BUTTERWORTHS HONG KONG

Immigration Law HANDBOOK

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Immigration Law Handbook

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The commentary in this book states the law as at 1 March 2023.

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of stay were retained, a new power was vested in the Governor to curtail the limited stay of an immigrant—to cancel or vary conditions of stay and to impose new conditions;

(4) a new control on resident immigrants who had been in Hong Kong for less than three years was made—the Governor could order the removal of such an immigrant whom he considered to be an undesirable person;

(5) the removal procedure for persons refused permission to land were too limited under the then existing provisions. The Immigration Ordinance (Cap 115) enabled removal under certain circumstances to be at the expense of the owner of the craft that brought him in; otherwise it would be at public expense;

(6) the power to detain persons whilst decisions are being made as to whether they should be ordered to be removed or deported was not changed in substance but there were some procedural changes and clarifications of the law;

(7) the power conferred on a court to recommend deportation already existed, but new provisions required that the power would only apply to a person who has passed his 16th birthday, and only in relation to offences which are punishable by at least two years' imprisonment. Seven days' notice was given to allow the person time to prepare his answer to the application, and the court was required to consider representations that he might wish to make and any evidence that he might wish to adduce as to his character and circumstances, before a recommendation could be made. Provision was also made for enquiry by a Deportation Tribunal, its functions being in the case of a removal order being made against a United Kingdom belonger or a deportation order against either a United Kingdom belonger or a Chinese resident, to enquire whether that person had been convicted of an offence punishable by at least two years' imprisonment, or whether facts exist to show it is conducive to the public good to deport him;

(8) changes were made to the provisions in relation to offences. Certain serious summary offences became triable on indictment. These are the offences in relation to the captain of a ship from which a person lands or seeks to land illegally and are contained in ss 38(4) and 39. New offences were introduced in relation to false statements made to immigration officers (s 42(1)) and whilst the existing law relating to the forgery and possession of forged or false travel documents was re-enacted, altering or possessing an altered travel document became an offence (s 42(2));

(9) the provisions for the forfeiture of ships and vehicles were revised considerably and followed substantially the corresponding provisions in the Import and Export Ordinance (Cap 60);

(10) previously officers of Her Majesty's ships had been authorised under emergency regulations to exercise powers under the immigration law. This power became incorporated in the Immigration Ordinance (Cap 115) (s 58) and the emergency regulations were revoked.

In 1979, Pts VIIA and VIIB were added to the Immigration Ordinance (Cap 115) to enable more effective action to be taken to prevent and penalise trafficking in

unlawful immigration. Because of the severe nature of the new offences and the evidentiary presumptions, safeguards were included: No prosecution was to commence without the attorney General's consent and the parts were to have limited life spans, unless otherwise determined by the Legislative Council. Part VIIB expired on 31 December 1993, having been last extended by LN 401 of 1992. The limit on the life of Pt VIIA was removed in 1993, when other amendments were made to that part. Concern had been expressed by members of the Council when those parts, and s 18(3) had been extended in 1992. The Government had then conducted a review with the intention of retaining only those powers that were justified and necessary. Section 18(3) had been introduced, also in 1979, because of problems regarding the time limit in relation to the removal of persons from Vietnam. By 1993, the practice had been to use the provisions of s 18(3) only in relation to Ex-China Vietnamese Illegal Immigrants, with other provisions being used for the detention and removal of Vietnamese migrants coming directly from Vietnam. It was therefore decided that s 18(3) did not need to be renewed. Part VIIA was however still considered essential because illegal immigration from China remained a serious problem and was likely to remain so. To moderate the heavy penalties the maximum terms of imprisonment were reduced. However Pt VIIB, which relates to offences committed outside the waters of Hong Kong, was rarely used, and it was considered that that Part could be allowed to lapse. These amendments were made by the Immigration (Amendment) Ordinance 1993 (82 of 1993).

