FACV No. 2 of 2014

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 2 OF 2014 (CIVIL)
(ON APPEAL FROM CACV NO. 22 OF 2012)

Between

GUTIERREZ JOSEPH JAMES, a minor, by GUTIERREZ JOSEPHINE B, also known as GUTIERREZ JOSEPHINE BALANDO, his mother and next friend	Applicant (Appellant)
and	
COMMISSIONER OF REGISTRATION	1st Respondent
REGISTRATION OF PERSONS TRIBUNAL	2nd Respondent

Before :	Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Tang PJ Mr Justice Chan NPJ and Sir Anthony Mason NPJ
Date of Hearing:	3 September 2014
Date of Judgment :	18 September 2014

J U D G M E N T

The Court:

1. This appeal arises in connection with an unsuccessful application made on behalf of the appellant by his mother, when he was a child aged 10, for verification of his eligibility for a Permanent Identity Card with a view to establishing that he enjoyed the status of Hong Kong permanent resident and a right of abode.

2. After the application was refused by the Immigration Department, the appellant applied to be issued with a juvenile Hong Kong Permanent Identity Card. That application was refused by the Commissioner of Registration (the 1st respondent). The appellant appealed to the Registration of Persons Tribunal[1] and his appeal was dismissed. That led to an application for leave to apply for judicial review. Leave was granted, but the substantive application was dismissed by Lam J.[2] His appeal to the Court of Appeal was dismissed.[3] Leave to appeal was granted by the Appeal Committee[4] after the Court of Appeal's refusal.[5]

3. Leave was granted on the basis that the following questions of great general or public importance are involved in this appeal:

> (1) For the purpose of qualifying as a HKSAR permanent resident under Article 24(2)(4) of Basic Law, what must a child or young adult applicant who is a non-Chinese national born in Hong Kong and whose application is made before he or she reaches the age of 21 establish, either on his own or by a parent or legal guardian on his or her behalf, to satisfy the requirement under Article 24(2)(4) of "having taken Hong Kong as [his or her] place of permanent residence"? ("The first question")

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1 Formally named as the 2nd respondent, but playing no part in the Court proceedings.

2 HCAL 136/2010 (10 November 2010).

3 [2013] HKLRD 319, Stock VP, Fok and Barma JJA.

4 FAMV 46/2013 (24 January 2014).

5 CACV 22/2012 (9 October 2013).

(2) For the purposes of Article 24 and Article 31 of the Basic Law, whether and under what circumstances a person exempted from the requirement of registration under the laws of the HKSAR and given permission to remain in Hong Kong as a visitor may become or be recognized as a non-permanent resident of the HKSAR to enjoy the freedom to travel and to enter and leave the HKSAR. ("The second question")

4. These two questions reflect the grounds of appeal. The appellant contends that the Tribunal and the Courts below erred, first, in their approach to deciding whether he had satisfied the requirement of "having taken Hong Kong as [his] place of permanent residence"; and secondly, in their approach to ascertaining whether he had satisfied the requirement of seven-years' continuous ordinary residence for the purposes of Article 24(2)(4). Ms Gladys Li SC[6] accepts that she must succeed on both grounds if the appeal is to be allowed. The relief which she seeks in that event is for the case to be remitted to the Tribunal with appropriate directions as to the correct approach to adopt in determining the two issues mentioned.

5. The appellant's mother, Ms Josephine Balando Gutierrez, a Philippine national who had been employed as a foreign domestic helper in Hong Kong since July 1991, had lodged her own verification application along with that of the appellant. The proceedings regarding her application followed a parallel course, leading to Lam J's dismissal of the judicial review applications made on behalf of herself and her son. However, after this Court's decision in *Vallejos v Commissioner of Registration*,[7] Ms Gutierrez abandoned her appeal and only her son's case proceeded to the Court of Appeal and is presently being pursued. It is nonetheless necessary, in dealing with the first question, to consider Ms Gutierrez's situation while examining the circumstances of the appellant's residence in Hong Kong.

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6 Appearing for the appellant with Mr P Y Lo.

7 (2013) 16 HKCFAR 45.

The first question

A.1 The circumstances of the appellant and his mother

6. Ms Gutierrez was born in the Philippines on 23 September 1963. She married Mr Marcial B Gutierrez in 1977 and four children were born of that union between 1980 and 1987, before the couple separated. On 6 June 1991, Ms Gutierrez was issued with a visa and commenced employment as a foreign domestic helper in Hong Kong in July 1991.

7. Between then and the making of the verification applications, Ms Gutierrez lived in Hong Kong, engaged as a foreign domestic helper by seven different employers over periods of employment varying between 8 months and six years.[8]

8. The appellant was born on 1 December 1996, between the end of Ms Gutierrez's fourth employment (23 April 1996) and the start of her fifth (19 June 1997), while she was in Hong Kong on a visitor's visa[9] which evidently covered the period of her pregnancy. The appellant's father is said to be a United States citizen to whom Ms Gutierrez was not married and with whom she has lost contact.

9. After his birth, the appellant was granted a visitor's visa until he went to the Philippines on 30 August 1997, having been issued with a Philippine passport on 26 March 1997. Some four months later, he returned to Hong Kong and, with numerous visitor visa extensions, he has lived continuously (except

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8 The Agreed Facts set out in Annex I to Lam J's judgment indicate the following periods of employment: (i) 23.7.91 – 6.9.92 (15 months); (ii) 16.2.93 – 12.10 93 (8 months); (iii) 11.12.93 – 31.1.95 (12 ½ months); (iv) 19.4.95 – 23.4.96 (12 ½ months); (v) 19.6.97 – 19.6.03 (6 years); (vi) 4.7.03 – 4.7.05 (2 years); (vii) 28.7.05 – 26.4.08 (2 years 9 months), the verification application having been made on 21.12.06. Ms Gutierrez began her 8th employment on 26.6.08.

9 Between 6.5.96 and 28.6.97 (13 months).

for certain periods of absence discussed later) with his mother at the premises of her various employers up to and after the making of his verification application on 20 December 2006.

10. The Court of Appeal[10] summarised the circumstances of the appellant relied on by his mother in an affirmation filed on his behalf in the proceedings before the Tribunal in the following terms:

> "(1) Joseph had no home in the Philippines and spoke little Tagalog;
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> (2) he had completely integrated into Hong Kong society where he has all his friends;
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> (3) he speaks fluent English and some Mandarin and Cantonese, which he learns at school here;
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> (4) he and she enjoyed a close relationship with her employer's family and Joseph and her employer's son treat each other like brothers;
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> (5) he has two half-brothers working in Hong Kong at the time the affirmation was made;
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> (6) Joseph is an active participant in sports at the local residents' club, and is a keen football player; and
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> (7) he had told his mother that he wishes to be a pilot when he grows up and she had enrolled him in a 'Basics of Flying' course organised by Cathay Pacific."

11. It is on the basis of that evidence that the appellant submits that he qualifies as a Hong Kong permanent resident and that the Commissioner was wrong to refuse to issue him with a permanent identity card.

A.2 Hong Kong residents under the Basic Law

12. Article 24 of the Basic Law lays down the qualifying conditions for the status of Hong Kong resident, both permanent and non-permanent, as follows:

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[10] Court of Appeal §30. Submissions elaborating on these matters are referred to by Lam J at §51.

Article 24

(1) Residents of the Hong Kong Special Administrative Region ("Hong Kong residents") shall include permanent and non-permanent residents.

(2) The permanent residents of the Hong Kong Special Administrative Region shall be:

(1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;

(2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;

(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);

(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region.

(5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region;

(6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

(3) The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode.

(4) The non-permanent residents of the Hong Kong Special Administrative Region shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the Region but have no right of abode.

13. The appellant's claim to be entitled to the status of Hong Kong permanent resident rests on Article 24(2)(4). He plainly does not come within any of the other categories.

A.3 Requirements for establishing permanent residence status

14. As is well-established, a fair and reasonable statutory scheme for the proper verification of a person's claim to right of abode which does not exceed the verification function is constitutionally valid and, until such claim is verified, the applicant does not enjoy the rights of a permanent resident.[11]

15. Schedule 1 of the Immigration Ordinance[12] establishes the machinery for such verification. It begins by reciting the six categories of persons who are permanent residents set out in Article 24(2), its paragraph 2(d) reproducing the category of persons not of Chinese nationality referred to in Article 24(2)(4).

16. Schedule 1, paragraph 3 then sets out the requirements for establishing that someone qualifies as a person who comes within that category, stating:

> (1) For the purposes of paragraph 2(d), the person is required-
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> (a) to furnish information that the Director [of Immigration] reasonably requires to satisfy him that the person has taken Hong Kong as his place of permanent residence. The information may include the following –
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> (i) whether he has habitual residence in Hong Kong;
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> (ii) whether the principal members of his family (spouse and minor children) are in Hong Kong;
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> (iii) whether he has a reasonable means of income to support himself and his family;
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> (iv) whether he has paid his taxes in accordance with the law;
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> (b) to make a declaration in the form the Director stipulates that he has taken Hong Kong as his place of permanent residence; the declaration for a person under the age of 21 years must be made by one of his parents or by a legal guardian; and
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> (c) to be settled in Hong Kong at the time of the declaration.

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[11] *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at 36; *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 at 312; *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26 at §§56-57.

[12] Cap 115.

(2) A person claiming to have the status of a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(d) does not have the status of a permanent resident in the Hong Kong Special Administrative Region until he has applied to the Director and the application has been approved by the Director.

(3) For the purposes of paragraph 2(d), a person is taken to have entered Hong Kong on a valid travel document-

(a) ...

(b) if he was born in Hong Kong and was permitted to remain in Hong Kong by an immigration officer or an immigration assistant.

17. The requirement in Schedule 1, paragraph 3(1)(c) for the applicant "to be settled in Hong Kong at the time of the declaration" was defined in Schedule 1, paragraph 1(5)[13] as involving two elements, namely, that the person is ordinarily resident in Hong Kong and that "he is not subject to any limit of stay in Hong Kong". This Court held in *Prem Singh v Director of Immigration*,[14] that the second element imported a condition incompatible with the requirements of Article 24(2)(4) and was unconstitutional. It follows that Schedule 1, paragraphs 1(5) and 3 must now be read so that the requirement of "being settled" in Hong Kong is met by being ordinarily resident here, without having to show that one is not subject to a "limit of stay".

