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GOVERNMENT SECRETARIAT
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24 October 2011

Mr Raymond LAM
Clerk to Panel on Security
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Mr LAM,

Panel on Security

Follow-up to special meeting on 17 October 2011

I refer to your letter of 17 October 2011 to the Secretary for Security, requesting the information the Administration had submitted to the Court in the recent judicial review lodged by a foreign domestic helper seeking the right of abode in Hong Kong (the JR). I am authorised to reply.

We understand Members' concerns over the JR. Subsequent to the Court of First Instance (CFI) judgment on the JR on 30 September 2011, the Government has lodged an appeal to the Court of Appeal (CA) and at the same time applied for an order for expedited hearing of the appeal. The application for expedited hearing is pending consideration by the CA. The Government has also applied for temporary relief, the hearing of which is scheduled for 26 October 2011 before the CFI. Legal advice is that, given the ongoing legal proceedings, it is not appropriate for the Government to provide the information submitted to the Court, which was prepared for litigation purpose (and not for other purposes), to a non-party to the proceedings.

For background information about the JR, including the Administration's position as expressed to the CFI, you may wish to refer to the CFI judgment, a copy of which is enclosed herewith for your reference.

Yours sincerely,

(Harry LIN)
for Secretary for Security

Encl.

由此

HCAL 124/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 124 OF 2010

BETWEEN

VALLEJOS EVANGELINE BANAO
also known as VALLEJOS EVANGELINE B. Applicant

and

COMMISSIONER OF REGISTRATION 1st Respondent

REGISTRATION OF PERSONS TRIBUNAL 2nd Respondent

Before: Hon Lam J in Court
Dates of Hearing: 22, 23 and 24 August 2011
Date of Judgment: 30 September 2011

JUDGMENT

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1. Article 24(2)(4) of the Basic Law provides that 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 shall be permanent residents of Hong Kong. The question to be decided in this case is whether a foreign domestic helper ["FDH"] can acquire right of abode in Hong Kong pursuant to this article. Though this case focuses on the position of the FDH, in the light of the legal submissions advanced before the court, it may also have implications as to other categories of persons specified in Section 2(4)(a) of the Immigration Ordinance.

2. Cases on right of abode often bring about debates amongst members of the public. Since the resumption of sovereignty over Hong Kong in 1997, there have been several cases of this nature. A decision in a right of abode case would inevitably have social, economic and political impact on the society. It is not surprising that people in Hong Kong are concerned as to the possible outcome. Neither is it surprising that the Government has to prepare for different contingencies based on its assessment of the potential impact.

3. The court respects the freedom of expression of our citizens. At the same time, public discussions on the case often go beyond the legal issues which the court can properly resolve in the litigation. Again this is not surprising since the socio-economic and political implications of a particular outcome necessarily transcend the legal analysis of the issues before the court.

4. But it is important that such public discussions should not be allowed to confuse the proper remit of the adjudicative function of the

court in the case itself. In the performance of his judicial duty, a judge should always focus on, and only focus on, the legal merits of the issues which he or she has to determine. In this case, what is in issue before me is the constitutionality of Section 2(4)(a)(vi) of the Immigration Ordinance. The submissions of the parties revolve around the proper construction of Article 24(2)(4), in particular, the expression "ordinarily resided". The proper construction of the expression is a question of law which has to be decided by way of legal analysis. My duty is to apply the law in resolving this question without regard to any other arguments based on politics or socio-economic considerations.

5. In the light of the public attention drawn to this case and the intensity with which the question of right of abode for foreign domestic helpers have been addressed at various quarters in the public arena, it is right that I should state clearly the nature of the judicial process at the outset. As mentioned, I can quite understand why this case generates so much public interest. I have no intention of stopping people from having discussion on the topic based on their own perspectives. However, what I should not allow to happen is to let such discussion influence this court in the process of judicial adjudication. Unlike the political process, the judicial process is not subject to any lobbying. It is important that judges are able to perform their judicial function independently, impartially and fearlessly. Our judicial oath requires judges to serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit.

6. I say these not because I feel any pressure in the present case. As far as I am aware, the public discussions so far represent different views on the topic held by different persons and none of them seek to influence this court in the judicial process. But I believe it is opportune that this court should reiterate what I said in the preceding paragraphs as the independence of the Judiciary is fundamental to the confidence in our administration of justice. Therefore, it is important for the general public to understand that this judgment is concerned exclusively with the legal merits of the Applicant's arguments. It is NOT a judgment on whether as a matter of social policy FDHs should be given the right of abode. Nor does this court have any power to rewrite Article 24(2)(4). This court's duty is to construe the Article and apply it in accordance with its true meaning.

The two systems of interpretation and the 1999 Interpretation

7. In respect of the proper approach to the construction of the Basic Law, the Court of Final Appeal has laid down the relevant principles in several cases. Though the courts in Hong Kong are authorized by Article 158(2) and (3) to interpret the provisions of the Basic Law in adjudicating cases, the Standing Committee of the National People's Congress ["the Standing Committee"] also has the power of interpretation of the Basic Law: Article 158(1) and (3) of the Basic Law and Article 67(4) of the Constitution of the People's Republic of China. In *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, the Court of Final Appeal acknowledged the power of the Standing Committee to interpret the Basic Law and the binding effect of such an interpretation. This was reiterated by Li CJ in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 at p.222G,

> "...where the Standing Committee has made an interpretation of the Basic Law pursuant to its power under art.67(4) of the Chinese Constitution and art.158 of the Basic Law, the courts in Hong Kong are under a duty to follow it."

At p.222H, it was further accepted that,

> "that power of the Standing Committee extends to every provision in the Basic Law and is not limited to the excluded provisions referred to in art.158(3)."

8. In *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, Li CJ referred to the difference between the mainland system for interpretation of the Basic Law and the common law approach in Hong Kong. Subject to any interpretation already made by the Standing Committee, the Court of Final Appeal held that the courts in Hong Kong are bound to apply the common law in exercising their power of interpretation, see p.222C to E.

9. Thus, there are two different approaches to the interpretation of the Basic Law,

(a) The mainland system by the exercise of the power of interpretation by the Standing Committee;

(b) The common law approach applied by the courts in Hong Kong.

Since these are different approaches, there could be occasions where different conclusions may be reached under the two approaches. Though the Basic Law was enacted as a mini-constitution for Hong Kong, it is also a piece of legislation by the National people's Congress of the People's Republic of China. Given that most of the drafters of the Basic Law did

not come from a common law background and judges in Hong Kong are not trained under the mainland system, it was deemed necessary for the Basic Law to provide for two systems of interpretation. As decided in *Lau Kong Yung* and reiterated again in *Chong Fung Yuen*, in the event of different answers provided by the two systems, the courts in Hong Kong are obliged to follow the interpretations by the Standing Committee.

10. In 1999, the Standing Committee interpreted Articles 22(4) and 24(2)(3) of the Basic Law ["the 1999 Interpretation"] and arrived at a different interpretation from the one adopted by the Court of Final Appeal in *Ng Ka Ling*. In the 1999 Interpretation, apart from dealing with those two articles, the following was also stated,

> "The legislative intent as stated by this Interpretation, together with the legislative intent of all other categories of Article 24(2) of the Basic Law ... have been reflected in the "Opinions on the Implementation of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress on 10 August 1996.
>
> As from the promulgation of this Interpretation, the courts of the Hong Kong Special Administrative Region, when referring to the relevant provisions of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, shall adhere to this Interpretation. ..."

11. The effect of these parts of the 1999 Interpretation was considered in *Chong Fung Yuen*. At first instance, Stock J (as he then was) held that the only mechanism by which the mainland method of interpretation could have binding impact in Hong Kong is Article 158. Since the Standing Committee had not made an interpretation under that article in respect of Article 24(2)(1), these parts were an addendum of the

interpretation on article 22(4) and 24(2)(3). For further reasons set out in [2000] 1 HKC 359 at p.383, His Lordship concluded that he was not bound by those paragraphs.

12. In the Court of Appeal, counsel for the Director accepted that there had not been any interpretation of article 24(2)(1) and no interpretation of that limb of article 24(2) had been sought (see [2000] 3 HKLRD 661 at p.670C; 675A; 685I) and these parts were relied upon as indicating the legislative intent for article 24(2)(1). In the light of that, the Court of Appeal refused to act upon those parts as if they were a binding interpretation by the Standing Committee on article 24(2)(1).

13. When the case reached the Court of Final Appeal, as stated above, the Chief Justice referred to the binding effect of an interpretation of the Standing Committee under Article 67(4) as well as Article 158. However, because of the concession by the Director that these paragraphs did not amount to a binding interpretation (see (2001) 4 HKCFAR 211 at p.223D to E), the court did not act on the same.

14. In the present case, Lord Pannick QC (who appeared for the Commissioner together with Mr Chow SC and Ms Sit) reserved the right to re-open the argument on the effect of the 1999 Interpretation when this case reaches a higher level. At first instance, counsel accepted that this court was bound by the decision of the Court of Appeal in *Chong Fung Yuen* that the 1999 Interpretation cannot be prayed in aid as a binding interpretation for Article 24(2)(4). In the light of this, I shall consider the issues in the present case on that basis. In accordance with the guidance given by the Court of Final Appeal in *Chong Fung Yuen*, in the absence of

any binding interpretation by the Standing Committee, this court shall apply the common law approach to interpret Article 24(2)(4).

Permanent residents and right of abode

15. Chapter III of the Basic Law sets out the fundamental rights and duties of the residents of the Hong Kong Special Administrative Region. However, the rights and duties of different categories of persons are not exactly the same. The Basic Law classifies the persons in Hong Kong into three different categories,

(a) Permanent residents;

(b) Non-permanent residents;

(c) Persons who are not residents, or in short, non-residents.

16. Some fundamental rights are only enjoyed by permanent residents: the right to vote and the right to stand for election under Article 26. Other fundamental rights are enjoyed by all residents and, by reason of Article 41, also by non-residents in accordance with law.

17. The major distinction between permanent and non-permanent resident is, however, the right of abode in Hong Kong. This is provided for under Article 24 of the Basic Law. Permanent residents are entitled to obtain permanent identity cards which state their right of abode. Non-permanent residents (and also non-residents) have no right of abode.

18. The distinction between non-permanent resident and non-resident depends on the qualification to obtain the Hong Kong identity

card. Article 24(4) provides that non-permanent residents shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the region but have no right of abode. The reference here is to identity cards, not permanent identity cards.

19. Who can obtain the identity card? This is not set out in the Basic Law. Rather, Article 24(4) refers to the laws of Hong Kong for determining who would qualify. The answer is to be found in the Registration of Persons Ordinance ["RPO"] Cap.177 and Registration of Persons Regulations ["RPR"]. Section 3 of the RPO requires every person in Hong Kong, unless exempted or excluded, to be registered in accordance with the RPR. Regulation 3 of the RPR requires every person in Hong Kong, unless exempted or excluded, to apply to be registered and apply for an identity card within 30 days of his entering Hong Kong.

20. Exempted persons are those exempted under regulation 25[1]. However, these people can still apply for identity cards if they so desire and if the Commissioner allows, see the proviso to regulation 25.

21. Hence, the only persons not qualified to obtain identity cards are the excluded persons specified under regulation 25A. These are, broadly speaking, the Vietnamese refugees and children of Chinese permanent residents of Hong Kong born out of Hong Kong and residing in the meantime in the mainland.

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[1] The main category is those coming within regulation 25(d): those who are bona fide travellers in transit or those who does not intend to stay for more than 180 days and in possession of valid travel document. Another major category is children under 11, see regulation 25(g).

22. Right of abode is not defined in the Basic Law. In *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at p.34G, Chief Justice Li characterized this right as a core right. The substance of that right is spelt out in Section 2A of the Immigration Ordinance Cap.115 ["IO"]. It includes the right to land in Hong Kong, the right not to have imposed upon him any condition of stay, and the right not to be deported or removed.

23. In other words, a permanent resident would not be subject to any restriction in respect of his or her employment, place of residence and duration of stay in Hong Kong.

24. Article 24 provides for 6 different categories of persons who shall have the status of permanent residents. At issue in the present case is Article 24(2)(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."

25. There are four elements in Article 24(2)(4):

(a) Persons not of Chinese nationality;

(b) Entered Hong Kong with valid travel documents;

(c) Ordinarily resided in Hong Kong for a continuous period of not less than seven years;

(d) Having taken Hong Kong as his or her place of permanent residence.

Further, it was held by the Court of Final Appeal in *Fateh Muhammad v Commissioner of Registration* (2001) 4 HKCFAR 278 that requirement (c) must be satisfied immediately before requirement (d). As regards requirement (d), the Court of Final Appeal held in *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26 that an applicant has to satisfy the Director that he intends to establish his permanent home in Hong Kong and that he has taken concrete steps to make Hong Kong, and Hong Kong alone, his place of permanent residence[2].

