ANOTHER CASE OF CONFLICT BETWEEN THE CFA AND THE NPC STANDING COMMITTEE?

The first constitutional crisis of the Hong Kong Special Administrative Region (HKSAR) occurred in February 1999. It will be recalled that Beijing demanded "rectification" of the Court of Final Appeal's statement in *Ng Ka Ling v Director of Immigration*[1] that Hong Kong courts have the jurisdiction "to examine whether any legislative acts of the National People's Congress or its Standing Committee are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent."[2] The crisis was resolved by the Court of Final Appeal (CFA) acceding to the HKSAR Government's request for the "clarification" of the statement.[3]

More recently, on the morning immediately after the CFA rendered its judgment in *Director of Immigration v Chong Fung Yuen*,[4] a spokesman for the Legislative Affairs Commission of the National People's Congress Standing Committee (NPCSC) pointed out in a widely reported statement that the CFA's decision in the *Chong* case was "not consistent" with the NPCSC's interpretation of the Basic Law, and "expressed concern" about the matter.[5] This was the second occasion in Hong Kong's post-1997 legal history on which the Beijing authorities publicly expressed a view about a decision of a Hong Kong court.

The *Chong* case is one of the many "right of abode" cases concerning the interpretation of Article 24(2) of the Basic Law that were litigated after the establishment of the HKSAR. The provision at issue in the *Chong* case was Article 24(2)(1), which provides that "Chinese citizens born in Hong Kong before or after the establishment of the HKSAR" are Hong Kong permanent residents with the right of abode in Hong Kong. The legislation implementing this provision provides for a qualification regarding the status of the parents of such Chinese citizens born in Hong Kong. According to paragraph 2(a) of Schedule 1 to the Immigration Ordinance,[6] a Chinese citizen born in Hong Kong after 1 July 1987 would only qualify as a Hong Kong permanent resident "if his father or mother was settled or had the right of abode in Hong Kong at the time of his birth or at any later time". This means that if a

1 [1999] 1 HKLRD 315. *See* generally Albert H. Y. Chen, "Constitutional Crisis in Hong Kong: Congressional Supremacy and Judicial Review" (1999) 33 *The International Lawyer* 1025.

2 [1999] 1 HKLRD 315 at 337.

3 [1999] 1 HKLRD 577.

4 FACV No 26 of 2000 (Court of Final Appeal; 20 July 2001).

5 The statement was issued on the morning of 21 July 2001 and published in Hong Kong newspapers on 22 July 2001.

6 Cap 115, LHK. The relevant provision was introduced into the Immigration Ordinance by the Immigration (Amendment) (No 2) Ordinance 1997 and subsequently amended by resolution of the Legislative Council under s 59A of the Immigration Ordinance on 16 July 1999.

pregnant woman from the Mainland comes to Hong Kong as a visitor (on a "two-way permit") or illegally enters Hong Kong or overstays in Hong Kong as a visitor, and she gives birth to a child in Hong Kong, the child would not be a Hong Kong permanent resident unless his or her father is himself a Hong Kong permanent resident or settled in Hong Kong (eg he is a lawful migrant to Hong Kong from the Mainland with a "one-way permit", but has not stayed in Hong Kong for seven years and is therefore not yet a Hong Kong permanent resident).

Chong Fung Yuen was born in Hong Kong in September 1997 to a couple visiting Hong Kong from the Mainland on "two-way permits". Neither his mother nor his father was a Hong Kong permanent resident or settled in Hong Kong. The parents returned to the Mainland in November 1997, but Chong stayed behind with his paternal grandfather, who is himself a Hong Kong permanent resident. The question litigated in this case was whether Chong is a Hong Kong permanent resident, which in turn depended on the resolution of the question of whether paragraph 2(a) of the Schedule to the Immigration Ordinance contravenes Article 24(2)(1) of the Basic Law.

