

For information

LegCo Panel on Administration of Justice and Legal Services

**Procedure for seeking an interpretation of the Basic Law (“BL”)
under BL 158(1)**

This paper provides information on the previous occasions where the Standing Committee of the National People’s Congress (“NPCSC”), pursuant to the power under BL 158(1), made interpretations of certain provisions of the Basic Law, either upon the request of the Government of the Hong Kong Special Administrative Region (“HKSAR”) through the State Council or upon the NPCSC’s own initiative. As requested, the information includes, where appropriate, the circumstances leading to the Administration’s requests, the procedures adopted in seeking the interpretation and the justifications for such requests. The paper also provides information on the interpretation by the NPCSC made in 1996 in respect of the Nationality Law that had been applied to the HKSAR from 1 July 1997.

Interpretation in 1999

2. On 29 January 1999, the Court of Final Appeal (“CFA”) gave judgments in *Ng Ka Ling and Others v Director of Immigration* [1999] 1 HKC 291 and *Chan Kam Nga and Others v Director of Immigration* [1999] 1 HKC 347 concerning the right of abode of persons born in the Mainland of Hong Kong residents. In its judgments, the CFA decided that certain provisions in the Immigration Ordinance (Cap. 115) were inconsistent with the Basic Law. The CFA ruled that persons born of Hong Kong residents referred to in Article 24(2)(3) of the Basic Law included persons born before, as well as persons born after, either one of their parents became a permanent resident, and included persons born in or out of wedlock. The CFA further ruled that the restrictions on entry into Hong Kong imposed by Article 22(4) of the Basic Law on “people from other parts of China” did not apply to these persons.

3. The Administration considered that the interpretation and rulings of the CFA, other than the one on persons born out of wedlock, were not consistent with the legislative intent of the relevant provisions of the Basic Law as understood by the Administration. The said rulings had changed the previous immigration control system of Hong Kong and had caused widespread concern and debate in the community. The assessment of the Administration was that the admission of these additional people would create enormous pressure on Hong Kong. Hong Kong's land and social resources would not be capable of coping with the demands of such a large number of new arrivals for education, housing, medical and health services, social welfare and other needs. This would trigger social problems and lead to consequences which would have a serious and adverse effect on the stability and prosperity of Hong Kong.

4. Article 43 of the Basic Law provides that the Chief Executive (“CE”) shall be the head of the HKSAR and shall represent the Region. The CE shall be accountable to the CPG and the HKSAR in accordance with the provisions of the Basic Law. Article 48(2) of the Basic Law provides that one of CE's powers and functions is to be responsible for the implementation of the Basic Law.

5. In accordance with Articles 43 and 48(2) of the Basic Law, the CE reported to the State Council on 20 May 1999 the problems he had encountered in the implementation of the Basic Law and sought assistance from the State Council. He proposed that the State Council should ask the NPCSC to interpret Articles 22(4) and 24(2)(3) of the Basic Law.

6. The interpretation by the NPCSC of Articles 22(4) and 24(2)(3) of the Basic Law adopted on 26 June 1999 have the following effect:

- (a) under Article 22(4), persons from all provinces, autonomous regions or municipalities directly under the Central Government including those persons within Article 24(2)(3) (i.e. persons of Chinese nationality born outside Hong Kong

of permanent residents of Hong Kong), who wish to enter the HKSAR for whatever reason, have to apply to the relevant authorities of their residential districts for approval in accordance with the relevant national laws and administrative regulations and have to hold valid documents issued by the relevant authorities before they can enter the HKSAR;

- (b) to qualify as a permanent resident under Article 24(2)(3), it is necessary that both parents or either parent of the person concerned has to be a permanent resident (within Article 24(2)(1) or Article 24(2)(2)) at the time of birth of the person concerned.

7. The NPCSC's power of interpretation under Article 158 was examined closely by the CFA in *Lau Kong Yung v Director of Immigration* [1999] 3 HKLRD 778. The background of the case is that Lau Kong Yung and the other plaintiffs of the case, having come to Hong Kong on two-way Chinese exit permits, overstayed in Hong Kong. They all claimed to be persons of Chinese nationality born in Mainland China of permanent residents of Hong Kong and entitled to the right of abode in the HKSAR under Article 24(2)(3) of the Basic Law.

8. The case went on appeal to the CFA which, in its judgment, ruled on the effect of the interpretation dated 26 June 1999 by the NPCSC of Articles 22(4) and 24(2)(3) of the Basic Law. In its judgment, the CFA stated clearly that the NPCSC had the power to make the above interpretation under Article 158(1) of the Basic Law. The CFA held that it is a valid and binding interpretation of Articles 22(4) and 24(2)(3) of the Basic Law which the courts in the HKSAR are under a duty to follow. The NPCSC has a general power to interpret the Basic Law. This power originates from Article 67(4) of the Constitution of the People's Republic of China ("PRC"), under which, the NPCSC has the power to interpret laws of the PRC, including the Basic Law which is a national law. This power is also contained in Article 158(1) of the Basic Law itself. The power of interpretation conferred by Article 158(1) is in general and unqualified terms. It is not restricted or qualified in any way by Articles

158(2) and 158(3) of the Basic Law which authorize the HKSAR courts to interpret the Basic Law in adjudicating cases. Furthermore, it is not restricted to interpreting only the excluded provisions, i.e. provisions of the Basic Law concerning affairs which are the responsibility of the Central People's Government or concerning the relationship between the Central Authorities and the HKSAR. Article 158 of the Basic Law and Article 67(4) of the PRC Constitution are reproduced in the Annex for ease of reference.

