

Enforcing the Right to Family Life in Hong Kong Courts: The Case of Dependant Policy

Matthew Chuen Ngai **Tang***
The Chinese University of Hong Kong

Abstract

Despite the Hong Kong courts' seemingly robust protection of fundamental rights and civil liberties, enforcing family rights remains extremely difficult. While the right to family life is safeguarded by both domestic and international human right instruments, applicants in judicial review cases are usually not able to rely on it to challenge the decisions made by the immigration authority. This paper examines the challenges in enforcing the right to family life in Hong Kong's Dependant Policy with a particular focus on the Hong Kong Court of Appeal's recent decision in *BI v Director of Immigration*. The immigration reservation, entered into by the United Kingdom when ratifying the International Covenant on Civil and Political Rights, has become a justification for a restrictive immigration regime even after the transfer of sovereignty. The Hong Kong courts also repeatedly accord wide discretion to immigration authority. The courts' reluctance to scrutinize socio-economic policies reveals one of the key weaknesses in

enforcing fundamental rights in Hong Kong by the way of judicial review.

Keywords: *human rights, Hong Kong legal system, right to family life, international covenant on civil and political rights, administrative law, dependant policy*

1. Introduction

A wide range of civil liberties and rights are contained in the Hong Kong Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383) (“HKBORO”). The Hong Kong courts have taken up the “unenviable task of safeguarding” these civil liberties (Yap, 2007: 499). In *W v Register of Marriage*, Chief Justice Ma affirmed that Hong Kong Courts have the obligation to enforce and interpret the Basic Law¹. The courts’ effectiveness in enforcing fundamental rights is well recognized. The Hong Kong Court of Final Appeal, for example, has been described as “the only political organ that has succeeded in continually resisting Beijing in the constitutional history of the People’s Republic of China” (Ip, 2014: 825).

Given Hong Kong’s common law heritage, the courts frequently refer to international human rights instruments and case law from foreign jurisdictions when interpreting the Basic Law and the Hong Kong Bill of Rights. The reliance on comparative law ensures that the decisions of the courts can “reflect adherence to the rule of law in accordance with internationally adopted judicial standards” (Mason, 2007: 303). In *R v Sin Yau Ming*, Silke VP affirmed that case law from common law jurisdictions with “a constitutionally entrenched Bill of Rights” and the decision of the European Court of Human Rights can offer guidance to the Hong Kong courts when constructing the Hong Kong Bill of Rights².

And yet, despite the courts' seemingly robust protection of fundamental rights and frequent reference to international human rights jurisprudence, enforcing certain fundamental rights remain difficult³. This is especially true when the legislature or executive has formulated socio-economic policies that potentially interfere with certain human rights. The courts are reluctant to "adjudicate on the merits or demerits" of government policies⁴. In *Fok Chun Wa v Hospital Authority*, the Court of Final Appeal confirmed that "more leeway" will be given to the legislature and the executive when examining legislation or executive decision that does not involve "disregard for core-values"⁵.

Such position has rendered the enforcement of the right to family life impossible. While family rights are protected by both domestic and international instruments, the long-standing position of the Hong Kong Immigration Department is that "very restrictive and stringent immigration policies" will be adopted. The city's "physical and social-economic constraints" such as "small geographical size" and "large population" hinder its capacity to accommodate new immigrants⁶. The Hong Kong courts have repeatedly affirmed such position, stating that they will only exercise supervisory jurisdiction when reviewing the decision of the Director of Immigration ("the Director"). While applicants of numerous judicial review cases have relied on the right to family life to challenge the Director's decisions, the courts rarely enforce such right.

This essay examines the challenges in enforcing the right to family life in Hong Kong's Dependant Policy with a particular focus on the Court of Appeal's recent decision in *BI v Director of Immigration*⁷. The ruling on *BI* is not only a classic illustration of the court's insistence to adopt a narrow and restrictive approach when reviewing public policies, but also showcases the difficulties to rely on the Bill of Rights Ordinance and international treaties in immigration matters. The courts'

reluctance to scrutinize socio-economic policies reveals one of the key weaknesses in enforcing fundamental rights in Hong Kong by way of judicial review. The Court of Appeal's refusal to apply related cases in foreign common law jurisdictions also indicates that the Hong Kong Courts are willing to depart from international human rights jurisprudence.

This essay will be divided into the following sections. Section 2 outlines a brief history of judicial review cases regarding rights to family life. Section 3 introduces the background of *BI v Director of Immigration* and the Dependant Policy, and provides an overview on the important aspects of the Court of Appeal's judgement. Section 4 evaluates the implications of the *BI* judgement.

2. Right to Family Life: History, Restriction and Enforcement

Before looking into the Court of Appeal's ruling in *BI*, it is necessary to first examine the overall context for enforcing family rights in judicial review cases in Hong Kong. The Basic Law, the Hong Kong Bill of Rights Ordinance (Cap. 383) ("BORO"), International Covenant on Economic, Social and Cultural Rights ("ICESCR") and Convention on the Rights of the Child ("CRC") all contain different languages to safeguard different aspects of the right to family life.

Article 37 of the Basic Law protects Hong Kong residents' rights to "raise a family freely". Article 19 of the Bill of Rights Ordinance recognizes family as "the natural and fundamental group unit of society" and hence is entitled to State protection. It also protects the rights of citizens to "found a family". Article 20 offers additional protection to children in accordance to their status as minors. Article 10 (1) of the ICESCR emphasizes that family deserves the "widest possible protection and assistance".

The Convention on the Rights of the Child has the most extensive provision on a child's right to live with his or her family. Article 9 (1) states that a child shall not be separated from his or her parents without the determination of competent authority that such separation is "necessary for the best interest of the child". Article 10 (1) specifically requires the State Parties to adopt a "positive, humane and expeditious" approach when dealing with application by a child or the parents to "enter or leave a State Party for the purpose of family reunification". Article 10(2) sets an even higher standard, stating that State Parties "shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country".

Given the seemingly wide protection on the right to family life in both domestic and international instruments, it is perhaps quite unusual that the applicants are usually not able to rely on the right to family life in judicial review cases. There are five major hurdles that prevent the applicants from relying on the right in immigration cases:

1. The immigration reservations in place in the Bill of Right Ordinance and Convention on the Rights of the Child.
2. The inability for applicants without the right to remain in Hong Kong to rely on the Basic Law regarding family rights.
3. The inability of applicants who are Hong Kong residents to rely on the above-mentioned instruments to contest a decision made against their relatives by the Director.
4. The Courts' tendency to review the Director's decision in accordance with Hong Kong's need for strict immigration control.
5. The unincorporated status of ICESCR and CRC.

