

J. Y. Interpretation No.710 (July 5, 2013) *

【Mandatory Deportation and Detention of People from the Mainland Area】

- ISSUE:**
1. Is it constitutional that the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area provides no defense opportunity to a person from the Mainland Area prior to his mandatory deportation ?
 2. Is it constitutional that the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area does not specify the grounds and duration for temporary detention ?
 3. Is it constitutional that the grounds for detention prescribed in the Rules Governing Enforced Deportation of People from Mainland China, Hong Kong, and Macau have not been explicitly authorized by law ?

RELEVANT LAWS:

Articles 8, 10, and 23 of the Constitution (憲法第八條、第十條、第二十三條) ; Article 11 of the Additional Articles of the Constitution (憲法增修條文第 11 條 (中華民國九十四年六月十日修正公布)) ; Article 10, Paragraph 1, and Articles 10-1, 17, 95-4 of the Act Governing Relations between

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Peoples from the Taiwan Area and the Mainland Area (臺灣地區與大陸地區人民關係條例第十條第一項、第十條之一、第十七條、第九十五條之四)；Article 18, Paragraph 1, of the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area (as amended on October 29, 2003; the amendment on July 1, 2009, revised the text of Paragraph 1), and Article 18, Paragraph 2, of the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area (as amended on October 29, 2003; Paragraph 3 of the same Article after the amendment on July 1, 2009) (臺灣地區與大陸地區人民關係條例第十八條第一項(九十二年十月二十九日修正公布,九十八年七月一日修正公布,第一項為文字修正)、第二項(九十二年十月二十九日修正公布,九十八年七月一日修正公布之同條例第三項))；Article 15 of the Enforcement Rules for the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area (臺灣地區與大陸地區人民關係條例施行細則第十五條)；Article 10, Subparagraph 3, of the Regulations Governing the Approval of Entry of People from the Mainland Area into the Taiwan Area (as promulgated on March 1, 2004; Subparagraph 2 of Article 14 of the same Regulations after the amendment on August 20, 2009) (大陸地區人民申請進入臺灣地區面談管理辦法第十條第三款(九十三年三月一日訂定發布,九十八年八月二十日修正發布之同辦法第十四條第二款)、第十一條(九十三年三月一日訂定發布,九十八年八月二十日修正發布之同辦法第十五條))；Article 5 of the Rules Governing Enforced Deportation of People from Mainland China,

Hong Kong, and Macau (as promulgated on October 27, 1999; the amendment on March 24, 2010, moved this provision to Article 6 of the same Rules) (大陸地區人民及香港澳門居民強制出境處理辦法第五條(八十八年十月二十七日訂定發布,九十九年三月二十四日修正發布移列為同辦法第六條)); Articles 12 and 13 of the United Nations International Covenant on Civil and Political Rights (聯合國公民與政治權利國際公約第十二條、第十三條); Paragraph 6 of General Comment No. 15 of the United Nations International Covenant on Civil and Political Rights (聯合國公民與政治權利國際公約第十二條、第十三條); Article 1 of Protocol No. 7 to the European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) (歐洲人權公約第七號議定書第一條); J.Y. Interpretation Nos. 384, 443, 497, 523, 558, 559, 588, 612, 618, 636, 676, 680, 689, 690, 708 (司法院釋字第四四三號、第四九七號、第五二三號、第五五八號、第五五九號、第六一二號、第六三六號、第六七六號、第六八〇號、第六八九號、第六九〇號、第七〇八號解釋)。

KEYWORDS:

mandatory deportation (強制出境), people from the Mainland Area (大陸地區人民), detention (收容); temporary detention (暫時收容), judicial review (法官保留), protection of physical freedom (人身自由之保障), protection of residence and migration freedom (居住及遷徙自由之保障), due process of law (正當法律程序).**

HOLDING: Article 18, Paragraph 1, of the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area (hereinafter the “Cross-Strait Relations Act”), as amended on October 29, 2003, provides, “In any of the following situations, any people from the Mainland Area who enter into the Taiwan Area may be deported by the police authorities” (the text of this Article was amended on July 1, 2009). Except where immediate actions are otherwise required in response to a threat to national security or social order, it is unconstitutional to mandatorily deport any person from the Mainland Area who has obtained permission to legally enter into the Taiwan Area without providing any defense opportunity to such person because it is in violation of the constitutional principle of due process of law and fails to comply with the meaning and purpose of the protection of migration freedom under Article 10 of the Constitution. Paragraph 2 of the same Article provides, “Any people from the Mainland Area specified in the preceding paragraph may be temporarily detained” (this is the same as Article

解釋文：中華民國九十二年十月二十九日修正公布之臺灣地區與大陸地區人民關係條例第十八條第一項規定：「進入臺灣地區之大陸地區人民，有下列情形之一者，治安機關得逕行強制出境。……」（該條於九十八年七月一日為文字修正）除因危害國家安全或社會秩序而須為急速處分之情形外，對於經許可合法入境之大陸地區人民，未予申辯之機會，即得逕行強制出境部分，有違憲法正當法律程序原則，不符憲法第十條保障遷徙自由之意旨。同條第二項規定：「前項大陸地區人民，於強制出境前，得暫予收容……」（即九十八年七月一日修正公布之同條例第十八條第三項），未能顯示應限於非暫予收容顯難強制出境者，始得暫予收容之意旨，亦未明定暫予收容之事由，有違法律明確性原則；於因執行遣送所需合理作業期間內之暫時收容部分，未予受暫時收容人即時之司法救濟；於逾越前開暫時收容期間之收容部分，未由法院審查決定，均有違憲法正當法律程序原則，不符憲法第八條保障人身自由之意旨。又同條例關於暫予收容未設期間限制，有導致受收容人身體自由遭受過度剝奪之虞，有違憲法第二十三條比例原則，亦不符憲法第八條保障人身自由

