

## **EXCERPT 1**

**HKSAR V. MA WAI KWAN DAVID AND OTHERS [1997] HKCA 652; [1997] HKLRD 761; [1997] 2 HKC 315; CAQL 1/1997 (29 JULY 1997)**

### **Interpretation of the Basic Law**

11. Before one attempts to interpret the Basic Law, it is necessary to bear in mind the history, nature and purpose of this document.

12. On 19th December 1984, the Joint Declaration was signed between the Government of the People's Republic of China (PRC) and the Government of the United Kingdom. By this Joint Declaration, Hong Kong was to be restored to China with effect from 1st July 1997. Under Article 3 of the Joint Declaration, China declared certain basic policies regarding Hong Kong. There was to be established the HKSAR which would enjoy a high degree of autonomy. Under Article 3(12), these basic policies would be stipulated in a Basic Law to be promulgated by the NPC [National People's Congress] and would remain unchanged for fifty years from 1st July 1997. These policies were further elaborated in Annex I to the Joint Declaration. The Basic Law for the HKSAR was drafted by the Drafting Committee of the Basic Law which consisted of members from China and from Hong Kong. It took many years to complete. It was promulgated on 4th April 1990 and was to take effect from 1st July 1997.

13. The Basic Law is not only a brainchild of an international treaty, the Joint Declaration. It is also a national law of the PRC and the constitution of the HKSAR. It translates the basic policies enshrined in the Joint Declaration into more practical terms. The essence of these policies is that the current social, economic and legal systems in Hong Kong will remain unchanged for 50 years. The purpose of the Basic Law is to ensure that these basic policies are implemented and that there can be continued stability and prosperity for the HKSAR. Continuity after the change of sovereignty is therefore of vital importance.

## **EXCERPT 2**

**LAU KONG YUNG AND OTHERS V. DIRECTOR OF IMMIGRATION [1999] HKCFA 5; [1999] 3 HKLRD 778; (1999) 2 HKCFAR 300; [1999] 4 HKC 731 ; FACV 11/1999 (3 DECEMBER 1999)**

### **The issues on the Interpretation**

#### *52. Article 67(4) of the Chinese Constitution*

Article 67(4) of the Chinese Constitution provides:

" The Standing Committee of the National People's Congress exercises the following functions and powers:

(4) to interpret laws;"

#### *53. Article 158 of the Basic Law*

Article 158 of the Basic Law provides:

" The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law."

### **The power of the Standing Committee**

54. Article 67(4) of the Chinese Constitution confers on the Standing Committee the function and power to interpret laws. This power includes the Basic Law which is a national law. The Basic Law

itself provides in Article 158(1) that the power of interpretation of this Law shall be vested in the Standing Committee.

55. Article 158(2) contains the authorization by the Standing Committee to the courts of the Region to interpret on their own in adjudicating cases the provisions of this Law which are within the limits of the Region's autonomy. Article 158(3) provides that the Region's courts may also interpret other provisions of this Law in adjudicating cases, that is provisions other than those which are within the limits of the Region's autonomy. But Article 158(3) proceeds to provide that if the courts in the Region in adjudicating cases need to interpret provisions which I shall refer to as "the excluded provisions" (the expression used in Ng Ka Ling), namely, the provisions concerning affairs which are the responsibility of the Central People's Government or concerning the relationship between the Central Authorities and the Region, then the courts shall before rendering judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee through the Court of Final Appeal. Thus, where the conditions provided for are satisfied, the Court of Final Appeal is under *a duty* to seek an interpretation of the excluded provisions from the Standing Committee. It is convenient to refer to this as a "judicial reference". Article 158(3) goes on to provide that when the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the Standing Committee's interpretation. However, judgments previously rendered shall not be affected. Article 158(4) provides that the Standing Committee shall consult its Committee for the Basic Law before giving an interpretation.

56. Mr Denis Chang SC submits that the Standing Committee had no power to make the Interpretation because under Article 158, properly interpreted, the Standing Committee cannot interpret the Basic Law except upon a judicial reference by the Court which would relate only to the excluded provisions. Mr Chang argues that Article 158 imposes a constitutional restraint on the Standing Committee's power and that this accords with the high degree of autonomy accorded to the Region by the Basic Law adopted by the National People's Congress which included the power of final adjudication. See Basic Law Articles 2 and 19.

57. This argument cannot be accepted. It is clear that the Standing Committee has the power to make the Interpretation. This power originates from Article 67(4) of the Chinese Constitution and is contained in Article 158(1) of the Basic Law itself. The power of interpretation of the Basic Law conferred by Article 158(1) is in general and unqualified terms.

58. That power and its exercise is not restricted or qualified in any way by Articles 158(2) and 158(3). By Article 158(2), the Region's courts are authorized to interpret on their own in adjudicating cases the provisions within the limits of the Region's autonomy. The words "on their own" underline the absence of a duty to refer the provisions in question to the Standing Committee for interpretation in contrast to the mandatory requirement relating to the excluded provisions

provided for in Article 158(3). That provision enables the courts to interpret provisions other than those within the limits of the Region's autonomy but, where the conditions provided for are satisfied, obliges the Court of Final Appeal not to interpret the excluded provisions and to seek an interpretation from the Standing Committee. So, there is no question of Article 158(3) restricting the Standing Committee's general power in Article 158(1). That provision is directed to limiting the Court's power by requiring a judicial reference of the excluded provisions in the circumstances prescribed.

