# Closing Chapter in the Immigrant Children Saga: Substantive Legitimate Expectations and Administrative Justice in Hong Kong

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## I. Introduction

It is an undeniable fact that it would be quite impossible for the Hong Kong Special Administrative Region (HKSAR) to accommodate all the many millions of people from elsewhere in China who would like to live there, without destroying that economic success which makes the HKSAR so attractive in the first place. One immediate consequence of this is that until economic development in other parts of China, particularly Guangdong, leads to a reduction in the pressure of people wanting to move to Hong Kong, immigration policy is going to be a persistent and difficult headache for the Hong Kong Government. And for as long as the rule of law—itself vital for the economic success of Hong Kong— survives, the decisions of the Hong Kong authorities on immigrations matters will be challenged in the courts and be the subject of public debate and controversy.

The decision of the Court of Final Appeal in *Ng Siu Tung v. Director of Immigration*,[1] will thus not be the last controversial immigration decision to be made by the courts in Hong Kong. But it does represent the closing chapter in the 'Immigrant Children' saga that burst upon Hong Kong soon after sovereignty was transferred from the United Kingdom to the People's Republic of China on the 1 July 1997 and which severely tested the mechanism set up in the Basic Law for its interpretation. One of the present authors has written in this journal on the grave constitutional issues—touching the very survival of the rule of law in Hong Kong itself - that arose.[2] The Hong Kong Government was faced with most unwelcome judicial decisions—primarily *Ng Ka Ling v. Director of Immigration*[3]—concerning who enjoyed the right of abode in Hong Kong under article 24 of the

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1 10 January 2002 (as yet unreported).

2 Mark Elliott and Christopher Forsyth, 'The Rule of Law in Hong Kong: Immigrant Children, the Court of Final Appeal and the Standing Committee of the National People's Congress' (2000) 8 *Asia Pacific Law Review* 53.

3 [1999] 1 HKLRD 315, Court of Final Appeal. See Elliott and Forsyth, *op cit* n. 2 p 56 n 17 for the references to all the cases which formed part of the right of abode litigation.

Basic Law. If the decisions had been fully complied with, a very large number of children—the precise figure is disputed—would have the right of abode in the HKSAR. Instead of either complying with the pronouncements of the courts or seeking the amendment of the Basic Law by the usual process, the government decided to side-step both the judicial and the legislative processes and seek an interpretation of the crucial sections of the Basic Law from the Standing Committee of the National People's Congress that was different from that already given by the Court of Final Appeal. We have little to add to what was said in the earlier article on these matters save to reiterate that fundamental constitutional principles should not be abandoned because of the practical exigencies of the moment.

*Ng Siu Tung*, however, raises and resolves fresh issues. The emphasis shifts away from questions of constitutional rights and the rule of law towards questions of fairness in administrative processes and in particular the question of the protection of substantive legitimate expectations. However, large numbers of applicants who raised many different issues were involved; and this caused the litigation to be formidably complicated. We present, comment on and criticise the issues that seem to us to be the most important, but do not suppose that we have said the last word on this case.

## II. How Ng Siu Tung Arose

Elementarily, since the transfer of sovereignty on 1 July 1997, the 'One Country, Two Systems' concept has governed the relationship between the HKSAR and the rest of China. This concept is given practical effect through the Basic Law, which is an enactment of the National People's Congress (NPC) of the People's Republic of China (PRC), and at the heart of this relationship between the HKSAR and the PRC is article 158 of the Basic Law. This vests the power of interpretation of the Basic Law in the Standing Committee of the National People's Congress (NPCSC) However, the NPCSC 'shall authorise the courts of the HKSAR to interpret on their own ... the provisions of this Law which are within the limits of the autonomy of the Region'. When questions of interpretation of other provisions of the Basic Law arise, namely, those provisions which concern 'affairs which are the responsibility of the Central People's Government' or 'the relationship between the Central Authorities and the Region' (the 'classified provisions') the Court of Final Appeal of the HKSAR (CFA) 'shall seek an interpretation of the relevant provisions from the Standing Committee'.[4] Of great importance to *Ng Siu Tung* are the last two sentences of article 158(3) which provide that, when the Standing Committee has interpreted certain provisions of the Basic Law, 'the courts of the Region, in apply-

[4] The Basic Law does not define which provisions are so 'classified', or establish who is to decide whether a particular provision relates to such matters or not. This is important because the reach of this class, and the question of who determines what falls within it, is what determines the true extent of the legal autonomy of the HKSAR. To the believer in the rule of law, the NPCSC as a non-judicial, political body must be substituted for a court as seldom as possible.

ing those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected'.

The issues arising in the right of abode litigation prior to *Ng Siu Tung* have been discussed in detail elsewhere,[5] but a very brief account needs to be given here. Article 24 of the Basic Law provides that 'permanent residents' of Hong Kong shall have the 'right of abode', and permanent residents are defined as Chinese citizens (i) born in Hong Kong at any time or (ii) who have ordinarily resided there for a continuous period of at least seven years or (iii) who are the children of such people. On 1 July 1997, the Provisional Legislative Council enacted the Immigration (Amendment) (No 2) Ordinance, which provided that the children of permanent residents only had the right of abode if *at the time of their birth* at least one of their parents was a permanent resident (this is the time-of-birth restriction). And on 10 July 1997 (but purporting to take effect on the 1 July 1997) the Immigration (Amendment) (No 3) Ordinance enacted a scheme for the verification of permanent residence. This involved both satisfying the Director of Immigration of their status as permanent residents and obtaining the mainland authorities' permission to travel to Hong Kong (this was the 'one way visa' restriction). This latter requirement rendered the right illusory for many because of the delays involved in obtaining these permits from the mainland authorities.[6]

These two Ordinances prevented a large number of mainland-born children from exercising what they saw as their right of abode. Many of them were already in Hong Kong, having entered as visitors on 'two way visas'. In early July 1997, they instituted judicial review proceedings to challenge these provisions after the Director of Immigration had rejected their claims and made removal orders against them. The number of people applying for legal aid to join in those proceedings or commence similar proceedings rose rapidly, arousing serious concern in the executive. As a result, various steps were taken by different authorities in order to manage this flow of litigation.

