For information

LegCo Panel on Security

Verification of non-Chinese nationals as Hong Kong Permanent Residents

Purpose

This paper provides information relating to the revised procedures applicable to the verification of non-Chinese nationals as Hong Kong permanent residents.

Background

2. According to Article 24(2)(4) of the Basic Law (BL24(2)(4)), a person not of Chinese nationality is a Hong Kong permanent resident on the condition that he/she has entered Hong Kong with a valid travel document, has ordinarily resided in Hong Kong for a continuous period of not less than seven years and has taken Hong Kong as his/her place of permanent residence. Detailed arrangements for implementing BL24(2)(4) are set out in paragraph 2(d) and paragraph 3 of Schedule 1 to the Immigration Ordinance (Cap. 115).

3. Before the Court of Final Appeal (CFA) judgment of 11 February 2003 on *Prem Singh v Director of Immigration (FACV No. 7 of 2002)*, it was provided in paragraph 3(1)(c) of Schedule 1 that a person not of Chinese nationality had to be "settled" in Hong Kong when he/she made a declaration to the Director of Immigration that he/she had taken Hong Kong as his/her place of permanent residence in accordance with paragraph 3(1)(b) of the said Schedule. It is further provided in paragraph 1(5) of the said Schedule that a person is "settled" in Hong Kong if he/she is ordinarily resident in Hong Kong and is not subject to any limit of stay (i.e. on unconditional stay status). In other words, before the CFA judgment, non-Chinese nationals had to obtain unconditional stay status before they were eligible to apply for Hong Kong permanent resident status.

The CFA judgment

4. A copy of the CFA judgment of February 2003 is at Annex. The relevant orders made in the judgment may be summarized below:

(a) the "settled" requirement in paragraph 3(1)(c) of Schedule 1 to the Immigration Ordinance contravenes BL24(2)(4) and is unconstitutional to the extent that such paragraph, in combination with paragraph 1(5)(b) of the said Schedule, requires a person not to be subject to any limit of stay in Hong Kong at the time of making the declaration of having taken Hong Kong as place of permanent residence referred to in paragraph 3(1)(b) of the said Schedule or at the time of such person's application for verification of his status as a permanent resident of the Hong Kong Special Administrative Region within BL24(2)(4); and

(b) the Director of Immigration is directed to determine the application made by the appellant in that case for verification as a Hong Kong permanent resident in accordance with the judgment.

5. Mr Justice Ribeiro pointed out in paragraph 64 of the judgment that the "permanence requirement" in BL24(2)(4) (i.e. having taken Hong Kong as place of permanent residence) "makes it necessary for the applicant to satisfy the Director both that he intends to establish his permanent home in Hong Kong and that he has taken concrete steps to do so. This means that the applicant must show that his residence here is intended to be more than ordinary residence and that he intends and has taken action to make Hong Kong, and Hong Kong alone, his place of permanent residence. The nature of the permanence requirement may be illuminated by contrasting the 'taking of Hong Kong as a person's place of permanent residence' with merely ordinary residence in Hong Kong". The judge further explained in paragraph 66 of the judgment that "(t)he permanence requirement in BL24(2)(4) demands more in at least two respects. The intention must be to reside, and the steps taken by the applicant must be with a view to residing, in Hong Kong permanently or indefinitely, rather than for a limited period. Such intention and conduct must also be addressed to Hong Kong alone as the applicant's only place of permanent residence". His view was agreed by three other judges in the CFA and hence formed the majority view of the highest court.

6. The CFA's majority view on the "permanence requirement" is a judicial pronouncement and an authoritative interpretation of the relevant provision of the Basic Law. Indeed, it is clearly stated in the CFA's order in that case that the Director of Immigration has to determine the application of the appellant for permanent resident status in accordance with the judgment. It follows that all other similar applications from non-Chinese nationals have to be dealt with in the same way.

The new procedures

7. As a result of and in line with the CFA ruling, non-Chinese nationals applying for permanent resident status are no longer required to obtain unconditional stay status beforehand. Applicants are now required to declare and demonstrate to the Immigration Department that they have the intention and conduct to make Hong Kong their only place of permanent residence.

8. Apart from certain basic information required to be furnished in the application form such as period of ordinary residence in Hong Kong, place of residence of family members and period of continuous absence, it is up to the applicant concerned to make available any other relevant information to the Immigration Department to support his/her application.

9. The new procedures have come into effect since 16 June 2003. To address the concerns of the expatriate community, we have made it clear that ownership of property in Hong Kong or having a family here are not prerequisites for complying with the permanence requirement. Neither does temporary absence from Hong Kong or ownership of property elsewhere necessarily mean that a person is not ordinarily resident here or not taking Hong Kong as his only place of permanent residence. The Immigration Department will carefully and reasonably consider all relevant factors in a case before making a decision. No single factor is necessarily decisive in the assessment of an application. Any grievance with the Department's decision is subject to statutory objection procedures under the Immigration Ordinance and judicial review by the court.

Security Bureau
September 2003

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附件
Annex

FACV No. 7 of 2002

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 7 OF 2002 (CIVIL)
(ON APPEAL FROM CACV NO. 260 OF 2001)

Between:

PREM SINGH **Appellant**

- and -

DIRECTOR OF IMMIGRATION **Respondent**

Court: Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ

Dates of Hearing: 14 – 16 January 2003

Date of Judgment: 11 February 2003

JUDGMENT

Chief Justice Li :

1. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Bokhary PJ :

2. From all over the world many persons not of Chinese nationality come to Hong Kong with valid travel documents, are given permission to enter and are then permitted to remain year after year. Article 24(2)(4) of our constitution the Basic Law provides such persons with a means by which to acquire Hong Kong permanent resident status, which carries with it the right of abode here. It enables them — if they are permitted to enter and then remain long enough — to acquire such status by ordinarily residing here for a continuous period of not less than seven years and taking Hong Kong as their place of permanent residence. They take Hong Kong as their place of permanent residence by ordinarily residing here for the requisite period and treating Hong Kong as their home indefinitely rather than for a limited period. Then all that they have to do is claim permanent resident status by applying for it in reliance upon having so resided here immediately before making that application. Once their claim is verified, they may enjoy their permanent resident status. This is all perfectly straightforward, as it should be. Any formalism, complication or subtlety by which a claim to a constitutional status or right can be denied or delayed would inevitably erode public confidence in the law.

3. Persons who eventually acquire permanent resident status by virtue of art. 24(2)(4) would have started off by having to rely on an exercise of administrative discretion in favour of permitting them to enter and then remain for a certain period. Thereafter they would have had to rely on successive exercises of administrative discretion in favour of permitting them to remain for further periods. But once they manage to bring themselves within the plain terms of art. 24(2)(4), their position ceases to be subject to administrative discretion and comes under constitutional protection.

Verification only

4. The legal question of whether a person has permanent resident status is the province of the Basic Law to the exclusion of ordinary law which has no role in this legal question. In this area the role of ordinary law is confined to providing proper machinery for verifying the crucial facts. This brings me to Schedule 1 to the Immigration Ordinance, Cap. 115, which is headed "Permanent Residents of the Hong Kong Special Administrative Region". The relevant provisions of this schedule are paras 1, 2 and 3. Do these provisions serve the Basic Law's purposes or do they run counter to those purposes? Paragraph 2(d) poses no problem. It simply tracks art. 24(2)(4). But then we come to a word which is not in art. 24(2)(4). It is the word "settled". Paragraph 3(1)(c) says that a person seeking to establish Hong Kong permanent resident status under para. 2(d) must be "settled" in Hong Kong at the time of his declaration that he has taken Hong Kong as his place of permanent residence.

5. Does the introduction of the word "settled" purport to make a constitutional status subject to a condition which the constitution itself does not impose? To find out, we have to look at certain other provisions of Schedule 1. Paragraph 1(5) 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".

