The Court of Final Appeal's Ruling in the "Illegal Migrant" Children Case: A Critical Commentary on the Application of Article 158 of the Basic Law

Albert H Y Chen

Faculty of Law
The University of Hong Kong

Law Working Paper Series
Paper No 23
March 1999

About the author

Albert H Y Chen is a graduate of the University of Hong Kong (LL.B. 1980) and Harvard University (LL.M. 1982), and also qualifies as a solicitor in Hong Kong. He began his teaching career at the University of Hong Kong in 1984, and is currently a Professor and the Dean of the Faculty of Law of that University. He has written six books and over seventy articles in English and Chinese on Hong Kong law, Chinese law and legal theory.

The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Cases: A Critical Commentary on the Application of Article 158 of the Basic Law

The landmark decision (*Ng Ka-ling and Others v Director of Immigration* [1999] 1 HKLRD 315) of the Court of Final Appeal (CFA) of the Hong Kong Special Administrative Region (SAR) on 29 January, 1999 has been rightly hailed as a victory for Hong Kong's autonomy, judicial independence, Rule of Law and individuals' rights. The CFA's moral courage is admirable in upholding the cherished values of the Common Law in the domain of constitutional jurisprudence against possible encroachment by legislative and executive actions at both the regional and national level. So far, there has been nothing but praise for the decision from the local legal community.[1] Some non-lawyer critics have questioned the decision in terms of the original intent of the draftsmen of the Basic Law, the social and economic consequences of the decision, or relevant reports of the Preparatory Committee for the SAR. However, on the legal front, it would appear that the decision is unassailable and its legal reasoning impeccable. Simply for the sake of contributing to scholarly and public discussion of the decision and not for the sake of undermining the authority of the CFA, I would like to set out in this essay what I perceive to be a possible legal flaw in the decision.[2] If the argument is this essay is sustainable, then the validity of the court's ruling regarding the 'de-linking' of Hong Kong's 'certificate of entitlement' scheme for mainland migrant children of Hong Kong permanent residents from the mainland's 'one-way exit permit' scheme is highly questionable.

The flaw

The possible flaw in the decision relates to the court's application of abtic 158(3) of the Basic Law, or what is called 'the reference issue' in the judgment see pp. 341-5). The relevant provision in article 158(3) reads:

> However, if the courts of the Region, in adjudicating cases, need to interpret the provisions [called 'the Excluded Provisions' in the judgment and hereinafter] of this Law concerning affairs which are the responsi ility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the

---

1 For the mainland Chinese criticism of the judgment and the extent to which such criticism is justifiable, see my essay *The Court of Final Appeal's Ruling in the "Illegal Migrant" Children Case: Congressional Supremacy and Judicial Review* (Paper No 24, Law Working Paper Series, Faculty of Law, University of Hong Kong, 1999).

2 This flaw has also been identified by Professor Yash Ghai, Sir Y K Pao Professor of Public Law at the University of Hong Kong. See his commentary on the CFA decision in [1999] 1 HKLRD 360 at 363-4.

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 NPC Standing Committee through the CFA of the Region.

It is clear from the judgment that the interpretation of article 22(4) of the Basic Law is an absolutely crucial and decisive step in the reasoning process which led to the court's conclusion (see pp. 345-8) that the linking in Hong Kong's immigration legislation of Hong Kong permanent residents' (PRs) right of entry to the SAR to the possession of the 'one-way exit permit' contravenes the Basic Law and is invalid. In the CFA, and in the two lower courts from which the appeals came, the validity of the immigration control scheme with regard to PRs' children in the mainland turned on the courts' interpretation of article 22(4), namely, whether the approval requirements in the article are applicable to mainlanders who have acquired the status of PRs by virtue of article 24(2)(3) upon the commencement of the Basic Law.

Hence two points are crystal-clear:

(a) The CFA in adjudicating this case 'need to interpret' article 22(4), and the 'interpretation' of article 22(4) 'will affect the judgment' in this case (words in quotation marks are taken directly from article 158).

(b) The CFA accepted provisionally (at p. 343: the actual words used are 'we shall assume') that article 22(4) is an Excluded Provision, and although the acceptance appears to be provisional only at p. 343, there is nothing in the judgment which subsequently withdraws or reverses the provisional acceptance. Thus the CFA must be taken as having accepted that article 22(4) is an Excluded Provision.

If one takes (a) and (b) together, and read again the relevant text of article 158(3) as set out above, having regard to its ordinary, natural and plain meaning, I think it is inconceivable for one not to conclude that the CFA in this case was bound under article 158(3) to refer the interpretation of article 22(4) to the NPC Standing Committee. And yet the CFA did not do so in this case. Why? What went wrong?

The 'undisputable' approach

Before exploring these questions, let me set out what I think is an 'undisputable' approach to the application of article 158(3). First, the court should identify and make a list of what articles in the Basic Law need to be interpreted in this case (and -- what seems to be a separate but overlapping condition -- the interpretation of which 'will affect the judgment' in the case). An alternative description of this first step would be to identify those Basic Law provisions the interpretation of which will form an essential part of the ratio decidendi of the case when it is eventually decided, or on the interpretation of which the outcome of the case is crucially dependent (see the discussion below on how this test is applied by

the English courts in the context of article 177 of the EEC Treaty (now known as the EC Treaty)). After the list has been made, the first stage is completed. Suppose the list now consists of provisions X and Y. Then, in the second stage of the process, the court should determine whether each of the provisions X and Y is an Excluded Provision. If it is, it should be referred to the NPC Standing Committee for interpretation.

The first stage described above is what is in the judgment called 'the necessity condition'. The second stage is what is in the judgment called 'the classification condition'. The use of these two terms is itself unproblematic. (But as will be pointed out below, the problems come with the CFA's understanding of 'the classification condition'.)

It should be note here that the order in which 'the necessity condition' and 'the classification condition' appears in the above discussion is significant. From a logical point of view, the 'necessity condition' must be addressed first, before one turns one's mind to 'the classification condition'. This is because the classification exercise is about (and only about) determining whether a *particular provision* in the Basic Law is an Excluded Provision. However, there is nothing for the court to classify unless and until the court first identifies, by the use of the 'necessity condition', what *particular provisions* are to be considered for the purpose of classification in the case before the court. After determining what provisions the court needs to interpret and the interpretation of which will affect the judgment in the case (the 'need' aspect and the 'affect the judgment' aspect will, in the following discussion, be collectively referred to as the 'necessity condition' or whether it is 'necessary' to interpret the provision concerned, so that when the word 'necessary' is used below, it should be taken to refer to the 'need' aspect and 'affect the judgment' aspect added together), the court should then determine whether any of such provisions falls within the category of Excluded Provisions.

How European Community law is of great assistance in applying the 'undisputable approach'

This section may be considered a long digression, and readers anxious to find out what 'went wrong' in the CFA case may turn immediately to the next section. But I would like to demonstrate in this section that the European Community law on article 177 of the EEC Treaty is in fact of crucial importance for the purpose of understanding the nature and operation of article 158 of the Hong Kong Basic Law. It also shows the central role played by the 'necessity condition' in the reference procedure, and throws light on how the 'necessity condition' should be applied in practice. It will also be seen that the Basic Law's division of the power of interpretation of the Excluded Provisions in the Basic Law between the SAR courts and the NPCSC (as advised by the Basic Law Committee) is largely modelled on the

scheme in article 177 of the EEC Treaty for the division of the power of interpretation of European Community law ('EC law') (consisting of the EEC Treaty and the subsidiary legislation made thereunder in the form of regulations, directives and other legislative acts of Community organs) between the national courts of the member states and the Court of Justice of the European Communities at Luxembourg.

