基本法案例摘要

有關程介南
英文判決書見 [2002] 1 HKC 41 (2001年12月3日)
Re Cheng Kai Nam Gary
[2002] 1 HKC 41 (3 December 2001)

有關背景: 法庭使用法定語文
Related Background: Use of Official Languages in Courts

於1995年 In 1995

《法定語文條例》(第5章)經修訂，使中文和英文在法院程序上均是法定語文。

The Official Languages Ordinance (Cap 5) was amended to make Chinese & English both official languages for court proceedings.

過渡性安排

於1996年至1997年期間，法庭使用中文計劃於上訴法庭、原訟法庭，區域法院及土地審裁處以漸進形式實施。由1997 年 6 月 27 日開始，各級法院均可使用兩種法定語文。

Transitional Arrangements

Use of Chinese in court programme in CA, CFI, District Court and Lands Tribunal was implemented on a gradual basis from 1996-1997.
Since 27 June 1997, both official languages may be used in all courts.

自1997 年 Since 1997

《基本法》第九條

"[香港特區] 的行政機關、立法機關和司法機關，除使用中文外，還可使用英文，英文也是正式語文。"

BL 9

"In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the [HKSAR]."

憲法權利 Constitutional Right

選擇在司法程序中所使用的語文，主導的考慮因素為該選擇須確保案件獲得公正、迅速及有效率的處理。主審法官會顧及訴訟人的意願、其代表律師的語文能力、案件的性質 (例如，涉及複雜商業交易的案件，遠較只涉及事實爭拗而非艱深法律觀點的刑事案件使用英文進行審訊的機會為高) 及需要翻譯的文件數量等問題，就所用語文作出決定。主審法官的決定是最終決定。

The guiding consideration in the choice of language in judicial proceedings is to ensure the just and expeditious disposal of the cases. The trial judge's decision is final and he will make the decision on the language having regard to the wish of the litigants, the language ability of the lawyers representing the litigants, the nature of the case (eg cases involving complex commercial transactions are more likely to be heard in the English language than criminal cases involving disputed facts but no difficult points of law) and the volume of documents required to be translated etc.

Judgment Update

有關程介南

英文判決書見 [2002] 1 HKC 41 (2001年12月3日)

Re Cheng Kai Nam Gary

[2002] 1 HKC 41 (3 December 2001)

申請人辯稱，根據《基本法》第九條，他享有憲法上的權利要求主審的法官*直接*明白他在庭上使用的廣東話。

The applicant contended that he enjoyed a constitutional right under BL 9 to be understood *directly* by the courts in Cantonese.

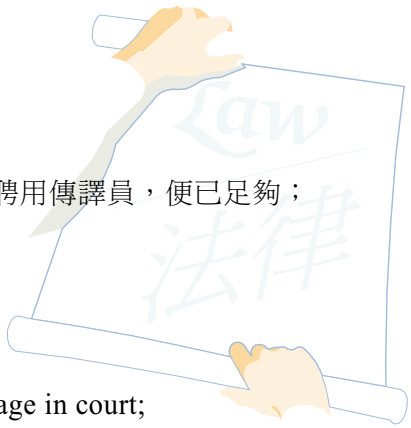
雙語法官
BilingualJudge

申請人提出司法覆核許可申請，反對排案官兩度決定由一名只懂英語而不懂廣東話的法官審理申請人的案件。

The applicant sought leave to apply for judicial review to challenge two decisions of the listing judge who had listed the applicant's trial before a monolingual judge who did not speak Cantonese.

原訟法庭裁定：

- 申請人享有在法院使用中文的憲法權利；
- 但該權利並不意味法官負有說或閱讀該語文的相應責任；
- 只要作出安排以協助法官了解與訟各方所說和所寫的，例如聘用傳譯員，便已足夠；
- 申請被拒絕。



The CFI held that:

- the applicant has a constitutional right to use the Chinese language in court;
- but that right does not imply a reciprocal obligation of the court to speak and read that language;
- sufficient if processes, eg employment of interpreters, exist to facilitate the court comprehending what is said or written;
- application refused.

Judgment Update

Re Cheng Kai Nam Gary

[2002] 1 HKC 41 (3 December 2001)

INTRODUCTION

The applicant sought leave to apply for judicial review. The application concerned a criminal trial in the District Court, the applicant being the accused in that trial.