18, Paragraph 3, of the same Act after the amendment on July 1, 2009). This provision violates the principle of legal clarity because it does not express that temporary detention should be imposed only when mandatory deportation cannot be completed without such detention, and also because it does not specify the grounds for temporary detention. Providing no prompt judicial remedy to a detainee who is under temporary detention for a reasonable period in order to enforce deportation and failing to subject an extension of the foregoing temporary detention to judicial review violate both the principle of due process of law under the Constitution and the meaning and purpose of protecting physical freedom guaranteed under Article 8 of the Constitution. Moreover, failing to specify a certain period of time for temporary detention under the same Act is likely to excessively deprive a detainee of his physical freedom and is in violation of the principle of proportionality under Article 23 of the Constitution as well as the meaning and purpose of protecting physical freedom guaranteed under Article 8 of the Constitution. The aforementioned

之意旨。前揭第十八條第一項與本解釋意旨不符部分及第二項關於暫予收容之規定均應自本解釋公布之日起，至遲於屆滿二年時失其效力。

portion of Article 18, Paragraph 1, of the Cross-Strait Relations Act that is not consistent with this Interpretation, as well as the part of Paragraph 2 of the same Article with regard to temporary detention, shall be null and void no later than two years from the issuance of this Interpretation.

Article 15 of the Enforcement Rules for the Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area (hereinafter the “Enforcement Rules of the Cross-Strait Act”) provides, “Persons entering into the Taiwan Area without permission as referred to in Article 18, Paragraph 1, Subparagraph 1, of the Cross-Strait Relations Act shall include those who enter into the Taiwan Area on fake or forged passports, travel papers, or other similar certifying documents, or by fraudulent marriage for which the registration or permission has been revoked or annulled as there exists sufficient evidence to establish that said marriage is false due to collusion, or by other illegal means.” Article 10, Subparagraph 3, of the Regulations Governing the Approval of Entry of People from the

臺灣地區與大陸地區人民關係條例施行細則第十五條規定：「本條例第十八條第一項第一款所定未經許可入境者，包括持偽造、變造之護照、旅行證或其他相類之證書、有事實足認係通謀虛偽結婚經撤銷或廢止其許可或以其他非法之方法入境者在內。」九十三年三月一日訂定發布之大陸地區人民申請進入臺灣地區面談管理辦法第十條第三款規定：「大陸地區人民接受面談，有下列情形之一者，其申請案不予許可；已許可者，應撤銷或廢止其許可：……三、經面談後，申請人、依親對象無同居之事實或說詞有重大瑕疵。」（即九十八年八月二十日修正發布之同辦法第十四條第二款）及第十一條規定：「大陸地區人民抵達機場、港口或已入境，經通知面談，有前條各款情形之一者，其許可應予撤銷或廢止，並註銷其入出境許可證件，逕行強制出境或限令十日內出

Mainland Area into the Taiwan Area provides, “An application filed by any person from the Mainland Area who receives an interview for entry into the Taiwan Area may be denied, and any entry permission already granted may be revoked or annulled in any of the following situations:...(3) after conducting the interview, no fact shows that the applicant lives together with the spouse or there are significant discrepancies in the statements of the applicant and the spouse” (this provision is the same as Article 14, Subparagraph 2, of the same Regulations amended on August 20, 2009). Article 11 of the same Regulations stipulates, “Any person from the Mainland Area who receives an interview notification upon arrival at the airport or seaport, or after entering into the Taiwan Area will be subject to mandatory deportation or be ordered to exit within ten days, any entry permission already granted may be revoked or annulled, and the entry and exit permit may be cancelled if any of the situations referred to in the preceding Article exists” (Article 15 of the same Regulations amended and promulgated on August 20, 2009, removed

境。」（九十八年八月二十日修正發布之同辦法第十五條刪除「逕行強制出境或限令十日內出境」等字）均未逾越九十二年十月二十九日修正公布之臺灣地區與大陸地區人民關係條例第十八條第一項之規定，與法律保留原則尚無違背。

the words “will be subject to mandatory deportation or be ordered to exit within ten days”). These provisions are consistent with Article 18, Paragraph 1, of the Cross-Strait Relations Act, as amended on October 29, 2003, and therefore do not violate the principle of legal reservation.

Article 5 of the Rules Governing Enforced Deportation of People from Mainland China, Hong Kong, and Macau, as promulgated on October 27, 1999, provides, “A person may be temporarily detained prior to enforced deportation in any of the following situations: (1) any of the situations referred in Paragraph 2 of the preceding Article exists; (2) enforced deportation in accordance with laws is impossible due to a natural disaster or a breakdown of aircrafts or vessels; (3) the resident from the Mainland Area, Hong Kong, or Macau subject to mandatory deportation has no travel permit to enter the Mainland Area, Hong Kong, Macau, or any third country; (4) any other reason rendering an immediate mandatory deportation impossible” (the amendment of March 24, 2010, moved this provision

