concerned. Further, the reference to section 9 of the Crimes Ordinance (now repealed) has to be changed to section 23 of the Safeguarding National Security Ordinance (Instrument A305).

102. Mr Yu specifically asks for an order that the acts of publishing of the 32 Items via the Uniform Resource Locators constitute acts being restrained by the injunction. This does not feature in the relief claimed in the Indorsement of Claim or the summons. Presently formulated, the Indorsement of Claim and the summons, and for that matter, the Certificate, all direct at acts committed in relation to the Song with the requisite *mens rea*. They do not specifically refer to the acts of publishing of the 32 items via the URLs *simplicitor*. Mr Yu however submits that while the injunction does not seek to prohibit the specified acts without the requisite *mens rea,* the evidence clearly establishes that the acts of publishing the 32 Items via the URLs are done with the requisite *mens rea*. To make good his submissions, Mr Yu has taken us through the evidence, showing that the 32 Items were broadcast or published etc either in circumstances capable of inciting others to

commit secession or in such a way as to misrepresent the Song as the national anthem insofar as the HKSAR is concerned. Giving the matter due consideration, we are satisfied that for the purpose of the injunction, both the requisite *actus reus* and *mens rea* are present for each of the 32 Items and that there is a proper basis for the order sought.

103. To address the concern about potential engagement of the right to free expression, Mr Yu has proposed exceptions, which we accept, for lawful activities conducted in connection with the Song, such as those for the purposes of academic activity and news activity, which on the evidence now before us are the two most apparent examples.[41]

104. Finally, to ensure that any person affected by the injunction or a newcomer can apply to the court, as Mr Yu accepts, there should be liberty to apply.

105. For the above reasons, we allow the appeal, set aside the Judge's order and make an interim injunction as appeared in Annex to this judgment, with no order as to costs.

106. Last but not least, we would like to thank counsel and the amici curiae for their able assistance.

(Jeremy Poon)	(Carlye Chu)	(Anthea Pang)
Chief Judge of the High Court	Vice President	Justice of Appeal

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

Mr Abraham Chan SC and Mr Martin Ho, Amici Curiae

The Defendants were not represented and did not appear

Annex

1. Until trial or further order of the Court, there be an injunction restraining the Defendants and each of them, whether acting by themselves, their servants or agents, or otherwise howsoever, from doing any of the following acts:

(a) Broadcasting, performing, printing, publishing, selling, offering for sale, distributing, disseminating, displaying or reproducing in any way including on the internet and/or any media accessible online and/or any internet-based platform or medium, the song commonly known as "願榮光歸香港" or "Glory to Hong Kong" ("**Song**"), whether its melody or lyrics or in combination:

(i) with the intent of and in circumstances capable of inciting others to commit secession, contrary to Article 21 of The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region; or

(ii) with a seditious intention as defined in section 23 of the Safeguarding National Security Ordinance (Instrument A305); and in particular to advocate the separation of the Hong Kong Special Administrative Region ("**HKSAR**") from the People's Republic of China; or

(b) Broadcasting, performing, printing, publishing, selling, offering for sale, distributing, disseminating, displaying or reproducing in any way including on the internet and/or any media accessible online and/or any internet-based platform or medium, the Song, whether its melody or lyrics or in combination, in such a way:

(i) as to misrepresent it as the national anthem insofar as the HKSAR is concerned; or

(ii) as to suggest that the HKSAR is an independent state and has a national anthem of her own;

and

with intent to insult the national anthem, contrary to section 7 of the National Anthem Ordinance (Instrument A405); or

(c) Wilfully assisting, causing, procuring, inciting, aiding, abetting others to commit or participate in any of the acts as set out in paragraph 1(a) or 1(b); or

(d) Knowingly authorizing, permitting or allowing others to commit any of the acts or participate in any of the acts as set out in paragraph 1(a) or 1(b);

2. Without limiting the generality of paragraph 1, the acts of publishing the items via the Uniform Resource Locators (URLs) set out in the Schedule hereunder constitute acts being restrained by paragraph 1(a) and/or 1(b);

3. The Defendants and each of them shall take such action forthwith to cause any of the acts as set out in paragraph 1 to cease;

4. For the avoidance of doubt, this Order does not prohibit any lawful acts in connection with the Song, whether its melody or lyrics or in combination, conducted for purposes such as academic activity and news activity, provided that they do not involve any of the acts as set out in paragraph 1(a) to (d);

5. In this Order:

(a) The Song as defined in paragraph 1(a) and any reference thereto include any adaptation of the Song, the melody and/or lyrics of which are substantially the same as the Song; and