Constitutional rights / administrative discretion

6. Apart from the problem of its being tacked to the word "settled" which is not in art. 24(2)(4), the condition in para. 1(5)(a) that the person be ordinarily resident in Hong Kong seems innocuous in itself. But what about paras 1(5)(b) and 3(1)(c)? In order to enjoy their permanent resident status,

people have to declare that they have taken Hong Kong as their place of permanent residence. But paras 1(5)(b) and 3(1)(c) combine to say that they cannot make such a declaration if they are subject to a limit of stay. Being conferred by the Basic Law, Hong Kong permanent resident status is a constitutional status. It carries, in particular, the three constitutional rights which the Basic Law reserves exclusively to Hong Kong permanent residents, namely the right of abode, the right to vote and the right to stand for election. By contrast, whether or not to lift a limit of stay is a matter for the exercise of the Director of Immigration's discretion under the Immigration Ordinance.

7. Can ordinary law make a constitutional status or right dependent upon a favourable exercise of an administrative discretion or, failing that, a successful administrative appeal or, failing even that, a successful judicial review challenge? In my view, such a state of affairs would be unconstitutional. As Lord Shaw of Dunfermline said in *Scott v. Scott* [1913] AC 417 at p.477:

> "To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand."

Indeed the notion of any legal right, let alone a constitutional right, being downgraded to something which can be granted or withheld as a matter of discretion is repugnant to the rule of law. As Alexis de Tocqueville is quoted in RJ Vincent: *Human Rights and International Relations* (1986) at p.17 as having said:

> "There is nothing which, generally speaking, elevates and sustains the human spirit more than the idea of rights. There is something great and virile in the idea of right which removes from any request its suppliant character, and places the one who claims it on the same level as the one who grants it."

8. Having the right of abode in Hong Kong, which right comes with Hong Kong permanent resident status, entitles a person to stay here without any limit. Therefore no limit on a person's stay in Hong Kong can co-exist with his

or her enjoyment of the right of abode here. Any such limit would have been imposed under ordinary law, namely the Immigration Ordinance. But the right of abode is a constitutional right conferred and entrenched by the Basic Law. Basic Law rights and freedoms are neither dependent upon nor defeasible by ordinary law. Therefore no limit on a person's stay in Hong Kong can impede the verification of his or her acquisition of the right of abode here by ordinarily residing here for a continuous period of not less than seven years, treating Hong Kong as his or her home indefinitely rather than for a limited period and applying for permanent resident status in reliance upon having so resided here immediately before making that application. Limiting her client's constitutional challenge to no more than what is needed for the purposes of the case at hand, Ms Audrey Eu SC for the appellant submits that para. 3(1)(c) is such an impediment and is therefore unconstitutional.

9. I agree. Para. 3(1)(c) of Schedule 1 to the Immigration Ordinance is unconstitutional. There was, I should mention, some suggestion in the course of the argument that to so hold might make the Director prone to exercise his discretionary powers so as to prevent non-Chinese nationals from building up seven years' ordinary and continuous residence. I do not consider it appropriate to say in advance what the courts would do in a judicial review challenge to such behaviour. But there are two things that I will say. To begin with, I note in fairness to the Director that he himself has not said that he would behave in that fashion. And in any event, the position is simply this. The courts have to uphold the Basic Law no matter how anybody may react to our doing so. No other course is open to us. Upholding the Basic Law is the first thing that every member of Hong Kong's judiciary swears to do when he or she takes the judicial oath.

The facts

10. I turn now to the facts of the present case. The appellant is an Indian national. In January 1988 he entered Hong Kong with a valid travel document. He lawfully took up employment here. In July 1996 he got married here. On 24 October 1998 he went to the Immigration Department in order to apply for an extension of stay based on new employment. At the Immigration Department a member of the Immigration Service asked him: "You change your job?" He replied "Yes". She then said to him: "On the application form you should say 'unconditional stay'. When you get your unconditional stay you can then apply for the right of abode." He filled in and submitted an application form accordingly.

11. That, Ms Eu submits as her primary point on the appellant's behalf, amounted to an application for permanent resident status. Even though this submission was not pursued before the Court of Appeal after having been rejected at first instance, I think that the circumstances of the present case are so very exceptional that we ought nevertheless to entertain the submission. The facts are clear, and leaving the point undecided would be most unfortunate. Failing his contention that the submission ought not to be entertained, Mr Joseph Fok SC for the Director of Immigration argued that on the merits the appellant cannot be taken to have applied for permanent resident status until 30 May 2000 when he sought verification of his eligibility for a permanent identity card.

Substance over form: application made

12. Despite the skill with which Mr Fok advanced it, I am unable to accept that argument. Having laid down in art. 24(2) who shall be permanent residents of Hong Kong, the Basic Law then provides in art. 24(3) that they "shall have the right of abode in the Hong Kong Special Administration Region

and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode". So permanent resident status carries with it the right of abode. Such status and right entitles a person to a permanent identity card stating that right of his or hers. As I said in *Fateh Muhammad v. Commissioner of Registration* (2001) 4 HKCFAR 278 at p.281 B-C in a judgment with which the other members of the Court agreed, a permanent identity card "signifies official recognition of the holder's Hong Kong permanent resident status with the right of abode here". A permanent identity card is not a source of or a pre-condition to, but is merely a badge of, permanent resident status and the right of abode. Such a card is a constitutional entitlement of all persons upon whom the Basic Law confers such status and right. It is impossible to say that you cannot apply for the status except by applying for the card. After all, you do not get the status because you have the card. It is the other way round. You get the card because you have the status.

13. On any view other than one so insistent on form over substance to the individual's disadvantage as to be unsuited to constitutional affairs, the appellant applied for permanent resident status when he submitted the application form which he submitted on 24 October 1998, and this application carried over to the time when he sought verification of his eligibility for a permanent identity card. By then he had made a declaration, which related back to 24 October 1998, that he had taken Hong Kong as his place of permanent residence. All that then remained for the Immigration Service to do was to verify the crucial facts. This brings me to Mr Fok's point based on s.2(4)(a)(ii) of the Immigration Ordinance which says that for the purpose of that Ordinance a person shall not be treated as ordinarily resident in Hong Kong during any period in which he remains in Hong Kong in contravention of any condition of stay.

14. The appellant had been granted an employment visa to enable him to work as a cook for a certain employer until 17 July 1999 or two weeks after the termination of his contract of employment with that employer, whichever came earlier. On 27 September 1998 the appellant left his employment with that employer. Mr Fok contends that two weeks thereafter i.e. on 12 October 1998 the appellant became an overstayer and ceased to be ordinarily resident in Hong Kong. To this contention Ms Eu makes a number of responses. I will mention two of them. One response which I will mention is that s.2(4)(a)(ii), which after all has penal implications, simply does not apply to situations like the present where the appellant dealt openly with the Immigration Service, and, with full knowledge of the facts, it invited him to apply for unconditional stay and the right of abode thereafter. The other response which I will mention runs thus. In any event, the appellant's stay had been enlarged and, as the Court of Appeal held in *Sae-Ang Paisarn v. Director of Immigration* [1989] 1 HKLR 205, such enlargement filled any gap in the total period of ordinary and continuous residence of the person concerned. Having invited the appellant to apply for unconditional stay and the right of abode thereafter, the Immigration Service then entertained the application which he made upon that invitation. And there is no justification in any context, let alone a constitutional one, for refusing to recognize that as an enlargement of the appellant's stay.

15. The Director has not yet applied his mind to what he would do in regard to s.2(4)(a)(ii) if the appellant's application for permanent resident status had indeed been made on 24 October 1998. Would the Director maintain his s.2(4)(a)(ii) point? And even if he did, would he exercise his discretion to enlarge the appellant's stay? The s.2(4)(a)(ii) point would not call for decision unless, looking at the matter afresh on the basis that the appellant had applied for permanent resident status on 24 October 1998, the Director nevertheless

maintains the point and declines to exercise his discretion to enlarge the appellant's stay. At this stage, I would leave the s.2(4)(a)(ii) point to one side.

