

Judgment Update

Introductory Commentary



In the 1st issue of this Bulletin published in March 2001, we covered four pending cases on the right of abode issue under the Basic Law. One of these, namely, *Ng Siu Tung & Others* was heard by the CFA on 28 May 2001 to 1 June 2001, 19 - 21 June 2001 and 6 - 7 September 2001. Judgment of the CFA is reserved (for summary of the CA judgment, please see *Judgment Update* of the 1st issue at pages 3 and 13). The CFA has delivered judgments in the remaining three cases, namely the cases of *Chong Fung Yuen*, *Tam Nga Yin & Others* and *Fateh Muhammad* on 20 July 2001. Although the CFA heard the *Chong Fung Yuen* appeal in March, it decided to defer giving judgment until after hearing the other two appeals. This was because a number of questions were common as between the *Chong Fung Yuen* appeal and one or both of the other two appeals. These questions included the proper approach to considering whether the CFA has to make a judicial reference of the BL article in question to the NPCSC for interpretation. They also included the proper approach to the interpretation of BL 24. In those circumstances the CFA thought it right that the judgments in all three appeals should be dealt with and handed down at the same time.

The judgment summary is based on the summary prepared by the Judiciary and is not part of the judgment and has no legal effect. Each judgment summary is preceded by a flow chart showing the development of the case from the CFI, CA to the CFA.

Related Article in the Basic Law
Article 24 (1) and (2)

Residents of the Hong Kong Special Administrative Region ("Hong Kong residents") shall include permanent residents and non-permanent residents.

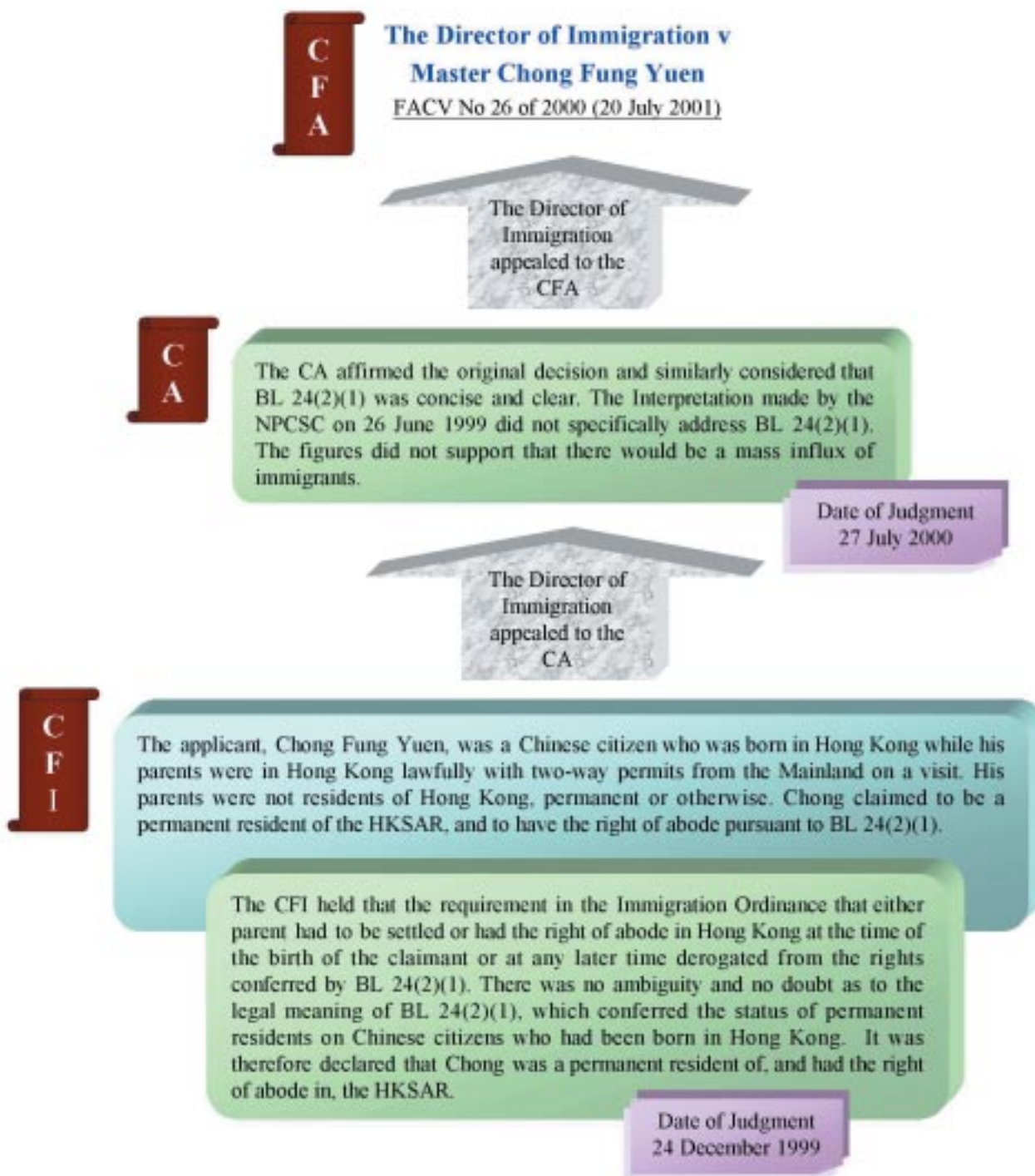
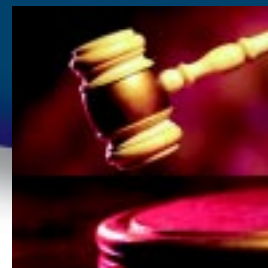
The permanent residents of the Hong Kong Special Administrative Region shall be:

