



(“PDPO”) was enacted in August 1995 to protect an individual’s right to privacy with respect to personal data. The PDPO provides for the establishment of an office by the name of the Privacy Commissioner for Personal Data to enforce and promote compliance with its provisions. The provisions of the PDPO and the three pieces of anti-discrimination legislation bind all sections of society including both public and private bodies.

CONCLUSION

To conclude, the protection of fundamental rights and freedoms is firmly rooted in our constitutional and legal systems. The applicable international human rights treaties have been implemented in the HKSAR through the Basic Law and SAR legislation and administrative measures. The implementation of such protection is monitored, at the international level, by the United Nations Treaty Monitoring Bodies and, at the domestic level, by an independent judiciary and relevant statutory bodies. **BLB**

sidelights



PRC Nationality Law and the NPCSC’s Explanations with reference to the case of Tse Yiu Hon

The Nationality Law of the People’s Republic of China (the “Nationality Law”) applies to the HKSAR by promulgation with effect from 1 July 1997. The Explanations of Some Questions by the Standing Committee of the National People’s Congress Concerning the Implementation of the Nationality Law of the People’s Republic of China in the Hong Kong Special Administrative Region (the “Explanations”) adopted by the NPCSC on 15 May 1996 is a component part of the Nationality Law and is an interpretation aid on the application of the Nationality Law in the HKSAR.

In the case of *Tse Yiu Hon v HKSAR Passports Appeal Board and Director of Immigration*, CACV No 351 of 2001, Tse Yiu Hon (“Tse”) was born in Germany in 1985 and his parents were Hong Kong permanent residents settling there. Tse’s status as a Hong Kong permanent residents before 1 July 1997 was confirmed by the issue to him a British Dependent Territories Citizen passport. In 1990, his parents were granted German nationality by naturalization and Tse also became a German citizen thereafter by naturalization. Tse was issued an HKSAR Passport in 1998 but the Director of Immigration subsequently notified his mother that his

passport would be cancelled on the ground that he had already acquired the German Nationality and hence lost his Chinese nationality at the time he applied for the HKSAR Passport.

To obtain an HKSAR Passport, an applicant must meet the requirements set out in s 3 of the Hong Kong Special Administrative Region Passports Ordinance (Cap 539), namely that he must be a Chinese citizen and permanent resident in the HKSAR holding a valid Hong Kong Permanent Identity Card. Section 2 of that Ordinance provides that “Chinese citizen” (中國公民) means a person of Chinese nationality under the Nationality Law, as implemented in the HKSAR in accordance with the Explanations.

The CA agreed that Tse had met the requirements of being a Hong Kong permanent resident as well as holding a Hong Kong Permanent Identity Card. If Tse were a Chinese national, he would be entitled to an HKSAR Passport. The question in issue was, therefore, whether Tse was a Chinese national in accordance with the Nationality Law and the Explanations.

The CA considered that Paragraph 1 of the Explanations¹ clearly defined two categories of Hong Kong residents of Chinese descent as “Chinese nationals”. The first category referred to those who were born in China (including the HKSAR) and the second category referred to those who satisfied the criteria laid down in the Nationality Law for having Chinese nationality. The CA observed that the criteria for the first category was consistent with Art 4 of the Nationality Law,² whereas the second category catered for those children of Hong Kong residents who were of Chinese descent and who were born abroad, ie those who satisfied the criteria laid down under Art 5 of the Nationality Law.³

The CA ruled that as both parents of Tse were Chinese nationals and Tse did not have any foreign nationality at birth, he fell under the second category of those who should have Chinese nationality under the first limb of Art 5 of the Nationality Law.

The CA further considered that in adopting the Explanations, the NPCSC made rules regarding change of nationality that were different from the Nationality Law so that Chinese nationals who were HKSAR residents holding foreign passports would not automatically lose their Chinese nationality by virtue of Art 9 of the Nationality Law.⁴ Under Paragraphs 5 and 6 of the Explanations,⁵ a Chinese national of the HKSAR shall lose his Chinese nationality only upon approval of his application to the Immigration Department for changing his nationality. As Tse never, as an HKSAR resident, made any application to change his Chinese nationality under the Explanations, he had not lost his Chinese nationality and hence he was eligible to obtain an HKSAR Passport. **BLB**

¹ Paragraph 1 of the Explanations:

Hong Kong resident is of Chinese descent and was born in the Chinese territories (including Hong Kong), or where a person satisfies the criteria laid down in the [Nationality Law] for having Chinese nationality, he is a Chinese national.”