26. The Applicant in the present case applied for a permanent identity card on the ground that she had satisfied these requirements. However, her application was rejected on the basis of Section 2(4)(a)(vi) of the IO. That sub-section laid down a rule that a person shall not be treated as ordinarily resident in Hong Kong for the purpose of the IO during any period in which he remains in Hong Kong in the specified circumstances. One of those circumstances being,

> "while employed as a domestic helper who is from outside Hong Kong."

27. The Applicant came from the Philippines and she has been employed as a domestic helper in Hong Kong since 1986. After her application was rejected by the Commissioner of Registration in November 2008, she appealed to the Registration of Persons Tribunal. Her appeal was dismissed by the Tribunal in June 2010. The Tribunal found that but for Section 2(4)(a)(vi), the Applicant would have satisfied the four criteria.

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[2] Para.64 of the judgment in *Prem Singh*, see also para.66.

28. By this judicial review application, the Applicant seeks to overturn the decisions of the Tribunal and the Commissioner. She challenges the constitutionality of Section 2(4)(a)(vi) and asks the court to rule that this provision in the IO is unconstitutional and has no effect.

The Applicant

29. The Applicant was born in the Philippines in 1952. She is a Philippines national. She married a Philippines national in 1974 and they have five children. Her husband and four of her children are still residing in the Philippines. The youngest of her children was born in 1984. Her eldest son resides in Ireland. She and her husband jointly owned a property in the Philippines. She had also owned a mini store and a purified water business in the Philippines.

30. She first came to work in Hong Kong as a FDH in August 1986. She was granted permission to remain in Hong Kong until February 1987 to work as a FDH for a designated employer. Soon after she arrived, she registered for and was issued with a Hong Kong Identity Card. However, her contract with the designated employer was terminated within one month of her arrival.

31. In January 1987, the Applicant applied for an extension of stay in order to process an application for change of employer. The condition of stay was varied accordingly. She signed a new FDH contract with a new employer in February 1987. Her application for change of employer was approved on 30 March 1987 and she was issued with a re-entry visa for FDH employment with the new employer for six months.

She continued to work as FDH for this employer in subsequent years under several contracts and the permission of stay granted to her was extended accordingly.

32. At the time when she applied for a permanent identity card, she was working for the same employer under a contract which ran up to 2009 and her permission to stay was extended to 17 April 2009 or two weeks after the termination of her employment contract, whichever was earlier.

33. During her employment as FDH in Hong Kong, she stayed and resided in her employers' respective residences. By the time she applied for a permanent identity card, she had resided in Hong Kong for more than 22 years though she had returned to the Philippines upon the expiry of each of her FDH contracts (as required by the condition of renewal of her contracts).

34. The Tribunal further found as follows:

(a) Her employer and his family members treated her as part of their family;

(b) She has integrated into the local community. She has friends in Hong Kong. She is an active member of a church here and participates in volunteer work of the church in her free time;

(c) She took various courses in Hong Kong in her spare time;

(d) She loves Hong Kong and wishes to retire in Hong Kong. Her husband fully supported her plan and he was willing to join her in Hong Kong.

(e) Her children had grown up and married and had their own families and were financially independent.

(f) In the 1990's she transferred her mini store and the purified water business to her fourth son.

35. Her employer supported her application for the change of her status as he wanted to employ her to look after his store. He indicated to the Immigration Department that he would continue to provide accommodation to her upon the change of her status.

The FDH policy

36. Since the 1970s, with the inadequate supply of local domestic helpers to meet the demand in Hong Kong, there has been substantial need for recruiting domestic helpers from other countries. These domestic helpers come from the Philippines, Indonesia, Thailand, Nepal, India, Pakistan and Sri Lanka. They came to be known as foreign domestic helpers and the Director of Immigration has established policy in permitting FDH to enter and work in Hong Kong. The policy includes the mandatory use of standard form FDH employment contract (the terms of which have been changed over the years).

37. According to the figures set out in the evidence of the Commissioner, in 1974 there were only 881 FDHs in Hong Kong. By 1986, the number of FDHs was increased to 28,951. By the end of 1990, there were 70,335 FDHs. As at 31 December 2010, there were 285,681 FDHs here. Amongst those 285,681 FDHs, 117,000 have been continuously working in Hong Kong for more than 7 years.

38. Under the FDH policy, permission for them to enter and stay in Hong Kong is tied in with their employment to a specified employer. The standard FDH employment contract is for a duration of two years. If a FDH's employment was terminated prematurely, she is required to leave Hong Kong within 2 weeks after the termination. If a FDH renews her employment, she has to sign a new two-year FDH contract and applied for permission from the Director of Immigration for her re-entry and stay in Hong Kong after she has taken her mandatory prescribed period of vacation. The vacation should generally be taken before she started her new contract though, with the consent of her employer, a FDH can apply to the Director to defer the vacation. Even if deferral is granted, the vacation normally has to be taken within one year after the expiry of the old contract.

39. The policy was summarized in the Explanatory Notes issued by the Immigration Department in 1990 as follows,

> "Domestic helpers and other semi-skilled persons are not admitted to Hong Kong for settlement. They are admitted only for specific employment, that is for a specific job with a named Employer, and for a limited period. Within the validity of the contract, the period of stay allowed is 6 months or 2 weeks after termination of contract, whichever is earlier. This will be extended for similar periods provided confirmation is received from the Employer that the Helper is continuing in his/ her employment and all other circumstances remain unchanged. Such workers are not as rule permitted to change employment in Hong Kong. They are not eligible to bring their dependants to Hong Kong for residence."

40. In the Affidavit of Mr Yeung, the Acting Principal Immigration Officer in charge of the Visa Control (Policies) Division, he contrasted the different features of the visa control regime for FDHs and

persons admitted under the General Employment Policy as follows at para.15,

Feature	FDH Employment	General Employment
Employment contract	Standard-form two-year employment contract	Applicant to submit proof to show that he/she and the employer have entered into a contract of employment, not necessarily for two years.
Limit of stay	Permitted to remain in Hong Kong for two years or two weeks after termination of contract, whichever is earlier (i.e. the two-week rule)	In the first instance for one year, with a pattern of extension of stay normally for two years plus two years plus three years Short-term employment for a specific project is also permitted
Home leave	Must return to place of origin for home leave before commencing new contract May apply for an extension of stay to defer the home leave, which has to taken within the extended period (normally not exceeding one year)	
Change of employment	Not allowed to change employer when the contract is terminated prematurely, save in exceptional circumstances	May apply to change employment after the premature termination of employment contract and the application will be considered

Requirement to leave after termination	Must leave Hong Kong upon expiry of their limit of stay or within two weeks after termination of their contracts, whichever is earlier (i.e. the two-week rule)	Two-week rule not applicable (save in the case of those who are employed as cooks, to whom different considerations apply)
Bringing in dependants	Not allowed, save in exceptional circumstances	May apply to bring in spouse and unmarried dependent children under the age of 18

41. I shall come back to some specific features of the FDH policy when I deal with the submissions of the parties.

A brief historical survey

42. In the 1970's, the expression "permanent resident" did not appear in our statute book. Instead, the IO had a definition of "Hong Kong belonger". But there were already references to "ordinarily resident in Hong Kong", e.g. in the definitions for "Chinese resident" and "resident United Kingdom belonger"[3]. Further, Section 2(4) of the IO already existed though at that time only those remained in Hong Kong unlawfully, in breach of a limit of stay and those imprisoned or detained were excluded from being "ordinarily resident in Hong Kong". See Ordinance No.55 of 1971.

[3] The concept of Hong Kong belonger can be traced back to the Deportation (British Subjects) Ordinance 1936. Under section 2 of that ordinance, a British subject would be deemed to belong to Hong Kong under certain circumstances. The tests in several limbs adopted the concept of ordinarily resident in Hong Kong continuously for 7 years. A Hong Kong belonger could not be deported, see section 3 of the ordinance.

43. On 19 December 1984, the Chinese Government and the British Government signed the Sino-British Joint Declaration on the Question of Hong Kong ["the Joint Declaration"]. The Chinese Government declared its basic policies regarding Hong Kong in Article 3 and elaborated the same in Annex I. In Article 3(12), it was declared that the basic policies of the People's Republic of China regarding Hong Kong would be stipulated in a Basic Law and they would remain unchanged for 50 years.

44. Section XIV of Annex I set out the categories of persons who shall have the right of abode in Hong Kong. For present purposes, the relevant category is stated as follows,

> "all other persons who have ordinarily resided in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region for a continuous period of 7 years or more and who have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region ..."

Though there was no reference to the expression "permanent resident", Section XIV stipulated that these persons (together with other specified categories of persons) shall be qualified to obtain Hong Kong permanent identity cards in accordance with the law of Hong Kong.

45. Section XIV of Annex I also stipulated,

> "The Hong Kong Special Administrative Region Government may apply immigration controls on entry stay in and departure from the Hong Kong Special Administrative Region by persons from foreign states and regions."

46. In order to ensure a smooth transfer of government in 1997 and with a view to the effective implementation of the Joint Declaration, pursuant to its Article 5 a Sino-British Joint Liaison Group ["JLG"] was set up. Annex II of the Joint Declaration provides for the establishment and function of the JLG. Paragraph 3 of Annex II defines the functions of JLG,

(a) To conduct consultations on the implementation of the Joint Declaration;

(b) To discuss matters relating to the smooth transfer of government in 1997;

(c) To exchange information and conduct consultations on such subjects as may be agreed by the two sides.

47. There was no reference to "right of abode" and "permanent resident" in the pre-1987 IO. In order to pave the way for the implementation of the basic policy in Section XIV, the IO was amended in 1987 to provide the statutory underpinning for these concepts. In moving for the Second Reading of the 1987 amendments, the Secretary for Security said the following,

> "For the first time, the term 'right of abode' will be applied in law to Hong Kong people. Some 5 million Hong Kong people will be accorded this right which will give them the right to land and remain in Hong Kong without any immigration restrictions. They will not be deportable or removable from Hong Kong. They will be described by a new term ... 'Hong Kong permanent resident'. This term, in both Chinese and English will be easily understood. 'Hong Kong permanent residents' will have permanent identity cards which will be evidence for all to see that they have the right of abode in Hong Kong."

48. The need to have such changes effected at that stage was explained in terms of facilitation of endorsement of travel documents and the implementation of the Joint Declaration. The Secretary said,

> "The arrangement to include a right of abode endorsement in travel documents is based upon the relevant provisions in section XIV of Annex I to the Sino British Joint Declaration. Those provisions state that people who will have the right of abode in Hong Kong Special Administrative Region will be issued with permanent identity cards stating their right of abode and that holders of permanent identity cards of the Hong Kong Special Administrative Region may have this fact stated in their travel documents as evidence of their right of abode in the Hong Kong Special Administrative Region. Such an endorsement which shows that the holder of the document will be able to return freely to Hong Kong is of vital importance to the acceptability of the British National (Overseas) passports and to the continued acceptability of Certificates of Identity for the purpose of international travel before and after 1997.
>
> Before permanent identity cards stating the holders' right of abode in Hong Kong can be issued to support the right of abode endorsement in British National (Overseas) passports and Certificates of Identity, it is necessary to introduce the term 'right of abode in Hong Kong' into the Hong Kong legislation. As the legislative amendments are part of the package to implement the agreement of Her Majesty's Government and the Government of the People's Republic of China on arrangements for travel documents, the principles upon which they are based have been discussed between the two Governments in the Joint Liaison Group. At the Sixth meeting of the Joint Liaison Group, both sides confirmed their common understanding on the specific principles relating to the proposals."

49. The Secretary then explained the changes introduced by the 1987 amendments. One important change highlighted was the extension of the right not to be deported to Chinese residents whilst previously such right was only enjoyed by Hong Kong belongers.

50. The Secretary further stated that the 1987 amendments would not be the final position. He said,

> "There is some way to go before provisions relating to right of abode in the Joint Declaration will be fully implemented. Her Majesty's Government and the Government of the People's Republic of China have agreed that the arrangements to be introduced by the proposed legislation are of a transitional nature and are intended to meet the immediate objective of including a right of abode endorsement in British National (Overseas) passports and certificates of identity to be issued from 1 July 1997 so that the categories of persons enjoying the right of abode in Hong Kong are on that date completely in line with those set out in section XIV of Annex I to the Joint Declaration. Both Governments have agreed that a step-by-step approach in bringing the provisions relating to the right of abode in Hong Kong completely in line with those in the Joint Declaration will be conducive to a smooth transition."

