

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 50 OF 2015

BETWEEN

HUDSON TIMOTHY GEORGE LOH (勞亨順), Applicant
a minor suing by HIS FATHER AND
NEXT FRIEND, TIMOTHY LOH (勞天佑)

and

DIRECTOR OF IMMIGRATION 1st Respondent

HONG KONG SPECIAL ADMINISTRATIVE 2nd Respondent
REGION PASSPORTS APPEAL BOARD

Before: Hon Chow J in Court

Date of Hearing: 30 August 2016

Date of Judgment: 25 January 2017

J U D G M E N T

INTRODUCTION

1. The present application for judicial review raises a short question of law of some importance, namely, whether paragraph 2 of the “NPC Explanations” concerning the implementation of the Nationality Law of the People’s Republic of China in the Hong Kong Special Administrative Region creates a distinct class of Chinese nationals consisting of persons falling within the expression “香港中國同胞(Hong Kong Chinese compatriots)”.

2. In what follows:-

(1) the “Nationality Law of the People’s Republic of China” shall be referred to as the “PRC Nationality law”;

(2) the “Explanations of Some Questions by the Standing Committee of the National People's Congress Concerning the Implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region (Adopted at the Nineteenth Session of the Standing Committee of the Eighth National People's Congress on 15 May 1996)” shall be referred to as the “NPC Explanations”.

BACKGROUND FACTS

3. The basic facts relevant for the purpose of present application can be shortly stated as follows.

4. Mr Loh and Ms Yip, both of Chinese descent, were born in Canada. It is not in dispute that they are Canadian, but not Chinese, nationals (see paragraph 11 of Mr Loh’s affirmation filed on 13 April 2015). They have been residing in Hong Kong since 1994 and

1996 respectively. They were married in Hong Kong in 1998. Mr Loh and Ms Yip became Hong Kong permanent residents in 2002 and 2008 respectively following their successful VEPIC applications.

5. Ms Yip took temporary shelter in Canada in April 2003 as a result of the outbreak of SARS in Hong Kong at that time, while Mr Loh remained in Hong Kong. It was while Ms Yip was taking temporary shelter in Canada that Master Loh was born, on 24 July 2003.

6. Master Loh acquired Canadian nationality at birth and was issued a Canadian passport on 5 September 2003.

7. On 28 September 2003, Ms Yip and Master Loh came back to Hong Kong. Master Loh was permitted to remain in Hong Kong initially as a visitor and subsequently as a dependant of Mr Loh. Since coming to Hong Kong in September 2003, Master Loh has continuously been resident and settled, and received education, in Hong Kong. In 2012, Master Loh became a Hong Kong permanent resident following a successful VEPIC application made by Mr Loh on his behalf.

8. On 26 August 2013, Mr Loh made (*inter alia*) an application on behalf of Master Loh for a HKSAR passport. Two bases for contending that Master Loh was a Chinese national were advanced: (i) he was a “Hong Kong Chinese compatriot”, pursuant to paragraph 2 of the NPC Explanations, and (ii) he was a Hong Kong resident of Chinese descent born in Hong Kong, pursuant to paragraph 1 of the NPC Explanations. Pausing here, it is plain that the second basis for Chinese nationality advanced on behalf of Master Loh is unsustainable in view of the fact that he was in fact not born in Hong Kong.

9. The application was refused by the Director of Immigration (“the Director”) by a letter to Mr Loh dated 6 December 2013. The following reason was given in the letter for the view taken that Master Loh was not a Chinese national:

“According to Article 5 of the Nationality Law of the People’s Republic of China (CNL), any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality; but a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality. Based on the information available, we are of the opinion that your child is not a Chinese citizen under the CNL.”

10. Mr Loh’s appeal against the decision of the Director was dismissed by the Hong Kong Special Administrative Region Passports Appeal Board (“the Appeal Board”) on 13 January 2015 without a hearing.

11. The Appeal Board’s reasons for dismissing the appeal can be seen from the following passages in its written “Reasons for Decision”:-

“6 Paragraph 1 of the [NPC Explanations] prescribes that:-

‘Where a Hong Kong resident is of Chinese descent and was born in the Chinese territories (including Hong Kong), or where a person satisfies the criteria laid down in the [PRC Nationality Law] for having Chinese nationality, he is a Chinese national.’

7 Since the Appellant was not born in Hong Kong, the Appellant has to satisfy the criteria laid down in the [PRC Nationality Law] which applies to Hong Kong by virtue of Article 18 of the Basic Law of the HKSAR.

