T v Commissioner of Police

FACV No. 3 of 2014 (10 September 2014)[1]
CFA

Background

In *T v Commissioner of Police*, the Applicant participated in a demonstration in May 2011 to raise awareness of issues faced by the lesbian, gay, bisexual, transgender and intersex community. The demonstration was held in a public pedestrian precinct and included a dance performed on a temporary stage. Police officers considered that the dance constituted "public entertainment" and the location of the dance was a "place of public entertainment" under s. 2 of the Places of Public Entertainment Ordinance (Cap. 172) ("PPEO") which required those who held the performance to obtain a valid licence for the event. The dance was stopped after the organisers were told that they did not have the required licence. The Applicant obtained leave to apply for judicial review of the intervention by the Commissioner of Police ("the Commissioner"), alleging that it was illegal.

The CFI dismissed the application for judicial review, holding that the organisers of the dance were required to obtain a licence under the PPEO. On appeal by the Applicant, the CA quashed the CFI decision, holding that the organisers were not so required. The Commissioner appealed to the CFA, which appeal was dismissed by a 3:2 majority.

CFI decision

The Applicant sought a declaration that:

(i) A place of public entertainment, for the purposes of the PPEO, does not include "an open space area (not being enclosed) where a political demonstration occurs"; or

(ii) Alternatively, ss. 2 and 4 of the PPEO to the extent that a place of public entertainment, for the purposes of the PPEO, does include an open space area (not being enclosed) where a political demonstration occurs are inconsistent with BL 27 and BL 39... and/or articles 16(2) and 17 of the BoR ... of s. 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) and/or articles 19 and 21 of the ICCPR 1966 ... and are unconstitutional.

Lam J (as he then was), ruled that the licensing regime in the PPEO applied to performances of this nature and dismissed the application. He considered that the dance performance was an "entertainment", that it was also a "public entertainment" and that the pedestrian precinct was a "place of public entertainment" as defined in the PPEO. Lam J also held that the provisions

[1] Reported at (2014) 17 HKCFAR 593.

of the PPEO were not unconstitutional in that, although they restricted the various freedoms relied upon, they satisfied the proportionality test. The PPEO pursued the legitimate purpose of public safety, the licensing requirements were rationally connected to achieving that purpose, and were a proportionate measure.

CA decision

The CA (Cheung CJHC, Stock VP (as he then was) and Barma JA) held that the reference in the definition of "public entertainment" to the general public being "admitted, with or without payment" to the entertainment implies as a matter of law that the organiser or performer of the entertainment has, or is entitled to exercise, a certain degree of control; or as a matter of fact exerts, or purports to exert, a certain degree of control over the place in which the entertainment is presented or carried on. This enables him to admit, or exclude, members of the public from the entertainment. The licensing requirements do not apply to an organiser or performer who had little or no control over entry to the place of entertainment. Rather, the licensing regime principally targeted entertainment carried on within buildings or temporary structures, but not entertainment in a public place.

The regulation was not capable of compliance where the place of entertainment was not, in some way, enclosed or cordoned off, and was therefore without an "entrance". Since in the circumstances the dance performance provided by the organisers was not a "public entertainment" within the meaning of the PPEO, no licence was required. The CA unanimously reversed the CFI decision[2]. Having arrived at this result, the CA did not deal with the constitutional issue. The Commissioner appealed to the CFA.

CFA decision

The CFA, by a majority of 3:2 (Fok PJ delivering the main judgment, Tang PJ and Lord Neuberger of Abbotsbury NPJ delivering separate and concurring judgments; Ma CJ and Ribeiro PJ dissenting), dismissed the Commissioner's appeal, holding that the organisers of the dance were not required to obtain a licence under the PPEO.

Fok PJ said that the issue in the appeal was whether and in what circumstances, on the true construction of the PPEO, an entertainment which is presented or carried on in a public street or other publicly accessible open space is one for which the organiser is required to obtain a licence. If the Commissioner's contention is correct, then a subsidiary question arises as to whether the provisions of the PPEO requiring a licence to be obtained are inconsistent with the constitutionally protected freedom of public demonstration and assembly and freedom of expression.

In the opinion of Fok PJ, the question in issue was whether the organisers were keeping or using a place of public entertainment within the meaning of the PPEO, that being the activity for which a licence is required under s. 4. That question in turn depended on whether the dance performance was a "public entertainment" and whether the place where it was "presented or carried on" was a "place of public entertainment". Fok PJ held that the primary focus of the appeal was the proper construction of the terms "public entertainment"

[2] Reported at [2013] 6 HKC 132.

and "place of public entertainment" in the PPEO.

Before the CFA, in light of the CA's ruling, the Applicant's approach focused as the central criteria for the PPEO's application on the ability of the entertainment's organizer to control admission of would-be entrants to (and their exclusion from) the place of its presentation.

Statutory construction

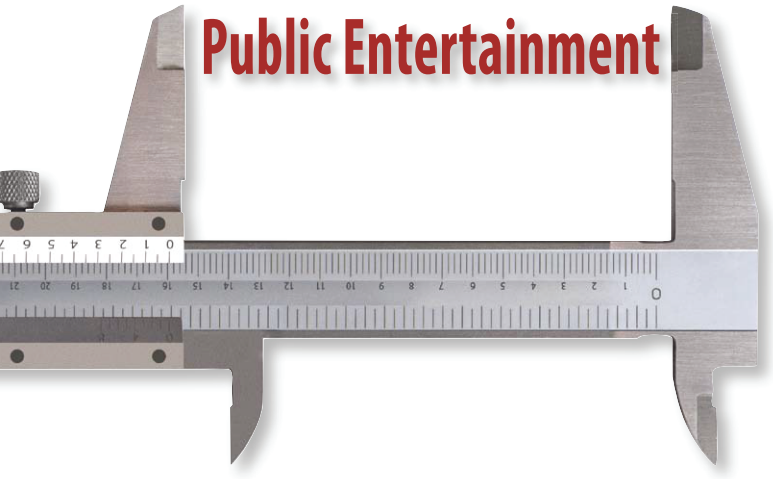
As a matter of statutory construction, the CFA held that the proper starting point is to look at the relevant words or provisions having regard to their context and purpose (*Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735 at §12). The context of a statutory provision should be taken in its widest sense and includes the other provisions of the statute and the existing state of the law (*HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568 at §13). A court cannot attribute a meaning to a statutory provision which the language, understood in the light of its context and statutory purpose, cannot bear (*HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at §63).