A.4 Prem Singh

18. As the Court noted in *Prem Singh*, to qualify under Article 24(2)(4), it must be shown that the person concerned:

(a) entered Hong Kong with a valid travel document ("the entry requirement");

(b) has ordinarily resided here for a continuous period of not less than seven years ("the seven-year requirement"); and

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[13] Schd 1, para 1(5): "A person is settled in Hong Kong if: (a) he is ordinarily resident in Hong Kong; and (b) he is not subject to any limit of stay in Hong Kong."

[14] (2003) 6 HKCFAR 26 at §§51-66.

(c) has taken Hong Kong as his place of permanent residence ("the permanence requirement").

19. The entry requirement is not in dispute. The appellant is taken to have entered Hong Kong on a valid travel document since he was born in Hong Kong and was lawfully permitted to remain.[15] As previously noted, the issues are whether he satisfies the permanence and seven-year requirements, the permanence requirement being the subject of the Appeal Committee's first question and the first ground of appeal presently being discussed. The seven-year requirement is dealt with in Section B of this judgment.

20. In *Prem Singh*, it was held that the wording, and especially the tense used by Article 24(2)(4) in requiring persons concerned to "have taken Hong Kong as their place of permanent residence", meant that an applicant, when putting forward his claim for verification by the Director, had to be able to point to facts which had already occurred permitting him to say that he had, starting at some prior point in time, already taken Hong Kong as his place of permanent residence.[16] This was so while recognizing that the permanence requirement imports "the quality of a past, present and future commitment to establishing and maintaining a permanent residence in Hong Kong."[17] It was held that the permanence requirement "makes it necessary for the applicant to satisfy the Director both that he intends to establish his permanent home in Hong Kong and that he has taken concrete steps to do so".[18] He must, in other words, show that his residence here is "intended to be more than ordinary residence and that he intends and has taken action to make Hong Kong, and Hong Kong alone, his

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15 Immigration Ordinance, Schd 1, para 3(3)(b).

16 (2003) 6 HKCFAR 26 at §60.

17 At §61.

18 At §64.

place of permanent residence,"[19] meaning that he intends to reside in Hong Kong "permanently or indefinitely, rather than for a limited period".[20]

A.5 The decisions of the Courts below

21. Lam J held that the Tribunal had not erred. He decided that, applying *Prem Singh*, the Tribunal had correctly found that the matters relied on failed to establish that requisite steps had been taken by the appellant or by his mother on his behalf to show that he had taken Hong Kong as his place of permanent residence.[21]

22. The Court of Appeal decided that the Tribunal had erred to the extent of rigidly equating the appellant's position with that of his mother, so that her inability to meet the permanence requirement was regarded as necessarily entailing the like inability on his part. It held that while, as a matter of common sense, in the vast majority of cases a child's position would follow that of the parent, the status of one does not necessarily follow the other, unusual though divergence might be.[22] Their Lordships decided, however, that it was unnecessary to remit the matter to the Tribunal because they were satisfied "that the mother came nowhere near establishing that the appellant, through her, had taken Hong Kong as his permanent place of residence".[23]

23. The Court of Appeal suggested that the crucial question was: "What were the mother's proposals for her son in the event that her contract of employment was terminated so that she had to return to the Philippines?" It took the view that the only plausible answers were either that she would take

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19 *Ibid.*

20 At §66.

21 Lam J at §§51-53.

22 Court of Appeal at §§42-43.

23 Court of Appeal at §54.

him with her or that she did not yet know although she hoped that someone would agree to provide him with accommodation and support until he was able to support himself. It held that accordingly there was no basis for concluding that the appellant had taken Hong Kong as his place of permanent residence and that the application was rightly dismissed.

A.6 The appellant's argument as to the proper test

24. Ms Li SC invites the Court to re-visit its decision in *Prem Singh*, submitting that the discussion in that case of what has to be established to qualify as a permanent resident under Article 24(2)(4) was not necessary to the decision and thus *obiter*.

25. The appellant's printed case points out that *Prem Singh*[24] involved an adult non-Chinese migrant coming to Hong Kong to work, and forming and raising a family in Hong Kong.[25] It makes the argument that the principles derived from that decision cannot appropriately be applied to children or young adults, pointing out that (other than showing habitual residence) the typical information that the Director may require an applicant to furnish[26] involves the presence of a spouse and children in Hong Kong; having a reasonable means of income to support himself and his family; and having paid his taxes: matters self-evidently applicable only to adults.[27] It is accordingly argued that applicants for permanent resident status under Article 24(2)(4) who were born in Hong Kong and have lived in Hong Kong since birth stand in a class of their own and should not to be dealt with applying the principles referred to in *Prem*

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24 As well as *Fateh Muhammad v Commissioner of Registration* (2001) 4 HKCFAR 278, where the Court also considered Article 24(2)(4).

25 Appellant's printed case §4.8.

26 As indicated by Schd 1 para 3(1).

27 Appellant's printed case §4.9.

Singh.[28] The United Nations Convention on the Rights of the Child is invoked in support.