16. For the foregoing reasons, I would decide in the appellant's favour on the primary point advanced on his behalf by Ms Eu.

Imprisonment

17. Nevertheless I propose to deal with the appellant's alternative point which was ably advanced by Ms Eu and ably opposed by Mr Fok. This is that despite the two weeks' imprisonment which the appellant served in 1999, he would have seven years' ordinary and continuous residence immediately preceding his application for permanent resident status even if he had not applied for such status until 2000. Ms Eu put this alternative point in two alternative ways. The first is that the two weeks do not prevent the whole period including those two weeks from being ordinary and continuous residence. And the second way is that the two weeks do not break the continuity of the period excluding those two weeks and bisected by them. The appellant is not relying on the inclusion of the two weeks in order to achieve a total of at least seven years. So either way would, if it succeeds, serve his purpose.

18. The abode claimant in *Fateh Muhammad's* case was sentenced to six years' imprisonment. Including the time which he spent in custody before he was sentenced and with one-third remission for good behaviour, he had been in prison for four of the seven years immediately preceding his application for permanent resident status. Such imprisonment, we held, meant that he could not be said to have been ordinarily resident in Hong Kong for a continuous period of not less than seven years immediately preceding his application for

permanent resident status. But we left open the question of whether or not imprisonment for a shorter period would defeat an abode claimant.

19. Two passages should be cited from my judgment in that case, with which judgment the other members of the Court agreed. The first is at p.283 A-G, and reads:

> "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'.)"

20. The second passage is at pp 283J-284F, and reads:

> " 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."

21. Ms Eu cited the decision of the United States Supreme Court in *Wisconsin Department of Revenue v. William Wrigley Jr Co.* 505 US 214 (1992). She places reliance on two propositions stated in the judgment of the majority delivered by Scalia J. The first is at p.231 where it is said that the *de minimis* principle "is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept". The second proposition is to be found at p.232 where it is said that "[w]hether a particular activity is a *de minimis* deviation from a prescribed standard must, of course, be determined with reference to the purpose of the standard".

22. Scalia J cites five decisions of the United States Supreme Court in support of the first proposition. In three of them (*Industrial Association of San Francisco v. United States* 268 US 64 (1925) at p.84, *Abbott Laboratories v. Portland Retail Druggists Association, Inc.* 425 US 1 (1976) at p.18 and *Republic of Argentina v. Weltover, Inc.* 504 US 607 (1992) at p.618) the instruments to which the *de minimis* principle was applied were federal statutes. But in the other two (*Ingraham v. Wright* 430 US 651 (1977) at p.674 and

Hudson v. McMillian 503 US 1 (1992) at pp 8-10) the *de minimis* principle was applied to the United States Constitution itself. It was applied in those two cases to *deny* constitutional protection against the matters complained of, leaving such protection to ordinary law. The argument for applying it to *accord* constitutional protection must be at least as strong if not stronger.

23. I respectfully agree with both of the propositions stated by Scalia J in the *Wisconsin* case. In my view, the *de minimis* principle does operate in regard to the question whether a short term of imprisonment during a period of not less than seven years precludes a person's residence during that period from being ordinary and continuous within the meaning of art. 24(2)(4). This is most obviously so in respect of what I characterised in *Fateh Muhammad's* case (at p.283C) as "pointless deprivations of liberty". But it is so even in respect of proper sentences. Whether a particular term of imprisonment is *de minimis* is a question to be answered with regard to art. 24(2)(4)'s purpose.

24. The purpose of art. 24(2)(4) as a whole is to provide a means by which persons not of Chinese nationality who have entered Hong Kong with valid travel documents can acquire Hong Kong permanent resident status and therefore the right of abode here. These means have two components. One is having been ordinarily and continuously resident here for not less than seven years. And the other is taking Hong Kong as one's place of permanent residence in the way which I have earlier explained. The purpose of the first component in particular, which is the component to which the *de minimis* point is directed, is to confer these means upon, and confine them to, persons who have managed to build up residence of a certain nature and duration.

25. I regard the second way in which Ms Eu puts the *de minimis* point as the appropriate way of putting it. Do the two weeks prevent the whole period including those two weeks from being ordinary and continuous residence? If

the question involved whether the two-week sentence is trivial as a sentence, I would regard it as impossible to say that it is not trivial. But what the question really involves is whether two weeks out of at least seven years are trivial as something put forward to deprive an individual of the benefit of art. 24(2)(4). This question is one of fact and degree. All the judges in the courts below have answered it negatively against the appellant. So would all my colleagues on this Court. And how I answer it does not affect the result, which is in the appellant's favour in any event. So even though I incline towards answering it affirmatively in the appellant's favor, I will not press my inclination to the point of answering such a question of fact and degree differently from the other eight judges who have considered this case in this Court and in the courts below. And I would therefore decide in the appellant's favour on his primary point alone.

Conclusion

26. I would allow the appeal to:

(i) quash all of the Director's administrative decisions in respect of which the appellant seeks judicial review (namely the Director's 4 June 1999 decision refusing to grant the appellant unconditional stay, the Director's 9 October 1999 decision upholding that 4 June 1999 decision of his and the Director's 14 June 2000 decision to the effect that the appellant is not a permanent resident);

(ii) strike down paras. 3(1)(c) of Schedule 1 to the Immigration Ordinance as unconstitutional;

(iii) order the Director to consider the appellant's application for permanent resident status on the basis that it was made on 24

October 1998 and is unaffected by his subsequent imprisonment;

(iv) award the appellant costs against the Director in this Court and in the courts below; and

(v) order legal aid taxation of the appellant's own costs.

27. Although I prefer to formulate the relief in the foregoing way, I am prepared to concur in the grant of relief in the terms favoured by the other members of the Court.

28. Finally I thank both legal teams for the assistance which I have derived from the arguments which they have prepared and presented so well.

Mr Justice Chan PJ :

29. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Ribeiro PJ :

30. This appeal raises issues concerning the conditions which must be met before non-Chinese nationals qualify under Article 24(2)(4) of the Basic Law for the status of permanent resident, and so the right of abode, in the Hong Kong Special Administrative Region.

The facts

31. The appellant is an Indian national. He first arrived in Hong Kong as a visitor in January 1988. In March of that year, he was granted permission to remain in Hong Kong to work as a cook.

32. Until 1998, his employment visa was renewed from time to time, with the appellant in each instance being granted permission to remain until a stated date. In the terminology of the Immigration Ordinance, Cap 115 ("the Ordinance"), he was made subject to a "limit of stay" on each occasion. Apart from two periods of absence which are not relevant, the appellant has been in Hong Kong since his first arrival.

33. In July 1996, the appellant got married in Hong Kong. His wife is a Filipino national who had come to work here as a domestic helper. On 13 November 1996, the appellant applied for permission to stay unconditionally on the basis that he had by then been ordinarily resident here for more than 7 years. However, he did not attend for interview as requested by the Immigration Department and his application was treated as cancelled. In November 1997, he repeated his application for an unconditional stay, this time through solicitors, but this was refused in May 1998.

34. The appellant's wife was, however, given permission in November 1996 to remain in Hong Kong as his dependant, subject to a limit of stay in line with his own. On 30 August 1999, they had a child. His wife and child both reside with him in Hong Kong.

35. In the course of his stay, the appellant has found himself in trouble with the law on a number of occasions.

(a) On 3 November 1994, he was convicted of common assault and was fined $1,000 and ordered to pay compensation of $500.

(b) On 7 January 1995, he was convicted of criminal damage and was bound over.

(c) On 23 January 1997, he was convicted of being drunk and disorderly and fined $1,000.

(d) On 3 May 1999, he was convicted of indecent assault and sentenced to imprisonment for 2 weeks.

36. At the hearing before the Court of Appeal, the court was told that on 17 April 2001, the appellant was convicted of assault occasioning actual bodily harm for which he was imprisoned for 3 months. He was further convicted on 20 June 2002 of wounding and of assaulting a police officer, being sentenced to a total of 5 months' imprisonment.

