

THE “FOREIGN DOMESTIC HELPERS CASE”:  
THE RELEVANCE OF THE NPCSC INTERPRETATION  
OF 1999 AND THE PREPARATORY COMMITTEE  
OPINION OF 1996



Albert H.Y. Chen\*

*One of the issues raised by the Vallejos case (the Foreign Domestic Helpers Case) is to what extent, if any, the fundamental legal issues which the court was called upon to decide in this case had already been dealt with by the National People's Congress Standing Committee when it issued its first Interpretation of the Basic Law in June 1999. This article discusses the relevance to this case of the 1999 Interpretation and the Preparatory Committee's Opinion which it referred to. It suggests that these documents enable us to have a better and fuller understanding of the legislative intent behind Art 24(2) of the Basic Law. Such legislative intent is consistent with, and converges with, the common understanding of the Chinese and British Governments of the intent behind the relevant provisions in the Sino-British Joint Declaration of 1984 that correspond to Art 24(2). The intent was to set out the basic principles governing permanent resident status and right of abode in the HKSAR, and to confer on the legislature of the HKSAR a broad power and a wide margin of appreciation in implementing and elaborating such basic principles by more detailed legislative rules.*

## Introduction

The decision of Hong Kong's Court of First Instance in *Vallejos Evangelina Banao v Commissioner of Registration*<sup>1</sup> (“the Foreign Domestic Helpers Case” or “the FDH Case”) has been the subject of much public attention in Hong Kong since the summer of 2011. One of the issues raised by the case is to what extent, if any, the fundamental legal issues which the court was called upon to decide in this case had already been dealt with by the National People's Congress Standing Committee (NPCSC) when it issued its first Interpretation of the Basic Law in June

\* Chan Professor in Constitutional Law, University of Hong Kong; Member, Hong Kong Basic Law Committee of the NPCSC. This article is an expanded version of the author's article, “FDH Case & 1999 NPCSC Interpretation”, *China Daily* (Hong Kong edition), 18 October 2011, p H31. The author is grateful to the anonymous reviewer whose comments have contributed to the improvement of the manuscript.

<sup>1</sup> HCAL 124/2010, [2011] HKEC 1289 (30 Sept 2011; Lam J).

1999 (the 1999 Interpretation).<sup>2</sup> In this comment, I will focus on the 1999 Interpretation, the Preparatory Committee's Opinion which it referred to and their relevance to the FDH Case.

### The 1999 Interpretation

The exact title of the 1999 Interpretation is "the Interpretation by the NPCSC of Articles 22(4) and 24(2)(3) of the Basic Law of the HKSAR". Articles 22(4) and 24(2)(3) were the Basic Law provisions that were litigated before and interpreted by the Hong Kong courts in the *Ng Ka Ling*<sup>3</sup> and *Chan Kam Nga*<sup>4</sup> cases. Mr Tung Chee-hwa, Chief Executive of the HKSAR at the time, requested the NPCSC to interpret these provisions after the Court of Final Appeal (CFA) rendered its judgments in the *Ng* and *Chan* cases in January 1999.<sup>5</sup>

Although the text of the 1999 Interpretation is mainly about Arts 22(4) and 24(2)(3) of the Basic Law, there is one crucial passage (the Relevant Passage) in the Interpretation that has a broader significance.

The passage reads as follows:

"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 of the HKSAR of the PRC, have been reflected in the 'Opinions on the Implementation of Article 24(2) of the Basic Law of the HKSAR of the PRC' adopted at the 4th Plenary Meeting of the Preparatory Committee for the HKSAR of the NPC on 10 August 1996."

In the above passage, "all other categories of Art 24(2)" refer to the various limbs or paragraphs of Art 24(2) other than para 3 of Art 24(2). Paragraph 3 is about the permanent resident status (ie right of abode in Hong Kong) of mainland-born children of Hong Kong permanent residents (ie the subject litigated in the *Ng* and *Chan* cases). The other paragraphs are on matters such as the right of abode in Hong Kong of children born in Hong Kong of pregnant women from mainland visiting Hong Kong

<sup>2</sup> Government of the HKSAR Gazette Extraordinary, Legal Supplement No 2, 28 June 1999, p 1577 (LN 167 of 1999). The relevant part of this interpretation was cited in para 10 of Lam J's judgment in the present case.

