

Judgment Update

The Director of Immigration v Master Chong Fung Yuen

FACV No 26 of 2000
(20 July 2001)



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The Director of
Immigration
appealed to the
CFA

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The CA affirmed the original decision and similarly considered that BL 24(2)(1) was concise and clear. The Interpretation made by the NPCSC on 26 June 1999 did not specifically address BL 24(2)(1). The figures did not support that there would be a mass influx of immigrants.

Date of Judgment
27 July 2000

The Director of
Immigration
appealed to the
CA

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The applicant, Chong Fung Yuen, was a Chinese citizen who was born in Hong Kong while his parents were in Hong Kong lawfully with two-way permits from the Mainland on a visit. His parents were not residents of Hong Kong, permanent or otherwise. Chong claimed to be a permanent resident of the HKSAR, and to have the right of abode pursuant to BL 24(2)(1).

The CFI held that the requirement in the Immigration Ordinance that either parent had to be settled or had the right of abode in Hong Kong at the time of the birth of the claimant or at any later time derogated from the rights conferred by BL 24(2)(1). There was no ambiguity and no doubt as to the legal meaning of BL 24(2)(1), which conferred the status of permanent residents on Chinese citizens who had been born in Hong Kong. It was therefore declared that Chong was a permanent resident of, and had the right of abode in, the HKSAR.

Date of Judgment
24 December 1999

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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

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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.

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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

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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.