Judgment Update

Ng Siu Tung & Others v The Director of Immigration
Li Shuk Fan v The Director of Immigration
Sin Hoi Chu & Others v The Director of Immigration

FACV Nos 1, 2 & 3 of 2001 (10 January 2002)

Background of the Right of Abode Cases on BL 22(4) & BL 24(2)(3)

BL 22(4)

This article requires people from other parts of China to apply for approval for entry into the HKSAR. Among them, the number of persons who enter the SAR for the purpose of settlement shall be determined by the competent authorities of the CPG after consulting the HKSARG.

BL 24(2)(3)

This article confers the status of permanent resident and the right of abode on persons of Chinese nationality born outside HK of HK permanent residents who:

1. are Chinese citizens born in HK before or after the establishment of the HKSAR; or
2. have ordinarily resided in HK for a continuous period of not less than seven years before or after the establishment of the HKSAR.

1 July 1997

The Immigration (Amendment) (No 3) Ordinance 1997 (the "No 3 Ordinance")

A scheme for the verification of permanent resident status is put in place, under which persons who fall within BL 24(2)(3) are required to obtain one-way exit permit issued by Mainland authorities to come to HK to exercise their right of abode as permanent residents.

The Immigration (Amendment) (No 2) Ordinance 1997 (the "No 2 Ordinance")

Persons eligible under BL 24(2)(3) are limited to those who were born after at least one of their parents had become a HK permanent resident.

A number of Mainland born children of HK permanent residents who claimed permanent resident status under BL 24(2)(3), but did not comply with provisions of the above Ordinances, instituted judicial review proceedings to challenge these provisions, after the Director of Immigration had rejected their claims and made removal orders against them.

The main issues in those proceedings centred on the exact meaning and scope of BL 24(2)(3) and its relationship with BL 22(4).

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Background of the Right of Abode Cases on BL 22(4) & BL 24(2)(3)

Ng Ka Ling & Others v The Director of Immigration

The CFA held that:

1. BL 24(2)(3) was not qualified by BL 22(4) so that persons who fell within BL 24(2)(3) and who were residing in the Mainland did not require one-way exit permits to come to HK to exercise their right of abode as permanent residents;
2. hence that part of the No 3 Ordinance which required those persons to hold one-way exit permits was held to be unconstitutional.

Chan Kam Nga & Others v The Director of Immigration

The CFA held that:

1. BL 24(2)(3) applied to Chinese nationals born outside HK of HK permanent residents, irrespective of whether they were born before or after at least one of their parents had acquired the status of permanent resident;
2. hence that part of the No 2 Ordinance which purported to exclude Chinese nationals who were born before at least one of their parents became a permanent resident of Hong Kong was also held to be unconstitutional.

29 January 1999

The Interpretation

1. BL 22(4) qualifies BL 24(2)(3) so that persons falling within BL 24(2)(3) must apply for approval from the Mainland authorities to enter the HKSAR;
2. For a person to qualify under BL 24(2)(3), at least one of his parents must already be a HK permanent resident at the time of his birth (the "time of birth limitation");
3. The Interpretation does not affect the right of abode in the HKSAR which has been acquired under the judgment of *Ng Ka Ling* and *Chan Kam Nga* by the parties concerned in the relevant legal proceedings.

26 June 1999

The Concession

The Government made a public announcement to the effect that it would allow persons who arrived in HK between 1 July 1997 and 29 January 1999, and had claimed the right of abode, to have their status as permanent resident verified in accordance with the judgments of *Ng Ka Ling* and *Chan Kam Nga*.

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Background of the Right of Abode Cases on BL 22(4) & BL 24(2)(3)

Lau Kong Yung & Others v The Director of Immigration

The CFA held that the Interpretation was a valid and binding interpretation of BL 22(4) and 24(2)(3) which the courts of the HKSAR are under a duty to follow in future.

3 December 1999

During the *Ng Ka Ling* and *Chan Kam Nga* litigation, senior government officials had made various public statements including statements to the effect that the government would abide by the decisions of the courts and would carry such decisions into effect.

Pro forma letters were written by the Legal Aid Department between 7 December 1998 and 29 January 1999 to individual applicants for legal aid stating that there was no need for them to join in existing proceedings or to commence fresh proceedings.

Persons who considered that they were in the same position as the parties in *Ng Ka Ling* and *Chan Kam Nga* did not join in the litigation or commence fresh proceedings.