<sup>3</sup> (1999) 2 HKCFAR 4.

<sup>4</sup> (1999) 2 HKCFAR 82.

<sup>5</sup> See generally Johannes Chan et al (eds), *Hong Kong's Constitutional Debate* (Hong Kong University Press, 2000).

(see para 1 – the subject litigated in the *Chong Fung Yuen*<sup>6</sup> case in 2001) and foreign nationals who have been ordinarily resident in Hong Kong for seven years and have taken Hong Kong as their place of permanent residence (see para 4 – the subject litigated in the present FDH Case).

The Relevant Passage in the 1999 Interpretation thus suggests that the legislative intent behind all the right of abode provisions in Art 24(2) of the Basic Law has been reflected in the Preparatory Committee’s Opinions of August 1996 (the PC Opinion). What, then, is the PC Opinion, and what is meant by saying that it reflects the legislative intent behind Art 24(2)?

### The Preparatory Committee

The Preparatory Committee (PC) was established in 1996 by the NPC in accordance with a decision of the NPC in April 1990, which was enacted at the same time as the enactment of the Basic Law itself. The Decision stated that the PC was responsible for preparing the establishment of the HKSAR. The PC enacted various measures which were fundamental to the handover process in 1997.<sup>7</sup> For example, it enacted the method for electing the first Chief Executive of the HKSAR. It decided to establish the Provisional Legislative Council and enacted the method for constituting it. It made recommendations on the implementation of the Chinese Nationality Law in the HKSAR and on the treatment of HK’s existing laws for the purpose of the 1997 transition. These recommendations were accepted by the NPCSC and incorporated into its Interpretation in 1996 of the Chinese Nationality Law and its Decision in February 1997 on the Treatment of HK’s Existing Laws under Art 160 of the Basic Law. The PC also issued the PC Opinion on the implementation of Art 24(2) of the Basic Law.<sup>8</sup> The Provisional Legislative Council of the HKSAR amended the existing Immigration Ordinance in accordance with the PC Opinion.<sup>9</sup> Several key provisions in the amended ordinance were the

<sup>6</sup> (2001) 4 HKCFAR 211 (CFA), [2000] 3 HKLRD 661 (CA), [2000] 1 HKC 359 (CFI, Stock J).

<sup>7</sup> See generally Albert H.Y. Chen, “Legal Preparation for the Establishment of the Hong Kong SAR” (1997) 27 HKLJ 405.

<sup>8</sup> The Chinese text of the Opinion and its English translation have been published in *The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and Related Documents* (中華人民共和國香港特別行政區基本法及相關文件) (Hong Kong: Joint Publishing (三聯書店), 2007), pp 91 and 234 respectively.

<sup>9</sup> Immigration (Amendment) (No 2) Ordinance 1997 (Ord No 122 of 1997). See also Immigration (Amendment) (No 3) Ordinance 1997 (Ord No 124 of 1997).

subjects of constitutional challenge in cases like *Ng, Chan* and *Chong* mentioned above and in the present FDH Case.

### The Preparatory Committee's Opinion

The text of the PC Opinion begins as follows:

“Paragraph 2 of Article 24 of the Basic Law of the HKSAR of the PRC provides for issues concerning permanent residents of the HKSAR. For the purpose of implementing the provisions, the following opinions are hereby provided for the reference of HKSAR to formulate the details of the implementation rules.”<sup>10</sup>

This opening paragraph is then followed by seven sections which deal with various aspects of the determination and acquisition of permanent resident status and the right of abode in the HKSAR. For example, s 1 covers the issue litigated in the *Chong* case. Section 2 deals with the issue litigated in the present FDH Case. Section 4 deals with the issue litigated in the *Chan* case and directly covered by the 1999 Interpretation. All these are very important provisions. If the CFA in the *Chan* case had accepted the validity of s 4, the reference to the NPCSC in 1999 would have been unnecessary. If the CFA in the *Chong* case had accepted the validity of s 1,<sup>11</sup> the subsequent problem of the increasing influx of pregnant women from mainland coming to Hong Kong to give birth to their babies would not have existed. And if the court in the present FDH Case can be persuaded to accept the validity of s 2, it would uphold the restrictions imposed by the existing Immigration Ordinance<sup>12</sup> on foreign domestic helpers' eligibility for the acquisition of permanent resident status.