八十八年十月二十七日訂定發布之大陸地區人民及香港澳門居民強制出境處理辦法第五條規定：「強制出境前，有下列情形之一者，得暫予收容。一、前條第二項各款所定情形。二、因天災或航空器、船舶故障，不能依規定強制出境者。三、得逕行強制出境之大陸地區人民、香港或澳門居民，無大陸地區、香港、澳門或第三國家旅行證件者。四、其他因故不能立即強制出境者。」（九十九年三月二十四日修正發布移列為同辦法第六條：「執行大陸地區人民、香港或澳門居民強制出境前，有下列情形之一者，得暫予收容：一、因天災或航空器、船舶故障，不能依規定強制出境。二、得逕行強制出境之大陸地區人民、香港或澳門居民，無大陸地區、香港、澳門或第三國家旅行證件。三、其他因故不能立即強制出境。」）未經法律明確授權，違反法律

to Article 6 of the same Rules, which provides, “People from the Mainland Area, Hong Kong, or Macau subject to mandatory deportation may be temporarily detained prior to repatriation in any of the following situations: (1) enforced deportation in accordance with laws is impossible due to a natural disaster or a breakdown of aircrafts or vessels; (2) the resident from the Mainland Area, Hong Kong, or Macau subject to mandatory deportation has no travel permit to enter the Mainland Area, Hong Kong, Macau, or any third country; (3) any other reason rendering an immediate mandatory deportation impossible”). This Article violates the principle of legal reservation because it has not been explicitly authorized by a law prescribing the grounds for temporary detention. Therefore this provision shall be null and void no later than two years from the issuance of this Interpretation.

REASONING: Article 8, Paragraph 1, of the Constitution provides, “Physical freedom shall be guaranteed to the people. In no case except that of flagrante delicto, which shall be separately

保留原則，應自本解釋公布之日起，至遲於屆滿二年時失其效力。

解釋理由書：憲法第八條第一項規定：「人民身體之自由應予保障。除現行犯之逮捕由法律另定外，非經司法或警察機關依法定程序，不得逮捕拘禁。非由法院依法定程序，不得審問處

prescribed by law, shall any person be arrested or detained other than by judicial or police authorities in accordance with procedures prescribed by law. No person shall be tried or punished other than by a court in accordance with procedures prescribed by law. Any arrest, detention, trial, or punishment not carried out in accordance with procedures prescribed by law may be resisted.” In order to comply with the meaning and purpose of the foregoing constitutional provision, any disposition by the government that deprives or restricts a person’s physical freedom—irrespective of whether the person is facing criminal charges—must have a legal basis and also fulfill required judicial procedures or other due process requirements (see J.Y. Interpretations Nos. 384, 588, 636, and 708). Moreover, the principle of due process of law under the Constitution requires legislators to promulgate adequate procedures after taking into considerations all factors including the type of underlying fundamental rights, the intensity and scope of the restrictions, the public interests pursued, the proper functions of the decision-making organs, and the

罰。非依法定程序之逮捕、拘禁、審問、處罰，得拒絕之。」是國家剝奪或限制人民身體自由之處置，不問其是否屬於刑事被告之身分，除須有法律之依據外，尚應踐行必要之司法程序或其他正當法律程序，始符合上開憲法之意旨（本院釋字第三八四號、第五八八號、第六三六號、第七〇八號解釋參照）。憲法上正當法律程序原則之內涵，應視所涉基本權之種類、限制之強度及範圍、所欲追求之公共利益、決定機關之功能合適性、有無替代程序或各項可能程序之成本等因素綜合考量，由立法者制定相應之適當程序（本院釋字第六八九號解釋參照）。又憲法第十條規定：「人民有居住及遷徙之自由」，係指人民有選擇其居住處所，營私人生活不受干預之自由，且有得依個人意願自由遷徙或旅居各地之權利（本院釋字第四四三號解釋參照）。

availability of alternative procedures or possible costs of the possible procedures (see J.Y. Interpretation No. 689). Furthermore, Article 10 of the Constitution provides, “The people shall have freedom of residence and of change of residence.” This Article means that people have the freedom to choose their residence and enjoy their private lives without intrusion, and they also have the freedom to move or reside anywhere according to their free will (see J.Y. Interpretation No. 443).

The Preamble of the Additional Articles of the Constitution stipulates, “To meet the requirements of the nation prior to national unification, the following articles of the Constitution are added or amended to the Constitution in accordance with Article 27, Paragraph 1, Subparagraph 3; and Article 174, Subparagraph 1, of the Constitution: . . .” Article 11 of the Additional Articles of the Constitution provides, “Rights and obligations between the people of the Chinese mainland area and those of the free area, and the disposition of other related affairs may be specified by law.”

憲法增修條文前言明揭：「為因應國家統一前之需要，依照憲法第二十七條第一項第三款及第一百七十四條第一款之規定，增修本憲法條文如左：……」憲法增修條文第十一條明定：「自由地區與大陸地區間人民權利義務關係及其他事務之處理，得以法律為特別之規定。」臺灣地區與大陸地區人民關係條例（下稱兩岸關係條例）即為規範國家統一前，臺灣地區與大陸地區間人民權利義務及其他事務，所制定之特別立法（本院釋字六一八號解釋參照）。兩岸關係條例第十條第一項規定：「大陸地區人民非經主管機關許可，不得進入臺灣地區。」是在兩岸分治之

The Cross-Strait Relations Act is the sui generis law enacted to regulate the rights and obligations between peoples from the Mainland Area and the Taiwan Area, as well as the disposition of other related affairs, prior to the nation's reunification (see J.Y. Interpretation No. 618). Article 10, Paragraph 1, of the Cross-Strait Relations Act provides, "No people from the Mainland Area may enter into the Taiwan Area without permission of the competent authorities." Given that the two sides of the Taiwan Strait are currently governed by different political entities, restrictions are therefore imposed on the freedom of people from the Mainland Area to enter into the Taiwan Area (see J.Y. Interpretations Nos. 497 and 588). However, after formally obtaining permission from the competent authorities and having legally entered the Taiwan Area, the freedom of movement of people from the Mainland Area should in principle be protected by the Constitution (see Article 12 and Paragraph 6 of the General Comment No. 15 of the UN International Covenant on Civil and Political Rights). Except where immediate actions are otherwise required

現況下，大陸地區人民入境臺灣地區之自由受有限制（本院釋字第四九七號、第五五八號解釋參照）。惟大陸地區人民形式上經主管機關許可，且已合法入境臺灣地區者，其遷徙之自由原則上即應受憲法保障（參酌聯合國公民與政治權利國際公約第十二條及第十五號一般性意見第六點）。除因危害國家安全或社會秩序而須為急速處分者外，強制經許可合法入境之大陸地區人民出境，應踐行相應之正當程序（參酌聯合國公民與政治權利國際公約第十三條、歐洲人權公約第七號議定書第一條）。尤其強制經許可合法入境之大陸配偶出境，影響人民之婚姻及家庭關係至鉅，更應審慎。九十二年十月二十九日修正公布之兩岸關係條例第十八條第一項規定：「進入臺灣地區之大陸地區人民，有下列情形之一者，治安機關得逕行強制出境。但其所涉案件已進入司法程序者，應先經司法機關之同意：一、未經許可入境者。二、經許可入境，已逾停留、居留期限者。三、從事與許可目的不符之活動或工作者。四、有事實足認為有犯罪行為者。五、有事實足認為有危害國家安全或社會安定之虞者。」（本條於九十八年七月一日修正公布，第一項僅為文字修正）九十八年七月一日修

in response to a threat to national security or social order, the mandatory deportation of a person from the Mainland Area who legally entered into the Taiwan Area must fulfill corresponding due process requirements (see Articles 13 of the UN International Covenant on Civil and Political Rights; Article 1 of Protocol No. 7 to the European Convention on Human Rights). In particular, mandatory deportation of Mainland spouses who have been permitted to legally enter into the Taiwan Area requires extra caution because it significantly affects marriages and family relationships. Article 18, Paragraph 1, of the Cross-Strait Relations Act, as amended on October 29, 2003, provides, “In any of the following situations, any people from the Mainland Area who enter into the Taiwan Area may be deported by the police authorities; provided, however, that prior approval shall be obtained from the judicial authorities where a judicial proceeding thereof is pending: (1) entering into the Taiwan Area without permission; (2) entering into the Taiwan Area with permission and staying or residing beyond the authorized duration; (3) engaging in

正公布同條例第十八條第二項增訂：「進入臺灣地區之大陸地區人民已取得居留許可而有前項第三款至第五款情形之一者，內政部入出國及移民署於強制其出境前，得召開審查會，並給予當事人陳述意見之機會。」惟上開第十八條第一項規定就因危害國家安全或社會秩序而須為急速處分以外之情形，於強制經許可合法入境之大陸地區人民出境前，並未明定治安機關應給予申辯之機會，有違憲法上正當法律程序原則，不符憲法第十條保障遷徙自由之意旨。此規定與本解釋意旨不符部分，應自本解釋公布之日起，至遲於屆滿二年時失其效力。

any activity or employment inconsistent with the purposes of the permission; (4) there is sufficient evidence to establish that a crime has been committed; (5) there is sufficient evidence to establish that there is a threat to national security or social stability” (this Article was amended on July 1, 2009, only the text of Paragraph 1 was revised). On the other hand, Article 18, Paragraph 2, of the same Act as amended on July 1, 2009, stipulates, “Before the National Immigration Agency of the Ministry of the Interior deports any people from the Mainland Area who, having obtained permission to reside in and to enter into the Taiwan Area, is in any of the situations specified in Subparagraphs 3 to 5 of the preceding paragraph, it may convene a review meeting and provide an opportunity for the person concerned to state his/her opinions.” Apart from the aforementioned Article 18, Paragraph 1, of the Cross-Strait Relations Act, where immediate actions are required in response to a threat to national security or social order, mandatory deportation of any person from the Mainland Area who has obtained permission to legally enter

into the Taiwan Area without requiring the police authorities to provide any defense opportunity to the deportee prior to his repatriation violates the constitutional principle of due process of law and also fails to comply with the meaning and purpose of the protection of residence and migration freedom guaranteed under Article 10 of the Constitution. The portions of Article 18 that are not consistent with this Interpretation shall be null and void no later than two years from the issuance of this Interpretation.

Article 18, Paragraph 2, of the Cross-Strait Relations Act, as amended on October 29, 2003, provides, “Any people from the Mainland Area specified in the preceding paragraph may be temporarily detained prior to enforced deportation...” (this is the same as Article 18, Paragraph 3, of the same Act amended on July 1, 2009). A temporary detention is a form of deprivation of people’s physical freedom because it confines a detainee at a certain place in order to isolate him from the outside world (see the Rules Governing Establishment and Administration of

九十二年十月二十九日修正公布之兩岸關係條例第十八條第二項規定：「前項大陸地區人民，於強制出境前，得暫予收容……。」（即九十八年七月一日修正公布之同條例第十八條第三項）按暫予收容既拘束收容人於一定處所，使與外界隔離（內政部發布之大陸地區人民及香港澳門居民收容處所設置及管理辦法參照），自屬對人民身體自由之剝奪。暫予收容之事由爰應以法律直接規定或法律具體明確授權之命令定之（本院釋字第四四三號、第五二三號解釋參照），始符合法律保留原則；法律規定之內容並應明確，始符合法律

Shelters for People from Mainland China, Hong Kong, and Macau, promulgated by the Ministry of the Interior). In order to comply with the principle of legal reservation, the grounds for temporary detention must be prescribed by law or by regulations explicitly authorized by law (see J.Y. Interpretation Nos. 443 and 523). Moreover, the content of the law must be clear and specific in order to meet the principle of legal clarity (see J.Y. Interpretation Nos. 636 and 690). The aforementioned Paragraph 2 of Article 18 of the Cross-Strait Relations Act, which allows predeportation temporary detention of any person from the Mainland Area receiving a removal order, is in violation of the principle of legal clarity because the content of this provision is overbroad. This provision does not express that temporary detention should be imposed only when mandatory deportation cannot be completed without such detention. Nor does this provision specify the grounds for temporary detention. Physical freedom is a prerequisite to the exercise of any of the freedoms and rights protected by the Constitution. Under the Constitution, in