2.1. *The Effect of Immigration Reservation*

The immigration reservation entered into by the United Kingdom when ratifying International Covenant on Civil and Political Rights (“ICCPR”) is expressed in section 11 of the Hong Kong Bill of Rights Ordinance which states that:

“As regards persons **not having the right to enter and remain in Hong Kong**, this **Ordinance does not affect any immigration legislation governing entry into, stay in and departure** from Hong Kong, or the application of any such legislation.” (emphasis added)

2.1.1. *Persons without the rights to enter or remain in Hong Kong*

Some of the early judicial challenges involving right to family life were lodged right after the Bill of Right Ordinance was enacted in 1991. In *R v Director of Immigration Ex parte Wong King-lung*⁸, applicants sought to invoke the right to family life and right of the child under the BORO to challenge against a deportation order made by the Director. The High Court had to determine if the s.11 reservation excludes persons without the rights to enter and to remain in Hong Kong and their family members with right of abode from relying on family rights. Jones J stated that the legislative intention is the key to determine the construction of the s.11 reservation. As the language of s.11 is “clear and unambiguous”⁹ and the reservation made by the UK government does not contravene the “objective and the intention of ICCPR”¹⁰, the intent of s.11 is to effectively exclude the application of BORO when concerning the “entry, stay and removal” of persons without right of abode under the Immigration Ordinance¹¹.

The reservation was given similar construction in *Hai Ho-tak v Attorney General*¹². While Mortimer JA admitted that the deportation of

a 6.5-year-old child from his family and the removal of a mother from a family of five children may constitute “a seriously arguable infringement” on article 14 and article 19 rights¹³, he, nevertheless, stated that “it is clear beyond argument” that s. 11 amounts to a blanket refusal for applicants without the right to enter or to remain in Hong Kong to rely on the right to family life in BORO¹⁴. Nazareth JA, using similar logic of Jones J in *Wong King-lung*, stated that s.11 should be given its “ordinary or literal meaning” as the language if the reservation is not “ambiguous or obscure”¹⁵.

2.1.2 Family members with right to remain

Not only does the s.11 reservation affects persons without the right of abode in Hong Kong, it also prevents family member with the right of abode or right to reside from relying on the BORO to challenge immigration decisions. In *Wong King-lung*, Jones J simply stated that s.11 make no reference as to the right of family members, who are Hong Kong residents, to apply relevant provisions of the BORO when challenging decisions “under the Immigration Ordinance” which concern the “entry, stay and removal of persons who do not have the right of abode in Hong Kong”¹⁶.

The court gave a more detailed explanation in *Hai Ho-tak* as to why family members are barred from enforcing their relevant rights under BORO. Mortimer JA pointed out that “a strange if not absurd” result will occur if family members are able to enforce those rights to challenge immigration decisions¹⁷. He argued that as the person who is “most affected” by the Director’s decision is unable to invoke his or her rights under BORO, it would be absurd if those who are “closely but less affected” by the same decision are able to rely on similar rights¹⁸. Nazareth JA further pointed out that the gist of s.11 is that BORO cannot “affect the application” of immigration legislation that governs “the entry

into, stay in and departure from Hong Kong of a person who does not have the right to enter and remain in Hong Kong” regardless of the immigration status of the person who seeks to invoke relevant BROR rights¹⁹. The family member’s own family rights are still being safeguarded by BORO individually. The enforcement of such rights, however, will not affect the Director’s decision under the Immigration Ordinance regarding person without right to enter or to remain²⁰.

Hai Ho-Tai is still regarded as the authoritative case regarding the effect of the s.11 reservation on family member’s reliance on BORO rights in immigration decisions. In *Chan Mei Yee v Director of Immigration*²¹, Cheung J refused the proposition to limit the application of s.11 reservation to cases that “do not involve family members”²². He pointed out that such construction is not acceptable given “wide” wordings of the reservation²³. He emphasized that he is bound by *Hai Ho-Tai* when evaluating different approaches to enforce rights in international covenants²⁴.

2.1.3. A blanket exclusion of family rights in all immigration cases

In *Comilang Milagros Tecson v Commissioner of Registration & Ors*²⁵, Lam J upheld the construction of s.11 in *Hai Ho-Tak*, stating that the same principle “is also applicable in respect of other manifestation of the immigration reservation”²⁶. In other words, while *Hai Ho-Tak* concerns challenge against a deportation order, the effect of s.11 reservation will be the same in other immigration cases, such as a challenge against the Director’s refusal to change the immigration state for a person without the right of abode. He further pointed out that the right to family life is not absolute in immigration cases. If the rights to family life is allowed to trump other considerations, immigration control will be compromised²⁷.

It is also worth noting that the s. 11 reservation not only affects the applicants' reliance on BORO rights only, but also prevents them from invoking the rights protected by the Basic Law. In *Santosh Thewe v Director of Immigration*²⁸, Stock J held that the provisions in the Basic Law, in this case article 37, "cannot be looked at in a vacuum"²⁹. The enforcement of article 37 should be considered in light of article 39 which specifically stated that only provisions of ICCPR "as applied in Hong Kong" shall remain in force³⁰. Drawing on *SJ v Oriental Press Group*³¹, he stated that rights guaranteed by the Basic Law can be subjected to restriction³². The immigration reservation made by the United Kingdom when ratifying the ICCPR should be considered as a restriction of rights that is "prescribed by law" under article 39³³. The immigration reservation constitutes a restriction on the enforcement of article 37 rights. Stock J, however, did not deal with the question of whether the Immigration reservation constituted a blanket exclusion of article 37 rights in immigration cases.

2.2. The Basic Law in Immigration Cases: Reliance and Construction of Article 37

As mentioned above, Stock J's ruling in *Santosh Thewe* prevented even residents from relying on article 37 in immigration cases. As for non-residents, article 41 of the Basic Law states that non-Hong Kong residents can only enjoy the rights guaranteed in Chapter III of the Basic Law "in accordance of with law". While some fundamental rights, such as freedom from torture, will be available to all persons in Hong Kong, other rights must be subjected to a "purposeful construction" in light of the context of the Basic Law as a whole before extending to non-Hong Kong residents³⁴. Persons without right of abode in Hong Kong will not be able to rely on article 37 given that family rights are not absolute³⁵.

The court conducted a more specific examination on the content and the enforcement of article 37 in *Gurung Deu Kumari & anor v Director of Immigration*³⁶. Cheung J considered that even an “over-stayer who was previously permitted to enter and remain in Hong Kong” is included in article 41 and therefore can “indirectly invoke” article 37 rights “in accordance with law”³⁷. There is a distinction between applicants who have successfully sought immigration clearance previously and those who do not have the right to enter or to remain in the city. Therefore, Cheung J suggested that even if the applicants’ right to remain in the city has already expired, they are not affected by the s11 immigration reservation. The difficulty to enforce article 37, however, goes far beyond the immigration status of the applicant, the courts also adopted a restrictive approach when constructing article 37.