So far, the Hong Kong courts have never accepted the PC Opinion as an authoritative guide to the interpretation of Art 24(2) of the Basic Law. It is true that the PC was not authorised to interpret the Basic Law. Neither did it purport to make an interpretation of the Basic Law,

<sup>10</sup> This English translation of the relevant passage in the PC Opinion comes from *The Basic Law* (n 8 above), p 234.

<sup>11</sup> The CFA rendered its judgment in the *Chong* case on 20 July 2001. On 21 July 2001, a spokesman for the Legislative Affairs Commission of the NPCSC stated that the CFA's decision was “not consistent” with the NPCSC's interpretation of the Basic Law, and “expressed concern” about the matter. The relevant interpretation is that of 1999, in which the Relevant Passage affirms the PC Opinion. See generally Albert H.Y. Chen, “Another Case of Conflict Between the CFA and the NPC Standing Committee?” (2001) 31 *HKLJ* 179.

<sup>12</sup> See s 2(4)(a)(vi) of the Ordinance.

as the opening paragraph of the PC Opinion suggests that the PC was only making recommendations to the HKSAR authorities on how to formulate detailed rules for the implementation of Art 24(2). This, however, should not be the end of the matter as far as the PC Opinion is concerned. The PC Opinion should not be disregarded. On the contrary, in the light of the 1999 Interpretation and the Relevant Passage in it, the PC Opinion deserves to be taken more seriously.

### **Taking the Preparatory Committee’s Opinion Seriously**

The PC Opinion, when read as a whole, shows that in the opinion of the PC, Art 24(2) only lays down the basic principles governing permanent resident status and the right of abode in the HKSAR; these basic principles are to be implemented by more detailed rules which may be and should be enacted by the legislature of the HKSAR.<sup>13</sup> In the opinion of the PC, the enactment into law of the provisions in ss 1–7 of the PC Opinion is within the power of the HKSAR legislature; the enactment of such provisions would not be inconsistent with Art 24(2) or the legislative intent behind it.

### **The Legislative Intent behind Article 24(2)**

The legislative intent behind Art 24(2) as understood by the PC must have been that Art 24(2) was intended to lay down the basic principles governing permanent resident status and the right of abode in the HKSAR; these basic principles are not completely self-executing but may be and should be implemented by more detailed rules to be enacted by the HKSAR legislature. It was intended that the legislature should enjoy a broad power and a wide “margin of appreciation” in making such detailed rules for the purpose of implementing the basic principles in Art 24(2), and that such detailed rules may elaborate and refine the broad and general principles in Art 24(2). This would explain why, in the opinion of the PC, the recommendations it made in ss 1–7 of the PC Opinion, if enacted into law by the HKSAR legislature, would not be inconsistent with Art 24(2) or the legislative intent behind it.

<sup>13</sup> This was also the view expressed by Ms Elsie Leung, Secretary for Justice designate, when she spoke to move the second reading of the Immigration (Amendment) (No 3) Bill 1997 before the Provisional Legislative Council on 7 June 1997. The relevant part of her speech was quoted in para 61 of the judgment in the present FDH Case.