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Applicants in the present appeals claim that they too should have their claims for permanent resident status verified according to the two judgments of *Ng Ka Ling* and *Chan Kam Nga,* ie, that they are unaffected by the Interpretation, or, alternatively, that they are covered by the Concession.

They base their case on five separate grounds. These grounds raise questions as to the interpretation and application of the Basic Law, the doctrine of legitimate expectation, abuse of process and the meaning, effect and scope of the Concession.

The majority of the CFA (4 to 1) held that:

1. Since the applicants in these appeals were not parties in *Ng Ka Ling* and *Chan Kam Nga*, they are, unless they can succeed on another issue raised in these appeals, affected by the Interpretation and cannot benefit from the two judgments.

2. Representees of the general representations made by the Director of Immigration and the CE to the effect that the government would abide by the decisions of the courts and would carry such decisions into effect cannot succeed on the ground of "legitimate expectation". However, representees who were recipients of the Legal Aid pro forma replies issued between 7 December 1998 and 29 January 1999 and RA13 who received the letter from the Secretary for Security of 24 April 1998 to the effect that the Immigration Department would follow the judgments of *Ng Ka Ling* and *Chan Kam Nga* are entitled to a fresh exercise of the Director of Immigration's discretions under the Immigration Ordinance to allow them to enter and reside in HK.

3. The removal orders against the applicants and the execution of such orders do not amount to an abuse of the process of the court.

4. (i) Applicants who were born after at least one of their parents had become a HK permanent resident and arrived in HK prior to 1 July 1997 are entitled to have their permanent resident status under BL 24(2)(3) verified in HK without the need to obtain one-way exit permits.

   (ii) Applicants who were born before either one of their parents had become a HK permanent resident and who arrived in HK prior to 1 July 1997 are affected by the time of birth limitation in BL 24(2)(3) as interpreted by the Interpretation.

   (iii) Applicants who arrived in HK between 1 July and 10 July 1997 are caught by BL 22(4) as interpreted by the Interpretation.

5. On the "Concession" issue, the CFA held that there was no misinterpretation or misapplication of the policy decision by the Director of Immigration, although the CFA found that in certain cases the Director had applied too strict a construction of what constituted a claim falling within the policy decision.

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This summary is based on the summary prepared by the Judiciary.
It is not part of the judgment and has no legal effect.

The majority of the CFA comprising the Chief Justice, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ, (Mr Justice Bokhary PJ dissenting) [1] have reached the following conclusions on the five issues raised in these appeals.

THE "JUDGMENTS PREVIOUSLY RENDERED" ISSUE

Upon the true construction of "judgments previously rendered shall not be affected" in BL 158(3), the judgments in *Ng Ka Ling* and *Chan Kam Nga* are binding only on the actual parties in those cases. Since the applicants in these appeals were not parties in those cases, they are, unless they can succeed on another issue raised in these appeals, affected by the Interpretation and cannot benefit from the two judgments.

THE "LEGITIMATE EXPECTATION" ISSUE

The statements made by the Director of Immigration and the CE to the effect that the government would abide by the decisions of the courts and would carry such decisions into effect, when considered in the light of the circumstances then prevailing and the test case character of the *Ng Ka Ling* and *Chan Kam Nga* litigation, amounted to a representation to the public that the government would treat persons who were in the same position as the parties in those cases as if they were parties thereto.

[1] Mr Justice Bokhary PJ would allow all these appeals. He accepts the applicants' "previous judgments unaffected" argument. On that basis, he would allow all these appeals to the fullest extent in favour of all the applicants by (i) quashing all the removal orders and (ii) declaring that all the applicants are Hong Kong permanent residents with the right of abode here.

Even if he were to proceed on the "legitimate expectation" ground alone, Mr Justice Bokhary PJ would still allow all these appeals so as to (i) quash all the removal orders and (ii) make a declaration in favour of all the categories of representees, in other words, all the applicants. Such declaration would be that the Director of Immigration must, in exercising his discretionary powers, including his powers under sections 13 and 19 of the Immigration Ordinance, take into account all the applicants' legitimate expectation of being treated as far as possible in the same way as the abode-seekers who were named parties in *Ng Ka Ling* and *Chan Kam Nga*. Mr Justice Bokhary PJ would spell it out in the declaratory order that such treatment is possible to the following extent. The Director can exercise his discretionary powers: (i) to authorize all the applicants to remain in Hong Kong; and (ii) to refrain from making a removal order against any of them. The Director can thus exercise his discretionary powers so as to enable all of them to stay here to make Hong Kong their home and build up seven years' ordinary and continuous residence in Hong Kong. Such residence would, by virtue of BL 24(2)(2), gain all of them Hong Kong permanent resident status and therefore the right of abode in Hong Kong.