37. In 1995 and 1996, the appellant received warnings from the Immigration Department in relation to his conviction for assault to the effect that if he were again to be convicted of a criminal offence "or otherwise come to adverse attention" his application to continue his stay in Hong Kong would "have to be re-assessed".

38. Nevertheless, on 17 July 1998, despite his convictions in 1995 and 1997, the appellant was given permission to work at an establishment known as the Shalimar Club and to extend his stay in Hong Kong until 17 July 1999 or 2 weeks after termination of his contract of employment, whichever might be the earlier.

39. His employment with the Shalimar Club in fact came to an end on 27 September 1998. Accordingly, his permission to remain in Hong Kong expired two weeks later, on 12 October 1998.

40. Some 12 days after such expiry, on 24 October 1998, the appellant applied at the Immigration Department for permission to stay in circumstances which will require more detailed consideration later. He produced a letter dated 23 October 1998 from a restaurant known as the Curry Hut stating that he had been offered employment there as a cook. The application form which he submitted indicated that he was applying for an unconditional stay.

41. On 5 March 1999, the Immigration Department received a letter dated 23 February 1999 from a different prospective employer, namely, the Hong Kong Country Club. This letter stated that the Club wished to offer the appellant a job and asked on the appellant's behalf that he be given "a temporary employment visa ..... or a speedy process of [his] permanent residency so that [he] can start his employment at the Club as soon as possible."

42. The appellant was then asked to attend a further interview to establish his then employment status. This took place on 17 April 1999 and the appellant promised to return two days later with proof of his employment. However, he did not do so and, on 4 May 1999, the Hong Kong Country Club wrote to the Director of Immigration ("the Director") stating that it had decided not to employ him. This was dated the day after the appellant was sentenced to 2 weeks' imprisonment for indecent assault.

43. That conviction and sentence duly came to the Director's attention. Taking them together with other factors including the appellant's earlier criminal convictions, the Director decided, by letter dated 4 June 1999, to refuse the appellant's 24 October 1998 application. This is the first decision challenged as unlawful by the appellant.

44. Three further applications for extension followed.

(a) On 17 June 1999, the appellant applied for an extension to enable him to take up work with a restaurant called the Banana Leaf Curry House. This was refused, the Director citing, among other things, his criminal record, as the reason.

(b) On 6 July 1999, the appellant asked for more time to make his departure arrangements and was given a visitor's extension until 8 July.

(c) Then on 8 July 1999, he sought a further extension on the ground that his wife was 8 months' pregnant and unable to travel. He and his wife were thereupon allowed to stay as visitors until 30 September 1999. As indicated above, his wife gave birth on 30 August 1999.

45. On 24 August 1999, the appellant sought to have the Director's refusal of his application for unconditional stay re-considered. On 9 October 1999, the Director upheld his earlier refusal. This decision is the second sought to be challenged by the appellant.

46. The appellant's solicitors then wrote to the Director on 30 May 2000 claiming, and seeking verification of, permanent resident status for the appellant. This was refused on 14 June 2000 on the basis that the appellant did not qualify for such status. This refusal is the third decision under challenge.

47. The appellant's application for judicial review was rejected by Cheung J on 4 December 2000 (Unreported, HCAL 1379/2000) and the appeal dismissed by the Court of Appeal on 7 December 2001 (Unreported, CACV 260/2001).

The issues

48. The relevant provisions of Article 24 of the Basic Law are set out as follows :-

> **Article 24**
>
> (2) The permanent residents of the Hong Kong Special Administrative Region shall be .....
>
> > (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;

.....

(3) The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode."

49. It follows that BL24(2)(4) requires non-Chinese persons to satisfy three conditions if they are to qualify for permanent resident status. They must :-

(a) have entered Hong Kong with valid travel documents ("the entry requirement");

(b) have ordinarily resided in Hong Kong for a continuous period of not less than seven years ("the seven year requirement"); and

(c) have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region ("the permanence requirement").

50. It is common ground that the appellant was able to satisfy the entry requirement. However, his ability to meet either the seven year requirement or the permanence requirement is in dispute. The differences between the parties give rise to the following issues :-

(a) The Director contends that since the appellant has throughout been subject to a limit of stay, he has never been able to satisfy the permanence requirement and so cannot qualify as a permanent resident. The appellant's response is that the purported necessity for such applicants to secure the lifting of any limit of stay imposed by the Director before being able to satisfy the permanence requirement is inconsistent with BL24(2)(4) and unconstitutional ("the limit of stay issue").

(b) The Director argues that the second reason for the appellant failing to qualify for permanent resident status is his inability to satisfy the seven year requirement because his imprisonment in May 1999 destroyed the continuity of his ordinary residence in Hong Kong over the relevant period. The appellant makes two responses to this argument. In the first place, he contends that the fact of his imprisonment for a period of two weeks should be ignored as *de minimis* since it constitutes a trivial interruption of the requisite period of ordinary residence ("the *de minimis* issue").

(c) The second response made by the appellant raises a third issue. He argues that his application for permanent resident status was made, or should in law be taken to have been made, on 24 October 1998. Accordingly, his imprisonment in May 1999 (as well as any subsequent period of imprisonment) occurred only after he had already achieved the continuous seven year period of ordinary residence in Hong Kong needed to satisfy BL24(2)(4)'s requirements. In answer, the Director contends that the application made by the appellant on 24 October 1998 was merely an application for an unconditional stay and that no application for permanent resident status was made until 30 May 2000, after the appellant's incarceration for indecent assault had destroyed the needed continuity of ordinary residence ("the time of application issue").

(d) The Director also submitted that the time of application issue had in fact been abandoned by the appellant through his counsel in the Court of Appeal so that this Court should not entertain that argument ("the abandonment issue").

(e) The parties also differ as to the relief, if any, which the appellant should obtain in the event of his succeeding materially on some or all of the issues identified above ("the relief issue").

The limit of stay issue

51. The Director contends that it is implicit in the permanence requirement as laid down by BL24(2)(4) that a non-Chinese applicant seeking to establish his right to permanent resident status must show, not only that he has formed the intention to take Hong Kong as his place of permanent residence, but also that he is not subject to any limit of stay preventing him, as a matter of immigration law, from staying here permanently. His permission to stay in Hong Kong must, in other words, be unconditional ("the unconditional stay requirement").

52. This view reflects provisions currently enacted in the Ordinance which are obviously intended to operate as a statutory scheme for implementing BL24(2)(4).

(a) Thus, Schd 1, para 2(d) of the Ordinance begins by introducing into the Ordinance a provision in terms materially identical to the terms of BL24(2)(4), as follows :-

> A person who is within one of the following categories is a permanent resident of the Hong Kong Special Administrative Region .....
>
> (d) 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.

(b) In elaboration of the permanence requirement, Schd 1, para 3(1) provides :-

For the purposes of paragraph 2(d), the person is required-

(a) to furnish information that the Director reasonably requires to satisfy him that the person has taken Hong Kong as his place of permanent residence. The information may include the following-

(i) whether he has habitual residence in Hong Kong;

(ii) whether the principal members of his family (spouse and minor children) are in Hong Kong;

(iii) whether he has a reasonable means of income to support himself and his family;

(iv) whether he has paid his taxes in accordance with the law;

(b) to make a declaration in the form the Director stipulates that he has taken Hong Kong as his place of permanent residence; ..... and

(c) to be settled in Hong Kong at the time of the declaration.

(c) The requirement that the applicant be "settled in Hong Kong" is further elaborated by Schd 1, para 1(5) in the following terms :-

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.

(d) Schd 1, para 1(4)(b) expands upon the seven year requirement as follows :-

For the purposes of calculating the continuous period of 7 years in which a person has ordinarily resided in Hong Kong, the period is reckoned to include a continuous period of 7 years -

(b) for a person under paragraph 2(d), before or after the establishment of the Hong Kong Special Administrative Region but immediately before the date when the person applies to the Director for the status of a permanent resident of the Hong Kong Special Administrative Region.