Fok PJ referred to other relevant canons of statutory interpretation. It is a principle of statutory interpretation that a person should not be penalised except under clear law. In other words, when considering opposing constructions of a statutory provision, the court presumes the legislature intended to observe this principle and should strive to avoid adopting a construction which penalises a person when the legislator's intention to do so is doubtful (*Bennion on Statutory Interpretation* (6th Ed), section 271 (pp 749-750)). Moreover, as part of the principle against doubtful penalisation, there is a presumption against the imposition of a statutory

interference with freedom of association or of speech without clear words (*Bennion on Statutory Interpretation* (6th Ed), sections 276 (pp 761-762) and 277 (pp 762-763)).

The context and purpose of the PPEO

Fok PJ stated that the context of the relevant provisions of the PPEO includes other provisions of the PPEO itself, the Places of Public Entertainment Regulations (Cap. 172A), the existing state of the law, including other ordinances relevant to the use of and policing of public places. It is clear from the scheme of the PPEO as well as its legislative history that its essential purpose is the regulation of safety at places where public entertainments are presented or carried on so that the safety of those members of the public attending the entertainment at these places will be adequately protected. However, Fok PJ noted that owing to the limited nature of the licensing regime, there are limits to the extent this statutory purpose can be used to construe the PPEO. For example, notwithstanding that large numbers of people may be invited to attend a private entertainment, the PPEO only applies to those places defined as places of public entertainment.



The meaning of "place of public entertainment"

Regarding the meaning of a "place of public entertainment" under the PPEO, in order to identify whether a place is a "place of public entertainment", it is necessary to have regard to the definition of "public entertainment". Fok PJ is of the view that a place can *prima facie* be an open space if suitably defined and delineated so that it can be identified (per Lord James of Hereford in *Powell v The Kempton Park Racecourse Co Ltd* [1899] AC 143 at 194).

The various locations within the definition, including a suitably defined open space capable of accommodating the public, are places of public entertainment if they are places "in or on which a public entertainment is presented or carried on whether on one occasion or more". Under s. 2 of the PPEO, a "public entertainment" is defined as any entertainment within the meaning of the PPEO "to which the general public is admitted with or without payment".

The Commissioner argued that as the concept of admission only applies to the entertainment rather than the place of entertainment and is only used to distinguish between a public entertainment and a non-public or private entertainment, to which the PPEO does not apply. It was submitted that admission to the place of entertainment is therefore not required.

However, Fok PJ pointed out that the definition of "place of public entertainment" could not be read in isolation. It necessarily incorporated the definition of "public entertainment" since "public entertainment" was part of the term itself. A "public entertainment" as defined required that it

be one "to which the general public is admitted". The requirement that the public be admitted to the place was therefore an integral part of the definition of a "place of public entertainment". If it were otherwise, there would be no safety concern for the public relating to the place of public entertainment and the legislative scheme for notification would make no sense.

Fok PJ referred to the summary of the legislative history. When the definition of "public entertainment" was introduced in 1919, the only entertainments to which the public could be admitted were entertainments which took place within a structure of some sort. It is clear that admission to the entertainment therefore involved both a locality and admission to that place where the entertainment as defined was to take place. Further, it was never suggested in any of the relevant explanatory memoranda or speeches in Hansard moving subsequent legislative amendments in the 50's, 70's and 80's that the admission of the public to the public entertainment did not involve an admission to a locality.

Fok PJ further held that if, on the Commissioner's case, admission to the place of public entertainment were not necessary, then places which were entirely remote and unconnected to where the actual entertainment was presented or carried could constitute a place of public entertainment. For example, spectators of a football match or musical concert who found vantage points outside the stadium or auditorium where the game or concert was being played or performed would be said to be admitted to the public entertainment and the various vantage points, if capable of accommodating the public, could each then be said to be places of public

entertainment for which licences would be required.

The concept of admission to the place of public entertainment under the PPEO was reinforced by the statutory restrictions on the unauthorised sale of tickets under s. 6(1) of the PPEO. A condition could also be imposed under the licence specifying the maximum number of persons which may be admitted as regards entertainments taking place in the place to which the licence relates. Fok PJ considered that these provisions would be incongruous and inconsistent if the definitions in the Ordinance were read as not requiring admission to the place of the entertainment and it could legitimately be asked why the draftsman framed those provisions in this way if admission to the place of entertainment was not required.

Fok PJ agreed with Tang PJ's observation that given the English and Chinese texts are equally authentic, and presumed to have the same meaning, the use of the expression "讓 ... 入場", especially the word "場" in the Chinese definition of "public entertainment", supports the view that it was concerned with the admission to the place of entertainment and not merely to the entertainment.

