Fateh Muhammad

and

Commissioner of Registration & Another

Li CJ, Bokhary and Chan PJJ, Nazareth and Sir Anthony Mason NPJJ
Final Appeal No 24 of 2000 (Civil)
21–23 May and 20 July 2001

Immigration — permanent residence — ordinary residence requirement — being in prison or training or detention centre did not constitute "ordinary residence" within art.24 — Basic Law art.24

Immigration — permanent residence — persons not of Chinese nationality — under art.24(2)(4), period of ordinary residence must be "immediately before" permanent residence application — Basic Law art.24(2)(4)

Words and phrases — "ordinarily resident"
[Basic Law art.24(2)(4); Immigration Ordinance (Cap.115) s.2(4)(b), Sched.1 para.1(4)(b)]

In 1998, X, a Pakistani-national, applied for a permanent identity card, claiming that he was a permanent resident under art.24(2)(4) of the Basic Law. Article 24(2)(4) provided "Persons not of Chinese nationality who have ... ordinarily resided in Hong Kong for a continuous period of not less than seven years" were permanent residents. X had lived in Hong Kong since the 1960s, but between 1994–97, had been in prison for non-immigration offences. Seven years had not elapsed since his release from prison. The lower courts held that he was not a permanent resident. X appealed.

Held, dismissing the appeal, that:

(1) The word "detention" as used in s.2(4)(b) of the Immigration Ordinance (Cap.115) was to be construed as covering only detention in a training or detention centre. (See p.283F.)

(2) Subject to the possibility that an extremely short period of imprisonment did not interrupt the continuity of residence, being in prison or a training or detention centre pursuant to a criminal conviction which had never been quashed and a sentence or order which had never been set aside, did not constitute "ordinary residence" within art.24. (See pp.283G–284F.)

(3) Further, the seven continuous years required by art.24(2)(4) must come immediately before the time when an application for permanent residence was made in reliance on those seven continuous years. (See pp.284G–285F.)

(4) Accordingly, s.2(4)(b) and para.1(4)(b) of Sched.1 to the Immigration Ordinance (Cap.115) were not unconstitutional. Section 2(4)(b) provided that imprisonment or detention did not count as ordinary residence. Paragraph 1(4)(b) provided that the seven years' ordinary and continuous residence for an applicant under art.24(2)(4) must come immediately before the time when the application was made. (See pp.284F, 285A.)

(5) Whether or not para.1(5)(b) of Sched.1 to the Immigration Ordinance (Cap.115) was constitutional was left open. X was being permitted to remain in Hong Kong, and might, three years from now, make another application for permanent resident status. Paragraph 1(5)(b) might be relevant to such application because the effect of this provision, if it was constitutional, was that even a person who had achieved seven years' continuous and ordinary residence could not obtain permanent resident status unless the Director of Immigration exercised his discretion to lift any limit on that person's stay. (See pp.286H–287E.)

[Chinese translation of headnote.]

入境——永久性居留——通常居住的要求——在監禁或教導所或勞教中心期間並不構成第24條所指的"通常居住"——《基本法》第24條

入境——永久性居留——非中國籍人士——根據第24(2)(4)條通常居住的時期必須是"緊接"在申請成為永久性居民前——《基本法》第24(2)(4)條

詞彙——"通常居住"
[《基本法》第24(2)(4)條；《入境條例》(第115章)第2(4)(b)條、附表1第1(4)(b)段]

在1998年，一位巴基斯坦籍人士，X，申請永久性居民身份證，聲稱他是《基本法》第24(2)(4)條所指的永久性居民。第24(2)(4)條規定"非中國籍人士...在香港通常居住連續7年以上"便是永久性居民。X自60年代起已居於香港。但在1994–97年間，他因非法入境罪行而被判監。他從監獄獲釋至今還沒有到7年。下屬法院裁定他並非永久性居民。X上訴。

裁決——上訴駁回：

(1) 在《入境條例》(第115章)第2(4)(b)條所指的"羈留"只可解釋為羈留在教導所或勞教中心。(見第283F頁)

(2) 除了極短的監禁期或可能不會中斷居留的連續性外，依據從未撤銷的刑事定罪或從未作廢的判刑或命令而被判監禁在監獄、教導所或勞教中心並不構成第24條所指的"通常居住"。(見第283G–284F頁)

(3) 再者，第24(2)(4)條所規定的連續7年必須是緊接在申請永久性居民身份之前的連續7年，而該申請是以此為依據。(見第284G–285F頁)

