[For information]

Legislative Council
Bills Committee of Immigration (Amendment) Bill 2001

1. At the Bills Committee held on 27 June 2002, Members asked the Administration to further explain the term "ordinarily resident" and provide details of court cases as examples to illustrate how local legislation could impose restrictions on or clarify certain constitutional provisions. This paper sets out the information required.

(A) Ordinary Residence

2. In **Fateh Muhammad v. Commissioner of Registration & Another** [1] the Court of Final Appeal ("CFA") held that the expression 'ordinarily resident' was to be given its natural and ordinary meaning. What that meaning was depended on the context in which the expression appeared. Further, it was held "No Single judicial pronouncement or combination of such pronouncements in regard to the meaning of the expression 'ordinarily resident' can be conclusive for the purposes of every context in which that expression appears."

3. When it comes to statutory interpretation, the starting point for most of the courts' inquiry has been the leading case of **R. v. Barnet London Borough Council, ex parte Shah** [1983] 2 AC 309 ("**ex parte Shah**"). Lord Scarman, who gave the leading speech of the House of Lords, held that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration'.[2] One exception is that if a man's presence in a particular place or country is unlawful, e.g. in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence.[3]

4. **Ex parte Shah** was followed by the Hong Kong Court of Appeal in **Cheung Cheong v. Attorney General** [1987] HKLR 356 and **Director of Immigration v. Ng Shun-loi** [1987] HKLR 798. A person is ordinarily resident in a place when he resides in the ordinary way. Absence, enforced or otherwise,

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[1] *Fateh Muhammad v. Commissioner of Registration & Another* [2001] 2 HKLRD 659, at 664D & G
[2] *R. v. Barnet London Borough Council, ex parte Shah* [1983] 2 AC 309 at p. 343G
[3] Ibid at p. 343

would not necessarily disrupt a period of ordinary residence. It was a question of fact to be determined in the particular circumstances of each individual case.[4]

5. While the Immigration Ordinance does not have its own comprehensive definition of "ordinary residence", section 2(4)(a) of the Ordinance specifies seven categories of persons whose periods in Hong Kong shall not be treated as ordinary residence. Likewise, section 2(6) of the Ordinance lists out the relevant circumstances to be taken into account in determining a person's ordinary residence during his temporary absence from Hong Kong.

6. Section 2(4)(a)(v) of the Ordinance provides that for the purposes of this Ordinance, a person shall not be treated as ordinarily resident in Hong Kong during any period in which he remains in Hong Kong while employed as a contract worker, who is from outside Hong Kong, under a Government importation of labour scheme. The legal effect of this sub-section was considered by the Court in **Huang Bingzhi v. Immigration Tribunal** (unreported, 18 January 2002; HCAL 1718/2000).

7. This case concerns a contract worker under a Government importation of labour scheme who came to Hong Kong on 1st November 1992, his status was changed to that of a visitor in February 1995. The issue was whether section 2(4)(a)(v) of the Immigration Ordinance, which was only added in 1997, applies to a person who had not acquired the right of abode in Hong Kong before 1st July 1997. The Court refers to section 2(5)(i) of the Immigration Ordinance, which provides that section 2(4)(a) does not apply to a person who acquired the right of abode in Hong Kong before 1 July 1997, and held that there is no acquired or accrued right of a permanent resident until a continuous period of ordinary residence of not less than seven years has been completed. Therefore section 2(4)(a)(v) does apply to a person who had not acquired the right of abode in Hong Kong before 1 July 1997. This is confirmed by the Court of Appeal in CACV 357/2001 [2002] 56 HKCU 1.

8. In this connection, **Fateh Muhammad** (*supra.*) should also be considered. The case concerns whether section 2(4)(b) and paragraph 2(d) of Schedule 1 to the Immigration Ordinance, when read together with paragraph 1(4)(b) of the said Schedule, are consistent with Article 24(2)(4) of the Basic Law ('BL'). Section 2(4)(b) provides that imprisonment or detention does not count as ordinarily residence and paragraph 2(d) when read together with

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[4] *Director of Immigration v. Ng Shun-loi* [1987] HKLR 798 at 804B-C

paragraph 1(4)(b) requires that the seven year's ordinary and continuous residence relied upon in an application for Hong Kong permanent resident status under BL 24(2)(4) must come immediately before the time when the application is made. CFA upheld the constitutionality of section 2(4)(b)[5] and paragraph 1(4)(b)[6] of Schedule 1 of the Immigration Ordinance.