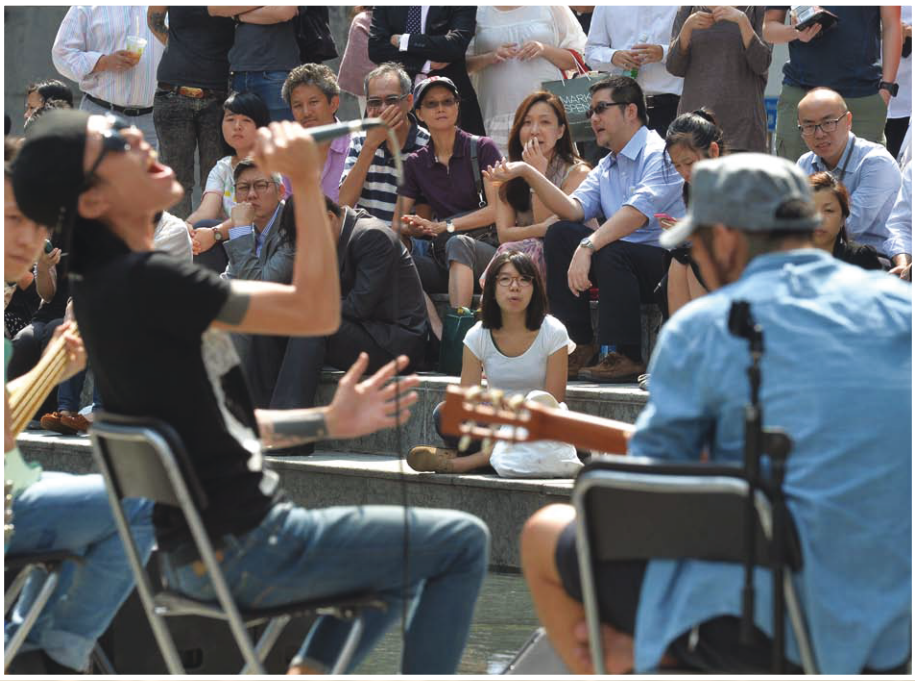
The requirement of admission

The Commissioner challenged the CA's conclusion that insofar as an open space may be a place of public entertainment, the requirement that the place be one to which the public have access means the place must be cordoned off and the person who is keeping or using the place must have the right and ability to admit or exclude others from it. The Commissioner submitted that the PPEO defines "entertainment" very widely and that the word "admitted", from the dictionary definition, should be construed in a passive sense to mean "Be open to or compatible with; leave room for" and "Afford entrance to; have room for". Moreover, the words "to which the general public is admitted with or without payment" should be construed purposively as requiring only that the public entertainment is one to which members of the public are afforded or allowed access or in which the public can participate. Since admission may be without payment and the PPEO refers only to entertainment to which the public is "admitted" but does not specify who enables admission, the legislative concern was thus public exposure to risks. The Commissioner contended that this is entirely consistent with the natural and ordinary meaning of the word "admitted" and will best achieve the PPEO's fundamental purpose of protecting public safety and order. The requirement that the person presenting or carrying on the entertainment to exercise control over those who are admitted is thus not necessary.

Fok PJ held that the requirement of admission does require some form of control over the admission of persons to the public entertainment and the place where it is being presented or carried on and, as a corollary, a right of exclusion from that place. He opined that there is a limit to purposive construction in that a court cannot attribute a statutory provision a meaning which the language, understood in the light of its context and statutory purpose, cannot bear. The word

"admitted", in its natural and ordinary meaning, suggests an active sense of giving permission to enter or have access or letting a person in. This is so even if an entertainment rather than a place is considered as the object of the admission, but it is all the more so if the admission is to a place as discussed above. It is unusual to use "admitted" to convey a sense of merely having access to or being exposed to or having an ability to participate in an entertainment. The definition would otherwise be adequately and more naturally expressed if it referred to a public entertainment being one to which the general public "has access to", "is exposed to" or "can participate in". The concept of admission normally connotes something more than that. Further, the active sense of the word was clear in light of the legislative history where the PPEO initially equated admission to the place with admission to the entertainment. There is nothing in any material to suggest that the original definition – limited to structures into which one would have to be physically admitted – has changed meaning. One must be cautious of imputing to the legislature an intention to change the meaning of an existing provision. Since a failure to obtain a licence for the keeping or use of a place of public entertainment constitutes a criminal offence, the principle against doubtful penalisation would tend to favour adopting the construction of two competing constructions which does not give rise to a risk of prosecution. Lord Neuberger of Abbotsbury NPJ was also of the view that if the entertainment is presented on a public highway, it is not a natural use of the word to say that the public are thereby "admitted" to it. If the admission of the public to an entertainment did not imply some control over admission or exclusion, a number of surprising and unintended results would follow, catching buskers and other informal entertainments.

Since the public has a right of way over a public street, it is difficult to see how control over admission of members of the public could lawfully be exercised. Absent some other basis for exercising control over admission by members



of the public to a public street, the PPEO licence regime cannot apply to an entertainment presented or carried on in a public street. If it is thought that this conclusion leaves a lacuna in the law, that is a matter for the legislature to address by legislation.

Conclusion of the majority

On the facts, the majority concluded that, as the organisers did not have the power to exclude other persons from the pedestrian precinct where the dance performance was presented or carried on, the public was not "admitted" to the pedestrian precinct. Therefore the precinct was not a place of public entertainment under the PPEO and the organisers were not required to obtain a licence for its use[3].

Since the construction issue was decided in favour of the Applicant, it was unnecessary to address the constitutional issue. Accordingly, the appeal was dismissed.

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[3] According to the minority, the purpose of the legislation is to promote public safety by means of a detailed precautionary licensing scheme (including a risk assessment to be made in advance of the proposed event by government departments possessed of expertise and experience relevant to the venue and type of entertainment proposed) aimed at anticipating potential dangers and putting preventive measures in place before the event occurs. Other Ordinances like the Public Order Ordinance (Cap. 245) provide no substitute for the PPEO's precautionary safety regime. The definition of "public entertainment" was concerned with the nature of the entertainment rather than the place where it was presented. An entertainment became a public entertainment because the general public were "admitted" to the entertainment. The definition made no mention of the place at which the entertainment was staged. There was no requirement that the general public had to be "admitted" to such a place before the duty to obtain a licence arose. The minority did not accept the majority's view that a place to which persons were admitted necessarily implied a means of controlling admission. Further, the minority was of the view that the requirements imposed by the PPEO were no more than necessary to secure public safety and good order in places of public entertainment. It was a legitimate, rational and proportionate measure which was compatible with the constitutional guarantee. For these reasons, the minority would allow the appeal, set aside the CA's orders and restore the CFI's order dismissing the application for judicial review.

Gutierrez Joseph James, A Minor v Commissioner of Registration and another

FACV No. 2 of 2014 (18 September 2014)[1]
CFA

Background

The Appellant was born in Hong Kong on 1 December 1996 out of wedlock to his mother, a Philippine national working in Hong Kong as a foreign domestic helper. Neither of his mother nor his purported father was, or is, a Hong Kong permanent resident ("HKPR").