All three courts that heard the case decided it in Chong's favour.[7] They held that the meaning of Article 24(2)(1) was clear and unambiguous. In nationality law, both the *jus soli* rule (determining the status of the child on the basis of his or her place of birth) and the *jus sanguinis* rule (determining the status of the child on the basis of the status of his or her parents) are well-established principles. There was nothing extraordinary in Article 24(2)(1) opting for the *jus soli* rule without incorporating any element of the *jus sanguinis* rule. Furthermore, the courts stressed that interpreting Article 24(2)(1) in this way would not result in huge problems in terms of population control. The figures for 1997–2000 suggest that only about 500 children per annum were born in Hong Kong in circumstances similar to Chong's (ie neither of the parents are Hong Kong permanent residents or settled in Hong Kong).

If the meaning of Article 24(2)(1) is plain and hardly arguable, what is interesting about this case? Why is the case of constitutional significance, and why does it involve a potential conflict between the Hong Kong courts and the NPCSC? The answer lies in the text of the NPCSC's interpretation of the Basic Law in June 1999.[8] Although the interpretation was mainly directed at Articles 22(4) and 24(2)(3) of the Basic Law (and these were the only provisions that the HKSAR Government had requested the NPCSC to interpret), there was a passage in the text of the interpretation which touched upon the other limbs of Article 24(2):

7 The decisions of the Court of First Instance and Court of Appeal are reported at [2000] 3 HKLRD 661 and [2000] 1 HKC 359 respectively.

8 [1999] Gazette Extraordinary, Legal Supplement No 2 1577 (LN 167 of 1999; 28 June 1999).

> "The legislative intent as stated by this Interpretation, together with the legislative intent of all other categories of Article 24(2) of the Basic Law of the HKSAR of the PRC, have been reflected in the "Opinions on the Implementation of Article 24(2) of the Basic Law of the HKSAR of the PRC" adopted at the Fourth Plenary Meeting of the Preparatory Committee for the HKSAR of the NPC on 10 August 1996."

The first paragraph of the Preparatory Committee's opinion states as follows:

> "Chinese citizens born in Hong Kong as provided in Category (1) of Paragraph 2 of Article 24 of the Basic Law refer to people who are born during which either one or both of their parents were lawfully residing in Hong Kong, but excluding those who are born to illegal immigrants, overstayers or people residing temporarily in Hong Kong."

Paragraph 2(a) of the Schedule to the Immigration Ordinance ("the impugned provision") is therefore consistent with the Preparatory Committee's opinion. Given that the Preparatory Committee's opinion was described by the NPCSC as reflective of the legislative intent behind the whole of Article 24(2) (which must therefore include Article 24(2)(1)), can the impugned provision be regarded as inconsistent with Article 24(2)(1)? This, then, was the interesting and difficult issue for the Hong Kong courts in *Chong Fung Yuen*.

In the Court of First Instance, counsel for the Government argued that the above-mentioned passage in the June 1999 interpretation of the NPCSC indicated how the NPCSC itself would interpret Article 24(2)(1) if it were called upon to interpret it (ie its interpretation would be the same as the view expressed in the Preparatory Committee's opinion).[9] Stock J however held that "I am not bound by a suggested prospect of that kind."[10] He also wrote:

> "I think that I may safely assume that the NPC, in the exercise in which it was engaged in June 1999, was not directed to the issues arising in this case or in any case concerning Article 24(2)(1); nor presented by any contending arguments about it."[11]

In Stock J's opinion, the NPCSC did not make any interpretation of Article 24(2)(1) in June 1999, and what it said about the Preparatory Committee's opinion reflecting the legislative intent of Article 24(2) was no more than an

[9] [2000] 1 HKC 359 at 371.
[10] At 383.
[11] At 383.

"addendum".[12] He stressed that he was bound to construe Article 24(2)(1) according to common law principles of interpretation,[13] and applying such principles, he came to the conclusion that Chong Fung Yuen was a Hong Kong permanent resident.