Cheung J stated that although the applicants, despite being a foreigner, may be able to rely on article 37, it should be interpreted narrowly. Cheung J pointed out that the Chinese version of article 37 of the Basic Law has more restrictive wordings³⁸. The Chinese version of article 37 provides:

“香港居民的婚姻自由和自願生育的權利受法律保護”³⁹

Similar to the English version, the first part of the article talks about Hong Kong residents’ freedom of marriage (婚姻自由). The second part of the Chinese article contains the term “自願生育的權利” which correlates with the term “to raise a family freely” in the English version; Cheung J concluded that the term “自願生育的權利” has a more restrictive meaning as it refers to “the right to procreate and to foster children voluntarily”⁴⁰. Cheung J noted that the purpose of article 37 is to exempt Hong Kong residents from the One Child Policy adopted by the People’s Republic of China. The term “right to procreate and to

foster children voluntarily” is to be contrasted with “the duty to practice family planning” required by article 45 of the Constitution of the People’s Republic of China⁴¹.

He further concluded that the English version “sits comfortably well” with the wordings of the Chinese version⁴². Hence, the proper construction of article 37 has nothing to do with taking care of one’s parents or spouse. Article 37 does not even concern the “formation or maintenance of a family comprising a parent and a child”⁴³. He indicated that such family right is protect by BORO but by not article 37 of the Basic Law⁴⁴.

In *Li Nim Han*, Lam J adopted Cheung J’s approach in *Gurung Deu Kumari*. He concluded that the Chinese version of article 37 “has nothing to do with spousal relationship” or the “right of the child to paternal support”⁴⁵. Refusing to interpret article 37 with a boarder scope, he pointed out that the implied immigration reservation in article 39 support the current narrow interpretation of article 37⁴⁶. Lam J also classified Article 37 as “more specific and limited in scope”⁴⁷ than article 8 of the European Convention on Human Rights.

2.3. Tiger without Teeth: Enforcement of ICESCR in Immigration Cases

Unlike ICCPR and CRC, the United Kingdom did not enter into similar immigration reservations for Hong Kong during ratification. There are two major difficulties when enforcing ICESCR rights: (1) its unincorporated status; (2) its so-called “promotional nature”.

As Hong Kong adopts the dualist legal system, any international covenant must be incorporated by domestic legislation before they can be enforced. As noted in the discussion below, the courts have repeatedly ruled that ICESCR has not been incorporated into a piece of domestic legislation. Instead, different provisions contained in the ICESCR have

been incorporated into various relevant ordinances separately. The lack of a centralized domestic legislation regarding ICESCR has made the reliance on the Covenant challenging. The applicants could not simply rely on the provisions in ICESCR, but often have to argue that the provisions they relied on has been incorporated into a specific ordinance.

Cheung J first affirmed the promotional nature of ICESCR in *Chan Mei Yee*. Drawing on various academic sources, he highlighted the progressive nature of the Covenant with reference to article 2 of the ICESCR which required State Parties to achieve the “full realization” of the ICESCR rights “progressively”, subjected to the “maximum” of the State Parties’ available resources⁴⁸. It is worth noting that he also considered ICESCR capable of being a framework for the government to formulate its decisions or discretions⁴⁹. He, however, stressed that he was bound by *Hai Ho-Tak* in which Godfrey JA ruled that the Director is “entitled to formulated lawful decision” to uphold strict immigration control even if there is no immigration reservation in BORO. The applicants, therefore, were not able to establish a legitimate expectation regarding family rights based on HKSAR’s ICESCR obligations⁵⁰.

Relying on the decision in *Chan Mei Yee*, Hartmann J further pointed out that the Hong Kong government, based on the informed opinion of the Director, is unable to “guarantee the rights protected by the Covenant” when it comes to immigration matters in *Chan To Foon & Anor v Director of Immigration*⁵¹. He added that ICESCR will only be considered as an aspiration about what can be achieved in the future. ICESCR may only be given “due consideration” by public decision makers in immigration matters when “the social imperatives permit”⁵². ICESCR, therefore, cannot be relied on by applicants in immigration matters.

2.4. Immigration Reservation and the CRC

Similarly, the applicants are unable to rely on the Convention on the Rights of the Child in immigration because of its unincorporated status and the immigration reservation in place. The reservations made by the People's Republic of China when ratifying the CRC is also binding to Hong Kong. The immigration reservation allows the Hong Kong government to continue to enforce legislation that governs the "entry into, stay in and departure from" Hong Kong for "those who do not have the right [to enter or remain in Hong Kong]"⁵³. Based on this reservation, Lam J refused to allow the applicants in *Comilang* to rely on CRC⁵⁴.

2.5. The Wide Discretion of the Director

The central difficulty for enforcing the right to family life is that the courts adopted a restrictive approach when reviewing the Director's decision. Following the long line of authorities, the courts have recognized the need for the Director to adopt highly restrictive immigration control policies. The courts almost always accept the Director's submission that Hong Kong's "unique circumstances" call for restrictive policies despite the lack of concrete evidence provided by the Director. The courts are cautious as they worry that their decision may have an immense impact on the city's population strategy⁵⁵. In the words of Lam J, the courts must resist the temptation to "grant relief on an individual basis"⁵⁶. Unlike the Director, the courts consider themselves ill-equipped to assess the impact of any changes in immigration policies. As mentioned in the above section, the courts tend to interpret the legal instruments narrowly when it comes to immigration matters.

The courts also accepted that the Director has no duty to consider humanitarian grounds in his decision making. More importantly, the

Director's refusal to regard humanitarian considerations is not usually subjected to judicial review. Such position was based on Li CJ's ruling in *Lau Kong Yung & Others v Director of Immigration*⁵⁷ in which he affirmed that section 13 of the Immigration Ordinance (Cap. 311) "imposes no statutory duty of any kind upon the Director"⁵⁸ except to operate an immigration control system in accordance with the Ordinance. The Director has the authority to take humanitarian considerations into account, but he can exercise this discretion as he sees fit. To be precise, Li CJ was dealing with a challenge against the Director's deportation orders when he concluded that humanitarian grounds were not mandatory considerations required by law. It is also worth noting that Li CJ specifically pointed out that the applicants in *Lau Kong Yung* did not seek to challenge the Director's refusal to consider humanitarian grounds⁵⁹.