In 1980, amendments were made in the policy regarding the detection and removal of illegal immigrants. It was announced on 23 October 1980 that there would be an end to the so-called 'reached base' policy whereby a person who illegally entered Hong Kong from China was permitted to remain in Hong Kong if he reached the urban areas and registered himself with the authorities. A short period was given to enable those illegal immigrants already in Hong Kong to register, but as of 23 October 1980 those who came illegally from China and had no right to remain would be liable to be returned, whenever they were detected. Amendments were made to the legislation, so that as from 30 October 1980 there would be compulsory carrying of proof of identity and from 3 November 1980 it became illegal to employ anyone who does not have an identity card or certain specified proof of identity. A new appeals system against removal orders was introduced, there being, for the first time, an independent appeal tribunal, based partly on the UK system under which an independent layman of standing considers such appeals. A panel of lay assessors, consisting the Immigration Tribunal, is called upon to consider appeals against removal. The Tribunal is appointed as the number of such appeals demand.

In 1981, the Immigration (Amendment) Ordinance 1981 (35 of 1981) added Pt IIIA as part of the provisions for the better control of Vietnamese refugees during their stay in Hong Kong. Provision was made for certain members of the Immigration Service to permit Vietnamese refugees to remain in Hong Kong and impose conditions of stay relating to residence in refugee centres (which were designated by Secretary for Security) and controlling the taking of employment. In the event of a breach of the conditions of stay the Director of Immigration was

empowered to issue a warrant of detention or to cancel or vary any condition of stay. Provision was made for appeals against detention warrants Consequential amendments were made to Pt IVB, in relation to their employment. Further amendments were made to these provisions in 1982, by the Immigration (Amendment) Ordinance 1982 (42 of 1982) which received Assent on 30 June 1982 and came into operation on 2 July 1982.

The term 'right of abode' was introduced by the Immigration (Amendment) (No 2) Ordinance 1987 (31 of 1987) which received Assent on 28 May 1987 and came into operation on 1 July 1987; which then accorded that right to 'Hong Kong permanent residents'. That Ordinance was complementary to amendments made to the Registration of Persons Ordinance (Cap 177) whereby a new permanent identity card was introduced, stating that the holder has the right of abode in Hong Kong. This card would facilitate the inclusion of a right of abode endorsement in a British National (Overseas) passport or certificate of identity. The Immigration Ordinance (Cap 115) deleted the definitions of 'Chinese resident', 'Hong Kong belonger', 'resident British citizen', 'resident United Kingdom belonger' and 'British subject by naturalisation in Hong Kong'. All persons who were 'Chinese residents' or 'Hong Kong belongers' became 'Hong Kong permanent residents' enjoying the right of abode in Hong Kong.

The Hong Kong Bill of Rights Ordinance (Cap 383) was enacted in 1991 but by s 11 it does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, as regards persons not having the right to enter and remain in Hong Kong. This precludes not only persons who do not have the right to enter or remain in Hong Kong to challenge immigration legislation under the Hong Kong Bill of Rights Ordinance but also precludes their family members who have the right to enter or remain in Hong Kong from so doing. Section 11 is not restricted to keeping out persons who have no ties to the territory but is intended to exclude the decisions under the Immigration Ordinance (Cap 115) in relation to the entry, stay and removal of persons who do not have the right of abode in Hong Kong. Section 2(2) of the Hong Kong Bill of Rights Ordinance (Cap 383) provides that the statement of rights in Pt II of the Hong Kong Bill of Rights Ordinance is subject to the exceptions and savings of Pt III: *Wong King Lung & Ors v Director of Immigration* [1993] 1 HKC 461, [1994] 1 HKLR 312 (CFI). The exempting clause in s 11 of the Hong Kong Bill of Rights Ordinance precludes reliance being placed on that Ordinance in relation to the powers exercised by the Director of Immigration under the Immigration Ordinance (Cap 115): *Chan Kong Tit and Ors v Director of Immigration* (unreported, CACV 163/1993, 14 April 1994) (CA); *Hai Ho Tak v A-G* [1994] 2 HKLR 202, [1994] HKCU 295 (CFI) followed. Examples include, obviously, whether permission should be given to be in Hong Kong in the first place, the purpose for which that permission is to be granted to enter Hong Kong, the duration of the stay, the activities which a person in Hong Kong may be permitted to carry out, whether a person should be permitted to work, and detention that is part of the statutory machinery designed to regulate termination of a person's stay in Hong Kong. However s 11 will not apply in relation to absolute non-derogable fundamental rights, such as those under Art 3 of the Bill of Rights per s 8 of the Hong Kong Bill of Rights Ordinance (Cap