26. However, in her oral submissions, Ms Li modified her position. She submitted that she was not contending that the *Prem Singh* decision should be confined to adults or for a different test to be applied to children. It was argued that *Prem Singh's* interpretation of Article 24(2)(4) was either wrong or had been misunderstood in its application by the Courts below.[29] Three main criticisms of *Prem Singh* or of those decisions below were advanced, namely:

(a) That *Prem Singh's* reference to the need to demonstrate "concrete steps" which indicated that an applicant has taken Hong Kong as his place of permanent residence,[30] had led the Courts below wrongly to insist on the appellant demonstrating that positive steps had been taken directed at making Hong Kong his permanent home, a requirement said to be unwarranted by the wording of Article 24(2)(4) and impossible for a boy of 10 to satisfy;

(b) That there has developed an erroneous belief that for an applicant to come within Article 24(2)(4), he has to show that all links with other countries have been severed; and,

(c) That *Prem Singh's* requirement that an applicant must show that he intends "more than ordinary residence" has led to the Courts enforcing a strict and mutually exclusive dichotomy between facts capable of supporting ordinary residence and facts supporting the permanence requirement, instead of looking at all the circumstances.

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28 Appellant's printed case §4.10.

29 And in the practice of the Director of Immigration.

30 Lam J at §§29-31.

27. Ms Li proposes that on a proper interpretation of Article 24(2)(4), apart from an applicant's parent or guardian making the declaration that the applicant has taken Hong Kong as his place of permanent residence[31] and apart from showing habitual residence in Hong Kong, it is or ought to be only necessary to show (a) the maintenance of an ordinary or regular pattern of life in Hong Kong; and (b) the reasonable prospect of the maintenance of such an ordinary or regular pattern of life in Hong Kong. In relation to (b), Counsel argues that instead of asking for evidence of concrete steps taken, it should be enough for an applicant to demonstrate that his declared intention of taking Hong Kong as the place of permanent residence is genuinely held, realistic and realisable. It is submitted that the appellant is capable of passing these tests.

A.7 The applicable test

A.7a Necessary to the decision

28. We do not accept that an examination of the requirements for bringing oneself within Article 24(2)(4) was not necessary to the decision in *Prem Singh*. That examination was carried out in the context of deciding whether the limit of stay requirement was constitutionally valid.[32] The Court held that in necessitating applicants to "have taken" Hong Kong as their place of permanent residence, the Basic Law necessarily envisaged that all the facts necessary to satisfy the permanence requirement were capable of coming into existence before the date of the application. It was important for the Court to identify the nature of such facts to enable it to ascertain that such facts would come into existence during the period when the applicant could be expected to be subject to a limit of stay imposed by the Director. It was on that basis that the Court held that the limit of stay condition was unconstitutional since it unjustifiably

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31 As required by Schd 1, para 3(1)(b).

32 As discussed in Section A4 above.

grafted onto the qualifications for permanent resident status under Article 24(2)(4), a discretion which enabled the Director to determine administratively whether an applicant should acquire such status simply by deciding or refusing to annul the limit of stay condition. Ascertainment of the requirements of Article 24(2)(4) was therefore a necessary part of the Court's reasoning.

A.7b Children and young adults

29. It is true that *Prem Singh* was a case which concerned an adult non-Chinese migrant who had come to Hong Kong to work, whereas the appellant is a non-Chinese child who was born in Hong Kong. It is unfortunate for him that the Basic Law does not distinguish between adults and children for Article 24(2)(4) purposes. In Article 24(2)(5), the Basic Law specifically addresses the position of non-Chinese children born in Hong Kong, granting them permanent resident status if they are under the age of 21 and if they were born of non-Chinese residents who qualify for permanent residence under Article 24(2)(4). But a child like the appellant, not of Chinese nationality, born in Hong Kong but not of residents within Article 24(2)(4), cannot rely on Article 24(2)(5). He can only qualify for permanent resident status if he comes within Article 24(2)(4), meeting the requirements explained in *Prem Singh*. The submission in the appellant's printed case that children and young adults stand in a different class, requiring a different test to be devised therefore cannot be accepted.

A.7c Ms Li's proposed test

30. The test proposed by Ms Li is not consistent with Article 24(2)(4). It seeks to translate the permanence requirement into a requirement for showing[33] merely (i) the maintenance by the applicant of an ordinary or regular pattern of

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[33] Apart from "habitual residence in Hong Kong" which is regarded by Ms Li as a self-evidently present fact: Appellant's printed case §4.12.

life in Hong Kong; and (ii) the reasonable prospect of the maintenance of such an ordinary or regular pattern of life in Hong Kong,[34] the latter condition requiring the applicant merely to demonstrate that his declared intention of taking Hong Kong as the place of permanent residence is genuinely held, realistic and realisable.[35]

31. Such a test is inconsistent with Article 24(2)(4) first, because as pointed out in *Prem Singh*,[36] Article 24(2)(4) makes it clear that more than ordinary residence is required. It specifies the permanence requirement as an element additional to the seven-year requirement. It is therefore not enough merely to show ordinary residence and an intention to continue to be ordinarily resident. Secondly, the words "have taken Hong Kong as their place of permanent residence" are properly construed as importing both subjective and objective requirements. The element of permanence connotes a subjective commitment to maintaining a residence in Hong Kong, while the need to "have taken Hong Kong (etc)" denotes the existence of objective facts constituting such "taking". Ms Li's proposal eliminates all need for objective evidence, replacing it with an assessment of the applicant's declared intention to continue being ordinarily resident in the future. Given the content of Article 24(2)(4), it is not plausible to suggest that the drafters of the Basic Law intended that ordinary residence accompanied by a mere declaration of intent without the support of concrete, objective evidence, would suffice to meet the permanence requirement.

