

SJ on foreign domestic helper's case

Following is the transcript of remarks by the Secretary for Justice, Mr Rimsky Yuen, SC speaking to the media about the foreign domestic helper's right of abode appeal today (December 13):

Secretary for Justice: The Department of Justice (DoJ) filed the Respondents' Case in the foreign domestic helper (FDH)'s right of abode (ROA) appeal in accordance with Court of Final Appeal (CFA)'s appeal procedures yesterday afternoon. As the Respondents' Case is a court document and as the hearing of the case has yet to begin, DoJ did not disclose the document or its content. There is however a news report today suggesting that DoJ would make use of the FDH case to ask the CFA to seek an interpretation from the Standing Committee of the National People's Congress (NPCSC) pursuant to Article 158(3) of the Basic Law (BL 158(3)) in order to clarify the legal effect of the NPCSC's Interpretation made in 1999 and to resolve the problems created by babies born in Hong Kong to mainland couples who have no resident status in Hong Kong, the so-called Mainland pregnant women problem.

As the Government's arguments in the FDH case have been disclosed by third parties and as an academic has warned that the "turbulent storm" of our legal system, which Bokhary NPJ is wary of, is approaching, I would like to make a few remarks.

Firstly, since judicial process of the FDH case is on-going, DoJ has not disclosed its arguments or strategies in that case. This is consistent with the Department's usual practice and legal procedures. DoJ also does not wish to unduly affect judicial independence by such disclosure.

Secondly, DoJ invites the CFA to consider seeking the NPCSC's interpretation under BL 158(3) to clarify the legal effect of the 1999 Interpretation because this is a relevant issue which needs to be resolved in the present case. The

penultimate paragraph of the 1999 Interpretation stated that the legislative intent of all categories of BL 24(2) has been reflected in the "Opinions on Implementation of Article 24(2) of the Basic Law of the HKSAR of the PRC" adopted by the Preparatory Committee of the HKSAR in 1996. The legal status of the 1999 Interpretation and the 1996 Opinions of the Preparatory Committee and their binding effect therefore involve complex legal issues. If such issues can be clarified, DoJ considers that the clarification can facilitate a proper interpretation of the right of abode for all categories of persons under BL 24(2) including FDHs.

Thirdly, this is not a case where the Government requests the NPCSC for an interpretation. Instead, the Government, under the Hong Kong judicial system, requests in accordance with BL 158(3) the CFA to consider whether to refer to the NPCSC the legal issues on the 1999 Interpretation for clarification.

That the CFA may decide whether to refer to the NPCSC for an interpretation is a mechanism under BL 158(3). It is a mechanism under the constitutional order of the HKSAR. BL 158 clearly provides that the ultimate power to interpret the Basic Law is vested in the NPCSC. Hong Kong courts may on its own interpret provisions of the Basic Law in adjudicating cases. There is also a constitutional duty on the part of the CFA to refer provisions concerning affairs which are the responsibility of the CPG, or concerning the relationship between the Central Authorities and the Region, to the NPCSC for interpretation in accordance with BL 158(3) if the conditions under this provision are satisfied.

Most importantly, whether to refer to the NPCSC for an interpretation is a decision to be made by the CFA in accordance with our common law. Therefore, there can hardly be any damage to the rule of law or jeopardising our judicial independence. It is exactly because of the consideration of judicial independence that the DoJ had not publicised the way

in which the FDH case is handled.

In the past, as in the Congo case, the CFA had referred to the NPCSC for an interpretation of the Basic Law in accordance with BL 158(3). At that time, the two legal professional bodies, the legal profession and the international community generally recognised that such measure would not affect judicial independence or the rule of law in Hong Kong.

As I have repeatedly stated in other occasions in the past, this Government absolutely respects the rule of law and judicial independence. We would adopt the same cautious attitude in handling the FDH case and the Mainland pregnant women problem. Therefore, I do not agree that DoJ's handling of the FDH case would bring on turbulent storm to the rule of law of Hong Kong.

Finally, I would reiterate that the request by the DoJ for the CFA to consider referring to the NPCSC for clarifying the effect of the 1999 Interpretation under BL 158(3) would absolutely not affect the rule of law and judicial independence of Hong Kong. On the contrary, this measure would hopefully assist to resolve the right of abode issue of different categories of persons, including foreign domestic helpers and babies born to Mainland pregnant women. This is also consistent with the idea that I have emphasised in the past: that is to resolve the relevant issue under the legal system of Hong Kong.

Reporter: In layman's term, are you asking the Court of Final Appeal for seeking interpretation from the NPC before it determines on the case, and if you are, are you going back on what you said to the reporters that in so far if possible, the case should be resolved within the system in Hong Kong?

Secretary for Justice: I am not going back on my words as to how to handle the issue in question. As I said earlier, the

way to refer any relevant issue to be interpreted by NPCSC under article 158(3) is in fact built in as part of our Basic Law, and it is also to go through the process filtered by the Court of Final Appeal. The Court of Final Appeal, of course, is part of our legal system. As I said earlier, the final decision whether or not to make any reference under article 158(3), that final decision, if I may stress and reiterate again, is to be made by the Court of Final Appeal, and by the Court of Final Appeal alone. Therefore that is a mechanism and a way which is (a) constitutional, (b) is built in and enshrined in our Basic Law, and (c) is perfectly within the Hong Kong's legal system.

Reporter: There is the question of whether you are asking the court to go back and look at the Preparatory Committee's decision under this matter prior to the handover, which is later accepted by the NPCSC?

Secretary for Justice: The question of the binding nature or the extent to which it was binding in fact has never been previously clearly adjudicated by the Court of Final Appeal in Hong Kong. If you go back to the case of Chong Fung Yuen, in fact that is a point which there was an expressive paragraph in the Court of Final Appeal judgement, that that point was not argued, it was simply being proceeded on the basis of whole parties' assumption as a result of concession made by the Government at the time. Therefore if I may make it absolutely clear that that was a point which has never ever been adjudicated by the Court of Final Appeal. Therefore there was no question of going back and also if I may say, that at the end of the day, whether on the question of making any references to NPCSC under article 158(3) or how that is to be dealt with or approached, the final decision is to be made by the Court of Final Appeal upon hearing submissions by both parties.

Ends/Thursday, December 13, 2012