明確性原則（本院釋字第六三六號、第六九〇號解釋參照）。前揭第十八條第二項僅規定大陸地區人民受強制出境處分者，於強制出境前得暫予收容，其文義過於寬泛，未能顯示應限於非暫予收容顯難強制出境者，始得暫予收容之意旨，亦未明定暫予收容之事由，與法律明確性原則不符。次按人身自由乃人民行使其憲法上各項自由權利所不可或缺之前提，國家以法律明確規定限制人民之身體自由者，須踐行正當法律程序，並須符合憲法第二十三條之比例原則，方為憲法所許（本院釋字第三八四號、第五八八號解釋參照）。鑑於刑事被告與非刑事被告之人身自由限制，在目的、方式與程序上均有差異，是兩者應踐行之司法程序或其他正當法律程序，自非均須相同（本院釋字第五八八號、第七〇八號解釋參照）。為防範受強制出境之大陸地區人民脫逃，俾能迅速將之遣送出境，治安機關依前揭第十八條第二項規定暫時收容受強制出境之大陸地區人民，於合理之遣送作業期間內，尚屬合理、必要，此暫時收容之處分固無須經由法院為之，惟仍應予受收容人即時司法救濟之機會，始符合憲法第八條第一項正當法律程序之意旨。是治安機關依前揭兩岸關係條例第十八條第二

order for a government disposition that is explicitly prescribed by law as restricting a person's physical freedom to be permissible, it must comply with due process and the principle of proportionality under Article 23 of the Constitution (see J.Y. Interpretation Nos. 384 and 588). Given that restrictions on physical freedom of criminal defendants and non-criminal defendants differ in terms of their purpose, methods, and procedure, the required judicial procedures and other due process requirements for restrictions on physical freedom of non-criminal defendants and of criminal defendants need not be identical (see J.Y. Interpretation Nos. 588 and 708). In order to prevent escape and to achieve quick repatriation, it is reasonable and necessary that police authorities may temporarily detain any person from the Mainland Area receiving a removal order for a reasonable period for the repatriation operation in accordance with the aforementioned Article 18, Paragraph 2, of the Cross-Strait Relations Act. Such temporary detention need not be subject to court review. Nevertheless, in order to ensure compliance with the meaning

項作成暫時收容之處分時，應以書面告知受收容人暫時收容之原因及不服之救濟方法，並通知其所指定在臺之親友或有關機關；受收容人一經表示不服，或要求由法院審查決定是否予以收容者，暫時收容機關應即於二十四小時內移送法院迅速裁定是否收容。至於暫時收容期間屆滿前，未能遣送出境者，暫時收容機關應將受暫時收容人移送法院聲請裁定收容，始能續予收容（本院釋字第七〇八號解釋參照）。另兩岸關係條例關於暫予收容之期限未設有規定，不符合「迅速將受收容人強制出境」之目的，並有導致受收容人身體自由遭受過度剝奪之虞，有違憲法第二十三條比例原則，亦不符第八條保障人民身體自由之意旨。相關機關應自本解釋公布之日起二年內，依本解釋之意旨，審酌實際需要並避免過度干預人身自由，以法律或法律具體明確授權之命令規定得暫予收容之具體事由，並以法律規定執行遣送所需合理作業期間、合理之暫予收容期間及相應之正當法律程序。屆期未完成者，前揭兩岸關係條例第十八條第二項關於「得暫予收容」部分失其效力。

and purpose of due process under Article 8, Paragraph 1, of the Constitution, a detainee under the foregoing temporary detention should be afforded a remedial opportunity to request immediate judicial review of the detention. Therefore, when imposing temporary detention according to Article 18, Paragraph 2, of the Cross-Strait Relations Act, the police authorities should send the detainee a written notice with the rationale of the detention, as well as the channels for requesting judicial relief. The notice shall also be given to the detainee's designated relatives or relevant agencies in Taiwan. If a detainee objects to the temporary detention or requests judicial review while in detention, the temporary detention authorities must transfer the detainee to the court within twenty-four hours for speedy review whether detention should be imposed. In the event that the detention period is about to expire and a detainee has yet to be repatriated, the temporary detention authorities must transfer the detainee to the court for review whether detention should be extended, and the authorities may continue detaining the detainee after the court so

orders (see J.Y. Interpretation No. 708). Furthermore, because the Cross-Strait Relations Act does not specify a certain period of time for temporary detention, it fails to comply with the purpose of “speedy repatriation of detainees,” is likely to excessively deprive a detainee of his physical freedom, and violates the principle of proportionality under Article 23 of the Constitution as well as the meaning and purpose of protecting physical freedom that is guaranteed under Article 8 of the Constitution. In light of the foregoing, the relevant authorities should review and amend the relevant laws in accordance with the intent of this Interpretation within two years from the issuance of this Interpretation. The amendments, which shall take into consideration the practical requirements of pre-deportation operations and also avoid excessive interference with a detainee’s physical freedom, should prescribe the specific grounds for temporary detention by law or by regulations explicitly authorized by law, and also prescribe the following: a reasonable period for the repatriation operation as well as a reasonable period of temporary deten-

tion and its corresponding due process. The aforementioned portion of Article 18, Paragraph 2, of the Cross-Strait Relations Act, with regard to temporary detention, shall become null and void in case the amendment has not been promulgated by the time set forth in this Interpretation.