32. That more than ordinary residence is required under Article 24(2)(4) is reinforced by comparing that Article with Article 24(2)(2) which, in relation to Chinese citizens, only requires ordinary residence in Hong Kong for a

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34 *Ibid.*

35 Appellant's printed case §§4.19 and 4.27.

36 (2003) 6 HKCFAR 26 at §64.

continuous period of not less than seven years, making no mention of having taken Hong Kong as the applicant's place of permanent residence.

A.7d "Concrete steps"

33. The reference in *Prem Singh* to "concrete steps" must be read in its proper context. It appears in the course of discussing what evidence an applicant is required to produce with a view to meeting the permanence requirement in Article 24(2)(4). The discussion begins at §60 with a reference to the wording and tense employed by the Article (requiring applicants to "have taken Hong Kong as their place of permanent residence") which were held to indicate:

> "...that an applicant, at the moment of putting forward his claim for verification by the Director, is required to point to *facts which have already occurred* permitting him to say that he has, starting at some point in time prior to the making of his application, *already taken* Hong Kong as his place of permanent residence." (Additional emphasis added)

34. In the same vein, the next paragraph (§61) states:

> "...BL art.24(2)(4) recognizes that *all the facts necessary* to satisfy the permanence requirement are capable of coming into existence weeks, months or even years before the date of the application so that in putting the application forward, the claimant is able to say: 'I have taken Hong Kong as my place of permanent residence' since a date in the past." (Emphasis added)

35. The proposition in these paragraphs is therefore that the Director may require evidence of any facts which are already in existence which tend to show that the applicant "has taken Hong Kong, etc" so as to meet the permanence requirement. There is no suggestion in these paragraphs that such evidence is confined to any particular class of fact.

36. The reference to "concrete steps" occurs at §64 in the statement that:

> "The permanence requirement makes it necessary for the applicant to satisfy the Director both that he intends to establish his permanent home in Hong Kong and that he has taken concrete steps to do so. This means that the applicant must show that his

> residence here is intended to be more than ordinary residence and that he intends and has taken action to make Hong Kong, and Hong Kong alone, his place of permanent residence."

37. As the context shows, those words were used to emphasize that there are both subjective and an objective elements in the permanence requirement: the applicant must show that he subjectively intends to establish his permanent home in Hong Kong *and* that he objectively has taken action to achieve that. They are words which emphasise that intention alone is not enough and that it is necessary for there to be some objective evidence of having taken Hong Kong as the applicant's permanent home.

38. The same applies to §66 which states:

> "The intention must be to reside, and the steps taken by the applicant must be with a view to residing, in Hong Kong permanently or indefinitely, rather than for a limited period. Such intention and conduct must also be addressed to Hong Kong alone as the applicant's only place of permanent residence."

39. The emphasis is again on the dual requirement of "intention and conduct", without suggesting that the evidence is restricted to any particular class of fact or "conduct".

40. If Ms Li is right in suggesting that some have taken the reference to "concrete steps" to mean that the only evidence which may be relied on to meet the permanence requirement is evidence of particular positive steps directed specifically to the taking of Hong Kong as one's place of permanent residence, that is an unfortunate and unintended reading of those paragraphs in *Prem Singh*. Plainly, the Court was pointing to the need to refer concretely to *objective facts* and not just a statement of intent. But while clearly holding that evidence of such objective facts is needed, the judgment cannot properly be read as confining such evidence or such facts to any particular category. Thus, the facts and circumstances which surround any conduct relied on for the purpose of satisfying the permanence requirement may be just as relevant as the conduct

itself. Indeed, conduct which may be described as involving an omission rather than positive steps, if tending to show that the permanence requirement is met, would plainly be relevant. Reading the passages mentioned above as a whole, it would plainly be inappropriate to ignore such facts and circumstances.

41. It is clear that the Court of Appeal at least did not fall into the suggested error. Fok JA stated:

> "Ribeiro PJ did not suggest what 'concrete steps' might be sufficient to satisfy the Director that an applicant has taken Hong Kong as his place of permanent residence. There is no doubt that this was deliberate. It would not be sensible for any court to seek to lay down a list of such steps for otherwise such a list might be interpreted as a definitive guide to the objective facts necessary to demonstrate the fact of having taken Hong Kong as a place of permanent residence. There is nothing in the Basic Law or Immigration Ordinance suggesting that the relevant facts required to be demonstrated can be definitively stated. Instead, what will be sufficient in any given case must depend on the individual facts of that case."[37]

42. Stock VP similarly stated:

> "What steps must have been taken to translate intention into reality is not a matter for prescription. It is, rather, a matter to be assessed objectively and with common sense having regard to the particular applicant and all the relevant circumstances, which will, of course, vary from case to case."[38]

43. At first instance, while Lam J apparently placed greater weight on the need for "concrete steps" when dealing with the mother's claim, he took a broader view when considering the appellant's situation with regard to the permanence requirement. His Lordship accepted Ms Li's submission that it would be wrong to confine the evidence relevant to the mother's position as if it were a rule of law, agreeing that "it is necessary to have regard to the individual facts of the case".[39] Where the Court of Appeal disagreed with Lam J was in

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37 Court of Appeal §93.