(B) Legislative Restrictions or Clarifications of Constitutional Provisions

Constitutional Framework

9. Since the Basic Law came into effect on 1 July 1997, Hong Kong has for the first time a written and comprehensive constitution. There are certain provisions in the Basic Law on the relationship between local legislation and the Basic Law. In this regard, BL 11(2) provides that "[n]o law enacted by the legislature of the [HKSAR] shall contravene [the Basic Law]." Laws enacted by the local legislature must be reported to NPCSC for record and any law returned by NPCSC due to non-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 HKSAR shall immediately be invalidated (BL 17(3)). BL 160(1) further provides that "[i]f any laws adopted under BL 160 are later discovered to be in contravention of [the Basic Law], they shall be amended or cease to have force in accordance with the procedure as prescribed by law".

10. As with other constitutions, the Basic Law states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise.[7] Local legislation may help determine and give effect to the broad objectives and purposes of the constitution by providing "details" for the implementation of the latter. In fact, the Basic Law expressly states that some of its articles are to be implemented "in accordance with law",[8] in which the "law" referred to likely includes local legislation. Local legislation may impose restrictions or clarify provisions of the Basic Law only if such restrictions and clarification are constitutional. As long as the HKSAR legislature acts *intra vires* and the legislation enacted does not contravene the Basic Law, any such permissible restrictions and clarification made by local legislation are constitutional.

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[5] *Fateh Muhammad v. Commissioner of Registration & Anor.* [2001] 2 HKLRD 659, at 665B
[6] Ibid, at 666 C-D
[7] *Ng Ka Ling & Others v Director of Immigration* [1999] HKLRD 315, at pp 339J – 340A.
[8] See for example BL 4, 6, 26, 36, 41, 95, 104, 105, 110, 123, 136, 138, 141, 143 and 154.

Judicial Review of Legislation and Sample Court Cases

11. The power to review the constitutionality of legislation is regarded as inherent in the process of the enforcement of the law, for when two laws are in conflict, the court has to decide which to enforce.[9] It is for HKSAR courts to determine questions of inconsistency and validity between local legislation and the Basic Law when they arise.[10] Since the Reunification, there have been several occasions in judicial proceedings that examine the constitutionality of local legislation with reference to particular BL-provisions.

***Ng Ka Ling & Others v Director of Immigration* [1999] 1 HKLRD 315**

12. This CFA case concerned, *inter alia*, whether a scheme introduced by the Immigration (Amendment) (No 3) Ordinance (No 124 of 1997) was constitutional and consistent with BL 24(2)(3). A part of the scheme required that a person's status as permanent resident by descent under paragraph 2(c) of the new Schedule 1 to the Immigration Ordinance introduced by the Immigration (Amendment) (No 2) Ordinance (No 122 of 1997) could only be established by his holding of, *inter alia*, a valid travel document issued to him and of a valid certificate of entitlement ("CoE") issued to him and affixed to such travel document. A person residing in the Mainland and person who was ordinarily resident in the Mainland immediately before landing Hong Kong should apply for a CoE through the Exit-Entry Administration of the Public Security Bureau in the district where he was residing. Such applicant should stay in the Mainland while applying CoE and while appealing against any refusal against the issue of CoE.[11]

13. CFA upheld the constitutionality of the part of the scheme mentioned above. CFA considered that one should distinguish between a permanent resident who enjoyed the right of abode on the one hand and a person claiming to be a permanent resident on the other hand. It was reasonable for the legislature to introduce a scheme which provided for verification of a person's claim to be a permanent resident. The scheme, apart from the requirement of the one way permit, was constitutional as it could not be said to go beyond verification. In holding the scheme (apart from the one way permit requirement) to be constitutional as it was directed towards verification, CFA took into account that the Director of Immigration should operate it lawfully in

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[9] Ghai, *Hong Kong New Constitutional Order – The Resumption of Chinese Sovereignty and the Basic Law* (HK: Hong Kong University Press, 2nd ed, 1999), at p 305.
[10] *Ng Ka Ling*, note 7 above, at pp 337J – 338A.
[11] *Ng Ka Ling*, note 7 above, at pp 329D – 333D.

a fair and reasonable manner and that there were safeguards to which its operation was subject.[12]

Cheung Man Wai Florence v Director of Social Welfare **[2000] 1 HKLRD A15**

14. The Applicant in this Court of First Instance ("CFI") case argued that the provisions of the Social Workers Registration Ordinance (Cap 505) ("SWRO") which required social workers to register were inconsistent with BL 144. BL 144 prescribes that "[s]taff members previously serving in subvented organisations in Hong Kong may remain in their employment in accordance with the previous system."

