

Judgment Update



The Director of Immigration v Master Chong Fung Yuen

FACV No 26 of 2000
(20 July 2001)

qualify for permanent resident by descent under BL 24(2)(3) with different requirements from those in BL 24(2)(1). But it does not follow from the fact that there are different requirements for the respective categories that BL 24(2)(1) should be regarded as ambiguous.

When the language of BL 24(2)(1) is considered in the light of its context and purpose, its clear meaning is that Chinese citizens born in Hong Kong before or after 1 July 1997 have the status of permanent residents. The meaning is not ambiguous.

On the common law approach which the Court is under a duty to apply in the absence of a binding interpretation by the NPCSC, the statement in the Interpretation that the legislative intent of all other categories of BL 24(2) have been reflected in the Preparatory Committee's Opinions cannot affect the clear meaning of BL 24(2)(1) properly reached by applying the common law approach. The Court is unable, on the basis of that statement to depart from what it considers to be the clear meaning in favour of a meaning which the language cannot bear.

RESULT

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

The Importance of Comparative Constitutional Law Research to the Understanding of the Basic Law

Comparative constitutional law research analyses the similarities and differences between various constitutional systems and constitutional laws around the world. It throws light on how different constitutional systems handle the same or related questions, thus enabling us to adopt or develop in the light of such experience the proper approaches to constitutional interpretation and the faithful implementation of the Basic Law.

The Basic Law is still a very young constitutional document and Hong Kong has limited experience on how to implement it. It has its unique constitutional characteristics and has at least three dimensions, namely international, domestic and constitutional. Interpretation of the Basic Law is further complicated by the fact that it is a national law of the PRC implemented in a common law system preserved under the Basic Law. Since the Reunification, Hong Kong has been developing its own jurisprudence in the light of comparative constitutional jurisprudence. In this evolving process, the comparative research into the common law and civil law jurisdictions, in particular the USA, Canada, Australia and the Mainland, provides very useful insight into the complicated question of constitutional interpretation. For example, the CFA has, in the flag-desecration case, taken into full account comparative materials in the interpretation of the Basic Law with reference to the two American flag desecration cases, as well as decisions and practices in overseas countries. It is relevant to note that the HKSAR courts are expressly authorized by BL 84 to refer to "precedents of other common law jurisdictions" in adjudicating cases.

The Committee for the Basic Law of the HKSAR under the NPCSC

The Committee was established by an NPC decision of 4 April 1990. It is a working committee under the NPCSC to study questions arising from the implementation of BL 17 (*laws enacted by the legislature of the HKSAR*), 18 (*national laws applied in the HKSAR as listed in Annex III to the Basic Law*), 158 (*interpretation of the Basic law*), 159 (*amendment to the Basic Law*) and submit its views thereon to the NPC. The Committee shall consist of 12 members appointed by the NPCSC, 6 from the Mainland and 6 from Hong Kong, including persons from the legal profession. Hong Kong members shall be Chinese citizens who are permanent residents of the HKSAR with no right of abode in any foreign country and shall be nominated jointly by the CE, President of the LegCo and Chief Justice of the CFA of the HKSAR for appointment by the NPCSC.

Currently members of the Committee includes Xiang Chunyi (Chairman), Wong Po Yan (Vice-Chairman), Wang Yingfan, Qiao Xiaoyang, Wu Wai Yung, Liu Zheng, Wu Jianfan, Ng Hong Mun, Albert Chen Hung Yee, Chen Ziying, Anthony Francis Neoh and Maria Tam Wai Chu.

By virtue of BL 18, the Committee was consulted by the NPCSC prior to the addition to Annex III to the Basic Law of the PRC Laws on National Flag, National Emblem, the Territorial Sea and the Contiguous Zone, Garrisoning of the HKSAR and the Exclusive Economic Zone and the Continental Shelf, as well as the PRC Regulations concerning Consular Privileges and Immunities. The NPCSC also consulted the Committee in accordance with BL 158(4) before it issued the Interpretation of BL 22(4) and 24(2)(3) on 26 June 1999.

Hong Kong Central Library - Basic Law Reference Collection

(Extracts from the Hong Kong Public Libraries Homepage at www.hkpl.gov.hk)

The Collection, comprising some 3000 items, incorporates the Collection of the former Basic Law Resource Centre and the Hong Kong Public Libraries' collection of materials relevant to the Basic Law of the HKSAR. It aims to be a reference resource for members of the public who seek to have a better understanding of the Basic Law, are engaged in civic education or conduct research on the Basic Law or related topics.

