### FAMC No 14 of 2023

[2024] HKCFA 9

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

**MIsCELLANEOUS PROCEEDINGS nO 14 OF 2023 (CRIMINAL)**

(ON APPLICATION FOR LEAVE TO APPEAL

FROM HCMA NO 372 OF 2019)

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BETWEEN

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|  | HKSAR | Respondent |
|  | and |  |
|  | LI QING BIN (李慶彬) | Applicant |

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| Appeal Committee: | Mr Justice Lam PJ, Mr Justice Chan NPJ and  Mr Justice Tang NPJ |
| Date of Hearing and Determination: | 17 April 2024 |

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| DETERMINATION |

Mr Justice Lam PJ:

1. It is not a rare occurrence that the date of birth set out in a travel document is not accurate and the holder of the document cannot correct the same for want of official record of date of birth in the old days. The Respondent fairly accepted that the intended appeal raised questions of law of great and general importance. Having considered the materials lodged in this application including the written submissions of the applicant of 17 April 2024 attached to his email informing the Court that he could not attend the hearing of the leave application, we consider that the concession is correct.
2. We certify the case involves the following questions of great and general importance and grant leave to appeal to the Applicant accordingly:

(1) Is the principle of automendacity discussed in *HKSAR v Chan Kam Ching*(2022) 25 HKCFAR 48 applicable in respect of a charge of using a false travel document under Section 42(2)(b) of the Immigration Ordinance Cap 115;

(2) In considering if a traveller’s use of a travel document with an inaccurate date of birth constituted a contravention of Section 42(1)(a) or 42(2)(b) of the Immigration Ordinance Cap 115, especially in the context of verification by automated means under Section 4A of the Ordinance, whether the Court should pay regard to his contemporaneous explanation to immigration officer or assistant or any other officer of the Immigration Department that the date of birth recorded on the travel document was incorrect;

(3) When a travel document issued by an official authority contained an inaccurate date of birth and it could not be rectified due to lack of official register of date of birth, whether the date of birth is a false material particular and the use of such travel document constituted offences under Section 42(1)(a) and/or 42(2)(b) of the Immigration Ordinance Cap 115;

(4) When considering whether a traveller has the mens rea for the offences under Section 42(1)(a) and/or 42(2)(b) of the Immigration Ordinance Cap 115 in the scenario set out in Question (3), does the Court need to find that the traveller knew that the date of birth was a material particular when he used the travel document;

(5) If the answer to Question (4) is “No”, is there an implied defence of reasonable excuse for the offences under Section 42(1)(a) and/or 42(2)(b) of the Immigration Ordinance Cap 115?

1. Though the Applicant did not formulate these questions, we believe that they fairly summarize the reasonably arguable questions raised in his application. The other questions raised in his materials are not reasonably arguable and we refuse to grant leave in respect of those other questions.
2. The Applicant acts in this application in person. According to his correspondence with the Registrar, he currently has difficulty in coming to Hong Kong by reason of his bankruptcy in the mainland.
3. In view of the great and general importance of the certified questions, there should be legal representation for him to facilitate the proper preparation of the printed case and the assistance to the Court by way of oral submissions at the substantive appeal hearing. We direct the Registrar to liaise with the Applicant regarding his application for legal aid.

1. Pending the grant of legal aid and the Applicant giving instructions to lawyers assigned by the Director of Legal Aid, the Court shall not fix a date for the hearing of the appeal.
2. The Applicant should be able to file and serve his Notice of Appeal even without legal representation. If he needs more time to file his Notice of Appeal than the 7-day time limit prescribed under Rules 14(2) and 16 of the Hong Kong Court of Final Appeal Rules Cap 484A, he needs to apply for an extension of time.
3. On the other hand, the Applicant should have legal representation in the preparation of his printed Case which has to be filed pursuant to Rule 25 of the Hong Kong Court of Final Appeal Rules. On condition that the Applicant applies for legal aid with due diligence, the Court will consider an application for the extension of time for the filing of his printed Case after a decision on his legal aid application.
4. If for whatever reason the Applicant cannot or is not willing to obtain legal aid in the appeal and no proper printed Case is filed on behalf of the Applicant, the Registrar shall proceed in accordance with Rule 18 of the Hong Kong Court of Final Appeal Rules.

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| (M H Lam) | (Patrick Chan) | (Robert Tang) |
| Permanent Judge | Non-Permanent Judge | Non-Permanent Judge |

Mr Li Qing Bin, the Applicant, unrepresented, absent

Ms Janice Cheuk SPP, of the Department of Justice, for the Respondent