The Appellant is a Philippine national and was issued with a Philippine passport on 26 March 1997. Since birth, he has remained in Hong Kong on "visitor" condition except for several short periods abroad.

In December 2006, the Appellant's mother applied, on his behalf, for verification of his eligibility for a permanent identity card ("VEPIC application") with a view to establishing his HKPR status.

The Appellant's application for verification of his HKPR status under BL 24(2)(4) and his application for a juvenile Hong Kong permanent identity card were refused by the Director of Immigration and the Commissioner of Registration ("the Commissioner") respectively.

The Appellant appealed to the Registration of Persons Tribunal ("the Tribunal") against the decision of the Commissioner in refusing to issue him with a permanent identity card. The Tribunal dismissed the Appellant's appeal on the grounds that:

(i) Because the Appellant's mother had not ordinarily resided in Hong Kong prior to the making of the VEPIC application, and had not taken Hong Kong as her place of permanent residence, the Appellant could not establish either of these requirements for entitlement to HKPR status under BL 24(2)(4).

(ii) Even assuming that the Appellant were ordinarily resident in Hong Kong, he could not satisfy the seven year continuous ordinary residence requirement by reason of his absences from Hong Kong in the seven years immediately before the VEPIC application, for which periods he had no permission to remain in Hong Kong.

On the Appellant's application for judicial review against the Commissioner's and the Tribunal's respective decisions, Lam J (as he then was) dismissed the application, holding that in the present case where the Appellant's mother (being the sole carer of the Appellant as a dependant

[1] Reported at (2014) 17 HKCFAR 518.

child) could not satisfy the permanence requirement herself, the Appellant also failed to establish on the facts of his case that requisite concrete steps had been taken by himself or by his mother on his behalf to take Hong Kong as his place of permanent residence; and, alternatively, the Tribunal was correct in holding that the Appellant did not have seven years' continuous ordinary residence in Hong Kong immediately before his VEPIC application as for those periods when he was outside Hong Kong, he did not have any lawful right to remain in Hong Kong pursuant to section 11(10) of the Immigration Ordinance (Cap. 115).

On appeal, the CA held that the Tribunal erred when it treated failure on the part of the Appellant's mother to establish the permanence requirement as necessarily determinative of the Appellant's inability to establish that requirement. Nevertheless, the CA dismissed the appeal on the basis that the Appellant's mother could not establish that at the time of the VEPIC application, she had made sufficient arrangements to ensure that the Appellant could continue to live in Hong Kong in the event that she ceased to be employed in Hong Kong. The CA also agreed that the Appellant was not able to rely on section 2(6) of the Immigration Ordinance (Cap. 115) to overcome the problem of his absences from Hong Kong to establish the seven-year continuous ordinary residence; and the new argument (which was not raised before the Tribunal and the Court below) that the Appellant was in possession of an extant multiple entry visa valid on its face until a date beyond the date of departure and re-entry was also unable to assist him in this respect.

Upon further appeal to the CFA, the appeal was dismissed.

Issues

The two main issues before the CFA were:

(i) For the purpose of qualifying as a HKPR under BL 24(2)(4), what must a child or young adult applicant who is a non-Chinese national born in Hong Kong and whose application is made before he or she reaches the age of 21, establish, either on his own or by a parent or legal guardian on his or her behalf, to satisfy the requirement under BL 24(2)(4) of "having taken Hong Kong as [his or her] place of permanent residence"? ("The First Question")

(ii) For the purpose of BL 24 and BL 31, whether and under what circumstances a person exempted from the requirement of registration under the laws of the HKSAR and given permission to remain in Hong Kong as a visitor may become or be recognised as a non-permanent resident of the HKSAR to enjoy the freedom to travel and to enter and leave the HKSAR? ("The Second Question")

The CFA went through the qualifying conditions for the status of HKPR as laid down under BL 24(2)(4) and the relevant legislation in Hong Kong.

The First Question: "place of permanent residence"

In *Prem Singh v Director of Immigration*[2] , the CFA held that to qualify under BL 24(2)(4), it must be shown that the person concerned:

(i) entered Hong Kong with a valid travel document ("the entry requirement");

(ii) has ordinarily resided in Hong Kong for a continuous period of not less than seven years ("the seven-year requirement"); and

(iii) has taken Hong Kong as his place of permanent residence ("the permanence requirement").

The entry requirement was not in dispute in the present case.

"Taking Hong Kong as the place of permanent residence"

The CA earlier held that, on the facts of his case, the Appellant did not satisfy the *Prem Singh* criteria of "permanent residence" because there was no evidence that he (either by himself or through his mother) had taken any concrete action to make

[2] Reported at (2003) 6 HKCFAR 26.

Hong Kong, and Hong Kong only, his place of permanent residence.

The Appellant argued before the CFA that *Prem Singh's* interpretation of BL 24(2)(4) was either wrong or had been misunderstood in its application by the Courts below. It was contended that *Prem Singh's* reference to the need to demonstrate "concrete steps" that an applicant has taken Hong Kong as his place of permanent residence was unwarranted by the wording of BL 24(2)(4) and impossible for a boy of 10 to satisfy. Moreover, the Appellant complained of an erroneous belief that the permanence requirement obliges an applicant to show that all links with other countries have been severed. Further, the *Prem Singh's* requirement that an applicant must show that he intends "more than ordinary residence" has led to the Courts enforcing a strict and mutually exclusive dichotomy between facts capable of supporting ordinary residence and facts supporting the permanence requirement, instead of looking at all the circumstances.

The Appellant requested the CFA to modify the *Prem Singh* criteria in its application to the Appellant that, apart from requiring an applicant's parent or guardian to make a declaration as required by paragraph 3(1)(b) of Schedule 1 to the Immigration Ordinance that the applicant has taken Hong Kong as his place of permanent residence and apart from showing habitual residence in Hong Kong, it is or ought to be only necessary to show:-

(i) the maintenance of an ordinary or regular pattern of life in Hong Kong; and

(ii) the reasonable prospect of the maintenance of such an ordinary or regular pattern of life in Hong Kong, i.e. instead of asking for evidence of concrete steps taken, it should be enough for an applicant to demonstrate that his declared intention of taking Hong Kong as the place of permanent residence is genuinely held, realistic and realisable.