59. In any event, the entire scheme of Article 158 is inconsistent with the argument that restrictions are to be implied from Articles 158(2) and 158(3) on the general power of interpretation conferred by Article 158(1). The authority given by Article 158(2) to the courts of the Region stems from the general power of interpretation vested in the Standing Committee. Article 158(3) extends that authority but subject to a qualification requiring a judicial reference. The reference results in the making by the Standing Committee of an interpretation which proceeds from the general power vested in it by Article 158(1). Mr Chang SC's submission, if it were accepted, would deny to the Standing Committee power to interpret provisions in the Basic Law other than the excluded provisions. Such a limited power of interpretation would be inconsistent with the general power conferred by Article 158(1).

60. Mr Chang SC relies on the different wording of the equivalent article (then numbered 169) to Article 158 in the draft Basic Law (April 1988). It reads:

" The power of interpretation of this Law is vested in the Standing Committee of the National People's Congress.

When the Standing Committee of the National People's Congress makes an interpretation of a provision of this Law, the courts of the Hong Kong Special Administrative Region, in applying that provision, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The courts of the Hong Kong Special Administrative Region may interpret the provisions of this Law in adjudicating cases before them. If a case involves an interpretation of the provisions of this Law concerning defence, foreign affairs and other affairs which are the responsibility of the Central People's Government, the courts of the Region, before making their final judgment on the case, shall seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law."

61. This draft article does not assist. We do not know why it was that the text of Article 158 was adopted in preference to the draft and, in any case, the draft would not lead to a different interpretation of Article 158 from that reached on the wording of that Article.

62. Accordingly, the Standing Committee has the power to make the Interpretation under Article 158(1). The Interpretation is binding on the courts of the HKSAR.

....

72. The Interpretation, being an interpretation of the relevant provisions, dates from 1 July 1997 when the Basic Law came into effect. It declared what the law has always been. Compare the common law declaratory theory of judicial decisions, see **Kleinwort Benson Ltd v Lincoln City Council** [\[1998\] UKHL 38](#); [\[1998\] 3 WLR 1095](#) at 1117 - 1119 and 1148

### **EXCERPT 3**

#### **Article 104 of the Basic Law**

When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China.

## **EXCERPT 4**

### **Interpretation of the Standing Committee of the National People's Congress of Article 104 of the Basic Law (Adopted by the Standing Committee of the Twelfth National People's Congress at its Twenty-fourth Session on 7 November 2016)**

...

2. The provisions in Article 104 of the Basic Law ... bear the following meaning:

- (1) ... No public office shall be assumed, no corresponding powers and functions shall be exercised, and no corresponding entitlements shall be enjoyed by anyone who fails to lawfully and validly take the oath or who declines to take the oath.
- (2) Oath taking must comply with the legal requirements in respect of its form and content. An oath taker must take the oath sincerely and solemnly, and must accurately, completely and solemnly read out the oath prescribed by law ....
- (3) An oath taker is disqualified forthwith from assuming the public office specified in the Article if he or she declines to take the oath. An oath taker who intentionally reads out words which do not accord with the wording of the oath prescribed by law, or takes the oath in a manner which is not sincere or not solemn, shall be treated as declining to take the oath. The oath so taken is invalid and the oath taker is disqualified forthwith from assuming the public office specified in the Article.
- (4) ... The person administering the oath has the duty to ensure that the oath is taken in a lawful manner. [A]n oath which is not taken in compliance with this Interpretation and the requirements under the laws of the Hong Kong Special Administrative Region is invalid. If the oath taken is determined [by the person authorized to administer the oath] as invalid, no arrangement shall be made for retaking the oath.

3. ... The oath taker must sincerely believe in and strictly abide by the relevant oath prescribed by law. An oath taker who makes a false oath, or, who, after taking the oath, engages in conduct in breach of the oath, shall bear legal responsibility in accordance with law.





## **EXCERPT 5**

**DEMOCRATIC REPUBLIC OF THE CONGO AND OTHERS v. FG HEMISPHERE ASSOCIATES LLC [2011] HKCFA 43; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV 7/2010 (8 June 2011)**

### *G.1 Approach of the Court to Article 158*

395. On three previous occasions this Court has considered the circumstances in which it is required by Article 158(3) to refer a question of interpretation of the Basic Law to the SCNPC.

396. In *Ng Ka Ling v Director of Immigration*,<sup>[177]</sup> the Court held that, under Article 158(3), it had a duty to make a reference if two conditions are satisfied:

- (a) “the classification condition”: if the provisions of the Basic Law in question
  - (i) concern affairs which are the responsibility of the CPG; or
  - (ii) concern the relationship between the Central Authorities and the Region ((i) and (ii) being referred to as “the excluded provisions”);
- (b) “the necessity condition”: if the Court of Final Appeal in adjudicating the case needs to interpret the excluded provisions and the interpretation will affect the judgment on the case.<sup>[178]</sup>

...

405. ... There is no issue between the parties as to the classification condition. The only issue is whether the necessity condition is satisfied and it is to that issue we now turn.