53. The result of these statutory provisions is that an applicant is not "settled in Hong Kong" and so is unable to meet the permanence requirement (as reproduced in Schd 1, para 2(d) and elaborated as aforesaid) unless he is not constrained by any limit of stay when declaring his intention to make Hong Kong his place of permanent residence in the course of applying for permanent resident status. Therefore, when the Director rejected the appellant's

application to have his limit of stay removed, the Director was effectively determining as a matter of discretion that, for the reasons mentioned above, the appellant should not be made eligible for permanent resident status.

54. Whether this statutory scheme faithfully implements BL24(2)(4) or whether, as the appellant contends, it is – in respect of the unconditional stay requirement – unconstitutional, has not been authoritatively determined. However, *dicta* tending in both directions can be found.

(a) In *Commissioner for Registration v Registration of Persons Tribunal and Another* [1999] 3 HKLRD 199 at 212, Keith JA, sitting as an additional judge of the Court of First Instance, was inclined to view the unconditional stay requirement as unconstitutional :-

> "..... there is a powerful argument for saying that para.1(5)(b) is not compatible with art.24(4). Its effect is to make the right of abode in Hong Kong for non-Chinese nationals dependent on the Director of Immigration lifting any limit on the applicant's stay. The acquisition of the right of abode in Hong Kong is therefore dependent on the exercise of a discretion in the applicant's favour. Since art.24(4) confers the right of abode in Hong Kong on non-Chinese nationals who satisfy the ordinary residence requirement and the requirement to have taken Hong Kong as their place of permanent residence, it is strongly arguable that to impose a further hurdle for them to cross — namely, the exercise of a discretion in their favour — amounts to a derogation from the automatic right of abode in Hong Kong contemplated by art.24(4)."

(b) In the Court of Appeal in that case [2000] 2 HKLRD 523 at 545, Rogers JA did not deal with this question but noted that Keith JA had "expressed disquiet in relation to this provision".

(c) However, in the same court (at 557-8), I expressed the view that the unconditional stay requirement was implicit within the permanence requirement as laid down by BL24(2)(4). Addressing

counsel's argument that no basis existed for grafting such a condition onto the plain words of the Article, I stated :-

> "I am unable to accept that argument. In the first place, it contains the premise that an applicant for permanent resident status is able to satisfy the 'taking Hong Kong' requirement purely on the basis of his subjective intention to take Hong Kong as his permanent place of residence, without regard to any legal restrictions which may be placed on his doing so. Such a premise is not justified. It is in my view, implicit in the 'taking Hong Kong' condition that the applicant must not only declare his own intention to reside here indefinitely, but must also not to be subject to a lawful restriction against his so doing. It must, in other words, be open to him to take Hong Kong as his place of permanent residence."

(d) When that case came to this Court (*Fateh Muhammad v Commissioner of Registration & Anr* (2001) 4 HKCFAR 278), the issue was described by Mr Justice Bokhary PJ (with whom the other members of the Court agreed) as "a serious question to be determined on some future occasion on which it may arise" (at 287).

(e) In the present case at first instance (Unreported, 4 December 2000, HCAL 1379/2000), Cheung J (whose decision pre-dated publication of this Court's judgment in the *Fateh Muhammad* case) indicated, without deciding, that he was inclined to agree with the view I expressed in favour of upholding the unconditional stay requirement.

(f) The Court of Appeal (Unreported, 7 December 2001, CACV 260/2001) confined itself to the *de minimis* issue and expressed no view on this point.

55. The occasion for the issue to be decided arises in the present case. I am persuaded by the submissions of Ms Audrey Eu SC, appearing for the appellant with Mr Kwok Sui Hay, that on the proper interpretation of

BL24(2)(4), the unconditional stay requirement is unconstitutional. This conclusion flows from the language and structure of the relevant constitutional provisions.

56. It is well-established that a fair and reasonable statutory scheme for the proper verification of a person's claim to right of abode is constitutional and that until such claim is verified, the applicant does not enjoy the rights of a permanent resident: *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 at 36; *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 at 312.

57. In the present context, this is reflected by Schd 1, para 3(2) of the Ordinance (read subject to the requirements that the verification scheme be fair and reasonable and not exceed the verification function) which provides as follows :-

> A person claiming to have the status of a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(d) does not have the status of a permanent resident in the Hong Kong Special Administrative Region until he has applied to the Director and the application has been approved by the Director.

58. Accordingly, a non-Chinese person claiming the right to permanent resident status and hence a right of abode, must apply to the Director for his claim to be verified. In accordance with BL24(2)(4), the Director is entitled to seek evidence which would establish that the applicant satisfies the entry, seven year and permanence requirements referred to in paragraph 49 above.

59. In the *Fateh Muhammad* case, this Court rejected the argument that these three requirements could be satisfied quite independently of each other and at different times prior to the application for permanent resident status. It was held that whether an applicant satisfies the seven year requirement must be judged at the time when the application is made by reference to the period

immediately preceding that application, as reflected in Schd 1, para 1(4)(b) of the Ordinance. It was also held that on the true construction of BL24(2)(4), a temporal linkage exists between the seven year and the permanence requirements so that they must be shown to be concurrently satisfied at the time the application for permanent resident status is made : (2001) 4 HKCFAR 278 at 285, per Bokhary PJ. That the seven year and permanence requirements are concurrent and are to be judged at the time of the relevant application, was not in dispute between the parties to the present appeal.

60. Bearing the aforesaid structure of the relevant provisions in mind, the wording of, and especially the tense employed in, the permanence requirement is important. BL24(2)(4) requires persons claiming the status to "*have taken* Hong Kong as their place of permanent residence". This means that an applicant, at the moment of putting forward his claim for verification by the Director, is required to point to facts which have already occurred permitting him to say that he has, starting at some point in time prior to the making of his application, *already taken* Hong Kong as his place of permanent residence.

61. It is true, as Mr Joseph Fok SC, appearing with Mr Daniel Wan for the Director, pointed out, that the notion of taking Hong Kong as a person's place of permanent residence imports the quality of a past, present and future commitment to establishing and maintaining a permanent residence in Hong Kong. It nevertheless remains the case that BL24(2)(4) recognizes that all the facts necessary to satisfy the permanence requirement are capable of coming into existence weeks, months or even years before the date of the application so that in putting the application forward, the claimant is able to say: "I have taken Hong Kong as my place of permanent residence" since a date in the past.

62. It will almost inevitably be the case that during that pre-application period, the non-Chinese applicant will have been subject to a limit of stay while building up his seven-year continuous period of ordinary residence. BL24(2)(4) therefore implicitly regards satisfaction of the permanence requirement as achievable at a time when an applicant is still subject to a limit of stay.

63. It follows that the Ordinance, in translating the Basic Law's permanence requirement into a condition that the applicant be "settled in Hong Kong" (Schd 1, para 3(1)(c)) and defining "settled" as requiring that the applicant be "not subject to any limit of stay in Hong Kong" (Schd 1, para 1(5)(b)), purports to impose a requirement which is incompatible with the requirements of BL24(2)(4). The Ordinance is therefore to that extent unconstitutional. While the Director may undoubtedly exercise his discretions as to whether a non-Chinese person should be allowed to enter Hong Kong and whether permission to remain should be extended, these discretions bearing on the entry and the seven year requirements respectively, the discretionary removal of a limit of stay forms no part of the permanence requirement.

64. The permanence requirement makes it necessary for the applicant to satisfy the Director both that he intends to establish his permanent home in Hong Kong and that he has taken concrete steps to do so. This means that the applicant must show that his residence here is intended to be more than ordinary residence and that he intends and has taken action to make Hong Kong, and Hong Kong alone, his place of permanent residence. The nature of the permanence requirement may be illuminated by contrasting the "taking of Hong Kong as a person's place of permanent residence" with merely ordinary residence in Hong Kong.