51. By the 1987 amendments, Section 2A which defines the right of abode in Hong Kong was added to the IO. A new First Schedule was introduced to replace the old one. The new First Schedule defined who shall be Hong Kong permanent residents who can enjoy the right of abode under Section 2A. Those people are,

> "FIRST SCHEDULE [ss.2(1) & 59A.]
>
> HONG KONG PERMANENT RESIDENTS
>
> 1. Any person who is wholly or partly of Chinese race and has at any time been ordinarily resident in Hong Kong for a continuous period of not less than 7 years.
>
> 2. Any person who is a British Dependent Territories citizen and who –
>
> (a) belongs to a class or description of persons specified in Article 2 of the Hong Kong (British Nationality) Order 1986 as having a connexion with Hong Kong; or
>
> (b) is such a citizen by virtue of his having a connexion with any of the British Dependent Territories (other than Hong Kong) mentioned in Schedule 6 to the British Nationality Act 1981 and has at any time been married to a person specified in sub-paragraph (a).

> 3. Any person who is a Commonwealth citizen and who immediately before 1 January 1983 had the right to land in Hong Kong by virtue of section 8(1)(a) as then in force."

52. The Basic Law was promulgated on 4 April 1990. The definition of permanent residents in Article 24 mirrored section XIV of Annex I to the Joint Declaration. The reference to the Hong Kong Government to apply immigration controls became Article 154(2).

53. I pause here to mention the submission of Ms Li that under the common law approach, post-enactment materials should not be relevant for the construction of the provisions of the Basic Law. On the other hand, Lord Pannick contended that the Court of Final Appeal did not completely rule out the relevance of post-enactment materials though the court should proceed cautiously. I shall discuss their competing submissions later. For the time being, I would just set out as a matter of fact as to what had happened after the promulgation of the Basic Law. The admissibility and relevance of these events for the purpose of construction will be dealt with later.

54. In a Note on Conditions of Stay for Foreign Domestic Helpers presented by the Government to the Executive Council, it was stated that despite the 1987 amendments of the IO, "the policy that foreign domestic helpers will not be eligible for unconditional stay remains unchanged". Four reasons were given for this policy,

> "(a) foreign domestic helpers are not admitted to Hong Kong for settlement; they are admitted only for specific employment on a fixed-term contract and are expected to leave at the end of their contract;

(b) the present practice of granting home leave to foreign domestic helpers and not allowing the entry of their dependants for residence is designed to ensure that they will maintain genuine links in their own country;

(c) to remove conditions of stay for domestic helpers would permit them to change jobs, thus making it necessary for local families to import others to replace those who are re-employed elsewhere in the local workforce. This would add to the number of foreign nationals in Hong Kong; and

(d) in accordance with current policy, to grant foreign domestic helpers unconditional stay would permit them to bring their dependants to Hong Kong. In view of the large numbers involved, this could lead to substantial immigration."

55. At the same time when the Basic Law was promulgated, the National People's Congress decided that in 1996 a Preparatory Committee would be established and it would be responsible for preparing the establishment of the Hong Kong Special Administrative Region. On 9 August 1996, the Legislative Sub-group of the Preparatory Committee reported on its work on the implementation of Article 24(2). Opinions were drawn up "proposing an appropriate resolution to be made after scrutiny by the plenary session of the Preparatory Committee to provide a reference for the Hong Kong Special Administrative Region in mapping out the details of implementation."

56. The report alluded to the definition of "ordinary residence" in the context of Article 24(2)(2) and (4) and said[4],

> "The concept of 'ordinary residence' originates from the existing law of Hong Kong. Requirements are laid down in the existing Immigration Ordinance about some circumstances not regarded as 'ordinary residence'. Taking into account that it is more

[4] The original report was in Chinese .

> difficult to define 'ordinary residence' from a positive angle, and that something will be left out among other things, members hold that the practice of the existing law of Hong Kong can be adopted to set out requirements about the circumstances not regarded as 'ordinary residence'.
>
> Having studied various circumstances not regarded as 'ordinary residence' under the existing Hong Kong Immigration Ordinance, members consider it possible to make no changes. Taking into consideration strong public demand to restrict Vietnamese migrants, foreign domestic helpers and imported labour from becoming Hong Kong permanent residents after 1997, members condier such demand reasonable and in line with relevant provisions of the Basic Law."

57. In respect of the FDHs, it was stated in the report,

> "Currently, some people in Hong Kong, e.g. foreign domestic helpers and imported labour, are allowed to enter Hong Kong to take up specific jobs by virtue of certain special government policies. They are subject to stricter conditions of stay and vetting procedures compared with those normally allowed to live and work in Hong Kong. This kind of persons cannot become Hong Kong permanent residents. Given that there are Chinese citizens and non-Chinese nationals among them, and that they are allowed to enter Hong Kong to alleviate and regulate the manpower shortage or demand and supply of some sectors, it is necessary to make clear that this kind of persons cannot become permanent residents. In this connection, it is suggested that the duration of stay permitted under special government policies should not be regarded as 'ordinary residence'. The scope of the special policies can be determined by the Hong Kong Special Administrative Region Government."

58. The Opinions of the Legislative Sub-group was adopted by the Preparatory Committee on 10 August 1996 at its Fourth Plenary Meeting. For the purpose of implementing Article 24(2), the Opinions were provided "for the HKSAR to formulate the details of the

implementation rules". Paragraph 2 of the Opinions refer to people ordinarily resided in Hong Kong[5],

> "People shall not be considered as 'ordinarily resided' in Hong Kong as provided in categories (2) and (4) of paragraph 2 of article 24 of the Basic Law if they are,
>
> (1) Illegal immigrants or illegal immigrants who have been permitted by the Director of Immigration to stay in Hong Kong;
>
> (2) Staying in Hong Kong in violation of the limit of stay or other conditions;
>
> (3) Staying in Hong Kong as a refugee;
>
> (4) Legally detained or sentenced to imprisonment in Hong Kong; or
>
> (5) Permitted to stay in Hong Kong under specific government policies."

59. Reading the Opinions together with the Report, the specific government policies under (5) included government policy on FDHs. The Opinions were referred to in the 1999 Interpretation.

60. In April 1997, in a statement made by the Director of Immigration to the Legislative Council Security Panel, it was reported that agreement on the interpretation of Article 24 had been reached between the British and Chinese Governments. With regard to Article 24(2)(4), the agreement was, inter alias, that

> "apart from contract workers under the Government Importation of Labour schemes, illegal immigrants, detainees and refugees, imported domestic helpers will also not be regarded as ordinarily resident in Hong Kong". Based on the agreement, a booklet about the Right of Abode in the Hong Kong Special Administrative Region was published by the Immigration

[5] The original Opinions are in Chinese.

> Department in April 1997. The information contained in it was compiled on the basis of the common view of the British and Chinese sides in the JLG on various issues relating to the right of abode after 30 June 1997. In the booklet, it was stated that a person shall not be treated as ordinarily resident in Hong Kong if he remains in Hong Kong during any period while employed as an imported domestic helper.

61. These developments were summed up by the Secretary for Justice designated when she moved for the Second Reading of the1997 amendments of the IO (which added the section 2(4)(a)(vi), the subject of the current litigation) before the Provisional Legislative Council on 7 June 1997. She said,

> "The Basic Law only provides for the basic principles and policies of the SAR and must be implemented by making detailed provisions in SAR laws. ... On 15 July 1996 the Preparatory Committee for the Hong Kong Special Administrative Region issued a policy statement by way of a Decision on the principles relating to the permanent residents of the SAR. The Sino-British Joint Liaison Group also reached a consensus on a number of issues relevant to the right of abode and such agreement was reflected in the booklet "The Right of Abode in the Hong Kong Special Administrative Region" published by the Hong Kong Immigration Department in April 1997. On the basis of the Decision issued by the Preparatory Committee and the consensus arrived at by the JLG, the Chief Executive's Office of the SAR has now prepared the Immigration (Amendment) (No.3) Bill 1997 and introduced it into the Provisional Legislative Council for scrutiny."

Submissions of the Applicant

62. The main contention of Ms Li, as I understand it, can be summarized in terms of the following propositions,

(a) Section 2(4)(a)(vi) of the IO (which she called the "Impugned Provision" and I shall adopt the same) cannot curtail the

definition of permanent resident under Article 24(2)(4) of the Basic Law.

(b) The expression "ordinarily resided in Hong Kong" in Article 24(2)(4) should be construed in accordance with its natural and ordinary meaning as stated by Lord Scarman in *Reg v Barnet London Borough Council, Ex p Shah* [1983] 2 AC 309 at p.343G to H, viz.

> "... 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".

(c) Applying this construction to the case of FDHs, their presence in Hong Kong during their employment as domestic helpers is not so out of ordinary that they could never satisfy the requirement of "ordinarily resided" here.

(d) There is no statutory definition for the expression "domestic helpers" used in the Impugned Provision and it may or may not tie in with those covered by the FDH policy. In any event, the FDH policy is susceptible to changes by the executive branch of the government.

(e) Thus the Impugned Provision has the effect of cutting down the scope of Article 24(2)(4) of the Basic Law by mandating otherwise.

(f) As such, the Impugned Provision is unconstitutional and therefore has no legal effect.

63. She also made the following points in dealing with the submissions of Lord Pannick.

(a) There is no ambiguity in the meaning of the expression "ordinarily resided in Hong Kong" and there is no room for admitting extrinsic materials to aid the construction of Article 24(2)(4).

(b) Whilst the Basic Law has to be construed in the light of its purpose and context, the relevant context for Article 24(2)(4) is to be found in Article 25 and, in contrast with other parts of Article 24, the absence of reference in Article 24(2)(4) to "in accordance with the law of the Region".

(c) On the other hand, Article 154 is not part of the context in which Article 24(2)(4) is to be construed. It was decided by the Court of Final Appeal in *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26 that immigration control cannot be relied upon to restrict the category of people qualifying as permanent residents under Article 24(2)(4). Though the Director can impose immigration control to limit the period for which a FDH may stay in Hong Kong, once she has ordinarily resided in Hong Kong continuously for more than 7 years immediately before she makes a declaration to support an application for permanent identity card which satisfied the second limb of Article 24(2)(4), viz. the permanence requirement referred to in *Prem Singh*, the Director does not have the power to curtail her right of abode in the guise of immigration control.

64. Counsel also relied on Article 25 of the Basic Law and Article 22 of the Hong Kong Bills of Right and contended that the Impugned Provision should be struck down as being discriminatory.

Submissions of the Respondent

65. Lord Pannick advanced two principal arguments to uphold the constitutionality of the Impugned Provision. In addition, counsel also made submissions in respect of the admissibility of extrinsic materials to aid the construction of Article 24(2)(4) of the Basic Law. Lord Pannick emphasized in his oral submissions that the extrinsic materials are not to be considered independently. Rather, the materials are relied upon as contextual matters which support the two principal arguments.

66. The first principal argument of Lord Pannick is that the expression "ordinarily resided in Hong Kong" in Article 24(2)(4) is to be contrasted with those whose residence in Hong Kong is "out of ordinary". Counsel submitted that this was the construction adopted by the Court of Final Appeal in *Fateh Muhammad v Commissioner of Registration* (2001) 4 HKCFAR 278. In the context of this article, which conferred a valuable status on a foreigner, a stricter meaning should be adopted for this expression (as compared with the same expression in the context of a tax statue).

67. Counsel said by reference to some features in the restrictions imposed upon a FDH her residence in Hong Kong is out of ordinary in the context of Article 24(2)(4) and the Impugned Provision merely set out specifically what would in any event be the position. Hence, like the

statutory exclusion of a person serving a prison sentence from the scope of "ordinary resided in Hong Kong" under Section 2(4)(b) of the IO (upheld by the Court of Final Appeal in *Fateh Muhammad*), there is no inconsistency between the Impugned Provision and Article 24(2)(4).

68. The features relied upon are as follows,

> "(1) An FDH is admitted into Hong Kong to work for a specified employer under a standard 2-year employment contract which, other than the amount of wages and the date of commencement of employment, cannot be changed. By the terms of the contract she can only carry out domestic duties. Other persons seeking to come to Hong Kong for general employment are not in any way limited on the duration or terms of their contracts.
>
> (2) The FDH must work and reside in the employer's residence as designated in the employment contract, and the employer is required to provide the FDH with accommodation and food. Accommodation may not be exclusively that of the FDH and she may have to share with another FDH or with the children of the employer. She therefore establishes no household or independent lifestyle of her own. There are no such restrictions for other foreigners seeking to come for general employment in Hong Kong.
>
> (3) The employer must pay for the FDH's passage to and from her place of origin. In case of death, the FDH's remains and personal property must be returned to the FDH's place of origin at the employer's expense. These requirements emphasize and foster the link between the FDH and her place of origin. There is no such provision for other persons seeking to come to Hong Kong for general employment.
>
> (4) On completion of the contract, the FDH is required to return to her place of origin for a prescribed period for vacation (home leave), unless prior approval for an extension of stay in Hong Kong is given by the Director of Immigration. If the Director exercises his discretion to defer home leave on the start of the new contract, it must be taken within the extended period, which is normally not more than 1 year. The requirement for home leave – which

is specifically incorporated into the standard-form contracts which employers and FDHs are obliged to adopt – is designed to ensure that FDHs maintain genuine links with their own country. There is no such provision for other persons seeking to come to Hong Kong for general employment.