- (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
- (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;
- (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);
- (4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;
- (5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and
- (6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

Judgment Update

The Director of Immigration v Master Chong Fung Yuen

FACV No 26 of 2000
(20 July 2001)



Judgment Update

The Director of Immigration v Master Chong Fung Yuen

FACV No 26 of 2000
(20 July 2001)



The judgment delivered by Chief Justice Li is the unanimous judgment of the Court.

INTRODUCTION

Chong Fung Yuen (the respondent) is a Chinese citizen born in Hong Kong on 29 September 1997. He claims he is a permanent resident within BL 24(2)(1) which provides that Chinese citizens born in Hong Kong before or after the establishment of the HKSAR are permanent residents with the right of abode.

The Director of Immigration (“the Director”) rejects his claim. The Director maintains that : (a) Para 2(a) of Schedule 1 to the Immigration Ordinance (“para 2(a)”) requires that for a Chinese citizen born in Hong Kong to be a permanent resident, one of his parents must have settled or had the right of abode in Hong Kong at the time of his birth or at any later time and the respondent does not comply. (b) On its true interpretation, BL 24(2)(1) by necessary implication does not confer a right of abode on Chinese citizens who are born in Hong Kong to illegal immigrants, overstayers or people temporarily residing in Hong Kong. Therefore para 2(a) is consistent with the Basic Law.

THE JUDGE AND THE CA

The Judge held in favour of the respondent. The CA upheld the Judge. The Director appeals to the CFA.

THE FACTS

The respondent was born in Hong Kong after his parents came to Hong Kong on two-way permits from the Mainland on a visit. His parents were then lawfully in Hong Kong. But neither his father nor his mother (i) was settled in Hong Kong or (ii) had the right of abode at the time of his birth or subsequently. His parents

were given extensions of stay until 24 November 1997, when they became overstayers. Subsequently, they returned to the Mainland. The respondent has been given extensions of stay pending the resolution of these proceedings.

THE ISSUES

The two issues are : (1) The BL 158(3) issue : whether BL 24(2)(1) is an excluded provision within BL 158(3) ie a provision “concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region.” If so, the Court would be under a duty to make a judicial reference of the article in question to the NPCSC for interpretation. (2) The BL 24(2)(1) issue (which arises only if the Court holds against making a judicial reference) : whether on its proper interpretation, the requirement relating to the parent in para 2(a) is inconsistent with BL 24(2)(1).