65. In *Akbarali v Brent LBC* [1983] 2 AC 309, Lord Scarman explains the ordinary and natural meaning of the words "ordinary residence". Adopting the approach in the tax cases *Levene v Inland Revenue Commissioners* [1928] AC 217 and *Inland Revenue Commissioners v Lysaght* [1928] AC 234, his Lordship (at p 343) stated that the concept :-

> "refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."

Elaborating on the term "settled purposes" Lord Scarman added (at p 344) :-

> "The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the 'propositus' intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."

66. The permanence requirement in BL24(2)(4) demands more in at least two respects. The intention must be to reside, and the steps taken by the applicant must be with a view to residing, in Hong Kong permanently or indefinitely, rather than for a limited period. Such intention and conduct must also be addressed to Hong Kong alone as the applicant's only place of permanent residence. These are nonetheless requirements which can and must be met prior to the date of application for verification of permanent resident status, notwithstanding that the applicant is still, at that stage, subject to a limit of stay. Upon verification of an applicant's status, the limit of stay falls away as a matter of law and, in the normal course, any condition endorsed on the applicant's travel document would be expressly cancelled by the Director.

The de minimis issue

67. Section 2(4)(b) of the Ordinance, 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".

68. As this Court noted in the *Fateh Muhammad* case (2001) 4 HKCFAR 278 at 283, provisions which exclude periods of imprisonment from qualifying as periods of ordinary residence have been on our statute books from 1971. It was held (*ibid*) that, provided one reads the word "detention" in that section *ejusdem generis* with "imprisonment" and therefore as applying only to detention in a training centre or in a detention centre, it was consonant with the ordinary and natural meaning of the words "ordinary residence" to exclude periods of imprisonment from that concept. Section 2(4)(b) was therefore constitutionally valid.

69. The Court, however, expressly left open the possibility that the *de minimis* principle might apply to trivial periods of imprisonment. This arose in the context of the challenge made to the constitutionality of section 2(4)(b), described by Mr Justice Bokhary PJ in the following terms:-

> "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." ((2001) 4 HKCFAR 278 at 283)

70. Mr Justice Bokhary PJ's response, introducing the possible application of the *de minimis* principle, was as follows :-

> "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." (*ibid*)

71. It is to be emphasised that this dictum addresses the suggestion that *one day's imprisonment* would suffice to trigger loss of continuity of ordinary residence. The other items on Mr Dykes's list were commented upon separately in the judgment.

72. Ms Eu seeks to argue nonetheless that the two week period of imprisonment relied on by the Director in this case as the basis for deciding that the appellant did not satisfy the seven year requirement ought to have been ignored as *de minimis*.

73. The maxim *de minimis non curat lex* (the law does not concern itself with trifling matters) is a common law principle of construction that applies unless a contrary intention appears: F A R Bennion, *Statutory Interpretation* (4th Ed, 2002) p 958. As this Court held in *Chong Fung Yuen v Director of Immigration* (2001) 4 HKCFAR 211 at 221-2, it is to the common law principles of interpretation that the courts look in construing the Basic Law. No intention to exclude the *de minimis* principle is detectable in the provisions of BL24(2)(4). The *de minimis* approach to construction is therefore in principle applicable to its interpretation.

74. Does the two week period of imprisonment in the present case come within the *de minimis* principle? While Cheung J did not expressly address that question, he decided (on the basis that the application for permanent resident status was made on 30 May 2000) that the imprisonment was sufficient to break continuity during the crucial period. The Court of Appeal, adopting the same date as the relevant date of application, considered but rejected the submission that *de minimis* applied.

75. In my judgment, the two week period of imprisonment in this case was not *de minimis*. Ms Eu sought to argue that the sentence brought about a trivial interruption because the period of two weeks represents a small fraction of the seven year qualifying period. However, the exclusion of periods of imprisonment from the ordinary and natural meaning of the words "ordinary residence" in BL24(2)(4) does not depend on the duration of such periods being substantial or on their amounting to a substantial fraction of the seven year qualifying period. The exclusion is qualitative. The incarceration, reflecting sufficiently serious criminal conduct to warrant an immediate custodial sentence, falls outside what could qualify as "the settled purposes" underlying a person's ordinary residence in the ordinary and natural sense of those words, referred to by Lord Scarman in *Akbarali v Brent LBC* [1983] 2 AC 309 at 344. It is this qualitative aspect of time spent in prison that has led to such periods being excluded from the concept of "ordinary residence" in successive statutory schemes and in the Basic Law.

76. I would be prepared to accept that the *de minimis* principle may apply, for instance, where a person, in a fit of temper, has acted in contempt of court and is sent down to the cells for a few hours or even overnight for his temper to cool and his contempt to be purged. But I would not be disposed to regard imprisonment of any greater substance as capable of engaging the *de minimis* principle. In the present case, the two week sentence was one of substance merited by the offence in all the circumstances. I see no basis for disregarding it for the purposes of BL24(2)(4) or section 2(4)(b).

The abandonment issue

77. The conclusion that the period of imprisonment was not *de minimis* does not dispose of this appeal. This is because the seven year requirement does not exist in a vacuum, but is tied to the time when the application for

verification of permanent resident status was made. As was decided in the *Fateh Muhammad* case (at p 285), the qualifying period for BL24(2)(4) purposes is the seven year period which immediately precedes that application, assessed at the time when the application is made.

78. As previously indicated, both Cheung J and the Court of Appeal proceeded on the footing that the application date was 30 May 2000. That is the position adopted by the Director. If correct, it would mean that the appellant cannot satisfy the seven year requirement since his imprisonment during May 1999 would have introduced a fatal discontinuity during the qualifying period. However, if, as the appellant seeks to argue, the true application date was 24 October 1998, the period of imprisonment post-dated and did not disrupt the appellant's achievement of the qualifying period.

79. The Director contends however that the time of application issue was abandoned in the Court of Appeal and that it should not be entertained in this Court.

80. It is clear that the issue was fully argued before Cheung J, his Lordship's decision being in the Director's favour. It is also clear that in the Court of Appeal, counsel then appearing for the Director plainly addressed the point, as Mayo VP noted :-

> "The first point made by Mr Geoffrey Ma SC for the respondent is that the first two decisions referred to at the commencement of this judgment were not decisions refusing applications for verification of the applicant's status as a permanent resident. They were applications for unconditional stay. The respondent has emphasized that these applications are entirely separate and distinct and dealt with by him in a different manner. The information sought in the application forms are different and they are processed by independent divisions within his Department. (at paras 17-18)

81. However, Mr Gerard McCoy SC, then appearing for the appellant, did not argue the time of application issue. He confined himself to the limit of

stay and the *de minimis* arguments, advancing the latter on the assumption that the qualifying period was that immediately preceding 30 May 2000. Ms Eu was at pains to emphasise that she was making no criticism of Mr McCoy, explaining that he had been asked to step into the breach at extremely short notice after the unfortunate indisposition of Mr Dykes. Certainly this judgment intends no criticism of Mr McCoy.

82. This Court has held that where a point has been raised at trial but dropped in the intermediate court, it would be reluctant to consider the point in this forum unless there are exceptional circumstances and unless admitting the point in argument can be done without injustice : *Wong Tak Yue v Kung Kwok Wai* (1997-98) 1 HKCFAR 55 at 66; and *Flywin Company Limited v Strong & Associates Limited* [2002] 2 HKLRD 485.

83. In my view, the present case does fall within that exceptional class. The *de minimis* issue is so closely bound up with and dependent upon the time of application issue that it would be wholly unsatisfactory for the Court to proceed to judgment solely on the basis of the former while ignoring serious questions which have been shown to arise on the latter.

84. Mr Fok was fully prepared to argue, and did in fact argue, the issue. He had indeed argued it at first instance and the issue was adverted to by Mr Ma SC in the Court of Appeal, as well as canvassed in the parties' printed cases. No procedural or other injustice therefore flows from permitting the argument to be advanced before this Court. On the contrary, justice would not be served if the Court were to proceed to judgment solely on the *de minimis* ground if it should transpire that 30 May 2000 was incorrectly assumed to be the date when the application was made.