The CFA held that in necessitating applicants to "have taken" Hong Kong as their place of permanent residence, the Basic Law necessarily envisaged that all the facts necessary to satisfy the permanence requirement were capable of coming into existence before the date of the application. It was important for the Court to identify the nature of such facts during the period when the applicant could be expected to be subject to a limit of stay imposed by the Director to enable it to ascertain that the applicant's residence here is intended to be more than ordinary residence and that he intends and has taken action to make Hong Kong, and Hong Kong alone, his place of permanent residence, meaning that he intends to reside in Hong Kong permanently or indefinitely, rather than for a limited period.

In the case of the Appellant, a child not of Chinese nationality, born in Hong Kong but not of residents within BL 24(2)(4), he cannot rely on BL 24(2)(5). He can only qualify for HKPR status if he comes within BL 24(2)(4), meeting the requirements set out in *Prem Singh*. The CFA did not accept the Appellant's argument that children and young adults should stand in a different class, requiring a different test to be devised.

The CFA held that the modified test proposed by the Appellant is inconsistent with BL 24(2)(4) for the following reasons.

First, as pointed out in *Prem Singh*, BL 24(2)(4) makes it clear that more than ordinary residence

is required. It specifies the permanence requirement as an element additional to the seven-year requirement. It is therefore not enough merely to show ordinary residence and an intention to continue to be ordinarily resident.

Second, the words "have taken Hong Kong as their place of permanent residence" are properly construed as importing both subjective and objective requirements. The element of permanence connotes a subjective commitment to maintaining a residence in Hong Kong, while the need to "have taken Hong Kong (etc)" denotes the existence of objective facts constituting such "taking". The CFA considered that the Appellant's proposal eliminates all need for objective evidence, replacing it with an assessment of the applicant's declared intention to continue being ordinarily resident in the future. Given the content of BL 24(2)(4), it is not plausible to suggest that the drafters of the Basic Law intended that ordinary residence accompanied by a mere declaration of intent without the support of concrete, objective evidence, would suffice to meet the permanence requirement.

"Concrete steps"

The CFA emphasized that the term "concrete steps" referred to in *Prem Singh* must be read in its proper context. The CFA considered that the Director of Immigration may require evidence of any facts which were already in existence which tended to show that the applicant "has taken Hong Kong, etc" so as to meet the permanence requirement; there is no suggestion that such evidence is confined to any particular class of fact or conduct. The words "concrete steps" were used in *Prem Singh* to emphasize that there were both subjective and objective elements in the permanence requirement. The CFA considered

that the applicant must show that he subjectively intends to establish his permanent home in Hong Kong and that he objectively has taken action to achieve that. In other words, intention alone in the absence of any objective factual evidence is not enough. The CFA clarified that the permanence requirement does not oblige an applicant to sever links with other countries. The CFA also rejected the Appellant's complaint about the approach of exclusive dichotomy of evidence supporting ordinary residence *vis-à-vis* evidence establishing permanence requirement in the Courts below and stressed the need to consider all the circumstances of the case in deciding whether the permanence requirement has been satisfied.

On the available evidence, there was no basis for suggesting that the Appellant had taken Hong Kong as his place of permanent residence through any conduct of, or arrangements made on his behalf or for his benefit by, his mother or any other person. The CFA ruled that the question posed by the CA as to what would become of the Appellant if his mother were to lose her employment was, in the circumstances of this case, a perfectly proper question, given the Appellant's lack of ability independently to establish Hong Kong as his place of permanent residence.

Conclusion on the First Question

The CFA's answer to the first question was that the permanence requirement laid down by BL 24(2)(4) requires a child or young adult applicant who is a non-Chinese national born in Hong Kong and whose application is made before he reaches the age of 21 to meet the criteria established by the Court in *Prem Singh*, taking into account his individual circumstances, including any action taken or arrangements made by himself or by a parent or legal guardian on his behalf or for his benefit which tend to show that such child or young adult has taken Hong Kong as his place of permanent residence. The CFA concluded that the Appellant failed on the permanent residence ground. It followed that the appeal must be dismissed.

The Second Question: whether a visitor exempted from registration may qualify as a non-permanent resident

To satisfy the seven-year requirement under BL 24(2)(4), it was necessary for the Appellant to establish that he had seven years' continuous ordinary residence in Hong Kong immediately before making the application, as established by the CFA in *Fateh Muhammad v Commissioner of Registration*[3].

During the material seven-year period, the Appellant was in Hong Kong on a visitor's visa, subject to a limit of stay which on each occasion[4] did not exceed 180 days and was subject to conditions of stay as prescribed by regulation 2(1) of the Immigration Regulations (Cap. 115A), including a restriction against him being a student. It was the Commissioner's case that the continuity of the relevant seven-year period was interrupted by the Appellant's absences from Hong Kong on three occasions for periods of 17, 9 and 16 days respectively[5] . The Commissioner relied on section 11(10) of the Immigration Ordinance, which provides that: "Any permission given to a person to land or remain in Hong Kong shall, if in force on the day that person departs from Hong Kong, expire immediately after his departure." It was argued that by virtue of section 11(10), the Appellant could not possibly have been ordinarily resident in Hong Kong during those periods of absence; when his permission to remain expired, he had no right to enter Hong Kong and could not lawfully enter Hong Kong without being granted permission afresh on presenting himself to an Immigration Officer on his return.

On the other hand, the Appellant argued that despite that being a child under 11 years of age at the material time, he was exempted under Regulation 25 of the Registration of Persons Regulations (Cap. 177A) from the requirement to register or apply for the issue of a Hong Kong identity card, he was in fact "qualified to obtain Hong Kong identity cards in accordance with

[3] Reported at (2001) 4 HKCFAR 278 at 285.

[4] Save once when, by error, he was granted permission to stay limited to 182 days.