(5) FDHs are not allowed to change their employer in Hong Kong when their contracts are terminated prematurely, save for exceptional circumstances (for example, where the employer is unable to continue with the contract because of migration, death or financial reasons, or where there is evidence that the FDH has been abused or exploited). Other persons seeking to come to Hong Kong for general employment may apply to change employment if the contract is terminated prematurely and the case is considered on its merits.

(6) An FDH is required to leave Hong Kong within her approved limit of stay or two weeks after termination of the contract, whichever is earlier. This 'two-week rule' does not apply to other persons seeking to come to Hong Kong for general employment (save for cooks, to whom different considerations apply).

(7) FDHs are not allowed to bring dependants to Hong Kong. Other persons seeking to come to Hong Kong for general employment may apply to bring in their spouse and unmarried dependent children under the age of 18."

69. Counsel said these restrictions were designed to ensure that FDHs would maintain genuine links in their own country and reflected the clear policy of the Government that FDHs are not admitted for settlement and do not form part of Hong Kong's permanent population.

70. The second principal argument of the Respondent is that Article 24(2)(4) should be construed in the light of the power given under Article 154(2) to the Government of Hong Kong to apply immigration controls on entry into, stay in and departure from Hong Kong by persons from foreign states and regions. Given the purpose of immigration controls

as expounded by A Cheung J (as he then was) in *MA v Director of Immigration* HCAL 10 of 2010, 6 January 2011, para.97 and the theme of continuity, bearing in mind the pre-1997 position of the FDHs, a purposive construction of the Basic Law leads to the conclusion that Article 154(2) authorizes the Government of Hong Kong to introduce and maintain the Impugned Provision to regulate the entry of FDHs into Hong Kong and their stay here is permitted on condition that they do not acquire any right of abode.

71. At paragraph 64 of his written submissions, Lord Pannick put his case on the second principal argument as follows,

> "Given that:
>
> (1) 'ordinarily resided' is not defined in the Basic Law;
>
> (2) the right of abode is a valuable status for a foreign national to acquire;
>
> (3) pre-1997 strict immigration policies were imposed on FDHs in view of Hong Kong's unique or special geographic and socio-economic circumstances in the region, and
>
> (4) Article 154(2) was designed to ensure that strict immigration controls could continue to be maintained in Hong Kong,
>
> Article 24(2)(4) needs to be construed and applied consistently with Article 154(2), which validates section 2(4)(a)(vi): the latter is an aspect of the immigration regime for FDHs which the Government and the legislature consider necessary in the interests of Hong Kong, requiring FDHs to return to their own countries at the end of their permitted period of stay in Hong Kong and making clear that their temporary stay in Hong Kong confers no right to remain on a permanent basis."

72. In his oral submissions, Lord Pannick emphasized he did not argue that the Hong Kong legislature has unlimited power to define

"ordinary residence". Counsel accepted that ultimately the construction the Basic Law is a matter for the court. However, counsel submitted that construing Article 24(2)(4) in context, in particular having regard to Article 154(2), the Hong Kong legislature is authorized to define and clarify what are the exceptional cases where a foreigner's residence in Hong Kong falls outside the scope of "ordinary residence". Insofar as the resulting legislation is not unreasonable in the public law sense, the court would not rule the same as unconstitutional. Counsel also contended that in the context of immigration control, the legislature enjoys a wide margin of discretion.

73. As regards the admissibility of extrinsic materials, Lord Pannick submitted that there were at least ambiguities in the meaning of "ordinarily resided" in Article 24(2)(4) and whether power had been conferred upon the Hong Kong legislature to enact the Impugned Provision under Article 154(2). Extrinsic materials are therefore admissible to show the legislative intent for these articles. Counsel said there was a clear consensus between the Chinese and British governments on the interpretation of the corresponding provision identifying the permanent residents of Hong Kong in the Joint Declaration and, unless precluded by clear wordings in the Basic Law, such interpretation should be adopted in the light of the relationship between the Joint Declaration and the Basic Law. By reason of the status of the Joint Declaration as a treaty, counsel invited the court to have regard to some post-1990 materials on the basis of Article 31(2) and (3) of the Vienna Convention on the Law of Treaties 1969. Counsel also submitted that the Joint Declaration and other developments evidenced by the extrinsic materials must have been present

in the mind of the draftsman of the Basic Law and they are therefore relevant in ascertaining the purpose and context of Article 24(2)(4)[6].

74. Counsel said, having regard to the relevant history up to 1997, there was harmony between the British and Chinese governments in holding the common view that specific class of persons can be excluded by the IO from the scope of ordinary residence and that FDHs form one of the excluded category.

75. Lord Pannick also made submissions on the challenge based on discrimination.

The common law approach to construction of the Basic Law and its application in earlier Court of Final Appeal cases on other limbs of Article 24(2)

76. In the light of the competing submissions advanced before this court, the ultimate issue is the proper construction of Article 24(2)(4) of the Basic Law, in particular the meaning of the phrase "ordinarily resided in Hong Kong". As I understand, Lord Pannick did not suggest that any provisions in the IO can override the true meaning given to that phrase in the Basic Law. Instead, he sought to persuade this court that the Impugned Provision is perfectly consistent with the correct interpretation of Article 24(2)(4). He did so by his two principal arguments.

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[6] See *Minister of Home Affairs v Fisher* [1980] AC 319, applied by Bokhary PJ in *Chan Kam Nga v Director of Immigration* (1999) 2 HKCFAR 82 at p.90B to C

77. Neither did Lord Pannick dispute that, subject to any potential interpretation by the Standing Committee (and also arguments as to the effect of the 1999 Interpretation), interpretation of the Basic Law is a matter for the courts. Chief Justice Li emphasized the role of the court in this regard in *Ng Ka Ling* at p.25H to J,

> "In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. ... In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law."

78. Counsel have reminded this court on the proper approach in the interpretation of the Basic Law. A useful starting point is the judgment of the Chief Justice in *Ng Ka Ling* at p.28 to 29. Though it has been quoted many times, the following paragraphs are worth repeating,

> "It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of the its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.

> ... The purpose of a particular provision may be ascertainable from its nature or other provisions of the Basic law or relevant extrinsic materials including the Joint Declaration.
>
> As to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials including the Joint Declaration. Assistance can also be gained from any traditions and usages that may have given meaning to the language used."

79. The Chief Justice then referred to the provisions in Chapter III of the Basic Law. It is noteworthy that a distinction was drawn between the generous interpretation of the constitutional guarantees for fundamental freedoms and rights in Chapter III and the definition of Hong Kong residents. As to the latter, His Lordship said at p.29B to C,

> "However, when interpreting the provisions that define the class of Hong Kong residents, including in particular the class of permanent residents (as opposed to the constitutional guarantees of their rights and freedoms), the courts should simply consider the language in the light of any ascertainable purpose and the context."

80. *Ng Ka Ling* is primarily a case about the fundamental right, viz. the right of abode, instead of the definition of permanent residents. This is apparent from the judgment at p.34C,

> "It is important to emphasise once again that it is accepted by the Director that the applicants are within the third category of permanent residents in art.24(2) ...The Court is not here dealing with the definition of the class of permanent residents. What we are dealing with is the right of abode in art.24(3) of persons who are undoubtedly permanent residents."

81. But this is subject to an exception. Amongst the cases dealt with in that judgment, there was a case of Miss Cheung in which her status

of permanent resident was disputed because she was born out of wedlock. This particular issue was dealt with at p.40-43. Chief Justice Li said at p.41B,

> "We are here concerned with the interpretation of a provision defining the class of permanent residents. In approaching its interpretation, its context should be considered. The context includes other provisions of the Basic Law including art.39 which provides that the ICCPR as applied to Hong Kong shall remain in force. Two principles appear from the context which are relevant. First, both the Basic Law and the ICCPR enshrine the principle of equality, the antithesis of any discrimination. See art.25 of the Basic Law and arts.3 and 26 of the ICCPR. ... Secondly, art.23(1) of the ICCPR recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

82. At p.41H to I, His Lordship considered the argument based on the reservations made by the United Kingdom in the ratification of the ICCPR in respect of immigration matters in relation to Hong Kong. He said,

> "But this, in our view, does not preclude the Court in interpreting the constitutional provision relating to the categories of permanent residents from considering the principles in the ICCPR which are part of the context."

83. He then turned to consider the argument based on the agreement reached by the JLG as evidenced by the booklet published by the Immigration Department in April 1997, the same booklet now relied upon by Lord Pannick. Counsel for the Director in *Ng Ka Ling* also relied upon Article 31 of the Vienna Convention. The court rejected the argument at p.42F to J in the following terms,

> "Assuming that [the JLG's] functions include the making of a subsequent agreement between the two Governments regarding the interpretation of the Joint Declaration or the application of its provisions in terms of art.31(3)(a) of the Vienna Convention on

> the Law of Treaties, the agreement, in our view, does not affect the matter.
>
> First, the basis on which the agreement was reached is uncertain. It may have been reached on the basis of a pragmatic solution to the matter and not as a matter of interpretation or application. It is doubtful whether the basis was interpretation or application as the booklet does not discriminate as far as the mother is concerned between a child born out of wedlock and one born in wedlock ... If the matter were interpretation or application, it is difficult to conceive of a proper basis for the distinction between the relationship with the father in contrast to that with the mother.
>
> Secondly, even if the agreement reached were on the basis of interpretation or application, art.31(3)(a) only provides that it shall be taken into account. Having done so, the Court can reach a different view. We consider that the conclusion we have come to is plainly correct."

84. In respect of the main dispute in *Ng Ka Ling*, the question was whether art.22(4) of the Basic Law qualifies the right of abode in art.24(3). In that context, counsel for the Director placed reliance on the Joint Declaration and Annex I, Part XIV, in particular on the reference to the continuation of prevalent practice in 1984-85 of requiring exit permit for Mainland residents to come to Hong Kong. Chief Justice Li rejected the argument at p.35I,

> "But there is no indication that the statement in Pt.XIV providing for the continuation of that practice was intended to apply to permanent residents and thereby qualify their right of abode clearly set out earlier in that part. Accordingly, we do not consider that the Joint Declaration is of any assistance in this connection."

85. The decision of the Court of Final Appeal in *Ng Ka Ling* on this main question was reversed by the Standing Committee in the 1999 Interpretation. As mentioned earlier in this judgment, this was the result of

different answers being arrived at through two different systems of interpretation.

86. On the same day when the Court of Final Appeal delivered the judgment in *Ng Ka Ling*, it also delivered another judgment in relation to Article 24(2) in *Chan Kam Nga v Director of Immigration* (1999) 2 HKCFAR 82. That case concerned the question whether there is a "time of birth limitation" in Article 24(2)(3), see p.87D. Thus, it is a case on the definition of permanent residents. An argument was also advanced on behalf of the Director based on the agreement reached by the JLG. It was rejected by the court on, inter alias, the same grounds as set out in *Ng Ka Ling*, see p.91G to H.

87. The Court of Final Appeal returned to the construction of Article 24(2) again in *Chong Fung Yuen.* The question in that case was whether a Chinese citizen born in Hong Kong can become a permanent resident under Article 24(2)(1) notwithstanding that neither of his parents have settled nor have right of abode in Hong Kong. It was a case on the interpretation as to the definition of permanent residents. As mentioned earlier, it was accepted by the Director in the Court of Final Appeal that the 1999 Interpretation was not an interpretation on Article 24(2)(1). I have also alluded to the Court of Final Appeal's endorsement of the common position of the parties in that case that in the absence of an interpretation by the Standing Committee the courts in Hong Kong should apply the common law in exercising their power of interpretation of the Basic Law.