If this reading of the PC Opinion is correct, and if the PC's understanding of Art 24(2) or the legislative intent behind it is correct, then a court engaged in the task of reviewing the constitutionality of legislation that was enacted to implement Art 24(2) should accord a considerable degree of judicial deference to, or a wide margin of appreciation to, the legislature that enacted such legislation. This would mean that such legislation should not be subjected to the strict scrutiny that is appropriate for the review of legislation that restricts human rights and fundamental freedoms. Legislation enacted to implement Art 24(2) should only be struck down if it is arbitrary, irrational or so unreasonable that no reasonable and responsible legislature implementing Art 24(2) in good faith would enact it,<sup>14</sup> or it gives a provision in this Article "a meaning which the language cannot bear".<sup>15</sup> The court should be slow in substituting its own judgment for that of the legislature in situations covered by Art 24(2) where reasonable differences in judgment and interpretation may legitimately exist.<sup>16</sup> In the context of the present FDH Case, the proper question for the court should be whether it was arbitrary, irrational or beyond the limits of reasonable judgment or determinations

<sup>14</sup> An argument along these lines was put forward before the court in the present FDH Case by Lord Pannick QC, acting on behalf of the HKSAR Government. See paras 72 and 158 of the judgment. The learned judge's response is as follows (para 159 of the judgment): "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 [Immigration Ordinance]; 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." With respect, the key question is precisely whether, as a matter of the true construction of Art 24(2)(4) of the Basic Law, it was intended that the HKSAR legislature should be authorised to elaborate and refine the meaning of "ordinarily resided" in Art 24(2)(4) by enacting legislation.

<sup>15</sup> *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533 at 546 (per Li CJ).

<sup>16</sup> In the present FDH Case, Lam J adopted the approach of Stock J's (as he then was) in the Court of First Instance in the *Chong* case (discussed in para 129 of Lam J's judgment): "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 ... ? 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*." (para 138 of Lam J's judgment; emphasis supplied) The learned judge concluded 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*." (para 175; emphasis supplied) With respect, whether the Impugned Provision "derogates from the requirements of the Basic Law" (to use Stock J's language in *Chong Fung Yuen* [2000] 1 HKC 359 at 376) depends on how the term "ordinarily resided" in Art 24(2)(4) is interpreted. If this term can reasonably accommodate more than one meaning or interpretation (say, interpretations A and B), then neither interpretations A nor B derogate from the Basic Law provision. The "deference" or "margin of appreciation" advocated here means that insofar as the term can reasonably sustain interpretations A and B, the court should not strike down interpretation B (the approach adopted by the legislature) as a derogation from the requirements of the Basic Law simply because the court itself prefers interpretation A.

for the legislature to have arrived at a legislative judgment that by virtue of the peculiar features of the FDH labour import scheme,<sup>17</sup> FDHs should not be regarded as “ordinarily resident” in Hong Kong.<sup>18</sup> In answering this question, it would not be appropriate for the court to accord overriding constitutional force in Hong Kong to the decision of any particular English court on the interpretation of the term “ordinarily resident” in a UK Act of Parliament and thus to constrain unduly the HKSAR legislature in this regard.<sup>19</sup>

<sup>17</sup> See para 68 of the judgment in the present case.

<sup>18</sup> Immigration Ordinance, s 2(4)(a)(vi).