3. Background of *BI v Director of Immigration*

The Court of Appeal's decision in *BI v Director of Immigration* is constructed in accordance with the above-mentioned authorities. The appeal was bought by the Director after the Court of First Instance quashed two decisions refusing to grant dependant visa to the applicants in *BI v Director of Immigration*⁶⁰ and *BH v Director of Immigration*⁶¹. The 1st applicants of two cases, *BI* and *BH*, are non-Chinese nationals who have been convicted of "breach of condition of stay" and other immigration offences⁶². Both lodged their claims under Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") and their claims were subsequently rejected. Both married a Hong Kong permanent resident or a person with the right to land and reside in Hong Kong⁶³. The director rejected both of their DV applications as they failed the "no record" requirement⁶⁴. The judges in

the lower court adopt two different approaches in reviewing the Director's decisions. While Zervos J in *BI* (CFI) concluded that the applicants' family circumstances should be treated reasonably, Chow J in *BH* (CFI) maintained that the Director has no duty to take the applicants' family circumstances into account. Chow J quashed the rejection due to the wordings of paragraph 5 of the Guidebook. The appeal mainly concerns with the proper construction of the Dependant Policy. The two main issues are:

- (1) Whether or not the Director has the public law duty to take the applicant's right to family life into account when formulating his decision in DV applications.
- (2) Whether or not the "no record" requirement under the policy is an eligibility criterion in which a failure to comply with the requirement will amount to a rejection of the application.

3.1. The Dependant Policy

The Director's Dependant Policy is outlined in *The Guidebook for Entry for Residence as Dependants in Hong Kong* ("the *Guidebook*"). Paragraph 3 and 4 outlined the types of dependants who can apply for dependant visa to join their sponsor to stay in Hong Kong. If the applicant fits into the categories in paragraph 3 or 4, they can submit an application to the Director⁶⁵. Paragraph 5 stated that their application "**may be favorably considered** if":

- (1) There is reasonable proof of a **genuine relationship** between the applicant and the sponsor ("genuine relationship" requirement).
- (2) There is **no known record to the detriment** of the applicant ("no record" requirement).

- (3) The sponsor is able to **support the dependant’s living at a standard well above the subsistence level** and provide him/her with suitable accommodation in the HKSAR (financial requirement) (emphasis added).

3.2. *The Court of Appeal’s Ruling*

The Court of Appeal upheld that the 3 requirements stated in paragraph 5 of the *Guidebook* are eligibility criteria that the applicants must fulfill in DV application. As the factors listed in paragraph 5 are connected to the eligibility criteria listed in paragraph 3, they must also be essential if the paragraph 3 criteria are to be considered as essential⁶⁶. The court pointed out that as the “genuine relationship” requirement and the financial requirement have been considered as essential requirements by the courts, an “internal inconsistency” will arise if the “no record” requirement is not considered as essential⁶⁷. The judges also rejected the applicants’ reliance on the phrase “may be favorably considered” in paragraph 5. The term is “an enabling term” that “trigger” the Director to consider the application once all the criteria are met⁶⁸.

The Court stressed that the “starting point” to construct the Dependant Policy should be the Hong Kong’s need for strict immigration control policies⁶⁹. The Dependant Policy is never a policy for general family reunion for spouse and children of Hong Kong residents⁷⁰. The Court accepted the Director’s submission that there is currently “no establish guideline and policy” for family reunion. The core of the Dependant Policy is not family ties or marriage, but dependency. To be successful in the application, the applicant must be “genuinely dependent on” the sponsor’s “maintenance, support and other requirement”⁷¹. The court pointed to the various restrictions found in paragraph 2-4 of the *Guidebook*, such as the exclusion of Mainland Chinese residents and the exclusion of family members other than

spouse, dependent children and parents over 60 years old, to illustrate that the policy does not intent to facilitate general family reunion. The court also refused to review the *Legislative Council Brief: "Immigration Policy on Entry of Dependants"* ("LegCo Brief") submitted by the applicants⁷². The applicants originally sought to rely on the LegCo Brief to argue that the legislative intent of the policy includes family reunion.

Given the courts' restrictive attitude towards the right to family life, the applicants in *BI* did not rely heavily on the above-mentioned domestic and international instruments. The applicants' main ground of argument is that the Director is bounded by the common law right to family life which cannot be restricted by s11 immigration reservation⁷³. Drawing from Sedley LJ's dictum in *R (Aguilar Quila) v Secretary of State for the Home Department*⁷⁴, the applicant argued that the right to family life, "in the eyes of the common law", should enable spouses to "live together" and that the state will need strong reasons before exiling a spouse's right to marry and "embark on family life"⁷⁵. The court rejected the submission stating the common law in Hong Kong has not enabled the "right not to be exiled" from family life to override immigration control policies⁷⁶. The common law position regarding the right to family life in Hong Kong is reflected by the long line of authorities that limited its application and the existence of the immigration reservation⁷⁷.

The applicants also argued that "family ties" should be the primary consideration in the Dependant Policy. It is a matter for the court, instead of the Director, to determine relevant and irrelevant considerations. The court, therefore, should be able to direct the Director to take humanitarian considerations into account when expectational circumstances require the Director to differ from his general policy⁷⁸. The court, once again, relied on *Lau Kong Yung* to conclude that the court is unable to intervene with the Director's decision based on a

failure to give weight to relevant considerations. The court also stated that it is “unlikely” that the Director ignored relevant considerations if he has taken humanitarian considerations into account⁷⁹. There is nothing in Hong Kong law that requires the Director to place the right to family life above other political or socio-economic considerations. In rejecting Zervos J’s ruling in Court of First Instance, the court stressed that judges should not put themselves “into the shoes of the Director” and conduct balancing exercise themselves⁸⁰.

4. The Implications of the *BI* Judgement

The *BI* ruling can be viewed as an extension of the long line of cases in which the courts had restricted the enforcement of family rights. While the construction of the Dependant Policy in *BI* will certainly influence future cases that challenge the policy, *BI* provides an illustration on how the Director’s policies will be scrutinized. The court’s reluctance to incorporate family rights safeguarded by domestic and international instruments into the Director’s policies reflects its long-standing recognition of Hong Kong’s need for strict immigration control. As the court classified family rights under humanitarian considerations, *BI* also clarifies the role of the courts in reviewing the Director’s determination of humanitarian considerations. In the following section, the implications of *BI* on the enforcement of family rights will be evaluated with reference to the Court of First Instance’s later rulings concerning the Dependant Policy.

4.1. Constructing the Dependant Policy to Enable Strict Immigration Control

The ruling is an indication the court will adopt a construction that favors the implementation of strict immigration control policies when there are

ambiguities in the provisions. A closer look at the court's reasoning will reveal that the nature of Hong Kong's immigration regime is the key factor for the Court to construct the "no record" requirement as an eligibility criterion.