88. On the common law approach, Chief Justice Li gave further guidance in *Chong Fung Yuen* in Section 6.3 of the judgment. The following paragraphs are often cited in subsequent cases,

> "The courts' role under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain *the legislative intent as expressed in the language*. Their task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain *what was meant by the language used* and to give effect to *the legislative intent as expressed in the language*. It is the text of the enactment which is the law and it is regarded as important both that the law should be certain and that it should be ascertainable by the citizen.
>
> The courts do not look at the language of the article in question in isolation. The language is considered in the light of its context and purpose. See *Ng Ka Ling* at pp.28-29. The exercise of interpretation requires the courts to identify the meaning borne by the language when considered in the light of its context and purpose. This is an objective exercise. Whilst the courts must avoid a literal, technical, narrow or rigid approach, they cannot give the language a meaning which the language cannot bear. As was observed in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 at p.329Ee, a case on constitutional interpretation:"Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language."

89. The Chief Justice discussed about the materials that the court can refer to in the process of interpretation. At p.224D to G,

> "To assist in the task of interpretation of the provision in question, the courts consider what is within the Basic Law, including provisions in the Basic Law other than the provision in question and the Preamble. These are internal aids to interpretation.
>
> Extrinsic materials which throw light on the context or purpose of the Basic Law or its particular provisions may generally be used as an aid to the interpretation of the Basic Law. Extrinsic materials which can be considered include the Joint Declaration and the Explanations on the Basic Law (draft) given at the NPC on 28 March 1990 shortly before its adoption on 4 April 1990. The state of domestic legislation at that time and the time of the

> Joint Declaration will often also serve as an aid to the interpretation of the Basic Law. Because the context and purpose of the Basic Law were established at the time of its enactment in 1990, the extrinsic materials relevant to its interpretation are, generally speaking, pre-enactment materials, that is, materials brought into existence prior to or contemporaneous with the enactment of the Basic Law, although it only came into effect on 1 July 1997."

90. Despite any reference to extrinsic materials, the Chief Justice reiterated the primacy of the language used in the relevant provision to be construed. At p.224I to 225B,

> "...extrinsic materials, whatever their nature and whether pre or post-enactment, cannot affect interpretation where the courts conclude that the meaning of the language, when construed in the light of its context and purpose ascertained with the benefit of internal aids and appropriate extrinsic materials, is clear. The meaning of the language is clear if it is free from ambiguity, that is, it is not reasonably capable of sustaining competing alternative interpretations.
>
> Once the courts conclude that the meaning of the language of the text when construed in the light of its context and purpose is clear, the courts are bound to give effect to the clear meaning of the language. The courts will not on the basis of any extrinsic materials depart from that clear meaning and give the language a meaning which the language cannot bear."

91. This theme was picked up again when the court addressed an argument based on the Opinions of the Preparatory Committee in 1996 atp.233D to H.

92. The Chief Justice addressed on the use of materials other than pre-enactment materials relating to context and purpose at p.225B to E,

> "In a case where the courts have to consider the use of extrinsic materials other than pre-enactment materials relating to context and purpose, the courts should, in conformity with common law principles, approach the matter cautiously. The common law

> does not in general adopt the approach that all extrinsic materials can be considered leaving their weight to be assessed. A prudent approach is particularly called for where the courts are asked to consider post-enactment materials. This is because as discussed above, under a common law system which includes a separation of powers, the interpretation of laws once enacted is a matter for the courts. So it is with the Basic Law, although in this regard, as noted above, the court's power is subject to the limit on the Court's jurisdiction imposed by art.158(3) ... and subject to being bound by any interpretation by the Standing Committee under art.158."

93. Though the court accepted that the context of Article 24(2)(1) includes the Joint Declaration and the background to it as far as immigration law was concerned (see p.231H), the reliance on the absence of immigration rights by birth in Hong Kong since 1983 was rejected. At p.232 F to H,

> "In our view, no reliance can be placed for a proper interpretation of art.24(2)(1) on the point that after 1983 no immigration rights in Hong Kong could be acquired by the mere fact of birth in Hong Kong alone. As was pointed out by Stock J [in the first instance judgment in *Chong Fung Yuen* at [2000] 1 HKC 359 at p.375[7]] this is because British nationality laws and consequential amendments to Hong Kong's immigration laws had their own history. The United Kingdom had to deal with issues arising from the perceived threat of large-scale immigration into the United Kingdom from British Commonwealth countries and this resulted in a policy shift away from citizenship based on *jus soli*. (In English, 'right of the soil', that is, the principle that a child's citizenship is determined by place of birth). It should not be assumed that the Basic Law followed this policy shift from that history."

94. The Court of Final Appeal concluded that the meaning of the language of Article 24(2)(1), considered in its context and purpose, was

[7] The relevant part of the judgment of Stock J started at p.374B.

clear and unambiguous and not reasonably capable of sustaining competing alternative interpretations.

95. On the same day when the judgment of *Chong Fung Yuen* was delivered, the Court of Final Appeal also decided *Tam Nga Yin v Director of Immigration* (2001) 4 HKCFAR 251. In that case, the question before the Court of Final Appeal was whether adopted children come within Article 24(2)(3) of the Basic Law. Hence, it was also a case on the definition of permanent residents. At p.258D to F, the court reiterated the common law approach,

> "In essence, the courts' role is to construe the language used in the text of the Basic Law in order to ascertain the legislative intent as expressed in the language. The language of the article in question must be considered in the light of its context and purpose. Whilst the courts must avoid a literal, technical, narrow or rigid approach, the language cannot be given a meaning which it cannot bear. Once the courts conclude that the meaning of the text when construed in the light of its context and purpose is clear, the courts are bound to give effect to the clear meaning of the language. The meaning of the language is clear if it is free from ambiguity, that is, it is not reasonably capable of sustaining competing alternative interpretations."

96. The court identified the purpose of Article 24(2) in the next paragraph, at p.258G to H,

> "As pointed out in *Chong Fung Yuen* (sec.8.2), the purpose of art.24(2) taken together with art.24(3) is to confer the right of abode on the persons defined to be the permanent residents of the HKSAR. Certain persons are included and this necessarily means that those not included are excluded. In this sense, it can be said that the purpose of art.24(2) is to limit the persons who are permanent residents of the HKSAR and hence its population."

97. The court then turned to the context of Article 24(2)(3). In respect of the ICCPR, the Director relied on the reservation in respect of

immigration matters to exclude its provision as part of the relevant context. The court rejected this submission. At p.261B to C,

> "That submission cannot be accepted. What we are concerned with in this case is whether, on a proper interpretation of art.24(2)(3), adopted children are permanent residents with the right of abode. We are not concerned with immigration legislation relating to persons who do not have this right. Accordingly, the reservation and s.11, which have the effect of rendering the ICCPR and the Bill of Rights inapplicable to immigration legislation in relation to persons who do not have the right of abode in Hong Kong, cannot affect the matter."

98. The court concluded that the ICCPR and the domestic law relating to adopted children were part of the context and were of assistance, see p.262B to C. If the language of Article 24(2)(3) were ambiguous, the court would, by reason of such context, have to choose an interpretation that adopted children are included since that would be conducive towards achieving some measure of family union. But the majority of the court held that the language was not ambiguous. Thus, despite the context, the majority held that adopted children are not included in Article 24(2)(3).

The two Court of Final Appeal decisions on Article 24(2)(4)

99. On the same day when the Court of Final Appeal delivered the judgments in *Chong Fung Yuen* and *Tam Nga Yin*, it also delivered the judgment in respect of a case on Article 24(2)(4). The case is *Fateh Muhammad v Commissioner of Registration* (2001) 4 HKCFAR 278. I have already referred to parts of this judgment in the above introduction on the requirements to be satisfied under Article 24(2)(4).

100. The case concerned a foreigner who had been in Hong Kong since the 1960s. He applied for permanent identity card in 1998 and was refused because he had served a prison sentence between 1994 and 1997. By reason of Section 2(4)(b) of the IO, he was not regarded as ordinary residence in Hong Kong during such period. Thus, the Commissioner took the view that he had not ordinarily resided in Hong Kong for a continuous period of not less than seven years immediately before he made his application. He challenged the constitutionality of Section 2(4)(b) unsuccessfully in the Court of First Instance and the Court of Appeal. His appeal was further dismissed by the Court of Final Appeal on the ground that Section 2(4)(b) is consistent with Article 24(2)(4).

101. As the general approach on interpretation of the Basic Law was fully canvassed in the judgments of *Chong Fung Yuen* and *Tam Nga Yin* delivered on the same day, the judgment in *Fateh Muhammad* focused on the interpretation of Article 24(2)(4). The challenge mount against Section 2(4)(b) was premised on its potentially width,

> "....Mr 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."

102. The submission was rejected by Bokhary PJ at p.283D to G. After disposing of the unlikely example of one day's imprisonment, His Lordship continued,

> "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."

103. Thus, a very narrow interpretation was given to Section 2(4)(b) and it was on this basis that the court eventually concluded that the section is constitutional. This aspect of the decision was highlighted again by Ribeiro PJ in the subsequent decision of *Prem Singh* at para.68 and by the Court of Appeal in the recent decision of *Asif Ali v Director of Immigration* CACV 87 of 2010, see the judgment of Fok JA.

104. Coming back to *Fateh Muhammad*, Bokhary PJ considered the meaning of "ordinarily resident" at p.283G to p.284F. The following paragraphs are of particular importance for present purposes,

> "The expression 'ordinarily resident' is to be given its natural and ordinary meaning. What that meaning is depends on the context in which the expression appears. ...Although residence and its nature can be highly relevant to the common law concept of domicile, it was pointed out by Lord Carson in *Gout v Cimitian* [1922] 1 AC 105 at p.110 that the expression 'ordinarily resident' ... could not be interpreted by the considerations which apply when determining domicile, and must be given its usual and ordinary meaning.
>
> 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 ordinary."

105. His Lordship then adverted to the possibility of different meanings given to the expression in different contexts. After alluding to the situation in taxation, he returned to the context under Article 24(2)(4),

> "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."

106. His Lordship went on to consider the "immediately before" requirement and concluded that it is constitutional through a purposive construction of Article 24(2)(4). At p.285B to D,

> "Article 24(2)(4) of the Basic Law confers the right of abode on non-citizens in certain circumstances. I think that it may even be fairly said that it concedes that right to them in those circumstances. In the context of setting out the categories or persons who shall have the right of abode in Hong Kong, it is scarcely realistic to suppose that it was intended to confer that right on persons whose seven years' ordinary and continuous residence ended long before they took, or ends long before they take, Hong Kong as their home. It would be surprising indeed if the right of abode were to be conferred upon persons who ordinarily resided in Hong Kong without taking Hong Kong as their home and thereafter severed all connections with Hong Kong."

107. Bokhary PJ also held that arguments based on discrimination did not take the matter further. At p.285H,

> "Once it is held, as I have held, that para.1(4)(b) merely provides explicitly what art.24(2)(4) provides implicitly, there is simply

> no room left for challenging its constitutionality by reference to any other provision contained in or incorporated by the Basic Law."

108. The second case on Article 24(2)(4) was *Prem Singh*. As it shall be shown below, the decision has immense significance in testing the validity of Lord Pannick's principal arguments. The case was about the constitutionality of the requirement under the then Schedule 1 para.3(1)(c) of the IO that an applicant for permanent residence has to be settled in Hong Kong, meaning that he was not subject to any limit of stay when the application was made. Thus, an applicant had to apply to the Director of Immigration for unconditional stay status first. Whether such application would be granted was a matter of discretion for the Director. Only when unconditional stay was granted could an applicant make an application for permanent residence. The Director sought to justify the requirement as part of the second limb of Article 24(2)(4), viz. having taken Hong Kong as his place of permanent residence ["the permanence requirement"]. The argument was rejected by the Court of Final Appeal.

109. Ribeiro PJ gave the majority judgment. His Lordship arrived at the conclusion that the unconditional stay requirement was unconstitutional by reference to the language and structure of Article 24(2)(4) at paras.55 to 66. The following points are of great importance for present purposes.

110. First, Ribeiro PJ affirmed 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, see para.56. The unconditional

stay requirement was held to be an additional requirement of substance and as such unconstitutional. The necessary implication is that it falls outside the purview of a fair and reasonable measure for verification.

111. In this respect, Bokhary PJ (who dissented on the *de minimis* issue) expressed similar sentiment at para.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."

And then at para.8,

> "... 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."

112. Second, Ribeiro PJ identified the limit to the discretion of the Director of Immigration at para.63,

> "Whilst 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."

113. On the discretion of the Director, Bokhary PJ had this to say at para.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 to 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."

114. Third, Ribeiro PJ considered the permanence requirement by contrasting it with the ordinary residence requirement at paras.64 to 66. In the course of so doing, His Lordship had to construe the meaning of ordinary residence. At para.65, His Lordship adopted the *Shah* test (set out above when I referred to the submissions of Ms Li) and Lord Scarman's elaboration on the term "settled purpose" in the test,

> "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."

