ANALYSIS
FOREIGN DOMESTIC HELPERS' RIGHT OF ABODE

Vallejos Evangeline B. v Commissioner of Registration: Why Foreign Domestic Helpers do not have the Right of Abode

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In deciding whether a foreign domestic helper could acquire the right of abode, (1) the Court of First Instance (CFI) was right to have rejected any reliance on an Immigration Department booklet published in April 1997 as it lacked any probative value in discerning the Sino-British understanding of the term "ordinarily resided" under Art 24(2)(4) of the Basic Law; (2) however, the CFI had misapplied the Court of Final Appeal (CFA) precedent in Chong Fung Yuen when rejecting the 1996 Opinions of the Preparatory Committee in its interpretation of Art 24(2)(4); and (3) the CFI wrongly assumed that, in deciding what constitutes "ordinary residence", the CFA in Prem Singh had merely required one's residence to be adopted voluntarily and for a settled purpose.

Introduction

The Hong Kong Court of First Instance (CFI) recently handed down a groundbreaking decision in *Vallejos Evangeline B. v Commissioner of Registration*,[1] which held that a foreign domestic helper (FDH) could acquire the right of abode in Hong Kong. In essence, the CFI held that FDHs could be considered to be in ordinarily residence in Hong Kong and were thus eligible to acquire the right to permanent residence under Art 24(2)(4)[2] of the Basic Law. In deciding whether the FDHs were ordinarily resident in Hong Kong, the CFI held that (1) it was bound

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1 (HCAL 124/2010, [2011] HKEC 1289).

2 Article 24(2)(4) of the Basic Law reads: The permanent residents of the Hong Kong Special Administrative Region shall be… 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.

by the Court of Final Appeal (CFA) decision in *Ng Ka Ling v Director of Immigration*[3] to reject post-Basic Law enactment materials, which herein took the form of an Immigration Department booklet published in April 1997, that purported to shed light on the Sino-British understanding of the term "ordinarily resided";[4] (2) it was bound by the CFA's decision in *Director of Immigration v Chong Fung Yuen*[5] to reject the use of the Opinions of the Preparatory Committee in 1996 to assist in the interpretation of the Basic Law; and (3) it was bound by the CFA decisions *in Prem Singh v Director of Immigration*[6] and *Fateh Muhammad v Commissioner of Registration*[7] definitional understanding of "ordinary residence", which merely required the residence to be adopted voluntarily and for a settled purpose.[8]

The facts and procedural history of the case may be briefly stated. The applicant came from the Philippines and had been employed as an FDH in Hong Kong since 1986. In 2008, she applied for a permanent identity card but her application was rejected by the Commissioner of Registration as s 2(4)(a)(vi) of the Immigration Ordinance established that a person shall not be treated as ordinarily resident in Hong Kong if he or she, while employed as a domestic helper, was from outside Hong Kong. She next appealed to the Registration of Persons Tribunal and her appeal was dismissed. By way of judicial review, she eventually sought to have s 2(4)(a)(vi) invalidated on the basis that the provision violated Art 24(2)(4) of the Basic Law.

In this Comment, I shall advance the following arguments: (1) the CFI was right to have rejected any reliance on an Immigration Department booklet published in April 1997 as it lacked any probative value in discerning the Sino-British understanding of the term "ordinarily resided"; (2) however, the CFI had misapplied the Court of Final Appeal (CFA) precedent in *Chong Fung Yuen* when rejecting the 1996 Opinions of the Preparatory Committee in its interpretation of Art 24(2)(4); and (3) the CFI wrongly assumed that in deciding what constituted "ordinary residence" the CFA in *Prem Singh* had merely required one's residence to be adopted voluntarily and for a settled purpose. These arguments will now be explored in turn.

[3] (1999) 2 HKCFAR 4.
[4] *See* n 1 above at para 121.
[5] (2001) 4 HKCFAR 211.
[6] (2003) 6 HKCFAR 26.
[7] (2001) 4 HKCFAR 278.
[8] *See* n 1 above at para 146.