4.1.1. Two completing narratives

The wording of paragraph 5 of the *Guidebook* is the main reason for Zervos J and Chow J in the lower court to characterize the factors stated in paragraph 5 as "eligibility considerations" instead of "eligibility criteria". Zervos J, for example, noted that the opening statement of paragraph 5 "does not eliminate the possibility" that the Director can approve the application even if the three listed factors are not satisfied. While he considered the three factors as important considerations, he stressed that the wording of paragraph 5 does not require all of the three factors to be satisfied for the application to be granted and it does not imply that the application must fail if one of the three factors is not met⁸¹. Chow J agreed with Zervos J's construction in *BH* (CFI) and concluded that the "no record" requirement is an "important, but not conclusive" consideration for the Director to formulate his decision⁸². He pointed out that based on the existing policy stated in the *Guidebook*, a failure to satisfy the "no record" requirement cannot be treated "as the end of the application"⁸³. Zervos J and Chow J's construction on the nature of the paragraph 5 factors allows the applicants to potentially rely on their right to family life to succeed in their applications even when they are not able to satisfy some of the paragraph 5 factors.

As mentioned in the above section, the Court of Appeal rejected such construction based on case law and the relevant context of restrictive immigration control policy. The court ruled that as the "genuine relationship" requirement "harked back" to the three eligibility criteria, the requirement itself must also be eligibility criterion. In

Gurung Deu Kumari v Director of Immigration, it could be argued that Cheung J highlighted the differences between the eligibility criteria listed in paragraph 3 and the factors listed in paragraph 5⁸⁴. If the relationship between the applicant and sponsor do not fall within the relationships stated with paragraph 3, the factors listed in paragraph 5 will not be engaged at all⁸⁵. By connecting paragraph 5 factors with categories in paragraph 3, the Court of Appeal in *BI* moved away from Cheung J's classification and declared that the two groups are of the same nature.

The Court of Appeal cited *Qamar Zaman v Director of Immigration*⁸⁶ to prove that the "genuine relationship" requirement was an eligibility criterion; the judges also relied on *Santosh Thewe* and *Qamar Zaman* to illustrate that the financial requirement is an eligibility criterion⁸⁷. These authorities had not stated in clear terms that the paragraph 5 factors are eligibility criteria. There are reasonable alternative interpretations of these cases which support the notion that the court in the past had not decided the nature of the paragraph 5 factors. No challenge was made by the applicant regarding the "genuine relationship" requirement in *Qamar Zaman*⁸⁸. The nature of the financial requirement is not the subject of *Santosh Thewe* at all. The applicant seeks to argue that the inclusion of the financial requirement under the Dependant Policy is "irrational" and an "unreasonable fetter on the discretion" of the Director⁸⁹. Stock J rejected the applicant by simply stated that the financial requirement is not unreasonable "in the context of dependency"⁹⁰. The purpose of the above discussion is not to advocate any particular way to interpret the cases but to illustrate that how need for strict immigration control policies shapes the interpretation of case law.

4.1.2. Implications of the Court of Appeal's construction

The Court of Appeal's interpretation has two major implications: (1) the enforcement of the family rights is seriously limited; (2) the requirements under the policy will be given a broad construction which may indirectly increase the threshold for a successful application.

The Court of Appeal's construction of the policy does not require the Director to take the applicant's family circumstances into account. The Director has the discretion to decide if he wants to take such consideration into account only when the applicant has failed one or more of the paragraph 5 requirements under the policy. The approach adopted by the lower court, on the other hand, allows the possibility for family rights to become one of the considerations alongside the more important paragraph 5 requirements. This illustrates that even when the drafting of the policy has left ambiguity that can be interpreted in favor of enforcing the right to family life, the need for immigration control will always require the court to adopt a narrow interpretation and limit the enforcement of such right.

The courts' broad construction of the "no record" requirement in the later cases is a sharp contrast to its narrow construction of family rights under the policy. The Court of Appeal's approach in *BI* ensured that the paragraph 5 requirements of the Dependant Policy will have a broad construction and may even extend beyond their original scope. This is reflected in the later cases of *LK & Ors v Director of Immigration*⁹¹ and *H v Director of Immigration*⁹². It is established in these two cases that the DV applicant can fail the "no record" requirement without a criminal conviction. In *LK*, one of the applicants failed the "no record" requirement even when the Immigration Department has decided not to prosecute his suspected offence due to his ongoing torture claim⁹³.

Rejecting the applicant's argument that there cannot be any "record" without a conviction, Au J stated that the "no record" requirement is "imposed in the context of Hong Kong's security concern under the overall strict immigration control"⁹⁴. The Director is entitled to review all forms of the records, not limited to criminal conviction, that may reveal security concerns. Au J further pointed out that it cannot be the proper construction of the policy that the "no record" requirement cannot be used as a ground of refusal if the Director has record that the applicant seek to come to Hong Kong to conduct, for example, terrorist activities and had not yet been convicted⁹⁵. Au J's ruling suggested that the "no record" requirement should be given a broad construction. The "no record" requirement does not only concern the conviction of serious crime, but also potential security concerns⁹⁶. In *LK*, the potential security concerns included a suspected immigration offence of a torture claimant who has not yet been prosecuted⁹⁷.

Au J's view was endorsed by Chow J in *H*. The 1st applicant raised three grounds to argue that he had not breached the "no record" requirement: (1) absence of criminal conviction; (2) the Director's uncertainty as to prosecution; (3) possibility of the magistrate to recognize the exceptional circumstances of the applicant and conclude that a conviction will not be "to his detriment"⁹⁸. Drawing from *LK*, Chow J rejected the above submission and considered the Director's decision as "lawful and rational"⁹⁹. He further pointed out that it is upon the Director to determine what record is determinantal to the applicant. The role of the court is, once again, to exercise supervisory jurisdiction¹⁰⁰.

The Director's wide discretion in constructing the Dependant Policy was affirmed in *BI*, *LK* and *H*. *BI* also affirmed that the Director firmly holds the discretion to regard family circumstances. The major justification for the court to set up such a high threshold to enforce

family rights under the policy is the court's recognition of adopting strict immigration control in Hong Kong due to its unique circumstances.

4.2. Possibility to Review the Director's Determination on Humanitarian Considerations

As demonstrated in the previous section, Li CJ's dictum in *Lau Kong Yung* that the Director is not required by law to take humanitarian considerations into account when formulating his decision was considered as the authoritative position in immigration cases. The dictum of Li CJ has extended to all the immigration policies. The Court of Appeal in *BI* also reviewed the *Lau Kong Yung* dictum and reviewed the scope in which the court can review humanitarian considerations.

On rejecting the applicant's submission that the court should be the one to determine the existence of exceptional circumstances in DV applications, the court insist that it is bound by *Lau Kong Yung*¹⁰¹. Therefore, if the Director has not taken any humanitarian considerations into account, the court cannot intervene on the ground that the Director failed to give weight to relevant considerations. Unlike the previously mentioned cases which directly apply the *Lau Kong Yung* dictum, the Court of Appeal went into a relatively detailed analysis on the application and the limitation of the dictum.