[5] 25.3.00 to 12.4.00 (17 days); 22.2.01 to 4.3.01 (9 days) and 31.3.04 to 17.4.04 (16 days).

the laws of the Region" within the meaning of BL 24(4). As such, it was argued by the Appellant that he was a non-permanent resident and therefore enjoyed the "freedom to travel and to enter or leave the Region" guaranteed by BL 31. The Appellant argued that as such he was entitled to re-enter Hong Kong on the basis of the permission previously granted to him with a limit of stay which had not expired, as was held in *Gurung Kesh Bahadur v Director of Immigration*[6] that s. 11(10) of the Immigration Ordinance does not operate in relation to non-permanent residents to cut short an extant permission to stay and that a non-permanent resident is entitled to re-enter Hong Kong on the basis of the permission previously granted with a limit of stay which had not expired.

The CFA agreed with the Commissioner that the proviso to Regulation 25 of the Registration of Persons Regulations makes it clear that an identity card will only be issued "if the Commissioner allows" that to happen, thus the proviso merely qualifies exempted persons to "apply" and not to "obtain" an identity card. The CFA pointed out that if merely being qualified to apply were sufficient, it would mean that even a transit passenger would have to be treated as a non-permanent resident and that could not possibly have been intended by the legislature[7].

Conclusion on the Second Question

The CFA held that a person exempted from the requirement of registration and given permission to remain in Hong Kong as a visitor was not, without more, qualified to enjoy the freedom to travel and to enter and leave the HKSAR as a non-permanent resident. The proviso to regulation 25 of the Registration of Persons Regulations did not, by enabling exempted persons to apply for an identity card, mean that they ought in law to be treated as persons who were qualified to obtain Hong Kong identity cards in accordance with the laws of the HKSAR within the meaning of BL 24(4) and were therefore non-permanent residents. Accordingly, the CFA also dismissed the appeal on this ground.

Question left open by the CFA

However, the CFA expressly left open the issue of whether the Appellant's permission to remain in Hong Kong as a visitor necessarily meant that he could not build up ordinary residence here, notwithstanding numerous visa extensions spanning many years; and the question of whether section 2(6) of the Immigration Ordinance might provide a basis for preventing interruption of continuity of ordinary residence in the Appellant's case. The CFA considered that no purpose would be served to remit the matter to the Tribunal to explore the relevant facts since the appeal will in any event be dismissed on the permanence requirement ground.

[6] Reported at (2002) 5 HKCFAR 480.

[7] Regulation 25(d)(i).

China International Fund Limited v Dennis Lau & Ng Chun Man Architects & Engineers (HK) Limited, and Secretary for Justice (Intervener)

HCMP No. 2472 of 2014 (12 August 2015)[1]
CA

Background

The issue before the CA was the constitutionality of section 81(4) of the Arbitration Ordinance (Cap. 609) ("AO").[2] Section 81(4) provides that the leave of the CFI is required for any appeal from a decision it makes on an application to set aside an arbitration award pursuant to section 81(1). The Applicant (China International Fund Limited) unsuccessfully applied to a CFI judge to set aside an arbitration award under section 81(4). The Applicant then sought leave to appeal against the decision of the judge. The judge refused leave and the Applicant applied to the CA to seek leave.

The Respondent (Dennis Lau & Ng Chun Man Architects & Engineers (HK) Limited) argued that section 81(4) confers jurisdiction to grant leave on the CFI, not the CA. The Applicant replied that section 81(4) is unconstitutional since it disproportionately restricts the power of final adjudication granted to the CFA by BL 82. Since there was a challenge to the constitutionality of legislation, the CA invited the Secretary for Justice ("SJ") to consider if he wished to intervene. Subsequently, the SJ decided to intervene in the

proceedings and filed evidence to explain the genesis and aims of section 81(4).

Principles for testing finality provisions

The CA noted that the CFA discussed the principles for testing a finality provision in *A Solicitor v Law Society* (2003) 6 HKCFAR 570 and *Mok Charles Peter v Tam Wai Ho* (2010) 13 HKCFAR 762. The CA stated the following propositions to be derived from those cases:

(a) BL 82 vests a constitutionally entrenched power of final adjudication in the CFA;

(b) Since there is no constitutionally-

[1] Reported at [2015] 4 HKLRD 609.

[2] The Applicant accepted before the CA that as a matter of statutory construction the court which has the power to grant leave under section 81(4) is the CFI (but not the CA).

entrenched right of appeal to the CFA, any consideration relating to BL 82 should be examined by reference to the CFA's power of final adjudication and function;

(c) By its very nature, subject to special statutory provisions, the final appellate power is exercisable upon appeal from an intermediate appellate court. Thus, other than cases where there is any statutory provision for direct appeal to the CFA, restriction of appeal to an intermediate appellate court would also restrict exercise of the power of final adjudication;

(d) The power of final adjudication requires regulation, which may include limitation, having regard to the power;

(e) Any restriction of the power of final adjudication must satisfy the proportionality test as follows:

(i) The restriction or limitation must pursue a legitimate aim;

(ii) The restriction or limitation must also be rationally connected to that legitimate aim; and

(iii) The restriction or limitation must also be no more than is necessary to accomplish that legitimate aim.

(f) It is the duty of the courts in the exercise of their independent judicial power to review any legislation which seeks to impose any limitation on the power of final adjudication by asking whether such limitation satisfies the proportionality test. The assessment must be conducted by examining all the circumstances; and

(g) BL 82 is a provision that may have relevance to all levels of court or statutory tribunals in terms of the appellate process.

Since the finality provision in section 81(4) has the effect of limiting appeals to the CA, which in turn would limit appeals to the CFA, BL 82 was engaged and it had to be examined under the proportionality test.