² Art 4 of the Nationality Law:

“Any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.”

³ Art 5 of the Nationality Law:

“Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.”

⁴ Art 9 of the Nationality Law:

“Any Chinese national who has settled abroad and who has been naturalized as a foreign national or has acquired foreign nationality of his own free will shall automatically lose Chinese nationality.”

⁵ Paragraph 5 of the Explanations:

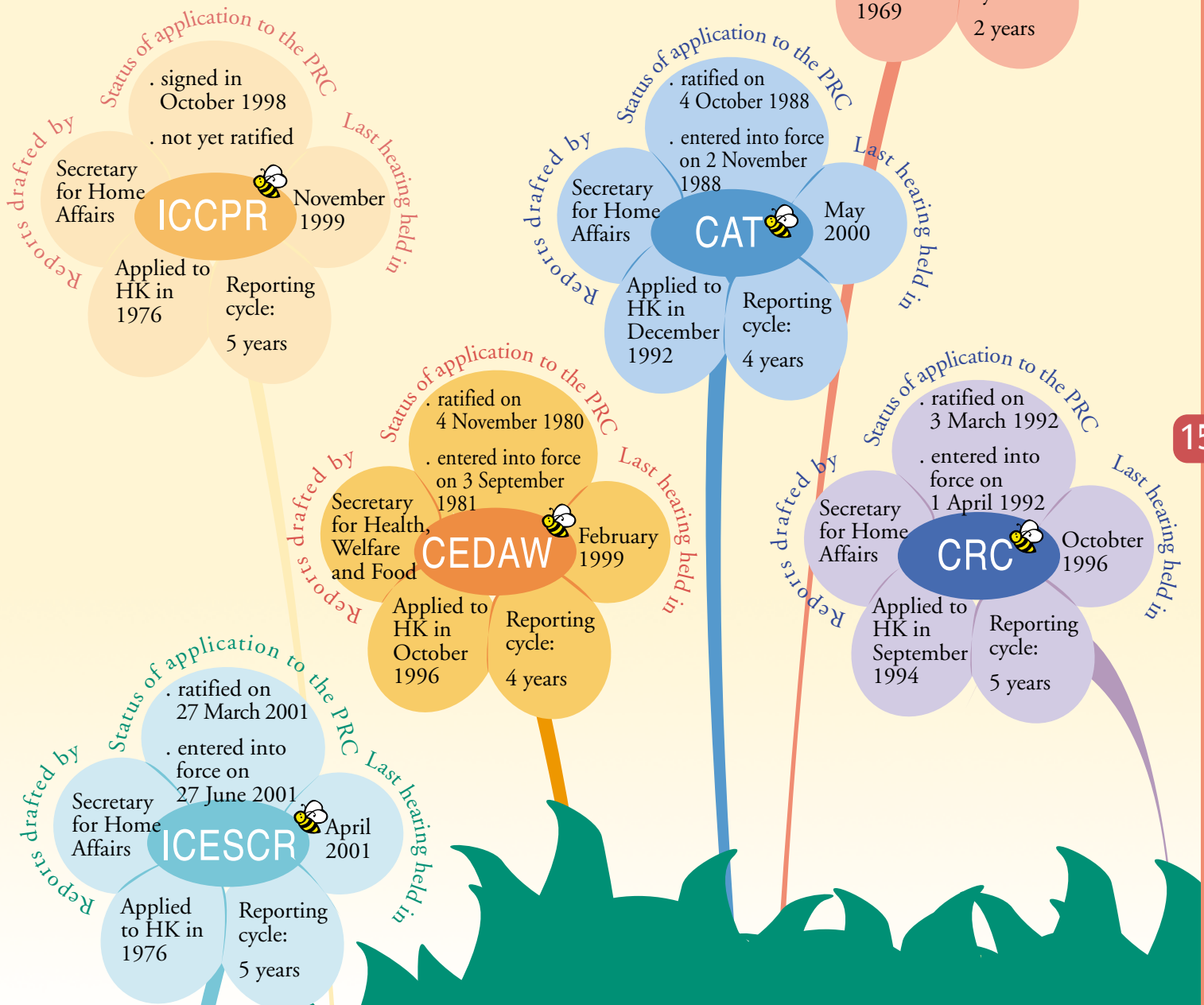
“If there is a change in the nationality of a Chinese national of the [HKSAR], he may, with valid documents in support, make a declaration at the authority of the [HKSAR] responsible for nationality applications.”