38 Court of Appeal §49.

39 Lam J §§49 and 50.

respect of his view that the Tribunal had not adopted that criticised rigid approach mentioned above.[40]

A.7e Severance of links

44. We are not aware of any judgment where the alleged error complained of has been made. *Prem Singh* certainly does not suggest that the permanence requirement obliges an applicant to sever links with other countries. No doubt because of the way the case was argued before him, Lam J does mention the severance of links as possibly a relevant factor but his Lordship is certainly not suggesting that it is a necessary condition. He correctly focuses instead on what has been done to turn the aspiration of making Hong Kong one's permanent home into a realistic proposition.[41]

45. Plainly, an applicant who provides evidence of intent and conduct to show that he has taken Hong Kong alone as the place where he plans to live permanently or indefinitely is not excluded from acquiring permanent residence because he owns property abroad, has close relatives residing in another country or maintains other kinds of foreign links.

A.7f Exclusive dichotomy

46. We are also unaware of any tendency in the case-law for the courts to treat evidence supporting ordinary residence as something to be hermetically segregated from and inapplicable to the establishment of the permanence requirement. Certainly, the Courts below did not espouse such an erroneous approach.

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40 Section A.5.

41 Lam J at §§29(d), 30 and 31.

47. Lam J observed that evidence which was merely referable to ordinary residence was "not *per se* sufficient", pointing out that *Prem Singh* made it clear that the permanence requirement demands more than ordinary residence. He continued:

> "Having said so, it does not mean that actions or conducts referable to ordinary residence would not be relevant at all. I can readily envisage that there are cases where the concrete step relied upon by an applicant has to be considered in light of other actions or conducts for the purpose of assessing the intention of the applicant behind such step ..."[42]

48. As we have already seen,[43] in the Court of Appeal, Stock VP and Fok JA both stressed the need to consider all the circumstances of the case in deciding whether the permanence requirement has been satisfied. Their Lordships would certainly have rejected any argument proposing the strict dichotomy complained of.

A.8 The test applied in the present case

49. As noted above,[44] the Court of Appeal rejected the Tribunal's conclusion that the appellant's situation was necessarily the same as his mother's, so that her inability to meet the permanence requirement meant that he was in the same position. And, as just pointed out, the Court of Appeal stressed that ascertaining whether the permanence requirement was satisfied involved a fact-specific inquiry where all relevant circumstances had to be considered. Their Lordships were clearly right to hold[45] that the appellant's case has to be considered individually in the light of all relevant circumstances. But that, of course, does not mean that the situation of his mother is irrelevant or should not be taken into account.

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42 Lam J §29(a) and (b).

43 Section A7.d above.

44 Section A.5 above.

45 As did Lam J at §50.

50. Looked at individually, the centrally important feature of the appellant's case is obviously that he was 10 years old when he made his claim for permanent residence. We agree with Lord Pannick's submission that one would not in general expect a child aged 10 independently to form the intention or to possess the means to establish his own place of permanent residence. As the Court of Appeal acknowledged, there may be rare occasions where that may occur, but in the great majority of cases, the child will be living with and dependent upon the support of his parents or guardian so that the child's position will for practical purposes follow that of his parents or guardian.[46] Applying the *Prem Singh* principles individually to a child like the appellant, one would take into account all relevant circumstances, asking whether there is evidence of conduct or arrangements made on his behalf or for his benefit, by his parents, guardian or otherwise (including by himself in the rare case whether that is possible), showing that he has taken Hong Kong as his place of permanent residence.

51. The matters relied on in support of the appellant's application are set out above.[47] They include the fact that he has no home in the Philippines and speaks no Tagalog, speaking English and some Chinese instead; and that he has formed some close friendships and takes part in sporting and other social activities in Hong Kong. These are matters which indicate that he has been ordinarily resident in Hong Kong, but provide no basis for thinking that, at the age of 10, he had the independent capacity to take and had already taken Hong Kong as his place of permanent residence.

52. The appellant's mother was not qualified for ordinary residence while employed as a foreign domestic helper, by reason of Section 2(4)(a)(vi) of the

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46 Court of Appeal, per Stock VP at §43 and per Fok JA at §92.

47 Section A.1.

Immigration Ordinance.[48] The Tribunal also found that she had not herself taken Hong Kong as her place of permanent residence,[49] a finding that Lam J upheld.[50] That conclusion was plainly justified.

53. On the available evidence, there was no basis for suggesting that the appellant had taken Hong Kong as his place of permanent residence through any conduct of, or arrangements made on his behalf or for his benefit by, his mother or by any other person. The question which the Court of Appeal posed as to what would become of the appellant if his mother were to lose her employment was, in the circumstances of this case, a perfectly proper question, given the appellant's lack of ability independently to establish Hong Kong as his place of permanent residence.

A.9 Conclusion as to the first question

54. Our answer to the first question is that the permanence requirement laid down by Article 24(2)(4) of Basic Law requires a child or young adult applicant who is a non-Chinese national born in Hong Kong and whose application is made before he reaches the age of 21 to meet the criteria established by this Court in *Prem Singh*, taking into account his individual circumstances, including any action taken or arrangements made by himself or by a parent or legal guardian on his behalf or for his benefit which tend to show that such child or young adult has taken Hong Kong as his place of permanent residence.