Immigration Department Booklet Lacks Probative Value in Discerning Sino-British Understanding of "Ordinarily Resided"

The first argument can be easily dealt with. Counsel for the government had sought to argue that in construing what "ordinarily resided" meant under Art 24(2)(4) of the Basic Law, the court could admit post-enactment materials to ascertain the purpose and context of this provision. Art 31(3)(a) of the Vienna Convention on the Law of Treaties, in particular, has provided that "any subsequent agreement between the parties regarding the interpretation of the treaty" shall be taken into account. However, the government did not provide any record of such subsequent agreement between China and the United Kingdom, and the only evidence of it adduced was the Immigration Department booklet published in 1997. Surely, a mere administrative pamphlet that advised on the practices of the Hong Kong Immigration Department could hardly be considered *probative* evidence of an international consensus reached between the Sino-British governments, even if the material professed to comply with the views of both governments. If the government seeks to establish any Sino-British consensus on this term, it certainly has to do better. The CFI was therefore right to have rejected any reliance on the Immigration Department booklet published in 1997 to construe the meaning of "ordinarily resided" under the Basic Law.

***Chong Fung Yuen* Did not Reject any Recourse to the 1996 Opinions of the Preparatory Committee when Interpreting Article 24(2)(4)**

The CFI next held that 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*"[9] and any judicial recourse to these materials was equally rejected.

There are several problems with the CFI's arguments herein. In *Chong Fung Yuen*, the CFA held that under Art 24(2)(1) of the Basic Law, the court could not look at the Preparatory Committee's Opinions on the implementation of Art 24(2) "as the meaning of art 24(2)(1) is clear; there is no ambiguity"[10] and, therefore, the court was unable to "depart from what it considers to be the clear meaning of art 24(2)(1) in favour

[9] *See* n 1 above at para 122.
[10] *See* n 5 above at 233.

of a meaning which the language cannot bear."[11] Article 24(2)(1) states unequivocally that the permanent residents of the Hong Kong Special Administrative Region shall be "Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region." Unlike Art 24(2)(1), where there is no definitional ambiguity in the text, Art 24(2)(4) includes the textually ambiguous term of "ordinarily resided", which the CFI conceded "may carry different meanings in different contexts."[12] Given that Art 24(2)(4) includes an unclear, ambiguous term open to differing interpretations, the CFI was wrong to assume that the CFA in *Chong Fung Yuen* had foreclosed any judicial reliance on the 1996 Opinions of the Preparatory Committee when interpreting the said provision. The CFA only rejected any reliance on the Preparatory Committee Opinions as the text of Art 24(2)(1) was clear. Article 24(2)(4) is not. Therefore, while *Chong Fung Yuen* would forbid the use of post-enactment materials when the text of the Basic Law "is free from ambiguity",[13] the CFA therein was open to the consideration of post-enactment materials when the Basic Law terms were unclear and ambiguous, but the courts must approach these post-enactment materials "cautiously".[14] Even if the CFI indeed had a "very cogent justification"[15] for not looking at the 1996 Opinions when interpreting Art 24(2)(4), the court unfortunately failed to explain what these valid reasons were. The CFA in *Chong Fung Yuen* would have expected no less.

Of course, it was still open to the CFI to disagree with the 1996 Opinions of the Preparatory Committee on their understanding of Art 24(2)(4), but it is a wholly different matter for the court to reject their relevance as a result of a misapplication of the CFA precedent in *Chong Fung Yuen*.

Prem Singh Does not Merely Require one's Residence to be Adopted Voluntarily and for a Settled Purpose

Finally, we turn to the crux of the constitutional challenge and the judicial determination of what "ordinary residence" entails.[16] The

[11] *Ibid*.
[12] *See* n 1 above at para 145.
[13] *See* n 5 above at 224.
[14] *See* n 5 above at 225.
[15] *See* n 1 above at para 120.
[16] The CFI was also right to have rejected the relevance of Art 154(2) when it sought to interpret Art 24(2)(4). Article 154(2) authorises the HKSAR government to exercise immigration controls but this provision does not shed light on what type of immigration control is constitutionally permissible. After all, surely Art 154(2) cannot be used to justify

CFI held that the CFA in *Prem Singh* had endorsed the test laid down by Lord Scarman in *Ex parte Shah*,[17] ie to be in ordinarily residence, the residence must be adopted voluntarily and for a settled purpose.[18] Therefore, a FDH would be considered in ordinary residence in Hong Kong as he or she comes here voluntarily and resides here for a settled purpose, ie employment.[19] The CFI held that it had never been an element of the *Shah* test that one had to have the capacity to establish a separate household or to bring dependants along to a place before he or she could be regarded as ordinarily resident in Hong Kong, and the inability to do so did not prevent one from pursuing employment as a settled purpose.[20]

The CFI was quite right that the CFA in *Prem Singh* had deemed the *Shah* test applicable in deciding what constituted ordinary residence under Art 24(2)(4). Compliance with the *Shah* test was indeed a *necessary* condition for one to be considered in ordinary residence. But the CFI erred in assuming that the compliance with the *Shah* test was a *sufficient* condition for one to be in ordinary residence. The CFA had never made such a claim.