A restriction placed on physical freedom must be prescribed by law or by regulations explicitly authorized by law (see J.Y. Interpretation Nos. 443 and 559). The specificity of the authorization shall not be confined to the language of the statutory provision but shall be determined by the totality of statutory interpretation or the relevant meaning of the statute as a whole (see J.Y. Interpretation Nos. 612 and 676). Article 95-4 of the Cross-Strait Relations Act only provides a general authorization to the Executive Yuan to formulate enforcement rules of the Cross-Strait Relations Act. Nonetheless, the comprehensive approach of the Cross-Strait Relations Act suggests that the Cross-Strait Relations Act has authorized the Executive Yuan to clarify the meaning of “entering into the Taiwan

對人民自由權利之限制，應以法律或法律明確授權之命令為之（本院釋字第四四三號、第五五九號解釋參照）；至授權明確與否，則不應拘泥於法條所用之文字，而應由法律整體解釋認定，或依其整體規定所表明之關聯意義為判斷（本院釋字第六一二號、第六七六號解釋參照）。兩岸關係條例第九十五條之四固僅概括授權行政院訂定施行細則，惟自該條例整體觀之，應認已授權行政院為有效執行法律、落實入出境管理，得以施行細則闡明九十二年十月二十九日修正公布之兩岸關係條例第十八條第一項第一款所稱「未經許可入境」之涵義。兩岸關係條例施行細則第十五條規定：「本條例第十八條第一項第一款所定未經許可入境者，包括持偽造、變造之護照、旅行證或其他相類之證書、有事實足認係通謀虛偽結婚經撤銷或廢止其許可或以其他非法之方法

Area without permission” under Article 18, Paragraph 1, Subparagraph 1, of the Cross-Strait Relations Act, as amended on October 29, 2003, in the Enforcement Rules of the Cross-Strait Relations Act in order to effectively enforce the law and to administer the borders. Article 15 of the Enforcement Rules of the Cross-Strait Act provides, “Persons entering into the Taiwan Area without permission as referred to in Subparagraph 1 of Paragraph 1 of Article 18 of the Cross-Strait Relations Act shall include those who enter into the Taiwan Area on fake or forged passports, travel papers, or other similar certifying documents, or by fraudulent marriage for which the registration or permission has been revoked or annulled as there exists sufficient evidence to establish that said marriage is false due to collusion, or by other illegal means.” This provision aims to clarify that persons “entering into the Taiwan Area without permission” refers to those who initially illegally entered into the Taiwan Area. The content of this provision does not go beyond the literal meaning of Article 18, Paragraph 1, Subparagraph 1, of the Cross-Strait Relations

入境者在內」，旨在闡明「未經許可入境」乃指以自始非法之方法入境臺灣地區而言。核其內容並未逾越前揭兩岸關係條例第十八條第一項第一款之文義，與法律保留原則尚屬無違。

Act, and therefore does not violate the principle of legal reservation.

Article 11 of the Regulations Governing the Approval of Entry of People from the Mainland Area into the Taiwan Area (hereinafter the “Regulations Governing Entrance Approval”), as promulgated on March 1, 2004, provides, “Any person from the Mainland Area who receives an interview notification upon arrival at the airport or seaport, or after entering into the Taiwan Area will be subject to mandatory deportation or be ordered to exit within ten days, any entry permission already granted may be revoked or annulled, and the entry and exit permit may be cancelled in any of the situations referred to in the preceding Article” (this provision is the same as Article 15 of the same Regulations amended on August 20, 2009, and the text of this provision was corrected by removing the words “will be subject to mandatory deportation or be ordered to exit within ten days”). Article 10, Subparagraph 3, of the same Regulations stipulates, “An application filed by any person from the Mainland Area

九十三年三月一日訂定發布之大陸地區人民申請進入臺灣地區面談管理辦法（下稱面談管理辦法）第十一條規定：「大陸地區人民抵達機場、港口或已入境，經通知面談，有前條各款情形之一者，其許可應予撤銷或廢止，並註銷其入出境許可證件，逕行強制出境或限令十日內出境。」（九十八年八月二十日修正發布之同辦法第十五條刪除「逕行強制出境或限令十日內出境」等字）同辦法第十條第三款規定：「大陸地區人民接受面談，有下列情形之一者，其申請案不予許可；已許可者，應撤銷或廢止其許可：……三、經面談後，申請人、依親對象無同居之事實或說詞有重大瑕疵。……」（即九十八年八月二十日修正發布之同辦法第十四條第二款）按兩岸關係條例第十條之一規定：「大陸地區人民申請進入臺灣地區團聚、居留或定居者，應接受面談、按捺指紋並建檔管理之；未接受面談、按捺指紋者，不予許可其團聚、居留或定居之申請。其管理辦法，由主管機關定之。」是面談為大陸地區人民申請進入臺灣地區團聚、居留或定居之法定程

who receives an interview for entry into the Taiwan Area may be denied, and any entry permission already granted may be revoked or annulled in any of the following situations: (3) after conducting the interview, no fact shows that the applicant lives together with the spouse or there are significant discrepancies in the statements of the applicant and the spouse” (this provision is the same as Article 14, Subparagraph 2, of the same Regulations amended on August 20, 2009). Article 10-1 of the Cross-Strait Relations Act provides, “Any people from the Mainland Area who applies to enter into the Taiwan Area for family reunion, residency, or permanent residency shall be interviewed, fingerprinted, and registered for record; when a person fails to be interviewed or fingerprinted, an application for family reunion, residency, or permanent residency shall not be granted. Governing rules thereof shall be prescribed by the competent authorities.” Accordingly, an interview for entrance approval is part of the procedures required by law for an application filed by any person from the Mainland Area to enter into the Taiwan Area for