### *G.2 The necessity condition*

406. On the view which we have taken of the arguments advanced by the parties with respect to waiver of state immunity, the DRC has not waived its immunity.<sup>[185]</sup> Hence the case cannot be resolved without a determination of the questions of interpretation affecting the meaning of Articles 13 and 19 of the Basic Law, in particular in relation to the words “acts of state such as defence and foreign affairs”. The necessity condition is therefore satisfied.

### *G.3 The questions to be referred to the Standing Committee of the National People’s Congress*

407. ... We make the obvious point that the duty to make a reference under Article 158(3) is limited to questions of interpretation of the Basic Law identified in that provision. The questions referred are:

- (1) whether on the true interpretation of Article 13(1), the CPG has the power to determine the rule or policy of the PRC on state immunity;

(2) if so, whether, on the true interpretation of Articles 13(1) and 19, the HKSAR, including the courts of the HKSAR:

(a) is bound to apply or give effect to the rule or policy on state immunity determined by the CPG under Article 13(1); or

(b) on the other hand, is at liberty to depart from the rule or policy on state immunity determined by the CPG under Article 13(1) and to adopt a different rule;

(3) whether the determination by the CPG as to the rule or policy on state immunity falls within “acts of state such as defence and foreign affairs” in the first sentence of Article 19(3) of the Basic Law; and

(4) whether, upon the establishment of the HKSAR, the effect of Article 13(1), Article 19 and the status of Hong Kong as a Special Administrative Region of the PRC upon the common law on state immunity previously in force in Hong Kong (that is, before 1 July 1997), to the extent that such common law was inconsistent with the rule or policy on state immunity as determined by the CPG pursuant to Article 13(1), was to require such common law to be applied subject to such modifications, adaptations, limitations or exceptions as were necessary to ensure that such common law is consistent with the rule or policy on state immunity as determined by the CPG, in accordance with Articles 8 and 160 of the Basic Law and the Decision of the Standing Committee of the National People’s Congress dated 23 February 1997 made pursuant to Article 160.

## **EXCERPT 6**

**DIRECTOR OF IMMIGRATION v. CHONG FUNG YUEN [2001] HKCFA 48; [2001] 2 HKLRD 533; (2001) 4 HKCFAR 211; FACV 26/2000 (20 July 2001)**

### *6.3 The common law approach to interpretation*

The courts in Hong Kong exercise independent judicial power under the Basic Law. See arts 2 and 80. One of the fundamental functions of the courts in the HKSAR, in exercising independent judicial power is the interpretation of the laws, including the Basic Law itself, subject to the limit on the Court's jurisdiction imposed by art. 158(3) in relation to the excluded provisions and subject to being bound by any interpretation by the Standing Committee under art. 158. Subject to these matters, it follows from the grant of independent judicial power to the courts that the interpretation of laws is a matter for the courts. This principle, which follows from the doctrine of the separation of powers, is a basic principle of the common law and is preserved and maintained in Hong Kong by the Basic 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. Their duty is to ascertain *what was meant by the language used* and to give effect to *the legislative intent as expressed in the language*. It is the text of the enactment 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 courts do not look at the language of the article in question in isolation. The language is considered in the light of its context and purpose. See Ng Ka Ling at 28-29. The exercise of interpretation requires the courts to identify the meaning borne by the language when considered in the light of its context and purpose. This is an objective exercise. Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear. As was observed in Minister of Home Affairs v. Fisher [\[1979\] UKPC 21](#); [\[1980\] AC 319](#) at 329E, a case on constitutional interpretation : "Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language".

As the Court held in Ng Ka Ling (at 29 A-C), the courts should give a generous interpretation to the provisions in Chapter III that contain constitutional guarantees of freedoms that lie at the heart of Hong Kong's separate system. However, when interpreting the provisions that define the categories of permanent residents, the courts should simply consider the language in the light of any ascertainable purpose and the context.

To assist in the task of interpretation of the provision in question, the courts consider what is within the Basic Law, including provisions in the Basic Law other than the provision in question and the Preamble. These are internal aids to interpretation.

Extrinsic materials which throw light on the context or purpose of the Basic Law or its particular provisions may generally be used as an aid to the interpretation of the Basic Law. Extrinsic materials which can be considered include the Joint Declaration and the Explanations on the Basic Law (draft) given at the NPC on 28 March 1990 shortly before its adoption on 4 April 1990. The state of domestic legislation at that time and the time of the Joint Declaration will often also serve as an aid to the interpretation of the Basic Law. Because the context and purpose of the Basic Law were established at the time of its enactment in 1990, the extrinsic materials relevant to its interpretation are, generally speaking, pre-enactment materials, that is, materials brought into existence prior to or contemporaneous with the enactment of the Basic Law, although it only came into effect on 1 July 1997.

It is unnecessary for the purposes of this case to explore what assistance (if any) can be derived from extrinsic materials other than pre-enactment materials relating to context and purpose; in particular, whether post-enactment materials can be called in aid. For the purposes of this case, it is sufficient to state that on the common law approach which the courts are bound to apply in the absence of a binding interpretation by the Standing Committee, extrinsic materials, whatever their nature and whether pre or post-enactment, cannot affect interpretation where the courts conclude that the meaning of the language, when construed in the light of its context and purpose ascertained with the benefit of internal aids and appropriate extrinsic materials, is clear. The meaning of the language is clear if it is free from ambiguity, that is, it is not reasonably capable of sustaining competing alternative interpretations.