(4) 因此，《入境條例》(第115章)第2(4)(b)條及附表1第1(4)(b)段並不是非憲制性的。第2(4)(b)條規定監禁或羈留不構成通常居住。第1(4)(b)段規定申請人在香港的連續7年的通常居住必須是緊接在申請之前的連續7年。(見第284F，285A頁)

(5) 《入境條例》(第115章)第1(5)(b)是否憲制性仍有待解決。X獲准繼續在香港停留，而在3年以後或可再次申請永久性居民身份。第1(5)(b)段或與該申請有關連，因為這條款的效力是即使某人在香港連續通

常居住了7年，但除非入境事務處處長行使酌情權解除此人所有停留的限制，否則他仍不可獲得永久性居民身份。(見第286H-287E頁)

Mr Philip Dykes SC and Mr Maurice Ng, instructed by Barnes & Daly and assigned by the Director of Legal Aid, for the appellant.
Mr Joseph Fok SC and Mr Jat Sew Tong, instructed by the Department of Justice, for the first respondent.
The second respondent absent.

Legislation mentioned in the judgment
Basic Law of the Hong Kong Special Administrative Region arts.24, 24(2)(4), 25, 39
Detention Centres Ordinance (Cap.239) s.4
Immigration (Amendment) (No 2) Ordinance 1997 (No 122 of 1997)
Immigration Ordinance (Cap.115) s.2(4)(b), Sched.1, Sched.1 paras.1, 1(4)(b), 1(5)(b), 2(d), 3, 3(1)(c)
International Covenant on Civil and Political Rights art.26
Training Centres Ordinance (Cap.280) s.4

Cases cited in the judgment
Gout v Cimitian [1922] 1 AC 105
IRC v Lysaght [1928] AC 234, [1928] All ER Rep 575
Levene v IRC [1928] AC 217, [1928] All ER Rep 746
R v Barnet LBC, ex p Shah (Nilish) [1983] 2 AC 309, [1983] 2 WLR 16, [1983] 1 All ER 226

Other materials mentioned in the judgment
Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999)
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 on 10 August 1996)

Li CJ
I agree with the judgment of Mr Justice Bokhary PJ.

Bokhary PJ

Introduction

The issue in this case is whether the appellant, Mr Fateh Muhammad, has Hong Kong permanent resident status and therefore the right of abode here. If he does not, then it may well be that he will acquire such status and right in future. But that depends on what may happen in future. This appeal is concerned with Mr Muhammad's present position.

Apart from temporary absences abroad, Mr Muhammad has lived in Hong Kong ever since the 1960s. Nothing turns on those absences. On 13 May 1998, he applied to the 1st respondent, the Commissioner of Registration, for verification of his eligibility for a Hong Kong permanent identity card. Such a card signifies official recognition of the holder's Hong Kong permanent resident status with the right of abode here. On 17 June 1998, the Commissioner refused such verification. On 29 June 1998, Mr Muhammad made a formal application by which he asked the Commissioner to issue him a Hong Kong permanent identity card. On 2 July 1998, the Commissioner refused to do so.

Mr Muhammad then appealed to the 2nd respondent, the Registration of Persons Tribunal, against such refusal. His notice of appeal was filed on 4 August 1998. That appeal was heard by the Tribunal on 14 January 1999. And it was allowed by the Tribunal on 29 January 1999.

The matter then went to court. It did so by way of judicial review proceedings brought in the High Court by the Commissioner against the Tribunal and Mr Muhammad. Those proceedings were heard by Keith JA sitting as an additional judge. On 24 June 1999, Keith JA handed down his judgment. He made: (i) a declaration that Mr Muhammad was not a Hong Kong permanent resident and did not have the right of abode here; and (ii) an order of *certiorari* quashing the determination by which the Tribunal had allowed Mr Muhammad's appeal against the Commissioner's refusal to issue him a Hong Kong permanent identity card. Mr Muhammad appealed to the Court of Appeal against Keith JA's judgment. On 19 April 2000, the Court of Appeal (Mayo V-P and, as they then were, Rogers and Ribeiro JJA) handed down its judgment, dismissing Mr Muhammad's appeal against Keith JA's judgment.

Mr Muhammad now appeals to this Court from the Court of Appeal's judgment. He appeared before us by leading and junior counsel. So did the Commissioner. The Tribunal did not appear before us, it being a nominal respondent to the present appeal.

