For information
24 January 2002

LegCo Panel on Security

Judgment of the Court of Final Appeal on the Ng Siu Tung, Sin Hoi Chu and Li Shuk Fan cases

Introduction

This paper sets out Government's position on the Court of Final Appeal (CFA)'s judgment on the Ng Siu Tung, Sin Hoi Chu and Li Shuk Fan cases.

Background

2. The Ng Siu Tung case and Sin Hoi Chu case involve about 5,000 applicants, from whom 24 representative applicants have been selected for determination of the legal issues involved. The third case relating to a single applicant, Li Shuk Fan, was heard by the CFA at the same time. The litigation relates to two provisions of the Basic Law, BL 22(4) and BL 24(2)(3). BL 22(4) provides that people from other parts of China require approval for entry into Hong Kong. BL 24(2)(3) confers the right of abode (ROA) on persons of Chinese nationality born outside Hong Kong, of persons who are themselves permanent residents of Hong Kong by virtue of BL 24(2)(1) or BL 24(2)(2).

3. On 29 January 1999, in the Ng Ka Ling case and Chan Kam Nga case, the CFA ruled that the provisions of the Immigration Ordinance requiring a Certificate of Entitlement to be affixed to a One-way Permit and limiting ROA under BL 24(2)(3) to persons who at the time of their birth had a parent who already had ROA, were unconstitutional. In the Ng Ka Ling case, the CFA upheld the requirement that a person claiming ROA under BL 24(2)(3) had to apply for a Certificate of Entitlement while remaining outside Hong Kong.

4. On 26 June 1999, the Standing Committee of the National People's Congress (NPCSC), in exercising its power of interpretation under BL 158(1), interpreted BL 22(4) and BL 24(2)(3). The Interpretation confirmed the constitutionality of the relevant provisions of the Immigration Ordinance. It also stated that it had application from 1

July 1997, but that it does not affect the ROA which has been acquired under the two judgments of the CFA of 29 January 1999 by "the parties concerned in the relevant legal proceedings". On 3 December 1999, the CFA, in the Lau Kong Yung case, held that the NPCSC has the power to make an interpretation and that the Interpretation of BL 22(4) and BL 24(2)(3) is valid and binding and has effect from 1 July 1997.

5. On 26 June 1999, Government announced that it would treat persons as being "parties to the relevant legal proceedings" and thus unaffected by the Interpretation if they satisfied certain criteria. This policy decision was referred to as Government's "Concession". The criteria are that an ROA claim had to be made to the Director of Immigration whilst an applicant was in Hong Kong between 1 July 1997 and 29 January 1999, and the claim must be one of which the Director has a record.

6. The applicants in the Ng, Sin and Li cases argued that they have rights which accrued under the CFA judgments of 29 January 1999, and that their rights were unaffected by the Interpretation. The applicants also argued that they had a legitimate expectation, alleged to arise from certain statements, that they would be treated in the same way as the parties to the CFA judgments of 29 January 1999. They also challenged the meaning, ambit and application of the Concession. The CFA heard the three cases on 28 – 31 May, 19 – 21 June, and 6 – 7 September 2001 and delivered its judgment on 10 January 2002.

CFA Judgment

7. The following summarises the CFA judgment in respect of four major issues concerning ROA, but it is no substitute for the judgment of the court-

(a) On the "judgments previously rendered" issue, the CFA ruled against the applicants.

(b) On the "legitimate expectation" issue, the CFA allowed the appeal in respect of the applicant who was a recipient of the proforma reply from the Legal Aid Department sent between 7 December 1998 and 29 January 1999 and in respect of the applicant who received a letter dated 24 April 1998 from the Secretary for Security. The CFA found each document to be amounting to a specific representation to the applicant concerned that he would be treated as if he was a party to the Ng Ka Ling and Chan Kam Nga cases. The appeals of the

two applicants have been allowed, the removal orders against them were quashed and the Director of Immigration was to reconsider their cases.

(c) On the issue relating to "Period 1" (i.e. before 1 July 1997) and "Period 2" (between 1 July to 10 July 1997) arrivals, the CFA only allowed the appeal in respect of the applicant who arrived in Hong Kong in Period 1 and who was born after one of his parents had become a Hong Kong permanent resident.

(d) On the "Concession" issue, the CFA held that there was no misinterpretation or misapplication of the policy decision by the Director of Immigration, although the CFA found that in certain cases the Director had applied too strict a construction of what constituted a claim falling within the policy decision.

8. Except for the individual cases mentioned above, the other representative applicants' appeals were dismissed. For the formal disposal of the appeals of all the applicants in these three appeals, Government and the applicants' solicitors are directed to consult together to draw up and submit a draft of formal orders for the CFA's approval.

Government's Position

9. The CFA judgment lays down a firm legal basis and clear yardsticks for dealing with the many ROA cases which arose in the past two years. Government respects the judgment and will take necessary measures to implement it in accordance with the law.

10. For Mainland residents who have no right to remain in Hong Kong, the Public Security Ministry (PSM) in the Mainland made an announcement on 10 January 2002, giving an assurance that for persons who were parties relating to ROA litigation and their children under 18, if they were willing to voluntarily return to the Mainland within the grace period from 11 January to 31 March 2002, no sanction would be imposed against them for having illegally entered or overstayed in Hong Kong in violation of the applicable exit permission of the Mainland. They can still go to Hong Kong in future to visit their relatives. A copy of the announcement is at Annex. Government will not take removal actions against those with no right to stay in Hong Kong before the end of the grace period announced by the Mainland authorities, i.e. on or before 31 March 2002.

11. Government appeals to ROA claimants to accept the judgment rationally and to return to the Mainland voluntarily. Apart from the pledge that no removal action will be taken before the end of the grace period, hotlines have been set up by the Social Welfare Department and a voluntary agency to provide counselling and other appropriate assistance for those in need.

Security Bureau
January 2002

附件
Annex

新　聞　稿

公安部出入境管理局就 1 月 10 日香港特區終審法院判決“吳小彤及冼海珠在港居留權案”發表講話：希望現時在香港爭取居留權的滯留人員服從香港特區終審法院的判決，盡快離開香港返回內地，並重申這些人員返回內地後，仍可依法申請赴港定居、探親和旅遊。

該局負責人介紹，1 月 10 日香港終審法院對吳小彤及冼海珠爲代表的居留權訴訟案的判決，有利於維護內地與香港的人員往來正常管理秩序。爲勸導在港爭取居留權的滯留人員盡快返回內地，決定自 2002 年 1 月 11 日至 3 月 31 日爲“寬限期”。涉及居留權訴訟的在港滯留人員以及他們的未成年香港子女，若自願返回內地，可向香港入境事務處申領有關身份證明函件、內地口岸邊防檢查機關憑此函件放行。內地有關部門不會對他們逾期或非法滯留香港的行爲進行追究，他們今後前往香港探親、旅遊也不會受到影響。公安機關出入境管理部門已放寬無依靠未成年人赴港定居的年齡限制，由 14 周歲放寬至 18 周歲，凡未滿 18 周歲且父母均爲香港居民的人員，可申請赴港定居，相信符合條件的未成年人在一年內均可赴港定居。