It is public knowledge that article 158 of the Basic Law was inspired by article 177 of the EEC Treaty. The 1988 draft of the Basic Law was published in a bilingual booklet containing also an 'introduction and summary' compiled by the Secretariat of the Consultative Committee for the Basic Law. Paragraph 52 of the 'introduction', commenting on article 169 of the draft Basic Law (which is similar though not identical to the present article 158), reads as follows:

> This provision, which takes account of the current practice in the courts of Britain and the European Community, will help prevent possible conflicts between the interpretations given by the courts of Hong Kong and those given by the NPCSC while not affecting the power of final adjudication of Hong Kong.

More recently, Professor Yash Ghai in his seminal work on *Hong Kong's New Constitutional Order* (Hong Kong University Press, 2nd ed. 1999) also points out that 'the PRC drafters referred to the European system as a precedent for the scheme of the Basic Law' (p. 200).

The basic features of the 'reference procedure' under article 177 of the EEC Treaty may be summarised as follows, with additional details provided where they are particularly relevant to the use of article 158 of the Hong Kong Basic Law. The following discussion is based on textbooks (including *Halsbury's Laws of England*) on European Community law, British constitutional law and legal system, and on English cases involving the use of the reference procedure. (The leading English case in this regard is still *Bulmer Ltd v Bollinger SA* [1974] 1 Ch 401, [1974] 2 All ER 1226, in which Lord Denning MR gave an authoritative set of guidelines on the 'necessity condition' and the exercise of discretion (the latter is relevant only to courts other than courts of final resort). These guidelines have been followed by both English and Scottish courts subsequently (see, e.g., *Customs and Excise Commissioners v ALCS Samex* [1983] 1 All ER 1042, *R v Stock Exchange, ex p Else* [1993] QB 534).

(1) To secure the consistent and uniform application of EC law throughout the member states of the EC (now the European Union), the European Court of Justice is empowered (inter alia) to determine questions of interpretation of EC law in the form of preliminary rulings (in the sense of being preliminary to the final decision in the case by the national court of the member state) given upon references by national courts under article 177.

(2) There are two kinds of references. The first is references at the discretion of national courts other than courts of final resort (article 177 (2)). The second is references that are mandatory on courts of final resort (article 177(3)).

(3) The precondition for both types of references is that in the case concerned, the court considers that a decision on a question of interpretation of EC law (as distinguished from municipal law) is necessary to enable it to give judgment (what I will now call 'the necessity condition' or 'necessity test'). [N.B. Although this is not clear from the language of article 177 itself, it has been established that the 'necessity condition' is applicable to both types of references: see *Bulmer v Bollinger*, op cit; *R v Henn and Darby* [1981] AC 850, [1980] 2 All ER 166.] However, even in the case of mandatory references which the national court of final resort is obliged to make once the precondition of 'necessity' is satisfied, it is for the national court to comply with the obligation voluntarily: the European Court will not take positive action itself to require a reference to be made to it; it has no power to 'call in' in case (see *Halsbury's Laws of England*, 4th ed., vol. 51, p. 281). [N.B. The parallel with article 158 can now be seen. The latter obliges the CFA to refer an Excluded Provision to the NPCSC for interpretation if it is necessary (as defined in the preceding section) to interpret it for the purpose of deciding the present case ('the necessity condition').]

(4) For the 'necessity condition' to be satisfied, it is not necessary for the whole of the case to be affected by the question of interpretation of EC law; it is sufficient that a particular aspect of the case be so affected, e.g. measure of damages, or terms of the court order. (See Smith and Bailey, *The Modern English Legal System* (1984), p 753).

(5) Lord Denning MR in *Bulmer v Bollinger* systematically formulated four guidelines regarding when the 'necessity condition' is to be satisfied. First, the answer to the question of interpretation of EC law must be 'conclusive of the case' (per Lord Denning), or, in the language of Bingham J in *Customs and Excise Commissioners v ApS Samex*, op. cit., 'substantially, if not quite totally, determinative of this litigation' (pp. 1054, 1056). 'The judge must have got to the stage when he says to himself: "This clause of the treaty [including the subordinate legislation made thereunder] is capable of two or more meanings. If it means *this*, I give judgment for the plaintiff. If it means *that*, I give judgment for the defendant.' In short, the point must be such that, whichever way the point is decided, it is conclusive of the case. ... In *Van Duyn v Home Office* ([1974] 3 All ER 178 at 186) Pennycuick VC said: "It would be quite impossible to give judgment without such a decision." ' (per Lord Denning MR, *Bulmer v Bollinger* [1974] 2 All ER 1226 at 1234, emphasis in original; see also *Case C 169/91, Stoke-on-Trent City Council v B*

& Q plc [1993] AC 900. It may be noted that the *Van Duyn* case provides a good example of how the questions to be referred to the European Court are to be formulated.)

(6) The second guideline concerns previous rulings by the European Court. 'In some cases, however, it may be found that the same point --- or substantially the same point --- has already been decided by the European Court in a previous case. In that event it is not necessary for the English court to decide it. It can follow the previous decision without troubling the European Court.'

(7) The third guideline (which is of critical importance if it had been brought to the CFA's attention in the case under discussion) concerns the doctrine (originally French) of 'acte clair' (if the relevant provision is 'acte clair', i.e. 'the correct application of Community law is so obvious as to leave no scope for any reasonable doubt' [Edward and Lane, *European Community Law* (2nd ed. 1995, p. 42; see also *Halsbury*, op. cit., p. 282, where the author explains why the concept of 'acte clair' must be applied with caution], then it is not necessary to interpret it, and the court should simply apply it in accordance with its unambiguous meaning): 'the English court may consider the point is reasonably clear and free from doubt. In that event there is no need to *interpret* the treaty but only to *apply* it, and that is the task of the English court' (emphasis supplied). On the other hand, if an 'arguable question of interpretation' in respect of Community law has been raised, then the 'acte clair' concept will not be applicable (see *Van Duyn*, op cit, at p 186). There is also ample authority in the case law of France, Germany and the European Court itself in support of this 'acte clair' doctrine. (The distinction between 'interpretation' and 'application' was mentioned earlier by Lord Denning in the same judgment: 'It is important to distinguish between the tasks of interpreting the treaty --- to see what it means --- and the task of *applying* it --- to apply its provisions to the case in hand. Let me put on one side the task of *applying* the treaty. On this matter in our courts the English judges have the final word. They are the only judges who are empowered to decide the case itself. ... Before the English judges can apply the treaty, they have to see what it means and what is its effect. In the task of *intepreting* the treaty, the English judges are no longer the final authority. ... The supreme tribunal for *interpreting* the treaty is the European Court of Justice at Luxembourg.' (emphasis in original) (See also *Henn and Darby v DPP* [1981] AC 850, [1980] 2 All ER 166, where Lord Diplock noted the different approaches to statutory interpretation adopted by the English courts and the European Court, and the fact that the texts of Community law are in six languages, all versions being equally authentic. Hence English judges should not be 'too ready to hold that because the meaning of the English text ...

seems plain to them no question of interpretation can be involved'; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, [1982] 2 All ER 402, in which the House of Lords considered it mandatory on it to refer a question of interpretation to the European Court even though the House did not have 'any serious doubt what answer would be given to that question by the European Court', because it could not be said that the answer was 'too obvious and inevitable to be capable of giving rise to what could properly be regarded as "a question" within the meaning of article 177' (p. 415); this case also provides a good example of a judgment of the European Court followed by the House of Lords' decision applying the judgment; *CILFIT v Ministry of Health* [1982] ECR 3415 (European Court); *Customs and Excise Commissioners v ApS Samex*, op. cit., where the matter was not regarded as so free from doubt as to render it 'acte clair' (p. 1055), because although it seemed unlikely that the defendant's argument would succeed, the argument was not hopeless and was of potential importance (p. 1056); *R v International Stock Exchange of the UK and the Republic of Ireland, ex p Else* [1993] 1 All ER 420; [1993] QB 534. In the last case, the Court of Appeal set aside the Divisional Court's order for a reference to the European Court on the ground that there was no reasonable doubt as to the correct application of Community law in this case, which could be determined 'with complete confidence'.)

