

**For discussion
on 28 May 2013**

LegCo Panel on Administration of Justice and Legal Services

Right of abode issues of children born in Hong Kong to Mainland parents both of whom are not Hong Kong permanent residents

Purpose

The Panel will discuss at its meeting on 28 May 2013 the item on “Right of abode issues of children born in Hong Kong to Mainland parents both of whom are not Hong Kong permanent residents”. This paper summarizes the Government’s position in relation to the item.

Background

2. Article 24(2)(1) of the Basic Law (BL) stipulates that Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region (HKSAR) shall be Hong Kong permanent residents (HKPRs). Article 24 further provides that HKPRs shall have the right of abode (RoA) in the HKSAR. In July 2001, the Court of Final Appeal (CFA) held in *Chong Fung Yuen* (2001) 4 HKCFAR 211 that Chinese citizens born in Hong Kong are HKPRs regardless of the residential status of their parents. Paragraph 2(a) of Schedule 1 to the Immigration Ordinance (Cap. 115) was accordingly amended in 2002 to bring the law in line with the CFA decision.

3. The number of children born by Mainland women in Hong Kong and whose fathers are not HKPRs (Type II children) soared from 620 in 2001 to 35,736 in 2011 (see figures at Annex A). This phenomenon has produced profound impact on various social and economic policy areas, causing great public concern in the HKSAR. The demand for obstetric services from Mainland pregnant women whose husbands are not HKPRs (MPW) far exceeds the capacity of local hospitals and undermines the stated policy of the Food and Health Bureau to ensure that Hong Kong resident women would be given priority for proper obstetric services. Gate-crashing by MPW at accident and emergency departments (A&EDs) of public hospitals further strains manpower and resources at the frontline. The educational, health and welfare needs of Type II children further impose tremendous pressure on our

resources on all fronts and will likely aggravate as these children grow up and move to Hong Kong. Type II children also creates great planning uncertainty in respect of Hong Kong's population policies since it is difficult to predict whether and when these children would return to live in Hong Kong. In view of the growing number of this category of HKPRs, the difficulty created by this uncertainty and the consequential impact cannot be underestimated.

4. The Government has since January 2012 stepped up various administrative measures including ceasing to accept delivery bookings by non-local pregnant women in public hospitals and setting a quota in private hospitals, and complementary immigration measures to tackle the problem. The number of Type II children dropped to 26,715 in 2012 (see Annex A). The Government has further increased the fees for non-booked deliveries at A&EDs of public hospitals and implemented zero delivery quota policy for MPW from 2013 for obstetric services. The number of non-booked deliveries at A&EDs has been contained since early 2012 (see figures at Annex B).

5. Notwithstanding these administrative measures, MPW may still seek to bypass such measures in order to acquire HKPR status for their children. Amongst others, they may enter Hong Kong at an early stage of pregnancy, overstay in Hong Kong and then gate-crash at A&EDs for deliveries. Some even seek to circumvent the zero quota policy by more innovative means such as obtaining foreign travel documents and entering Hong Kong from overseas. Administrative measures alone may not be sufficient to contain the problem in the long run. The Government has to monitor the situation closely and explore possible means including legal measures to tackle the issue.

BL 158(3) reference

6. As regards the reference to the Standing Committee of the National People's Congress (NPCSC) by the CFA to interpret the Basic Law, the CFA endorsed in its recent judgment in the foreign domestic helpers case, *Vallejos Evangeline Banao & Another v The Commissioner of Registration & Another* (FACV Nos. 19 & 20 of 2012, 25 March 2013) (the *Vallejos* case), the approach developed in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4. Ma CJ held that the CFA has a duty to make a reference under Article 158(3) of the Basic Law (BL 158(3)) if two conditions are satisfied:-

- (a) "the classification condition":- if the provisions of the Basic Law in question-

- (i) concern affairs which are the responsibility of the Central People's Government; or
 - (ii) concern the relationship between the Central Authorities and the HKSAR (provisions in (i) and (ii) being referred to as "the excluded provisions");
- (b) "the necessity condition":- if the CFA in adjudicating the case needs to interpret the excluded provisions and the interpretation will affect the judgment on the case.

7. We note that there are comments which criticised the Government for making the BL 158(3) reference request before the CFA in the *Vallejos case* as a means to resolve the RoA issue of Type II children. Those comments went on to assert that the request has undermined the rule of law and the independence of the judiciary. We do not think such criticisms are justified.

8. BL 158 clearly provides that the ultimate power to interpret the Basic Law is vested in the NPCSC, while Hong Kong courts may on their own interpret provisions of the Basic Law in adjudicating cases. As held by Ma CJ in the *Vallejos case*, the Court has a constitutional duty to make a BL 158(3) reference if the classification condition and necessity condition are fulfilled and if the requirement of arguability is satisfied. Commenting on the BL 158(3) reference, Ma CJ said: "[i]t is part of the Court's constitutional jurisdiction" (see paragraph 103(4) of the judgment in the *Vallejos case*). The seeking of an interpretation of the Basic Law by the CFA in accordance with BL 158(3) in an appropriate case where the said conditions are met will not adversely affect the rule of law or the authority of the CFA.

