

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

Facts

The Appellants claimed to have right of abode in Hong Kong. They were in Hong Kong before 10 July 1997 when the Immigration (Amendment) (No. 3) Ordinance 1997 ("the No. 3 Ordinance") was enacted which required the Appellants to apply for a certificate of entitlement in Mainland in order to establish their right of abode. The No. 3 Ordinance was deemed to come into operation on 1 July 1997 and the Appellant's right of abode was hence subject to the discretionary control of the Mainland authorities.

Issues

One of the issues arose was the proper approach to interpret the Basic Law.

Court of Final Appeal Decision

In the interpretation of a constitution, such as the Basic Law, a purposive approach was to be applied. The Court should consider :

1. the principles of the particular provision declared in or ascertained from that provision and other provisions in the Basic Law and other relevant extrinsic materials; and
2. the language of its text in the light of the context found in the Basic Law and relevant extrinsic materials. The Court had to avoid a literal, technical, narrow and rigid approach.

Comments

The extract of the Court decision quoted by the Department of Justice on the approach to interpretation of the Basic Law is pertinent. However, the Court of Final Appeal has made the following qualification in its decision:

"What we have set out above cannot be and is not intended to be an exhaustive statement of the principles the courts should adopt in approaching the interpretation of the Basic Law. Constitutional interpretation, like other forms of interpretation, is essentially question specific. As and when questions of interpretation arise, the courts will address the challenges posed by the questions raised and develop principles as necessary to meet them." ([1999] 1 HKLRD 315 at 340J).

**HKSAR
and
Ma Wai Kwan, David & Others
[1997] HKLRD 761 at 772I**

Facts

The Respondents were charged in 1995 with an offence at common law of conspiracy to pervert the course of public justice. When the trial resumed on 3 July 1997, the Respondents raised the argument that common law did not form part of the Laws of the HKSAR as there was no positive act of adoption of law previously in force in Hong Kong.

Court of Appeal Decision

1. A generous and purposive approach was more appropriate in interpreting the constitutional aspects of the Basic Law.
2. The whole tenor of the Basic Law was to establish continuity save for those changes necessary upon the resumption of exercise of sovereignty by the PRC. The intention of the Basic Law indicated that there should be no change in the laws and legal system in Hong Kong, except those which contravened the Basic Law. No positive act of adoption of the common law was required.

Comments

The Court decision was on the law, legal and judicial systems.

**Cheung Man Wai Florence
and
The Director of Social Welfare
(HCAL No. 25 of 1999)**

Facts

The Social Workers Registration Ordinance Cap. 505 which required registration of social workers was enacted on 6 June 1997. The Applicant, who has been a Social Worker Assistant in a voluntary organization subvented by the Social Welfare Department since 1996, refused to register.

Issues

One of the issues raised by the Applicant was that she was qualified under BL144 as "a staff member previously serving in subvented organizations in Hong Kong" and thus could "remain in her employment in accordance with the previous system".

Court of First Instance Decision

1. The relevant date for "the laws previously in force in Hong Kong" was 30 June/1st July 1997. As the statutory system of registration for social welfare workers was established before the relevant date, the registration requirement was "in the previous system".
2. BL 142 provides for the statutory context of BL144. BL144 should be read in the light of BL 142 and BL145.

"Pursuant to Article 145 the Government has the duty and is obliged to develop and improve the social welfare system as Hong Kong society requires, and I find it difficult to understand how the provisions of Article 144 could, in effect, stultify this requirement given that the legislation complained of falls squarely within the area of the development of the social welfare system."

Comments

The Court decision on BL 144 was made in the light of BL 142 and 145. While BL 100 mirrors BL 144, there is no provision in the Basic Law which resembles BL 142 and BL 145 to enable or impose a duty on the Government to develop and improve the Government structure.

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**The Association of Expatriate Civil Servants of Hong Kong
and
The Secretary for the Civil Service
(HCAL No. 9 of 1998)**

Facts

The Association of an Expatriate Civil Servants claimed that the Chinese language proficiency requirement for the transfer from agreement terms to permanent terms of employment introduced after June 1997 was in breach of Article 100 of the Basic Law.

Court of First Instance Decision

"Article 100 is principally intended to ensure continuity of employment so that no public servant suffers as a consequence of the transition itself. Whatever else may have been the intention, Article 100 is not intended to inhibit the introduction of new measures for the good governance of Hong Kong."

Comments

The decision was on BL 100. There was no reference to BL 103 which provides : "Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained".