



HONG KONG BAR ASSOCIATION

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The Secretary for Justice's Request under Article 158(3) of the Basic Law of the HKSAR in the Foreign Domestic Helpers Final Appeals

香港大律師公會對日前律政司司長根據基本法第 158(3)條
在外傭居港權案尋求人大釋法之聲明

The Secretary for Justice's Request under Article 158(3) of the Basic Law of the HKSAR
in the Foreign Domestic Helpers Final Appeals

Statement of the Hong Kong Bar Association

1. The Hong Kong Bar Association ("HKBA") notes the public discussion and debate following the news report that the Department of Justice has made a request to the Court of Final Appeal in the final appeals by foreign domestic helpers pending before the Court of Final Appeal (FACV 19, 20/2012). The request by the Department of Justice is for a reference under Article 158(3) of the Basic Law of the HKSAR to the Standing Committee of the National People's Congress ("NPCSC") seeking an interpretation to clarify certain issues concerning the binding effect of the NPCSC's 1999 interpretation of Articles 22(4) and 24(2)(3) of the Basic Law.
2. The HKBA also notes the statement of the Secretary for Justice on 13 December 2012 that the clarification of those issues by the NPCSC "can facilitate a proper interpretation of the right of abode for *all categories of persons* under BL 24(2) including FDHs".
3. The HKBA has not substantially commented on the Department of Justice's request because the final appeals are still to be heard by the Court of Final Appeal. The HKBA does not regard that it should comment on the merits of the rival arguments when the matter is *sub judice*.
4. However, the HKBA expresses its concern that as the public discussion and debate develops, commentators and interviewees have, in a high-profiled manner:

- (1) raised in the public domain arguments and counter-arguments on the legal merits of the request;
 - (2) made conjectures on the outcome(s) of the request;
 - (3) expressed in strong terms the social and political consequences if the Court of Final Appeal were to rule one way or another; and
 - (4) levelled criticisms on the Secretary for Justice for making the request.
5. Freedom of expression is a cherished value of the society and the mass media in Hong Kong. However, exercise of freedom of expression has to be informed, and against the following background:-
 - (1) The Secretary for Justice has a professional and constitutional responsibility to advance on behalf of the Government all arguments that he, his department and external Counsel (leading and junior, local and overseas) consider to be reasonably arguable, just as counsel for any other party is obliged and expected to do.
 - (2) Whether the Court of Final Appeal should make a reference under Article 158(3) of the Basic Law on the request is patently a legal issue. The Court of Final Appeal, upon receiving the written arguments and hearing the oral arguments of *all* the parties, will come to a view on all the arguments before it independently and impartially, according to law. The Court of Final Appeal, and they alone, will decide whether the request ought to be acceded to on the basis of the law, and of the law alone.
6. The HKBA believes that the Court of Final Appeal will not accept an otherwise legally unmeritorious argument because of political expediency or pressure emanating from one end of the political spectrum. In a similar vein, the Court will not reject an otherwise legally meritorious argument

because of alleged concerns about the perceived demise of the Rule of Law emanating from another end of the political spectrum.

7. The HKSAR has a Judiciary that has been rightly recognised both locally and internationally as being truly impartial, independent and free from corruption, manipulation and political influence. Such recognition demands and deserves the trust and support of the community and media of the HKSAR. When a matter is *sub judice*, high-profiled commentary and conjecture might be perceived to add unnecessary pressure to those concerned, and are best avoided.
8. The HKBA finds it necessary in the present context for it to repeat what it had stated earlier on 10 October 2012 in another context: Any act which interferes, or which may be perceived as interfering, with the independence of the judiciary in Hong Kong, regardless of political affiliation, must be viewed with great circumspection even if otherwise within the letter of the law.

Dated 18th December 2012.

HONG KONG BAR ASSOCIATION

**香港大律師公會對日前律政司司長根據基本法第 158(3)條
在外傭居港權案尋求人大釋法之聲明**

1. 近日媒體報導，律政司司長將在外傭居港權終審上訴(案件編號 FACV 19, 20/2012)聆訊中，建議終審法院根據基本法第 158(3)條提請全國人大常委會(以下簡稱“人大常委會”)解釋《基本法》，以澄清某些關於人大常委會在 1999 年就《基本法》第 22(4)條及第 24(2)(3)條所作的解釋對香港法院的約束力，香港大律師公會留意到公眾對此議論紛紜，各自表述。
2. 香港大律師公會亦留意到律政司司長於 12 月 13 日發出的聲明，指人大常委會對問題的澄清，將有助解決所有《基本法》第 24(2)條下不同類別人士(包括外傭)的居港權問題。
3. 香港大律師公會未有對律政司司長的建議作出實質的評論，皆因有關案件仍有待終審法院裁決，公會不宜對法律理據的是非曲直置評。
4. 然而，隨著公眾討論日益熾熱，有評論員和受訪者高調地提出有關請求提請釋法在法理上正、反兩面的論據，又揣測建議會否被接納，並以強烈的字眼表述提請釋法與否對社會及政治所帶來的後果，更批評律政司司長向終審法院所作的建議。香港大律師公會對此表示關注。
5. 言論自由是社會大眾和傳媒所珍重的價值。可是，行使言論自由的同時，亦須了解事件的情況和背景。首先，代表政府提出所有合理的論據，是律政司司長在專業上和憲法上的責任。終審法院是否按《基本法》第 158(3)條提請人大釋法純屬法律問題。正如代表任何案件當事人的法律顧問一樣，律政司司長本人與其部門、以及所延聘之法律專家(包括本地和海外的資深大律師及大律師)有責任共同磋商，提出一切有合理可辯性的論據，而其他當事人的法律代表團隊亦必會對此提交論據作出抗辯。終審法院在詳細考慮各方法律代表的書面及口述論據後，自會獨立地、公正無私地，以法律作唯一的基礎，對律政司司長的請求依法判決。

6. 大律師公會深信終審法院既不會因為政治上的權宜、或受某一方政權或政客施壓而接受一些於法不合的論據, 但也不會因懼怕其判決或會被另一方政客或其所引起的輿論指控為削弱法治, 而拒絕接納一些符合法理的論據。
7. 大律師公會重申香港特別行政區的司法機構, 一向不偏不倚、廉潔獨立、不受任何政治或其他勢力操控或影響, 廣為本地及海外推崇。 正因如此, 社會各界和傳媒更應對司法機構及其獨立性表示信任和支持, 避免在案件待決期間, 對案件作高調評論或無謂揣測, 以免制造任何不必要的壓力和干擾。
8. 就本次事件, 大律師公會必須重申在 2012 年 10 月 10 日回應另一事件所發出的聲明: 任何干擾司法獨立或可能被視為干擾司法獨立的舉措, 不論政治立場, 即使是不違法, 仍須嚴加防範並慎重處理。

香港大律師公會

2012 年 12 月 18 日