HISTORY

The judgment recounted briefly the history of recent events : The Court’s judgments in the *Ng Ka Ling* and *Chan Kam Nga* cases, the CE’s report to the State Council requesting assistance, the Interpretation adopted by the NPCSC on 26 June 1999, the speech made by Mr Qiao Xiaoyang before its adoption. According to the Interpretation, (1) BL 22(4) means that people from other parts of China, including those persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents who wish to enter Hong Kong for whatever reason, must obtain approval from the Mainland authorities before they can enter; (2) BL 24(2)(3) means that to qualify, both parents or either parent must be a permanent resident within the 1st or 2nd category of BL 24(2) at the time of birth of the

Judgment Update

The Director of Immigration v Master Chong Fung Yuen

FACV No 26 of 2000
(20 July 2001)



person concerned. The Interpretation also stated that the legislative intent as stated by the Interpretation together with the legislative intent of all other categories of BL 24(2) have been reflected in the Preparatory Committee's Opinions on the implementation of BL 24(2). Those Opinions stated in relation to BL 24(2)(1) that Chinese citizens born in Hong Kong refer to people who are born during which either one or both of their parents were lawfully residing in Hong Kong but excluding those who are born to illegal immigrants, overstayers or people residing temporarily in Hong Kong.

THE APPROACH TO THE INTERPRETATION OF THE BASIC LAW

The position of the Director and the respondent is that the courts are bound to apply the common law as developed in Hong Kong in interpreting the Basic Law. This accords with the Basic Law which provides for a separate legal system in the HKSAR based on the common law.

The NPCSC's power to interpret the Basic Law is derived from the Chinese Constitution and the Basic Law. In interpreting the Basic Law, it functions under a system different from that in Hong Kong. Under the Mainland system, legislative interpretation can clarify or supplement laws. Where the NPCSC has made an interpretation, whether under BL 158(1) which relates to any provision, or under BL 158(3) which relates to the excluded provisions, the courts in Hong Kong are bound to follow it. Thus, the authority of the NPCSC to interpret the Basic Law is fully acknowledged and respected in the Region.

The Director accepts that the NPCSC has not issued an interpretation of BL 24(2)(1) which is binding on the courts in Hong Kong. He accepts that the statement in the Interpretation that "together with the legislative intent of all

other categories of [BL] 24(2) ... have been reflected in the Preparatory Committee's Opinions" does not amount to a binding interpretation of BL 24(2)(1).

One of the fundamental functions of the courts in Hong Kong is the interpretation of laws including the Basic Law subject to the limit on the Court's jurisdiction imposed by BL 158(3) in relation to the excluded provisions and subject to being bound by any interpretation by the NPCSC under BL 158. This principle, which follows from the doctrine of the separation of powers, is a basic principle of the common law.

The courts' role under the common law in interpreting the Basic law is to construe the language used in the text of the instrument in order to ascertain *the legislative intent as expressed in the language*. Their task is not to ascertain the intent of the lawmaker on its own. It is the text which is the law and it is regarded as important both that the law should be certain and that it should be ascertainable by the citizen. The language is considered not in isolation but in the light of its context and purpose. While the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear.

In the absence of a binding interpretation by the NPCSC, extrinsic materials cannot affect interpretation where the courts conclude that the meaning of the language is clear. It is clear if it is free from ambiguity, that is, it is not reasonably capable of sustaining competing alternative interpretations. The courts will not on the basis of any extrinsic materials depart from the clear meaning and give the language a meaning which the language cannot bear.

Judgment Update

The Director of Immigration v Master Chong Fung Yuen

FACV No 26 of 2000
(20 July 2001)



THE BL 158(3) ISSUE

The issue is whether BL 24(2)(1) is an excluded provision. The Director argues it is.

According to the Immigration Department's figures, during the 43 months between 1 July 1997 to 31 January 2001, a total of 1991 Chinese citizens born in Hong Kong would qualify within BL 24(2)(1) if the Director's contention were rejected, ie 46 children per month; about 555 children per annum. On the basis of those figures, the Director accepts that there is no indication that a decision against him will give rise to an immediate influx of persons from the Mainland. In the Court's view, on the basis of these figures, there could not be said to be any significant risk to Hong Kong resulting from a decision against the Director.