Once the courts conclude that the meaning of the language of the text when construed in the light of its context and purpose is clear, the courts are bound to give effect to the clear meaning of the language. The courts will not on the basis of any extrinsic materials depart from that clear meaning and give the language a meaning which the language cannot bear.

In a case where the courts have to consider the use of extrinsic materials other than pre-enactment materials relating to context and purpose, the courts should, in conformity with common law principles, approach the matter cautiously. The common law does not in general adopt the approach that all extrinsic materials can be considered leaving their weight to be assessed. A prudent approach is particularly called for where the courts are asked to consider post-enactment materials. This is because as discussed above, under a common law system which includes a separation of powers, the interpretation of laws once enacted is a matter for the courts. So it is with the Basic Law, although in this regard, as noted above, the courts' power is subject to the limit on the Court's jurisdiction imposed by art. 158(3) in relation to the excluded provisions and subject to being bound by any interpretation by the Standing Committee under art. 158.

...

## *8. The art. 24(2)(1) issue*

### *8.1 The submissions*

Article 24(2) provides that the permanent residents of the HKSAR 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."

It is common ground that the Interpretation did not contain any interpretation of art. 24(2)(1) which is binding on the courts in Hong Kong and that the Court should apply the common law approach. The respondent's case is simple. Article 24(2)(1) means what it says, that is, Chinese citizens born in Hong Kong before or after 1 July 1997, no more, no less. The Director's case is that by one of two independent routes, the Court should interpret art. 24(2)(1) to mean by necessary implication that it does not include those Chinese citizens who are born to illegal immigrants, overstayers or people residing temporarily in Hong Kong. The two routes are : (1) By interpreting the article in the light of its context and purpose. (2) By taking into account the statement in the Interpretation that the legislative intent of "all other categories of art. 24(2) ... have been reflected" in the Preparatory Committee's Opinions on the implementation of art. 24(2).

## *8.2 Interpretation of art. 24(2)(1) in the light of its purpose and context*

Article 24(2) defines the persons who are permanent residents of the HKSAR and art. 24(3) confers on them the right of abode. So the purpose of art. 24(2) taken together with art. 24(3) is to confer the right of abode on the persons defined to be the permanent residents of the HKSAR. By the definition, certain persons are included. Those not included would be excluded and in this sense, the purpose of art. 24(2) can be said to be to limit the persons who are permanent residents of the HKSAR and hence its population.

The context of art. 24(2)(1) includes in particular two matters which should be examined. First, the other categories in art. 24(2). Secondly, the Joint Declaration between the United Kingdom and the People's Republic of China signed in December 1984 and the background thereto as far as immigration law was concerned.

When one considers, as part of the context, the other categories of art. 24(2), it is significant that 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". Thus, art. 24(2)(3) defines that category as persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2). Similarly, art. 24(2)(5) defines that category as "persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after" 1 July 1997. In contrast, art. 24(2)(1) in defining that category refers to the place of birth, that is, Hong Kong, and contains no words providing for any requirement relating to the parent. Such a contrast is significant.

Annex I to the Joint Declaration contains an elaboration by the Government of the People's Republic of China of its basic policies regarding Hong Kong and the Basic Law was enacted to ensure the implementation of such basic policies. Chapter XIV of Annex I set out the categories of persons who shall have the right of abode in the HKSAR. The relevant provision is :

"all Chinese nationals who were born or who have ordinarily resided in Hong Kong before or after the establishment of [the HKSAR] for a continuous period of 7 years or more, and persons of Chinese nationality born outside Hong Kong of such Chinese nationals."

Categories (1), (2) and (3) in art. 24(2) contain the classes of persons provided for in this provision with similar wording.

As part of the context for art. 24(2)(1), the Director relies on the state of immigration law in Hong Kong in 1984 as forming part of the background of Annex I to the Joint Declaration. By that time, no immigration rights in Hong Kong could be acquired under the law by the mere fact of birth in Hong Kong alone, whereas before 1983, they could be so acquired; immigration rights were conferred on British subjects born in Hong Kong. See the judgment of Stock J [2000] 1 HKC at

367-8, 374-5. So it would be odd, the Director's argument runs, if art. 24(2)(1), which implements Annex I, was intended to confer permanent resident status by the mere fact of birth in Hong Kong alone.

In our view, no reliance can be placed for a proper interpretation of art. 24(2)(1) on the point that after 1983 no immigration rights in Hong Kong could be acquired by the mere fact of birth in Hong Kong alone. As was pointed out by Stock J (at 375), 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 and this resulted in a policy shift away from citizenship based on *jus soli*. (In English, "right of the soil", that is, the principle that a child's citizenship is determined by place of birth). It should not be assumed that the Basic Law followed this policy shift from that history.

The Director points out that a person in the position of the respondent would, but for the fact that his parents were visiting in Hong Kong at the time of his birth, have been born in the Mainland where his parents normally reside. And he would have to qualify for permanent resident status by descent under art. 24(2)(3) by satisfying the requirement that either parent must be a permanent resident under category (1) or (2) at the time of his birth. Even if that requirement were satisfied, exit permission under art. 22(4) has to be obtained. Those indeed would be the consequences if a person in the position of the respondent were born on the Mainland. These consequences follow from the fact that the requirements in the art. 24(2)(3) category are different from those in the art. 24(2)(1) category. But it does not follow from the fact that there are different requirements for the respective categories that art. 24(2)(1) should be regarded as ambiguous.

