

Statement of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“**HKBA**”) refers to the judgment of the Court of Final Appeal (“**the Court**”) in FACV 19 & 20/2012 handed down on 25 March 2013 concerning the claims of foreign domestic helpers for right of abode in Hong Kong.

2. In the judgment, the Court declined the request by the HKSAR Government to make a reference of two questions on Article 158 of the Basic Law to the Standing Committee of the National People’s Congress (“**NPCSC**”) for interpretation. In short, the Court was of the view that, having reached its view on the interpretation of Article 24(2)(4) of the Basic Law (which was the provision that had to be interpreted in the adjudication of the case before it) on the basis of common law principles of interpretation, that sufficed to dispose of the adjudication against the foreign domestic helpers appellants. A reference to the NPCSC therefore “is simply unnecessary”.

3. In connection of any possible requests by HKSAR Government directly to the State Council to propose to the NPCSC for an interpretation of any provisions of the Basic Law, the HKBA repeats and re-iterates what it had submitted to the Legislative Council Panel of Administration of Justice and Legal Services in November 2012 as to the factors that should be taken into account when considering whether such a course of action should be taken. In gist:-

- The concept of the Rule of Law does not simply mean taking steps that are permitted by (or not prohibited by) the law.
- The public in Hong Kong are accustomed to, and are justifiably confident in a system whereby legal disputes and questions of legal interpretation are: resolved in Courts that are independent from political influence, which hear cases openly and fairly, upon receiving evidence presented by all sides to a dispute, and by reference to well established legal principles as well as legal materials placed before them by the parties and which are freely and openly accessible.
- The importance of maintaining the Rule of Law in Hong Kong is such that (amongst other things) the powers of the Executive are checked and kept within the strict limits of the law, and also that every person can have a reasonable opportunity of predicting and assessing their legal position in advance by reference to well established legal principles that are readily and easily ascertainable.
- Any public act should fully respect the Hong Kong public’s reasonable expectation as to how legal disputes (including disputes as to meaning of an enactment) are to be resolved.
- Any public act which undermines the authority of the Hong Kong judiciary is likely to be perceived to be a threat to the Rule of Law and the independence of the Judiciary, even if the public act is otherwise permitted by the law.

4. The HKBA also repeats its submissions dated 25th May 2012 on the Procedure for seeking an interpretation of the Basic Law under Article 158(1) at paragraph 14, which warrants setting out in full:-

“Nevertheless, the Bar would respectfully suggest that the Chief Executive, when deciding whether he would request the State Council to propose to the NPCSC for an interpretation of certain provision(s) of the Basic Law, should take into account a myriad of factors, including in particular that he should, where and whenever it is possible, to promote the autonomy of the HKSAR as opposed to intervention of the Central Authorities; further that he should respect the principle of separation of powers, and be fully supportive of the independent judicial power guaranteed under the Basic Law. Lastly, such a reference should always be considered as the very last resort and would only be invoked after the most careful consideration of all the circumstances then prevailing. The Bar would also encourage the Administration that, whenever possible, to consult the public and the legal profession to solicit views and consensus before making a decision”.

5. The “doubly non-permanent resident” children issue had caused much public concern and public debate in Hong Kong. It is a matter for the HKSAR Government to decide on how the issue is to be addressed. However, if the HKSAR Government intends to address the issue by legal means, the HKSAR Government should take the matters set out above into account. In view of the Court’s decision in *Chong Fung Yuen* and in the present case, any attempt by the HKSAR Government to request the State Council to propose to the NPCSC for an interpretation of the Basic Law is likely to have a detrimental impact on the Rule of Law in Hong Kong. The HKSAR Government is urged to exercise extreme caution in this regard.

Dated 25th March 2013.
Hong Kong Bar Association