The time of application issue

85. As noted above, the competing dates for the time of application issue are 24 October 1998 and 30 May 2000 respectively. On the evidence and on the face of the documentary record, no application expressly aimed at securing permanent resident status for the appellant was made until 30 May 2000. However, the appellant argues that but for the Director's unconstitutional adherence to the unconditional stay requirement, the application which he made on 24 October 1998 would have explicitly been for verification of his permanent resident status. Accordingly, it is argued, the earlier application should be taken to be the relevant application for the purposes of judging whether the appellant had satisfied the seven year requirement.

86. It is evident that at the times material to this appeal, including 24 October 1998, everyone concerned was acting on the basis of provisions which I would declare constitutionally invalid. Schd 1, para 3(1)(c) and para 1(5)(b) of the Ordinance required removal of any applicable limit of stay before an applicant could be found entitled to permanent resident status. A person seeking verification of such status would have been directed first to apply for an unconditional stay. If on 24 October 1998, this was what had in fact happened to the appellant, and if he and the Immigration Department had both in fact been processing what was known and intended to be the first step in his application for permanent resident status on the basis of his having met the seven year requirement, one would be driven to conclude that if the unconstitutionality of the requirement had then been appreciated, the appellant would instead have been making an unequivocal application for permanent resident status. On such facts, justice would require that the appellant be treated as if the unconstitutional requirement had not been introduced and accordingly, that his application on 24 October 1998 be treated as a permanent residence application.

87. What then is the factual position? The appellant first applied for an unconditional stay in November 1996. As Mr Fok correctly submits, this could only have been with a view to securing removal of the conditions of stay imposed on him and no more. That application could not have been intended as an application to verify his permanent resident status in the HKSAR since, in November 1996, the Region had not yet come into existence. Mr Fok submits that this is important since the 24 October 1998 application should be regarded as no more than a repetition or a plea for reconsideration of the application made in November 1996 as, indeed, later correspondence from the appellant states.

88. Furthermore, following upon refusal of the 24 October 1998 application on 4 June 1999, in each of the relevant subsequent applications, the appellant consistently specified that he was seeking an unconditional stay. Mr Fok submits that this shows that on 24 October 1998, the appellant knew precisely what he was doing, namely, applying solely and simply for an unconditional stay and not for permanent resident status. It was pointed out that a not insignificant number of persons do make applications for an unconditional stay without going on to apply for permanent resident status for various reasons of their own, highlighting the separate and distinct nature of the two applications. Taking all this into account, it was urged that the 24 October 1998 application should not be regarded as the relevant application for the purposes of reckoning the seven year qualifying period.

89. It is at this point that the circumstances in which the 24 October 1998 application was made require more detailed scrutiny. The appellant's affirmation describes what happened as follows :-

> "15. I obtained a sponsoring letter from the Curry Hut and went to the Immigration Department in Wanchai on 24 October 1998 to apply for an extension of a working visa based on my new employment. I filled out an extension form and put it in the slot near the counters with my passport.

> 16. About 2 hours later my number was called and I went to the window (I recall it was counter 14). I spoke with a female officer. She said, 'You change your job?', to which I replied, 'Yes'. She then said, 'On the application form you should say "unconditional stay". When you get your unconditional stay you can then apply for the right of abode.' My understanding is that unconditional stay and right of abode are virtually the same thing.
>
> 17. She then pointed to the place in the portion of the form provided for the sponsor's details. I then wrote the words as she suggested and handed the form back to her. She then asked for copies of the visa chops on my passport. .....
>
> 18. ..... I handed over my copies to her and she gave me a white card and told me to wait for their letter."

90. 'The Immigration Officer in question was Tang Mei Ping. She understandably does not have any recollection of the details of the interview with the appellant and is unable to dissent from the appellant's account of the interview. The form filled in by the appellant is in evidence. It is on a form designed for applications for extensions of stay which is also used for applications for an unconditional stay. That the appellant was seeking an unconditional stay appears from his writing "uncondition" (sic) as the reason for his application. The handwritten notation by the Immigration Officer confirms that the application was being processed as one for "unconditional stay" on the basis of the applicant having had seven years residence in Hong Kong.

91. The evidence therefore indicates that when the appellant first made his way to the counter at the Immigration Department on 24 October 1998 he may well have had no more than an extension of his working visa in mind. However, the Immigration Officer evidently realised that, given the length of his stay in Hong Kong, he might be eligible for permanent resident status. No doubt wishing to be helpful, she suggested to him that what he ought to be doing was to seek an unconditional stay as the first step towards obtaining permanent resident status. This was obviously a welcome suggestion and the appellant readily complied.

92. That this is what he intended to do receives support from the contents of the letter dated 23 February 1999 from the Hong Kong Country Club referred to at paragraph 41 above. It must have been the appellant who had informed the Club that his immigration arrangements were being processed. That the Club's letter refers to this as the processing of his "permanent residency" indicates that this is what the appellant must have said and what he believed was taking place.

93. The fact that from 24 October 1998 onwards, everyone kept referring to the appellant's application as one for an unconditional stay is, on the law as it stood, perfectly consistent with such application being the first step towards establishing an entitlement to permanent resident status. The evidence therefore clearly shows that on 24 October 1998 and thereafter, acting with the knowledge and at the suggestion of the Immigration Officer, the appellant was not merely seeking an unconditional stay but had initiated his application for permanent resident status under BL24(2)(4).

94. In *Fateh Muhammad*, this Court held (at 285) that the relevant qualifying period "must come immediately before the time when an application for Hong Kong permanent resident status is made in reliance on those seven continuous years." The application made on 24 October 1998 in the circumstances described above constitutes the relevant application for such purposes. Accordingly, as at 24 October 1998, the requisite qualifying period had not been interrupted by any period of imprisonment. His subsequent period or periods of incarceration do not bear upon his entitlement to permanent resident status judged at the time when the relevant application was made.

The proper relief

95. On the basis of the foregoing conclusions, the appellant is entitled to an order quashing the three decisions challenged (referred to above in paragraphs 43, 45 and 46). The Court should also declare that 24 October 1998 is to be taken as the date on which the appellant made his application for verification of his permanent resident status. It is, however, much in issue as to what consequences should flow from such orders and what, if any, further directions or orders the Court should make.

96. 'In the ordinary course, the aforesaid orders should lead to the appellant's claim to entitlement to permanent resident status being remitted to the Director for his determination in accordance with the Court's decision. However, both parties have urged the Court instead to determine the appellant's entitlement to such status here and now.

97. In the first place, Mr Fok raises what may be called "the overstayer argument". He submits that remitting the matter back to the Director would be pointless since the inevitable result would be a decision that the appellant did not, as at 24 October 1998, meet the seven year requirement and so could not qualify for permanent resident status. On this basis, he urges the Court to dismiss the application. The argument runs as follows:-

(a) As noted in paragraphs 38 to 40 above, the permission given to the appellant on 17 July 1998 to remain and work in Hong Kong expired on 12 October 1998 and it was not until 24 October 1998, some 12 days later, that he made the relevant application to the Immigration Department. He was therefore an overstayer contravening his limit of stay during those 12 days.

(b) Section 2(4)(a)(ii) of the Ordinance provides :-

> "For the purposes of this Ordinance, a person shall not be treated as ordinarily resident in Hong Kong during any period in which he remains in Hong Kong ..... in contravention of any condition of stay."

(c) It follows that during the 12 days which immediately preceded the relevant application, the appellant was not ordinarily resident in Hong Kong.

(d) Accordingly, so the Director argues, the applicant cannot possibly show that he had been continuously ordinarily resident in Hong Kong for at least 7 years immediately before the application in question.

98. Ms Eu advances two arguments in response.

(a) First, relying upon the decision of the Court of Appeal in *Sae-Ang Paisarn v Director of Immigration* [1989] 1 HKLR 205, she argues that since subsequent extensions or implied extensions of stay were granted to the appellant, the original contravention was cured ("the retrospective cure point").