115. Then at para.66, Ribeiro PJ identified two respects demanded by the permanence requirement which are not to be found in the concept of ordinary residence,

> "The permanence requirement in BL art.24(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."

In this connection, it should be noted that though paragraph 3(1) of Schedule 1 to the IO sets out certain information which an applicant for permanent resident status must provide, that paragraph has to be read as

being subject to the Court of Final Appeal's interpretation of the permanence requirement under Article 24(2)(4). Thus, although an applicant is required to furnish information as to whether the principal members of family are in Hong Kong, whether he has reasonable means to support himself and his family and whether he has paid any taxes, and these would be relevant information to be taken into account in applying the criteria laid down by Ribeiro PJ, it does not follow that an applicant's application must fail if his family is not in Hong Kong or if he does not have adequate means to support himself.

116. Further light was shed on the concept of ordinary residence at para.75 when His Lordship discussed the *de minimis* rule.

> "However, the exclusion of periods of imprisonment from the ordinary and natural meaning of the words 'ordinary residence' in BL art.24(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 London Borough Council, ex pa Shah* [1983] 2 AC 309 at p.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."

117. In the judgment of Bokhary PJ, the purpose of Article 24(2)(4) was identified at para.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."

Extrinsic materials

118. I have referred to the judgments of the Court of Final Appeal in these cases extensively not only because they are binding on this court, but also because on proper analysis the principles derived from them have fully addressed the able and forceful arguments of Lord Pannick. I shall start by explaining why the extrinsic materials relied upon by the Commissioner could not offer much assistance under the common law approach.

119. Even though the Court of Final Appeal in *Chong Fung Yuen* did not rule out reference to post-enactment materials completely, it did say generally the relevant extrinsic materials are pre-enactment materials because the relevant purpose and context were established at the time of enactment. The Chief Justice gave a further reason for proceeding cautiously in respect of post-enactment materials: under the common law system, once enacted, interpretation of the Basic Law is a matter for the courts[8]. This approach stems from the cardinal principle as to the primacy of language in the common law approach to construction as emphasized by the Chief Justice in *Chong Fung Yuen* and *Tam Nga Yin*.

120. Therefore there has to be very cogent justification before the courts, applying the common law approach, can have regard to post-enactment materials. In the present case, Lord Pannick invited the court to have regard to the post-1990 materials on the basis that there were ambiguities in (a) the meaning of the expression "ordinarily resided"; and

[8] Though this must be subject to the right and authority of the Standing Committee to interpret the Basic Law, it would be extraneous to the common law system and is therefore outside the scope of this judgment.

(b) whether the Basic Law authorizes the Hong Kong legislature to provide for the meaning of this expression. And the justification for admission of post-1990 materials was the Joint Declaration (it being part of the context for the Basic Law) and Article 31 of the Vienna Convention.

121. As regards the submission based on the Joint Declaration and Article 31 of the Vienna Convention, it has been rejected by the Court of Final Appeal in *Ng Ka Ling* and *Chan Kam Nga*. Even though those cases were not about the case of FDHs, the rationale and the materials referred to are the same insofar as admission of post-enactment materials is concerned. It is not open to this court to depart from the decision of the Court of Final Appeal.

122. In respect of the use of the 1996 Opinions to assist in the interpretation of the Basic Law, this court is bound by the decision of the Court of Final Appeal in *Chong Fung Yuen*, a decision made after the 1999 Interpretation. This must of course be subject to any arguments on the effect of the 1999 Interpretation which can only be canvassed at a higher level.

123. The submissions as to the ambiguities are in substance the two principal arguments which I shall analyse below. At this juncture, I would mention that the natures of the two alleged ambiguities are different and there is a tension between them. The alleged ambiguity as regards the Hong Kong legislature's power and authority to define or clarify the meaning of ordinary residence in Article 24(2)(4) is not an ambiguity on the meaning of this expression in Article 24(2)(4) per se (though it has to be premised on the existence of such an ambiguity as

otherwise there is no need for any definition or clarification). It is put forward as an ambiguity as to the authority of the Hong Kong legislature to provide such definition or clarification by way of legislation in the form of the Impugned Provision by reason of reading Article 24(2)(4) together with Article 154. The necessary implication of this argument is that before the IO was amended by the Hong Kong legislature in 1997 to define or clarify the meaning of "ordinarily resided", the meaning of that expression had not yet been crystallized. On the other hand, as regards the first principal argument of Lord Pannick, the meaning of these words can be ascertained by reference to the extrinsic materials even before the enactment of the Impugned Provision.

124. If one examines the admissible extrinsic materials prior to the enactment of the Basic Law, there was no clear indication in the relevant context and purpose that Article 24(2)(4) would necessarily have a meaning encompassing a deeming provision in respect of the FDHs like the Impugned Provision. In this connection, in accordance with the guidance set out in *Chong Fung Yuen*, I accept the pre-enactment materials that I have referred to in my above brief survey of history as part of the admissible evidence of the context.

125. However, I am unable to accept the newspaper report of the comments of the convenor of the Sub-Group on Basic Rights and Duties of the Hong Kong residents under the Basic Law Drafting Committee ["the Sub-group"] in August 1986 and the views of the consultees regarding FDHs as relevant evidence on the context. The views of the consultees can hardly be of assistance.

126. With great respect to the convenor, I do not regard his reported view (even assuming that they were accurately reported by the newspaper) as expressing the finalized position of the drafters of the Basic Law so as to render his view to be of assistance. According to the newspaper report, the convenor himself indicated that,

> "the Hong Kong Government was making preparations for the amendment of identity card, and the Special Group would take the circumstances into consideration when drawing up the concrete eligibility criteria in future."

127. The same observation can be made in respect of the views of the Basic Law drafters in 1988 that "the definition of residents" was "based on the legal system currently in force in Hong Kong". Article 24(2)(4) was not an adoption of the current legal system as far as foreigner's acquisition of the permanent resident status is concerned. Prior to 1997, only British or Commonwealth citizens can become permanent residents in Hong Kong[9]. After the resumption of sovereignty, Article 24(2)(4) extends such right to all foreigners. Though some views had been expressed by some individuals, the evidence did not establish that at that stage a fixed policy had been formulated collectively by either the drafters of the Basic Law or the National People's Congress with regard to the FDHs.

128. The admissible extrinsic materials relied upon by the Commissioner suggested that at the time when the Basic Law was enacted, the implementation of the Joint Declaration on the question of permanent resident was a subject of discussion for the JLG. The 1987 amendments to

[9] Chinese residents can also become permanent residents under the 1987 amendments to the IO. After 1997, they are no longer foreigners and fall outside the scope of Article 24(2)(4).

the IO were agreed between the two governments as a transitional measure in the overall step-by-step approach towards the full implementation of the provisions in the Joint Declaration. There was no suggestion that by 1990 when the Basic Law was enacted there was agreement between the two governments on the having a provision in the IO to deal with the FDHs.

129. In respect of the relevance of the JLG materials, I note that in *Chong Fung Yuen* similar reliance was placed on them by the Director. Stock J considered the utility of such materials at p.376-377 of the report [2000] 1 HKC 359. At p.376G to I, His Lordship pinpointed the crucial issue by spelling out two different scenarios,

> "If it is to say that local legislation giving effect to the Basic Law was expected to *define* or *clarify* or *complement* broad words or phrases in the Basic Law, then that, too, cannot be gainsaid; and it is also a question in this case whether para.2(a) of Sch 1 to the Ordinance achieves one of those purposes or whether, on the other hand, it clarifies nothing but instead *derogates* from the requirements of the Basic Law. But if in his reference to 'only ... a framework' [10], Mr Wong is implying for the Basic Law guidance and nothing more, then he is, in my opinion, off the mark."

130. Then at p.377B to D, Stock J continued,

> "The Basic Law, in art 24, is not some generalization to future legislatures as to the path that *might* be taken. It is a constitutional bedrock conferring rights, from which rights there was to be no derogation. The instrument itself *defined* who was to have the status of permanent resident. That is not to say that there was left no room for particularization or clarification,

[10] The relevant sentence in the affirmation before Stock J was quoted at p.376E to F and was as follows, "There was a mutual understanding between the Chinese and British sides of the JLG that the BL only provided a framework for defining who would be permanent residents of the HKSAR, but the Immigration Ordinance, when amended to bring it into line with the provisions of the BL, would need to set out the definitions with more precision in the manner agreed between both sides."

> *properly so-called.* So, for example, there is, in the Ordinance which was subsequently enacted a definition of 'Chinese citizen'; a prescription for the calculation of the period of seven years; and definition or explanation of the term 'born ... of those residents' by reference to the status of the parents at the time of birth, and so on. But whatever understanding was reached in the meeting rooms of the JLG could not provide a carte blanche for the draftsman of local legislation, or for the legislature, to cut down on the terms of the Basic Law, and to start redefining those entitled to right of abode."

131. I have already referred to the judgment of the Chief Justice in *Chong Fung Yuen*. His emphasis on the legislative intent as expressed in the language was founded on a proposition: it is the text of the enactment which is the law and it is important both that the law should be certain and that it should be ascertainable by the citizen. Thus, though the courts must not adopt a literal, technical, narrow or rigid approach in the interpretation of the Basic Law without regard to its purpose and context, they cannot give the language a meaning which it is not capable of bearing. In my respectful opinion, Stock J's above observations are logical extensions from this basic premise.

Article 154 and immigration control cannot be the basis for the Impugned Provision

132. I now turn to the principal arguments. Since I have been discussing the approach Stock J in *Chong Fung Yuen* as to the role of the Hong Kong legislature, it would be convenient at this juncture to deal with the second principal argument of Lord Pannick. That argument requires the reading of Article 24(2)(4) in the light of Article 154(2) of the Basic Law. Article 154(2) states,

> "The Government of the Hong Kong Special Administrative Region may apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions."

133. Lord Pannick referred to the special situation of Hong Kong in terms of the need for tight immigration control as established policy recognized by our laws prior to 1990 and submitted that the Impugned Provision should be regarded as part of the immigration controls exercised by the Hong Kong Government authorized by Article 154(2), and Article 24(2)(4) should be construed and applied in that light. Counsel argued powerfully that if Article 154(2) were construed as not being wide enough to authorize the enactment of the Impugned Provision by the local legislature, it would deny Hong Kong Government the power to authorize entry into Hong Kong for a group of foreign nationals on a limited basis: viz. their stay in Hong Kong, no matter how long, would not entitle them to apply for permanent resident status. That would also be contrary to the principle of continuity, contrary to the belief of all the stakeholders prior to 1997.

134. Free from authorities, I can see the force of the submission that Article 154(2) should be part of the relevant context in the interpretation of Article 24(2)(4). As mentioned above, both articles can be traced back to Section XIV of Annex I to the Joint Declaration. In terms of the implementation of the Joint Declaration regarding the provisions for permanent resident status, as evidenced by the speech of the Secretary of Security in the Second Reading of the 1987 amendments of the IO, the JLG apparently discussed the matter on the basis of implementing the same through, inter alias, the IO.

135. The purpose of Article 24(2)(4), as identified by Bokhary PJ in *Fateh Muhammad* and *Prem Singh*, is to provide a means by which persons other than Chinese nationals can acquire Hong Kong permanent resident status and through doing so the right of abode. To the same effect is the judgment of the majority in *Tam Nga Yin* at p.258H: "the purpose of art.24(2) is to limit the persons who are permanent residents of the HKSAR and hence its population". Admission of foreigners for entry into Hong Kong and setting the condition of their stay in Hong Kong are clearly matters of immigration control, as such within the scope of Article 154(2).

136. Article 24(2)(4) aside, I cannot see any reason why the immigration authority should not have the authority to exercise immigration control by having a policy of admitting certain categories of people to Hong Kong on condition that they would not be able to become permanent resident of Hong Kong simply by reason of the duration of their residence irrespective of the length of that duration. That had actually been the position prior to the resumption of sovereignty in 1997.

137. As Bokhary PJ observed in *Fateh Muhammad*, it can fairly be said that the right of abode is conceded to foreign nationals. But the issue in the present context is: by which instrument? The Applicant's case is that the right is conceded by Article 24(2)(4) and that article alone, as such the right cannot be taken away by the Impugned Provision. On the other hand, the Commissioner contends that the right is conceded by Article 24(2)(4) reading together with the Impugned Provision as an immigration control authorized by Article 154(2).

138. Put in another way, the issue is: taking the purpose and the context of Article 24(2)(4) into account, should its reference to ordinarily residence be construed as subject to the authority given to the Hong Kong legislature to enact provisions like the Impugned Provision excluding certain categories of persons from its scope by way of immigration control pursuant to Article 154(2)? To a common lawyer applying the common law approach of interpretation, I can readily see the attraction in the judgment of Stock J in *Chong Fung Yuen*, viz. the Basic Law is not merely some generalization to the local legislature as to the path that might be taken; instead it defines who shall have the status of permanent resident and there cannot be any derogation of it by local legislation.