383): see *Ubamaka Edward Wilson v Secretary for Security & Anor* [2013] 2 HKC 75, (2012) 15 HKCFAR 743 (CFA); *GA & Ors v Director of Immigration* [2014] 3 HKC 11, (2014) 17 HKCFAR 60 (CFA) and *Ghulam Rbani v S-J for and on behalf of the Director of Immigration* [2014] 3 HKC 78, (2014) 17 HKCFAR 138 (CFA). See also discussion further below of *BI & BH v Director of Immigration* [2017] 3 HKC 147, [2016] 2 HKLRD 520 (CA) at [92(5)] and *Comilang & Ors v Director of Immigration* [2018] 5 HKC 459, [2018] 2 HKLRD 534, [2018] HKCA 175 and in the Court of Final Appeal *Comilang & Ors v Director of Immigration* [2019] 2 HKC 492, (2019) 22 HKCFAR 59, [2019] HKCFA 10. By s 14 of the Hong Kong Bill of Rights Ordinance (Cap 383), the Immigration Ordinance (Cap 115) was one of the six pieces of legislation which during a one year 'freeze' period from 8 June 1991 had not been subject to the Hong Kong Bill of Rights Ordinance (Cap 383). The Immigration (Amendment) Ordinance 1992 (48 of 1992) was enacted with the aim of bringing certain provisions of the principal Immigration Ordinance (Cap 115) into line with the Hong Kong Bill of Rights Ordinance. The amendments related mainly to powers of detention and presumptions. Certain provisions regarding the detention of Vietnamese refugees were no longer necessary since they had been made obsolete by a change in policy in June 1988, under which all refugees live in open camps. Only those awaiting screening or who had been refused refugee status were held in detention. Presumptions in relation to the offences of employing illegal immigrants and of bringing them to Hong Kong were amended to ensure that they were consistent with the Hong Kong Bill of Rights Ordinance.

The Official Languages (Authentic Chinese Text) (Immigration Ordinance) Order (LN(C) 36 of 1995), made under the Official Languages Ordinance (Cap 5), s 4B(1), gazetted on 12 May 1995, declares the authentic Chinese text of the Immigration Ordinance (Cap 115) as at 3 March 1995. Miscellaneous amendments have been made to the Chinese text of the Ordinance by the Statute Law (Miscellaneous Provisions) Ordinance 2000 (32 of 2000) to rectify any inconsistency in the Chinese term for registration officer in s 17C(4)(a) and to amend a term in Sch 2 para 16.

Further amendments to the principal Immigration Ordinance (Cap 115) have been made arising from the change in sovereignty on 1 July 1997 (88 of 1997). The major amendments have been made firstly by the Immigration (Amendment) Ordinance 1997, which came into operation on 30 June 1997 and amended the principal Ordinance to bring the immigration status of the resident British citizen and the resident United Kingdom belonger into line with citizens from other countries. Prior to then, those persons enjoyed a right to land in Hong Kong and the power to remove or deport them was restricted. Subsequent ordinances were enacted by the Provisional Legislative Council of the Hong Kong Special Administrative Region with amendments made to the Immigration Ordinance (Cap 115) to ensure conformity with the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the 'Basic Law') and the status of Hong Kong as a Special Administrative Region of the People's Republic of China. The principal amendments were made by the Immigration (Amendment) (No 2) Ordinance 1997 (31 of 1987), which was enacted and came