In addition to what he holds in the applicants' favour on their "previous judgments unaffected" and "legitimate expectation" arguments, and without in any way derogating therefrom to any applicant's disadvantage, Mr Justice Bokhary PJ respectfully concurs in everything decided by the other members of the CFA in favour of the applicants or any of them on any of the applicants' other arguments.

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The Legal Aid pro forma replies sent to applicants for legal aid between 7 December 1998 and 29 January 1999 in which the Legal Aid Department stated that it was not necessary for them to join in existing proceedings or to commence fresh proceedings, amounted to a representation to those applicants that the government would carry into effect the decisions of the courts in the *Ng Ka Ling* and *Chan Kam Nga* cases and acted as an inducement to those applicants not to take the very action which, if taken, would have placed them in the same position as the parties to those pending cases and within the protection given to judgments previously rendered so that those applicants would also benefit from the two judgments.

The letter dated 24 April 1998 sent by the Secretary for Security to one of the representative applicants, namely, RA13, to the effect that the Immigration Department would follow the judgments of the courts in dealing with applications for certificate of entitlement, amounted to a representation to RA13 that his case would be dealt with in the same way as the parties in the *Ng Ka Ling* and *Chan Kam Nga* cases.

As a result of the Interpretation and the subsequent changes, the Director of Immigration is precluded by law from giving effect in full to the original legitimate expectation of persons to whom these representations were made. He is precluded by law because the Interpretation validated, with effect commencing on 1 July 1997, the relevant provisions in the Immigration Ordinance (Cap 115), namely, that a one-way exit permit is required to establish permanent resident status and that for a person to fall within BL 24(2)(3), at least one of his parents must already be a Hong Kong permanent resident at the time of his birth.

However, notwithstanding the changes resulting from the Interpretation, the Director of Immigration has a discretion under ss 11, 13 and 19(1) of the Immigration Ordinance, to allow persons, who do not satisfy Part 1B of the Immigration Ordinance, to enter and reside in Hong Kong. He cannot, however, lawfully exercise such discretion in respect of a broad, innominate class of persons since to do so will undermine the legislative scheme as a whole. Even if he could, he would be entitled to decide that whatever expectations these persons might have, they are overridden by the overwhelming force of immigration policy which underlies the immigration legislation validated by the Interpretation. Representees of the general representations made by the Director of Immigration and the CE cannot succeed on this ground.

But in respect of the representees who were recipients of the Legal Aid pro forma replies and RA13 who received the letter dated 24 April 1998 from the Secretary for Security, exercise of the Director of Immigration's discretions under ss 11, 13 and 19(1) of the Immigration Ordinance treating them as exceptional cases would not undermine the statutory scheme as validated by the Interpretation. Since the Director of Immigration did not consider their legitimate expectation or the extent to which such expectation could be lawfully addressed under these provisions at the time when he made the removal orders against these applicants, such orders must be quashed. These applicants are entitled to a fresh exercise of the Director of Immigration's discretions under ss 11, 13 and 19(1) of the Immigration Ordinance so that the substantial unfairness to them generated by the Director of Immigration's failure to give effect to their legitimate expectation can be duly taken into account.

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THE "ABUSE OF PROCESS" ISSUE

The making of a removal order and its execution do not form part of the curial process. It is an exercise by the Director of Immigration of his statutory powers. The removal orders against the applicants in these appeals and the execution of such orders do not amount to an abuse of the process of the court as alleged by the applicants.

THE "PERIODS 1 AND 2" ISSUE

Those applicants who are Group A applicants (ie, born after at least one of their parents had become a Hong Kong permanent resident) and who arrived in Hong Kong prior to 1 July 1997 (ie, before the provisions of the Basic Law, particularly BL 22(4), took effect) are entitled to have their permanent resident status under BL 24(2)(3) verified in Hong Kong without the need to obtain one-way exit permits. After they have established their status, they are entitled to exercise their right of abode in Hong Kong.

Those applicants who are Group B applicants (ie, born before either one of their parents had become a Hong Kong permanent resident) and who arrived in Hong Kong prior to 1 July 1997 are affected by the time of birth limitation in BL 24(2)(3) as interpreted by the Interpretation. They do not fall within BL 24(2)(3) and are not entitled to benefit from the judgment in *Chan Kam Nga,* unless they can succeed on another issue raised in these appeals.