The Director relies on what is stated in the Preamble to the Interpretation in relation to BL 24(2)(3). The Preamble cannot be read as expressing a clear view that BL 24(2)(3) on its own is an excluded provision. The NPCSC was not faced with a request for an interpretation of BL 24(2)(3) on its own, without BL 22(4) being involved.

BL 158(3) focuses on the provision in question. In considering whether a provision is an excluded provision, BL 158(3) cannot be interpreted to prescribe as the test, submitted by the Director, the factual determination of the substantive effect of its implementation. The character of the provision has to be considered. The character of BL 24(2)(1) is that of a provision defining one category of permanent residents with the right of abode. Having regard to its character, 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 BL 24(2)(1) ISSUE

It is common ground that the Interpretation did not contain any interpretation of BL 24(2)(1) which is binding on the courts in Hong Kong and that the Court should apply the common law approach.

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

In the other categories of BL 24(2), where qualification for permanent resident status depends upon the status of a parent of the person concerned, this is expressly stated with the words "born ... of "; such as BL 24(2)(3) and BL 24(2)(5). In contrast, BL 24(2)(1) refers to the place of birth and contains no words providing for any requirement relating to the parent. Such a contrast is significant.

In the Court's view, no reliance can be placed for a proper interpretation of BL 24(2)(1) on the point that after 1983 no immigration rights in Hong Kong could be acquired by mere fact of birth in Hong Kong alone. This is because British nationality laws and consequential amendments to Hong Kong's immigration laws had their own history. The United Kingdom had to deal with issues arising from the perceived threat of large scale immigration into the United Kingdom from British Commonwealth countries.

A person in the position of the respondent would, but for the fact that his parents were visiting Hong Kong at the time of his birth, have been born in the Mainland and would have to

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

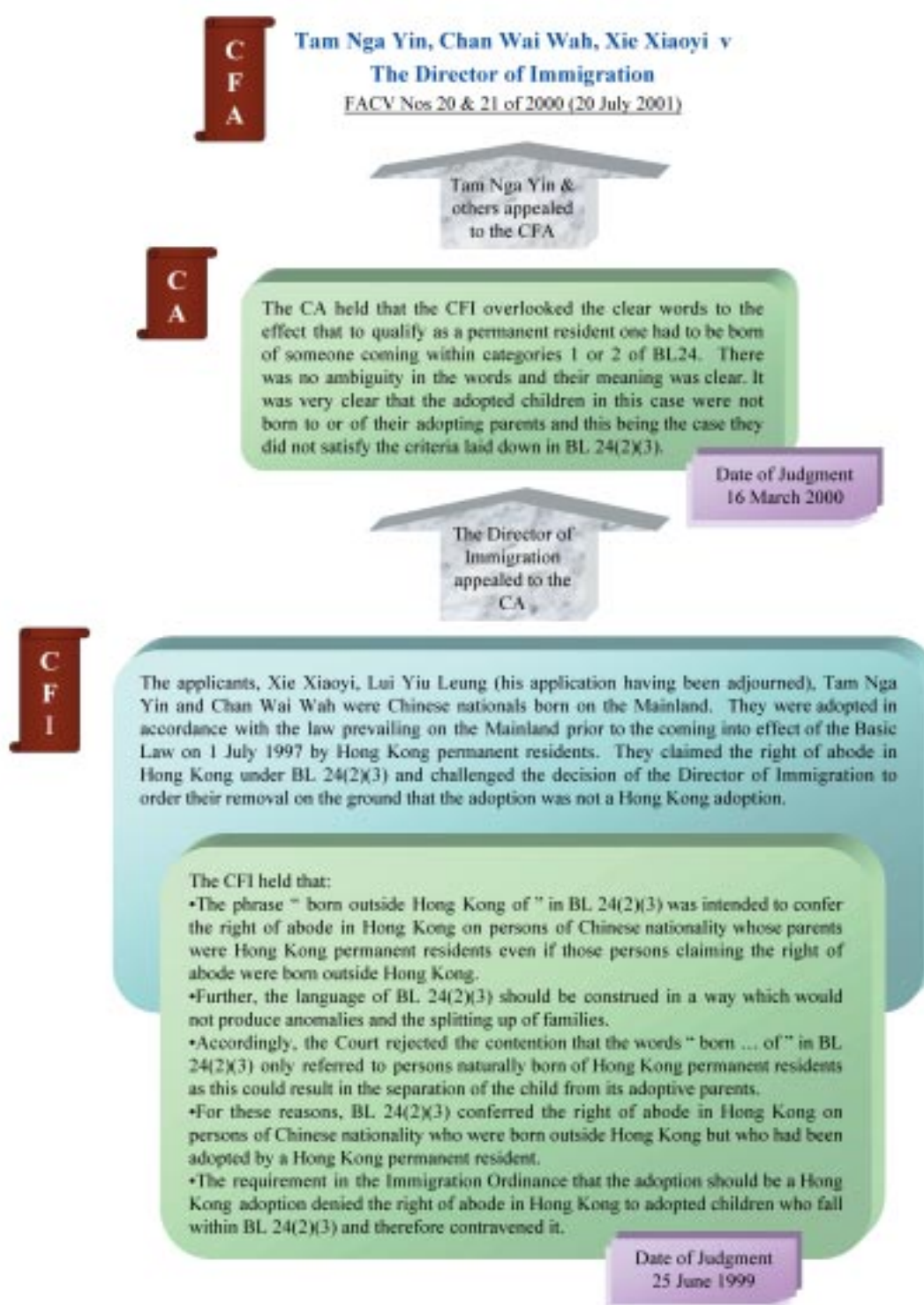
Comparative constitutional law research analyses the similarities and differences between various constitutional systems and constitutional laws around the world. It throws light on how different constitutional systems handle the same or related questions, thus enabling us to adopt or develop in the 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.