## *A. The Executive's Management Strategy*

Inevitably, a range of different statements were made by the executive authorities in response to their growing difficulties. On several occasions, the Chief Executive said that the government would 'do what the court eventually decides', and would 'abide by the rulings of the court'.[7] On 23 July 1997, the Chief Secretary for Administration, who is responsible for the Legal Aid Department at Legislative Council meetings, was asked about the financial implications of the large number of applications for legal aid. He replied that 'so far, 73 cases have been granted legal aid. However, with the agreement of the courts and both sides, a few cases will be selected as test cases to obtain rulings from the courts on points of law. It is

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[5] Elliott and Forsyth, *op cit* n 2, pp 56–62.

[6] A quota of 150 per day was fixed notwithstanding that there were more that 66,000 such applications in mid-1997.

[7] The first of these statements was made in a speech to the Australian Chamber of Commerce and the third in a speech delivered at Chatham House, London. All were made in July 1997.

therefore unnecessary to initiate separate proceedings for each and every legally aided person .... The Department will closely monitor expenditure in these cases'.

In addition to these general statements, several specific representations were made by government agencies. Applicants for the right of abode who addressed themselves either to the Immigration Department or to some other government officials, such as the Chief Executive and Secretary for Security, received a standard non-committal reply, but, in a reply to an applicant, the Secretary of Security said on 24 April 1998 that 'after the whole litigation process is completed, the Immigration Department will follow the final judgment of the Courts in dealing with the applicants for the Certificate of Entitlement'.

As was recognised in the opening paragraph of this article, the government's fears about being swamped by a very large number of persons unexpectedly obtaining the right of abode were genuine. None the less, it must be frankly acknowledged that all the subsequent difficulties are the result of the government's attempts, which have been in large measure successful, to resile from these statements.

## B. *The Management Strategy of the Legal Aid Department*

The Legal Aid Department was also trying to stem the flow of applications for legal aid. In August 1997, the Director of Immigration had given an undertaking not to remove persons who had been granted legal aid, so the actual grant of legal aid was vital. In September 1997, however, the Department stopped granting further legal aid certificates because the new cases contained no fresh legal issues. Applicants for legal aid were instead recorded and given a pink card. In these circumstances, the Director of Immigration agreed not to remove those who had applied for (but had not been granted) legal aid, but whom the Legal Aid Department considered to have a meritorious case. In December 1998, there was another surge in applications and the Department introduced a registration system whereby only urgent cases, including those in which the applicants were under detention or in danger of being removed, were screened. Other cases were registered and the applicants were sent a *pro forma* reply stating that, since the same matters were currently being heard in the CFA there was 'no need to bring individual cases for litigation'. In February 1999, these letters were replaced by white cards acknowledging that applications for legal aid had been made.

## C. *The Court's Management Strategy*

Further references to the litigation as 'test cases' came from the court proceedings themselves. The litigation began with five actions which were commenced in early July 1997. Keith J, who handled these five cases at first instance, was similarly conscious of the problems presented by the large numbers of potential cases. He urged the parties to select suitable cases for trial on the issues common to all the cases. These selected cases would then be 'representative cases' in the sense that the issues decided by the courts would be of interest to people who were not parties to the cases. By agreement of the applicants, four cases involving five applicants were chosen. They became known as the *Cheung Lai Wah* cases (later called *Ng Ka Ling* in the CFA). The first five actions and another three cases were

stayed by Keith J pending the determination of the representative cases. On 12 November 1997, another case involving 81 applicants was instituted. Again, one applicant was selected by agreement of the parties to be a representative applicant, and the case became *Chan Kam Nga*. In no case was an order making the case representative sought or granted.

*Cheung Lai Wah*[8] (later to be known as *Ng Ka Ling*) and *Chan Kam Nga* then made their way though the High Court and the Court of Appeal. On 29 January 1999, however, in *Ng Ka Ling* the CFA held that persons claiming permanent resident status under article 24(2)(iii) (ie on the basis that at least one parent was a permanent resident) were not subject to the approval of the mainland authorities. The one-way exit permit requirement was thus invalid, as was the retrospective provision, but the part of the scheme which required an application for permanent resident status to be made only in the mainland was upheld.[9] And when *Chan Kam Nga*[10] reached the Court of Final Appeal on 29 January 1999, the time-of-birth limitation was held incompatible with article 24(2)(iii) and invalid.[11]

## D. *The Interpretation by the Standing Committee of the NPC*

The next development[12] was the HKSAR Government's request to the Standing Committee of the NPC for an interpretation of the relevant provisions because, according to the Chief Executive, 'the effect of the [Court's] interpretation would be to place unbearable pressure on the HKSAR, given the predicted influx of migrants',[13] although this contention was challenged.[14] It may be noted that article 158 envisages that references will be made in appropriate cases to the Standing Committee by the CFA. There is no express warrant in the Basic Law for a 'free-standing' reference by the government to the Standing Committee.

The 'Interpretation', once delivered, essentially contradicted the findings of the CFA in *Cheung Lai Wah* and *Chan Kam Nga*, without dealing with the arguments that had persuaded the Court. The time-of-birth limitation was reinstated, as was the requirement that approval of the mainland authorities was required before the exercise of a right of abode under article 24. So, under the 'Interpretation', many people who thought that they possessed a right of abode found that they did not, and those who did possess the right but did not live in the HKSAR found that their ability to exercise the right was dependent upon the discretion of the mainland

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8 [1997] 3 HKC 64.

9 [1999] 1 HKLRD 315.

10 [1998] 1 HKLRD 142.

11 [1999] 1 HKLRD 304.

12 Nothing will be said here about the CFA's rather opaque 'clarification' of its 29 January 1999 decisions. For the detail, see Elliott and Forsyth, *op cit* n 2, p 62.