(8) The fourth guideline is that 'As a rule you cannot tell whether it is necessary to decide a point until all the facts are ascertained. So in general it is best to decide the facts first.'

(9) There exist rules of court prescribing the procedure for making references to the European Court (e.g. RSC, Ord 114, rules 1-6).

(10) When making its ruling upon the reference, the European Court will confine its attention to the question of interpretation raised by the reference of the relevant provision in EC law, and will avoid any interpretation of municipal law. Nor will it rule directly on the compatibility of EC law with specific provisions of municipal law.

(11) After deciding the relevant question of interpretation that is the subject of the reference (which ruling is binding on the national courts), the European Court will remit the matter back to the national court. The European Court may, in the judgment making the ruling, limit its retrospective effect (Edward and Lane, op. cit., p. 42).

(12) It is for the national court to apply the European Court's ruling on the question of interpretation to the case and to resolve the dispute between the parties.

There are at least three points emerging from the English jurisprudence on

article 177 of the EEC Treaty that are of particular relevance to the discussion in this essay and to the analysis below.

(a) *The centrality of the 'necessity' test.* The jurisprudence demonstrates the central role played by the 'necessity' test in the operation of the system of references to the European Court. Courts of final resort are *obliged to* refer a question of interpretation of Community law to the European Court *if* the 'necessity' test is satisfied, and lower courts *may* make such a reference *only if* the 'necessity' test is satisfied. A great deal of jurisprudence has been developed in English case law regarding the application of the 'necessity' test. In comparison, the 'classification' exercise (to determine whether the question to be decided concerns a point of Community law or a point of domestic law) is relatively easy. It is just a matter of locating the crucial words that it is necessary to interpret. If the words are found in the text of the EEC Treaty or the regulations and directives made thereunder, then the question is one of Community law; otherwise it is a question of domestic law.

(b) *The flexibility of the 'necessity' test.* The English and European jurisprudence demonstrates the flexibility of the 'necessity' test as a threshold for determining whether a reference should be made. The 'necessity' test is only satisfied where a determination of the interpretation of the relevant provision would be 'conclusive' for the purpose of deciding the case or 'substantially determinative' of its outcome. Hence provisions the interpretation of which are merely marginally relevant will not be the subject of references. The national court can judge for itself whether the degree of relevance is such as to meet the threshold requirement of the 'necessity' test.

(c) *The concept of 'acte clair' and the distinction between 'interpretation' and 'application'.* The English and European jurisprudence demonstrates the importance of the conceptual distinction between 'interpretation' and 'application' in the operation of the reference system. There is no need to 'interpret' a provision where its meaning is clear, unambiguous and free from doubt ('acte clair'). Such a provision need only be 'applied' by the national court. A reference to the European Court should only be made if a real question of 'interpretation' arises, i.e. the point is arguable.

The application of the 'undisputable approach' to the case

Let us now try to apply the 'undisputable approach' set out above to this case. The CFA's judgment dealt with three cases in a consolidated manner. Let us confine ourselves to the cases of *Ng Ka-ling v The Director of Immigration* and *Tsui Kuen-nang v The Director of Immigration*, where, unlike the situation in *The Director of Immigration v Cheung Lai-wah*, it was undisputed that the appellants came within the definition of Hong Kong permanent residents in article 24 of the

Basic Law, no question of illegitimacy or the parents' status at the time of birth of the childern being arguable. The only question was whether their right of abode and entry as HKPRs may be lawfully restricted with reference to the 'one way permit' / 'certificate of entitlement' scheme.

The mechanics of applying the 'undisputable approach' to the cases are simple. At the first stage ('the necessity condition'), one finds out that it is necessary to interpret article 22 for the purpose of deciding the cases. As pointed out above and as recognised by the two courts below, the validity of the whole immigration control scheme for PRs rested on a particular interpretation of article 22(4) (that is to say, it is applicable even to PRs if they are originally residing in mainland). To borrow Lord Denning's language (*Bulmer v Bollinger* [1974] 2 All ER 1226 at 1234):

> This provision of the Basic Law is capable of two or more meanings. If it means *this* (the words 'people from other parts of China' do not cover mainland residents who have acquired the status of HKPRs by virtue of article 24 of the Basic Law on the commencement of the Basic Law), we shall declare the immigration unconstitutional insofar as it requires such HKPRs to possess the One Way Exit Permit in addition to the Certificate of Entitlement before they may enter the SAR. If it means *that*, which is what the Court of First Instance and the Court of Appeal of the High Court interpreted it to mean (the words quoted above do cover the PRs mentioned above), we shall consider upholding the immigration legislation as the courts below did (and only consider striking it down on the points of 'illegitimacy' and 'the parents' status at the date of birth of their children').

And insofar as the decision in the case goes beyond the 'retroactivity' issue (issue (3) on p. 336 of the judgment) and extends to the non-retroactive aspect of the validity and operation of the immigration legislation (issue (2) of the judgment), the question of the interpretation of article 22(4) will be 'conclusive' or 'substantially determinative' of the outcome of the case. It will satisfy the 'necessity' test however rigorously the test is formulated, taking into account the English and European jurisprudence on article 177 of the EEC Treaty. [N.B. Although this point is not directly relevant here, I would like to point out that article 22(4) is not only 'arguably relevant' (a term used in the judgment, see pp. 343-5 of the judgment) to the decision in this case, but it is 'demonstrably' relevant, 'fundamentally' relevant, 'crucially' relevant, 'decisively' relevant, or 'absolutely' relevant, as is demonstrated by the judgments of the courts below and the reasoning process in this case (as set out on pp. 345-8). Incidentally, it may also be pointed out that surely what is at stake is whether the interpretation of article 22(4) is highly relevant *to the decision in this case*, rather than whether it is relevant *to the interpretation of article 24*, which seems to be the emphasis in the judgment.]

Having satisfied ourselves that it is necessary to interpret article 22(4) for the

purpose of deciding the case, we may also consider whether it is necessary to interpret article 24 as well. As we are confining our attention here to the cases of Ng Ka-ling and Tsui Kuen-nang and have separated the 'illegitimate children' point and 'parents' status at children's date of birth' point (on the one hand) from the point concerning the 'One Way Permit/Certificate of Entitlement' scheme (on the other hand), the interpretation of article 24(2)(3) of the Basic Law (which is indeed ambiguous as far as the former set of points is concerned) is not relevant to our case. Is it necessary to 'interpret' (as distinguished from 'apply', bearing in mind the relevant jurisprudence on article 177 of the EEC Treaty) any provision in article 24? I would suggest that the answer is probably 'no'. As far as the cases of Ng Ka-ling and Tsui Kuen-nang are concerned, there is nothing arguable in article 24 to be 'interpreted'. As far as they are concerned, article 24 is, in Lord Denning's words (in *Bulmer v Bollinger*, op. cit., p. 1235), 'reasonably clear and free from doubt'. The concept of 'acte clair' applies.

What is reasonably clear and free from doubt is that article 24 (particularly article 24(3), which can also be read together with article 31) confers on Ng Ka-ling and Tsui Kuen-nang the right of abode in Hong Kong, and this right entails the right to enter the SAR. There is nothing ambiguous in the wording of article 24(3). The ambiguity lies in the wording of article 22(4). If the latter does cover mainland residents who have acquired the status of HKPRs on 1 July 1997 by virtue of article 24, then the question arises as regards whether, and, if so, how their right to enter Hong Kong has been qualified. So it is necessary to interpret article 22(4), to determine what the words 'people from other parts of China' mean.

The conclusion at the end of the first stage of the exercise is thus as follows. It is definitely necessary to interpret article 22(4). As for article 24, it is doubtful whether it is necessary to interpret it at all. If the court considers the meaning of its words clear enough, it only needs to 'apply' it, but its *application* may have to be *subject to* article 22(4) if article 22(4) is *interpreted* to cover some of the HKPRs under article 24.