The court concluded that *Lau Kong Yung* does not aid the court when the director has taken humanitarian considerations into account¹⁰². The court pointed out that the applicants in *Lau Kong Yung* were unable to rely on humanitarian considerations because of the Interpretation by the National People's Congress Standing Committee¹⁰³. Li CJ did not definitively conclude that the Director's consideration on humanitarian circumstances cannot be reviewed, he simply stated that their reliance could not be successful given the special circumstances of the case. The Court of Appeal in *BI* concluded that the court could review the

Director's decision when he takes humanitarian considerations into account and that there is unfairness in his determination¹⁰⁴. The court based its conclusion heavily on the Court of Final Appeal decision of *C v Director of Immigration*¹⁰⁵. In *C*, Tang PJ stressed that the Director's wide power must be exercised "in accordance with the law"¹⁰⁶. The legislature, while entrusting the Director with wide discretion, also presumed that the Director will exercise the power fairly "in all the circumstances"¹⁰⁷. The Court of Appeal also highlighted Sir Anthony Mason NPJ's discussion in *C* on the limitations of reviewing administrative decisions based on procedural fairness¹⁰⁸. The court suggested that even when the Director's consideration of humanitarian grounds is subjected to review, such review on fairness will be a limited one.

The court recognized that the Director, when reviewing the application of *BI* and *BH*, did consider the "family circumstances" of the applicants¹⁰⁹. The court concluded that the Director did not reject the application outright when the applicants failed the "no record" requirement. Instead, the Director went on to examine the existence of exceptional circumstances, including the family connection with spouse and children, that could justify treating the applicant differently from the existing policy¹¹⁰. Only the Director can decide the weighting of different considerations and to determine if special treatment should be granted¹¹¹. The key legal question, as a result, becomes: Is it fair for the Director, when reviewing the family circumstances of the applicants, simply conclude that there is no exceptional circumstances for special treatment that will be given without any explanation? Given the importance of the right to family life, *Zervos J* in the lower court suggested that a higher standard should be adopted. In *BI* (CFI), he criticized the Director for giving only "superficial regard" to the family circumstances of the applicants¹¹². Rejecting *Zervos J*'s determination,

the Court of Appeal ruled that given the need for restrictive immigration control, the Director's assessment could not be regarded as "superficial, inappropriate or improper"¹¹³. The court also ruled that the Director's refusal to give detail explanation regarding humanitarian consideration is not *Wednesbury* unreasonable¹¹⁴.

The Court of Appeal's stand on reviewing humanitarian considerations was followed by the lower court in later challenges. In *Dembele Salifou & Ors v Director of Immigration*¹¹⁵, Au J relied heavily on *BI*, stating that the Director has considered all factors including family circumstances when making the determination¹¹⁶. He also argued that an adverse decision itself cannot imply that the Director has ignored the family circumstances of the applicants¹¹⁷. Au J highlighted two observations from the Director: (1) the 1st applicant will not have difficulty returning to his home country; (2) the 1st applicant is also a Malian passport holder which enables him to visit Hong Kong for 14 days without a visa¹¹⁸. He concluded that given the above the two factors, the Director's rejection is not *Wednesbury* unreasonable. Au J also suggested that *Wednesbury* unreasonableness should be the standard for reviewing the Director's consideration of humanitarian circumstances. While the Court of Appeal in *BI* did not impose a blanket rejection on reviewing the Director's consideration of humanitarian circumstances, such review will have a high threshold¹¹⁹.

Although the Director's consideration of humanitarian circumstances is available for a limited review, the Court of Appeal in *BI* did not abolish the *Lau Kong Yung* dictum. The Court of Appeal in *BI* considered Tang PJ's approach in *C* as a cautious endorsement of the *Lau Kong Yung* dictum in the context of family reunion¹²⁰. Tang PJ in *C* stated that the case should be differentiated from *Lau Kong Yung* as refugee claimants may face "much more serious consequences". He suggested that the main effect of the challenged legal provision in *Lau*

Kong Yung is to prevent persons, including children “with one or more Hong Kong parents” from “rejoining their family in Hong Kong”. Hence, the family reunion consideration has “less scope of a basis” to challenge against a removal order¹²¹. Therefore, the Court of Appeal in *BI* considered itself to be bound by the *Lau Kong Yung* dictum in cases where the applicants seeks to rely on the right to family life. The general doctrine for reviewing humanitarian consideration after *BI* could be summarized as follows:

- (1) If the Director did not consider humanitarian circumstances in his decision making, he is under no public law duty to do so and his refusal to consider such grounds could not be reviewed, unless the decision could lead to serious consequences (e.g. refoulment of refugees).
- (2) If the Director had taken humanitarian considerations into account, it will be subjected to judicial review on unfairness or *Wednesbury* unreasonableness.

4.3. Enforcing the Right to Family Life under a Restrictive Context

The most predictable impact of *BI* is that the courts will refuse to enforce family rights safeguarded by the common law, domestic and international instruments under the Dependant Policy. The court in *BI* was concerned that the recognition of such right under the common law could “fetter the wide discretion” of the Director to maintain immigration control in which the court concluded is “essential for the sustainability of Hong Kong”¹²². Hence, “interests in family life” of the applicant or his or her family members cannot override the wide discretion of the Director¹²³. The Court of Appeal’s decision is hardly surprising given the long line of authorities as discussed in Section 2 that restricted the enforcement of family rights.

The applicants in *BI* and in later challenges were, perhaps, aware of the difficulty to directly enforce such right and had adjusted their strategy accordingly. The applicants in later cases sought to provide extra evidence to prove that family reunion is the purpose of the Dependant Policy. If family reunion is one of the purposes of the policy, the Director will have legal duty to take the applicant's family rights into account "as a matter of relevance". The applicants combined asserted family rights with other grounds of judicial reviews¹²⁴. If the purpose of the Dependant Policy is family reunion, the Director's refusal to consider the family rights of the applicants will be *Wednesbury* unreasonable. Similarly, any requirements that hindered family reunion will also be *Wednesbury* unreasonable as it obstruct the intent of the policy¹²⁵. The advantage for adopting such approach is that by constructing the Dependant Policy that favors family reunion, some hurdles to enforcing family rights, such as the s11 immigration reservation, can be avoided. The applicants can argue that it is the intent of the policy to take their family connection into account.

The Court of Appeal in *BI*, however, has declared that family reunion is not the purpose of the Dependant Policy. The court also emphasized that the primary determination of the Dependant Policy is dependency instead of family reunion. The policy was characterized as "one of the specific immigration policies formulated by the Director under the umbrella of strict immigration control policy overall"¹²⁶. The court also based their determination on the policy generally excluding all Mainland Chinese residents or former Mainland Chinese residents residing in Macau. The court argued that if the Dependant Policy is indeed a general family reunion policy, such groups will be "arguably the largest and indeed most natural group of potential applicants"¹²⁷.