Interpretation in 2004

9. On 26 March 2004, the NPCSC announced that the issues of legislative process relating to Hong Kong's constitutional development would be included in the agenda of its meeting from 2 to 6 April 2004 because there were divergent views on these issues. On the same day, the Administration was notified of the matter and was requested to provide the conclusions of the Constitutional Development Task Force ("Task Force") on the issues of legislative process to NPCSC for reference. On 29 March 2004, the First Report of the Task Force was submitted to the CE. On 30 March 2004, the Task Force submitted to the NPCSC its First Report together with all the views it received from the community on the issues.

10. On 6 April 2004, the NPCSC on its own initiative interpreted Article 7 of Annex I and Article III of Annex II to the Basic Law. The interpretation of the NPCSC on Annexes I and II of the Basic Law was intended to assist the HKSAR to resolve the important issue of constitutional development. Before the interpretation was made, there were divergent views on the interpretation of the provisions in Annexes I and II of the Basic Law. For instance, there were different views on whether the phrase "the terms subsequent to the year 2007" should include 2007 and whether the amendment procedures in the relevant Annexes should be initiated by the HKSAR Government. The interpretation of the NPCSC helped to clarify these issues and put an end to the disputes in the community.

Interpretation in 2005

11. On 12 March 2005, the CPG approved the request of Mr Tung Chee Hwa to resign from the office of the CE of the HKSAR. The office of the CE became vacant on that date. According to Article 53 of the Basic Law, in the event that the office of the CE becomes vacant, a new CE shall be selected within six months in accordance with the provisions of Article 45 of the Basic Law. Section 10 of the Chief Executive Election Ordinance (Cap. 569) (“CEEEO”) required that an election be held on 10 July 2005, not earlier or later, to return a candidate for appointment to fill the vacancy in the office of the CE.

12. The HKSAR Government believed, upon the proper interpretation of the Basic Law, that the term of office of a new CE elected to fill a vacancy in the office of the CE should be the remainder of the term of the preceding CE. However, two different views had emerged in the community on the term of office of the new CE in such circumstances. Some supported the view that it should be the remainder of the term of the preceding CE while others considered that it should be a fresh five-year term.

13. It was necessary to amend the CEEEO to set out clearly the term of office of a new CE elected to fill the vacancy in the office of the CE which arises other than the expiry of term. In order to ensure the timely completion of the legislative process for the amendment bill, it was necessary to have an authoritative and definitive interpretation of the relevant provisions of the Basic Law, so as to provide a firm constitutional basis for the local legislation. Moreover, an application for judicial review was filed with the Court of First Instance on 4 April 2005 to challenge the amendment bill to the CEEEO.

14. In order to avoid any uncertainty over the election of the new CE, the Acting CE on 6 April 2005 submitted, in accordance with Articles 43 and 48(2) of the Basic Law, a report to the CPG and proposed to request the NPCSC to make an interpretation of Article 53(2) of the Basic Law regarding the term of office of the new CE. The NPCSC made an interpretation on 27 April 2005 to the effect that, having regard

to Articles 45 and 53 and the current version of Annex I of the Basic Law, the term of office of the new CE shall be the remainder of the original 5-year term.

15. On each of the previous occasions of the NPCSC's interpretation of the Basic Law, discussions were held in the Legislative Council and its relevant committees both before and after the interpretation.

Explanations Concerning the Nationality Law

16. According to Article 18 and Annex III of the Basic Law, the Nationality Law of the PRC is applied in the HKSAR from 1 July 1997. On 15 May 1996, the NPCSC on its own initiative adopted the Explanations of Some Questions by the NPCSC Concerning the Implementation of the Nationality Law of the PRC in the HKSAR. The said Explanations was adopted by the NPCSC, taking account of the historical background and the existing circumstances of Hong Kong, to allow Hong Kong people holding foreign passports to retain their Chinese nationality. For instance, paragraph 4 of the said Explanations provides that "Chinese nationals of the Hong Kong Special Administrative Region with right of abode in foreign countries may, for the purpose of travelling to other countries and territories, use the relevant documents issued by the foreign governments." This helps to address the issue of non-recognition of dual nationality for any Chinese national under the Nationality Law.

Department of Justice
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Article 158 of the Basic Law

The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

Article 67(4) of the PRC Constitution

The Standing Committee of the National People's Congress exercises the following functions and powers:

...

(4) to interpret laws;