15. CFI upheld the constitutionality of the registration provisions of SWRO. It considered that BL 142 provided the statutory context for the provisions of BL 144, in which BL 142 required that "HKSARG, on the basis of maintaining the previous systems concerning the professions, should formulate provisions on its own for assessing the qualifications for practice in the various professions." Also pursuant to BL 145, HKSARG had the duty and was obliged to develop and improve the social welfare system as Hong Kong society required. CFI found it difficult to understand how the provisions of BL144 could, in effect, stultify such requirement given that SWRO fell squarely within the area of the development of the social welfare system.

HKSAR v Ng Kung Siu & Another **[1999] 3 HKLRD 907**

16. This CFA case concerned the freedom of expression enshrined in Art 19 of the International Covenants on Civil and Political Rights ("ICCPR") (and applicable in the HKSAR by virtue of BL 39). The question in this appeal was whether the statutory provisions which criminalize desecration of the national flag and the regional flag were inconsistent with the guarantee of the freedom of expression. The statutory provisions in question were section 7 of the National Flag and National Emblem Ordinance (No 116 of 1997) and section 7 of the Regional Flag and Regional Emblem Ordinance (No 117 of 1997) ("the Flag Ordinances").

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[12] *Ng Ka Ling*, note 7 above, at p 348C – J.

17. CFA examined whether the restriction imposed by both sections 7 of the Flag Ordinances on the freedom of expression was constitutional with reference to Art 19(3) of ICCPR:

> "…[The freedom of expression] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
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> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."[13]

18. On this basis, and having taken into account the extent of the restriction; the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag; and the necessity of such restriction, CFA held that the statutory prohibition of desecrating the national and regional flags was a justifiable restriction on the right to the freedom of expression and therefore constitutional.

19. In considering the extent of a restriction, it was well settled that any restriction on the right to freedom of expression should be narrowly interpreted. The restriction was limited in that it only banned one mode of expressing whatever the message the person concerned may wish to express, ie the mode of desecrating the flags. It did not interfere with the person's freedom to express the same message by other modes. Such limited restriction was proportionate to the legitimate interests in protecting the national and regional flags as the unique symbols of the nation and the Region within the concept of public order (*ordre public*), which included what was necessary for the protection of the general welfare or for the interests of the collectivity as a whole and such concept should remain a function of time, place and circumstances. In considering the question of necessity, the court should give due weight to the view of the HKSAR legislature that the enactment of the Flag Ordinances was appropriate and considered whether the restriction on the guaranteed right to freedom of expression was proportionate to the aims sought to be achieved.[14]

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[13] *HKSAR v Ng Kung Siu & Another* [1999] 3 HKLRD 907, at pp 919I - 920F.

[14] *Ng Kung Siu*, note 13 above, at pp 921A – 926H.

***Chan Shu Ying v CE of the HKSAR* [2001] 1 HKLRD 405**

20. This CFI case concerned whether the constitutional arrangement put into place with the promulgation of the Provision of Municipal Services (Reorganization) Ordinance (Cap 552) ("the Reorganization Ordinance") and the District Councils Ordinance (Cap 547) complied with Art 25(a) of ICCPR, BL 97 and 98.

21. By virtue of the Reorganization Ordinance, HKSARG assumed executive and administrative responsibility for various functions of a regional or local nature which were taken over from the Provisional Urban Council and the Provisional Regional Council. At the time of abolition, 18 District Councils were created in terms of the District Councils Ordinance, which were purely advisory and exercised no legislative, executive or administrative powers.