In *Fateh Muhammad*, the CFA held that where a person was serving a term of imprisonment, at least when it was not of trivial duration, he would not be in ordinary residence. More significantly, Bokhary PJ on behalf of the CFA emphasised the following:

> "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."[21]

Subsequently, in *Prem Singh*, the majority on the CFA held that to be in ordinary residence, one must adopt his residence voluntarily and for a settled purpose but any incarceration, reflecting sufficiently

any and all types of immigration control measures the HKSAR government seeks to impose even if those statutory measures violate other parts of the Basic Law. Furthermore, *Prem Singh* would definitely have been decided differently as the invalidated portion of the immigration legislation could equally have been justified as a mode of immigration control authorised under Art 154(2). But the CFI is arguably wrong to assume that such an expansive reading of Art 154(2) is inconsistent with *Chong Fung Yuen* (see n 1 above at para 141). Article 154(2) is found in Part VII of the Basic Law which concerns External Affairs and it authorises visa controls on "persons from foreign states and regions". Therefore, Art 154(2) would arguably have no bearing on any immigration controls imposed on the entry or exit of Chinese citizens and Hong Kong Permanent Residents.

17 [1983] 2 AC 309.

18 *See* n 1 above at para 149.

19 *See* n 1 above at para 171.

20 *See* n 1 above at para 173.

21 *See* n 7 above at 283–284.

serious criminal conduct to warrant an immediate custodial sentence, fell outside what could qualify as "the settled purposes" underlying a person's ordinary residence.[22] In such an event, *Shah* would not be satisfied and there was no occasion for the CFA to elaborate on the other extraordinary forms of residence. It is also significant that the CFA never opined that the *Shah* test was the only condition that a person seeking the right of abode should satisfy. Indeed, to do so would be inconsistent with Bokhary PJ's pronouncement in *Fateh Muhammad* that no single judicial pronouncement in regard to the meaning of the expression "ordinarily resided" could be conclusive for the purposes of every context in which that expression appeared. Therefore, while the CFI was right that a FDH could satisfy the conditions laid down in *Shah*, the court was wrong to have assumed that the satisfaction of the *Shah* test was a sufficient condition for one to be in ordinary residence.

If compliance with the *Shah* test is not a *sufficient* condition for being in ordinary residence, my detractors may naturally ask me what other conditions are applicable. This is a fair question to which I now turn.

In ascertaining the meaning of any Basic Law provision, which would include the term "ordinarily resided" in Art 24(2)(4), the CFA in *Ng Ka Ling* had advised that the courts must consider the purpose of the instrument and its relevant provisions as well as the language of the text in light of the context, context being of particular importance in the interpretation of a constitutional instrument.[23] Furthermore, in *Chong Fung Yuen*, the CFA held the following:

> "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."

Therefore, in identifying the context and purpose of the term "ordinarily resided" under Art 24(2)(4), the CFA would require courts to consult the immigration legislations and practices in 1990 to determine which forms of residence would be considered ordinary or extraordinary to the framers of the Basic Law. In fact, back in 1990, the Immigration Department had already barred FDHs from bringing their dependants to Hong Kong, which was extraordinary since other expatriates on general employment terms could freely bring in their spouses and dependent

[22] *See* n 6 above at 53–54.
[23] *See* n 3 above at 28.

children.[24] So far as counsel for the government can show how stark the differences between the visa control regime for FDHs and those expatriates admitted under the general employment policy were back in 1990, the more extraordinary an FDH's form of residence in Hong Kong must be for the purposes of interpreting Art 24(2)(4).