(b) 'News activity' in paragraph 4 means any journalistic activity and includes:

(i) The –

I. gathering of news;

II. preparation or compiling of articles, programmes or other publications concerning news; or

III. observations on news or current affairs, for the purpose of dissemination to the public; or

(ii) The dissemination to the public of –

I. any article or programme or other publication of or concerning news; or

II. observations on news or current affairs;

6. There is liberty to apply.

7. Leave be granted to the Plaintiff to serve this Order on the Defendants by way of substituted service by (a) publishing a copy of the sealed Order on the webpages of the Hong Kong Police Force, the Department of Justice and the Government of the HKSAR (**"Government"**); (b) exhibiting securely at a conspicuous place that is accessible by the public at the Wan Chai Division Report Room, No. 1 Arsenal Street, Wanchai, Hong Kong a notice containing the QR code linking to this Order; and (c) issuing a press release by the Government in which the three aforesaid webpages are set out and the QR code linking to this Order is provided.

SCHEDULE

1. **Hong Kong Anthem Official |**
   https://www.youtube.com/watch?v=gLhjkLToSqs
2. 《願榮光歸香港》合集 香港國歌 Hong
   https://www.youtube.com/watch?v=0u3yueQa7-s
3. National Anthem of Hong Kong -
   https://www.youtube.com/watch?v=cxsKSlDbBIY
4. 香港國歌 National Anth
   《願榮光歸香港 Glory To Hong Kong
   https://www.youtube.com/watch?v=zHyJYeWdWJM
5. 《願榮光歸香港》 anthem
   https://www.youtube.com/watch?v=3YaxgmzJP5E
6. 《願榮光歸香港》anthem ver3.0
   https://www.youtube.com/watch?v=TvNRAefh3SE
7. anthem mv test1,
   https://www.youtube.com/watch?v=AxsWxTGn7iw
8. 《願榮光歸香港》原版 《Glory to Hong Kong》
   https://www.youtube.com/watch?v=y7yRDOLCy4Y
9. 《願榮光歸香港》正式進行曲版 《Glory to Hong

https://www.youtube.com/watch?v=YxptkMBYk2A

10. 《Glory to Hong Kong》International & Instru
https://www.youtube.com/watch?v=e1Qy-WHErOE
11. 《영광이 다시 오길》 《Glory to
https://www.youtube.com/watch?v=3R268czrPaE
12. 《Glory to Hong Kong》 《
https://www.youtube.com/watch?v=jXZNOecZreY
13. 《Glory to Hong Kong》《願榮光
https://www.youtube.com/watch?v=7y5JOd7jWqk
14. 【榮光燦爛】藝術很有事 第60集, 02:24 to 04:02, 05:09 to 05:55,
https://www.youtube.com/watch?v=plDe-E3dHFA
15. 願榮光歸香港 (純樂器版),
https://www.youtube.com/watch?v=ZJetLUXmhK4
16. 《願榮光歸香港》 中樂合奏及合唱團版
https://www.youtube.com/watch?v=VHOZuIO5G2s
17. 【香港 9•23】 【轉載】《願榮光歸香港》手語版,
https://www.youtube.com/watch?v=OQDUjVOZBgk
18. 10.11 【超好聽】《願榮光歸香港》英文版 | 旺角街頭藝人演唱 | Bu
https://www.youtube.com/watch?v=kav9OnKLAZw
19. Glory to Hong Kong—
https://www.youtube.com/watch?v=Chx1a-IV6yM
20. 《願榮光歸香港台語版》台灣《撐香港，要自由》 演唱會 |
https://www.youtube.com/watch?v=IVaop1QoyKg
21. 香港に栄光あれ - 珠夢
https://www.youtube.com/watch?v=2PF1a8-AF20
22. 【轉載】《영광이 다시 오길》 《Glory to
https://www.youtube.com/watch?v=kXclYJqB56g
23. 《願榮光歸香港》德語版 Möge der Ruhm
https://www.youtube.com/watch?v=4gv-MybAcUU
24. Glorie aan Hong Kong (
https://www.youtube.com/watch?v=cHHNQdxxO8Q
25. 《願榮光歸香港 x 肥媽有話兒》大戲版,
https://www.youtube.com/watch?v=FjHaT-EQJxc