<sup>19</sup> Both the CFA in the previous cases of *Fateh Muhammad* (2001) 4 HKCFAR 278 and *Prem Singh* (2003) 6 HKCFAR 26 and Lam J in the present FDH Case regarded the House of Lords’ decision in *R v Barnet London Borough Council, Ex p Shah* [1983] 2 AC 309 (the *Shah* case) as highly authoritative for the purpose of the interpretation of the meaning of “ordinarily resident” in Art 24(2)(4) of the Basic Law. It is questionable whether the House of Lords’ interpretation in the *Shah* case of the term “ordinarily resident” as used in the Education Act 1962 and its subsidiary legislation should be given overriding constitutional force in the HKSAR, so as to trump any different legislative judgment reached by the HKSAR legislature as regards whether a particular category of persons (such as FDHs, or other categories of persons provided for in s 2(4)(a) of the Immigration Ordinance, such as refugees, contract workers who come to Hong Kong under an “importation of labour scheme”, foreign consular officials, members of the Chinese military force, or Chinese cadres sent by the mainland government to work in Hong Kong) should be regarded as “ordinarily resident” in Hong Kong (having regard to the particular features of the scheme or policy under which such persons have been allowed entry into Hong Kong). This approach (of giving overriding constitutional force to the House of Lords’ decision in the *Shah* case) is questionable for at least two reasons. First, the *Shah* case was decided in the context of the interpretation of a UK statute rather than a constitutional instrument. In the UK, Parliament always has, and has from time to time exercised, the power to legislate to elaborate, refine or adjust the meaning of “ordinarily resident” in different legislative contexts and for different purposes, usually by exclusionary provisions that provide that residence in certain specified circumstances is not considered “ordinarily resident” in the UK. (See, eg, National Service Act 1948, s 34(4); Visiting Forces Act 1952, s 12(3); Immigration Act 1971, s 33(2). It is noteworthy that after the House of Lords’ decision in the *Shah* case, the practical effect of the decision (in terms of foreign students’ eligibility for grants for university study) was reversed by an amendment to reg 13(1)(a) of the Education (Mandatory Awards) Regulations 1982: see *R v Hereford and Worcester County Council, Ex p Wimbourne* (CO/174/83; Queen’s Bench Division, 8 Nov 1983).) The legislature of colonial Hong Kong also had, and had from time to time exercised, a power similar to that of the UK Parliament to legislate to elaborate or refine the meaning of “ordinarily resident”: see, eg, the legislative history of s 2(4) of the Immigration Ordinance. It is highly doubtful whether the intention behind the relevant provision of the Joint Declaration (on the right of abode in the HKSAR of foreign nationals ordinarily resident in Hong Kong) and the corresponding provision in Art 24 of the Basic Law was that the House of Lords’ interpretation of the term “ordinarily resident” in a UK statute should constrain and fetter the legislative judgment and discretion of the HKSAR legislature even though it constrains and fetters neither the UK Parliament nor the colonial Hong Kong legislature. The better view is that the intention behind the relevant provisions in the Joint Declaration and the Basic Law was that the existing system (at the time of the conclusion of the Joint Declaration and the enactment of the Basic Law) should be maintained whereby the Hong Kong legislature had a broad power to define, refine, elaborate or adjust the meaning of “ordinarily resident” by exclusionary provisions or otherwise. This view would be consistent with the general theme in the Basic Law of continuity of existing systems and policies. Secondly, a reading of the judgments of the Divisional Court ([1980] 3 All ER 679) and of the Court of Appeal ([1982] 1 All ER 698) (both of which rendered judgments contrary to the House of Lords’ decision in the same case) in the *Shah* case would reveal that at the time of the *Shah* case, several varying interpretations of the term “ordinarily resident” co-existed

## Back to the 1999 Interpretation

Is the above understanding of the legislative intent behind Art 24(2) accurate and sound? I think several factors are relevant in this regard. First, the 1999 Interpretation has already, in the Relevant Passage, affirmed the validity of the PC's understanding of the legislative intent behind Art 24(2). Even if, as decided by the CFA in the *Chong* case, the Relevant Passage does not constitute a binding interpretation of the NPCSC on all the various limbs of Art 24(2),<sup>20</sup> there is no reason why the Relevant Passage should not be recognised as having persuasive authority.<sup>21</sup> Secondly, the PC's work has received the endorsement of the

in UK law, and the interpretation adopted by the Divisional Court and the Court of Appeal differed from that finally adopted by the House of Lords. In particular, the Court of Appeal's interpretation took into account and gave considerable weight to the purpose for which the relevant persons (who claimed that they were ordinarily resident in the UK) were initially allowed entry into the UK, the terms and conditions upon which they were allowed entry, their immigration status and related policy considerations. If the Court of Appeal's approach in the *Shah* case were to be adopted by the HKSAR court, it is much more likely that the impugned provision in the FDH Case would be upheld. Since the House of Lords' interpretation in the *Shah* case of "ordinarily resident" in a UK statute is binding on neither the HKSAR court nor the HKSAR legislature for the purpose of Art 24(2) of the Basic Law, it would not be appropriate or legitimate for an HKSAR court to require, or to impose a constitutional mandate on, the HKSAR legislature to follow the House of Lords' approach (to the interpretation of "ordinarily resident") in preference to that of the English Court of Appeal in the *Shah* case. From the perspective of the constitutional law of the HKSAR or the intention behind the relevant provisions in the Joint Declaration and Art 24(2) of the Basic Law, making a choice between these two approaches should surely be within the margin of discretion or margin of appreciation of the HKSAR legislature.