9. In preparing the final appeal of the *Vallejos case*, the Government simply could not assume that the CFA would reach a decision on the true construction of BL 24(2)(4) in her favour. Faced with such an important issue, any responsible government would adopt such a cautious approach especially when one takes into account the fact that Lam J, as he then was, had ruled against the Government in the Court of First Instance. Should the CFA disagree with the Government on the true construction of BL 24(2)(4), the nature of the relevant part of the Interpretation made by the NPCSC in 1999 under BL 158 and its legal effect would need to be considered by the CFA and the necessity condition would likely be satisfied. In such circumstances, the Court, as it did in the *Vallejos case*, would have to independently and impartially determine whether a BL 158(3) reference should be made after considering submissions made by the parties.

10. In *Vallejos* case, the following questions were identified by the Commissioner of Registration for a BL 158(3) reference:

- (a) What is the meaning of an “interpretation” which the NPCSC has power to give under BL 158(1)?
- (b) Whether the statement¹ contained in the penultimate paragraph of the Interpretation made by the NPCSC in 1999 on BL 22(4) and BL 24(2)(3) is or constitutes part of an “interpretation” within the meaning of BL 158(1), such that it is binding on and shall be applied by the courts of the HKSAR when deciding cases involving any one of the categories under BL 24(2) (including Article 24(2)(4))?

11. The CFA made no observation that these questions were not appropriate questions for making a reference under BL158(3). Instead, applying the classification condition, the necessity condition and the arguability factor (i.e. the requisite conditions), the CFA in the *Vallejos* case held that the classification condition was satisfied because BL 158 is a provision that concerns the relationship between the Central Authorities and the HKSAR. The CFA held that the necessity condition had not been satisfied because it had already reached a conclusion on the true construction of BL 24(2)(4) in favour of the Government. It was in such a context that the CFA found it unnecessary to make a reference to the NPCSC.

12. As illustrated in the *Vallejos* case, the Commissioner’s invitation for a judicial reference under BL 158(3) is consistent with the constitutional order within the framework of the Basic Law. More importantly, the decision of whether to make a reference to NPCSC under BL158(3) is vested solely in the CFA (although it has a constitutional duty to do so once the relevant criteria are met). In other words, it is not a decision forced upon the CFA but a decision made by the CFA by exercising its jurisdiction in an independent manner. Accordingly, any request or decision for making reference under BL158(3) do not, would not and should not be viewed as an affront to the rule of law.

¹ The statement reads as follows:

“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 Hong Kong Special Administrative Region of the People’s Republic of China, have been reflected in the “Opinions on the Implementation of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China” adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People’s Congress on 10 August 1996.”

Other options

13. The *Vallejos* case has been concluded, and the Government respects the decision made by the CFA. On the other hand, the Government fully appreciates that the community remains concerned with the issues arising from Type II children. Accordingly, with a view to tackling the issues arising from Type II children, the Department of Justice will actively continue its study and research on other legal options including those options proposed by the public, legislators, local academia and reported in the media. It should be emphasized that each option would have pros and cons and we need to assess the legal and policy implications as well as litigation risks involved in each option carefully in order to determine the best way forward.

Conclusion

14. Meanwhile, the Government would monitor the situation closely and strengthen the administrative measures as necessary to contain the problem. We would continue to explore other viable options to deter MPW from breaching our immigration control and giving birth in Hong Kong.

Department of Justice
May 2013

Number of Live Births in Hong Kong

Year	Number of live births (1) (2)	Live births to local women (2)	Number of live births born in Hong Kong to Mainland women			
			Whose spouses are HKPRs	Whose spouses are not HKPRs (3)	Others (4)	Sub-total
2001	48 219	40 409	7 190	620	–	7 810
2002	48 209	39 703	7 256	1 250	–	8 506
2003	46 965	36 837	7 962	2 070	96	10 128
2004	49 796	36 587	8 896	4 102	211	13 209
2005	57 098	37 560	9 879	9 273	386	19 538
2006	65 626	39 494	9 438	16 044	650	26 132
2007	70 875	43 301	7 989	18 816	769	27 574
2008	78 822	45 257	7 228	25 269	1 068	33 565
2009	82 095	44 842	6 213	29 766	1 274	37 253
2010	88 584	47 936	6 169	32 653	1 826	40 648
2011	95 451	51 469	6 110	35 736	2 136	43 982
2012	91 343 ⁽⁵⁾	58 144	4 698	26 715	1 756	33 199

- (1) The figures refer to the total number of live births born in Hong Kong in the reference period counted by the occurrence time of the events (i.e. births actually taking place in that reference period).
- (2) The figures include a very small number of live births born in Hong Kong to foreign women (e.g. Philippine), which are minor compared to live births born in Hong Kong to Mainland women.
- (3) Include non-permanent residents (e.g. persons from the Mainland having resided in Hong Kong for less than seven years) and non-Hong Kong residents.
- (4) The Mainland mothers chose not to provide the father's residential status during birth registration.
- (5) Provisional figure.

Annex B

Number of Non-booked Deliveries by Mainland Women at Accident and Emergency Departments of Public Hospital

Year	Month	Number of Non-booked Deliveries	
2011	January	8	Total = 894
	February	8	
	March	17	
	April	21	
	May	31	
	June	45	
	July	71	
	August	89	
	September	119	
	October	159	
	November	162	
	December	164	
2012	January	116	Total = 610
	February	78	
	March	92	
	April	74	
	May	45	
	June	41	
	July	45	
	August	33	
	September	25	
	October	25	
	November	26	
	December	10	
2013	January	22	Total = 73
	February	22	
	March	19	
	April	10	