26. 《願榮光歸香港》管弦樂團及合唱團版 MV, https://youtu.be/oUIDL4SB60g

27. 《願榮光歸香港 》新年中樂版, https://www.youtube.com/watch?v=U2jE2jixKK4

28. 《願榮光歸香港》光輝版, 00:00 https://www.youtube.com/watch?v=4qNmhaWxTbo

29. "Glory to Hong Kong" - Anthem of The https://youtu.be/6yjLlYNFKCg

30. 何韻詩在中環慶祝集會上演唱《願榮光歸香港》, https://youtu.be/4MU8xmG9hTw

31. 路上ライブで「願榮光歸香港」 警察が出動【香港中環10月24日】一位 民的支持與歌手的無懼 事件最後和平收場, 05: https://youtu.be/bhJZav1qQsc

32. MAY GLORY BE TO HONG KO https://youtu.be/koOAJHt9UO8

- END -

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[1] Cap 4.

[2] See [7] for definition.

[3] [2023] HKCFI 1950 (“Decision”).

[4] Leave to appeal was granted by the Judge, and leave to rely on additional grounds in this appeal was granted by this Court in *CAMP 303/2023*.

[5] See, for example, an interview published by Stand News on 11 September 2019 entitled “【專訪】「香港之歌」誕生？《願榮光歸香港》創作人：音樂是凝聚人心最強武器”; an article in the TIME magazine on 12 September 2019 entitled “Listen to the Song That Hong Kong’s Youthful Protestors Are Calling Their ‘National Anthem’”; an article published by Citizen News on 22 December 2019 entitled “年度歌曲《願榮光歸香港》 創作人：歌詞坦誠最有共鳴”; and a video published on YouTube by the name “【榮光燦爛】藝術很有事 第60集” on 3 June 2020.

[6] Cap 200. It has been repealed by the enactment of the Safeguarding National Security Ordinance (Instrument A305) which came into force on 23 March 2024. The offences of seditious intention are now contained in sections 23 and 24 of that Ordinance.

[7] Instrument A405.

[8] That part of the Certificate is couched in terms identical to paragraph 1 of the Indorsement of Claim.

[9] See Wong's Affidavit, [71] - [75].

[10] Decision, [34] - [43].

[11] Decision, [51].

[12] Decision, [52].

[13] Decision, [57].

[14] Decision, [58].

[15] Decision, [63].

[16] Decision, [64].

[17] Decision, [68].

[18] Ibid.

[19] Decision, [69].

[20] Decision, [71].

[21] Decision, [82] - [83].

[22] Grounds 1 and 2 of the grounds of appeal.

[23] Ground 3 of the grounds of appeal.

[24] Ground 5 of the grounds of appeal. Ground 4 complains that the Judge failed to take into account relevant considerations and took into account irrelevant considerations. Ground 6 complains that the Judge failed to giving separate consideration to the grant of the injunction in relation to restraining insult to the national anthem by misrepresenting the Song as the national anthem. For reasons which will become apparent, it is not necessary to deal with Grounds 4 or 6 separately.

[25] The judgment was given by Lord Reed, Lord Briggs and Lord Kitchin (with whom Lord Hodge and Lord Lloyd-Jones agreed).

[26] Quite recently in Hong Kong, an interim injunction had been granted in aid of (1) the Mass Transit Bye-laws against protestors who unlawfully and wilfully obstructed or interfered with the proper use of the MTR system in *MTR Corp Ltd v Unknown Persons* [2019] 4 HKLRD 446; and (2) the Airport Authority Bye-law against persons unlawfully obstructing or interfering with the proper use of the Hong Kong International Airport in *Airport Authority v Persons Unlawfully Obstructing or Interfering with the Proper Use of the Hong Kong International Airport* [2019] HKCFI 2104.

[27] The judgment in *Bovis* was delivered on 18 April 1988.

[28] Similar concerns were expressed by Viscount Dilhorne at pp 490H-491B; Lord Diplock at pp 498F-500C; and Lord Fraser of Tullybelton at p 521C-E.

[29] Decision, [45].

[30] On 23 March 2024, the Safeguarding National Security Ordinance (lnstrument A305) came into force.

[31] Together with Mr Jenkin Suen SC.

[32] Mr Yu also asks us to note that in *Begum*, the English Supreme Court at [70] and [71] applied a similar approach in the context of the UK Special Immigration Appeals Commission.

[33] See also Part 2.4 below.

[34] See [26(1)] above.

[35] Leading Mr Martin Ho.

[36] Decision, [67] and [68].

[37] Cap 4A.

[38] Decision, [68].

[39] Decision, [69].

[40] See [17] above.

[41] The exception for news activity is made pursuant to the proposal by the Hong Kong Journalists Association which is accepted by the Secretary for Justice.