<sup>20</sup> See paras 11–14 of the judgment in the present FDH Case.

<sup>21</sup> In *Chong* (n 6 above), the Government conceded that the 1999 Interpretation did not constitute a binding interpretation of Art 24(2)(1) of the Basic Law (ie the provision which the court had to interpret in *Chong*), and the CFA decided the case on this basis: see [2001] 2 HKLRD 533 at 545, 553, 555–556. However, the CFA did not state in its judgment to what extent, if any, the Relevant Passage in the 1999 Interpretation may be accorded persuasive authority. Two considerations should be relevant in this regard. First, the Relevant Passage and the PC Opinion it referred to may constitute post-enactment extrinsic materials (ie materials that came into existence after the enactment of the Basic Law in 1990) that may "throw light on the context or purpose of the Basic Law or its particular provisions" (*ibid.* p 546). In *Chong*, the CFA held that it was not necessary "to explore what assistance (if any) can be derived from extrinsic materials other than pre-enactment materials relating to context and purpose" (*ibid.* p 547), because the meaning of the Basic Law provision being interpreted in this case was clear and unambiguous. The CFA thus left open the possibility of reference to and reliance on post-enactment material where the meaning of the relevant Basic Law provision is ambiguous, although it also pointed out that in any event, such material should be approached "cautiously"; a "prudent approach" is called for (*ibid.* p 547). Secondly, the common law practice of according high persuasive authority to *obiter dicta* in the decisions of the House of Lords (or the present Supreme Court) may be understood as being based on the principle that the opinion of a body that has the supreme authority to interpret the law should be accorded persuasive authority even if it is not binding because it does not address directly the issues raised by the case which the court is hearing. As the NPCSC has the supreme authority to interpret the Basic Law under Art 158 of the Basic Law, according persuasive authority to an *obiter dictum* in an interpretation issued by it under Art 158 would be consistent with this principle.



NPC itself when it passed a resolution on the subject in March 1997.<sup>22</sup> Thirdly, support for the PC's view can be found in the legislative history of Art 24(2), particularly the Joint Declaration and the negotiations between the Chinese and British Governments on the implementation of the right of abode provisions in the Joint Declaration.<sup>23</sup> This third point may be elaborated as follows.<sup>24</sup>

### The Sino-British Joint Declaration of 1984

The text of Art 24(2) of the Basic Law is by no means original. It was not invented by the Basic Law Drafting Committee; instead it was almost completely duplicated from the first paragraph of Section XIV of Annex I to the Joint Declaration (JD). This close relationship or direct link between the right of abode provisions in the JD and the Basic Law, or what I would call the "Duplication Phenomenon", is highly relevant to the understanding of the legislative intent behind Art 24(2) for two reasons.

First, it is not difficult to understand that when the first paragraph of Section XIV of Annex I (the Relevant JD Provisions) was drafted, it was most probably not intended to be used as the text of a written constitution that serves as the basis or yardstick for constitutional judicial review of legislation and for strict scrutiny of relevant legislation in this regard. The Relevant JD Provisions were drafted in 1983–84, and it would not have been possible at the time to consider in detail and to resolve satisfactorily all the complex issues that would arise in the course of the precise delineation of the categories of persons who were to be given the right of abode in the future HKSAR. (Indeed, the very concept of the right of abode was novel and did not exist in Hong Kong law at the time the JD was concluded.<sup>25</sup>) Thus the most which the Chinese and British Governments could do in the Relevant JD Provisions would be

<sup>22</sup> For the English translation of the resolution, see Chen (n 7 above), p 424.

<sup>23</sup> The relevant information on these matters has been summarised in the judgment in the present FDH Case.

