

# COMMENT



## Undermining Our Rights and Autonomy

On 9 October 1997, Keith J upheld the constitutionality of an amendment to the Immigration Ordinance requiring mainland children born of parents either of whom is a permanent resident of the Hong Kong SAR to obtain a certificate of entitlement and a one-way exit permit before coming to the SAR.<sup>1</sup> The court's ruling turns on its view that Art 22(4)<sup>2</sup> of the Basic Law (BL22(4)), which governs the entry of people from other parts of China, applies also to mainlanders who enjoy the right of abode in the SAR.

It is submitted that the learned judge's interpretation of BL22(4) is wrong and, if it stands uncorrected on appeal, would seriously undermine the high degree of autonomy conferred upon the SAR by the Joint Declaration and the Basic Law.

The court took the view that the reference to 'people from other parts of China' in BL22(4) could include those living in mainland China who had a right of abode in the SAR as there was no express wording to exclude this category of people from the operation of BL22. But the judge overlooked the point that 'permanent residents' and 'people having the right of abode' mean the same thing under BL24.

BL24 says unequivocally that these mainland-born children are permanent residents of the SAR. They are not merely people who may be eligible to be permanent residents. Hence they are not 'people from other parts of China' even on the so-called linguistic approach adopted by Keith J. Whether one is a permanent resident depends on whether one falls within any of the six categories set out in BL24, but neither where one originally came from nor where one is currently living is specified as a criterion.

The quota and the one-way permit system are administered by the mainland authorities, over which the SAR has no control. As the court acknowledged, its ruling would mean that people living in mainland China who are accorded the right of abode in the SAR by BL24(3) need the permission of the mainland authorities before they can enjoy that right. The implementation of BL24(3) would therefore be in the hands of the Chinese authorities and the high degree of autonomy in its affairs which the SAR is to enjoy would be undermined.

Indeed at present not all mainlanders with the right of abode are eligible under the present quota and one-way permit system. For example, the

<sup>1</sup> *Cheung Lai-wah v Director of Immigration* [1997] HKLRD 1081.

<sup>2</sup> BL22(4) reads: 'For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region.'

mainland authorities do not accept applications from adults or those who were born illegitimately. The enjoyment of the right of abode by these groups of SAR permanent residents is therefore not merely limited but non-existent. The judge, however, regarded this derogation from the SAR's autonomy as something expressly sanctioned by BL22(4).

BL22 is rather lengthy. It expressly prohibits departments of the Central People's Government and other provinces and regions from interfering in the affairs of the HKSAR. It governs also the setting up of offices by departments in the mainland and entry of people from the mainland. It is clear that the provisions were designed to maintain the high degree of autonomy of the SAR. They seek to make it clear that the fact of Hong Kong becoming part of China does not entitle people from other parts of China a free or unrestricted entry into the SAR. BL22(4) cannot be construed to regulate or govern the rights of the residents of the SAR, including their mainland-born children, as set out in BL24. It is ironic that BL22, which is designed to protect the SAR's autonomy, was construed by the court to sanction its derogation.

Apart from undermining the SAR's autonomy, the court's ruling may lead to other unintended but far-reaching consequences. For example, if, as held by the court, BL22(4) applies to all people living in the mainland irrespective of whether they are permanent residents of the SAR, it would follow that all Hong Kong residents who have chosen to reside in the mainland will be subject to the quota and permit system in case they subsequently decide to resettle here. In particular the Social Welfare Department has recently encouraged aged people to live in the mainland by allowing them to enjoy similar cash benefits there. It is therefore incumbent on the government to warn these people in advance of this legal consequence.

Moreover, it appears that pregnant Hong Kong women should be warned against travelling to the mainland, whether for pleasure or for work, during perhaps the third trimester lest, in the event of premature or early birth, their babies born there be subject to the quota and permit system by virtue of BL22(4).

BL24(3) confers the right of abode on all Chinese nationals born outside Hong Kong of those permanent residents who are Chinese, drawing no distinction between those born in the mainland and those born overseas. The court's interpretation of BL22(4) means permanent residents by descent born in China have a lesser right of abode than those born abroad. This clearly flies in the face of BL25 which provides that all Hong Kong residents shall be equal before the law.

Denis Chang SC, counsel for the applicants, described the government's reliance on BL22(4) as 'a monumental afterthought.' Both parties had adduced to the court relevant minutes of the Basic Law Drafting Committee and other contemporaneous correspondence and documents. None shows any hint that

BL22(4) was intended to apply to these mainland-born children having a right of abode under BL24(3). It was not until December 1995 that the linkage between BL22(4) and BL24 was first recorded.<sup>3</sup> Indeed the Immigration Amendment (No 3) Ordinance was clearly not enacted on the basis of BL22(4).