139. There is no indication in the express wordings of Article 24(2)(4) that it should be construed with such qualification. Unlike other parts of the same article, Article 24(2)(4) does not refer to "ordinarily resided *in accordance with law*". I accept this is not conclusive. As pointed out by Lord Pannick, the Court of Final Appeal concluded in *Fateh Muhammad* that the ordinary residence requirement should be satisfied immediately before the permanence requirement even though this is not explicitly provided for.

140. More importantly, even though no reference was made to Article 154(2), the Court of Final Appeal in *Prem Singh* drew a clear line of demarcation between immigration controls and the verification of permanent resident status upon satisfaction of the requirements under Article 24(2)(4). The latter was held to be the legitimate limits of the power of the Director and the local legislature once the requirements of Article 24(2)(4) had been satisfied. The necessary implication is that

immigration controls cannot be relied upon to trump the right acquired under Article 24(2)(4).

141. Indeed, if Lord Pannick's argument were correct, *Chong Fung Yuen* and *Prem Singh* should have been decided differently. Like the Impugned Provision, the relevant provisions in the IO which the Court of Final Appeal held to be invalid in those cases could equally be justified as immigration control under Article 154(2).

142. Whilst the Court of Final Appeal did uphold the validity of Section 2(4)(b) of the IO in *Fateh Muhammad*, the decision was based on a narrow construction of that section and the conclusion that it does not go beyond the true meaning of ordinary residence in Article 24(2)(4) construed independently from the provisions in the IO. Such reasoning would not be necessary if the Court of Final Appeal were of the view that the section could be justified as immigration control within the power of the local legislature. This view is reinforced by the dictum of Bokhary PJ (who delivered the leading judgment in *Fateh Muhammad*) in *Prem Singh* cited above[11] and the emphasis placed on the narrow construction of section 2(4)(b) at para.68 in the judgment of Ribeiro PJ in that case.

143. It is therefore not open to this court to accept the contention of Lord Pannick based on Article 154(2).

144. Can the Impugned Provision be justified as falling within the category of local legislation for the purpose of particularization or

[11] At paras.111 and 113

clarification of Article 24(2)(4) which Stock J would accept as constitutional in *Chong Fung Yuen*? That would depend on the meaning of the expression "ordinary residence" and I shall now turn to this issue.

Ordinary residence

145. As held by Bokhary PJ in *Fateh Muhammad,* the expression "ordinary residence" may carry different meanings in different contexts. The Court of Final Appeal considered the meaning of this expression in the context of Article 24(2)(4) in the two cases mentioned above. The following guidance can be derived from these judgments of the Court of Final Appeal,

(a) The expression should be given its natural and ordinary meaning (*Fateh Muhammad* at p.283G);

(b) The expression should not be interpreted by the considerations which apply when determining domicile (*Fateh Muhammad* at p.283J);

(c) As a starting point, "ordinarily" is to be contrasted with "extraordinarily" or "out of ordinary" (*Fateh Muhammad* at p.284A to B);

(d) A relevant context in ascertaining the meaning of the expression is that it forms part of the criteria for the acquisition of a valuable right and status as permanent resident (*Fateh Muhammad* at p.284 D to E);

(e) The *Shah* test, together with Lord Scarman's explanation of settled purpose, can be applied in the context Article 24(2)(4) (*Prem Singh* para.65);

(f) Contrasting with the permanence requirement, ordinary residence does not require the propositus to have the intention to reside in Hong Kong permanently or indefinitely with Hong Kong alone as his permanent residence (*Prem Singh* para.66, and Lord Scarman's explanation of settled purpose);

(g) The statutory exclusion for imprisonment and detention is constitutional because such period falls outside what could be qualified as "the settled purposes" under a person's ordinary residence in the ordinary and natural sense of the expression, as such it does not have the qualitative character of ordinary residence for the purpose of Article 24(2)(4) (*Prem Singh* para.75).

146. Lord Pannick submitted that the Court of Final Appeal only assumed the *Shah* test to be applicable in *Prem Singh*. Whilst it does not appear from the law report that the applicability of *Ex parte Shah* had been the subject of any submissions by counsel, I do not believe Ribeiro PJ would refer to the criteria in *Ex parte Shah* in explaining the majority decision on the *de minimis* issue[12] if His Lordship had any doubt as to its applicability in the context of Article 24(2)(4). Further, in contrasting between the ordinary residence requirement and the permanence requirement, if I may respectfully say so, Ribeiro PJ highlighted why in the context of this Article the ordinary residence requirement should be interpreted according to the *Shah* test: the additional matters that the permanence requirement set in the Article over and above the ordinary residence requirement are essentially aspects of domicile which Lord

[12] *Prem Singh* para.75

Scarman excluded from the natural and ordinary meaning of "ordinary residence". Ribeiro PJ's reference to *Ex parte Shah*, in my view, forms part of the rationale of the majority in *Prem Singh*.

147. Existing usage of an expression is part of the context that the court can have regard to in the common law approach to interpretation. The test for ordinary residence in *Ex parte Shah* had been applied in Hong Kong in numerous cases, including cases in immigration context: see *Director of Immigration v Ng Shun Loi* [1987] HKLR 798. It has also been applied in the election context: see *Lau San Ching v Apollonis Liu* (1995) 5 HKPLR 23. In this connection, one of the unique rights given to permanent residents under the Basic Law is the right to participate in election. Viewed against such background, I have no doubt that the Court of Final Appeal in *Prem Singh* was familiar with the use of the *Shah* test in similar context in Hong Kong and endorsed its use in the context of Article 24(2)(4).

148. Given the Court of Final Appeal's endorsement of the *Shah* test, and in the light of counsel's submissions based on this case, it is necessary to examine at greater length the speech of Lord Scarman in that case. The case was reported as *Reg v Barnet London Borough Council Ex parte Shah* [1983] 2 AC 309. The House of Lords held that the meaning of the expression "ordinary residence" in the statute in that case should be construed according to its natural and ordinary meaning. Such meaning was to be derived from two earlier tax cases. Before Lord Scarman set out his famous statement on the meaning of the expression, he stated that he agreed with the meaning given to that expression by Lord Denning MR in the judgment of the Court of Appeal, see p.342D to E. Then Lord Scarman

referred specifically to the case of *In re Norris* (1888) 4 TLR 452 for this proposition,

> "... one person could be ordinarily resident in two countries at the same time. This is, I have no doubt, a significant feature of the words' ordinary meaning for it is an important factor distinguishing ordinary residence from domicile." (p.342F to G)

149. After referring to the two aspects in which the mind of the propositus is relevant: viz. (a) resident must be voluntarily adopted; and (b) there must be a degree of settled purpose, Lord Scarman adverted to the proof of ordinary residence at p.344F,

> "For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose."

150. At p.345, Lord Scarman set out the submissions of the two councils: the "real home test" and its variant: where the person lives as a member of the general community and not merely for a specific or limited purpose. These tests imply that a man can have only one ordinary residence at any one time. These submissions were rejected, at p.345D,

> "What is important is to note that the test is wholly inconsistent with the natural and ordinary meaning of the words as construed by this House in the two tax cases. Indeed it is, I believe, an unhappy echo of 'domicile', the rules for ascertaining which impose great difficulties of proof."

151. At p.346B to 348F, Lord Scarman considered the judgments of the Divisional Court and the Court of Appeal. As to the latter, Lord Scarman noted at p.346H to 347A,

> "Three points emerge as of critical importance in the court's judgment: first, the emphasis laid upon the purpose of the

> presence here; secondly, the reliance upon 'immigration status'; and thirdly, the reliance upon policy considerations derived not from the education legislation itself but from the court's own view as to what Parliament could or could not have intended."

152. At p.347 H to 348B, Lord Scarman identified the error of law in the judgments below,

> "My Lords, the basic error of law in the judgments below was the failure by all the judges, save Lord Denning MR, to appreciate the authoritative guidance given by this House in [the two tax cases] as to the natural and ordinary meaning of the words 'ordinarily resident'. They attached too much importance to the particular purpose of the residence; and too little to the evidence of a regular mode of life adopted voluntarily and for a settled purpose, whatever it be, whether study, business, work or pleasure. In so doing, they were influenced by their own views of policy and by the immigration status of the students."

153. His Lordship cautioned specifically against attaching too much significance on immigration status when deciding whether a person is ordinarily resident at a place. At p.348D to E,

> " 'Immigration status', unless it be that of one who has no right to be here, in which event presence in the United Kingdom is unlawful, means no more than the terms of a person's leave to enter as stamped upon his passport. This may or may not be a guide to a person's intention in establishing a residence in this country: it certainly cannot be the decisive test, as in effect the courts below have treated it."

154. On settled purpose, Lord Scarman held that the lower courts committed the following error,

> "A further error was their view that a specific limited purpose could not be the settled purpose, which is recognized as an essential ingredient of ordinary residence. This was, no doubt, because they discarded the guidance of the [tax cases]. But it was also a confusion of thought: for study can be as settled a purpose as business or pleasure. And the notion of a permanent or indefinitely enduring purpose as an element in ordinary residence

> derives not from the natural and ordinary meaning of the words 'ordinarily resident' but from a confusion of it with domicile."

155. Given the established usage of the *Shah* test in Hong Kong under similar context as exemplified by the decision of the Court of Appeal in *Director of Immigration v Ng Shun Loi* [1987] HKLR 798[13], this court must in any event take this into account in ascertaining the meaning of "ordinarily resident" in Article 24(2)(4).

156. Lord Pannick submitted that the test in *Ex parte Shah* is only applicable in the absence of any particular statutory framework or legal context. I have already dealt with counsel's submissions on the authority given to the Hong Kong Government to apply immigration controls at the previous section of this judgment. I am now dealing with his first principal argument: the Impugned Provision, like Section 2(4)(b) of the IO in *Fateh Muhammad*, does not go beyond the scope of Article 24(2)(4). In respect of the first principal argument, the meaning of "ordinary residence" has to be ascertained in the context prior to the enactment of the Basic Law in 1990.

157. What is the context which Lord Pannick relied upon to contend that the expression should be given a meaning different from the natural and ordinary meaning prescribed by the *Shah* test? Counsel said as there is no definition for ordinary residence in the Basic Law, there is an ambiguity in ascertaining whether a person's residence is so out of

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[13] That was a case decided prior to the 1987 amendments to the IO. Under the previous law, "Chinese resident" means an immigrant who "has at any time been ordinarily resident in Hong Kong for a continuous period of not less than seven years".

ordinary that it would not come within the expression "ordinary residence". In the context of the grant of a valuable right and status upon those who satisfied the requirement in Article 24(2)(4), a more stringent test is called for. It is therefore open to the local legislature, counsel said, to clarify or refine the meaning of that expression by enacting the Impugned Provision.

158. Counsel did qualify the last proposition by accepting that ultimately the construction of the Basic Law is a matter for the court and there are limits beyond which the local legislature cannot tread in the guise of clarification or refining the expression "ordinarily resident". Two alternative tests were suggested by Lord Pannick: (1) reasonableness in the public law sense; or (2) proportionality test (which I understood to be the same as the justification test laid down in *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335) with a wide margin of discretion.

159. With respect, I do not think this is correct under the common law approach of interpretation. In my judgment, as we are dealing with clarification or refinement as envisaged by Stock J in *Chong Fung Yuen*, the court must test the Impugned Provision against the proper meaning of the expression in the context of Article 24(2)(4). It is not open for the court to say: simply because the language in the Basic Law is ambiguous there could be room for clarification by the IO; and so long as the provision in the IO is reasonable in the public law sense or proportionate, the court would not intervene. That would in substance be delegated legislation. In the absence of proper delegation of such authority to the local legislature under the Basic Law, the court must construe the relevant provision in the Basic Law to ascertain its meaning before it proceeds to test the constitutionality of the local legislation under challenge.

160. Though there is no definition for "ordinarily resident" in the Basic Law, it does not necessarily mean that there is any ambiguity in the application of the *Shah* test in the context of Article 24(2)(4). Lord Pannick pinpointed the ambiguity as the ambiguity as to what is out of ordinary. Counsel focused on what is out of ordinary by referring to the judgment of Bokhary PJ in *Fateh Muhammad.*

161. With respect, I do not read the judgment of *Fateh Muhammad* as laying down that the test is simply whether a person's residence is out of ordinary. Whilst Bokhary PJ did refer to the contrast between ordinary and out of ordinary as a starting point and uphold the constitutionality of Section 2(4)(b) of the IO by reference to the extraordinary nature of imprisonment, I do not believe that the Court of Final Appeal in *Fateh Muhammad* intended to reduce the *Shah* test into the single question of whether the residence is out of ordinary. Bearing in mind that Bokhary PJ did make reference to the two tax cases and *Ex parte Shah* in his judgment, if His Lordship were departing from such well established test for ordinary residence it would be most surprising if there was no discussion as to the reasons why he considered that to be necessary in the context of Article 24(2)(4). Further, Bokhary PJ actually started his discussion on the meaning of ordinary residence at p.283G by stating that the expression should be given its natural and ordinary meaning. The *Shah* test, as discussed above, was based on the natural and ordinary meaning of this expression.