13 Chief Executive's Report to the State Council, 20 May 1999, see www.info.gov.hk/basic_law/english/CE-01.doc.

14 As was noted in the earlier article, while the HKSAR Government estimated 1.6 million people would be eligible as a result of the right of abode litigation, the pressure group Human Rights Monitor put the figure at only 562,000. See Elliott and Forsyth, *op cit* n 2, p 63, n 44.

authorities. The difficulties with the course adopted by the HKSAR Government were explored in the earlier article.[15]

But what was the status of the 'Interpretation' in the law of Hong Kong? The Court of Final Appeal held in *Lau Kong Yung* v. *Director of Immigration*[16] that the 'Interpretation' was valid and effective. Nothing in articles 158(2) or (3) limited the power of the NPCSC to interpret the Basic Law under article 158(1), a power which was held to be in 'general and unqualified terms'. Since the 'Interpretation' was an interpretation, not a change, of law, its effect should date from 1 July 1997 when the Basic Law came into force. Thus the time-of-birth limitation and the one-way exit permit and verification scheme were and always had been constitutional. The only remaining invalidity was the retrospective provision of the Ordinance, which the CFA held was not affected by the 'Interpretation'.

## III. Excursus: An Introduction to Legitimate Expectations

*Ng Siu Tung* will be best known in the future for the contributions which it made to the development of the law of legitimate expectations in Hong Kong. So, before we turn to this, a short account of the protection of legitimate expectations in the common law world generally seems appropriate.[17] The doctrine of legitimate expectations addresses the protection of the trust which citizens have placed in statements or practices of those in authority. Citizens to whom solemn

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[15] In the result, a right protected under the Basic Law became contingent on the political will of the Central Authorities under the other PRC system, a position surely incompatible with the promise of 'one country, two systems'. Furthermore, there were serious problems with the choice of interpretation under art. 158. First, this amounted to *de facto* amendment of the Basic Law without adopting the procedures for such amendment (two-thirds support from the Legislative Council, two-thirds support from the Deputies of the Regions to the NPC), thereby eroding the constitutional status of the Basic Law. Secondly, it is plain that interpretation and amendment are clearly envisaged by the Basic Law as having different roles; interpretation is to happen in the context of specific legal proceedings as an integral part of judicial process, whereas it is the amendment process which is to facilitate changes to Hong Kong's constitution.

[16] [1999] HKCFA 77.

[17] A full account will be found in Wade and Forsyth, *Administrative Law* (8th edn, 2000, Oxford University Press) pp 370–373 and 494–500. For discussion with European comparisons, see Forsyth, (1988) *Cambridge Law Journal* 238; and Craig, (1992) 108 *Law Quarterly Review* 79. No mention is made here of the Australian heresy that allows a person who is unaware of an undertaking (and so has placed no trust in it) to assert a legitimate expectation. See *Minister of Ethnic Affairs* v. *Teoh* (1995) 128 ALR 353 at p 365. See Taggart, (1996) 112 *Law Quarterly Review* 50 for criticism; and the discussion in Wade and Forsyth, *Administrative Law*, p 496 n 61. The assertion is based upon a confused understanding of the nature and purpose of legitimate expectations and should not be followed.

assurances have been made, who have placed their trust in those promises of officials, should not find when those officials do not act as promised, that the law can give them no remedy. Legitimate expectations generally fall into two types: an individual may through the promise of a decision-maker legitimately expect either that a particular procedure will be adopted in reaching the decision—this is a *procedural expectation*. Alternatively, an individual may expect a particular (and favourable) decision as the outcome of a decision-making process—this is a *substantive expectation*.

Procedural expectations—once they are recognised as legitimate—are protected simply by requiring that the promised procedure is followed. And the well-known leading case is *Attorney-General of Hong Kong v. Ng Yuen Shui*.[18] Here the Government of Hong Kong had promised that certain illegal immigrants, who were liable to be removed, would be interviewed individually and treated on the merits in each case. A removal order made without according an individual a proper interview was quashed. The Privy Council held that 'when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty'.

Less straightforward is the protection of substantive legitimate expectations. Some cases hold that, where there is a substantive legitimate expectation that is deemed worthy of protection, then, save where there is an overriding public interest, the decision-maker who does not fulfil that legitimate expectation by making a decision in accordance with the expectation may have his decision quashed in judicial review proceedings. Thus the English Court of Appeal unequivocally adopted the doctrine in *R. v. North and East Devon Health Authority, ex parte Coughlan*[19] that, where a substantive legitimate expectation was found, that expectation should be fulfilled, save where an 'overriding public interest' was found by the court itself.

This protection of substantive expectations fetters the freedom of action of the decision-maker, and thus tends to undermine the autonomy of the individual decision-maker to judge where the public interest lies. However, as we shall see, the protection of substantive expectations was held to be 'part of the administrative law of Hong Kong' in *Ng Siu Tung*.[20]

## IV. Ng Siu Tung

The right of abode seekers who would have derived such a right from article 24(2) but for the Ordinances can now be divided into three categories.[21] First, there are the *Ng Ka Ling* and *Chan Kam Nga* applicants themselves. For these applicants,

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18 [1983] 2 AC 629.

19 [2000] 2 WLR 622.

20 Para. 91 (majority judgment).

21 The CFA divided the applicants before it in *Ng Siu Tung* into two categories. Group A did not fall foul of the time-of-birth limitation, and were only prevented from exercising their right of abode by the No 3 Ordinance. In other words, these applicants only needed

the only issue was whether the 'judgments previously rendered' protection would extend to a 'free-standing' interpretation given under article 158(1) rather than a judicial reference given under article 158(3). Secondly, there are those who had begun to pursue claims, but were prevented from doing so by one of the management strategies outlined above, such as the *pro forma* reply from the Legal Aid Department, or the letter of 24 April 1997 from the Secretary of Security. Thirdly, there are those who did not apply to any of the executive bodies, or to the Legal Aid Department, because they were deterred from doing so by relying on the more general statements made as part of the executive's management strategy. The relationship between these three groups, and the relationship between the right of abode decisions and the Interpretation, formed two of the five points of appeal in *Ng Siu Tung*.