into operation on 1 July 1997, to give effect to Art 24 of the Basic Law, substituting a new definition of 'permanent resident'. This was followed by the Immigration (Amendment) (No 3) Ordinance 1997 (124 of 1997), which made detailed provision for establishing the status of a person of Chinese nationality born outside Hong Kong to a parent who is a permanent resident of the Hong Kong Special Administrative Region. The constitutionality of this Immigration Ordinance (Cap 115) has been considered by the Court of Final Appeal, in *Ng Ka Ling (an infant) & Anor v Director of Immigration* [1999] 1 HKC 291, (1999) 2 HKCFAR 4, [1999] 1 HKLRD 315 (CFA). It held that this Immigration Ordinance (Cap 115) was unconstitutional to the extent that it required permanent residents residing on the Mainland to hold the one-way permit before they could enjoy the constitutional right of abode. Other than this, the scheme was constitutional since it was reasonable for there to be a scheme to provide for verification of a person's claim to be a permanent resident. The requirements that a claimant apply for and obtain a certificate from the Director of Immigration; that a claimant's status as a permanent resident can only be established by holding such a certificate; and that a claimant in the Mainland stay there whilst applying for a certificate are constitutional. The Court excised the parts of the legislation that were unconstitutional, including a retrospective provision.

In *Chan Kam Nga (an infant) & Ors v Director of Immigration* [1999] 1 HKC 347, (1999) 2 HKCFAR 82, [1999] 1 HKLRD 304 (CFA), the Court of Final Appeal ruled that the restriction in the Immigration (Amendment) (No 2) Ordinance 1997 (31 of 1997) that category 3 permanent residents could only be permanent residents if the parent had the right of abode at the time of the birth of the person, was unconstitutional.

Following these decisions, pursuant to a request by the State Council, which had received a request by the Chief Executive, the National People's Congress Standing Committee ('NPCSC') adopted an interpretation of Art 22 para 4 and Art 24 para 2 of the Basic Law. The purpose of the interpretation was to displace the construction placed on them by the Court. It provided first that, Art 22 para 4 meant that persons from the Mainland including persons of Chinese nationality born outside Hong Kong of permanent residents, who wish to enter Hong Kong for whatever reason, must apply to the relevant Mainland authorities and must hold valid documents, namely, one-way permits before they can enter Hong Kong. Secondly, the provisions of Art 24 para 2 category (3) meant that the persons in category (3) could only be permanent residents if both parents of such persons or either parent was a permanent resident at the time of the birth of the person.

The Court of Final Appeal accepted in *Lau Kong Yung (an infant) & Ors v Director of Immigration* [1999] 4 HKC 731, (1999) 2 HKCFAR 300, [1999] 3 HKLRD 778 (CFA) (*Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095 (HL) considered) that the NPCSC has the power to make the interpretation and that it was binding on courts in Hong Kong. The effect of the interpretation is:

(1) as a matter of the Basic Law, permanent residents by descent must obtain exit approval from the Mainland authorities and must hold a one-way permit before entry into Hong Kong;

(2) to qualify as a category;

(3) permanent resident: it is necessary that both parents or either parent of the person concerned must be a permanent resident at the time of the birth of the person concerned; and

(4) the interpretation: being an interpretation of the relevant provisions, was applicable from 1 July 1997 when the Basic Law came into effect. The interpretation expressly stated that it did not affect 'the right of abode in the HKSAR which has been acquired under the judgment of the Court of Final Appeal on the relevant cases dated 29 January 1999 by the parties concerned in the relevant legal proceedings.' On the same day, the HKSAR Government made a public announcement of a policy to the effect that it would 'allow persons who arrived in Hong Kong between 1 July 1997 and 29 January 1999, and had claimed the right of abode, to have their status as permanent residents verified in accordance with the two judgments'. The Court of Final Appeal in *Ng Siu Tung and Ors v The Director of Immigration and Ors* (2002) 5 HKCFAR 1, [2002] 1 HKLRD 561, [2001] HKCU 13 (CFA) determined who was entitled to the benefit of the judgments and therefore not affected by the Interpretation.