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48 "For the purposes of this Ordinance, a person shall not be treated as ordinarily resident in Hong Kong (a) during any period in which he remains in Hong Kong ... while employed as a domestic helper who is from outside Hong Kong." Upheld as constitutionally valid in *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45.

49 Tribunal, §§51-53 and 63.

50 Lam J §§33, 38 and 39.

55. For the reasons given in this Section, we conclude that the appellant fails on the permanent residence ground of appeal. It follows that the appeal must be dismissed. However, we will proceed to address the second question since it was fully argued and raises questions of practical importance.

The second question

56. The appellant made his application for permanent resident status on 20 December 2006. To satisfy the seven-year requirement under Article 24(2)(4), it was necessary for him to establish that he had continuously spent seven years ordinarily resident in Hong Kong immediately before making that application, as established by this Court in *Fateh Muhammad v Commissioner of Registration.*[51]

57. During that seven-year period, the appellant was in fact absent from Hong Kong on three occasions for periods of 17, 9 and 16 days respectively.[52] The issue is whether those periods of absence resulted in the continuity of the appellant's ordinary residence in Hong Kong being interrupted so that the seven-year requirement could not be met.

B.1 The Commissioner's case

58. The Commissioner's case (accepted by the Tribunal and the Courts below) is that continuity was broken so that the seven-year requirement was not satisfied.

59. Lord Pannick points out that throughout the material period, the appellant was in Hong Kong on a visitor's visa, subject to a limit of stay which did not on each occasion exceed 180 days;[53] and subject to conditions of stay,

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[51] (2001) 4 HKCFAR 278 at 285.

[52] 25.3.00 to 12.4.00 (17 days); 22.2.01 to 4.3.01 (9 days) and 31.3.04 to 17.4.04 (16 days).

[53] Save once when, by error, he was granted permission to stay limited to 182 days.

including a restriction against becoming a student at a school or other educational institution, as prescribed by regulation 2(1) of the Immigration Regulations.[54]

60. The Commissioner relies on section 11(10) of the Immigration Ordinance which provides:

> Any permission given to a person to land or remain in Hong Kong shall, if in force on the day that person departs from Hong Kong, expire immediately after his departure.

61. Accordingly, so the argument runs, by virtue of section 11(10), on each of the three occasions when the appellant left Hong Kong during the relevant seven-year period, his permission to remain expired (whatever the balance of the period of such permission might otherwise have been) so that during his absence, he had no right to enter Hong Kong and could not lawfully enter without being granted permission afresh on presenting himself to an Immigration Officer on his return. It follows, so Lord Pannick argues, that the appellant could not possibly have been ordinarily resident in Hong Kong during those periods of absence since he could not even lawfully enter Hong Kong, far less claim to be ordinarily resident here. Continuity was therefore interrupted and the seven-year requirement not satisfied.

B.2 The appellant's case

62. It is contended for the appellant that section 11(10) does not apply and that there was no interruption to the continuity of his ordinary residence. The reasoning runs as follows:-

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[54] Regulation 2(1): "Permission given to a person to land in Hong Kong as a visitor shall be subject to the following conditions of stay: (a) he shall not take any employment, whether paid or unpaid; (b) he shall not establish or join any business; and (c) he shall not become a student at a school, university or other educational institution."

(a) Article 24(4) of the Basic Law provides:

> The non-permanent residents of the Hong Kong Special Administrative Region shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the Region but have no right of abode.

(b) By virtue of regulation 25 of the Registration of Persons Regulations,[55] the appellant is a non-permanent resident because he is a person "qualified to obtain Hong Kong identity cards in accordance with the laws of the Region" but who (at the time of his application) had no right of abode.

(c) Regulation 25 must be read together with section 3(1) of the Registration of Persons Ordinance which states:

> "Every person in Hong Kong is required to be registered under this Ordinance, unless exempted or excluded from its provisions by regulations made under section 7."

(d) Regulation 25 is a regulation made under section 7 and relevantly provides:

> None of the persons mentioned hereunder so long as he retains the status and qualifications hereinafter mentioned shall be required to register or apply for the issue of an identity card under the [Registration of Persons] Ordinance and these regulations – ...
>
> (d) any person who -
>
> (i) is a bona fide traveller in transit through Hong Kong;
>
> (ii) satisfies a registration officer, or in respect of whom a registration officer is satisfied, that he does not intend to remain in Hong Kong for more than 180 days or such longer period as a registration officer may approve; or
>
> (iii) has been granted permission to remain in Hong Kong by the Director of Immigration for a period of not more than 180 days, and is in possession of a valid travel document bearing the appropriate visa issued by a competent authority or of an official document of identity indicating that he normally lives outside Hong Kong; ...
>
> (g) children under 11 years of age:

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[55] Cap 177.

> Provided that any of the above-mentioned persons may, if they so desire and if the Commissioner allows, ... register, apply for the issue of identity cards or for the renewal of identity cards and be issued with identity cards under the Ordinance and these regulations.