## *A. The First Category of Right of Abode Seekers: The 'Judgments Previously Rendered' Issue*

The CFA affirmed the undisputed proposition that this protection applied to 'free-standing' interpretations under article 158(1) as much as it did to interpretations given in response to an article 158(3) reference. The protection given to judgments by the last sentence of article 158(3) was 'to be seen as an express recognition of the consequences which follow from the making of an interpretation under article 158(1), namely, that judgments previously rendered shall not be affected' because 'it would make little sense' to do Otherwise.[22]

This naturally led to the question of the scope of the word 'judgments'. What exactly was to remain unaffected by an article 158 interpretation? The Director of Immigration contended that it extended only to the court orders affirming or denying the rights of the parties to the litigation. The applicants, on the other hand, argued that 'judgment' meant the *ratio decidendi*. This, if accepted, would greatly expand the numbers of persons protected through the decisions in *Ng Ka Ling* and *Chan Kam Nga* and article 158(3). The majority found for the Director of Immigration. Otherwise, they reasoned, the *ratio* and reasoning of the decision would be transferred from the realm of precedent to the area of binding judgment, and the binding effect of a judgment would be extended in favour of 'strangers to the litigation'. Moreover, the assimilation of *ratio decidendi* to judgment would displace the penultimate sentence in article 158(3). The words 'when the NPCSC makes an interpretation ... the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee'[23] would be deprived of meaning.

'Strangers to the litigation' is hardly an apt phrase to describe the applicants in *Ng Siu Tung*, but plainly there are powerful arguments in favour of the view adopted of the meaning of 'judgments previously rendered'. The argument accepted

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to benefit from *Ng Ka Ling*. Group B applicants, on the other hand, needed to benefit from both *Ng Ka Ling* and *Chan Kam Nga* because they fell foul of the time-of-birth limitation in the No 2 Ordinance, as well as requiring the permission of the Central Authorities under the No 3 Ordinance in order to exercise their right of abode.

[22] Decision of 10 January 2002, paras 26–30.

[23] *Ibid*, paras 31–38.

in the dissenting judgment of Bokhary PJ, however, was that the word 'judgment' must be interpreted in its context of 'constitutional litigation about an entrenched right'. And in that context 'all the persons whose existing circumstances put them in the relevant position acquire crystallised rights under a favourable judgment'.[24] Such an interpretation has much to commend it.[25] It does not leave the 'Interpretation' without effect, for the law as stated therein would apply to children not born at the time of the 'Interpretation' or whose parent was not by that time a permanent resident. A wide meaning being given to 'judgment' seems appropriate in the light of the 'high degree of autonomy' accorded to the HKSAR under the Basic Law, since it leaves to the judicial system of the HKSAR the task of determining how cases in the pipeline at the time of an 'Interpretation' were to be dealt with. Moreover, such an interpretation would aid sound administration in the future. In the absence of such an interpretation, large-scale litigation such as the right of abode litigation will not be able to be dealt with on a test case basis. Prudence will dictate that every person affected will apply for legal aid and will wish to join in the litigation.

And, finally, such an interpretation would fit in with the reasonable expectations of the applicants. Notwithstanding their description as 'strangers to the litigation', the CFA also said that the applicants in *Ng Siu Tung* (both the general and specific representees) expected 'that persons in these categories will be treated as if they were litigants in the *Ng Ka Ling* and *Chan Kam Nga* cases respectively'.[26] But this must mean that the applicants expected that they would be *treated as if they were litigants* in the *Ng Ka Ling* and *Chan Kam Nga cases, in other words, that they would be covered by the 'judgments previously rendered' provision*. To define their expectations as the CFA later did, by reference to the substantive *outcome* of the *Ng* and *Chan* cases, is to misunderstand the true force of those expectations, which were to be treated as parties to the *Ng* and *Chan* cases *whatever* their specific outcome.[27]

In the end, the CFA could choose a wide or a narrow interpretation of 'judgment'. However, as Bokhary PJ notes in his dissenting judgment, 'between these two obvious extremes, there ...lies a ...middle ground'.[28] The word judgment could have included those with the expectation of being treated as parties to the two cases, without being extended to mean *ratio decidendi*. The argument here is not that through asserting a legitimate expectation the parties should be given the

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24 *Ibid*, para. 325.

25 It is well established in the law of Hong Kong and elsewhere that constitutional interpretation is not to be hindered by the 'austerity of tabulated legalism'. See Elliott and Forsyth, *op cit* n 2, pp 59–60.

26 Decision of 10 January 2002, para. 108.

27 It is apparent that in their written submissions the parties had in fact come close to arguing this, but that in the oral hearing the two matters were kept separate, so that the 'test case' character of the litigation in *Ng Ka Ling* and *Chan Kam Nga* was held to be 'relevant to the case based on legitimate expectation', counsel for the applicants having 'disclaimed reliance upon [this] in relation to the Article 158 argument' (para. 39). Thus the CFA did not have this argument clearly before it and the two issues remained separate.

28 Para. 316.

protection of article 158(3). This would be to suggest that a legitimate expectation could give them protection that article 158(3) itself could not. This argument simply buttresses the conclusion of Bokhary PJ that article 158(3) should have been interpreted as including all those with such a crystallised right. It would then be necessary to establish exactly who does have such a crystallised right, and the answer to that is 'all those who were in the pipeline', in other words, all those with a legitimate expectation of being treated as parties to the *Ng* and *Chan* cases whatever their specific outcome.[29]

## B. *The Second and Third Category of Right of Abode Seekers: The 'Legitimate Expectations' Issue*

We turn now to consider legitimate expectations proper, namely, that as a result of the management strategies listed above the applicants had legitimate expectations that they would receive the same treatment as the parties in the *Ng Ka Ling* and *Chan Kam Nga* litigation. In dealing with this ground of appeal, the Court began by outlining the development of this area of law in England, in particular in relation to substantive, as opposed to procedural, legitimate expectations,[30] before concluding that:

> the doctrine [of substantive legitimate expectations] forms part of the administrative law of Hong Kong. As such, the doctrine is an important element in the exercise of the court's inherent supervisory jurisdiction to ensure, first, that statutory powers are exercised lawfully and are not abused and, secondly, that they are exercised so as to result in administrative fairness in relation to both procedural and substantive benefits.[31]

It is clear, therefore, that the CFA in *Ng Siu Tung* did not envisage that procedural protection would suffice. It clearly recognised[32] that the law in England had moved on to protect, in appropriate cases, substantive expectations substantively and went on to accept that this was also the position in Hong Kong. It is true that in these paragraphs the court was specifically contrasting substantive protection with protection by the standard of *Wednesbury* unreasonableness (decision only

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[29] Some of the force of arguments such as those in the preceding paragraph is impliedly recognised by the government in the 'Concession'. This was the policy decision announced by the Chief Executive about who would be affected by the 'Interpretation'. Applicants in Hong Kong between 1 July 1997 and 29 January 1999 (the date of the CFA's decision in *Ng Ka Ling*) and who had lodged a claim for right of abode during that period would not have the Interpretation applied to them. This is surely recognition that those persons other than the actual parties in the cases concerned were worthy of protection.