8 Article 5 of the [PRC Nationality Law] provides that:-

‘Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has

acquired foreign nationality at birth shall not have Chinese nationality.’

9 Both of the Appellant’s parents are not Chinese nationals ...

10 Mr. LOH Timothy on behalf of his son, the Appellant, argues that the Appellant is a Chinese national because Paragraph 2 of the [NPC Explanations] states ‘All Hong Kong Chinese compatriots are Chinese nationals ...’, and the Appellant is of Chinese descent. However, the understanding of Mr. LOH on the Paragraph 2 is not correct. Paragraph 2 of the [NPC Explanations] provides that:-

‘All Hong Kong Chinese compatriots are Chinese nationals, whether or not they are holders of the ‘British Dependent Territories Citizens passport’ or ‘British Nationals (Overseas) passport’. With effect from 1 July 1997, Chinese nationals mentioned above may, for the purpose of travelling to other countries and territories, continue to use the valid travel documents issued by the Government of the United Kingdom. However, they shall not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People’s Republic of China on account of their holding the above mentioned British travel documents.’

11 The aforesaid Paragraph 2 aims at explaining to Hong Kong permanent residents who are of Chinese nationality that their status will not be changed to a person of British nationality notwithstanding they are holding ‘British Dependent Territories Citizens passport’ or ‘British Nationals (Overseas) passport’ (BNO). Moreover, the words used in Paragraph 2 are ‘Chinese compatriots’, but not ‘Chinese descent’. If all people of Chinese descent are Chinese nationals as claimed by Mr. LOH, it would be unnecessary to refer to Paragraph 1 of the [NPC Explanations] and the [PRC Nationality Law].”

12. On 13 April 2015, Mr Loh made an application on behalf of Master Loh for leave to apply for judicial review of the aforesaid decisions of the Director and the Appeal Board respectively. The application for leave to apply for judicial review was granted by this court on 7 May 2015.

13. On 24 June 2016, the Appeal Board wrote to inform the court that it would take a neutral stance in the present application for judicial

review. The Appeal Board's attendance at the substantive hearing of this application on 30 August 2016 was excused by the court.

DISCUSSION

14. Notwithstanding the different grounds of judicial review being advanced in the Form 86, it is clear that, ultimately, there is only one legal question the resolution of which will be determinative of the present application for judicial review, namely, whether paragraph 2 of the NPC Explanations creates a distinct class of Chinese nationals consisting of persons falling within the expression “香港中國同胞(Hong Kong Chinese compatriots)”.

15. In my view, the answer to this question is “no”. My reasons are as follows.

16. Under Section 3(2)(a) of the *Hong Kong Special Administrative Region Passports Ordinance*, Cap 539 (“the Ordinance”) the Director shall not issue a HKSAR passport to an applicant unless the applicant has satisfied (*inter alia*) the condition that “he is a Chinese citizen”.

17. The expression “Chinese citizen” is defined in Section 2 of the Ordinance to mean:-

“a person of Chinese nationality under the Nationality Law of the People's Republic of China, as implemented in the Hong Kong Special Administrative Region in accordance with the Explanations of Some Questions by the Standing Committee of the National People's Congress Concerning the Implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region adopted at the 19th

meeting of the Standing Committee of the National People's Congress at the 8th National People's Congress on 15 May 1996”.

18. Hence, in order to qualify as “Chinese citizen” for the purpose of an application for a HKSAR passport, the applicant must show that he is a person of Chinese nationality under the PRC Nationality Law, which is applicable in the HKSAR with effect from 1 July 1997 by virtue of Article 18 of the Basic Law read together with Annex III thereto, as implemented in the HKSAR in accordance with the NPC Explanations.

19. The NPC Explanations are part of the PRC Nationality Law as implemented in the HKSAR and have the same effect as the PRC Nationality Law itself: see *Tse Yiu Hon Patrick (an Infant) v HKSAR Passports Appeal Board*, CACV 351/2001 (28 January 2002), at paragraph 16 *per* Leong CJHC (giving the judgment of the Court of Appeal).

20. Paragraph 1 of the NPC Explanations states as follows:-

“凡具有中國血統的香港居民，本人出生在中國領土(含香港)者，以及其他符合《中華人民共和國國籍法》規定的具有中國國籍的條件者，都是中國公民。

(Where a Hong Kong resident is of Chinese descent and was born in the Chinese territories (including Hong Kong), or where a person satisfies the criteria laid down in the Nationality Law of the People's Republic of China for having Chinese nationality, he is a Chinese national.)”