22. CFI found that the matters in issue should be judged only in the context of the new constitutional order dictated by the Basic Law. What the ICCPR sought to express were fundamental principles which would endure despite changes in government, laws or institutions and that was one of the reasons why Art 25(a) did not attempt to direct at what level there should be compliance or its modalities of compliance. CFI should not be concerned with comparing the modalities of compliance of Art 25(a) in other jurisdictions with those in Hong Kong nor with the workings of the old councils with the new set-up.[15]

23. CFI accepted that a broad concept was embodied in the words "*to take part in the conduct of public affairs*" of Art 25(a). The right conferred by Art 25(a) included in that right not only participation in institutions which had legislative, executive or administrative powers but participation also in institutions which, while not possessed of those powers, did have the power by way of open debate, consultation and advice to have real influence on public affairs. "Public affairs" covered all aspects of the formulation of public policies and their administration from the national to the regional to the local, including municipal affairs. However, that did not imply that there should exist a body at all levels through which the conduct of such affairs would take place. It was for each jurisdiction, through its constitution and laws, to decide the modalities best suited to meet the changing conditions of its own society which at the same time comply with Art 25(a).[16]

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[15] *Chan Shu Ying v CE of the HKSAR* [2001] 1 HKLRD 405, at pp 414D – 415A.
[16] Ibid, at pp 422F – 423B.

24. Regarding the Applicant's contentions under BL 97 and 98, CFI considered that BL 97 was permissive in the sense that it permitted the establishment of district organizations but did not create a constitutional obligation to establish them. If the Government and the Legislature did decide to establish district organizations, they might do so *either* to act as consultative bodies on matters of district administration and related affairs *or* to be responsible for providing local services. No obligation existed under BL 97 to create district organizations which possessed executive or administrative powers.[17] Moreover, the decision of the Preparatory Committee made on 1 February 1997 was not an attempt to be interpretive of BL 97 and 98. It did no more than making recommendations to the first CE on transitional arrangements, assuming perhaps that similar councils would replace those existing before the resumption of sovereignty.[18]

25. For the reasons given above, CFI was satisfied that the constitutional arrangement put into place with the promulgation of the Reorganization Ordinance and the District Councils Ordinance did comply with Art 25(a) and not inconsistent with BL 97 and BL 98.

***Fateh Muhammad v Commissioner of Registration & Another* [2001] 2 HKLRD 659**

26. As noted in paragraph 8 above, this CFA case concerns whether section 2(4)(b), paragraph 2(d) of Schedule 1 to the Immigration Ordinance when read together with paragraph 1(4)(b) of the said Schedule 1 were consistent with BL 24(2)(4).

27. CFA upheld the constitutionality of the above provisions of the Immigration Ordinance. The expression "ordinarily resident" was to be given its natural and ordinary meaning. What that meaning was depended on the context in which the expression appeared.[19] In the context in the present case there was a very strong case for saying that residence while serving a substantial term of imprisonment or detention in a training or detention centre was not ordinary residence.[20] Having considered the context of setting out under BL 24 the categories of persons who should have the right of abode in Hong Kong, CFA held that a purposive construction of BL 24(2)(4) drove the court to say

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[17] Ibid, at p 424B – D.
[18] Ibid, at p 425G – H.
[19] *Fateh Muhammad v Commissioner of Registration & Another* [2001] 2 HKLRD 659, at p 664D.
[20] Ibid, at pp 664J – 665C.

that the seven continuous years required by BL 24(2)(4) should come immediately before the time when an application for Hong Kong permanent resident status is made.[21]

28. The above cases provide good illustrations as to when it is permissible (and constitutional) to implement, clarify or even impose restrictions on certain provision(s) of the Basic Law (on the basis of some other BL-provision(s) as summarized below:

(a) *Ng Ka Ling* –	a statutory scheme may be enacted to provide for the verification of claims for right of abode under BL 24;
(b) *Florence Cheung* –	BL 145 provides the constitutional basis for restriction of the right of employees of subvented organizations under BL 144;
(c) *Ng Kung Siu* –	the right to freedom of expression guaranteed under ICCPR Art 19 (applicable in the HKSAR by virtue of BL 39) may be restricted in accordance with ICCPR Art 19(3);
(d) *Chan Shu Ying* –	implementation of BL 97 and 98 through the Reorganization Ordinance and District Councils Ordinance is consistent with ICCPR Art 25(a);
(e) *Fateh Muhammad* –	implementation/clarification of the concept of "ordinary residence" in BL 24(2)(4) through the Immigration Ordinance.

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[21] Ibid, at pp 665H – 666D.