(b) Secondly, she argues that if the appellant had not been diverted by a constitutionally invalid requirement into making an application for an unconditional stay, but if he had explicitly been seeking verification of his entitlement to permanent resident status, the Director could not, as a responsible public official, possibly have refused to extend the appellant's permission to stay pending verification so that any overstayer argument could not arise ("the extension point").

99. In the *Sae-Ang Paisarn* case, a foreign national had applied for and was granted an extension to his limit of stay on three occasions after the limit of stay had expired. The Court of Appeal held that the immigration officer did

have power to grant such post-expiry extensions and that, in doing so, each earlier contravention was cured, preserving the continuity of that appellant's ordinary residence. However, the *Sae-Ang Paisarn* decision is not authority for suggesting that any fresh permission to stay necessarily results in the waiver of any prior breach of a limit of stay. Whether the contravention is cured must depend on the terms upon which the subsequent permission to stay is given.

100. If, as occurred in the *Sae-Ang Paisarn* case, the Director is content simply to enlarge the period of permitted stay, allowing the applicant to remain for the same purpose and on the same terms, it would be difficult to avoid the conclusion that any earlier period of overstaying is waived. But it is equally open to the Director to grant subsequent permission to stay on terms which are not intended to fill in any earlier gaps or to condone any earlier contraventions.

101. The facts of the present case fall into the latter category.

(a) As indicated in paragraph 43 above, the Director refused the appellant's 24 October 1998 application by letter dated 4 June 1999. The letter went on to say : -

"You are allowed to stay in Hong Kong as a visitor until 18 June 1999 for departure arrangement".

(b) This was unlike what had occurred in the *Sae-Ang Paisarn* case. Here, the permission to stay was for only 14 days and intended merely to facilitate departure. It was not an extension of the appellant's previously existing employment visa granted on a late application. The permission to stay granted on 4 June 1999 therefore did not relate back and did not cure the 12 day contravention.

(c) Insofar as subsequent extensions of the permission to stay related back, they did so merely to the permission granted on 4 June 1999 and had no curative effect on the earlier contravention.

(d) Neither did the invitations to interviews addressed by the Director to the appellant in the course of processing his claim carry any implication that earlier contraventions were cured.

102. Ms Eu's retrospective cure point therefore does not provide an answer to the overstayer argument. However, her extension point poses more serious problems for the Director. In the course of submissions and in answer to queries from the Bench, Mr Fok stated on instructions that where an applicant had lodged a relevant application while still within his limit of stay but where that limit of stay expired before processing of the application could be completed, the Director's policy was, as one would expect, to grant an extension pending completion of processing. This accords with what was stated by the Court of Appeal in the *Sae-Ang Paisarn* case. Kempster JA referred to the Director's "practice ..... of granting temporary extensions as a matter of course on receipt of timeous applications and pending considered determination": [1989] 1 HKLR 205 at 210, see also Yang CJ at 208.

103. However, it is not known what the Director's policy on extensions is or would have been on 24 October 1998 and whether an extension would have been granted given that the application was not made timeously, but 12 days after expiry of the applicant's limit of stay.

104. Ms Eu sought to argue that it is inconceivable that an applicant in the position of the appellant would not have been given an extension or that his status as a 12 day overstayer could responsibly be taken as the sole reason for denying his entitlement to permanent resident status. She therefore invited the

Court to view verification of the appellant's entitlement to permanent resident status as inevitable, notwithstanding Mr Fok's overstayer argument.

105. I am unable to accept Ms Eu's argument. I am however of the view that it raises a real possibility that after due investigation of the circumstances of the appellant's late application in the light of prevailing Immigration Department policies, an extension could have been granted and so could have negated the overstayer argument.

106. Accordingly, I cannot accept either side's submissions as to the inevitability of the Director either rejecting or accepting the appellant's entitlement, as the case may be. Those arguments can only proceed on a purely hypothetical basis. What happened in fact was that, acting on a constitutionally flawed basis, the Director refused to lift the appellant's limit of stay on discretionary grounds relating to his criminal record, without further consideration of his claim to entitlement to permanent resident status. No thought has therefore ever been given to the facts, policies and decisions which would have been relevant if it had been appreciated that the application, made 12 days after expiry of the appellant's limit of stay, was for verification of his claim to permanent resident status, to be approached without the necessity for the prior discretionary removal of his limit of stay. There may well be relevant evidence to be adduced by one or both sides and relevant further representations to be made on various aspects of these matters. No such materials are before the Court, making it necessary for the Court to refer the appellant's claim to entitlement to permanent resident status to the Director for investigation and decision in accordance with this Judgment.

107. The same issues and conclusions attach to Mr Fok's submission that, on a hypothetically reconstituted processing of the 24 October 1998 application, the Director might well have come to the conclusion that the

appellant could not meet the permanence requirement as implemented by Schd 1, para 3(1)(a)(iii) of the Ordinance, in that he might well have been unable to show that he had "a reasonable means of income to support himself and his family". Since this has never been investigated one again simply does not know what representations might have been made, what facts put forward or what prevailing policies applied in this context. I accordingly express no view on the merits of this submission or the overstayer argument, apart from the views expressed in paragraph 101 above.

Conclusion

108. I would make the following Orders, namely :-

(a) That a Declaration be granted that paragraph 3(1)(c) of Schedule 1 to the Immigration Ordinance contravenes Article 24(2)(4) of the Basic Law and is unconstitutional to the extent that such paragraph, in combination with paragraph 1(5)(b) of the said Schedule, requires a person not to be subject to any limit of stay in Hong Kong at the time of making the declaration referred to in paragraph 3(1)(b) of the said Schedule or at the time of such person's application for verification of his status as a permanent resident of the Hong Kong Special Administrative Region within Article 24(2)(4) of the Basic Law.

(b) That there be an Order of Certiorari to bring up and quash the decisions of the Director of Immigration made on 4th June 1999 refusing the appellant's application for an unconditional stay and the decision of the Director of Immigration made on 9th October 1999 upholding the said refusal; and the decision of the Director of Immigration made on 14th June 2000 finding that the appellant

does not meet the requirements to become a permanent resident of the Hong Kong Special Administrative Region.

(c) That a Declaration be granted that the application made by the appellant to the Director of Immigration dated 24th October 1998 is in law to be treated as an application for verification of his status as a permanent resident of the Hong Kong Special Administrative Region within Article 24(2)(4) of the Basic Law and that such date is to be taken as the relevant date of application for the purposes of Schedule 1 paragraph 1(4)(b) to the Immigration Ordinance Cap. 115.

(d) That there be an Order of Mandamus directed to the Director of Immigration requiring him to determine the application made by the appellant to the Director dated 24 October 1998 for verification of his status as a permanent resident of the Hong Kong Special Administrative Region in accordance with this Judgment.

(e) That there be an Order that the appellant do have costs here and in the courts below.

(f) That there be an Order for Legal Aid taxation.

(g) That the parties do have liberty to apply in respect of the terms and implementation of these Orders, any such application to be made in writing, to be dealt with in such manner as the Registrar shall direct.

Sir Anthony Mason NPJ :

109. I agree with the judgment of Mr Justice Ribeiro PJ.

Chief Justice Li :

110. The Court unanimously allows the appeal and makes the Orders set out in the Conclusion to Mr Justice Ribeiro PJ's judgment.

(Andrew Li)
Chief Justice

(Kemal Bokhary)
Permanent Judge

(Patrick Chan)
Permanent Judge

(R A V Ribeiro)
Permanent Judge

(Sir Anthony Mason)
Non-Permanent Judge

Ms Audrey Eu SC and Mr Kwok Sui-hay (instructed by Messrs Barnes & Daly and assigned by the Legal Aid Department) for the appellant

Mr Joseph Fok SC and Mr Daniel Wan (instructed by the Department of Justice) for the respondent