[30] Decision of 10 January 2002, paras 87–90.

[31] *Ibid*, para. 91, citing *R. v. North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622.

[32] *Ibid*, paras 88, 89 and 90.

quashed if denial of the expectation was unreasonable),[33] but the thrust of these paragraphs is the acceptance of substantive review of expectations rather than the procedural protection of substantive expectations. Legitimate expectations would therefore arise as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority,[34] but on the other hand the decision-maker must remain free to change its policy and to abandon or modify its undertakings.[35] In particular, the Court relied on the decision of the English Court of Appeal in *R. v. London Borough of Newham and Manik Bibi and Ataya Al-Nashed*[36] to establish four propositions relating to this balance in the application of substantive legitimate expectations.

First, they held that the law requires that a substantive legitimate expectation be properly taken into account so long as to do so falls within the power of the decision-maker. Failure to do so would amount to an abuse of power.[37] Secondly, unless there are reasons recognised by law for not giving effect to legitimate expectations, then effect should be given to them. Where this is not possible, then fairness requires the decision-maker to give the applicant its reasons so that they can be tested by a court in the event that the decision is challenged.[38] Thirdly, even if the decision involves the making of a political choice by reference to policy considerations, the decision-maker must make the choice in the light of the legitimate expectation of the parties.[39] Fourthly, if the decision-maker does not comply with the third requirement, the decision will be vitiated for a failure to take account of a relevant consideration, which is an abuse of power. Once the court has established this, it may ask the decision-maker to exercise his discretion by taking the legitimate expectation into account.[40] However, the CFA added the qualification 'usually' to this fourth proposition, since the failure to take the legitimate expectation into account must be material.[41]

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[33] See *R. v. Home Secretary, ex parte Hargreaves* [1997] 1 WLR 906; and *R. v. Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681 (decision also based upon fairness) where this was the approach adopted. For comment, see Forsyth, (1997) *Public Law* 375; and Bamforth, (1997) 56 *Cambridge Law Journal* 1.

[34] Decision of 10 January 2002, para. 92, citing *Attorney-General for Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629; and *R. v. Secretary of State for the Home Department, ex parte Ruddock* [1987] 1 WLR 1482.

[35] Decision of 10 January 2002, para. 93, following *R. v. Secretary of State for the Home Department, ex parte Asif Mahmood Khan* [1984] 1 WLR 1337; and *R. v. North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622 at p 647.

[36] [2001] EWCA Civ 607; [2002] 1 WLR 237, discussed below.

[37] Decision of 10 January 2002, para. 94, citing *R. v. London Borough of Newham and Manik Bibi and Ataya Al-Nashed* [2001] EWCA Civ 607; [2002] 1 WLR 237, paras 39 and 51.

[38] Decision of 10 January 2002, para. 95, citing *R. v. London Borough of Newham and Manik Bibi and Ataya Al-Nashed* [2001] EWCA Civ 607; [2002] 1 WLR 237, para. 59.

[39] Decision of 10 January 2002, para. 96, citing *R. v. London Borough of Newham and Manik Bibi and Ataya Al-Nashed* [2001] EWCA Civ 607; [2002] 1 WLR 237, para. 64.

[40] Decision of 10 January 2002, para. 97, citing *R. v. London Borough of Newham and Manik Bibi and Ataya Al-Nashed* [2001] EWCA Civ 607; [2002] 1 WLR 237, para. 41.

[41] Decision of 10 January 2002, para. 98, citing *Lau Kong Yung*, applying *R. v. Hull University Visitor, ex parte Page* [1993] AC 682 at pp 702B–C; *Nguyen Tuan Cuong v. Director of*

In *Ng Siu Tung*, the majority held that the applicants had an expectation that, first, they would not require a one-way exit permit in order to exercise a right of abode under article 24(2)(iii) (*Ng Ka Ling*), and, secondly, that they would be regarded as qualifying under article 24(2)(iii) of the Basic Law even though at the time of their birth neither of their parents had yet acquired permanent resident status in the HKSAR (*Chan Kam Nga*).[42] This meant, the court continued, that the expectation does not conform to the law as it stands and has stood since the 'Interpretation'.

Thus full effect could not be given to these two expectations as the applicants did not qualify as a matter of law for the benefit they were seeking. However, the applicants had countered this by arguing that, although the Director of Immigration could not therefore give full effect to their expectations, he could go some way towards it by exercising his discretion under sections 11, 13 and 19(1) of the Immigration Ordinance.[43] This would not give the applicants a right of abode, but would give them permission to remain or land in Hong Kong. But this permission to remain in Hong Kong, if not revoked, would in due course ripen into the right of abode under article 24(2).

The Court (following *R.* v. *Secretary of State for Education and Employment, ex parte Begbie*[44]) pointed out that the statutory powers could not be exercised in such a way as to undermine the statutory scheme as a whole. It thus concluded that the Director of Immigration could not validly allow all the representees of the four general representations (our third class of right of abode seekers) to enter and reside in Hong Kong, because the numbers of such applicants would be so large that this would undermine the effect of the legislative scheme.[45] In any case, the majority held that, even if the Director of Immigration could lawfully exercise his discretionary powers in favour of this class of claimants, he would be entitled to decide that their expectation was overridden by the overwhelming force of the immigration policy which underlies the legislation validated by the 'Interpretation'.

