

**Information paper for meeting of
LegCo Panel on Administration of Justice
and Legal Services on 22 April 2002**

**Implications of the Court of Final Appeal judgment
in the cases of Ng Siu Tung, Sin Hoi Chu and Li Shuk Fan
on litigation involving a large number of parties**

Introduction

At its meeting on 25 February 2002, the Panel discussed the implications for multi-party litigation of the above judgment of the Court of Final Appeal (FACV1-3/2001, 10 January 2002). The Panel considered papers from the Director of Legal Aid, the Judiciary Administrator and the Hong Kong Bar Association. Members agreed (paragraph 24 of the minutes of the meeting) that the Secretary for Justice (“the Administration”) be requested to provide comments on the issues raised at the meeting from a legal policy angle.

The problem

2. In the Administration’s view, it is worth noting that the perceived problem does not arise only in respect of an interpretation of the Standing Committee of the National People’s Congress (“NPCSC”) under Article 158(1) of the Basic Law. There are several situations in which the precedential value of a court’s judgment can be lost, in a way that could prejudice those who were not parties to the previous litigation. These include the situations where –

- (1) a judicial interpretation of local legislation is affected by an amendment of that legislation;

- (2) a judicial decision on a common law principle is affected by subsequent legislation;
- (3) a judicial decision (even at the highest level) is subsequently overturned by another judicial decision; and
- (4) a judicial interpretation of the Basic Law is affected by an amendment of the Basic Law (as noted in paragraph 22 of the minutes).

Conflicting values

3. The Administration considers that, in dealing with the above situations, there are different values which must be taken into account. These include –

- (1) the value of being able to amend the law when this is considered appropriate;
- (2) the value of correcting interpretations of statutory provisions that did not reflect the legislative intent;
- (3) the value of respecting the rights of parties to litigation who have obtained a court judgment in their favour;
- (4) the value of avoiding unnecessary litigation and wasteful use of resources;
- (5) the value of certainty in the rights of individuals;
- (6) the overriding value of achieving justice by treating like cases alike.

The solution

4. So far as public law litigation is concerned, the right of abode litigation has clarified the extent to which non-parties can benefit from a decision even after it is no longer good law. That clarification goes a long way to reconciling the above values. In particular, the Court of Final Appeal has decided that a specific undertaking to individuals (who can be identified as being covered by the undertaking) to the effect that they will be treated as if they were parties to the litigation, is fully enforceable, even if the precedential value of the court's decision does not last.

5. If any public law litigation in future involves a large class of potential claimants, such undertakings could be given. This would obviate the need for all claimants to join in the proceedings and would ensure that they would all benefit from (or be bound by) the courts' final decision.

6. The Administration notes paragraphs 14 to 30 of the paper dated 21 February 2002 submitted by the Bar Association and endorses the cautious approach suggested in paragraph 30.

7. The Administration has found that, in the judicial reviews relating to both the Vietnamese asylum seekers and the right of abode claimants, the outcome in relation to each applicant is likely to be at least to some extent fact sensitive and there is ultimately therefore no alternative to an individual examination of each case. Nevertheless, some legal issues apply to a number of cases and selecting a sample of cases for full litigation while putting the remainder on hold has proved an effective way of dealing with a large number of similar cases. The appropriateness of giving an undertaking in any particular case and its terms, and any conditions to which it should be subject, would have to be considered in the light of the relevant circumstances.

Civil Justice Reform

8. As noted in paragraph 29 of the Bar Association's paper, the Consultative Paper issued by the Chief Justice's Working Party on Civil Justice Reform does not focus on multi-party judicial review litigation. Further the Consultative Paper did not purport to address the concerns of the Panel, namely, the impact of the NPCSC interpretation on non-parties. In the Administration's view, this problem can already be solved in practice as suggested above and it is unnecessary to rely on civil justice reform to find a solution.

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