21. It is clear that, by paragraph 1 of the NPC Explanations, there are two broad categories of persons who may qualify as “Chinese nationals” under the PRC Nationality Law as implemented in the HKSAR:-

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- (1) where the person is a Hong Kong resident of Chinese descent and was born in the Chinese territories (including Hong Kong); and
- (2) where the person satisfies the criteria laid down in the PRC Nationality Law for having Chinese nationality.

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22. Although Master Loh is a Hong Kong resident of Chinese descent, he cannot qualify as a Chinese national under (1) above because he was born, not in the Chinese territories (including Hong Kong), but in Canada.

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23. Neither can he qualify as a Chinese national under (2) above, because he does not satisfy the the criteria laid down in PRC Nationality Law for having Chinese nationality.

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24. In this regard, it may be noted that the PRC Nationality Law lays down various classes of persons who may qualify for “Chinese nationality”. In particular:-

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(1) Article 4 states:

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“父母雙方或一方為中國公民，本人出生在中國，具有中國國籍。

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(Any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.)”

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(2) Article 5 states:

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“父母雙方或一方為中國公民，本人出生在外國，具有中國國籍；但父母雙方或一方為中國公民並定居在外國，本人出生時即具有外國國籍的，不具有中國國籍。

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(Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.)”

(3) Master Loh does not come within either Article 4 or Article 5, because neither of his parents is a Chinese national.

(4) For the sake of completeness, I should mention that there is another article in the PRC Nationality Law, namely, Article 6, which prescribes a further class of persons as having Chinese nationality at birth, but that article has no relevance to the present case because it relates to persons whose parents are stateless or of uncertain nationality.

25. It is presumably for the above reasons that the applicant is driven to argue that paragraph 2 of the NPC Explanations creates a further class of Chinese nationals consisting of persons falling within the description “香港中國同胞 (Hong Kong Chinese compatriots)”. In my view this argument involves a mis-reading or misunderstanding of the purpose and effect of paragraph 2 of the NPC Explanations.

26. Paragraph 2 of the NPC Explanations states as follows:-

“所有香港中國同胞，不論其是否持有‘英國屬土公民護照’或者‘英國國民(海外)護照’，都是中國公民。自 1997 年 7 月 1 日起，上述中國公民可繼續使用英國政府簽發的有效旅行證件去其他國家或地區旅行，但在香港特別行政區和中華人民共和國其他地區不得因持有上述英國旅行證件而享有英國的領事保護的權利。

(All Hong Kong Chinese compatriots are Chinese nationals, whether or not they are holders of the ‘British Dependent Territories Citizens passport’ or ‘British Nationals (Overseas) passport’. With effect from 1 July 1997, Chinese nationals mentioned above may, for the purpose of travelling to other countries and territories, continue to use the valid travel documents issued by the Government of the United Kingdom. However, they shall not be entitled to British consular protection in the Hong Kong Special administrative Region and other parts of the People's Republic of China on account of their holding the above mentioned British travel documents.)”

27. To properly understand the purpose and effect of paragraph 2 of the NPC Explanations, it is necessary to have regard to the legislative intent behind those explanations. For this purpose, I have been referred to what have been described as the *travaux preparatoires* of the NPC Explanations, in particular:-

- (1) the recommendation (“the PC Recommendation”) made by the Legal Sub-group of the Preparatory Committee for the HKSAR on 23 March 1996 to the effect that the NPCSC should render an interpretation on the application of the PRC Nationality Law to the HKSAR;
- (2) Mr Lu Peng’s speech in March 1996 explaining the PC Recommendation; and
- (3) Mr Qiao Xiaoyang’s speech on 7 May 1997 explaining the legislative intent behind the NPC Explanations.

28. For the purpose of the present discussion, I consider it sufficient for me to merely refer to a part of the speech of Mr Qiao quoted by A Cheung J (as he then was) in *Azan Aziz Marwah v Director of Immigration* [2009] 3 HKC 185, at paragraph 12, as elaborating on the legislative intent behind the NPC Explanations, as follows:-

“ Due to historical reasons, the nationality status of Hong Kong residents is quite complicated. At present, apart from the British Dependent Territories Citizens’ Passport and the British National (Overseas) Passport issued by the British Government, many Hong Kong residents of Chinese descent are holders of passports issued by other countries. In 1990, the British Government, in breach of its promise, implemented the so-called *British Nationality Selection Scheme* and unilaterally decided to grant British citizenship to 225 000 Chinese compatriots residing in Hong Kong. This made the nationality issue of Hong Kong residents even more complicated ...

