

**President's ruling on
the Immigration (Amendment) (No. 2) Bill 2012
intended to be introduced by Hon Jeffrey LAM**

Background

Hon Jeffrey LAM submitted to me on 25 April 2012 the Immigration (Amendment) (No. 2) Bill 2012 (“the Bill”), which he intends to introduce into the Legislative Council.

2. Rule 51(3) of the Rules of Procedure provides that Members may not either individually or jointly introduce a bill which, in the opinion of the President, relates to public expenditure or political structure or the operation of the Government. Rule 51(4) provides that in the case of a bill which, in the opinion of the President, relates to Government policies, the written consent of the Chief Executive is required for its introduction.

3. To assist me in considering whether Mr LAM’s Bill is caught by Rule 51(3) and (4) of the Rules of Procedure, I invited the Administration to comment on the Bill and Mr LAM to respond to the Administration’s comments.

Object of the Bill

4. According to its Explanatory Memorandum, the Bill seeks “to amend the Immigration Ordinance (Cap. 115) to reinstate and implement the true legislative intent of Article 24(2)(1) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (*Basic Law*) in accordance with the Interpretation by the Standing Committee of the National People’s Congress of Articles 22(4) and 24(2)(3) of the Basic Law”.

5. The Bill proposes to repeal the existing paragraph 2(a) of Schedule 1 to the Immigration Ordinance (“IO”), which specifies that “A Chinese citizen born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region” is a permanent resident of the Hong Kong Special Administrative Region (“HKSAR”), and replaces it with a new paragraph 2(a) which reads “A Chinese citizen born in Hong Kong – (i) before 1 July 1987; or (ii) on or after 1 July 1987 if his or her father or mother was settled, or had the right of abode, in Hong Kong at the time of his or her birth or at any later time”.

The Administration's view

6. The Administration is of the view that the Bill does not relate to public expenditure, political structure or the operation of the Government, but it relates to Government policies.

7. The Administration submits that Article 24(2)(1) of the Basic Law ("BL") provides that Chinese citizens born in Hong Kong before or after the establishment of HKSAR are Hong Kong permanent residents and have the right of abode in Hong Kong. Before the judgment of the Court of Final Appeal ("CFA") in *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533, it was provided in paragraph 2(a) of Schedule 1 to IO that "A Chinese citizen born in Hong Kong – (i) before 1 July 1987; or (ii) on or after 1 July 1987 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" was a Hong Kong permanent resident.

8. The Administration points out that CFA ruled in the *Chong Fung Yuen* case that, according to the common law approach to interpretation of BL, under Article 24(2)(1) of BL, Chinese citizens born in Hong Kong before or after the establishment of HKSAR are Hong Kong permanent residents, regardless of the residential status of their parents. The Administration also points out that the Legislative Council passed a resolution in 2002 to amend paragraph 2(a) of Schedule 1 to IO to bring it into line with the CFA judgment, and that the current version of paragraph 2(a) of Schedule 1 to IO reflects the prevailing government policy to implement the CFA's interpretation of BL in the *Chong Fung Yuen* case. In this regard, the Immigration Department verifies the permanent resident status of, *inter alia*, Chinese citizens born in Hong Kong in accordance with IO.

9. The Administration submits that the Bill, if enacted, will in effect restore paragraph 2(a) of Schedule 1 to IO to the position prior to the CFA judgment in the *Chong Fung Yuen* case, which is in conflict with the prevailing government policy.

10. The Administration explains that under Article 82 of BL, the power of final adjudication of HKSAR is vested in CFA. The interpretation by CFA in the *Chong Fung Yuen* case has since become the law of Hong Kong. In the absence of any further legal development, including further interpretation of Article 24(2)(1) of BL or a conclusive determination on the legal effect of the Standing Committee of the

National People's Congress ("NPCSC")'s interpretation in 1999 in relation to the legislative intent of Article 24(2)(1) of BL by CFA or NPCSC under Article 158 of BL, the interpretation by CFA in the *Chong Fung Yuen* case remains valid. The Administration submits that the Bill, if enacted, would be inconsistent with Article 24(2)(1) of BL as interpreted by CFA, and in conflict with the law. The Administration considers that it is the constitutional duty of the Legislative Council to act in accordance with BL and the laws of Hong Kong.