The trial was set down for hearing before a monolingual judge, ie, a judge who did not speak Cantonese. Two applications were made to have this matter listed before a bilingual judge, ie, one who spoke both Cantonese and English. In respect of both applications, the listing judge considered it appropriate that the applicant's trial should continue to be listed for hearing before a monolingual judge.

One of the two bases for challenging the decisions of the listing judge was that the applicant enjoyed a constitutional right to have his case determined by a judge who spoke Cantonese, the language which, if he testified, he would speak at trial. [2]

THE CONSTITUTIONAL ISSUE

The applicant submitted (via his counsel) that since the resumption of exercise of sovereignty a new constitutional order had come into existence, one which recognized the supremacy of the Chinese language over that of English. To that end, the applicant referred to the following wording of the Joint Declaration (JD reference 51):

> "In addition to Chinese, English may also be used in organs of government and in the courts in the [HKSAR]."

More importantly, the applicant also made reference to BL 9, the syntax of its wording echoing the Joint Declaration. BL 9 read:

> "In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the [HKSAR]."

The applicant contended that BL 9 made it plain that Chinese was to be the primary official language of Hong Kong and of its judiciary. English, however, "may also be used", an equally clear statement of its secondary role.

From this basis, the applicant submitted that a constitutional right to use Chinese in the courts of Hong Kong would be undermined if the right did not comprise two essential elements; first, the right to speak Cantonese and, second, the right to be understood by the courts in Cantonese without the intervention of an interpreter. The CFI had no difficulty in accepting the first essential element but found no basis whatsoever for accepting the second.

[2] The second base of challenge was that the listing judge acted in a manner that was *Wednesbury* unreasonable (in that the listing judge in exercising his discretion, took into account irrelevant matters or failed to take into account matters that were relevant). The CFI held that this was not capable of argument.

Judgment Update

The CFI was of the view that if the applicant was correct in his purposive interpretation of BL 9, it meant that a person who used Cantonese in SAR courts was entitled as a constitutional right to be understood *directly* in that language by the judge assigned to hear his matter. That might, if one accepted the submissions of the applicant as to the ease with which alternate or deputy judges could be appointed, be capable of practical manifestation. But BL 9 also referred to the use of Chinese as an official language in the executive branches of government and the legislature. In respect of the legislature it should therefore follow that a member who, as a constitutional right, used Chinese (Cantonese) was entitled, also as constitutional right, to be understood *directly* in that language by the other members to whom he spoke. That could not be right. BL 67, for example, allowed specifically for permanent residents of Hong Kong who were not of Chinese nationality to be elected as members of the LegCo. There was nothing, implied or otherwise, in the relevant articles, or in the Basic Law read as a whole, to suggest that those persons who were not of Chinese nationality should nevertheless speak a Chinese language.

As to the manner in which BL 9 was worded, instruments of constitution regularly spoke to matters which defined national or regional identity. In that regard, the Basic Law was no different. The Basic Law, while upholding the territorial integrity of the PRC, recognized that Hong Kong had a special history. The Preamble to the Basic Law made specific reference to that history and to Hong Kong's other "realities" such as its capitalist system of commerce and its system of law.

Accordingly, as a work of constitutional architecture, the Basic Law was built upon the foundations of Hong Kong's special history. Part of that history was its adoption of the common law, the root language of which was English. The common law was the law of Hong Kong upon the resumption of exercise of sovereignty and BL 81 enshrined that system.

The Basic Law not only enshrined the common law but, in order to give continuing effect to that enshrinement, allowed under BL 92 for the recruitment of judges from other common law jurisdictions, without there being suggestion that those judges should speak a Chinese tongue.

Accordingly, the CFI rejected the applicant's argument and held that the constitutional right of a person to use the Chinese language in a court of law in Hong Kong meant no more than the right of that person to employ that language, ie, to utilize it, for the purpose of forwarding or protecting his interests. That right to employ or utilize the language did not imply a reciprocal obligation on the part of the court to speak and read that language. It was sufficient if processes, such as the employment of interpreters or translators, existed to facilitate the court comprehending what was said or written.

As to the manner in which either or both of the official languages might be used in SAR courts, the CFI was satisfied that section 5 of the Official Languages Ordinance (Cap 5) was applicable and was in no way contrary to the provisions of the Basic Law. Section 5 made it plain that even though a judge before whom proceedings took place might determine to use *one* official language, his decision did not prohibit the parties to the proceedings or their legal representatives from employing the *other* official language.

CONCLUSION

Accordingly, the application for leave to apply for judicial review was refused. BLB