The applicants in our second category, however (who were asserting a legitimate expectation on the basis of specific representations made to them as individuals

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*Immigration* [1997] 1 WLR 68 at p 77B; and *R.* v. *Cambridge Health Authority, ex parte B* [1995] 1 WLR 898 at pp 907B–C. It is only in an exceptional case that this will be found to be so: Decision of 10 January 2002, para. 98, citing *Gransden & Co. Ltd* v. *Secretary of State for the Environment* (1985) 54 P&CR 86 at p 94.

42 Decision of 10 January 2002, para. 121.

43 Cap 115. Section 11 deals with permission to land and conditions of stay, and provides that an immigration officer or assistant may give someone permission to land or remain in Hong Kong even though they would not otherwise be able to do so, although limiting conditions can be attached to this permission. Section 13 provides that the Director of Immigration can at any time allow an illegal immigrant to remain in Hong Kong, subject to such conditions of stay as the Director thinks fit. Section 19(1) conversely provides that a removal order 'may' be made in certain conditions. Since the wording is permissive, the issuing of removal orders is therefore discretionary (Decision of 10 January 2002, paras 125–127).

44 [2000] 1 WLR 1115.

45 Decision of 10 January 2002, paras 134–135.

in the legal aid *pro forma* replies and the letter from the Secretary of Security), were held by the majority to be in a different position. The exercise in their favour of the relevant discretionary powers would not undermine the statutory scheme as a whole. Although their numbers would still be significant, they would still represent only a small fraction of the relevant claimants or potential claimants and would constitute a specific group of individuals susceptible to exceptional discretionary treatment.[46]

The majority went on to indicate that the Director of Immigration should in exercising his discretion give effect to the substantive legitimate expectations of the class of 'specific representees', noting that 'the disappointment of the original legitimate expectation of members of this class has given rise to a very substantial degree of unfairness which the Director can partly alleviate by a favourable exercise of his powers',[47] and, further, that a favourable exercise of discretion by the Director would 'represent giving only partial relief from the unfairness of not giving effect to the original legitimate expectation. Giving permission to reside ... is obviously not the same as processing the applicant's right of abode application as if he were a party to the *Ng* and *Chan* Cases'.[48]

# V. The Role and Scope of Legitimate Expectations

## *A. Legitimate Expectations as an Aid to Good Administration*

The doctrine of substantive expectations, however inconvenient its application may be in any particular case, should not be seen as the enemy of good administration. On the contrary, provided that it is confined to its proper limits it may serve the administration well. First, far from fettering the discretion of the decision-maker and preventing the change of policy, the courts are simply phasing in the new exercise of discretion and increasing the sophistication of the way in which the policy is changed. Finite groups of applicants are granted substantive legitimate expectations because they are the 'pipeline people' who should have been taken into account by the decision-maker in the first place. This is the answer to the Court's concern that 'by giving the *ratio* and the reasoning [of the *Ng* and *Chan* cases] this extended binding effect, the argument frustrates the intended operation of the penultimate sentence in article 158(3), the purpose of which is to require the Standing Committee interpretation to be followed in lieu of the judgment displaced by the interpretation'.[49]

Secondly, the undertakings given by the Legal Aid Department upon which the success of the protected class of applicants in *Ng Siu Tung* was founded had the effect of greatly facilitating the orderly administration of both legal aid and immigration control in Hong Kong. As the majority judgment says of the legal aid

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[46] *Ibid*, para. 137.
[47] *Ibid*, para. 138.
[48] *Ibid*, para. 143.
[49] *Ibid*, para. 34.

*pro forma* replies: 'Here the representation about the government's future conduct is held out as an inducement to refrain from taking action, a course which is stated to be unnecessary. By these replies, the Legal Aid Department sought to induce the recipients of the replies not to take the very action which, if taken, would have brought them within the protection given to "judgments previously rendered" '.[50] Thus had those undertakings not been given, every one of those applicants would, if properly advised, have insisted on proceeding with their applications for judicial review so that they would share fully in the outcome in *Ng Ka Ling* and *Chan Kam Nga* and enjoy the protection of article 158(1). Had the undertakings not had the effect of placing all those claims on hold, great difficulties would have faced the Legal Aid Department, and the conduct of the litigation in *Ng Ka Ling* and *Chan Kam Nga* would also have been made very much more difficult since every applicant would consider themselves a test case. The undertakings had the effect of bringing order where chaos was threatening. However, were those undertakings to enjoy no protection in law so that it was open to the government freely to renege upon them then that calming effect would vanish. Should a situation arise in the future—quite possibly not in an immigration context—where a large number of persons had similar claims against a public authority in Hong Kong, it will be open to the authorities to calm the frenzy by giving undertakings that all the cases would be dealt with in the way that test cases were dealt with. However, had *Ng Siu Tung* left substantive legitimate expectations totally unprotected then every applicant would have pressed their case to judicial determination with resulting difficulty if not disruption to the administration. Indeed, one consequence of the limited protection offered by *Ng Siu Tung* is that general representations are unlikely to have the calming effect identified above in the future. One can well foresee that public authorities will be pressed to give highly specific undertakings in such circumstances and that, if they fail to do so, the courts will be flooded with cases.

Thirdly, having adopted this useful management strategy based on legitimate expectations, the courts, in reaching their conclusions in *Ng Ka Ling* and *Chan Kam Nga*, considered the possible impact of their decisions on many other claimants.[51] If, having considered the potential application of their decisions to other cases, the courts nevertheless reached the conclusions they did in the two right of abode cases, why should the application of those decisions now be limited? The argument here is therefore not that the decision-makers failed to take the pipeline people into account. The argument is that, as a result of the management strategy adopted by the executive and the Legal Aid Department, the CFA in the two right of abode cases *did* take them into account, and the account it took of them should be applied. Obviously, this could be countered by pointing out that it was also the CFA that decided the issue of substantive legitimate expectations in *Ng Siu Tung*, but the answer to this is again that the Court was not given the proper opportunity to consider the category three 'general representees' because of the separation of the first two grounds of appeal in argument.

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[50] *Ibid*, para. 106.

[51] *Ibid*, para. 78.