The CFI did examine pre-enactment materials and noted that prior to 1997, only British or Commonwealth citizens could become permanent residents in Hong Kong[25] but there were no such limitations after the Basic Law came into effect. The CFI appeared to be suggesting that although the FDHs did not have the right of abode prior to the commencement of the Basic Law, this did not mean they could not have acquired this right, along with the other non-Commonwealth citizens, when the Basic Law came into effect. With respect, it is immaterial that non-Commonwealth citizens were not given Permanent Residency (PR) status before the Basic Law came into effect; the central point when one reads the Basic Law in light of the domestic legislations in 1990 is to ask whether the framers would have considered the FDHs (or any group of foreigners) to be in "ordinary residence" such that they would be eligible to acquire the right of abode when the Basic Law came into effect. Therefore, the fact that FDHs were in practice non-Commonwealth citizens, and could not be permanent residents before 1997, was wholly irrelevant. The central issue regarding the interpretation of Art 24(2)(4) lies only in the identification of the groups of foreign citizens that would be considered by the framers to be in ordinary residence in Hong Kong, and for this purpose, it is wholly irrelevant that non-Commonwealth citizens could not acquire Hong Kong permanent residency before 1997.

At this juncture, I must emphasise that I do not subscribe to a hard-line originalist understanding of the Basic Law. Hard-line originalists would "look for a sort of objectified intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris"[26] and in deriving this objective intent, they would only look to historical understandings and practices that were accepted at the time the constitutional provisions were adopted. More importantly, to these hard-line originalists, any legislative practice that was constitutional at and since the time the Constitution was enacted cannot be found unconstitutional today. Fortunately, this is not the

[24] See Explanatory Notes Issued by Immigration Department in 1990. Cited in para 39 of the judgment.

[25] *See* n 1 above at para 127.

[26] Antonin Scalia, "Common Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws", in *A Matter of Interpretation* at 17 (Amy Gutmann ed, 1998).

practice of the Hong Kong courts as the judiciary has recognised that the Basic Law is a "living instrument tended to meet changing needs and circumstances".[27] However, where the Hong Kong judiciary has departed from an originalist understanding of the Basic Law, the courts have done so when the domestic legislative practice in question is inconsistent with the contemporary opinion of liberal democracies as evidenced in their legislative practices and / or case law.[28] However, with regard to this dispute, as far as I am aware, no court or legislature in the world has ever conferred upon their FDHs the constitutional right to permanent residence. It would thus be wholly reasonable, in this instance, for the courts to defer to the framers' understanding of what constituted "ordinary residence" back in 1990, as evidenced in the state of domestic legislations at the time the Basic Law was conceived, as these practices would form the context against which the Basic Law provisions were understood and is to be interpreted. As I have emphasised earlier, so far as counsel for the government can show how stark the differences were, back in 1990, between the visa control regime for FDHs and those from Commonwealth and non-Commonwealth countries that were admitted under the general employment policy, the more extraordinary a FDH's form of residence in Hong Kong must be when one interprets Art 24(2)(4). Again, it is irrelevant that non-Commonwealth citizens could not acquire the right of permanent residency in 1997; my point is that, back in 1990, the form of residence for the FDHs was extraordinary even when one compares them with those non-Commonwealth citizens admitted on general employment terms.[29] In any case, as my learned colleague, Professor Albert Chen has convincingly argued in his Comment, also published in this issue, the intent of Art 24(2) 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."[30]

The CFI, in this regard, had thus erred by assuming that the CFA had imposed the *Shah* test as the only condition a person had to satisfy to be in ordinary residence. The court had equally failed to examine closely the state of domestic legislations at the time the Basic Law was enacted and

[27] *See* n 3 above at 27.

[28] *Leung v Secretary of Justice* [2006] 4 HKLRD 21; *Chan Kin Sum v Secretary of Justice* [2009] 2 HKLRD 166.

[29] *See* Explanatory Notes Issued by Immigration Department in 1990. Cited in para 39 of the judgment.

[30] *See* Albert Chen, "The 'Foreign Domestic Helpers Case': the Relevance of the NPCSC Interpretation of 1999 and the Preparatory Committee Opinion of 1996" (2011) 41 *HKLJ* 621.

had thus omitted to determine the context against which Art 24(2)(4) is to be understood.

Conclusion

The CFI in *Vallejos Evangeline B.* had felt obliged to observe the controlling precedents of *Chong Fung Yuen* and *Prem Singh*. But neither of these CFA decisions would have required Lam J to reach the result he did. Unfortunately, the learned judge was solely responsible for the bind he was in.

The ultimate kicker and the greatest irony in this decision would have to be Lam J's observations when he rejected the applicant's Art 25 equality ground of challenge and this passage deserves to be cited in full:

> "It has to be borne in mind that Art 24(2)(4) confers the status of permanent residences 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] 1 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."[31]

I cannot agree any more with the learned judge. One cannot help but wish that Lam J had heeded his own advice.

[31] *See* n 1 above at para 179.