We can now move to the second stage of the exercise. At this stage, the question for determination is how each of articles 22(4) and 24 (assuming that it is also necessary to interpret article 24, although doubts have been expressed about this above) should be classified ('the classification condition'). Should article 22(4) be classified as an Excluded Provision? Yes. Should article 24 be classified as an Excluded Provision? No.

Having reached this point, that should be the end of the matter. The CFA is now constitutionally obliged (and it is a mandatory requirement under the Basic Law) to refer the question of the interpretation of article 22(4) to the NPC Standing Committee.

The CFA's line of reasoning

Now let us return to the question of what went wrong in the CFA's reasoning process, and where and how it was led astray. At the beginning (p. 342), the court correctly set out the two tests -- the 'classification condition' and the 'necessity condition', although one may take issue with the order in which the two tests appear (the first test refers to 'the provisions of the Basic Law in question', but how on earth can one know what are the provisions in question without turning to the 'necessity condition', i.e. inquiring into what are the provisions the interpretation of which is necessary for and will affect the judgment in the case).

Then the court pointed out that 'If the classification [condition] is not satisfied, that would be an end of the matter.' (p. 342) It is not necessary to go on to the 'necessity condition', 'since the *provision in question* would not be an excluded provision' (p. 342, emphasis supplied) This is, I think, where the problem begins. What is a 'provision in question'? These words are absent from article 158(3). How does one know what is a 'provision in question' that needs to be classified (as an Excluded Provision or otherwise) unless one applies the 'necessity condition' first, that is to say, one considers what are the provisions that need to be interpreted for the purpose of deciding the case and that will affect the judgment (in the wording of article 158(3) itself)? So at this point one begins to see how the court is -- unjustifiably -- developing the 'classification condition' exercise into an inquiry which, as I will submit below, is totally outside the scope of inquiry authorised by article 158(3), and introducing a test which, as I will submit below, is extraneous and irrelevant to the true tests embodied in article 158(3) as set out in the 'stage one' and 'stage two' exercises in the 'undisputable approach' described above.

Let us go a few pages further before returning to p. 342. One will find after reading these pages that the court never reached the stage of the 'necessity condition'. So what happened was that the court decided in this case that the 'classification condition' was not satisfied, and so, as it seems to have foretold the matter at the beginning (p. 342), 'If the classification [condition] is not satisfied, that would be an end of the matter.' (p. 342)

What exactly did the court mean by the 'classification condition'? The 'classification condition' was first defined on p. 342, but if one reads on and examines how the court applied the 'classification condition', one would discover that the 'classification condition' exercise actually performed by the court went far beyond the 'classification condition' defined on p. 342. Let me elaborate on what I mean.

The point of departure now is p. 343, where the court said that 'Although Mr Ma SC relies on both the excluded categories, for present purposes, we shall assume that Article 22(4) is an excluded provision on the sole basis that it concerns the relationship between the Central Authorities and the Region.' This is fine. If article

22(4) is classified (if only provisionally) as an Excluded Provision, then the next step mandated by article 158(3) is plainly that the court should go on to the 'necessity condition', and determine whether it is necessary to interpret article 22(4) for the purpose of deciding the case and whether the interpretation of article 22(4) will affect the judgment. As discussed above, *if the court now steps into the domain of the 'necessity condition' and asks this question*, the answer will be a resounding 'yes'.

Unfortunately, the next paragraph in the judgment reads:

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

With great respect, this is the point at which the court began to go astray, and to inadvertently slip its mind into unwarranted domains. If we go back to the definition of the 'classification condition' on p. 342, the definition shows that the only 'classification' question is to determine whether a particular provision is an Excluded Provision (i.e. a provision concerning affairs which are the responsibility of the CPG, or concerning the relationship between the Central Authorities and the Region). Where then is the room for any 'test' which the court said it 'should apply in considering whether the classification condition is satisfied'?

It appears later that the test (which the court adopted from Mr Denis Chang SC's submission) is this (pp. 344-5): 'As a matter of substance' (which I take to refer to the nature and subject-matter of the case)(p. 344), what is the 'predominant provision which we are interpreting' in this case (p. 345), or to put it slightly differently, 'what predominantly is the provision that has to be interpreted in the adjudication of the case' (p. 344)? It was held that if the predominant provision is not an Excluded Provision, then, even if an Excluded Provision is 'arguably relevant' to the construction of the non-excluded provision [N.B. the court did not address the question of what would be the case if an Excluded Provision is fundamentally and crucially relevant to the final decision in the case, which I think is the case for article 22(4) -- assuming for the moment that the court is correct in introducing the 'predominant provision' test], there is no need to refer the Excluded Provision to the NPC Standing Committee for interpretation.

The court held that this is the case for article 22(4) as an excluded provision and regarded this as the end of the 'classification condition'. So it decided that it was not necessary to refer article 22(4) to the Standing Committee for interpretation. *The court never went into the 'necessity condition' and applied it to article 22(4) for the purpose of determining whether it is necessary to interpret it for the purpose of deciding the case.*

It must be pointed out, with great respect, that the court's reasoning is confused at this point of the judgment. If article 24 is considered under the classification condition because it 'has to be interpreted in the adjudication of the case' (p. 344), how do we know that it 'has to be' interpreted? We can only know this

by applying the 'necessity test' -- by inquiring whether it is necessary to interpret it for the purpose of deciding the case and whether its interpretation will affect the judgment. But there is no indication in the judgment that the court had applied the 'necessity test' to either article 24 or 22(4).

So to summarise, a close reading of the judgment demonstrates that the court had erected in mid-air a structure of inquiry or a test regarding the distinction between predominant provisions to be interpreted in the case and provisions that are arguably relevant to the interpretation of the predominant provisions (it is strange that the reference is not to 'arguably relevant to the decision in the case'), and a principle that if the predominant provision is a non-Excluded Provision, then there is no need to refer any non-predominant Excluded Provision for the NPC Standing Committee's interpretation. This structure of inquiry is not grounded in anything in article 158(3) itself. And using this structure to exclude from the NPC Standing Committee the opportunity to interpret Excluded Provisions even if they are necessary for and affect the judgment of the case (including article 22(4) in the present case the interpretation of which is crucially and fundamentally relevant to the decision in the case) is contrary to the plain wording of the article, its intention and purpose (see also the section below on the 'purposive approach'). To operate within this structure of inquiry would be to go outside the scope of power and fail to observe the duty provided for the CFA in article 158(3) and to take into account irrelevant or extraneous standards. The 'classification condition' has been expanded to include this illegitimate structure, whereas the 'necessity condition' has almost collapsed into the 'classification condition' and been rendered nugatory. Hence, the CFA has most probably acted ultra vires article 158(3) of the Basic Law.

The critique above of the CFA's application of article 158 mainly rests on logical and methodological considerations. Lest the reader still has doubt at this point, I would like to develop my argument further along the following lines:

(1) The error is in the nature of a 'jurisdictional error' and not a wrong decision on the merits.

(2) The 'predominant provision to be *interpreted*' in this case is not article 24.

(3) The 'inversion' of the 'necessity condition' and the 'classification condition' (i.e. putting the latter first, unlike the methodology in the 'undisputable approach' presented above of putting the 'necessity condition' first) in the court's thinking process paved the way for the deviation or error.

(4) The deviation can be understood as a 'conversion' of a test based on 'what provision is it necessary to interpret in this case' (the true test) into a test based on 'what is the predominant provision being applied in this case', or a substitution of the latter test (a wrong and irrelevant test) for the former test, and the two tests are inconsistent in nature.

(5) The 'conversion' cannot be justified by the use of the 'purposive approach' to

statutory interpretation.