## *B. The Scope of the Doctrine; Who Can Claim a Legitimate Expectation?*

Nevertheless, one crucial feature of arguments one and three may still defeat the general representees. It is clear that the number of people to whom the promise or assurance was made did play an important part in the result in *Ng Siu Tung*. The Court clearly considered that the large number of persons to whom the general representations were made (possibly in the order of 600,000) was what precluded the Director of Immigration from exercising his exceptional powers under sections 13 and 19(1) in their favour.[52] There was no basis on which the Director could fairly distinguish between members of this class so as to favour some and not others. Moreover, although not expressed in this way, the weight of numbers involved must bear on the question of whether there was an overriding public interest justifying dashing the legitimate expectations in the particular circumstances.[53] The significance of the numbers involved is also recognised in *Coughlan*[54] and justifies the comment that 'expectations may be more readily protected substantively when the expectation is given individually to a small group of persons ... than where a general announcement of policy is made to a large group .... In the first class of case the decision-maker's freedom of action is being restricted only in exceptional cases, while in the second a general restriction applicable in all cases is required'.[55]

But behind the weight of numbers argument are one or two more subtle issues that may be mentioned. These may be relevant to the kinds of statements that may be made by officials in the future. First of all, it is also important whether the group concerned is finite, ie consists of a fixed number of members, or whether it is indefinite, ie the numbers involved are uncertain. A finite class ensures that the court in ordering the protection of the expectation does not impose an infinite burden upon the administration. In *Ng Siu Tung*, the court was plainly influenced by the fact that the group to which the general representations had been made was an 'innominate class'.[56] Secondly, statements affecting large numbers of person are more likely to be made on broad issues of policy, the view being that the smaller the number of people the lower the level of policy, and the larger the number of people the more 'macro-political' the issue.[57] At the macro-political level, the courts are likely to be particularly sensitive to the issues of legitimacy that will arise. By ordering the substantive protection of the expectations they will be intruding into the heart of the executive's domain and that will be perceived as illegitimate. These concerns will not have the same force at the micro-level where no broad issue of policy is involved.

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[52] *Ibid*, para. 134.

[53] *Ibid*, para. 136.

[54] [2000] 2 WLR 622 at p 646 and pp 649–650.

[55] Wade and Forsyth, *Administrative Law* (8th edn, 2000, Oxford University Press) pp 499–500.

[56] Decision of 10 January 2002, para. 134; and see *R. v. North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622 at pp 649–650.

[57] *R. v. Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at p 1131.

The role of legitimate expectations in the macro-political class of case is limited but, it seems from *Ng Siu Tung* and other cases, not entirely excluded. In making the change of policy, it is open to the administrator to recognise that particular persons or groups will be adversely affected by the change, and therefore to make transitional or 'pipeline' provisions for them. However, where the decision- maker has made no provision for those already in the system at the time of the change, the doctrine of legitimate expectations provides this 'pipeline cover' instead. This aspect of the doctrine of legitimate expectations is prominent in the law of the European Union. In *Sofrimport*,[58] for instance, the applicant sought to import apples from Chile into the Community. A licence was required under one regulation, but after the importer had begun to transport the apples to the Community a further regulation was passed suspending the grant of all such licences. In an action for annulment, the European Court of Justice held that this was a frustration of the applicant's legitimate expectations. The Court held that provision should have been made for goods in transit ('pipeline provisions') as had been done in a second suspensory directive. This sense that the applicant should have been taken into account in making the decision in the first place informs the impact of the protection of legitimate expectations in EU law.

Thus, if the class of 'general representees' is, not large, but innominate, they may still not be able to assert their legitimate expectations. However, there are arguments relating to the particular circumstances of the *Ng Siu Tung* case which suggest that they perhaps ought to be able to succeed despite their innominate nature.

First, in *Ng Siu Tung*, unlike other cases, the administration is responsible not only for the creation and frustration of the legitimate expectations, but also for the very fact that the class of general representees is innominate, rather than finite. If the executive, instead of stating that it would comply with the *Ng* and *Chan* judgments, had stated that it would not comply with them except in the case of applicants who had registered their claims with the Legal Aid Department, then the class of general representees would not have existed. They would either have been included in the class of specific representees, or they would have had no factual expectations capable of giving rise to legal substantive legitimate expectations. This would also have meant that the exact numbers of people concerned by the *Ng* and *Chan* decisions would have been known when those cases were decided, and could have been a matter taken into account in even more detail by the CFA in reaching its decision. Again, if the executive had made statements to this effect the job of the Legal Aid Department would have been made even harder, and thus, again, the executive in fact benefited from inducing people to rely on the general representations rather than bringing themselves within the class of specific representees.

Secondly, the boundaries of legitimate expectations and the exact criteria which will give rise to them are still being developed by the courts in many different jurisdictions. In particular, the relationship with other doctrines such as equality and estoppel has not yet been charted. However, it is interesting to compare the claimant-oriented approach of legitimate expectations with the approach of estop-

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[58] Case 152/88, *Sofrimport Sarl* v. *Commission of the European Communities* [1990] ECR I-2477; [1990] 3 CMLR 80, ECJ.

pel, which is perhaps more concerned with preventing the defendant from going back on its word.

It should be remembered that in *Ng Siu Tung* all the sources of retroactivity were created by the Hong Kong Government itself. First, it chose to respond to the *Chan* and *Ng* cases by requesting an interpretation rather than an amendment. Secondly, in order to stem the flow of litigation before the *Chan* and *Ng* cases, it had specifically made representations on which it intended the representees to rely, in order to manage its workload. Thirdly, as noted immediately above, in relation to the class of general representees, the administration was responsible not only for their expectations based on *Ng* and *Chan*, but also for their presence in the innominate category rather than the class of specific representees. If a more defendant-based approach were to be adopted, then it is arguable that the government could be estopped from claiming that any of the representees should not be entitled to the protection of the 'judgments previously rendered' provision in article 158(3). Thus, even if it is not possible to establish which of the third, innominate class of general representees are the 'pipeline people' that have the 'crystallised rights' covered by the correct interpretation of article 158(3), the government could be estopped from making this argument. This is not to alter the definition of legitimate expectations, or to suggest that an innominate class can claim such expectations. It is rather to suggest that, because the government is itself responsible for their presence in the innominate class, it cannot then benefit from this.