Hon Jeffrey LAM's response to the Administration's view

11. Hon Jeffrey LAM agrees that his Bill relates to Government policies. Mr LAM however argues that the present policy has no legal basis and no legal effect in that it is contrary to BL and ignores the statement made by the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress in 1996 ("the 1996 Opinions"). Mr LAM submits that as the present policy has given rise to serious social problems, the Government has the responsibility to review its policy and that the new term Government should implement a new policy to replace its existing one. In his submission, Mr LAM has made reference to an analysis on the Administration's view on the Bill prepared by the Basic Law Institute to support his response.

My opinion

12. According to Counsel to the Legislature, "Hong Kong permanent resident", as defined in section 2(1) of IO, means a person who belongs to a class or description of persons specified in Schedule 1 to IO, and under section 59A of IO, the Legislative Council may by resolution amend Schedule 1.

13. Counsel advises that under the existing paragraph 2(a) of Schedule 1 to IO, a Chinese citizen born in Hong Kong before or after the establishment of HKSAR is a permanent resident of HKSAR. The current version of paragraph 2(a) was introduced by a motion moved by the Secretary for Security at the Council meeting of 15 May 2002 to replace its earlier version following the CFA judgment in the *Chong Fung Yuen* case. In that case, CFA considered the meaning of Article 24(2)(1) of BL and held that in the absence of a binding interpretation by NPCSC on Article 24(2)(1) of BL, the Court was unable, on the basis of the statement in the 1996 Opinions, to depart from the clear meaning of

that Article in favour of a meaning which the language could not bear. On the proper construction of Article 24(2)(1) of BL, CFA held that Chinese citizens born in Hong Kong before or after the establishment of HKSAR had the status of permanent residents, irrespective of the status of their parents if they were born after such establishment. Counsel advises that paragraph 2(a) of Schedule 1 to IO, before it was amended in 2002, read as follows:

- “(a) A Chinese citizen born in Hong Kong –
- (i) before 1 July 1987; or
 - (ii) on or after 1 July 1987 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.”.

14. It has been established through my past rulings that in order for a bill not to be caught by Rule 51(4) of the Rules of Procedure, the bill must not have substantive effect on Government policies which include policies reflected in legislation. I accept the Administration’s submission that Hon Jeffrey LAM’s Bill, if passed by the Council, will in effect restore paragraph 2(a) of Schedule 1 to IO to the position prior to the CFA judgment in the *Chong Fung Yuen* case, which is in conflict with the prevailing government policy as reflected in the current version of paragraph 2(a) of Schedule 1 to IO. I am of the opinion that Mr LAM’s Bill has substantive effect on the Government policy in relation to the right of abode in Hong Kong.

15. The Administration has also stated in the last paragraph of its views on Hon Jeffrey LAM’s Bill that “[i]ntroduction and enactment of the Member’s Bill, which is inconsistent with the Basic Law as interpreted by the CFA, would be in conflict with the law”, and pointed out for my consideration that “it is the constitutional duty of the Legislative Council to act in accordance with the Basic Law and the laws of Hong Kong”. I should make it clear that under Rule 51(4) of the Rules of Procedure, the opinion I am required to form is whether Mr LAM’s Bill relates to Government policies. Whether there are merits in the Administration’s view that the Bill’s enactment would be in conflict with the law is not a point relevant to my consideration of the Bill in the context of Rule 51(4) of the Rules of Procedure.

My ruling

16. I rule that the Bill intended to be introduced by Hon Jeffrey LAM relates to Government policies within the meaning of Rule 51(4) of the Rules of Procedure. The written consent of the Chief Executive is required for its introduction.

(Jasper TSANG Yok-sing)
President
Legislative Council

12 July 2012