162. This reading of *Fateh Muhammad* is reinforced by the judgment of Ribeiro PJ in *Prem Singh.* As explained earlier, His Lordship endorsed the applicability of the *Shah* test in the context of Article 24(2)(4)

in respect of the ordinary residence requirement. If there were any reason to believe that *Fateh Muhammad* had in any way modified that test, bearing in mind that Chief Justice Li, Bokhary PJ, Chan PJ and Mason NPJ were members of the Court of Final Appeal hearing both *Fateh Muhammad* and *Prem Singh*, it would be most remarkable if none of their Lordships qualified the use of the *Shah* test by Ribeiro PJ in the latter case.

163. The narrow construction given to the word "detention", as explained by Bokhary PJ in *Fateh Muhammad* and reiterated by Riberio PJ subsequently in *Prem Singh* further indicates that it could not have been the intention of Bokhary PJ to adopt a simple test of "out of ordinary" in place of the well established *Shah* test. Detention was construed as being restricted to the kind of detention having the same nature as imprisonment pursuant to criminal conviction. As illustrated by the Court of Appeal's decision in *Asif Ali*, the criminal conviction makes a world of difference for the purpose of Article 24(2)(4) as regards the character of the subsequent detention and imprisonment in respect of the ordinary residence requirement. The explanation for the exclusion of imprisonment was given by Ribeiro PJ in *Prem Singh* at para.75,

> "The incarceration, reflecting sufficiently serious criminal conduct to warrant an immediate custodial sentence, falls outside what could qualify as 'the settled purposes' underlying a persons's ordinary residence in the ordinary and natural sense of those words [according to *Shah*]. 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."

164. The following points emerge from this part of the judgment in *Prem Singh*. First, it was emphasized that the incarceration was due to the conviction for serious criminal conduct which warranted immediate

custodial sentence. Thus, the exclusion does not extend to other form of loss of liberty. Second, the significance of such incarceration does not lie in the fact that the person's remaining in Hong Kong is involuntary. Rather, its significance lies in the other aspect of the *Shah* test: the inability to satisfy the criterion of settled purposes. And this is because of the criminal conviction. Third, the continuity of the meaning of 'ordinary residence' in the Basic Law with earlier statutory schemes is highlighted. In this connection, I have already alluded to the use of *Shah* test in pre-1997 cases in similar context.

165. The clear implication from the narrow construction given to the word "detention" is that those instances identified by Mr Dykes SC in *Fateh Muhammad* would not be excluded from the reckoning of ordinary residence for the purpose of Article 24(2)(4). A simple test of exclusion of residence which is "out of ordinary" cannot provide a principled basis for arriving at such conclusion. In my respectful view, it is better to understand what Bokhary PJ said in *Fateh Muhammad* as building upon the foundation already laid down in the common law as to the natural and ordinary meaning of "ordinary residence" as explained in *Ex parte Shah.*

166. Thus, instead of exploring whether there is any ambiguity as to what kind of residence is "out of ordinary" in the context of Article 24(2)(4), the issue should be whether the Impugned Provision serves the legitimate function of clarifying some ambiguity as to the natural and ordinary meaning of "ordinary residence" in the context of that Article, bearing in mind the well-established use of the *Shah* test in Hong Kong.

167. Ms Li made the point that there is no definition for "domestic helper" in the Impugned Provision and it could cover cases outside the scope of the FDH policy. Adopting a purposive construction, bearing in mind that the Impugned Provision referred to domestic helpers from outside Hong Kong, subject to the inherent requirement that the law must be certain and accessible and insofar as it refers to policy in its operation, such policy must also bear the same quality in addition to being legal in the sense that it must not contravene any provisions in the Basic Law or domestic legislation including the Hong Kong Bill of Rights, I am prepared to construe the Impugned Provision as referring exclusively to domestic helpers who obtained permission of the Director of Immigration to come and work here under the FDH policy.

168. Counsel also submitted that since the FDH policy, not being law in its nature, can be changed by the executive arm of the Government. That may be so. However, any change in policy will be subject to two levels of check. First, the adoption of the policy as a criterion under the Impugned Provision has to be legal. In the present context, if the policy is out with the proper scope of Article 24(2)(4) (as I shall conclude below), the Impugned Provision would be rendered unconstitutional for failing to satisfy the legality test. Second, the legislature can monitor any change in the FDH policy and conduct debate thereon. If necessary consideration could be given to the amendments of the Impugned Provision.

169. Counsel further submitted that the FDH policy is implemented through a scheme of standard forms FDH contract and such contractual provisions should not be read as having the same effect as condition of stay. For present purposes, I do not think it is necessary to

examine at length whether a particular provisions in the standard form contract can be regarded as forming part of the condition of stay granted by the Director to the Applicant. In any event, as observed by Lord Scarman in *Ex parte Shah*, immigration status cannot and should not be conclusive on determining a person's "ordinary residence".

170. On the evidence before this court, I think it is proper to proceed on the basis that the features of the FDH policy identified by Lord Pannick in his submissions are salient features in all FDH cases after 1997. Examining these features (which Lord Pannick contended to be features rendering the residence of the FDHs in Hong Kong out of ordinary) against the *Shah* test, even bearing in mind that Article 24(2)(4) confers valuable right and status on foreign nationals, I cannot accede to the submission that the Impugned Provision simply clarify or refine what is already provided for in general term under that Article. I shall explain by going through the list of features.

171. First, the permission to entry and remain granted to a FDH is subject to the requirement that the FDH can only work as a domestic helper under a specified employment contract. An FDH is not allowed to change her employer in Hong Kong even though her contract is terminated prematurely. This can be considered together with the requirement that a FDH is required to leave Hong Kong within 2 weeks after the termination of the contract of employment if it is terminated before its expiry. In my judgment, these limits cannot alter the character of a FDH's residence in Hong Kong during the time she is permitted to stay. She resides here for a settled purpose, viz. employment, and she comes and stays here voluntarily. She is confined to a particular employer and has to leave after her contract

ends. But it does not detract from the primary position: whilst she is here, she is here as part of the regular order of her life for the time being.

172. Second, whilst in Hong Kong the FDH has to work and reside in the employer's residence. The significance, Lord Pannick submitted, is that a FDH cannot establish a household or independent lifestyle of her own. I do not accept that a FDH cannot have a lifestyle of her own during her residence in Hong Kong. Much less am I persuaded that such a conclusion follows simply because of the requirement that a FDH has to work and reside at the specified residence of the employer. FDH, like other employees in Hong Kong, are protected by the Employment Ordinance and they are entitled to rest day every week and statutory holidays in the same manner as other employees in Hong Kong. During their rest days and holidays, they are free to do whatever they like in terms of recreation, religious or social activities or other pursuit of life. It is a matter of private agreement between a FDH and her employer as to the spare time she could have during a working day. As demonstrated in the case of the Applicant, if her employer gives her sufficient spare time, she could pursue some part-time education. Alternatively, if she has the necessary spare time, there is no reason why she could not enjoy other aspects of life which other Hong Kong residents could enjoy during their spare time. Admittedly, there are activities which a FDH may have difficulties in pursuing due to her lack of access to an exclusive spacious residence. But the same constraint is experienced by many Hong Kong residents who do not have the resource to acquire such accommodation. Actually, it is not a foregone conclusion that the accommodation provided by an employer to a FDH is so limited that she could not enjoy the lifestyle of an average Hong Kong resident. There are certainly some FDHs in Hong Kong who worked for

wealthy families and I would not be surprised that they enjoyed better living condition and have more spare time to themselves than some of our locals who have to work long hours to make ends meet. I stress I am not suggesting that this is a typical comparison. However, the reference to such atypical cases still serves the purpose in terms of demonstrating the fallacy in counsel's argument in this respect.

173. As regards the establishment of a separate household, this can be considered together with the last feature relied upon by Lord Pannick, viz. that FDHs are not allowed to bring dependants to Hong Kong. I do not think these features have any real bearing on the question of ordinary residence. It has never been an element of the *Shah* test that one has to have the capacity to establish a separate household or to bring his dependants along to a place before he could be regarded as ordinarily resident there. As recognized by Lord Scarman, education or employment can be the relevant settled purpose for staying at a place. I appreciate that the pursuit of such purposes is not mutually exclusive with the establishment of household or bringing along dependants to the place of residence. However, the point is that the inability to do the latter does not prevent one from pursuing the former as a settled purpose.

174. Third, Lord Pannick referred to the fact that an employer of a FDH is required to pay for her passage to and from her place of origin and make corresponding arrangement in case of the death of the FDH. Further, counsel also referred to the prescribed home leave upon the completion of a contract. These measures are aimed at fostering and maintaining the FDH's link with her home country. Again, bearing in mind that the *Shah* test is the proper test to be applied instead of asking in a general sense

whether a FDH's residence in Hong Kong has features which could be regarded as out of ordinary, I do not think these features have much significance. The fostering of the link with the home country will have a bearing on the intention as to permanent residence. But that would only be relevant to the permanence requirement instead of the ordinary residence requirement. Using these features to support the Impugned Provision is equivalent to the confusion of the concept of ordinary residence with domicile, an error emphatically rejected by Lord Scarman in *Ex parte Shah*. In the context of Article 24(2)(4), it would be a confusion of the ordinary residence requirement with the permanence requirement. As pointed out by Lord Scarman, giving the expression its natural and ordinary meaning, a person can have ordinary residence at two different places at the same time. Thus, the mere maintenance of link with her country of origin does not mean that she is not ordinarily resident in Hong Kong.

175. Though I have condensed Lord Pannick's list, I believe I have covered every items in the list of special features. On final anaylsis, these features whether taken individually or collectively cannot take a FDH's residence out of the concept of ordinary residence within the context of Article 24(2)(4). It follows that the Impugned Provision, by excluding the FDHs as a class from the benefit of Article 24(2)(4), derogates instead of clarifies the meaning of that Article.

176. I therefore reject the first principal argument of Lord Pannick despite his skilful effort in that regard.

177. Having rejected both principal arguments advanced by Lord Pannick to defend the constitutionality of the Impugned Provision, my

conclusion is that on the common law interpretation approach the Impugned Provision is inconsistent with Article 24(2)(4).

Discrimination

178. My conclusion above is sufficient to dispose of the matter before the court. As regards the alternative argument of Ms Li based on Article 25, I can deal with it shortly. In my judgment, this is not a case about discrimination and Article 25 is not engaged. This point has been adequately addressed by Bokhary PJ in *Fateh Muhammad* at p.285H when His Lordship rejected a similar argument advanced in the context of a challenge to Section 2(4)(b) of the IO.

179. It has to be borne in mind that Article 24(2)(4) confers the status of permanent residents on foreign nationals. It must be up to the sovereign authority to decide the extent to which such a concession is to be granted. As observed by Lord Bingham in *Januzi v Home Secretary* [2006] 2 AC 426 at p.439G, a fundamental principle in international law is that a sovereign state has the power to admit, exclude and expel aliens. Therefore there cannot be any complaint that Article 24(2)(4) confers such status on certain people but not others.

180. The relevant line is drawn by Article 24(2)(4) and the present case falls to be decided by asking whether the Applicant comes within the requirements laid down in that Article.

Consequential directions

181. Parties agreed that this court should hand down its judgment on the main issues debated at the hearing and reserve a date for argument as to the relief that should be granted in the light of it.

182. I now direct that the case be listed for such purpose on 26 October. To facilitate the efficient disposal of the matter, I also direct,

(a) The Respondent shall lodge his skeleton submissions and draft order by 11 October;

(b) The Applicant shall lodge her skeleton submissions and draft order by 14 October.

183. I would also take this opportunity to thank counsel for their valuable assistance in this matter.

(M H Lam)
Judge of the Court of First Instance
High Court

Ms Gladys Li, SC, Mr Kwok Sui Hay and Ms Jocelyn S L Leung, instructed by Messrs Barnes & Daly (D.L.A.), for the Applicant

Mr Lord Pannick, QC, Mr Anderson Chow, SC and Ms Eva Y W Sit, instructed by Department of Justice, for the 1st Respondent