When the language of art. 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 of the provision is not ambiguous, that is, it is not reasonably capable of sustaining competing alternative interpretations.

### *8.3 The Interpretation and the Preparatory Committee's Opinions*

The Director relies on the statement in the Interpretation that the legislative intent of all other categories of art. 24(2) have been reflected in the Preparatory Committee's Opinions on the implementation of art. 24(2) ("the statement in question"). As has been pointed out, he accepts that it is not a binding interpretation of art. 24(2)(1) by the Standing Committee. His argument is that the common law is sufficiently flexible to enable the Court to take such statement into account and hold in favour of the interpretation contended for by the Director. He does not base any submission on the Preparatory Committee's Opinions divorced from the statement in question in the Interpretation.

On the common law approach, which the Court is under a duty to apply in the absence of a binding interpretation by the Standing Committee, the statement in question cannot affect the clear meaning of art. 24(2)(1) properly reached, applying the common law approach.

As discussed above, on the common law approach, the Court's task is to construe the language in art. 24(2)(1) in the light of its context and purpose in order to ascertain *the legislative intent as expressed in the language*. As concluded earlier, the meaning of art. 24(2)(1) is clear; there is no ambiguity. It means Chinese citizens born in Hong Kong before or after 1 July 1997. In conformity with the common law, the Court is unable, on the basis of the statement in question, to depart from what it considers to be the clear meaning of art. 24(2)(1) in favour of a meaning which the language cannot bear.



## **EXCERPT 7**

**NG KA LING AND ANOTHER v. THE DIRECTOR OF IMMIGRATION [1999] HKCFA 72; [1999] 1 HKLRD 315; (1999) 2 HKCFAR 4; [1999] 1 HKC 291 ; FACV 14/1998 (29 January 1999)**

98. The crucial question before us is what test the Court should apply in considering whether the classification condition is satisfied.

99. Mr Ma SC submits that where (a) the Court is engaged in interpreting provision X (Article 24 in this case) which, being a provision within the limits of the Region's autonomy, is not an excluded provision but (b), it is *arguable* that provision Y (Article 22(4) in this case), which on its own is an excluded provision, is relevant to the interpretation of provision X, then the Court is obliged to make a reference under Article 158.

100. We are at the stage of considering whether the Court is obliged to make a reference under Article 158. At this stage, the Court is concerned with what is arguable and not with deciding the question of interpretation. That is a matter for the Standing Committee if a reference has to be made and a matter for the Court if a reference does not have to be made. Of course, an argument which is plainly and obviously bad would not be arguable. If the Court decides at this stage, that the point is unarguable, that would be an end of the matter as far as a question of reference is concerned. If the Court decides that it is arguable, the Court would then consider whether the classification and necessity conditions are satisfied. In the present case, it is arguable that an excluded provision (Article 22(4)) is relevant to the interpretation of a non-excluded provision (Article 24).

101. In deciding what test is to be applied in considering whether the classification condition is satisfied, a purposive interpretation has to be adopted. An important purpose of Article 158 is the Standing Committee's authorization to the Hong Kong courts including the Court of Final Appeal to interpret "on their own" the provisions of the Basic Law which fall outside the excluded provisions, particularly provisions which are within the Region's autonomy. This is an essential part of the high degree of autonomy granted to the Region.

102. In the light of that approach, we turn to the test. Provision X (Article 24 here), which is a provision within the Region's autonomy, must be interpreted in its context. The context naturally includes other provisions in the Basic Law which may be relevant to the construction of provision X in a number of ways. For example, they may qualify provision X and qualification may be by way of addition, subtraction or modification. Or they may lend colour to its meaning or provide a pointer to its construction. On Mr Ma SC's argument, once an excluded provision (Article 22(4) here) is so relevant, the matter would have to be referred to the Standing Committee. The subject of the reference would not be the interpretation of provision X because it is not an excluded provision; the suggestion seems to be that the subject of the reference would be the interpretation of the excluded

provision so far as relevant to the interpretation of provision X. Such a reference would withdraw from the jurisdiction of the Court the interpretation of a provision (provision X) of the Basic Law which is within the limits of the autonomy of the Region. In our view, this would be a substantial derogation from the Region's autonomy and cannot be right.

103. In our view, the test in considering whether the classification condition is satisfied is that put by Mr Chang SC for the applicants. As a matter of substance, what predominantly is the provision that has to be interpreted in the adjudication of the case ? If the answer is an excluded provision, the Court is obliged to refer. If the answer is a provision which is not an excluded provision, then no reference has to be made, although an excluded provision is *arguably* relevant to the construction of the non-excluded provision even to the extent of qualifying it.

104. The test gives effect to both of the two main objects of Article 158, that of vesting interpretation of the Basic Law, particularly the excluded provisions, in the Standing Committee and that of authorizing the courts of the Region to interpret the non-excluded provisions, in particular to interpret "on their own" the provisions within the limits of the Region's autonomy.

105. It is, in our view, of considerable significance that Article 158 requires a reference to the Standing Committee of the interpretation of the relevant excluded provisions only. The Article does not require a reference of the question of interpretation involved generally when a number of provisions (including an excluded provision) may be relevant to provide the solution of that question.