To maintain the stability and prosperity of Hong Kong and to ensure the smooth implementation of the *Nationality Law*, and in view of the historical background and the reality of Hong Kong, the Standing Committee of the National People’s Congress should make a legal interpretation on the problems concerning the implementation of the *Nationality Law* in the Hong Kong Special Administrative Region in accordance with the provisions of the *Nationality Law*, the *Basic Law* and the usual practice of the State in handling the nationality issue of Hong Kong residents... The Draft Interpretation is explained as follows.

1. Questions concerning the Chinese nationality of Hong Kong residents

In accordance with the *Nationality Law of the People’s Republic of China*, all Chinese compatriots residing in Hong Kong are Chinese nationals. As the majority of Hong Kong residents are of Chinese descent and were born in the territory of China, they should have Chinese nationality. Therefore, regarding the acquiring of Chinese nationality, Article 1 of the Draft Interpretation, based on the relevant provisions of the *Nationality Law*, provides a more explicit explanation which reads ‘Where a Hong Kong resident is of Chinese descent and was born in the Chinese territories (including Hong Kong), or where a person satisfies the criteria laid down in the *Nationality Law of the People’s Republic of China* for having Chinese nationality, he is a Chinese national.’ This interpretation, which is in line with the basic principle prescribed by the Nationality Law of taking the doctrine of descent (*jus sanguinis*) as the first consideration and integrating with the doctrine of the place of birth (*jus soli*), provides a more objective standard for ascertaining the Chinese nationality of Hong Kong residents in a simple and convenient way.

2. Questions concerning the status of ‘British Dependent Territories Citizens’ and the British citizenship granted under the ‘British Nationality Selection Scheme’

Problems concerning the status of Hong Kong residents who are ‘British Dependent Territories Citizens’ were resolved in the Exchange of Memoranda between the governments of the two countries when the Sino-British Joint Declaration was signed. Regarding the ‘British Nationality Selection Scheme’, China has already stated clearly that the British citizenship of Chinese national residing in Hong Kong granted under the ‘British Nationality Selection Scheme’ shall not be recognized. Articles 2 and 3 of the Draft Interpretation seek to settle these two questions in a legal manner.

3. Questions concerning the foreign travel documents held by Chinese nationals residing in Hong Kong

At present, some Chinese compatriots in Hong Kong hold foreign passports for the convenience of travelling. Article 4 of the Draft Interpretation particularly deals with this situation. According to the Article, in ascertaining the Chinese nationality of Hong Kong compatriots, the question of whether they are holders of foreign passports shall not be considered. In practice, their foreign passports are regarded only as a travel document and they are allowed to continue to use them for the purpose of travelling to other countries or regions. But such travel documents shall have no legal effect in demonstrating nationality status in the Hong Kong Special Administrative Region (HKSAR) and any other part of the People’s Republic of China. This is a concrete manifestation of the basic principle of the *Nationality Law* of not recognizing dual nationality as applied to the HKSAR and a flexible and practical provision that facilitates the exit and entry of Hong Kong residents. This will have a positive effect on maintaining Hong Kong’s status as a free port and an international financial and trade centre, as well as the stability and prosperity of the Hong Kong community.

...

The Nationality Law has express provisions on how to handle applications for Chinese nationality by Hong Kong residents who are not Chinese nationals. The competent authorities of the Hong Kong Special Administrative Region that handle nationality applications may handle such applications in accordance with the *Nationality Law* and this Interpretation.”

29. The legislative intent behind the NPC Explanations is clear, and is encapsulated in its preamble, namely, to apply or implement the PRC Nationality Law in the HKSAR after 1 July 1997 “[t]aking into account the historical background and the existing circumstances of Hong

Kong” as alluded to in Mr Qiao’s speech. In particular, the PRC Nationality Law is to be applied in the HKSAR for determining who would be regarded as “Chinese nationals” subject to one clarification or extension, namely, that a Hong Kong resident of Chinese descent who was born in the Chinese territories (including Hong Kong) would be so regarded. As observed by Leong CJHC in *Tse Yiu Hon Patrick*, at paragraph 18, the clarification or extension of Chinese nationality is applicable only to those persons as specified in paragraph 1 of the NPC Explanations.