Drawing from the *Guidebook*, the purpose of the Dependant Policy is to allow an applicant who is genuinely dependent on the sponsor's financial support to apply for permission to stay without the risk of being a burden to Hong Kong¹²⁸. While it may be a "happy consequence"¹²⁹ when family reunion is enabled under the policy, this is not the primary purpose of the policy.

The position of the court in *BI* regarding the purpose of the policy is followed by the Court of First Instance in later cases. In *Dembele*, Au J considered himself bound by the decision of *BI* despite the additional evidence submitted by the applicants to illustrate that the purpose of the Dependant Policy is to facilitate family reunion. He pointed out that the construction of the policy is a matter of law and that it is important for the courts to adopt "a single meaning"¹³⁰ regarding the language of the policy. The applicant's asserted rights were rejected by the court.

With reference to the long line of cases discussed in Section 2, nearly all of the family rights available to the applicants and their family members were denied by the courts. The Court of Appeal's decision in *BI* had prevented the applicants from relying on the common law when protection from other instruments are not available. Given the court's construction of the Dependant Policy in *BI*, there is little room for the policy to accommodate the applicants' family rights.

5. Conclusion

One of the central themes emerged from the above discussion and repeatedly affirmed by courts is the Director's wide discretion to impose strict immigration control policies in Hong Kong. The restrictive immigration regime requires the courts to adopt a narrow interpretation of the domestic and international instruments to limit the enforcement of family rights and construct ambiguously worded policies such that

family circumstances will not become a mandatory consideration. The Director's submission regarding the "special circumstances" of Hong Kong is almost automatically accepted by the courts. While it is firmly established that the courts will observe the principle of "margin of appreciation" when reviewing socio-economic policies and usually refrain from "adjudicating the merits or demerits" of government policies to respect the will of legislature¹³¹, it is also up to the decision makers to provide evidence to prove that their policies do not impose restriction on rights that is "manifestly without reasonable foundation"¹³². The need for strict immigration control may be applicable when constructing certain types of immigration policies but it may not be necessarily applicable to others. Different judicial challenges may have a different impact on the immigration regime of Hong Kong. It should be upon the Director to provide evidence in order to illustrate the impact of a particular challenge if he wishes to argue that a less restrictive approach in constructing immigration policy will destroy the social fabric of the city. The danger for the court to only exercise supervisory jurisdiction is that the Director's determination on humanitarian considerations will be difficult to challenge. Cheung J in *Chan Mei Yee* expressed similar concerns:

"In the present case, the Director said that he had taken humanitarian consideration into account. If so, I have to say that **I am disturbed by the Director's statement** that he was of the view that Ms Chan's case **"does not have sufficiently strong humanitarian grounds or other reasons to justify special treatment"**. This case affects a six-year old child with epilepsy who obviously needs a mother to be with her and not merely a nanny as suggested by the Director. While the Director clearly is duty bound to ensure the immigration policy in Hong Kong is conducted in an appropriate manner, this is **obviously a case in**

which the Director **could have exercised the discretion differently without causing the slightest harm to the established policy.**¹³³
(emphasis added)

Given the high threshold established by the *BI* judgement, it will be very difficult for the applicants in the future to rely on their family rights to challenge the Dependant Policy. It is perhaps reasonable to suggest that work should be done in the other two branches of government to initiate a reform that calls for a Dependant Policy that is more accommodating to the applicants' right to family life. However, it is important to remember that judicial review in Hong Kong has its unique advantage when compared to advocacy work targeting other branches. Judicial review has become "a vital method, guarded by a robust judiciary, for people to address untenable policies" (Daly, 2010: 413) due to the lack of democratic legitimacy of the Hong Kong government. By resorting to judicial review, it is hoped that "the hidden and non-transparent policies will be exposed to some scrutiny" (*ibid.*: 415). The courts' reluctance to examine the constitutionality of socio-economic policies has created a limbo for enforcing certain rights protected by domestic and international instruments. While the role of Hong Kong courts in safeguarding the fundamental rights cannot be understated, such reluctance undermines the courts' effectiveness in scrutinizing the constitutionality of legislations and executive actions.

Notes

- * Matthew Chuen Ngai Tang (鄧傳毅) obtained his Juris Doctor from the Chinese University of Hong Kong (香港中文大學) and Bachelor of Science in Global China Studies: Humanities and Social Science from the Hong Kong University of Science and Technology (香港科技大學). He

is currently a Postgraduate Certificate in Laws candidate at the Faculty of Law, the Chinese University of Hong Kong. He is expected to graduate in summer 2018. The current paper is an extract from his research dissertation. Matthew Tang was an intern at various regional and international institutions including the United States House of Representatives and the Pacific Economic Cooperation Council where he conducted a wide range of research from U.S. healthcare policies to corporate cash holding in the Asia-Pacific region. His current research interests include judicial development in Hong Kong, immigration law, comparative refugee law and legal sociology. <Email: cnmtang@link.cuhk.edu.hk, cnmtang@gmail.com>

1. (2013) 3 HKLRD 90 at p. 136, para. 121.
2. (1992) 1 HKCLR 127, para. 50.
3. Yap (2007), for example, observed that the Hong Kong Courts generally adopt a “conservative” approach when reviewing “alleged human rights violations” that have “law and order implications”. The courts are willing to accord a wide margin of appreciation to the Legislature and Executive “in maintaining pace and stability”. See note 1 above, p. 450, p. 464.
4. *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 437, para. 66 per Ma CJ.
5. *Ibid.*, para. 77.
6. See for example *Comilang Milagros Tecson v. Commissioner of Registration & Ors* (2012) (unreported) HCAL 28/2011.
7. (2016) 2 HKLRD 520.
8. (1993) 3 HKPLR 253.
9. *Ibid.*, p. 276.
10. *Ibid.*, p. 276.
11. *Ibid.*, p. 277.
12. (1994) 2 HKLR 202.
13. *Ibid.*, p. 207.

14. *Ibid.*, p. 209.
15. *Ibid.*, p. 209.
16. See note 8 above, p. 277.
17. See note 12 above, p. 207.
18. *Ibid.*, p. 207.
19. *Ibid.*, p. 209.
20. *Ibid.*, p. 209.
21. (2000) HKEC 788.
22. *Ibid.*, para. 38.
23. *Ibid.*, para. 38.
24. *Ibid.*, para. 46.
25. (2012) (unreported) HCAL 28/2011.
26. *Ibid.*, para. 41.
27. *Ibid.*, para. 42.
28. (2000) 1 HKLRD 717.
29. *Ibid.*, p. 721-722.
30. *Ibid.*, p. 722.
31. (1999) 2 HKLRD 123.
32. *Ibid.*, p. 721.
33. *Ibid.*, p. 721.
34. *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 163 per Bokhary NPJ.
35. *Li Nim Han v Director of Immigration* (2012) 2 HKC, para. 14-15 per Lam J.
36. (2010) 6 HKC 137.
37. *Ibid.*, p. 148.
38. *Ibid.*, p. 150.
39. Roughly translated as: “The freedom of marriage and the freedom to procreate voluntarily of Hong Kong residents are protected by law”.
40. *Ibid.*, p. 150.