Paragraph 6 authorizes the HKSARG to designate its Immigration Department as the authority of the HKSAR responsible for nationality applications.

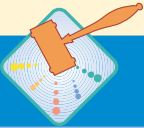


Human Rights Reporting

A total of fourteen international human rights treaties apply to Hong Kong. Six of them entail a reporting requirement (see illustrations below). Hong Kongs reports under all these treaties are drafted by the relevant Bureaux of the HKSARG. In the case of the ICCPR, the HKSAR delegation attends hearings of the reports in its own right by special arrangement between the CPG and the United Nations. In other cases, representatives of the HKSARG do so as members of the relevant Chinese delegations. At the hearings, delegates answer questions put to them by the United Nations Committees.



CAT = Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
 CEDAW = Convention on the Elimination of All Forms of Discrimination Against Women
 CRC = Convention on the Rights of the Child
 ICCPR = International Covenant on Civil and Political Rights
 ICERD = International Convention on the Elimination of All Forms of Racial Discrimination
 ICESCR = International Covenant on Economic, Social and Cultural Rights



LEGCO PRESIDENT'S DECISIONS ON MEMBERS' BILLS

CITIC Ka Wah Bank Limited (Merger) Bill

Since the last issue (April 2002), the LegCo President has made one decision under Rule 51 (3) and (4) of the Rules of Procedure of the LegCo¹ on 24 April 2002 in respect of the CITIC Ka Wah Bank Limited (Merger) Bill. The Bill was proposed by Dr Hon David Li Kwok Po. The Bill sought to transfer certain undertakings of CITIC Ka Wah Bank Limited to The Hong Kong Chinese Bank Limited, thereby effecting a merger between the two banks in so far as undertakings were concerned. The Hong Kong Chinese Bank Limited would become the merged entity and should be changed to "CITIC Ka Wah Bank Limited". On a day to be appointed by the Hong Kong Monetary Authority, the original banking licence of CITIC Ka Wah Bank Limited would be revoked and the bank would be changed to "CITIC International Financial Holdings Limited".

Having considered the advice of Counsel to the Legislature in the light of the views of the Secretary for Financial Services ("SFS") on the Bill, and having regard to Mr Li's advice that he had no objection to SFS's views, the LegCo President was satisfied that the Bill related to Government policies on the regulation of banks, the set-off of losses against profits of corporations, and the control of tenancies, as reflected in the relevant legislation. The LegCo President decided that the Bill related to Government policy within the meaning of Rule 51(4) and required the written consent of the CE for its introduction.

Written consent for the introduction of the Bill was given by the CE and it was enacted by the LegCo as the CITIC Ka Wah Bank Limited (Merger) Ordinance (Ord No 30 of 2002) and gazetted on 19 July 2002. **BLB**

sidelights



Major Rulings on Human Rights since 1 July 1997

Right to a fair hearing
(BoR Art 10 / ICCPR Art 14(1))

Ruling

The right to a fair hearing under BoR Art 10 required that a determination of rights and obligations made by the executive be subject to subsequent control by a judicial body that had full jurisdiction on both law and fact. However, where an administrative determination had a high policy content or was made on the grounds of expedience, the absence of appeal to a judicial body with full jurisdiction was still consistent with BoR Art 10 as the final decision on the merits should rest with the executive rather than a court.

In such case, it was sufficient if the decision was subject only to judicial review on legality.

Ma Wan Farming Ltd v CE in Council & Another
[1998] 1 HKLRD 514
(CA, 26 March 1998)

Retrospective legislation
(BoR Art 12 / ICCPR Art 15)

Ruling

In the context of the Hong Kong legal system, the prohibition against persons being held guilty of retrospective criminal offences in BoR Art 12(1) struck at the retrospective provision itself and not merely at prohibiting prosecution and conviction of persons for criminal offences. It rendered s 1(2) of the Immigration (Amendment) (No 3) Ordinance 1997 (No 124 of 1997) which involved persons retrospectively in the commission of criminal offences of landing or remaining in Hong Kong without permission contrary to s 38 of that Ordinance unconstitutional.

Ng Ka Ling & Others v Director of Immigration
[1999] 1 HKLRD 315
(CFA, 29 January 1999)

¹ For further discussion on the operation of Rule 51 of the Rules of Procedure, please refer to *The Focus* at p 15 of Issue No 1 of the Bulletin.