Jurisdictional error

In administrative law, the doctrine of 'jurisdictional error' exists even though its validity and usefulness have been questioned and the scope for its application is being narrowed. However, the concept of 'jurisdictional error' is useful for the purpose of the present discussion. From the point of view of a superior court exercising the power of judicial review of the decisions of inferior courts or tribunals that are challenged as 'ultra vires', there is a distinction between a mistake made in the course of deciding on the merits of the case and a mistake that takes the inferior court or tribunal outside its jurisdiction. The former type of mistake should be rectified by way of the appellate process, whereas the latter type of mistake can be dealt with by way of judicial review.

In the present case, the argument is that the CFA has applied the *wrong test* (the 'predominant provision' test) to decide whether it should refer the interpretation of article 22(4) (which it conceded to be an Excluded Provision) to the NPCSC, and has failed to apply the *true test* (the 'necessity' test, a test laid down in clear and unambiguous language in article 158, and on which a wealth of English, Scottish and European jurisprudence exists in the context of the application of article 177 of the EEC Treaty which the draftsmen of the Basic Law publicly acknowledged to be the inspiration for article 158). On this basis, the CFA went ahead to interpret article 22(4) itself instead of referring it to the NPCSC. It has wrongly determined a 'preliminary' question the answer to which its power to interpret article 22 depends on. It has 'wandered outside its designated territory by misconstruing the statute which gives it power to act' (Smith and Bailey, op. cit., p. 744). Hence a jurisdictional error has been committed. On the other hand, if the CFA had applied the right test and come to a conclusion which we or members of the NPCSC disagree with, it would not have been a jurisdictional error. The CFA's application of article 158 would not then be 'demonstrably wrong', and different lawyers may reasonably hold different views regarding whether the decision is right or wrong. The difference between the 'right test' and the 'wrong test' mentioned here will be elaborated below.

Predominant provision

The test used by the court in deciding whether to refer article 22(4) to the NPCSC was 'what, as a matter of substance, was the predominant provision to be interpreted in this case'. It held that the predominant provision was article 24 and not article 22, because article 24 '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.' (p. 345)

However, the court has only demonstrated that article 24 is the predominant provision *from the point of view of* the 'substance' or subject matter of the case. It has not considered whether, nor has it demonstrated that, article 24 is the predominant provision *from the point of view of* the 'interpretation' issues at stake in the case, and this latter point of view is apparently the central concern of article 158 (and, indeed, also article 177 of the EEC Treaty on which article 158 was modelled). (Article 158(3) reads: 'if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning ...')

If the court had looked at the matter from the point of view of the interpretation issues at stake, it would see that the crucial words to be interpreted in this case are contained in article 22(4) of the Basic Law. Indeed, as pointed out above and in the light of highly relevant and enlightening English case law, it is doubtful whether article 24 is a 'provision to be interpreted' (the court's own words) in this case, not to say the 'predominant provision to be interpreted', because if the meaning of its words is 'reasonably clear and free from doubt', the court needs only to 'apply' it (subject to article 22(4) if this provision is interpreted to cover mainland residents who have acquired the status of HKPRs on 1 July 1997) and does not need to 'interpret' it. Therefore, it may well be the case that article 24 is 'the predominant provision to the *applied* in this case', but it is highly questionable whether it is 'the predominant provision to be *interpreted* in this case'.

The analysis can be pushed one stage further. The existing language of article 24 is clear as far as the appellants' right of abode is concerned (in *Ng Ka-ling* and *Tsui Kuen-nang*). But article 24 may be subject to other provisions of the Basic Law. Article 22 is possibly such a provision which limits the right of abode and entry conferred by article 24. If article 22(4) (the meaning of which is ambiguous) is interpreted to cover the PRs concerned, then it may have the effect of qualifying the right conferred by article 24. If it is interpreted otherwise, then the right has not been qualified. Hence the *first* interpretation question that has to be settled concerns article 22(4). *After* article 22(4) has been interpreted and its ambiguity resolved (say, upon a reference to the NPCSC), the *next* question that arises is how (if necessary) the court should reconcile article 22(4) and article 24. At this point, and only at this point, a *second* question of interpretation arises, and this concerns *the extent to which the right conferred by article 24 has been limited by article 22(4)*, and the extent to which the immigration legislation is inconsistent with the Basic Law. *Here the Hong Kong court will have an active and crucial role to play.* A similar situation entails in the European system. As pointed out above, the Euorpean Court will only pronouce on the interpretation of textual provisions of Community law (equivalent from a comparative-structural perspective to the Excluded Provisions in the Basic Law), but will not deal directly with questions of the compatibility of national law (equivalent to the non-Excluded Provisions, or

primarily domestic-related provisions, in the Basic Law plus other Hong Kong laws) with Community law. It is up to the national court to address the consequence of the European Court's interpretation, when issued, on the interpretation, validity and application of the domestic law.

The 'inversion' effect

As discussed above, it is important to 'get the order right' in applying the 'necessity condition' and 'classification condition'. Logically speaking, there exists nothing to be classified (i.e. to determine whether it is a provision concerning the central government's powers or the central-SAR relationship, in which case it is an Excluded Provision) unless and until we first determine what are the provisions which it is necessary to interpret (and to classify before such interpretation is made) in this case. This is the 'necessity' test, and, as pointed out above, an abundance of authorities exist to guide the court in applying it, and there is also room for flexibility in setting the 'threshold standard' in this test. After it is determined that, say, provisions X and Y of the Basic Law (a 'provision' for this purpose need not be a whole article, it may be only a paragraph, sentence or phrase in an article) satisfy the rigorous requirements of the 'necessity' test, the next task is to determine (classify) whether any of the provisions is an Excluded Provision.

If two stages in the examination of the 'necessity' and 'classification' conditions had not been inverted in the present case, the error demonstrated above would not probably have occurred. The whole problem arose from the loose use *at the 'classification condition' stage* of vague words such as 'the provisions of the Basic Law *in question*' (p. 342), 'the provision that *has to be interpreted* in the adjudication of the case' (p. 344), or 'the predominant provision *which we are interpreting*' in this case (p. 345) (emphasis supplied). These words presumably refer to provisions which it is necessary to interpret (or 'need' to be interpreted). Hence, as mentioned above, 'the "necessity condition" has almost collapsed into the "classification condition" and been rendered nugatory.' Whereas the 'necessity condition' provides a precise and objective test for determining what are 'the provisions of the Basic Law in question' (p. 342), the use of loose language as mentioned above paved the way for a mental slip whereby article 24 was subjectively and intuitively identified as the 'predominant provision *which we are interpreting*' in this case. In fact, as demonstrated above, article 24 may well be the 'predominant provision which the court is *applying* in this case', but it is highly questionable whether a question of *interpretation* has been raised in relation to article 24 (at least as far as the *Ng Ka-ling* and *Tsui Kuen-nang* cases are concerned). The English and European jurisprudence mentioned above shows that interpretation is ultimately interpretation of *words* that can bear more than one meaning, and here in this case, such words are located in article 22(4).

So what happened at the end of the day was that, as a result of the 'inversion', what the court 'classified' or determined was

> whether the 'predominant provision to be interpreted in this case' (which, as suggested above, probably means 'predominant provision being applied in this case') was an Excluded Provision,

whereas what it should have done is to classify or determine

> whether 'any provision that needs to be interpreted in this case' (and the interpretation of which would affect the judgment) was an Excluded Provision.

Thus the 'classification exercise' has miscarried.

The 'conversion' effect

The 'conversion' or 'substitution' of tests may be explained as follows.

(1) *According to article 158*, the CFA is obliged to refer an Excluded Provision to the NPCSC for interpretation *if* it is necessary to interpret it for the purpose of deciding the case (or, more precisely, the court 'needs to interpret' it and 'its interpretation will affect the judgment in the case'). In other words, the CFA should refer the Excluded Provision to the NPCSC if the 'necessity condition' is satisfied.

(2) *According to the CFA ruling*, the CFA is obliged to refer an Excluded Provision to the NPCSC for interpretation *only if* it is 'as a matter of substance the predominant provision to be interpreted in this case'. In other words, the CFA only need to refer the Excluded Provision to the NPCSC if the 'predominant provision' test is satisfied.