The Court of Final Appeal has also considered the position of Chinese citizens who are born in Hong Kong to illegal immigrants, overstayers or people temporarily residing in Hong Kong (see *The Director of Immigration v Master Chong Fung-Yuen (an infant by his grandfather and next friend Chong Yiu-Shing)* (2001) 4 HKCFAR 211, [2001] 2 HKLRD 533, [2001] HKCU 660 (CFA)); of adopted children (see *Tam Nga Yin & Ors v Director of Immigration* (2001) 4 HKCFAR 251, [2001] 2 HKLRD 644, [2001] HKCU 661 (CFA)); and what constitutes ordinary residence (see *Fateh Muhammad v Commissioner of Registration and Registration of Persons Tribunal* (2001) 4 HKCFAR 278, [2001] 2 HKLRD 659, [2001] HKCU 662 (CFA)).

The Immigration (Amendment) Ordinance 1998 (28 of 1998) disapplies the provisions of Pt IIIA of the present Immigration Ordinance (Cap 115) in relation to arrivals who were residents or former residents of Vietnam, who arrived or landed in Hong Kong on or after 9 January 1998 or who are not detained under the Ordinance until on or after that date. It also extinguishes the rights under that part when a person departs or is removed from Hong Kong. The provisions regarding the powers of detention pending removal were also clarified, these provisions took effect from 13 March 1998. This Ordinance was enacted after a decision of the Court of Final Appeal, where it was stated that as the legislature had prescribed a special regime to govern Vietnamese refugees, it made little sense to interpret the Ordinance as conferring on the authorities after an examination under the provisions of s 4, an open-ended discretion whether to deal with them under Pt IIIA at all. Although s 13A(1) confers a discretion, this is a discretion to permit or refuse, and not a general discretion on the immigration authorities

whether to entertain his application at all. See *Thang Thieu Quyen & Ors v Director of Immigration & Anor* [1998] 3 HKC 247, (1998) 1 HKCFAR 167, [1998] 2 HKLRD 179 (CFA).

The Court of Appeal also took pains to summarise the following important principles regarding the legitimate scope and extent of the Director's powers in *BI & BH v Director of Immigration* [2017] 3 HKC 147, [2016] 2 HKLRD 520 (CA) and *Comilang & Ors v Director of Immigration* [2018] 5 HKC 459, [2018] 2 HKLRD 534, [2018] HKCA 175 (leave to appeal to the Court of Final Appeal granted, but appeal eventually dismissed: see *BI & BH v Director of Immigration* [2019] 2 HKC 492, (2019) 22 HKCFAR 59, [2019] HKCFA 10:

(1) the 'starting point' in construing various policies and discretions exercised by the Director of Immigration pursuant to the Immigration Ordinance (Cap 115) is the overall highly restrictive immigration control policy adopted by the Director throughout the entire immigration regime. The policy is dictated by geographical, social, and economic imperatives faced by Hong Kong with one of the highest population densities in the world which remains an attractive destination for legal and illegal immigrants, and is hence necessary for the maintenance of Hong Kong's sustainability. It is both legitimate and rational to apply such restrictive policy to the entire immigration regime.

(2) the Director has to maintain a delicate and difficult balance between keeping Hong Kong as an open society where foreigners can readily be granted permission to enter and remain for limited duration(s) for legitimate purposes and upholding the public interest in having a tight immigration regime to prevent scarce public resources (including public housing, medical and education facilities) being subject to undue pressures by uncontrolled waves of economic immigrants from neigbouring regions who are attracted by the unique situation in Hong Kong.

(3) by reason of Art 154(2) of the Basic Law and the Immigration Ordinance (Cap 115), the administration of such policies and practices is in the hands of the Director of Immigration who has been given very wide discretion to discharge a very heavy responsibility. Such wide discretion is necessary because very often the Director has to make some hard decisions based on such policies and practices, some of which might be regarded by members of the public as tough and unpopular. In the discharge of his onerous duty, the Director has to make such decisions in light of the macro circumstances and needs of Hong Kong based on matters and information which could not be fully explained to or understood by the general public.