Freedom of expression
(BoR Art 16 / ICCPR Art 19)

Ruling

Restrictions imposed by the flag ordinances were consistent with the freedom of expression guaranteed under BoR Art 16 as they only banned one mode (ie the mode of desecrating the national or regional flags) of expressing whatever message the person concerned might wish to express and was proportionate to the legitimate interests in protecting the national and regional flags as the unique symbols of the nation and the SAR within the concept of public order/*ordre public* (for further discussion on this case, please refer to *The Focus* at p 25 and *Sidelights* at pp 17 & 35 of Issue No 3 of the Bulletin).

*HKSAR v
Ng Kung Siu & Another*
[1999] 3 HKLRD 907
(CFA, 15 December 1999)

Right to participate in public life
(BoR Art 21 / ICCPR Art 25)

Village representatives should be regarded as engaged in the conduct of public affairs within BoR Art 21(a), which guaranteed the right of every permanent resident to take part in the conduct of public affairs without discrimination and unreasonable restrictions. Electoral arrangements which restricted the participation of non-indigenous villagers were therefore unreasonable and inconsistent with BoR Art 21(a) (for details, please refer to *Judgment Update* at p 6 of Issue No 1 of the Bulletin).

*Secretary for Justice & Others
v Chan Wah & Others*
[2000] 3 HKLRD 641
(CFA, 22 December 2000)

Rights in respect of family
(BoR Art 19 / ICCPR Art 23)

Ruling

BoR Art 19(1) and the domestic law relating to adopted children were part of the context which the court should take account of when interpreting BL 24 (2)(3). The court must therefore take account of the principles (1) that the family was entitled to protection and (2) that the adopted child was as much a part of the family of the adoptive parents as a natural child would be. If the language of BL 24(2)(3) were ambiguous, it would require the court to lean in favour of an interpretation that adopted children were included, since that would be conducive towards achieving some measure of family union. However, it was plain that the phrase "born...of" in BL 24(2)(3) referred only to natural children (for details, please refer to *Judgment Update* at p 15 of Issue No 2 of the Bulletin).

*Tam Nga Yin & Others
v Director of Immigration*
[2001] 2 HKLRD 644
(CFA, 20 July 2001)

Principle of legal certainty

Ruling

The expression “prescribed by law”, when used in the context such as BL 39, mandated the principle of legal certainty. The common law offence of misconduct in public office was sufficiently precise to constitute “law” within the meaning of BoR Art 11(1) and to satisfy the requirement of “prescribed by law” in BL 39 and “established by law” in BoR Art 5(1).

Shum Kwok Sber v HKSAR
[2002] 2 HKLRD 793
(CFA, 10 July 2002)

Liberty and security of person etc
(BoR Art 5 / ICCPR Art 9;
BoR Art 3 / ICCPR Art 7)

Ruling

There was nothing capricious or unreasonable as to contravene BoR Art 5 in classing conduct, which was done with the intention of causing grievous bodily harm and which in the event caused another’s death, as murder. Taking into account the inherent and unique gravity of murder and the sentencing objectives of a mandatory life sentence as a whole, the compulsory imposition of such sentence in all murder cases was neither manifestly disproportionate to contravene BoR Art 5 nor grossly disproportionate to contravene BoR Art 3 which prohibited torture, cruel, inhuman or degrading treatment or punishment (for details, please refer to *Judgment Update* at p 10.)

Lau Cheong & Another v HKSAR
[2002] 2 HKLRD 612
(CFA, 16 July 2002)

Freedom to travel (BL 31)

Ruling

The statutory curtailment of a non-permanent resident’s limit of stay due to his departure from Hong Kong was inconsistent with his constitutional right to travel under BL 31.

BL 39(2) did not imply that rights found only in the Basic Law, such as the right to travel under BL 31, might be freely qualified or limited simply by restriction which were prescribed by law (for details, please refer to *Judgment Update* at p 8).

Gurung Kesh Bahadur v Director of Immigration
[2002] 2 HKLRD 775
(CFA, 30 July 2002)

{ Abbreviations }

BL	Basic Law / Basic Law Article
BoR	Hong Kong Bill of Rights
CA	Court of Appeal
CE	Chief Executive
CE in C	Chief Executive in Council
CFA	Court of Final Appeal
CFI	Court of First Instance
CPG	Central People’s Government
ExCo	Executive Council
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
The Interpretation	The Interpretation by the Standing Committee of the National People’s Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China

This Bulletin is also available from the “Laws and Legal Information” section of the Central Cyber Government Office (Intranet address: portal.cgo.hksarg/index.jsp) and under the column “Publications” of the home page of the Department of Justice (Internet address: www.info.gov.hk/justice/new/depart/index.htm).