In the Court of Appeal, counsel for the Government again argued that if a reference were made to the NPCSC, its interpretation would inevitably be the same as the view expressed in the Preparatory Committee's opinion.[14] It was further argued that although the NPCSC had not interpreted Article 24(2)(1) in June 1999, what it said regarding the Preparatory Committee's opinion constituted "persuasive *obiter dicta* in relation to the interpretation of Article 24(2)(1)"[15] – "*obiter dicta* of the highest order".[16] The Government's counsel even went further and suggested that "this court should either put itself in the position of the Standing Committee interpreting the Basic Law or should, at any rate, decide the case on the same basis that [as argued by counsel] the Standing Committee would decide an interpretation of Article 24(2)(1)".[17]

These arguments were rejected by the three judges of the court. Mayo V-P pointed out that the problems regarding the interpretation of Article 24(2)(1) had never been specifically addressed either by the Preparatory Committee or the NPCSC, and it was "by no means obvious" that the NPCSC would interpret the provision in the manner suggested by counsel for the Government.[18] Leong JA said that until the matter was submitted to the NPCSC for interpretation, "how the Standing Committee, after consulting the Basic Law Committee, will interpret [Article] 24(2)(1) is just speculation".[19] As regards the argument regarding the persuasive force of the NPCSC's "*obiter dicta*", Rogers JA said:

> "Specific care is always taken with regard to *obiter dicta* because it may well constitute statements in respect of which there has been no full or proper argument. ... These considerations are, in my view, all the more relevant in relation to interpretations by bodies where there is no representation by interested parties, still less adversarial argument. ... There is no indication that the Basic Law Committee was consulted in relation to Article 24(2)(1). ... Most importantly however, *obiter dicta* in relation to statutory

[12] At 382.
[13] At 378, 383.
[14] [2000] 3 HKLRD 661 at 667.
[15] At 682.
[16] At 685.
[17] At 682.
[18] At 675.
[19] At 680.

> interpretation can only be of assistance to courts insofar as they indicate a process of reasoning. In none of the documents to which our attention has been drawn, ... is there any process of reasoning expressed or any indication given as to why there should be any limitation of what otherwise would be clear constitutional rights. ... Insofar as it is suggested that this Court should approach the question on the basis of the Standing Committee would interpret Article 24(2)(1) in the same way as is expressed in the opinions of the Preparatory Committee, I see nothing to suggest that that would be so. ... This court applies the common law in its interpretation of the Basic Law."[20]

In the arguments before the Court of Final Appeal, it was common ground that the NPCSC had not made any binding interpretation of Article 24(2)(1), and that the court should adopt the common law approach in interpreting the Basic Law. As regards this approach, the Chief Justice said:

> "The courts' role under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain *the legislative intent as expressed in the language*. Their task is not to ascertain the intent of the lawmaker on its own. ... It is the text of the enactment which is the law and it is regarded as important both that the law should be certain and that it should be ascertainable by the citizen. ... The language is considered in the light of its context and purpose."[21]

Applying the common law canons of construction to interpret Article 24(2)(1), the CFA came to the same conclusion as the two courts below it and dismissed the Director of Immigration's appeal. How then did the CFA deal with the argument that the above-mentioned passage in the NPCSC's June 1999 interpretation (referring to the Preparatory Committee's opinion as reflective of the legislative intent behind all limbs of Article 24(2)) was persuasive *obiter dicta* from the highest interpreting authority? Unlike Rogers JA in the court below, the CFA apparently decided not to explain why it was not persuaded by the NPCSC's *dicta*. It bypassed the issue by stating the same point in different parts of its judgment, namely, the NPCSC has not issued any interpretation of Article 24(2)(1) that is binding on the CFA. That being the case, the CFA was free to adopt the common law approach in interpreting the article, and was thereby compelled to hold that the impugned provision in the Immigration Ordinance was inconsistent with the article.