41. *Ibid.*, p. 151.
42. *Ibid.*, p. 151.
43. *Ibid.*, p. 151.
44. *Ibid.*, p. 151.
45. See note 35 above, p. 309, para. 34.
46. *Ibid.*, p. 311, para. 38.
47. *Ibid.*, p. 308, para. 24-25.
48. See note 17 above, para. 43.
49. *Ibid.*, para. 46.
50. *Ibid.*, para. 46.
51. (2001) HKCU 320, para. 28.
52. *Ibid.*, p. 29.
53. See note 35 above, para. 34.
54. *Ibid.*, para. 99.
55. See for example *ibid.*, para. 30.
56. *Ibid.*, para. 31.
57. (1999) 2 HKCEAR 300.
58. *Ibid.*, p. 330.
59. *Ibid.*, p. 330.
60. (2014) HKEC 2054.
61. (2015) 4 HKC 107.
62. See note 7 above, p. 529.
63. *Ibid.*, p. 534.
64. *Ibid.*, p. 529-534.
65. See note 28 above, p. 143.
66. See note 7 above, p. 545.
67. *Ibid.*, p. 547.
68. *Ibid.*, p. 549.
69. *Ibid.*, p. 545.
70. *Ibid.*, p. 542.

71. *Ibid.*, p. 542.
72. *Ibid.*, p. 545.
73. *Ibid.*, p. 554.
74. (2011) 3 ALL ER 81.
75. See note 7 above 554.
76. *Ibid.*, p. 555.
77. *Ibid.*, p. 556.
78. *Ibid.*, p. 555.
79. *Ibid.*, p. 557.
80. *Ibid.*, p. 557.
81. See note 60 above, para. 64.
82. See note 61 above, para. 45.
83. *Ibid.*, para. 46.
84. This interpretation was adopted by Zervos J in *BI* (CFI).
85. See note 36 above, para. 18.
86. (2003) (unreported) HCAL 145/2002.
87. See note 7 above, para. 78-79.
88. Hartmann J stated that it was “necessary” for the sponsor to demonstrate a “genuine relationship of dependency existed”. As the case did not concern that requirement, he made no reference to the requirement later in his judgement. It is questionable if Hartmann J’s brief statement has implied that he considered the requirement as an eligibility criterion given that the applicant did not rely on the Guidebook. Hartmann J did not, and there was no need for him to, determine the nature of the “genuine relationship” requirement in *Qamar Zaman*. Yet the Court of Appeal in *BI* considered Hartmann J’s simplistic statement as the authoritative position of the court that the “genuine relationship” requirement is an eligibility criterion.
89. See note 28 above, p. 720.
90. *Ibid.*, p. 723. At no point in the judgement did Stock J stated that the application must fail if the financial requirement cannot be satisfied, he

merely pointed out that the existence of a financial requirement, either as an important consideration or eligibility criterion, is reasonable in the Dependant Policy.

91. (2016) HKCU 1874.
92. (2016) (unreported) HCAL 172/2015.
93. See note 91 above, para. 144.
94. *Ibid.*, para. 146.
95. *Ibid.*, para. 146.
96. *Ibid.*, para. 146.
97. *Ibid.*, para. 144.
98. See note 92 above, para. 46.
99. *Ibid.*, para. 49.
100. *Ibid.*, para. 49.
101. See note 7 above, p. 556.
102. *Ibid.*, p. 557.
103. *Ibid.*, p. 557.
104. *Ibid.*, p. 557.
105. *Ibid.*, p. 556-557; (2013) 16 HKCFR 280.
106. *Ibid.*, p. 295.
107. *Ibid.*, p. 295.
108. See note 7 above, p. 557.
109. *Ibid.*, p. 560, p. 562.
110. *Ibid.*, p. 560, p. 562.
111. *Ibid.*, p. 561.
112. See note 60 above, para 79.
113. See note 7 above, p. 561.
114. *Ibid.*, p. 561.
115. (2016) (unreported) (HCAL 44/2014).
116. *Ibid.*, para. 83.
117. *Ibid.*, para. 83.

118. *Ibid.*, para. 91.
119. *Ibid.*, para. 94.
120. See note 7 above, p. 556.
121. See note 105 above, p. 298.
122. See note 7 above, p. 555.
123. *Ibid.*, p. 555.
124. See note 115 above, para. 22.
125. *Ibid.*, para. 23.
126. See note 7 above, p. 543.
127. *Ibid.*, p. 544.
128. *Ibid.*, p. 544.
129. *Ibid.*, p. 545, drawing on Hartman J's ruling in *Christian Bulao Palmis v Director of Immigration* (2003) HKEC 230.
130. See note 115 above, para. 36.
131. *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR, p. 437, para. 66 to 68 per Ma CJ.
132. *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR, para 40-43.
133. See note 21 above, para. 47.

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C v Director of Immigration (2013) 16 HKCFR 280

Chan Mei Yee v Director of Immigration (2000) HKEC 788

Chan To Foon & Anor v Director of Immigration (2001) HKCU 320

Comilang Milagros Tecson v Commissioner of Registration & Ors (2012) (unreported) HCAL 28/2011

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Lau Kong Yung & Others v Director of Immigration (1999) 2 HKCEAR 300
Li Nim Han v Director of Immigration (2012) 2 HKC (1999) 2
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R v Director of Immigration Ex parte Wong King-lung (1993) 3 HKPLR 253
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Immigration Ordinance (Cap. 311)

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International Covenant on Economic, Social and Cultural Rights

Convention on the Rights of the Child

Committee on Economic Social and Cultural Rights (1990). *CESCR General Comment No.3: The Nature of States Parties' Obligations* (E/1991/23).
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Appendix A: Abbreviations of Law Reports cited

Hong Kong Cases

Full name	Abbreviation
Hong Kong Court of Final Appeal Reports	HKCFAR
Hong Kong Cases	HKC
Hong Kong Cases Unreported	HKCU
Hong Kong Court of First Instance	HKCFI
Hong Kong Electronic Cases	HKEC
Hong Kong Law Reports and Digest	HKLRD
Hong Kong Public Law Reports	HKPLR

Other Cases

Full Name	Abbreviation
All England Law Reports	ALL ER
Commonwealth Law Reports	CLR

