



Constitutional Affairs Committee's Views on Immigration (Amendment) Bill 2001

The Committee has reviewed the Bill. There are different views expressed within the Committee, which are presented here for the Bills Committee's consideration:

Interpretation of the Basic Law by the legislature

1. Article 24 of the Basic Law sets out the categories of persons who shall be permanent residents. Under Article 24(2)(2) "Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region" qualify as permanent residents. What is meant by "ordinarily resided"? The Bill, if enacted, will give a specified meaning to "ordinary residence" in specified circumstances. This is an interpretation of the Basic Law. Is an interpretation of the Basic Law by the Hong Kong legislature permissible?
2. Article 18 provides that "the laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law and the laws enacted by the legislature of the Region". Article 11 provides that "no law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this law". There appears to be no limitation on the laws which may be enacted by the Hong Kong legislature including laws interpreting the Basic Law, provided that no law enacted may contravene the Basic Law.
3. The question then is whether the Bill, if enacted, will become a law which contravenes the Basic Law. How will this be determined?
4. Article 17 provides that laws enacted by the legislature must be reported to the Standing Committee of the National People's Congress for the record. It further provides that if the Standing Committee, after consulting the Committee for the Basic Law of the Hong Kong Special Administrative Region under it, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of the Basic Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region, the Standing Committee may return the law in question but shall not amend it. Any law returned by the Standing Committee shall immediately be invalidated.

5. It is arguable whether this Bill concerns affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region. If an enacted law is returned after it is reported to the Standing Committee for record, it will be clear that it contravenes the Basic Law. If it is not returned, it could mean one of two things:
 - it concerns the affairs etc. but does not contravene the Basic Law; or
 - it does not concern the affairs etc.
6. If the enacted law is not returned by the Standing Committee but is challenged in Hong Kong, the Hong Kong courts will have to decide
 - whether it concerns the affairs etc., in which event an interpretation will have to be sought from the Standing Committee under Article 158; and
 - if it does not concern the affairs etc., whether the enacted law contravenes the Basic Law.
7. Objection can also be taken to the Bill on the ground that it cuts down a “constitutional right” under the Basic Law, namely the right to become a permanent resident. This is an issue that calls in question the fundamental nature of the Basic Law. These issues, if taken up, will have to be resolved by the Hong Kong Courts.

Reservations expressed on the Bill

8. Some Members of the Committee do not think it is a proper function of the legislature to pass a piece of legislation to interpret the Basic Law. As stated by the Court of Final Appeal (“CFA”) in *Director of Immigration v. Chong Fung Yuen* FACV No. 26 of 2000 (2001-07-20):

“...it follows from the grant of independent judicial power to the courts that the interpretation of laws is a matter for the courts. This principle, which follows from the doctrine of the separation of powers, is a basic principle of the common law and is preserved and maintained in Hong Kong by the Basic Law.”

9. It should be noted that we are not at a time when the Basic Law was first enacted or came into effect, but are now 5 years after the Handover. As stated by the CFA in the same case:

“Because the context and purpose of the Basic Law were established at the time of its enactment in 1990, the extrinsic materials relevant to its interpretation are, generally speaking, pre-enactment materials, that is, materials brought into existence prior to or contemporaneous with the enactment of the Basic Law, although it only came into effect on 1 July 1997...In a case where the courts have to consider the use of extrinsic materials other than pre-enactment materials relating to context and purpose, the courts should, in conformity with common law principles, approach the matter cautiously. The common law does not in general adopt the approach that all extrinsic materials can be considered leaving their weight to be assessed. A prudent approach is particularly called for where the courts are asked to consider post-enactment materials. This is because as discussed above, under a common law system which includes a separation of powers, the interpretation of laws once enacted is a matter for the courts.”

It is doubtful if the current exercise is a genuine attempt to interpret the Basic Law. It appears that it is an attempt to amend the law as a result of a recent change in policy after consultation with the Central People's Government ("CPG"). As disclosed by the Government, at the time of the gazettal of the Bill, over 1,300 mainland residents working in Hong Kong under official sponsorship have acquired right of abode in Hong Kong (i.e. the category of persons sought to be excluded under the proposed legislation). The main reason for the proposed legislation was that a review of the situation with the mainland authorities in 2001 resulted in a decision that these mainland officials should not be treated as ordinarily resident in HK. It was only on 11 October 2001 that the CPG implemented a new administrative measure to that effect.

10. In *Gurung Kesh Bahadur v. Director of Immigration* FACV 17 of 2001 (2002-07-30), the Chief Justice states:

"If it were otherwise and the Director's primary submission were correct, it would mean that where the Basic Law has chosen to confer rights additional to the minimum guarantees provided for in the ICCPR as applied to Hong Kong incorporated by the Bill, these additional rights could be swept away by domestic legislation and would therefore be much less secure than the rights in the Bill, whether or not they are also provided for in the Basic Law. This could not have been the intention of the Basic Law. The intention of the Basic Law was to entrench constitutionally the rights and freedoms in Chapter III, the rights and freedoms which are essential to Hong Kong's separate system, and the courts have a duty of safeguarding and protecting them by adopting a generous approach to their interpretation."

The proposed Bill would arguably be an attempt to restrict a core constitutional right particular when one considers that such rights are to be generously interpreted. *Chong Fung Yuen* also affirms the use of common law interpretative principles. As such one cannot derogate from, or restrict the common law term "ordinarily resided" as it is a provision entrenched in the Basic Law with all the rights flowing therefrom particularly in light of the "generous approach" noted above.

11. The proposed legislation has no retrospective effect. If it were a true interpretation of the Basic Law, it is doubted why the proposed legislation would have no retrospective effect.
12. To exclude those periods in which a person is detained or is in breach of conditions of stay may be reasonable qualifications for the concept of "ordinarily residence". However, this reasonable interpretation approach in a given context should not be extended without good reason or be abused.
13. It is questionable whether other existing excluded categories – such as domestic helpers – could pass the test of constitutionality, particularly in cases where it is clear that such a person intends to live in Hong Kong as a permanent resident and has no solid ties in the country of origin. In the proposed Bill, it is arguable how one could limit the concept of "ordinary residence" by excluding a category of persons with reference to the purpose of their residence. This should not be confused with the concept of settlement, which is an additional requirement for the category under Art. 24(2)(4) (non-Chinese nationals becoming permanent residents).

Other Options

14. If as a policy, we do not want to grant permanent residency to these Mainland officials, the simple way out is to require them to return to the Mainland before they have lived here for more than 7 years. If (upon legal advice) the Administration truly believes that the correct interpretation of the Basic Law is that reflected in the proposed legislation, what it should do is just to change its policy administratively and refuse to grant permanent residency to these Mainland officials even if they have lived here for more than 7 years. In case of dispute, the matter may be resolved by the court.
15. The Administration can also consider allowing the Mainland Authorities make the decision whether to extend the employment endorsement in HK for their deployed officials, or imposing a CPG approval requirement for people from the Mainland seeking permanent resident status. Given the wordings of Article 22 of the Basic Law, such a link up may be justifiable.

Drafting Suggestion

16. Assistant Legal Adviser Arthur Cheung's suggestion of a flexible definition of "prescribed CPG travel document" is noted. To allow for some flexibility, it is suggested the definition can be changed to "...which bears an endorsement stating that..., *or such wordings with the similar effect.*"

Constitutional Affairs Committee
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