The Applicant accepted that section 81(4) satisfied the first and second limbs of the proportionality test. Namely, a restriction must pursue a legitimate aim and the restriction must be rationally connected to that aim. Section 3 specified the legitimate aims of promoting speed, finality, reduction of costs related to arbitration,

and the parties' autonomy in choosing their own dispute resolution process. However, the Applicant submitted that section 81(4) failed to satisfy the third limb of the proportionality test. Its main grounds were that section 81 is based on the UNCITRAL Model Law on International Commercial Arbitration – but the Model Law, unlike section 81(4), does not absolutely exclude the role of the CA. Furthermore, while section 81(1) only allows judicial intervention in limited circumstances, that high threshold makes it harder to justify absolute exclusion of appeals to the CA. It is also wrong in principle to give the CFI judge who decided the application to set aside the award exclusive power over the grant of leave to appeal against his own judgment when CA and CFA judges have more experience and expertise. Parties to arbitration should be able to appeal to the CFA if something goes badly wrong. There are broader rights to appeal to the CA in Schedule 2, sections 3(5), 4(6), 5(8) and 6(5) of the AO, and Schedule 2, sections 5(9) and 6(6) allow the CA to grant leave to appeal on questions of general importance or some other special reason.

The Respondent replied that, unlike in the BL 82 case *Mok Charles Peter v Tam Wai Ho*, section 81(4) does not create an absolute bar against appeal but instead provides for the CFI to grant leave to appeal where there is a reasonable prospect of success. In the context of arbitration awards, it is important to respect the parties' autonomy to choose arbitration to resolve their disputes with speed, privacy and finality. There is no inconsistency between section 81(4) and the parties' autonomy not to opt for the scheme in Schedule 2. In proceedings for enforcement or setting aside arbitration awards, by the time the CFI considers a leave application the parties have already had their case considered by the arbitrator and the CFI. Furthermore, arbitration cases are heard by specialist judges in the Construction and Arbitration List and the judge who dealt with the leave application in the CFI would have greater familiarity with the case than the CA. There is a range of reasonable options, including section 81(4), which the legislature could adopt to achieve the legitimate aims in question and the present scheme of the AO. Accordingly, the CA should

accord section 81(4) the appropriate margin of appreciation.

Role of the CA in the AO

The CA noted that the AO adopts many features of the UNCITRAL Model Law, one of which can be found in section 81, which incorporates Article 34 of the Model Law into Hong Kong law. An important objective of the AO is to set the proper scope for judicial interference in arbitration. The underlying policy of the AO is clearly set out in section 3(2), that is, subject to the observance of safeguards that are necessary in the public interest, the AO is based on the principle of honouring the parties' autonomy in choosing arbitration as an alternative dispute resolution process to the exclusion of the court unless expressly provided for in the AO.

The CA referred to many provisions in the AO reflecting the importance of section 3(2) regarding the role of the courts in arbitration. Section 2 designates the CFI as the court to perform specified functions under the AO. In line with the UNCITRAL Model Law, the AO restricts the CFI's involvement in the arbitration process. Decisions made under sections 22B, 26(3), 31(8), 45, 55, 58(7), 59(5), 60, 61, 62, 72, 77, 81, 84, 86(4), 89(5) and 98D(5) are either not appealable or are only appealable with the leave of the CFI. Accordingly, the role of the CA is more limited under the scheme of the AO than usual proceedings in the High Court. Even where an appeal to the CA is possible, leave of the CFI is required.

There is also an option for alternative arbitration schemes under the provisions of Schedule 2 to the AO. Parties can opt for some or all of those provisions in the arbitration agreement. Schedule 2 provides a wider scope for the involvement of the CFI and the CA in arbitration. Determinations under sections 3, 4 and 5 of Schedule 2 are appealable with the leave of the CFI or the CA. Under section 3 of Schedule 2, a party to arbitration may apply to the court for the determination of a question of law. Such determination is appealable with the leave of the CFI or the CA. Under section 4 of Schedule 2, a party may challenge an arbitral award on the ground of serious irregularity and the CFI's determination of that challenge can be appealed with the leave of the CFI or the CA. Under section 5 of Schedule 2, an arbitral award can be appealed on a question of law and the determination of the appeal by the CFI can be further appealed to the CA with the leave of the CFI or the CA if the question is of general importance or, for some other special reason, should be considered by the CA. Other than the situations within sections 100 and 101[3], it is entirely a matter for the parties to

[3] Schedule 2 also applies automatically to arbitration pursuant to an agreement providing for domestic arbitration made within six years from the commencement of the AO (see section 100). Also, section 101 provides for automatic application of the Schedule 2 regime for construction subcontracts.

decide whether they would opt for the provisions of Schedule 2 in their arbitration agreements.

The CA also considered the potential engagement of the CA in applications for leave to appeal in cases where an award is challenged on the ground of serious irregularity. If a party wishes to retain an option to seek leave in the CA, he can stipulate in his arbitration agreement that section 4 of Schedule 2 shall apply. Conversely, if a party does not so stipulate, he is taken to have bargained with the opposite party that the role of the CA in such matter would be limited in accordance with section 81 of the AO.

Even under the section 81 regime, the CA may retain overall supervision of the fairness of the process of seeking leave before the CFI within its residual jurisdiction under section 14 (1) of the High Court Ordinance (Cap. 4). The residual jurisdiction affords redress in the extreme situation where the refusal of leave by the lower court cannot be properly regarded as a "judicial" decision, meaning a decision reached "not by any intellectual process, but through bias, chance, whimsy or personal interest". The residual jurisdiction as a remedy available to the CA is not to substitute the CA for the lower court in deciding whether to grant leave. Rather the CA would only decide whether or not to set the original decision to refuse leave aside and, if it is set aside, the intended appellant could reapply to the lower court for leave to appeal.[4]

[4] *Guangdong Changhong Electric Co Ltd v Inspur Electronics (HK) Ltd* [2015] 2 HKLRD 714, citing Mustill LJ in *Aden Refinery Co Ltd v Ugland Management Co Ltd* [1987] Q.B. 650, Rix LJ in *CGU International Insurance Plc v AstraZeneca Insurance Co Ltd* [2007] 1 All ER (Comm) 501, and Longmore LJ in *Kyla Shipping Co Ltd v Bunge SA* [2013] EWCA Civ 734.

The proportionality test

Legitimate aim and rational connection

The primary scheme of the AO provides for the determination of grounds for setting aside an arbitral award by the CFI. If the CFI considers that there is a reasonable prospect of success (which is not a very high threshold) in an appeal from its determination on such grounds, it would grant leave to appeal. On the other hand, if a specialist judge in the CFI's Construction and Arbitration List decided (after fair and judicial consideration of the matter) that there is no reasonable prospect of success, it is unlikely that such a case could properly be characterised as an arbitration process gone badly wrong.