(4) it is not appropriate for the court to usurp the role of the Director as the court does not and cannot have a macro picture of the overall immigration pressure and the expertise to assess the potential political and socio-economical impact of a shift (no matter how minor it is) in the immigration policy. The court is not equipped with the necessary information nor tasked by the law to carry out the responsibility of the Director.

(5) the Director is not above the law in the exercise of the power of immigration control. The rule of law manifests itself by the court retaining a supervisory jurisdiction in such exercise of power. The supervisory power is exercised by the court in accordance with well-established public law principles by way of judicial review, including in relation to the questions of legality, relevance, fairness, and rationality.

(6) in relation to legality, s 11 of the Hong Kong Bill of Rights Ordinance (Cap 383) provides that as regards persons not having the right to enter and remain in Hong Kong, the provisions in the Bill of Rights do not affect any immigration legislation governing entry into, stay in and departure from Hong Kong or the application of such legislation. Hence, apart from absolute non-derogable fundamental rights (such as those under Art 3 of the Bill of Rights per s 8 of the Hong Kong Bill of Rights Ordinance (Cap 383)), the Director's exercise of his wide discretion in matters relating to entry into, stay in and departure from Hong Kong cannot be taken as infringement of any other rights under the Bill of Rights.

(7) as discussed in a long line of cases, the Bill of Rights and the Basic Law do not give an applicant who has no right to stay in Hong Kong any right to pre-empt a decision by the Director in not granting him or her a right to remain in Hong Kong. The principle was affirmed by Fok J (as he then was) in the Court of Appeal in *Ubamaka v Secretary for Security & Anor* [2011] 1 HKC 508, [2011] 1 HKLRD 359 (CA) and by Ribeiro PJ in the Court of Final Appeal in the same case *Ubamaka Edward Wilson v Secretary for Security & Anor* [2013] 2 HKC 75, (2012) 15 HKCFAR 743 (CFA).

(8) those cases (including *Hai Ho Tak v A-G* [1994] 2 HKLR 202, [1994] HKCU 295 (CFI)) established that a family member with the right of permanent residence in Hong Kong, of a person who has no right to remain in Hong Kong, cannot rely on the family member's own rights under the Bill of Rights or the Basic Law to require the Director to grant a right to remain in Hong Kong to that other person.

(9) where an applicant cannot bring himself within any established policy for the grant of permission to stay or remain in Hong Kong, the Director of Immigration has a wide residual discretion in not making a removal order on humanitarian considerations. However, the Director of Immigration is not obliged to take humanitarian considerations into account (this obviously also applies to situations where an illegal immigrant has entered illegally or has contravened a condition of stay and/or when the question is a s 19 removal order, or any statutory discretions such as s 13 that may be relied on to enable a claimant to stay in Hong Kong temporarily or permanently: see *Lau Kong Yung (an infant) & Ors v Director of Immigration* [1999] 4 HKC 731, (1999) 2 HKCFAR 300, [1999] 3 HKLRD 778 (CFA); *Chan To Foon & Ors v The Director of Immigration and the Secretary for Security* [2001] 3 HKLRD 109, [2001] HKCU 320 (CFI) and *Ma Chi Ching v Director of Immigration* [2015] 1 HKLRD 1138, [2014] HKCU 1120 (CA). While he may do so, if he did not in fact take them into account, there is no basis for the courts to intervene.

(10) if the Director does give regard to humanitarian considerations, the courts could intervene if there were unfairness in the process. However, the courts are not equipped to exercise immigration control in place of the Director, and as a matter of Hong Kong law the weight to be attached to a particular humanitarian consideration in a particular case at a particular point in time is a matter for the Director of Immigration. Immigration control involves decisions of high political as well as socio-economic content which should be accorded a broad margin of discretion, and the courts should not succumb to the temptation to usurp the role of the Director of Immigration, whose policies the courts are generally institutionally ill-equipped to gain say. It would also be unlikely for it to be inferred that the Director of Immigration to have not taken a relevant humanitarian consideration into account, once it is appreciated that as a matter of Hong Kong law there is no legal basis to say that the family tie or connection should be given higher priority over other considerations in the exercise of immigration control.