106. Applying that test, in adjudicating this case, as a matter of substance, the predominant provision which we are interpreting is Article 24, which provides for the right of abode of a permanent resident, and the content of that right. That Article is the very source of the right which is sought to be enforced by the applicants in these appeals. That being so, the Court, in our view, does not have to make a reference, although Article 22(4) is *arguably* relevant to the interpretation of Article 24.

## **EXCERPT 8**

### **MASTER CHONG FUNG YUEN v. DIRECTOR OF IMMIGRATION [2000] HKCA 499; [2000] 3 HKLRD 661; CACV 61/2000 (27 July 2000)**

102. Turning to the interpretation by the Standing Committee on 26 June 1999, the first matter to be observed is that Article 24(2)(1) was not a matter of interpretation by the Standing Committee on that occasion. It is true that in the Standing Committee's interpretation, corresponded almost exactly, to the wording of paragraph 4 of the Working Report of the Preparatory Committee.

Moreover, the Standing Committee concluded their interpretation with the words :-

"The legislative intent as stated by this Interpretation, together with the legislative intent of all other categories of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, have been reflected in the ... [the Working Report of the Preparatory Committee to which I have referred above]."

103. Mr Fok specifically argues that this is not and was not intended to be an interpretation of Article 24(2)(1). But he says that it should be treated as obiter dicta of the highest order. He goes so far as to say it would be "nonsensical" for this court to decide this case on any basis other than by "accepting" in effect paragraph 1 of the Preparatory Committee's Working Report as a guide to the proper construction of Article 24(2)(1). It was not, however, a matter which was referred to the Standing Committee and it is not clear therefore what was considered by the Standing Committee.

104. Specific care is always taken with regard to obiter dicta because it may well constitute statements in respect of which there has been no full or proper argument. The difficulty of obiter dicta was referred to by Lord Haldane on more than one occasion. In the case of *Cornelius v Phillips* [1918] AC 199 at 211, he doubted whether dicta of judges, however eminent, ought to be cited as establishing authoritatively propositions of law unless they really form integral parts of the train of reasoning directed to the real question to be decided. The same sentiments were expressed by Lord Dunedin in *Leeds Industrial Co-operative Society, Limited v. Slack* [1924] AC 851 at 864. He said :-

"My Lords, if a decision is binding, there is an end of it. But if you have only to do with dicta, though such dicta may well serve to help you to form your own opinion, I cannot see that they ought to overrule it."

These considerations are, in my view, all the more relevant in relation to interpretations by bodies where there is no representation by interested parties, still less adversarial argument.

105. A further aspect of the matter is in relation to the Basic Law Committee. That Committee is consulted as part of a process of the Standing Committee making an interpretation. The Basic Law Committee was consulted prior to the 26 June 1999 interpretation, but on the face of the matter

only, in relation to Article 22(4) and Article 24(2)(3). There is no indication that the Basic Law Committee was consulted in relation to Article 24(2)(1). Moreover, the observations of the Standing Committee are general observations. There is no suggestion that the Standing Committee's attention was drawn to the restriction on constitutional rights.

106. Most importantly however, obiter dicta in relation to statutory interpretation can only be of assistance to courts insofar as they indicate a process of reasoning. In none of the documents to which our attention has been drawn, be they the opinions, the Working Reports, the speech of the Deputy Premier, the resolution of the National People's Congress or the interpretation by the Standing Committee, is there any process of reasoning expressed or any indication given as to why there should be any limitation of what otherwise would be clear constitutional rights. There is, in consequence, very little basis for deriving any assistance as to the proper interpretation of the words of Article 24(2)(1) from the opinions or Working Report of the Preparatory Committee or any of the materials consequent thereon or the interpretation of June 1999.

## **EXCERPT 9**

### **YAU WAI CHING v. CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, SECRETARY FOR JUSTICE [2017] HKCFA 57; FAMV 8/2017 (1 September 2017)**

34. In approaching questions raised in respect of the Interpretation, it must be borne in mind that the Court has previously considered the scope of BL158(1), the power of the NPCSC to interpret provisions of the Basic Law and the effect of such interpretations on a number of occasions, among them in the Court's decisions in *Ng Ka Ling & Others v Director of Immigration*,<sup>[16]</sup> *Ng Ka Ling & Others v Director of Immigration (No.2)*,<sup>[17]</sup> *Lau Kong Yung & Others v Director of Immigration*,<sup>[18]</sup> *Director of Immigration v Chong Fung Yuen*<sup>[19]</sup> and, most recently, *Vallejos v Commissioner of Registration*.<sup>[20]</sup>

35. Thus, certain basic propositions are authoritatively established. Under the constitutional framework of the Hong Kong Special Administrative Region, the Basic Law is a national law of the PRC, having been enacted by the National People's Congress pursuant to Article 31 of the [Constitution](#) of the PRC.<sup>[21]</sup> The NPCSC's power to interpret the Basic Law derives from Article 67(4) of the [Constitution](#) of the PRC and is provided for expressly in the Basic Law itself in BL158(1) and is in general and unqualified terms.<sup>[22]</sup> The exercise of interpretation of the Basic Law under PRC law is one conducted under a different system of law to the common law system in force in the Hong Kong Special Administrative Region, and includes legislative interpretation which can clarify or supplement laws.<sup>[23]</sup> An interpretation of the Basic Law issued by the NPCSC is binding on the courts of the Hong Kong Special Administrative Region.<sup>[24]</sup> It declares what the law is and has always been since the coming into effect of the Basic Law on 1 July 1997.<sup>[25]</sup>