Whether Mr Muhammad has the right of abode in Hong Kong turns on the interpretation of art.24 of the Basic Law. This article confers the right of abode in Hong Kong on those persons whom it defines as the permanent residents of Hong Kong. In its second paragraph, it defines them as:

> (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
> (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;

(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);

(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;

(5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and

(6) Persons other than those residents listed in categories (l) to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

It is Mr Muhammad's contention that he comes within category (4). The courts below held that he does not. To understand their reasoning, it is necessary to be aware of these facts. Although Mr Muhammad has lived in Hong Kong for much more than seven years, his time in Hong Kong unfortunately includes his imprisonment here from 27 April 1994 to 27 February 1997 serving a sentence for conspiracy to utter forged banknotes and conspiracy to deliver counterfeit banknotes. And of course seven years have not yet elapsed from the time of his release from prison to even the present time let alone have elapsed from the time of such release to the time of any application made by him for Hong Kong permanent resident status.

In the circumstances outlined above, the courts below held against Mr Muhammad on the basis of their view of the law, the effect of which may be summarised as follows. First, they held that the ordinary residence required by art.24 does not include time spent serving a prison sentence. Secondly, they held that the seven continuous years required under art.24(2)(4) must come immediately before the time when an application for Hong Kong permanent resident status is made in reliance on those seven continuous years. Thirdly and accordingly, they held that the Legislature was acting constitutionally when it passed legislation under which: (a) imprisonment or detention does not count as ordinary residence; and (b) the seven years' ordinary and continuous residence relied upon in an application for Hong Kong permanent resident status made in reliance upon art.24(2)(4) must come immediately before the time when the application is made.

There is another point which the courts below chose not to decide because it was possible to dispose of the matter on their view of the "imprisonment" and "immediately before" points. Until I have dealt with those two points, I will say nothing more about the other point beyond identifying it as the "limit of stay" point.

Imprisonment or detention

Section 2(4)(b) of the Immigration Ordinance (Cap.115), provides that "a person shall not be treated as ordinarily resident in Hong Kong ... during any period ... of imprisonment or detention pursuant to the sentence or order of any court". This provision has been in the statute book since 1971. In challenging its constitutionality, Mr Philip Dykes SC for Mr Muhammad says that what it catches includes even: detention pending a trial which results in acquittal or the dropping of charges; detention due to mental illness; detention as a debtor; detention pending extradition which eventually fails; detention of an eventually acquitted person due to a refusal by a magistrate of bail which is then granted by a judge; and one day's imprisonment.

As to the last item in that list of Mr Dykes's, I would not like to think that such pointless deprivations of liberty are part of the Hong Kong legal scene. In any event, I would not preclude an argument, whether on the *de minimis* principle by which the law ignores trifles or on some other basis, that a term of imprisonment of that short duration would not defeat an abode claimant. The view might well be taken that such a short period of imprisonment does not interrupt the continuity of residence for the purpose of art.24(2)(4) of the Basic Law and, accordingly, of s.2(4)(b) of the Immigration Ordinance.

Turning to the other items in Mr Dykes's list, I would exclude them from s.2(4)(b)'s ambit on this simple basis. In a provision like s.2(4)(b) "detention" and "order" must, in my view, be read as being of the same nature as "imprisonment" and "sentence" respectively. Accordingly the only kind of detention covered by s.2(4)(b) is detention in a training centre or in a detention centre. (The word "order" in s.2(4)(b) is needed because, although s.4 of the Training Centres Ordinance (Cap.280), speaks of a "sentence of detention", s.4 of the Detention Centres Ordinance (Cap.239), speaks of a "detention order".)

The expression "ordinarily resident" is to be given its natural and ordinary meaning. What that meaning is depends on the context in which the expression appears. The courts have often had to grapple with the expression's natural and ordinary meaning in legislation eg as in *Levene v IRC* [1928] AC 217 and *IRC v Lysaght* [1928] AC 234 (where liability to tax was concerned) and as in *R v Barnet LBC, ex p Shah* [1983] 2 AC 309 (where entitlement to educational allowance was concerned). Although residence and its nature can be highly relevant to the common law concept of domicil, it was pointed out by Lord Carson in *Gout v Cimitian* [1922] 1 AC 105 at p.110 that the expression "ordinarily resident" (found in that case in an order-in-council) could not be interpreted by the considerations which apply when determining domicil, and must be given its usual and ordinary meaning.