(11) any challenge to the Director's discretion based on irrationality or *Wednesbury* unreasonableness must have regard to the wide discretion of the Director, and that humanitarian considerations are only relevant in the context of whether an applicant merits exceptional treatment against a policy of stringent immigration control.

(12) subsequently, the Court has also noted that 'proportionality' is not a standalone ground for judicial review, at least in the immigration context: *Riaz Hussain and Anor v Permanent Secretary for Security* [2020] HKCU 3496, [2020] HKCFI 2532.

Both *BI & BH v Director of Immigration* [2017] 3 HKC 147, [2016] 2 HKLRD 520 (CA) and *Comilang & Ors v Director of Immigration* [2018] 5 HKC 459, [2018] 2 HKLRD 534, [2018] HKCA 175 concerned the specific policy of the Director of Immigration for dependant visa applications as contained in the 'Guidebook for Entry for Residence as Dependants in Hong Kong' (the 'Dependant Policy'), or the Director's decision to refuse a foreign national an extension of their stay in Hong Kong to take care of their children (one of whom was a permanent resident of Hong Kong). In relation to such specific matters, given the aforesaid context the Court of Appeal has also held that:

(1) a Hong Kong resident does not have any common law entitlement to the grant of right of residence to his or her spouse or other close family members.

(2) the Dependant Policy is not a family reunion policy whereby prime consideration should be given to the family ties of the applicant in Hong Kong. Rather, its objective and purpose were plainly to permit genuine dependants of Hong Kong permanent residents or residents to apply for residence in Hong Kong upon the latter's sponsorship. The objective of the financial sufficiency requirement was:

  (a) to ensure that the dependant would not become a burden to Hong Kong; and

  (b) to ensure that the applicant was truly dependant upon the sponsor. The Director of Immigration was entitled to prefer such an arrangement which provided for greater certainty for all concerned parties.

(3) the eligibility requirement in relation to the Dependant Policy is that there is no record of detriment of the applicant before his dependant visa application could be considered. On this point specifically, see further *Aguilar Joenalyn Elmedorial v Director of Immigration* [2013] HKCU 136 (unreported, CACV 225/2012, 17 January 2013) (CA): record of detriment includes conviction for non-immigration offences in addition to immigration / labour offences. The requirement for no record of detriment is an eligibility requirement and not merely a factor to be taken into account, and subject to Wednesbury unreasonableness, there is no limit to the types of adverse records that the Director may take into account: *AH v Director of immigration* (2020) 23 HKCFAR 437, [2020] HKCU 3896, [2020] HKCFA 34.

(4) None of the following asserted rights of Arts 37 and 39 of the Basic Law, Arts 14, 19(1) and 20(1) of the Hong Kong Bill of Rights Ordinance (Cap 383), Art 10 of the International Covenant on Economic, Social and Cultural Rights, the children applicants' right of abode and permanent resident status under Art 24 of the Basic Law, and the best interests of the child applicants under the Convention on the Rights of the Child and customary international law as part of the common law (collectively, 'the Asserted Rights') were relevant to such decisions.

While the Court of Final Appeal granted leave to appeal in *Comilang & Ors v Director of Immigration* [2018] 5 HKC 459, [2018] 2 HKLRD 534, [2018] HKCA 175, it eventually dismissed the appeal in *Comilang & Ors v Director of Immigration* [2019] 2 HKC 492, (2019) 22 HKCFAR 59, [2019] HKCFA 10. In the process, their Lordships held that:

(1) section 11 of the Hong Kong Bill of Rights Ordinance (Cap 383) was not confined to rights in the Bill of Rights, but extended by necessary implication to cognate rights in the Basic Law in the specified immigration context. It was for this, and other reasons, that the Asserted Rights also did not arise, and hence the Director of Immigration was not duty bound to take such into account when exercising his discretion to refuse permission to stay pursuant to s 11 of the Immigration Ordinance (Cap 115). *Hai Ho Tak v A-G* [1994] 2 HKLR 202, [1994] HKCU 295 (CFI) would not be overruled.