36. In these circumstances, unless this Court were to revisit these fundamental propositions of law, it is apparent that many of the questions sought to be raised by Leung and Yau as to the Interpretation have already been authoritatively determined by the Court. In our view, there is no warrant for revisiting those propositions and Leung and Yau's contentions questioning their correctness are not reasonably arguable. In short, we are satisfied that the Interpretation is clear in its scope and effect, that disqualification of Leung and Yau is the automatic consequence of their declining or neglecting to take the Legco oath, and that it is binding on the courts of the Hong Kong Special Administrative Region as regards the true construction of BL104 at the material time when Leung and Yau purported to take their oaths.

37. In any event, in respect of the other questions sought to be raised by Leung and Yau on the Interpretation in relation to the true construction of BL104, in view of the proper construction of section 21 of the Ordinance as held by the courts below (the proposed challenges to which, we have concluded, are not reasonably arguable) and the unchallenged findings of fact of those courts, the outcome of the present case would be the same irrespective of the Interpretation. We do not

consider it to be reasonably arguable that the effect of the Interpretation is to oust the jurisdiction of the courts in respect of the question of whether a member of Legco has validly taken the Legco oath or that it precludes the application of the Ordinance to govern the consequences of declining or neglecting to take a required oath.

[\[16\]](#) (1999) 2 HKCFAR 4.

[\[17\]](#) (1999) 2 HKCFAR 141.

[\[18\]](#) (1999) 2 HKCFAR 300.

[\[19\]](#) [\[2001\] HKCFA 48](#); [\(2001\) 4 HKCFAR 211](#).

[\[20\]](#) (2013) 16 HKCFAR 45.

[\[21\]](#) *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 at p.13A-B.

[\[22\]](#) *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300 at p.323B-C; *Director of Immigration v Chong Fung Yuen* [\[2001\] HKCFA 48](#); [\(2001\) 4 HKCFAR 211](#) at p.222G-H.

[\[23\]](#) *Director of Immigration v Chong Fung Yuen* (*supra*) at pp.222J-223A.

[\[24\]](#) *Ng Ka Ling & Others v Director of Immigration (No.2)* (1999) 2 HKCFAR 141 at p.142D; *Lau Kong Yung & Others v Director of Immigration* (*supra*) at pp.322D-324E (per Li CJ) and 344C-346E (per Sir Anthony Mason NPJ); *Director of Immigration v Chong Fung Yuen* (*supra*) at p.223A-C.

[\[25\]](#) *Lau Kong Yung & Others v Director of Immigration* (*supra*) at pp.326D-E and 346J-347A.

## **EXCERPT 10**

Decision of the NPCSC on Approving the Co-Operation Arrangement Between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-Location Arrangement (adopted at the 31st Session of the Standing Committee of the 12th NPC on 27 December 2017).

*[The ‘co-location arrangement’ for the Guangzhou-Shenzhen-Hong Kong Express Rail Link gives Chinese authorities jurisdiction over part of a train station located in Hong Kong. Although this arrangement mandates the application of PRC laws in Hong Kong, the mechanism for applying PRC laws set forth in BL 18 was not followed. In 2017, the NPCSC issued a decision that purported to ‘approve’ the arrangement.<sup>1</sup> However, this decision was not an interpretation of the Basic Law pursuant to BL 158. Nor did it obviously fit under any of the Basic Law provisions giving the NPCSC power to issue decisions binding upon Hong Kong: although the decision asserted that it was issued pursuant to the PRC Constitution and the Basic Law, it did not pinpoint specific provisions. This decision was subsequently given de facto conclusive weight by the Hong Kong Court of First Instance in Leung Chung Hang, Sixtus v. President of Legislative Council and Secretary for Justice [2018] HKCFI 2657, [53]-[76]. — Cora Chan]*

... To fully unleash the high-speed rail’s advantages of high speed and great efficiency, enable the vast number of passengers to fully enjoy fast and convenient service, and ensure the transport, economic and social benefits and efficiency of the Hong Kong Section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link, it is necessary to implement co-location arrangement at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link in the Hong Kong Special Administrative Region (“West Kowloon Station”) and to establish the Mainland Port Area for the specific purpose of conducting clearance and inspection on high-speed rail passengers and their personal belongings and luggage.

The Session is of the view that the Co-operation Arrangement is consistent with the principle of “one country, two systems” and is consistent with the Constitution and the Basic Law of the Hong Kong Special Administrative Region. Pursuant to the Constitution, the Basic Law of the Hong Kong Special Administrative Region authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy, including implementing a separate immigration controls system etc. The making of an appropriate arrangement through consultation on issues relating to the

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<sup>1</sup> Decision of the NPCSC on Approving the Co-Operation Arrangement Between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-Location Arrangement (adopted at the 31st Session of the Standing Committee of the 12th NPC on 27 December 2017). This decision was given de facto conclusive weight by the Hong Kong Court of First Instance in *Leung Chung Hang, Sixtus v. President of Legislative Council and Secretary for Justice* [2018] HKCFI 2657, [53]-[76].

