

Judgment Update

Tam Nga Yin, Chan Wai Wah, Xie Xiaoyi v The Director of Immigration

FACV Nos 20 and 21 of 2000
(20 July 2001)



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Tam Nga Yin, Chan Wai Wah, Xie Xiaoyi v The Director of Immigration FACV Nos 20 & 21 of 2000 (20 July 2001)

Tam Nga Yin &
others appealed
to the CFA

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The CA held that the CFI overlooked the clear words to the effect that to qualify as a permanent resident one had to be born of someone coming within categories 1 or 2 of BL24. There was no ambiguity in the words and their meaning was clear. It was very clear that the adopted children in this case were not born to or of their adopting parents and this being the case they did not satisfy the criteria laid down in BL 24(2)(3).

Date of Judgment
16 March 2000

The Director of
Immigration
appealed to the
CA

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The applicants, Xie Xiaoyi, Lui Yiu Leung (his application having been adjourned), Tam Nga Yin and Chan Wai Wah were Chinese nationals born on the Mainland. They were adopted in accordance with the law prevailing on the Mainland prior to the coming into effect of the Basic Law on 1 July 1997 by Hong Kong permanent residents. They claimed the right of abode in Hong Kong under BL 24(2)(3) and challenged the decision of the Director of Immigration to order their removal on the ground that the adoption was not a Hong Kong adoption.

The CFI held that:

- The phrase “ born outside Hong Kong of ” in BL 24(2)(3) was intended to confer the right of abode in Hong Kong on persons of Chinese nationality whose parents were Hong Kong permanent residents even if those persons claiming the right of abode were born outside Hong Kong.
- Further, the language of BL 24(2)(3) should be construed in a way which would not produce anomalies and the splitting up of families.
- Accordingly, the Court rejected the contention that the words “ born ... of ” in BL 24(2)(3) only referred to persons naturally born of Hong Kong permanent residents as this could result in the separation of the child from its adoptive parents.
- For these reasons, BL 24(2)(3) conferred the right of abode in Hong Kong on persons of Chinese nationality who were born outside Hong Kong but who had been adopted by a Hong Kong permanent resident.
- The requirement in the Immigration Ordinance that the adoption should be a Hong Kong adoption denied the right of abode in Hong Kong to adopted children who fall within BL 24(2)(3) and therefore contravened it.

Date of Judgment
25 June 1999

Judgment Update



Tam Nga Yin, Chan Wai Wah, Xie Xiaoyi v The Director of Immigration

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The Court by majority (comprising the Chief Justice, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ) with Mr Justice Bokhary PJ dissenting, dismisses the appeals with no order as to costs.

THE MAJORITY JUDGMENT

BL 24(2)(3) prescribes that persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2) are permanent residents. The question is whether adopted children are within it.

The appellants are Chinese citizens born on the Mainland and were adopted in accordance with Mainland law. At the time of their adoption and indeed at the time of their birth, at least one of their adoptive parents had become a permanent resident.

It is common ground that : (1) The adoption of each of the appellants under Mainland law is an overseas adoption within and has the same effect as a valid adoption order under the Adoption Ordinance, ie the adopted child stands in the position of a child born to the adopter in wedlock.

The appellants succeeded before the Judge but failed in the CA.

THE 1ST ISSUE

Nothing in the Interpretation carries any implication as to the status of adopted children under BL 24(2)(3). Accordingly, there is no interpretation by the NPCSC of BL 24(2)(3) in relation to adopted children.

THE 2ND ISSUE

The character of BL 24(2)(3) is that of a provision prescribing one category of permanent residents with the right of abode. It does not concern affairs which are the responsibility of the CPG or the relationship between the Central

Authorities and the Region. It is a provision within the Region's autonomy and is not an excluded provision. Accordingly, a judicial reference to the NPCSC is not required.

THE 3RD ISSUE

In the absence of a binding interpretation by the NPCSC, the courts in Hong Kong apply the common law in interpreting the Basic Law. The courts' role is to construe the language in the light of its context and purpose in order to ascertain the legislative intent as expressed in the language. Once the courts conclude the meaning is clear, the courts are bound to give effect to the clear meaning of the language. It is clear if it is free from ambiguity ie it is not reasonably capable of sustaining competing alternative interpretations.

The purpose of BL 24(2) taken together with BL 24(3) is to confer the right of abode on the persons defined to be permanent residents. Those not included are excluded. In this sense, it can be said the purpose is to limit the persons who are permanent residents of the HKSAR and hence its population.

BL 39 provides that the ICCPR shall remain in force and shall be implemented through the laws of the HKSAR. The ICCPR was implemented in Hong Kong through the BoR, article 19(1) of which provides that : "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". Article 19(1) and the domestic law relating to adopted children are part of the context and are of assistance. So when interpreting, the Court must take account of the principles (1) that the family is entitled to protection and (2) that the adopted child is as much a part of the family of the adoptive parents as a natural child would be. The reference to previous immigration legislation is of no assistance.

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To qualify as a permanent resident under BL 24(2)(3), the person concerned must satisfy three requirements : (1) Must be a Chinese citizen. (2) Must have been born outside Hong Kong. (3) At least one of the parents must have been a permanent resident within BL 24(2)(1) or 24(2)(2) at the time of birth of the person concerned. The question is whether the relationship in the third requirement covers that arising from adoption.

If the language of BL 24(2)(3) were ambiguous, the principles (1) and (2) that the Court must have regard to referred above would require the Court to lean in favour of an interpretation that adopted children are included since that would be conducive towards achieving some measure of family union. Is the language with the phrase “ born ... of ” ambiguous? It is plain it refers only to natural children and is incapable of sustaining an interpretation that adopted children are included. To hold otherwise would involve reading “ born ” as relating only to the place of birth, that is outside Hong Kong, and treating the word “ of ” in “ born of ” as virtually meaningless. This interpretation is supported by the time of birth requirement. This requirement in focusing on the time of birth suggests that the relationship is the natural relationship and does not include the relationship arising from adoption. To apply the time of adoption would be to substitute a different requirement. If one takes the time of birth of the person concerned, that cannot be appropriate since at that time, there was no relationship with the adoptive parents.

Accordingly, the appeal is dismissed with no order as to costs.

MR JUSTICE BOKHARY PJ DISSENTING

In his judgment, BL 24(2)(3) includes adopted children and he would allow these appeals.

He agrees with the majority judgment on the 1st and 2nd issues and almost everything they say on the 3rd issue. Unlike the majority, he thinks the wording permits a reading which includes adopted children. The word “ born ” can be read as pertaining only to the place of birth and the word “ of ” as merely connoting the parent and child relationship. If, as he thinks, that reading is permissible, he has no doubt that it is the reading which BL 24(2)(3) ought to receive. For that is the reading which promotes family unity, which is valued at every level in our society including the constitutional level.

As to the time by which at least one adoptive parent must have permanent resident status, he feels driven to an interpretation which requires at least one adoptive parent had such status both at the time of birth and at the time when the adoption became effective in law.

As to the risk of abuse, he would not preclude an argument in future cases that artificial adoptions, which are not really meant to make a child a member of a new family but are meant only to get a child into Hong Kong while its birth family remains elsewhere, are not covered by BL 24(2)(3).