The remaining point for the CFA to deal with was whether it should refer Article 24(2)(1) to the NPCSC for interpretation. This point did not arise in

[20] At pp 686–687.
[21] *See* p 15 of the typewritten version of the judgment (emphasis in original).

the lower courts as the duty to make a reference (of a Basic Law provision "concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region,"[22] ie what the CFA calls an "excluded provision") is only applicable to the CFA. Here the CFA held that the character of Article 24(2)(1) is such that it is not an "excluded provision", but is within the autonomy of the HKSAR. In so doing, the CFA rejected the Government's contention that the test for determining whether a Basic Law provision is an "excluded provision" is "whether the implementation of the Basic Law provision in question (on whichever of two or more asserted interpretations) will have a substantive (meaning not substantial, but real) effect on (i) affairs which are the responsibility of the Central People's Government or (ii) the relationship between the Central Authorities and the Region".[23]

The CFA's decision on this point is undoubtedly correct. Article 24(2)(1) is about the Hong Kong permanent resident status of "Chinese citizens born in Hong Kong", and it would be alarming and a derogation from Hong Kong's autonomy if the provision were to be regarded as an "excluded provision". Even in the subsequent statement of the Legislative Affairs Commission of the NPCSC, there was no suggestion that the CFA should have referred Article 24(2)(1) to the NPCSC for interpretation in the *Chong Fung Yuen* case. What the statement stressed was that although since June 1999 the Hong Kong courts "repeatedly emphasised that the NPCSC's interpretation of the Basic Law is binding on the courts of the HKSAR", the CFA's decision in the *Chong* case is "not consistent with the relevant interpretation by the NPCSC".

Then is it really true that the CFA's interpretation of Article 24(2)(1) of the Basic Law is inconsistent with the NPCSC's interpretation? The question is whether the NPCSC has already interpreted Article 24(2)(1) in June 1999. The CFA's view, which was based on a consensus between counsel for the Government and the applicant's counsel on this point, was that the NPCSC has not issued any such interpretation. This view can be justified by the fact that when the HKSAR Government referred the matter via the State Council to the NPCSC, it only sought an interpretation of Articles 22(4) and 24(2)(3), and the document subsequently issued by the NPCSC is entitled an interpretation of Articles 22(4) and 24(2)(3). The text of the document also focuses on these two provisions.

Nevertheless, the fact remains that the NPCSC did say in the document that "the legislative intent of all other categories of Article 24(2) of the Basic Law" has been "reflected in" the Preparatory Committee's opinion. If this passage, described in the courts below the CFA as an "addendum" or "*obiter*

[22] *See* Art 158 of the Basic Law.
[23] *See* pp 18–19 of the typewritten version of the judgment.

dictum" were binding on the Hong Kong courts, then the courts would probably have no alternative but to uphold the Preparatory Committee's view of Article 24(2)(1) as one revelatory of its legislative intent.

The real question is therefore whether this passage in the NPCSC's interpretation is binding on the Hong Kong courts. The Hong Kong courts determined for themselves that it was not binding, drawing an analogy between it and the concept of *obiter dictum* in the common law tradition. But from the point of view of Chinese law, is it valid or legitimate to draw a distinction between the *ratio decidendi* (which is binding) and *obiter dicta* (which is not binding) when looking at the text of an interpretation by the NPCSC? Given that the interpretation is a "legislative interpretation", and in Chinese law, the nature of a legislative interpretation is such that it is a legislative rather than judicial act,[24] might it not be possible that the full text of the interpretation is binding, in the same way as the full text of a legislative enactment is binding on the courts? These jurisprudential questions were neither argued before nor considered by the three Hong Kong courts that decided the *Chong* case.