序。自該條例整體觀之，應認主管機關於面談時，發現有九十二年十月二十九日修正公布之兩岸關係條例第十八條第一項第一款所稱「未經許可入境」之情事，自得依法撤銷或廢止其入境許可。次按同條例第十七條第一項規定：「大陸地區人民為臺灣地區人民配偶，得依法令申請進入臺灣地區團聚；有下列情形之一者，得申請在臺灣地區依親居留：一、結婚已滿二年者。二、已生產子女者。」（九十八年七月一日修正文字為「大陸地區人民為臺灣地區人民配偶，得依法令申請進入臺灣地區團聚，經許可入境後，得申請在臺灣地區依親居留。」）同條第七項並規定：「第一項人員經許可依親居留、長期居留或許可定居，有事實足認係通謀而為虛偽結婚者，撤銷其依親居留、長期居留、定居許可及戶籍登記，並強制出境。」（該條於九十八年七月一日為文字修正）足徵前揭面談管理辦法第十條第三款所稱「說詞有重大瑕疵」，係指有事實足認申請人與依親對象間，自始即為通謀虛偽結婚，惟治安機關一時未察，而核發入境許可者而言。面談管理辦法第十條第三款規定就此並未增加前揭兩岸關係條例第十八條第一項第一款所稱「未經許可入境」所無之限制，與法律保留原

family reunion, residency, or permanent residency. Considering the comprehensive approach of the Cross-Strait Relations Act, the competent authorities may revoke or annul the entry permission of a person from the Mainland Area in accordance with laws if a finding is made following the interview that the interviewee “entered into the Taiwan Area without permission,” as prescribed under Article 18, Paragraph 1, Subparagraph 1, of the Cross-Strait Relations Act, as amended on October 29, 2003. Moreover, Article 17, Paragraph 1, of the Cross-Strait Relations Act provides, “Any people from the Mainland Area who are spouses of any people from the Taiwan Area may apply to enter into the Taiwan Area for family reunion and may apply for spouse residency in the Taiwan Area in any of the following situations: (1) the applicant has been married for at least two years; or (2) the applicant has already born children” (the amendment on July 1, 2009, changed the text of this provision to “Any people from the Mainland Area who are spouses of any people from the Taiwan Area may apply to enter into the Taiwan Area for family reunion in accor-

則尚無違背。

dance with laws and regulations and may apply for spouse residency in the Taiwan Area after obtaining permission to enter into the Taiwan Area”). Paragraph 7 of the same Article provides, “For any people from the Mainland Area who are permitted to have spousal residency, long-term residency, or permanent residency in accordance with Paragraph 1, if there exists sufficient evidence to establish that his/her marriage is false due to collusion, the permission for his/her spousal residency, long-term residency, permanent residency, and household registration shall be revoked and, in addition, he/she shall be deported” (the amendment on July 1, 2009, only corrected the text of this provision). All of the above provisions suggest that the so-called “significant discrepancies in the statements” prescribed under Article 10, Subparagraph 3, of the aforementioned Regulations Governing Entrance Approval refers to the situation where there are facts sufficient to establish that the applicant and the spouse colluded to enter into a sham marriage from the beginning, but the police authorities issued the entry permission without discovering

the marriage fraud. Article 10, Subparagraph 3, of the Regulations Governing Entrance Approval does not impose any additional condition on top of the “entering into the Taiwan Area without permission” requirement prescribed under Article 18, Paragraph 1, Subparagraph 1, of the Cross-Strait Relations Act, as amended on October 29, 2003, and therefore does not violate the principle of legal reservation.

Article 5 of the Rules Governing Enforced Deportation of People from Mainland China, Hong Kong, and Macau (hereinafter the “Rules Governing Enforced Deportation”), as promulgated on October 27, 1999, provides, “A person may be temporarily detained prior to mandatory repatriation in any of the following situations: (1) any of the situations referred in Paragraph 2 of the preceding Article exists; (2) completing mandatory deportation in accordance with laws is impossible due to a natural disaster or a breakdown of aircrafts or vessels; (3) the resident from the Mainland Area, Hong Kong, or Macau subject to mandatory

八十八年十月二十七日訂定發布之大陸地區人民及香港澳門居民強制出境處理辦法（下稱強制出境辦法）第五條規定：「強制出境前，有下列情形之一者，得暫予收容：一、前條第二項各款所定情形。二、因天災或航空器、船舶故障，不能依規定強制出境者。三、得逕行強制出境之大陸地區人民、香港或澳門居民，無大陸地區、香港、澳門或第三國家旅行證件者。四、其他因故不能立即強制出境者。」（九十九年三月二十四日修正移列為同辦法第六條：「執行大陸地區人民、香港或澳門居民強制出境前，有下列情形之一者，得暫予收容：一、因天災或航空器、船舶故障，不能依規定強制出境。二、得逕行

deportation has no travel permit to enter the Mainland Area, Hong Kong, Macau, or any third country; (4) any other reason rendering an immediate mandatory deportation impossible” (the amendment on March 24, 2010, moved this provision to Article 6 of the same Rules, which provides, “People from the Mainland Area, Hong Kong, or Macau subject to mandatory deportation may be temporarily deported prior to repatriation in any of the following situations: (1) completing mandatory deportation in accordance with laws is impossible due to a natural disaster or a breakdown of aircrafts or vessels; (2) the resident from the Mainland Area, Hong Kong, or Macau subject to mandatory deportation has no travel permit to enter the Mainland Area, Hong Kong, Macau, or any third country; (3) any other reason rendering an immediate mandatory deportation impossible”). A temporary detention constitutes a form of deprivation of physical freedom. Grounds for temporary detention must be prescribed by law or by regulations explicitly authorized by law. In the event that the grounds for temporary detention are prescribed by regu-