30. In this regard, it may be noted that without this clarification or extension, there could potentially be an issue as to whether a Hong Kong resident of Chinese descent who was born in Hong Kong can be regarded as a Chinese national under the PRC Nationality Law because, as earlier observed, acquisition of Chinese nationality at birth under Articles 4 or 5 thereof requires proof that one or both parents of the person is/are Chinese national(s). The latter question is itself a matter of some complication in view of the historical background and circumstances of Hong Kong.

31. In relation to the expression “香港中國同胞(Hong Kong Chinese compatriots)” appearing in paragraph 2 of the NPC Explanations, as pointed out by Yeung J (as he then was) in *Tse Yiu Hon Patrick (an Infant) v HKSAR Passports Appeal Board*, HCAL 1240/2000 (17 January 2001):-

- (1) “同胞”是普遍用語，指具有相同血緣的人或同一國家的人 (“Compatriots” is a general term which refers to people of the same consanguinity or the same country); and

(2) “該解釋”第二條第一段中之“香港中國同胞”所指的是在香港定居及擁有中國國籍的香港同胞 (“Hong Kong Chinese compatriots” as referred to in line 1 of Clause 2 of “the Explanations” are the Hong Kong compatriots who are settled in Hong Kong and have Chinese nationality).

32. So understood, it is clear that the purpose of paragraph 2 of the NPC Explanations is to deal with the status of “British Dependent Territories Citizens” or “British Nationals (Overseas)” passports held by “香港中國同胞(Hong Kong Chinese compatriots)”, but not to create a further class of Chinese nationals consisting of persons falling within that expression. Paragraph 2 of the NPC Explanations makes it clear that such persons shall be regarded as Chinese nationals, irrespective of whether or not they are holders of the “British Dependent Territories Citizens passport” or “British Nationals (Overseas) passport”, and therefore they will not be entitled to British consular protection in the HKSAR and other parts of the PRC on account of their holding such documents. This reading of paragraph 2 of the NPC Explanations is consistent with Point 2 of Mr Qiao’s speech quoted above.

33. To read paragraph 2 of the NPC Explanations as creating a further class of Chinese nationals consisting of persons falling within the expression “香港中國同胞(Hong Kong Chinese compatriots)” as contended by Mr Hectar Pun SC would be inconsistent with the clear meaning and effect of paragraph 1 of the NPC Explanations which, in my view, exhaustively defines two categories of persons as being Chinese nationals in so far as the implementation of the PRC Nationality Law in the HKSAR is concerned.

34. In all, I am of the view that the Director is correct in law in rejecting the application made on behalf of Master Loh for a HKSAR passport, and the Appeal Board is correct in law in dismissing the appeal against the Director's decision.

35. In passing, I should point out that, as mentioned by Mr Johnny Mok SC (for the Director), Master Loh can apply to be naturalized as a Chinese national pursuant to Article 7 of the PRC Nationality Law. It may be that Master Loh will not be able to retain his Canadian nationality if he decides to be naturalized as a Chinese national in view of Article 8 of the PRC Nationality Law. That issue was expressly left open by Mr Mok, and is not one which I need to decide in the present case.

DISPOSITION

36. For the forgoing reasons, the present application for judicial review is dismissed.

37. For the sake of completeness, I should also dispose of the Director's summons issued on 25 August 2015 seeking to set aside the leave to apply for judicial review granted by this court on 7 May 2015 on the grounds of material non-disclosure and/or that the present application for judicial review is not reasonably arguable. At the hearing on 30 August 2016, Mr Mok on behalf of the Director confirmed that the Director would not pursue the application to set aside on the ground of material non-disclosure. Although I have reached a clear conclusion in favour of the Director in the present application for judicial review after having the benefit of considering the full submissions of Mr Mok, I do not

consider the point raised on behalf of Master Loh to be so devoid of merits that it is not reasonably arguable. I would therefore dismiss the Director's summons dated 25 August 2015.

38. On the question of costs, instead of making separate costs orders in relation to the application for judicial review and the Director's summons dated 25 August 2015, I make a costs order *nisi* that the applicant shall pay the Director 85% of his total costs incurred in these proceedings, to be taxed if not agreed.

39. The applicant's own costs are to be taxed in accordance with legal aid regulations.

(Anderson Chow)
Judge of the Court of First Instance
High Court

Mr Hectar Pun, SC, instructed by Daly & Associates, assigned by Director of Legal Aid, for the applicant

Mr Johnny Mok, SC and Mr Jonathan Chang, instructed by Department of Justice, for the 1st respondent

The 2nd Respondent – attendance be excused with leave of the Court dated 29 June 2016