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)



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)

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.

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)

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.

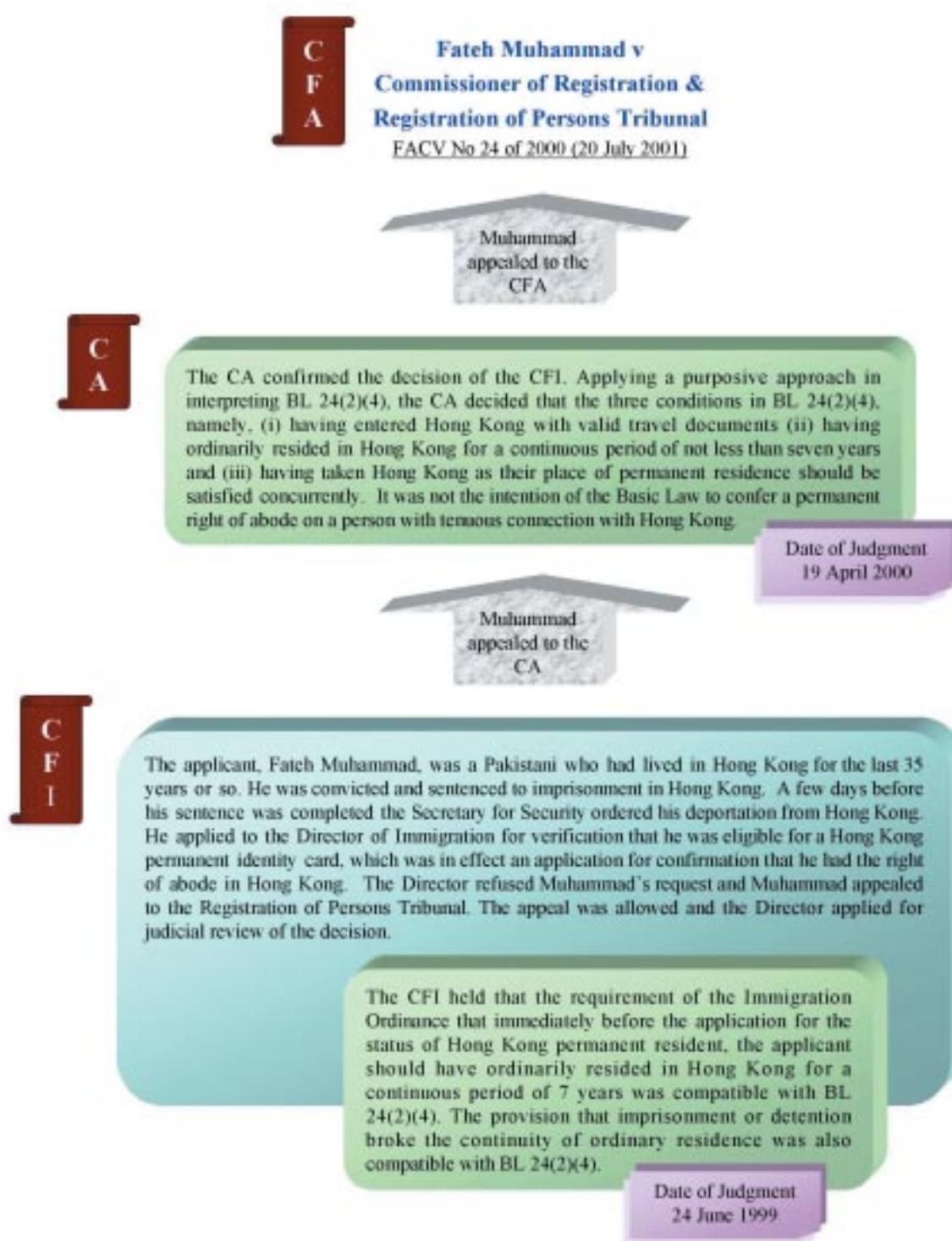
As to the time by which at least one adoptive parent must have permanent resident status, he feels driven to an interpretation which requires at least one adoptive parent had such status both at the time of birth and at the time when the adoption became effective in law.