Those applicants, whether they are Group A or Group B applicants, who arrived in Hong Kong in Period 2 (ie, between 1 July and 10 July 1997) are caught by BL 22(4) as interpreted by the Interpretation which requires them to obtain one-way exit permits before coming to Hong Kong for the purpose of settlement. They are not entitled to benefit from the judgment in *Ng Ka Ling*, unless they can succeed on another issue raised in these appeals.

THE "CONCESSION" ISSUE

The policy decision announced by the CE on 26 June 1999 was a decision reached by the CE in C as to who would be unaffected by the Interpretation. This policy decision must be considered in the light of the history of the *Ng Ka Ling* and *Chan Kam Nga* litigation, the events leading to the Interpretation, the object of and rationale behind the policy decision and the context of right of abode claims.

According to the policy decision, in order to benefit from the *Ng Ka Ling* and *Chan Kam Nga* judgments, an applicant must have been in Hong Kong within the period between 1 July 1997 and 29 January 1999 and must have lodged a claim for right of abode to the Immigration Department during that period. As implemented, the claim had to be one made:

(1) to the Immigration Department;
(2) during this Concession period; and
(3) while the applicant was present in Hong Kong.

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When the policy decision is considered in the light of its preceding history, it is reasonably clear that the ExCo intended the policy to benefit only those who had lodged claims for right of abode with the Immigration Department or whose claims had been referred to the Immigration Department by government agencies in the course of their duty. There was no misinterpretation of the policy decision by the Director of Immigration in laying down these requirements.

There was also no misapplication of the policy decision on the part of the Director of Immigration in making it a requirement that a record be kept by the Immigration Department of a relevant claim for right of abode.

However, having regard to the context and the circumstances in which the claims came to be made, the Director of Immigration has in certain cases departed from a rational approach in applying too strict a construction of what amounts to a "claim" falling within the policy decision. Any document which clearly :

(1) identifies a person as a Hong Kong permanent resident and another person as his child;
(2) provides some details such as his or her date or place of birth; and
(3) asks for the child to come to Hong Kong either to settle or to enjoy his or her right of abode,

should be rationally understood as a claim to the right of abode. A rejection of a document which falls within these criteria would amount to a misapplication of the policy decision. BLB

Brandeis Brief

The Brandeis Brief was first adopted in an American case *Muller v Oregon* (1908) 208 US 412, in which Louis D Brandeis, counsel for the state of Oregon, filed a brief in the US Supreme Court which included social-science data drawn from books, articles and reports in support of the constitutionality of a state law prescribing a ten-hour workday for women in laundries and factories on the ground that the law was related to worker health and safety. The brief covered sociological, economic and physiological data on the effect of long working hours on the health of women. The data had not been proved in the conventional way, and yet it was accepted by the Supreme Court which acknowledged that it had considered the brief as a matter of "judicial cognizance" in reaching its decision. A Brandeis Brief is particularly useful in constitutional cases because it can expose the court to a broad range of social-science knowledge without the limitation imposed by ordinary evidential rules and the parties incurring substantial costs associated with a trial involving a lengthy parade of expert witnesses.

The tool was first introduced to Hong Kong in the Flag Case, where the issues of freedom of expression and protection of national and regional flags arose. In that case, the CFA affirmed the importance of freedom of expression in the HKSAR:

> "Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticise governmental institutions and the conduct of public officials."(see (1999) 2 HKCFAR 442 at 455 H - I)

The key issue in the Flag Case was whether the statutory provisions criminalizing desecration of the national and regional flags was a constitutional restriction of the freedom of expression. Both parties submitted a huge bundle of materials containing a vast amount of social-science data covering areas such as the symbolic meaning of the national flag to the Mainland and relevant legislation in other jurisdictions. Though not referring exactly to the concept of the Brandeis Brief, the CFA acknowledged the "invaluable assistance" given to the Court by the "materials produced by the respective teams"(see (1999) 2 HKCFAR 442 at 462 A - C).

The Brandeis Brief in the Flag Case was a reflection of the principal focus of the government's strategy before the CFA. This strategy was values-driven: what is necessary and what meets the balance is very much a matter of the values of our community. The Brandeis Brief helped support the argument that the restriction under both flag ordinances on the guaranteed right to freedom of expression was both necessary and was proportionate to the aims sought to be achieved and permitted under the ICCPR. There was a legitimate interest in protecting the national flag as a unique symbol of the Nation and the regional flag as a unique symbol of the HKSAR, and that interest fell within the concept of public order/*ordre public*.