The Certificate of Entitlement Scheme under the ordinance applies generally to all persons claiming a right of abode under BL24(3), irrespective of whether they were born in the mainland or in overseas countries. Nowhere in the government's brief to the provisional legislature or in any official public statement has there been any reference to BL22 as the basis for the No 3 Ordinance.<sup>4</sup> Indeed in answer to a question put by the Hon Frederick Fung at the Provisional Legislative Council debate on 9 July 1997 before the passing of the ordinance, Peter H L Lai, the Secretary for Security, stated that the No 3 Ordinance did not discriminate against children born in the mainland as the Certificate of Entitlement Scheme applied equally to children born overseas. It is therefore entirely wrong for the judge to say that the 'postponement of the right [of abode] arises from the implementation of Article 22(4) through the provisions of the No 3 Ordinance.'

The court's ruling is undoubtedly a blow to the fundamental rights of SAR residents seeking the protection of the Basic Law. BL24 is included in Chapter III of the Basic Law, which is 'a chapter specially devoted to Hong Kong residents' rights and freedoms.'<sup>5</sup> BL24 confers in clear and unambiguous language a fundamental right of abode on six categories of people. One would naturally expect any immigration legislation made pursuant to this article to facilitate or enable the exercise of this fundamental right.

Unfortunately the Immigration Amendment (No 3) Ordinance seeks to disable the exercise of this right and the court has now sanctioned this measure by stretching the meaning of 'people from other parts of China' in BL22(4) to include the permanent residents of the SAR.

Before this judgment, one would have thought that the Basic Law as a constitutional document would be interpreted in such a way as to uphold the fundamental rights and freedoms and safeguard the autonomy of the SAR in its own affairs to the highest extent. Destroying a fundamental right by virtue of

<sup>3</sup> See the draft Annex III to the Report of the Social and Security Special Subject Sub-group to the Sixth Plenary Meeting of the Preliminary Preparatory Committee, as noted in Keith J's judgment.

<sup>4</sup> I am not referring to isolated views expressed by some individual members of the provisional legislature.

<sup>5</sup> See the Explanations on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft) and its related documents made by Ji Pengfei, the Chairman of the Drafting Committee for the Basic Law, to the Third Session of the Seventh National People's Congress on 28 March 1990.

a so-called 'purposive' interpretation<sup>6</sup> of BL22(4), the court has undermined confidence in the protection afforded by the Basic Law.

Eric Cheung\*

### The Basic Law on Trial

In its first opportunity to interpret the Basic Law, did the Court of Appeal funk it? The central question in *HKSAR v David Ma Wai-kwan*<sup>1</sup> was whether the common law survived the change of sovereignty on 1 July 1997. Article 160 of the Basic Law provides that upon the establishment of the Hong Kong SAR 'the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law' (emphasis supplied). The respondents, who had been charged in 1995 with the common law offence of conspiracy to pervert the course of public justice, argued on the tenth day of their trial — 3 July 1997 — that, since there had been no formal act of adoption by the NPC or its Standing Committee, the offence was no longer part of the laws of the HKSAR.

The court unanimously rejected this view and held that no formal act of adoption was required under BL160. It accepted also the government's argument that, in any event, the Hong Kong Reunification Ordinance, passed by the provisional legislature in the early hours of 1 July 1997 and assented to immediately thereafter by the Chief Executive, effected the continuation of the laws previously in force.

In the course of its judgment, the court made a number of sweeping dicta whose ripples will be felt for some time to come. In particular, it adumbrated a new constitutional order that would appear to reduce or eliminate the power of HKSAR courts to question the validity of decisions of the NPC. This expansive construction of our new judicial process effectively establishes a new and potentially indeterminate source of law. It is unsurprising that, in consequence, the court accepted the legality of the Provisional Legislative Council.

Each of these matters, and a number of others, are discussed in the special 'Focus on the Ma case' in this issue. This is certainly not the last we shall hear of this decision. Its many ramifications will continue to attract the attention of contributors to future parts of the Journal.

Raymond Wacks†

<sup>6</sup> Keith J stated that, because some of the persons enjoying the right of abode under BL24 may be living in mainland China and that 'Article 22(4) seeks to control the entry into Hong Kong of persons living in mainland China, a purposive construction of Article 22(4) requires it to be construed as applying to those persons who enjoy the right of abode under Article 24 but who are living in mainland China.' If this reasoning is correct, a 'purposive' interpretation of BL154(2), which provides that the SAR government 'may apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions,' would have required it to be construed as applying to those persons who enjoy the right of abode under BL24 but who are living in foreign states and regions.

\* Assistant Professor, Department of Professional Legal Education, University of Hong Kong.

<sup>1</sup> [1997] 2 HKC 315.

† Editor.