Three problems emerge from a comparison of the two diverging approaches.

(a) If, as is argued above, the 'predominant provision' actually means 'the predominant provision to be applied in the case' rather than the 'predominant provision to be interpreted in the case', then the tests in (1) and (2) are of totally different nature. (1) focuses on what provision it is necessary to *interpret* for the purpose of reaching a decision, whereas (2) focuses on what provision is predominantly *applicable* to the substance or subject-matter of the case.

(b) Even if the soundness of the concept of 'the predominant provision to be interpreted in this case' (test (2)) can be established, this test is still materially different from the test of what is 'a provision which it is necessary to interpret for the purpose of deciding the case' (test (1)). Test (2) looks to the substance or subject-matter of the case, and considers whether it concerns the central-SAR relationship or the rights of HKPRs (a domestic issue for Hong Kong). Test (2) may be considered a test concerning the *subject-matter* of the case. Test (1) looks at the *words* in the Basic Law, particularly those words

that are ambiguous, and asks whether the resolution of such ambiguity is essential in the reasoning process leading to the decision in the case. Test (1) is therefore a test concerning legal *text*, its role in the decision-making process, and its authoritative interpretation (and an interpretation is most authoritative if it forms a crucial part of the ratio decidendi of a case decided by a court of final appeal).

(c) Hence tests (1) and (2) are of different nature, so that test (2) cannot be legitimately regarded as part of test (1) or an extension thereof (nor did the CFA itself so regard it, for the court used it at the 'classification' stage). As discussed above, test (2) cannot be regarded as a legitimate part of the 'classification condition'. Nevertheless, can it be fairly argued that on the basis of a 'purposive approach' to the interpretation of the Basic Law, test (2) (as a test independent of and separate from both the 'necessity test' and the 'classification exercise') should be *implied into* article 158(3) so that the latter is in effect expanded (or added to) as follows:

'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, *then, provided that such provisions are, as a matter of substance, the predominant provisions being interpreted or applied in the case*, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the NPCSC through the CFA of the Region.' (the highlighted words are words added to the existing version)

The addition of the above words would substantially curtail the scope of issues of interpretation which the CFA is obliged to refer to the NPCSC for interpretation. It would also be a substantial departure from the plain, ordinary and natural meaning of article 158(3). As article 158(3) concerns the division of power between the SAR courts and the NPCSC regarding the interpretation of the Basic Law, it itself is an Excluded Provision. If the CFA believed that article 158(3) may be interpreted in the above manner (with the words added as shown), then, given that it is by no means 'reasonably clear and free from doubt' that it may be so interpreted (i.e. it is not 'acte clair'), and given that the determination of the 'reference issue' would crucially affect the outcome of the case, it should have referred this question of interpretation to the NPCSC in the present case. For otherwise it would be in breach of the obligation provided for in article 158(3).

The 'purposive approach'

Putting aside the issue of reference to the NPCSC under article 158 a

question of interpretation of article 158 itself, it remains for me to consider whether implying the 'predominant provision' test into article 158(3) (as illustrated at the end of the preceding section) would be justified by the use of the purposive approach to statutory construction. In this regard, the following passage in the judgment should first be noted:

> In deciding what test is to be applied in considering whether the classification condition is satisfied [my comment: as pointed out above, any 'test' that is applied here does not really belong to the 'classification condition', but we shall accept for the moment that the court may imply a test in addition to the 'classification condition' and 'necessity condition'], 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. (p. 344) ... 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.* (p. 344) (emphasis supplied)

With respect, the highlighted sentences are highly questionable. If article 22(4) is to be referred to the NPCSC in this case (and English cases regarding references under article 177 of the EEC Treaty provide ample guidance on how questions for interpretation may be formulated), the NPCSC need only be asked to rule on whether the words 'people from other parts of China' in article 22(4) of the Basic Law should be taken to include 'mainland residents who have acquired the status of HKPRs by virtue of article 24 upon the commencement of the Basic Law who would like to come to Hong Kong to take up their right of abode'. After the NPCSC has ruled on this question of interpretation, then, as in the case of the European system, the matter will be remitted back to the CFA, which can then interpret or apply article 24 in the light of article 22 as interpreted by the NPCSC, and then give judgment in this case. As the court itself recognised in the judgment (p. 345):

> ... 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.

Indeed, the scheme's design (and the European system based on article 177 of the EEC Treaty is similarly designed) is such that the NPCSC just issues an interpretation of the Excluded Provision which needs to be interpreted in the case (i.e. which satisfies the 'necessity test'), and then it is up to the Hong Kong court to decide the case on the basis of the Excluded Provision as interpreted by the NPCSC, taken together with other provisions in the Basic Law and in other sources of Hong Kong law as interpreted and applied by the Hong Kong court. The Hong Kong court retains full power to adjudicate on the impact of the Excluded Provision (as interpreted by the NPCSC) on these other provisions, which the court retains full authority to interpret and apply. Therefore, the claims that 'a reference would withdraw from the jurisdiction of the Court the interpretation of a provision of the Basic Law which is within the limits of the autonomy of the Region' and that 'this would be a substantial derogation from the Region's autonomy' cannot be sustained. On the contrary, the CFA's approach to the application of article 158 might result in a 'substantial derogation' from the legitimate power of final interpretation of Excluded Provisions in the Basic Law reserved by the NPCSC under article 158.

Apart from this questionable argument about 'withdrawal of jurisdiction from the Hong Kong court', can the purposive approach still be used to justify the CFA's approach to article 158 on the basis that it advances the SAR's autonomy, which is the purpose of the 'one country, two systems' model established by the Basic Law? Here it should be pointed out that the SAR's autonomy is not the sole objective underlying the Basic Law. Another fundamental objective is to delineate the scope and limit of such autonomy and to enable the Central Government to exercise supervisory powers to ensure that the limits of autonomy are not exceeded. This question of the limits of autonomy lies at the core of the Central-SAR relationship.

As Professor Yash Ghai points out in his treatise on the Basic Law (*Hong Kong's New Constitutional Order*, op. cit., pp. 195, 206-207),

> Article 158 divides the responsibility for interpretation between the NPCSC and the HKSAR. ... there is ... a clear division of responsibilities between the NPCSC and the HKSAR courts. The primary responsibility of the NPCSC is to maintain the boundaries between the HKSAR and the Central Authorities, in this way both protecting the autonomy of the HKSAR and preventing its own invasion of the powers of the Central Authorities. The Basic Law does so by assigning to the NPCSC the task of determining questions which relate to affairs which are the responsibility (or in other words, the powers) of the Central Authorities or the relationship between them and the region. ... The

> function of the HKSAR courts, on the other hand, is to ensure that the HKSAR institutions respect the limits on their competencies within areas of their autonomy and that they observe the Basic Law. The CFA will be able to play a full role in this function ...

The purpose of article 158, then, is to achieve an appropriate balance between the respective powers of interpretation of the Basic Law of the Hong Kong courts on the one hand and the NPCSC on the other hand. It is therefore the duty of the Hong Kong courts, flowing from their duty of fidelity to the Basic Law, both to exercise actively their judicial autonomy on the one hand, and to observe voluntarily the limits of such autonomy and to respect the prerogatives of the Central Authorities on the other hand. In construing Basic Law provisions that determine where the limits lie, any purposive approach used must be wide enough to embrace both the vision of autonomy and the safeguarding of the legitimate interests and powers of the Central Government.

The political and legal background to the reference system established by article 158 of the Basic Law is of course very different from that to the system under article 177 of the EEC Treaty, but the structural designs of both systems embody a similar kind of 'control mechanism' or 'supervisory control mechanism'. The control is exercised by the NPCSC (advised by the Basic Law Committee, a quasi-constitutional court) in one case, and by the European Court in the other case. The control is exercised, not by deciding the actual outcomes of litigation, but by having a *final* say over how certain words contained in certain legal provisions are to be interpreted. On the other hand, the Hong Kong courts (under the Basic Law) or the national courts (in the European system) apply such interpretations, together with other legal norms which are not subject to the 'reference' system, in coming to the final decisions in cases.