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. But as a starting point at least, Viscount Sumner's observation in *IRC v Lysaght* [1928] AC 234 at p.243 that "the converse to 'ordinarily' is 'extraordinarily'" is, I think, of wide utility. Serving a term of imprisonment, at least when it is not of trivial duration, is something out of the ordinary. Of course it does not mean that a person in prison in any given jurisdiction is never to be regarded as ordinarily resident in that jurisdiction for any purpose. Certainly I would not be disposed to hold, for example, that the fact of being in prison somewhere would of itself render a person not ordinarily resident there when his being so would render him liable to tax.

The present context is a different and somewhat special one. For the question to which it gives rise is this. Does being in prison or a training or detention centre in Hong Kong pursuant to a criminal conviction which has never been quashed and a sentence or order which has never been set aside constitute ordinary residence here when seven years' ordinary and continuous residence here is a qualification prescribed by the Basic Law for attaining a valuable status and right, namely Hong Kong permanent resident status and the right of abode here? In such a context, there is a very strong case for saying that residence while serving a substantial term of imprisonment or detention in a training or detention centre is not ordinary residence. So in my judgment: (i) the answer to the question posed above is "no"; (ii) art.24 of the Basic Law is to be construed accordingly; and (iii) s.2(4)(b) of the Immigration Ordinance (construed in the way explained above) is therefore constitutional.

I turn now to the "immediately before" point.

Immediately before

Even in pre-handover days, the categories of Hong Kong permanent residents were identified in Sched.1 to the Immigration Ordinance. When it became necessary to replace it with a new schedule which complied with art.24 of the Basic Law and implemented its provisions in detail, an amendment ordinance, namely the Immigration (Amendment) (No 2) Ordinance 1997, was passed replacing the old Sched.1 with a new one. That new one is the current one. My references to Sched.1 will be to it, and my references to paragraphs will be to its paragraphs.

Paragraph 2(d) sets out this category of Hong Kong permanent resident:

> A person not of Chinese nationality who has entered Hong Kong with a valid travel document, has ordinarily resided in Hong Kong for a continuous period of not less than 7 years and has taken Hong Kong as his place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region.

That simply tracks the language of art.24(2)(4) of the Basic Law. But it is preceded by para.1(4)(b) which provides that for a person under para.2(d), the seven years must come "immediately before" the date when he applies to the Director of Immigration for Hong Kong permanent resident status.

Article 24(2)(4) of the Basic Law confers the right of abode on non-citizens in certain circumstances. I think that it may even be fairly said that it concedes that right to them in those circumstances. In the context of setting out the categories of persons who shall have the right of abode in Hong Kong, it is scarcely realistic to suppose that it was intended to confer that right on persons whose seven years' ordinary and continuous residence ended long before they took, or ends long before they take, Hong Kong as their home. It would be surprising indeed if the right of abode were to be conferred upon persons who ordinarily resided in Hong Kong without taking Hong Kong as their home and thereafter severed all connections with Hong Kong.

So unless its wording simply cannot support such a reading, a purposive construction of art.24(2)(4) drives the Court to say that the seven continuous years required by art.24(2)(4) must come immediately before the time when an application for Hong Kong permanent resident status is made in reliance on those seven continuous years. In my view, the wording of art.24(2)(4) supports such a reading. Such support is to be found generally in the tenor of the provision and particularly in the implicit link between the twin requirements of seven years' ordinary and continuous residence and of having taken Hong Kong as one's place of permanent residence. In my judgment, the seven continuous years required by art.24(2)(4) of the Basic Law must come immediately before the time when an application for Hong Kong permanent resident status is made in reliance on those seven continuous years.

On the constitutionality or otherwise of para.1(4)(b), there remains Mr Dykes's argument that it is unconstitutional as being discriminatory against non-Chinese citizens, contrary to art.26 of the International Covenant on Civil and Political Rights as enshrined in arts.25 and 39 of the Basic Law. I am able to deal with this argument quite shortly. Once it is held, as I have held, that para.1(4)(b) merely provides explicitly what art.24(2)(4) provides implicitly, there is simply no room left for challenging its constitutionality by reference to any other provision contained in or incorporated by the Basic Law. I would just add that different treatment of citizens and non-citizens in regard to the right of abode is a common if not invariable feature of the laws of countries throughout the world, including those with constitutions which prohibit discrimination. That difference of treatment flows inevitably from the fact of the political boundaries which are drawn across the globe. The "immediately before" requirement is not racist. It applies regardless of race, and there are rational and cogent grounds for it.