If the NPCSC's position is correct that the common law distinction between *ratio* and *obiter* should not be applied by the Hong Kong courts with regard to the NPCSC's interpretation of June 1999 and that the full text of the interpretation is binding on the Hong Kong courts, then it does have a legitimate grievance as reflected in its Legislative Affairs Commission's statement of 21 July 2001. The incident can then be interpreted as a manifestation of a conflict between the "two systems" in "one country, two systems". Indeed, if the Beijing side indeed perceived the CFA's decision in the *Chong* case as a challenge to or at least recalcitrant behaviour with regard to the NPCSC's authority, then the statement of 21 July 2001 was already a muted reaction. Things could have been much worse, as the experience of the "constitutional crisis" of February 1999 demonstrated.

But who was right: the Legislative Affairs Commission or the CFA? If we look at the matter as the result of the difference and conflict between the "two systems", then neither side was right or wrong. They simply had different perceptions and perspectives. However, if "one country, two systems" is to work, it is necessary to develop a jurisprudence that is acceptable to both sides and one that reconciles the differences or at least provides principles and norms that define what differences are tolerable. Is there any lesson for us in this regard in the *Chong Fung Yuen* case?

The lesson I think is that in "one country, two systems", each system can respect the principles and norms of the other system without necessarily agreeing with them, while maintaining a critically reflective attitude towards them,

[24] *See* generally Albert H. Y. Chen, "The Interpretation of the Basic Law" (2000) 30 *HKLJ* 380, 411–416.

as well as towards the principles and norms of one's own system. In matters where there is no direct conflict of fundamental interests between the two systems, as in the *Chong* case, there is considerable space for the toleration of differences. In the *Chong* case, the Mainland side has no direct interest in whether Chinese citizens born in Hong Kong to visitors or illegal entrants from the Mainland have the right of abode in Hong Kong. Hence, even though the Beijing side disagreed with the CFA's handling of the matter, it did not intervene to overrule the CFA's interpretation. It exercised self-restraint in the interests of the autonomy of Hong Kong and the Rule of Law therein. For this, the Beijing side deserves to be commended.

The Hong Kong courts also deserve to be commended because they were courageous enough to uphold their common law principles in the interpretation of the Basic Law, though the latter is an enactment of the NPC. When confronted by the passage in the NPCSC's interpretation which upheld the Preparatory Committee's opinion as reflective of the legislative intent behind the whole of Article 24(2), they were not cowed into submission. Instead they drew upon the common law distinction between *ratio* and *obiter*, and made use of the common law reasoning regarding why *dicta* may not be accurate and reliable.

In the final analysis, there might be some degree of universal validity in such common law distinction and reasoning after all. Even a Mainland jurist can recognise that when the NPCSC and Basic Law Committee advising it prepared its interpretation of June 1999, they had not addressed their attention directly to the problems surrounding the interpretation of Article 24(2)(1) of the Basic Law. Whatever they said about the Preparatory Committee's opinion and Article 24(2) generally cannot be as well considered an opinion as their determination on the interpretation of Articles 24(2)(3) and 22(4), whose interpretation had been specifically sought by the HKSAR Government. It is true that the NPCSC is the supreme authority in the People's Republic of China on questions of interpretation of laws, but it is not infallible when it makes an incidental comment on some legal provisions in the context of the interpretation of some other provisions.

Happily, therefore, the *Chong Fung Yuen* case and its aftermath represent a "win-win" scenario for the "two systems". The common law tradition and judicial autonomy in Hong Kong have been defended; the authority of the NPCSC has been asserted; the spirit of mutual self-restraint, tolerance and accommodation has triumphed. *Chong Fung Yuen*, then, will stand together with *Lau Kong Yung*[25] as milestones in Hong Kong's post-1997 constitutional and legal history. *Lau Kong Yung* acknowledges the potentially unlimited authority of the NPCSC to interpret the Basic Law at any time and in any way.

[25] [1999] 3 HKLRD 778.

Chong Fung Yuen, on the other hand, testifies to the durability, vitality and adaptability of the common law tradition in Hong Kong, and the practical limits to the theoretically unlimited nature of the NPCSC's authority.

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