The nature of this kind of 'control system' is such that its operation is more aptly governed by the kind of test which the 'necessity test' is, than by the kind of test which the 'predominant provision' test is. As mentioned above, the 'necessity test' focuses on legal texts, their determinative effect in judicial decision-making and hence their authoritative interpretation, whereas the 'predominant provision' test is more concerned with the actual substance, subject-matter and hence the outcome of the case. The 'control systems' that article 158 of the Basic Law and article 177 of the EEC Treaty institutionalise are directed at legal texts, claiming the right of the *final* authoritative interpretation of such texts. This is why they operate on the basis of the 'necessity test', and this also explains why, after decades of use in all the member states of the European Communities, no doctrine of 'predominant provision as a matter of substance' has evolved in the European system.

The 'control mechanism' as exemplified by the European system is a perfectly acceptable model for the operation of article 158 of the Basic Law, particularly from

the point of view of the Hong Kong judiciary. A ready-made set of jurisprudence is available, and the system allows a plentiful scope of judicial autonomy for the Hong Kong courts. No reference of an Excluded Provision for interpretation need to be made until and unless the issue reaches the CFA, and then only if the rigorous 'necessity test' is satisfied. Furthermore, it is up to the CFA to formulate the question of interpretation for the NPCSC, whose answer is expected to be confined to the scope of the question posed. The answer will be sent back to the CFA, which will then apply it in conjunction with other provisions of the Basic Law and legal norms contained in other sources of Hong Kong law. The CFA retains full judicial power and authority regarding how to reconcile possible inconsistencies between these various legal norms, and to determine to what extent, if any, the local legislation in question is contrary to the Basic Law and invalid. Thus it is that the Hong Kong courts retain the full right and power of final adjudication, even in circumstances where the right and power of final interpretation of particular provisions in the Basic Law is exercised by the NPCSC.

As far as the purposive approach is concerned, the conclusion therefore is that not only is the CFA's introduction of the `predominant provision' test into article 158 not justifiable by the purposive approach to statutory construction, but this is probably inconsistent with the true purpose behind article 158. This purpose, as I see it, is to enable the NPCSC (advised by the Basic Law Committee) to exercise the power of the final authoritative interpretation of the Excluded Provisions of the Basic Law (i.e. provisions on the Central-SAR relationship or the powers of the Central Government). The manner in which the CFA has now applied article 158 meant that the CFA's own interpretation of an Excluded Provision (namely, article 22(4)) is now the most authoritative interpretation thereof, and (since it is crucially relevant to the decision in this case, passes the `neccesity test' and forms an essential part of the ratio decidendi of the case) is strictly binding on all the courts of the HKSAR, as well as on the legislative and executive branches of the SAR Government. The purpose of article 158 as suggested above has therefore been defeated. And it would be understandable if the NPCSC feels that the CFA in this case has usurped the former's legitimate power of final interpretation of Excluded Provisions in the Basic Law. Of course, the NPCSC retains the power to issue an interpretation of the relevant provision that overrides the CFA's interpretation. But in this event, a political cost will have to be borne, in terms of perceived or alleged `interference' with the SAR's judicial autonomy. And the `ideal scenario' for the operation of article 158 from the point of view of the SAR's autonomy --- the NPCSC never issuing an interpretation under article 158 on its own initiative and doing so only if requested by the CFA to do so --- will also become a broken dream.

The interpretation of article 22(4): incidental comments

The flaw in the CFA judgment identified above means that the CFA was constitutionally obliged to refer article 22(4) to the NPC Standing Committee but failed to do so. And the court went ahead to interpret the provision itself. Now if the matter had been referred to the NPCSC, would the resultant interpretation have been materially different from that actually given by the CFA in this case? In this section, I would like to suggest that the CFA's interpretation of article 22(4) is of dubious validity, or at least leads logically to an internal contradiction in the judgment itself. This, I will try to show, is largely due to the CFA's failure to recognise the full implications of the legal force in mainland China of the Basic Law as a national law, and to handle properly the relationship between the Basic Law and other mainland laws. In this regard two important points should have been borne in mind:

(1) The hybrid or dual nature of the Basic Law as both a Chinese law and a Hong Kong law: The Basic Law is not only the most fundamental law in Hong Kong, but it also has full force and effect in the mainland in relation to relevant persons and subject-matters, and is applicable to all persons and agencies that are subject to it expressly or by implication. The national ambit of the application of the Basic Law is stressed in almost every book and article on the Basic Law written by mainland scholars and has also been affirmed repeatedly by officials, partly for the purpose of reassuring the people of Hong Kong that the autonomy and rights protection conferred by the Basic Law are legally binding on mainland persons and authorities.

Hence the Basic Law can confer rights not only on persons in Hong Kong, but also on relevant persons in the mainland. The mainland authorities are legally bound to observe the Basic Law insofar as it applies to such persons, and to respect their rights. An example is Hong Kong PRs who have acquired their status as PRs before the commencement of the Basic Law and possess Hong Kong PR identity cards. If they are travelling (or even residing) in the mainland, and if the mainland authorities require them to obtain an exit permit (to be issued on a discretionary basis) before they can come back to Hong Kong, this would be a violation of and a denial of their rights under articles 24 and 31 of the Basic Law. Such rights have full legal force and effect even when the rights-holders are in the mainland, because the Basic Law is in force in the mainland. So in this particular respect, they 'carry their rights with them' when they go to the mainland.

(2) The possibility of inconsistency between the Basic Law and other mainland laws: The Basic Law is applicable to both the mainland and Hong Kong. Just as in Hong Kong, the Basic Law can override any legislation enacted by the SAR legislature that is inconsistent with it, in the mainland, where there is an inconsistency between the Basic Law and any provision in mainland law,

the issue of which prevails has to be addressed. If the Basic Law was enacted after the relevant provision in mainland law, the latter may be considered impliedly repealed. Other principles of construction may also come into play, such as the principle that the more specific provision prevails over a more general provision. A provision in mainland law may be found to be inconsistent with the Basic Law where, for example (applying a test commonly used in Australian constitutional jurisprudence), the former forbids something (being done in the mainland) which the latter permits (being done in the mainland by the same person), or the former denies a right (exercisable in the mainland) that is conferred or guaranteed by the latter.

There are basically two ways to interpret article 22(4) insofar it is relevant to this case. I shall call them interpretations (a) and (b).

(a) Article 22(4) is applicable (inter alia) to mainland residents who have acquired the status of PRs under article 24 upon the commencement of the Basic Law, and they need to apply for approval by the mainland entry and exit authorities before exercing their right of entry to and abode in Hong Kong under article 24. (Note that this does not mean that article 22(4) is also applicable to *all* PRs who are in mainland, such as PRs resident in Hong Kong before the commencement of the Basic Law (and who have already acquired their PR identity cards) who subsequently travel to the mainland or settle in the mainland.) This interpretation was adopted by the courts below and was the crucial element in their decisions to uphold the new immigration control scheme.

(b) Article 22(4) is only applicable to mainland residents who are not Hong Kong PRs. PRs' right to move from the mainland to Hong Kong is a right under article 24 that is not subject to the exit permit control system under article 22(4). This interpretation was adopted by the CFA.

The CFA chose interpretation (b) because it believed that the 'constitutional right of abode' conferred by article 24 should be given a generous interpretation, and article 22(4) should not be interpreted to derogate from such right and from the underlying autonomy of Hong Kong in admitting its PRs.