In my judgment, for the reasons given above, para.1(4)(b) of Sched.1 to the Immigration Ordinance is constitutional.

Common law principles

On the "imprisonment or detention" and "immediately before" points, the Commissioner succeeds on common law principles without having to rely on his alternative arguments based on what the Standing Committee of the National People's Congress's 26 June 1999 Interpretation said about certain statements made in the Preparatory Committee's 10 August 1996 Opinions. Since I arrive on common law principles at conclusions which are the same as the ones which the Commissioner says can also be derived from that other source, it is unnecessary to address those alternative arguments.

Mr Muhammad does not yet have the right of abode

The view which I have formed on the true construction of art.24(2)(4) of the Basic Law and on the constitutionality of s.2(4)(b) of the Immigration Ordinance and para.1(4)(b) of Sched.1 to that Ordinance is sufficient to dispose of the matter as it now stands. Mr Muhammad does not yet have Hong Kong permanent resident status and therefore does not yet have the right of abode here. This is because he has not yet achieved the necessary period of seven years' ordinary and continuous residence in Hong Kong immediately before applying for Hong Kong permanent resident status.

Mr Muhammad is being permitted to live in Hong Kong and may well acquire Hong Kong permanent resident status and therefore the right of abode here before too long. This is because on 26 February 1999 the deportation order which had been made against him on 24 February 1997 was rescinded and is therefore to be ignored for all purposes. Hence it would appear that he has been ordinarily and continuously resident in Hong Kong ever since his release from prison on 27 February 1997. On that footing, if he continues to be ordinarily resident here, he will achieve the requisite residence in three years' time from now.

Limit of stay

The "limit of stay" provisions contained in paras.1 and 3 of Sched.1 to the Immigration Ordinance would then arise.

Paragraph 3(1)(c) provides that a person seeking to establish Hong Kong permanent resident status under para.2(d) (which tracks art.24(2)(4) of the Basic Law) is required to be settled in Hong Kong at the time of his declaration that he has taken Hong Kong as his place of permanent residence. This brings one back to para.1(5) which reads:

A person is settled in Hong Kong if:

(a) he is ordinarily resident in Hong Kong; and
(b) he is not subject to any limit of stay in Hong Kong.

Item (a) poses no problem. It is subsumed by the requirements of art.24(2)(4) of the Basic Law as I have construed those requirements.

Keith JA had misgivings over para.1(5)(b)'s constitutionality. In the Court of Appeal, one member was silent on para.1(5)(b), another drew attention to Keith JA's misgivings and yet another thought that para.1(5)(b) was constitutional.

On the material before us, there is no reason to assume that the Director of Immigration would refuse to exercise his discretion in favour of lifting any limit on Mr Muhammad's stay once he has achieved seven years' continuous and ordinary residence in Hong Kong and then applies to the Director for Hong Kong permanent resident status. But is it constitutional to make such an applicant's Hong Kong permanent resident status dependent on a successful exercise of administrative discretion or, failing that, a successful administrative appeal or, failing even that, a successful judicial review challenge? This is a serious question to be determined on some future occasion on which it may arise.

Result

Keith JA made no order as to costs other than an order for legal aid taxation of Mr Muhammad's own costs. But in addition to ordering legal aid taxation of Mr Muhammad's own costs, the Court of Appeal ordered costs in favour of the Commissioner. Mr Joseph Fok SC, who appeared for the Commissioner here and below, informed us that he had not asked the Court of Appeal for costs in favour of the Commissioner. Mr Fok also informed us that even if the Commissioner were successful before us, he would not seek costs here and would be agreeable to our setting aside the costs order made in his favour by the Court of Appeal. Mr Fok's approach is a sensible one to adopt in the circumstances.

In the result, I would set aside the order for costs made by the Court of Appeal in the Commissioner's favour, but otherwise dismiss this appeal, and make no order as to the costs before us other than an order for legal aid taxation of Mr Muhammad's own costs.

Chan PJ
I agree with the judgment of Mr Justice Bokhary PJ.

Nazareth NPJ
I agree with the judgment of Mr Justice Bokhary PJ.

Sir Anthony Mason NPJ
I agree with the judgment of Mr Justice Bokhary PJ.

Li CJ
The Court unanimously sets aside the order for costs made by the Court of Appeal in the Commissioner's favour, but otherwise dismisses this appeal, and makes no order as to the costs before us other than an order for legal aid taxation of Mr Muhammad's own costs.