The CA agreed with the Respondent that section 81 is not inconsistent with Schedule 2 as the rationale for the differences between the regimes under section 81 and Schedule 2 respectively is based on the autonomy of the parties to arbitration. If a party has opted for arbitration under section 81, it is substantially different from a scenario where a party opted for arbitration under section 4 of Schedule 2.

The CA also considered that, as submitted by the SJ, the essential question is who should be the gatekeeper. The power of final adjudication of the CFA in BL 82 is engaged because without any appeal from the CA, absent specific legislation, there cannot be an appeal to the CFA. The CA noted the Respondent's submission that, if the CA refused leave, it could equally be argued that the party should be able to seek leave from the Appeal Committee of the CFA. Potentially therefore, the party who succeeded in the arbitration (which was upheld by the CFI with leave to appeal refused) would be subject to two further rounds of leave applications before the matter reached finality.

As to whether it is a proportionate measure to curtail such further rounds of leave applications having regard to the legitimate aims of the AO noted above, the English Court of Appeal considered a similar question in *Republic of Kazakhstan v Istil Group Ltd (No 2)* [2008] 1 All ER (Comm) 88. The case concerned a limitation to appeal against a High Court decision in a challenge to an arbitration award under section 67(4) of the Arbitration Act 1966. The limitation against appeal in section 67(4) of the English Act is equivalent to that in section 81(4) of the AO.

As the High Court set aside the arbitral award and refused leave to appeal, the successful party in the arbitration sought leave to appeal to the English Court of Appeal, which held that section 67(4) satisfied the proportionality test and was compatible with the right to a fair trial in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The English CA held that the limitation was proportionate as it pursued the legitimate aim that second appeals should not proceed unless they have a reasonable prospect of success. In the context of arbitration cases, where disputes have to be resolved without unnecessary delay or expense, it is proportionate for the judge who knows about the case and decides the dispute to also decide whether there is a reasonable prospect of success on appeal.

Importantly for the proportionality of the statutory restrictions on rights of appeal, arbitration is an optional regime that is attractive because of its speed, privacy and limitations on control by the court through challenges and appeals. The parties, in contracting to refer their disputes to arbitration, opt also for the limit in the number of permissible court challenges. The CA further noted that, although BL 82 engaged the power of final adjudication and the structural integrity of the judicial system, rather than the right to a fair trial, similar considerations should inform its assessment of the proportionality of section 81(4) of the AO.

The CA considered that recognition of the residual jurisdiction does not undermine the absolute prohibition against applying to the CA for leave. The residual jurisdiction differs in character and purpose from a right to apply to the CA for leave to

appeal. Such difference is important in the context of the structural integrity of Hong Kong's judicial system. The rarity of occasions where it would be proper to invoke the residual jurisdiction and the very high threshold that an applicant must meet have repeatedly been emphasised[5]. The number of occasions where the residual jurisdiction would be invoked is likely to be much less than those where leave applications are renewed in the CA.

No more than is necessary

The CA said the third limb of the test (that the limitation must be no more than is necessary to accomplish the legitimate aim) should not be applied without recognising the possibility of a range of reasonable options. Although the CA was concerned with the power of final adjudication, an area which involves basic constitutional questions, there is still room for different ways of satisfying the test.

The CA cited *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 in which the CFA considered the relevance of the different roles of the judiciary, the executive and the legislature. The stringency or intensity of the scrutiny by the court will be greater in cases involving fundamental legal concepts. Nevertheless, the CFA said that the courts will not find a law which allegedly infringes core values to be too broad provided that it falls within a range of reasonable alternatives. The same point concerning fundamental or non-derogable rights, such as that of access to the court, was also illustrated by the CFA in *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735 and *Mok Charles Peter v Tam Wai Ho* (2010) 13 HKCFAR 762.

Accordingly, the CA recognised that the question with which it was concerned was whether section 81(4) falls outside the range of reasonable options. Subject to the limited supervisory residual discretion of the CA, section 81(4) imposes finality on the decision of the CFI on whether leave to appeal should be granted. The underlying subject matter is an arbitral award. By the time that the CFI's intervention is sought to set aside an award, the parties have gone through the adjudicative process by a tribunal of their choice whose decision they have agreed to be final and not to be subject to an appeal on the merits.

In this context, the CA affirmed that it is a matter

[5] *Kyla Shipping Co ltd v Bunge SA* [2013] EWCA Civ 734 at [15]; *Republic of Kazakhstan v Istil Group Ltd (No 2)* [2008] 1 All ER (Comm) 88, at [32] to [33]; *Guangdong Changhong Electric Co Ltd v Inspur Electronics (HK) Ltd* [2015] 2 HKLRD 714 at [20].

for policy consideration to decide who should be the gatekeeper having regard to the importance to be placed on party autonomy in arbitration, the promotion of speed and reduction of costs in arbitration cases and the interest of bringing a challenge to an award to the higher level courts.

In light of the considerations mentioned in *Republic of Kazakhstan v Istil Group Ltd (No 2)* [2008] 1 All ER (Comm) 88, the CA was satisfied that the limitation in section 81(4) is not more than what is necessary to achieve the legitimate aims and falls within the range of reasonable options for achieving those aims. The CA found no objection to the judge deciding whether leave should be granted for an appeal against his own decision. With reference to the English position, it is also clear that the judge would be more familiar with the case and the arguments of the parties and could usually reach a prompt decision on the leave application.

Conclusion

The CA concluded that it clearly had no jurisdiction to entertain any leave application and that the judge was correct in holding that the appeal enjoyed no reasonable prospect of success. In reality, what the Applicant sought to attack was the substantive merits of the award although it was dressed up as attacks on the integrity of the arbitration process.

The Applicant then applied before the CA for leave to appeal to the CFA on the grounds that the appeal raises questions of great, general or public importance or otherwise ought to be submitted to the CFA. However, the application was dismissed by the CA[6].

[6] HCMP 2472/2014, 18 December 2015.