In mainland, the Law on the Control of the Exit and Entry of Citizens (enacted in 1985) and its subsidiary legislation (hereinafter called the Exit Law) restricts the right of exit from the mainland (and hence also entry to Hong Kong) of mainland residents, including new PRs of Hong Kong who have acquired this status on the commencement of the Basic Law on 1 July 1997. When interpreting the right of entry of PRs under article 24, the court did consider the Exit Law, but held that the Exit Law cannot be the basis for reading into article 24 an implied restriction (based on reasonableness) of the constitutional right of abode to the effect that the Exit Law should be complied with. The combined effect of the court's interpretation

of articles 24 and 22(4) is that Hong Kong's immigration legislation `is unconstitutional to the extent that it requires permanet residents of the Region residing on the mainland to hold the one way permit before they can enjoy the constitutional right of abode' (p. 348).

Although the court struck down the one way permit system as a component part of Hong Kong's immigration control scheme, it nevertheless commented that 'The Mainland laws requiring exit approval for Mainland residents coming to Hong Kong of course are and remain fully enforceable on the Mainland.' (p. 348) Thus it would seem that although Hong Kong law (by virtue of the existence of the Basic Law) cannot impose restrictions on the right of entry of PRs migrating from the mainland on the basis of prior exit approval by the mainland authorities, mainland law can still do so. Two problems flow from this and particularly from the adoption of interpretation (b) of article 22(4).

First, an anomaly, absurd result or undesirable social situation would be created: If mainland-resident Hong Kong PRs (who have only become PRs upon the commencement of the Basic Law) who possess the 'certificate of entitlement' (which, according to the judgment, is for the purpose of verification of PR identity only and should be issued upon application without undue delay) wish to migrate from the mainland to the SAR, and they do so by violating the Exit Law, by-passing the mainland exit control system and entering Hong Kong illegally (from the point of view of mainland law), they will nevertheless be given full legal protection of their `constitutional right of abode' once they arrive in Hong Kong. In a way, therefore, Hong Kong law would encourage such people to break the mainland Exit Law with impugnity, and the Hong Kong authorities cannot repatriate or punish them upon arrival. This seems to be contrary to the principle of according due recognition of and respect for the legal system and institutions of a different jurisdiction within the same country, which principle (in the form of the 'full faith and credit' clause in some constitutions) applies as between member states of a federal state.

Secondly, the approach adopted by the CFA gives rise to an internal logical contradiction within the judgment: as will be demonstrated below, logically and jurisprudentially *the court cannot hold (as it has so held) that the Basic Law can invalidate any requirement for one way permit in Hong Kong's immigration legislation without at the same time invalidating the mainland Exit Law insofar the latter imposes the one way permit requirement for movement to Hong Kong on mainland-resident Hong Kong PRs.*

Before demonstrating this, let us remind ourselves of the following 'assymetrical' situation. Although the Exit Law (a mainland law) is not applicable to Hong Kong, the Basic Law (a Hong Kong law) is applicable to the mainland. Thus both the Basic Law and Exit Law are in force in the mainland. The analysis below suggests that it is unfortunate that the CFA ignored the existence of the Exit

Law when it interpreted provisions in the Basic Law whose application in the mainland are potentially in conflict with the Exit Law . And the CFA should have considered whether it should adopt an interpretative approach that seeks to reconcile the potential conflict.

Now according to the CFA's interpretation of the Basic Law, in particular, interpretation (b) of article 22(4), Hong Kong immigration law is invalid insofar as it subjects Hong Kong PRs migrating from mainland to the one way permit scheme, because such a restriction on PR rights is inconsistent with the Basic Law (being a higher law than the immigration law and inconsistent with it). By precisely the same logic, and as will be further elaborated in the following paragraph, if the CFA's interpretation of the Basic Law (in particular article 22(4)) is right, then the Exit Law has also been impliedly repealed by the Basic Law (being a law in force in the mainland and conferring an unrestricted right of entry to Hong Kong on all Hong Kong PRs in the mainland, and being a later law than the Exit Law and inconsistent with it) insofar as the former subjects Hong Kong PRs migrating from mainland to Hong Kong to the one way permit scheme. [N.B. Incidentally, this also illustrates well the point why a provision like article 22(4) should have been referred to the NPC Standing Committee for interpretation. Under the Chinese consitutional system, the NPC Standing Committee is the arbiter of different Chinese laws that apparently contradict one another. It also has the constitutional power to interpret any Chinese law.] But this could not possibly have been the intention of the Chinese legislature when it enacted the Basic Law, given China's general policy and practice regarding exit controls and population migration to Hong Kong.

The point about partial 'implied repeal' of the Exit Law may be elaborated as follows. According to the CFA's reading of articles 22 and 24, the following propositions stand:

(1) Hong Kong PRs (including those originally resident in the mainland who acquired the status of PRs by virtue of article 24(2)(3) of the Basic Law upon the commencement of the Basic Law on 1 July 1997, hereinafter called 'originally mainland-resident HKPRs') have, under the Basic Law, a right of abode in and a freedom of movement from the mainland to the SAR, which right and freedom may not be fettered by the kind of 'discretionary control of the Mainland authorities' (words used in the judgment, p. 346) that the 'one way permit' scheme embodies.

(2) Any Hong Kong law inconsistent with this right and freedom is invalid since it contravenes the Basic Law.

(3) Therefore, the provisions in the Immigration (Amendment)(No 3) Ordinance enacted on 10 July 1997 that mandated the possession of the one-way permit as a condition precedent for the exercise of this right and freedom by

originally mainland-resident HKPRs is invalid.

On the basis of the above analysis regarding the application of the Basic Law in the mainland and the possibility of inconsistency between the Basic Law and other mainland laws, the following further propositions may be generated from the three preceding propositions.

(4) Any mainland law enacted prior to the Basic Law that is inconsistent with right and freedom mentioned in proposition (1) is invalid since it would have been repealed (at least by implication) by the Basic Law.

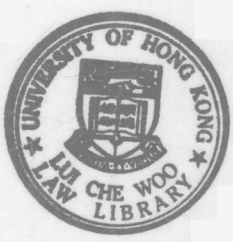
(5) Therefore, the provisions in the Exit Law and its subsidiary legislation that mandate the possession of the one-way permit as a condition precedent for the exercise of this right and freedom is invalid.

It is submitted that the proper interpretation of the Basic Law, particularly article 22(4), should probably be one that would enable both the Basic Law and the Exit Law to remain fully valid, and that would reconcile any potential conflict between the two. Adopting interpretation (a) of article 22(4) would have achieved this result. This is probably the right interpretation. The court went the other way because it did not consider fully the significance of the Basic Law as a national law that is fully applicable in the mainland, nor did it adopt the appropriate interpretative approach in dealing with the relationship between the Basic Law and the Exit Law.

My conclusion here is therefore that not only did the CFA lack the jurisdiction to interpret article 22(4), but it also probably erred in the actual interpretation of article 22(4). As it stands, this aspect of the judgment contains a logical contradiction and leads to practical enforcement problems as set out above. On the other hand, removing the logical contradiction (i.e. recognising that the Exit Law has been partially repealed by the Basic Law by implication) would lead to a result which could not possibly have been the intention of the Chinese legislature.

Finally, the above analysis suggests that although mainland laws (except those listed in Annex III of the Basic Law in accordance with article 18) are not applicable to the SAR, it might be necessary, in certain special contexts, to take into account certain relevant provisions in mainland law for the purpose of construing the Basic Law. Such special contexts relate to situations in which the Basic Law confers rights or imposes obligations on relevant persons or agencies in the mainland, or otherwise regulates acts or events in the mainland. In these contexts, the combined effect of the Basic law and other mainland laws on the situation will need to be addressed. The present case provides a good example of such a situation, and underscores the challenge of developing a jurisprudence that really meets the needs of, and addresses the genuine problems generated by, the adventure and experiment that we call 'one country, two systems'.

CFA.4/bn (8.3.99)



Published by the Faculty of Law
The University of Hong Kong
Pokfulam
Hong Kong

1999

HK$15.00