<sup>24</sup> Actually, this argument based on the Joint Declaration and the Sino-British negotiations may be independently relied on to establish the legislative intent behind Art 24(2) of the Basic Law, irrespective of whether an HKSAR court adopting the common law approach to the interpretation of the Basic Law should rely on the 1999 Interpretation and the PC Opinion in circumstances where they are not binding. I am grateful to this Journal's anonymous reviewer for drawing my attention to this point.

<sup>25</sup> See generally Albert H.Y. Chen, "The Development of Immigration Law and Policy: The Hong Kong Experience" (1988) 33 *McGill LJ* 631.

to set out the basic principles, and to leave to the future the questions and tasks of their implementation, which would necessarily include the enactment of more detailed rules.

### The Basic Law Drafting Committee

The drafting of the Basic Law could have been the opportunity for the basic principles in the Relevant JD Provisions to be elaborated, refined and concretised. However, the Basic Law Drafting Committee ultimately decided not to tamper with the Relevant JD Provisions, but to reproduce them in Art 24(2) of the Basic Law almost verbatim. In this regard, the draftsmen of the Basic Law cannot be faulted for the faithful implementation of the JD. If the PC – whose members included many of the members of the Basic Law Drafting Committee – was right in understanding the legislative intent behind Art 24(2), it was in any event open for the HKSAR legislature to elaborate and refine the provisions of Art 24(2) in the course of their implementation. There would therefore be no harm in leaving Art 24(2) simple and simply copying the text of the Relevant JD Provisions into it.

### Treaty and International Law

Now I turn to the second legal implication of the Duplication Phenomenon, which entails that the interpretation of Art 24(2) and its legislative intent cannot be divorced from the interpretation of the Relevant JD Provisions and the intent of the two governments that agreed to them. According to international law, where a treaty is made between two states, then the governments of the two states have the right to interpret the provisions of the treaty in the course of its implementation,<sup>26</sup> because they understand best their own intentions when they agreed to particular provisions in the treaty; any relevant agreement between, or practice or conduct of, the governments subsequent to the conclusion of the treaty may throw light on how the treaty should be interpreted.<sup>27</sup>

<sup>26</sup> Ian Brownlie, *Principles of Public International Law* (7th edn 2008), p 630: “Obviously the parties have competence to interpret a treaty, but this is subject to the operation of other rules of the law.”

<sup>27</sup> Vienna Convention on the Law of Treaties 1969, Art 31. Article 31(3)(a) and (b) provide as follows: “There shall be taken into account [for the purpose of the interpretation of a treaty], together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice

## Sino-British Negotiations

In the case of the Relevant JD Provisions, there is ample evidence<sup>28</sup> that ever since the conclusion of the JD, the Chinese and British Governments had engaged in negotiations, mainly under the auspices of the Joint Liaison Group set up under the JD, on how the Relevant JD Provisions should be implemented and elaborated by domestic legislation in Hong Kong. On the basis of such negotiations, consensus was reached on various relevant issues, and during the transition years leading up to 1997, some amendments to the existing immigration law were introduced by the colonial legislature in pursuance of such consensus. Immediately after the handover, further amendments – including the amendment relating to foreign domestic helpers that was challenged in the present case – were made by the HKSAR legislature, again on the basis of the consensus reached between the two governments regarding the implementation of the Relevant JD Provisions.

## The Common View of the Two Governments

The conduct of the two governments in engaging in continuous negotiations and reaching consensus during the transition period of 1984–1997 on the precise legislative details of the implementation of the Relevant JD Provisions by domestic legislation in colonial Hong Kong and in the HKSAR demonstrates unequivocally that in the common view of the two governments, the Relevant JD Provisions merely provide basic principles which are subject to elaboration and refinement in the course of their implementation by more detailed domestic legislation. The relevant conduct also indicates that in the common view of the two governments, the consensus solutions or measures they agreed to in the course of the negotiations on various issues that arose in the course of the implementation of the Relevant JD Provisions were consistent with the Relevant JD Provisions and the intent behind it, and were by no means a breach of the Relevant JD Provisions.<sup>29</sup> Insofar

in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. See also Art 31(4) (A special meaning shall be given to a term if it is established that the parties so intended) and Art 32 (on having recourse to, *inter alia*, “the circumstances of” the conclusion of the treaty). Article 31 was considered by the CFA in *Ng Ka Ling* (1999) 2 HKCFAR 4 at 41–42. See also paras 73 and 121 of the judgment in the present FDH Case.