The Collection consists of the following:

- a. newspaper clippings (from 1985 to present) relating to the drafting and implementation of the Basic Law;
- b. records of Basic Law related court judgment;
- c. consultation documents & reports issued by the Basic Law Drafting Committee and the Basic Law Consultative Committee;
- d. publications, videos, education kits, and publicity materials relating to the Basic Law issued by the Government, professional bodies, academic institutions, community organizations or commercial institutes, etc;
- e. publications relating to constitutional law, administrative law, human rights, and civic rights; and
- f. various electronic resources for the study and research of the Basic Law.

The Focus



Government relies in particular on the CE's constitutional duties both to implement the Basic Law (BL 48(2)) and to be accountable to the CPG (BL 43(2)) in support of the positive answer to issue 3. The CFA held, regarding issue 4, that the NPCSC has a free-standing power to interpret any provision in the Basic Law and, if it does so, Hong Kong courts are bound by that interpretation.

For issue 2, the CFA assumed that BL 22(4) concerned the relationship between the Central Authorities and the Region (ie it was an excluded provision) but declined to seek interpretation of the article from the NPCSC on the basis that it was not the "predominant provision" that needed to be interpreted in the case. Subsequently, the NPCSC decided that both articles in issue 2 should have been referred to it for interpretation.

Conclusion

Those are the demarcation issues that have arisen in Hong Kong since Reunification and the ways that they have been resolved. Hong Kong's high degree of executive, legislative and judicial power makes it unlikely that we will face many of the demarcation issues that exist in federal jurisdictions. Moreover, if such issues do arise, the BL 158 mechanism is available for their resolution.

A Survey to find out the Public's Understanding of the Basic Law conducted in the Fourth Quarter of 2000

A recent survey commissioned by the Constitutional Affairs Bureau on the public's awareness of the Basic Law shows that 79.4% of the general public and 80.2% of all students considered that they had some/good knowledge of the Basic Law or had heard of the Basic Law. The corresponding figures for teachers and civil servants were 99.8% and 99.7% respectively. Among those who thought that they needed to have a more comprehensive understanding of the Basic Law, the majority would like to have a better understanding of the following aspects: (1) "Fundamental rights and duties of the residents" (Chapter III of the Basic Law), (2) "Relationship between the Central Authorities and the HKSAR" (Chapter II of the Basic Law) and (3) "Education, Science, Culture, Sports, Religion, Labour and Social Service" (Chapter VI of the Basic Law).

Like other target segments, a great majority of the civil servants (85.3%) obtained information about the Basic Law through television, mostly the Government's announcements of public interest. 31.7% of civil servants had participated in Basic Law related training/activities provided by government departments. More than half of them found such training/activities very/quite effective.



The Purposive Approach – Key to the Proper Interpretation of the Basic Law

It has been suggested by the CA in *HKSAR v Ma Wai Kwan, David & Others* [1997] HKLRD 761 that the common law principles of interpretation, as developed in recent years, are sufficiently wide and flexible to allow a purposive approach of the plain language of the Basic Law. This purposive approach to constitutional interpretation has, in particular, been summarized by the CFA in the case of *Ng Ka Ling* [1999] 1 HKLRD 315:

“It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.

As to purpose, the purpose of the Basic Law is to establish the Hong Kong Special Administrative Region being an inalienable part of the People’s Republic of China under the principle of “one country, two systems” with a high degree of autonomy in accordance with China’s basic policies regarding Hong Kong as set out and elaborated in the Joint Declaration. The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic Law or relevant extrinsic materials including the Joint Declaration.

As to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials including the Joint Declaration. Assistance can also be gained from any traditions and usages that may have given meaning to the language used.”

This approach has been further developed by the CFA in *The Director of Immigration v Master Chong Fung Yuen*, FACV No 26 of 2000. In particular, it has emphasized that once the courts conclude that the meaning of the language of the text when construed in the light of its context and purpose 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 courts will not on the basis of any extrinsic materials depart from that clear meaning and give the language a meaning which the language cannot bear (for details, please see *Judgment Update* at page 7).

{ Abbreviations }	BL	Basic Law / Basic Law Article
	BoR	Hong Kong Bill of Rights
	CA	Court of Appeal
	CE	Chief Executive
	CFA	Court of Final Appeal
	CFI	Court of First Instance
	CPG	Central People's Government
	HKSAR	Hong Kong Special Administrative Region
	HKSARG	Government of the HKSAR
	ICCPR	International Covenant on Civil and Political Rights
	ICESCR	International Covenant on Economic, Social and Cultural Rights
	LegCo	Legislative Council
	NPC	National People's Congress
	NPCSC	Standing Committee of the NPC
	PRC	People's Republic of China

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