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).

Judgment Update



Fateh Muhammad v Commissioner of Registration &
The Registration of Persons Tribunal FACV No 24 of 2000 (20 July 2001)



Judgment Update



Fateh Muhammad v Commissioner of Registration & The Registration of Persons Tribunal

FACV No 24 of 2000 (20 July 2001)

The appellant, Mr Fateh Muhammad, claimed to be a Hong Kong permanent resident with the right of abode here. He applied to the 1st respondent, the Commissioner of Registration, for a Hong Kong permanent identity card, which would be official recognition of his permanent resident status. The Commissioner took the view that Mr Muhammad did not have such status. So the Commissioner refused to issue Mr Muhammad a permanent identity card.

It was Mr Muhammad's case that he came within the category of permanent residents set out in BL 24(2)(4) which covers:

"Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the [HKSAR]."

Mr Muhammad has lived in Hong Kong since the 1960s. But his time in Hong Kong includes his imprisonment here from 27 April 1994 to 27 February 1997 serving a sentence for conspiracy to utter forged banknotes and conspiracy to deliver counterfeit banknotes. And of course seven years have not elapsed since his release from prison. The 2nd respondent, the Registration of Persons Tribunal, held that Mr Muhammad was a permanent resident. But both the CFI and the CA held that he was not. He appealed to the CFA.

Dismissing Mr Muhammad's appeal, the CFA held as follows:

- (1) Subject to the possibility of an argument that an extremely short period of imprisonment does not interrupt the continuity of residence, being in prison or a training or detention centre pursuant to a criminal conviction which has never been quashed or a sentence or order which has never been set aside does not constitute ordinary residence in Hong Kong

within the meaning of BL 24.

- (2) The seven continuous years required by that article must come immediately before the time when an application for permanent resident status is made in reliance on those seven continuous years.
- (3) Accordingly the legislature was acting constitutionally when it passed legislation under which (a) imprisonment or detention does not count as ordinary residence and (b) the seven years' ordinary and continuous residence relied upon in an application for permanent resident status made in reliance upon BL 24(2)(4) must come immediately before the time when the application is made.
- (4) For the foregoing reasons, Mr Muhammad does not yet have permanent resident status because he has not yet achieved seven years' ordinary and continuous residence in Hong Kong immediately before applying for such status.

Mr Muhammad is being permitted to remain in Hong Kong, and might three years from now make another application for Hong Kong permanent resident status. Paragraph 1(5)(b) of Schedule 1 to the Immigration Ordinance, Cap 115 might be relevant to such application. The effect of this provision, if it is constitutional, is that even a person who has achieved seven years' continuous and ordinary residence in Hong Kong cannot obtain permanent resident status unless the Director of Immigration exercises his discretion to lift any limit on that person's stay. The CFA left open the question whether or not this provision is constitutional.