establishment of a port at the West Kowloon Station and the implementation of co-location arrangement thereat by the Government of the Hong Kong Special Administrative Region with the relevant parties of the Mainland is a clear demonstration of the exercise of a high degree of autonomy by the Hong Kong Special Administrative Region in accordance with law. The establishment of the Mainland Port Area at the West Kowloon Station does not alter the boundary of the administrative division of the Hong Kong Special Administrative Region, does not affect the high degree of autonomy enjoyed by the Hong Kong Special Administrative Region in accordance with law, and does not undermine the rights and freedoms enjoyed by the residents of the Hong Kong Special Administrative Region in accordance with law. Out of the need to implement co-location arrangement at the West Kowloon Station, it is appropriate that the Co-operation Arrangement makes provisions for the delineation of jurisdiction (including jurisdiction of the courts) and the application of laws of the Mainland and the Hong Kong Special Administrative Region and expressly provides for the West Kowloon Station Mainland Port Area to be regarded as being situated in the Mainland. The authorities stationed by the Mainland at the West Kowloon Station Mainland Port Area will perform their duties and functions in accordance with the laws of the Mainland, strictly confined to the Mainland Port Area. This is different from the application of national laws in the entire Hong Kong Special Administrative Region under Article 18 of the Basic Law of the Hong Kong Special Administrative Region. The acquisition of the right to use the areas of the West Kowloon Station Mainland Port Area, the duration and the fees will be provided for in a contract to be entered into by the Government of the Hong Kong Special Administrative Region and the relevant Mainland authorities, and this is consistent with the provisions of Article 7 of the Basic Law of the Hong Kong Special Administrative Region regarding the ownership of the land of the Hong Kong Special Administrative Region and the management of its uses. The implementation of co-location arrangement at the West Kowloon Station is consistent with the requirements of the Basic Law of the Hong Kong Special Administrative Region that the Government of the Hong Kong Special Administrative Region should formulate appropriate policies to promote and co-ordinate the development of various trades and provide an appropriate economic and legal environment for promoting economic developments etc., and is consistent with the fundamental purposes of the “one country, two systems” principle and of the Basic Law of the Hong Kong Special Administrative Region.

Pursuant to the Constitution of the People’s Republic of China and the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, the Standing Committee of the National People’s Congress decides as follows:

1. The Co-operation Arrangement signed by the People’s Government of Guangdong Province and the Government of the Hong Kong Special Administrative Region on 18 November 2017 is hereby approved, and it is also hereby confirmed that the Co-operation Arrangement is consistent with the Constitution and the Basic Law of the Hong Kong Special Administrative Region.



The Hong Kong Special Administrative Region should enact legislation to ensure the implementation of the Co-operation Arrangement.

2. The establishment of the West Kowloon Station Mainland Port Area and its specific area are to be approved by the State Council.

The Mainland will exercise jurisdiction over the West Kowloon Station Mainland Port Area in accordance with the laws of the Mainland and the Co-operation Arrangement with effect from its commissioning date, and will station immigration inspection authority, customs authority, inspection and quarantine authority, integrated port administration authority and railway police authority thereat to perform duties and functions in accordance with law. The above-mentioned authorities and their personnel shall not enforce the law in any area outside the West Kowloon Station Mainland Port Area.

After the commissioning of the West Kowloon Station Port, any amendment to the Co-operation Arrangement shall be approved by the State Council and shall be reported to the Standing Committee of the National People's Congress for record.

## **EXCERPT 11**

*[In 2020, the NPCSC issued a decision extending the term of the sixth LegCo for at least one year, to fill the gap resulting from the CE's decision to postpone elections (in the name of protecting public health amidst a pandemic). Like both the co-location decision [Supplement Excerpt 10] and the enactment of the NSL, this decision purported to be issued pursuant to the PRC Constitution and Basic Law but was not underpinned by any specific provision in the Basic Law. The decision apparently circumvents the Basic Law, which prescribes each term of LegCo to be four years. — Cora Chan]*

The Standing Committee of the Thirteenth National People's Congress deliberated at its Twenty-first Session the motion submitted by the State Council requesting a decision by the Standing Committee of the National People's Congress on the continuing operation of the sixth term Legislative Council of the Hong Kong Special Administrative Region. The motion was moved following the relevant report submitted by the Chief Executive of the Hong Kong Special Administrative Region to the Central People's Government. In response to the severe local situation of the novel coronavirus epidemic, the Chief Executive of the Hong Kong Special Administrative Region in consultation with the Executive Council had decided to postpone the election for the seventh term Legislative Council of the Hong Kong Special Administrative Region for one year. As such, there will be a lacuna in the legislature of the Hong Kong Special Administrative Region. To safeguard the constitutional order and order of the rule of law in the Hong Kong Special Administrative Region and to ensure the normal governmental administration of the Government of the Hong Kong Special Administrative Region and the normal operation of the society, the Standing Committee of the National People's Congress decides, pursuant to the relevant provisions of the Constitution of the People's Republic of China and the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, as follows:

After 30 September 2020, the sixth term Legislative Council of the Hong Kong Special Administrative Region is to continue to discharge duties for not less than one year until the seventh term of office of the Legislative Council of the Hong Kong Special Administrative Region begins. After the seventh term Legislative Council of the Hong Kong Special Administrative Region is formed in accordance with the law, its term of office remains to be four years.

The decision is hereby announced.