<sup>28</sup> As summarised in the judgment in the present FDH Case.

<sup>29</sup> In the context of the present FDH Case, the relevant consensus was evidenced by a statement made by the Director of Immigration to the Legislative Council Security Panel on 14 Apr 1997 (when Hong Kong was still under British rule) and a booklet on “Right of Abode in

as such consensus was partly to be implemented by legislation made by the HKSAR legislature, it is fair to say that the two governments both understood the Relevant JD Provisions – and hence the almost identical provisions in Art 24(2) of the Basic Law – as having conferred on the HKSAR legislature a broad power and a wide margin of appreciation for the purpose of implementing and elaborating the Relevant JD Provisions, including the power to legislate to implement the consensus solutions or measures mentioned above.<sup>30</sup> Indeed, given the Duplication Phenomenon, a court striking down as unconstitutional any legislation that was based on the consensus reached by the two governments on the implementation of the Relevant JD Provisions would in effect be implying that the two governments had conspired to act in breach of the Relevant JD Provisions.

## Conclusion

In the course of the present litigation in the FDH Case, the 1999 Interpretation of the NPCSC and the PC Opinion affirmed by this Interpretation deserve to be taken seriously. Taking the PC Opinion seriously will enable us to have a better and fuller understanding of the

the Hong Kong Special Administrative Region” published by the Immigration Department in Apr 1997: see para 60 of the judgment in the present case. According to the Director of Immigration’s LegCo statement of 14 Apr 1997, “In past discussions with the Chinese side, we [the British / Hong Kong side] have reached a large measure of agreement on the interpretation of Article 24 of the Basic Law and the implementation arrangements. ... The interpretations agreed are summarised as follows ... With regard to persons not of Chinese nationality ... 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”.

<sup>30</sup> In the context of the present FDH Case, the two governments must have understood the provision in Section XIV of Annex I to the Joint Declaration providing for the right of abode in the HKSAR of foreign nationals “who have ordinarily resided in Hong Kong ... for a continuous period of 7 years or more and who have taken Hong Kong as their place of permanent residence” to mean that the HKSAR legislature has a broad power or a wide margin of discretion to define, elaborate or refine the meaning of “ordinary residence” for this purpose (by exclusionary provisions (applicable to particular categories of persons) or otherwise), just as both the colonial legislature in Hong Kong and the UK Parliament had, at the time of the conclusion of the Joint Declaration, the power to do so for the purposes of Hong Kong and UK law respectively (which power they had indeed exercised from time to time in different contexts and for different purposes). It could not have been the intention of the two governments, when they agreed to this provision in the Joint Declaration, that the power or competence of the HKSAR legislature in this regard should be fettered by a particular interpretation given to the term “ordinarily resident” in a UK statute in a particular case such as the House of Lords’ decision in the *Shah* case, or that the two governments should be deprived of the competence to enter into a subsequent agreement (lawfully and without acting in breach of the Joint Declaration) to implement this provision like the subsequent agreement that was actually reached with regard to the implementation of this provision in the case of foreign domestic helpers. See also n 19 above.

legislative intent behind Art 24(2) of the Basic Law. Such legislative intent is consistent with, and converges with, the common understanding of the Chinese and British Governments of the intent behind the Relevant JD Provisions that correspond to Art 24(2). The intent of both Art 24(2) and the Relevant JD Provisions was to set out the basic principles governing permanent resident status and right of abode in the HKSAR, and to confer on the legislature of the HKSAR a broad power and a wide margin of appreciation in implementing and elaborating such basic principles by more detailed legislative rules.