## VI. Conclusions

Once the 'Interpretation' had been accepted as effective in the law of Hong Kong—as it was in *Lau Kong Yung v. Director of Immigration*[59]—then it was plain that every child who would have qualified for the right of abode under the law as laid down in *Ng Ka Ling v. Director of Immigration*[60] could not qualify for the right of abode. However, this did not mean that every such child could not qualify. In the first place, 'judgments previously rendered' were not to be affected by the 'Interpretation'; and so the question arose which children fell within this protection. In the event, the CFA restricted this protection to the actual parties to the cases, each of which, it was acknowledged by all, represented many others in a similar position. In some ways the most disappointing aspect of *Ng Siu Tung* is its failure to give an entirely proper, but wide, interpretation to the word 'judgment'. Apart from anything else, this narrow interpretation will have made such representative litigation much more difficult. In any case involving the Basic Law, those affected will now, if well advised, insist on being parties in order to secure the protection of article 158(3).[61]

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[59] [1999] HKCFA 77.

[60] [1999] 1 HKLRD 315, Court of Final Appeal. See Elliott and Forsyth, *op cit* n 2, p 56 n 17, for the references to all the cases which formed part of the right of abode litigation.

[61] Whisper it softly, but note how the protection of legitimate expectations, a common law doctrine, has certain advantages over protection by means of the Basic Law. Had a more

This conclusion meant, moreover, that some other resting place had to be found on the spectrum between giving protection to everyone who qualified under the *Ng Ka Ling* law and giving protection only to the actual parties to the test litigation. That meant recourse was had to the doctrine of the substantive protection of legitimate expectations. The unequivocal acceptance of this doctrine into the administrative law of Hong Kong will prove of considerable importance to the development of judicial review. Decision-makers will inevitably become more cautious in the statements which they make to the public and to individuals. But for the reasons given above, they should also realise that the doctrine, being founded on the protection of trust between the governed and the governor, can serve the administration well. In the absence of that trust, the choice is simply between coercion and chaos. Indeed, the failure to protect fully the legitimate expectations of all the applicants leads to the prospect of 'ugly scenes ...[as] abode seekers have to be forcibly repatriated and the heartbreak of families being split and children torn from the classroom'.[62] For the future, it will no longer be possible for the government to adopt broader management strategies such as the general representations[63] made before the decisions in *Ng Ka Ling* and *Chan Kam Nga*. Anyone who has a claim will in future be advised to apply to the Legal Aid Department and the relevant government administrative authority, in order to bring themselves at least within the class of specific representees. Moreover, since even the specific representees did not benefit from the protection of article 158(3) on 'judgments previously rendered', in future it will not be open to the Legal Aid Department or the courts to adopt a *de facto* test case strategy. To do this would deprive people of the protection of article 158(3) and relegate the protection of the expectations of specific representees to the vagaries of the doctrine of substantive legitimate expectations. Prudence will always require specific representees to be full parties in cases such as *Ng Ka Ling* and *Chan Kam Nga*.

So much for the situation in potential future disputes. As for the right of abode litigation itself, those unsuccessful applicants still in Hong Kong have been given until 31 March 2002 to leave. But many have sought judicial review of the Director of Immigration's decisions in regard to them specifically. These applications have so far been dismissed without a hearing or rejected in the Court of First Instance, but at the time of writing 4,753 appeals have been brought against these decisions, concerning 7,620 applicants.[64] Even if all these appeals are unsuccessful, they will

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extensive reading of 'judgment' in art. 158 been adopted by the CFA, that interpretation might have been referred to the Standing Committee by the government. But the Standing Committee can only interpret provisions of the Basic Law itself (art. 158(1)). The CFA has the final word on the common law.

62 *South China Morning Post*, 12 January 2002.

63 Two of which were made outside China: see the statement to the Australian Chamber of Commerce, 31 July 1997 ('the Hong Kong SAR Government will argue its case in court and abide by the court's ruling'); and the statement in a speech delivered at Chatham House, London, 22 October 1997 ('the Government will argue its case in court and abide by the rulings').

64 *South China Morning Post*, 5 February 2002.

occupy substantial amounts of the time and resources of the Courts.[65] Given the acute humanitarian considerations that will arise in many cases with families being split up, it is difficult to escape the conclusion that there will be cases where the exercise by the Director of Immigration of his discretion under section 13 of the Immigration Ordinance to grant leave for illegal immigrants to remain in Hong Kong will be appropriate. An easy way out of these difficulties would be through the grant of an amnesty to the disappointed applicants in *Ng Siu Tung*. Such an amnesty could apply, for example, to all those who filed legal actions for the right of abode before the *Ng Siu Tung* ruling, a finite group estimated to be around 10,000 people.[66] This would not prompt an influx from the mainland, or create a legal precedent, but would instead be a one-off policy decision. But, given the vigour with which the government fought these cases to the CFA, this is unlikely to occur.

It is not an easy or straightforward task to govern Hong Kong; and there should be sympathy and understanding for the government's apprehension of the difficulties that would result were large numbers of persons unexpectedly to qualify for the right of abode. It must be said though that adopting the stratagem of seeking an Interpretation from the Standing Committee and thereby avoiding both the judicial and the legislative process was a threat to constitutional government in Hong Kong. It is worrying then that the Chief Executive has refused to give an undertaking not to use this stratagem again.[67] It may therefore be reiterated that the existence of a power under the law of the HKSAR for the Chief Executive to make such references may be doubted but that in any event such a reference must be subject to judicial review.[68] It may therefore be necessary in the future for the good government of Hong Kong for the courts to review such a reference and establish themselves as the proper and constitutional gatekeepers of the path to the Standing Committee.

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[65] There have been some suggestions that these applications are an abuse of the process of the courts (Ambrose Lee Siu-Kwong, Director of Immigration, *South China Morning Post*, 8 February 2002), but this has been denied by the Bar Association and the Human Rights Monitor (*South China Morning Post*, 5 February 2002).

[66] *South China Morning Post*, 12 January 2002.

[67] In response to a question from Bar Association Chairman Alan Leong Kah-kit at a consultation on 31 January 2002.

[68] Elliott and Forsyth, *op cit* n 2, pp 65–67 and 74–75.