強制出境之大陸地區人民、香港或澳門居民，無大陸地區、香港、澳門或第三國家旅行證件。三、其他因故不能立即強制出境。」) 惟暫予收容乃剝奪人身自由之處分，其事由應以法律或法律具體明確授權之命令定之；如授權以命令定之，授權條款之明確程度應與所授權訂定之法規命令對人民權利之影響相稱（本院釋字第六八〇號解釋參照）。九十二年十月二十九日修正公布之兩岸關係條例第十八條第六項（九十八年七月一日修正公布改列第七項）僅授權內政部訂定強制出境辦法及收容處所之設置及管理辦法，並未明確授權主管機關以前揭強制出境辦法補充規定得暫予收容之事由。前揭強制出境辦法第五條（現行第六條）之規定未經法律明確授權，牴觸法律保留原則，應自本解釋公布之日起，至遲於屆滿二年時失其效力。

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lations authorized by law, the degree of clarity in the authorizing provision should correspond with the impact on people's rights by the authorized regulations (see J.Y. Interpretation No. 680). Article 18, Paragraph 6, of the Cross-Strait Relations Act, as amended on October 29, 2003 (the amendment on July 1, 2009, only moved this provision to Paragraph 7 of the same Article), only authorizes the Ministry of the Interior to prescribe the Rules Governing Enforced Deportation, as well as rules governing the establishment and administration of detention centers. However, this provision does not expressly authorize the competent authorities to use the foregoing Rules Governing Enforced Deportation as a supplementary regulation to provide the grounds for temporary detention. Thus, Article 5 (which is now Article 6) of the aforementioned Rules Governing Enforced Deportation violates the principle of legal reservation because it has not been explicitly authorized by law to prescribe the grounds for temporary detention. This provision shall be null and void no later than two years from the issuance of this Interpretation.

Justice Ching-You Tsay filed concurring opinion in part.

Justice Dennis Te-Chung Tang filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion in part and dissenting opinion in part.

Justice Pai-Hsiu Yeh filed concurring opinion in part and dissenting opinion in part.

Justice Chun-Sheng Chen filed concurring opinion in part and dissenting opinion in part.

Justice Beyue Su Chen filed concurring opinion in part and dissenting opinion in part.

Justice Chang-Fa Lo filed concurring opinion in part and dissenting opinion in part.

Justice Chen-Shan Li filed dissenting opinion in part.

Justice Shin-Min Chen filed dissenting opinion in part.

EDITOR'S NOTE:

Summary of facts: Petitioner A is a person from the Mainland area who married a Taiwanese citizen, B, in 2003.

本號解釋蔡大法官清遊提出之部分協同意見書；湯大法官德宗提出之協同意見書；黃大法官茂榮提出之部分協同部分不同意見書；葉大法官百修提出之部分協同部分不同意見書；陳大法官春生提出之部分協同部分不同意見書；陳大法官碧玉提出之部分協同部分不同意見書；羅大法官昌發提出之部分協同部分不同意見書；李大法官震山提出之部分不同意見書；陳大法官新民提出之部分不同意見書。

編者註：

事實摘要：聲請人A係大陸地區人民，於92年間與國人B結婚，以依親名義往返兩岸；期間曾因非法打工遭

A traveled between the two sides of the Taiwan Strait in her capacity as spouse. Soon thereafter, A was mandatorily deported because she engaged in illegal employment and because her residency expired. In 2007, the fourth time that A was permitted to enter Taiwan as a citizen's spouse, the National Immigration Agency found significant discrepancies in the statements of A and B during their interviews. Therefore, the National Immigration Agency cancelled A's Entry and Exit Permit in accordance with Article 10, Paragraph 1, Subparagraph 3, of the Regulations Governing the Approval of Entry of People from the Mainland Area into the Taiwan Area, and also Article 11 of the same Regulations. At the same time, the National Immigration Agency imposed a mandatory deportation on A according to Article 18, Paragraph 1, Subparagraph 1, of the Cross-Strait Relations Act Governing Relations between Peoples from the Taiwan Area and the Mainland Area, and also temporarily detained A in accordance with Paragraph 2 of the same Article and Article 5, Subparagraph 4, of the Rules Governing Enforced Departa-

強制出境，亦曾因居留期滿而離境。96年A四度來臺依親獲准，惟經內政部入出國移民署面談，認AB二人說詞有重大瑕疵，乃依大陸地區人民申請進入台灣地區面談管理辦法第10條第1項第3款及第11條規定，註銷其入出境證件，同時依台灣地區與大陸地區人民關係條例第18條第1項第1款作成強制出境處分；並依同條第2項及大陸地區人民及香港澳門居民強制出境處理辦法第5條第4款規定，自96年9月17日起暫予收容，97年1月21日始強制離境，計收容126日。

tion of People from Mainland China, Hong Kong, and Macau. A was temporarily detained for a total of one hundred and twenty-six days, from September 17, 2007, until January 21, 2008, the date she was mandatorily removed from Taiwan.

A visited Taiwan again in December 2008. She filed a lawsuit arguing that she is entitled to national compensation because she suffered damages for the aforementioned detention, which illegally deprived her of her physical freedom. However, the court rejected A's claim several times and the decision was final. Thus, A petitioned for an interpretation by arguing that the aforementioned provisions violate the Constitution.

A 於 97 年 12 月間再次來臺，認前揭收容違法拘束其人身自由，並致生其損害，提起國家賠償訴訟迭遭駁回確定，乃主張上揭各項規定違憲，聲請解釋。