(e) It is argued that the appellant is an exempted person under regulation 25 since he was at the material time a child under 11 years of age within paragraph (g) or a person coming within paragraph (d)(ii) or (iii). Accordingly, by virtue of the proviso to regulation 25, if he so desired and if the Commissioner allowed, he was able to register, apply for and be issued with an identity card.

(f) That, Ms Li submits, means that he was "qualified to obtain Hong Kong identity cards in accordance with the laws of the Region" within the meaning of Article 24(4), making him a non-permanent resident.

(g) This Court held in *Gurung Kesh Bahadur v Director of Immigration*[56] that non-permanent residents enjoy freedom to "travel and to enter or leave the Region" guaranteed by Article 31 of the Basic Law.[57] It held, accordingly, that section 11(10) of the Immigration Ordinance does not operate in relation to non-permanent residents to cut short an extant permission to stay and that a non-permanent resident is entitled to re-enter Hong Kong on the basis of the permission previously granted with a limit of stay which had not expired.

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56 (2002) 5 HKCFAR 480.

57 Article 31: "Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. They shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization."

(h) When the appellant returned to Hong Kong at the end of each of the three periods of absence, he did so within the unexpired period of the permission to stay he had previously been given. Accordingly, he was entitled to the benefit of Article 31 so that section 11(10) did not affect him and did not interrupt the continuity of his ordinary residence in Hong Kong.

B.3 Conclusion as to the second question

63. The difference between the Commissioner and the appellant on the second question hinges on whether the proviso to regulation 25, by enabling exempted persons to apply for an identity card, means that they ought in law to be treated as "persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the Region" within Article 24(4) and are therefore non-permanent residents.

64. We agree with Lord Pannick's submission that the answer is "No" because the proviso to regulation 25 merely qualifies exempted persons to *apply* and not to *obtain* an identity card. This is so because the proviso makes it clear that an identity card will only be issued "if the Commissioner allows" that to happen. Plainly, if an application is refused, the applicant cannot claim to be a person qualified to obtain an identity card.

65. Lord Pannick furthermore makes the cogent point that if merely being qualified to apply were sufficient, it would mean that even a transit passenger would have to be treated as a non-permanent resident of the HKSAR since the proviso enables persons in all the regulation 25 categories to apply, including "a bona fide traveller in transit through Hong Kong".[58] That cannot possibly have been intended.

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[58] Regulation 25(d)(i).

66. Our answer to the second question is therefore that a person exempted from the requirement of registration and given permission to remain in Hong Kong as a visitor does not, without more, qualify to enjoy the freedom to travel and to enter and leave the HKSAR as a non-permanent resident. We accordingly also dismiss the appeal on the basis that the argument based on regulation 25 fails.

Section 2(6) of the Immigration Ordinance

67. We wish, however, expressly to leave open the question whether in a case like the present, section 2(6) of the Immigration Ordinance might provide a basis for preventing interruption of continuity of ordinary residence. Section 2(6) provides:

> For the purposes of this Ordinance, a person does not cease to be ordinarily resident in Hong Kong if he is temporarily absent from Hong Kong. The circumstances of the person and the absence are relevant in determining whether a person has ceased to be ordinarily resident in Hong Kong. The circumstances may include –
>
> (a) the reason, duration and frequency of any absence from Hong Kong;
>
> (b) whether he has habitual residence in Hong Kong;
>
> (c) employment by a Hong Kong based company; and
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> (d) the whereabouts of the principal members of his family (spouse and minor children).

68. In the Court of Appeal, the appellant did seek to argue that (i) he was ordinarily resident in Hong Kong by the time the seven-year period immediately prior to the date of his application commenced; (ii) that accordingly, his three absences abroad were all temporary absences which, by virtue of section 2(6), did not break continuity; and (iii) that section 11(10) did not affect that position. Stock VP rejected that argument essentially on the basis that the appellant was here as a visitor and was not a resident, implicitly holding that his visitor status prevented him from being ordinarily resident here – the position which Lord Pannick adopts and reserved for argument. On that basis, the Court of Appeal

held that section 11(10), rather than section 2(6) governed the position in respect of continuity.[59]

69. The question of whether the appellant's permission to remain in Hong Kong as a visitor necessarily meant that he could not build up ordinary residence here, notwithstanding numerous visa extensions spanning many years, is a question which we leave open. It was not a question for which leave was granted. It would in the present case require the matter to be remitted for the relevant facts to be explored. However, since the appeal is in any event to be dismissed on the permanence requirement ground, no purpose would be served by such a remitter and it is appropriate for present purposes merely to reserve the question to be addressed if necessary in the future.

70. For the aforesaid reasons, we dismiss the appeal and make an order nisi for costs against the appellant. We direct that the parties be at liberty, if so advised, to lodge written submissions as to costs within 14 days of the date of this judgment and in default thereof, that the order nisi should stand as an order absolute.

(Geoffrey Ma) Chief Justice	(R.A.V. Ribeiro) Permanent Judge	(Robert Tang) Permanent Judge

(Patrick Chan) Non-Permanent Judge	(Sir Anthony Mason) Non-Permanent Judge

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[59] Court of Appeal at §§62-66.

Ms Gladys Li SC & Mr PY Lo, instructed by Daly & Associates and assigned by the Director of Legal Aid, for the Appellant

Lord Pannick QC & Ms Eva Sit, instructed by the Department of Justice, for the 1st Respondent