(2) there was an especially cogent need for a coherent approach to the constitutional scheme given the recognised necessity for strict and effective immigration control that has long been the policy adopted in Hong Kong.

The Director also has no obligation or duty to make necessary inquiries with an applicant for a dependency visa to satisfy himself whether there are sufficient

grounds to refuse the application. It is for the applicant to raise all the objectively reasonable matters that he/she wishes to rely on to persuade the Director to accede to the request by exercising the discretion in his/her favour: The Director is under no duty to ask questions in this respect, let alone to make inquiries about them himself: *Pagtama, Victoria Alegre & Anor v Director of Immigration* [2016] HKCU 83 (unreported, HCAL 13, 45 and 56/2014, 12 January 2016) (CFI), Au J (as he was then).

These, and other related matters, are addressed in relation to the commentary on ss 7, 11, 13, 19, 20, 54 and 55 hereunder.

The Dependant Policy can however be subjected to scrutiny for discrimination on the basis of sexual orientation. See *Director of Immigration v QT* [2018] 4 HKC 403, (2018) 21 HKCFAR 324, [2018] HKCFA 28 where it was held that the Dependant Policy was discriminatory in restricting the grant of a dependant visa to spouses only if the said spouse was party to a monogamous marriage consisting of one male and one female. The Court of Final Appeal allowed the application for judicial review of the applicant, a same-sex civil partner (pursuant to a civil partnership under foreign law) of a foreigner granted an employment visa to work in Hong Kong, on the bases that:

(1) marriage per se could not be a factor justifying discrimination; and
(2) the Dependant Policy was not rationally connected to the Director's stated justificatory grounds of attracting foreign talent and maintaining strict immigration control.

Claims for breach of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT') used to be handled by the Immigration Department under an administrative screening mechanism prior to the implementation of the statutory scheme under Pt VIIC of the Immigration Ordinance (Cap 115). In response to the judgments of the Court of Final Appeal in *Ubamaka Edward Wilson v Secretary for Security & Anor* [2013] 2 HKC 75, (2012) 15 HKCFAR 743 (CFA), on 21 December 2012; and *C & Ors v Director of Immigration & Anor* [2013] 4 HKC 563, (2013) 16 HKCFAR 280 (CFA), the government implemented the Unified Screening Mechanism ('USM') to process non-refoulement claims lodged by persons without a right to enter and remain in Hong Kong against removal to another country on all applicable grounds, including risk of refoulement torture under CAT (per Pt VIIC of the Immigration Ordinance (Cap 115)), risk of cruel, inhuman and degrading treatment and punishment ('CIDTP') under Art 3 of the Hong Kong Bill of Rights Ordinance (Cap 383), and persecution risk with reference to the non-refoulement principle under Art 33 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (persecution risk): see *AW v Director of Immigration & Anor* [2016] 2 HKC 393 (CA). The USM has hence handled all such claims since 3 March 2014 and the process is broadly set out in relation to the commentary on ss 37U, 37X, and 37ZU et seq below. Practitioners should also be aware of the impact of the 2021 amendments in relation to such claims, in particular to ss 37V, 37Y, 37Z, 37ZAB, 37ZAV, 37ZB, 37ZC, 37ZD, 37ZG, 37ZI, 37ZK, 37ZN, 37ZS, 37ZT, 37ZTA,

37ZV and 37ZZ of the Immigration Ordinance (Cap 115), to Sch 1A of the Ordinance, and of the savings and transitional provisions at the new Sch 5 of the Ordinance.

(CHAPTER 115)

IMMIGRATION ORDINANCE

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