

21/83

Appeal No. 48 of 1982

IN THE PRIVY COUNCIL

O N A P P E A L

FROM HER MAJESTY'S COURT OF APPEAL (HONG KONG)

IN THE MATTER OF THE APPLICATION BY MAK YUI MING,
MAK SIU FONG, MAN CHIU YING FOR JUDICIAL REVIEW
AND WRIT OF HABEAS CORPUS SUBJICIENDUM

AND IN THE MATTER OF THE DECISION OF THE DIRECTOR
OF IMMIGRATION DATED THE 14th NOVEMBER 1980

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B E T W E E N :

MAK YUI MING
MAK SIU FONG
both infants by their
next friend CHAN SAU LAM

MAN CHIU YING
an infant by her next
friend CHAN WAI PING

Appellants

- and -

THE ATTORNEY GENERAL

Respondent

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CASE FOR THE APPELLANTS

Nature of Appeal

Record

1. This appeal arises from the issue of a Writ of Habeas Corpus ad Subjiciendum and an application by the Appellants for Judicial Review (Order of Certiorari) of a decision of the Respondent (Director of Immigration) dated the 14th November 1980, whereby the Appellants were deemed to be "illegal immigrants", and thereby subject to removal orders and repatriation to China.

Record

History of the proceedings

- p.2 2. On the 15th November 1980 the Honourable Mr Justice Penlington granted a writ of Habeas Corpus directed to the Commissioner of Prisons and to the Chief Immigration Officer at the Victoria Immigration Centre.
- p.3 By his return dated the 17th November 1980 the Superintendent of Prisons certified that the Applicants were detained by virtue of removal orders made under s.19 (1)(b)(ii) of the Immigration Ordinance and by s.32(3A) of the Immigration Ordinance signed by the Director of Immigration on the 14th November 1980. 10
- p.8-22 At the hearing of the matter before the High Court (Zimmern, J. and Mr Commissioner Litton Q.C.) the Applicants applied for judicial review seeking an order of certiorari to quash the detention and removal orders and for a writ of Habeas Corpus.
- On the 18th December 1980 the High Court held that the Applicants were lawfully detained. The court quashed the writ of Habeas Corpus and also the application for judicial review. 20
- p.25-34 On the 8th June 1981 the Court of Appeal (Sir Alan Huggins VP., Leonard and Cons, JJ.A.) dismissed the Appellants' appeal against the decision of the High Court.
- p.36 On the 3rd July 1981 an order was made by the Court of Appeal (His Honour Sir. A. Huggins V.P., and His Honour, Mr. Justice O'Connor) granting leave to appeal to the Judicial Committee of the Privy Council against the decision of the Court of Appeal. 30

FACTS

3. The chronology of material events is as follows:-

2nd August 1962	Birth of Man Chiu-Ying in China
11th September 1962	Birth of Mak Siu-Fong in China
7th June 1965	Birth of Mak Yui-Ming in China

All three Appellants are accordingly Chinese nationals and therefore subject to Hong Kong Immigration Laws and Control. 40

p.46
Line 24

23rd October 1980

The Appellants were in Canton (China) where and when they saw and heard on television an

announcement in Cantonese read out by a Hong Kong immigration officer. The Appellants understood the statement to mean that if they could enter Hong Kong and register at the Victoria Barracks before midnight on October 26th 1980 they would be granted Hong Kong citizenship and the right to stay and work in Hong Kong.

Record

25th October 1980

p.47
line 10

10 In the early hours the Appellants got across to Lau Fau Shan in Hong Kong via a boat. The same day they telephoned their uncle Mr Chan Yue Lun who arranged to meet them at the registration centre the next day.

26th October 1980

p.56
Line 14

20 The uncle met the Appellants at about 3 am. at Victoria Barracks. At 4 am. they reported to the Special Registration Office at Victoria Barracks, within the time limit set by the Hong Kong government. Upon reporting they were given a card headed "Initial Application to Register for Identity Card". They were told to return at 1 pm. on the 11th November 1980 to complete the procedure.

p.70-72
item No G1

11th November 1980

30 At the appointed time they attended Victoria Barracks. Each of the Appellants using a form entitled "Application for an entry permit to remain in Hong Kong and registration for Hong Kong identity card" and they were given future identity card numbers. In addition they were asked to fill in Immigration Arrival Cards and did so. They were then given a form entitled "Immigration Department Registration of Persons Office". They were instructed to take this form to the Immigration Clearance Office at Victoria Barracks and obtain on the form a clear endorsement. After obtaining this they were
40 to report to the Immigration Clearance Office. They were told to return the next day.

p.76-81
item No 11

p.72-75
Item No H1

p.51-55
Item No B3

12th November 1980

The Appellants returned but were arrested and detained.

Record

14th November 1980

Removal orders against the Appellants were issued.

15th November 1980

p.82-89A
Item No J1

At 10.15 am. the Appellants were served with removal orders.

The Legislative context

4. The rules material to the Director of Immigration's case are:-

- (i) s.38(1)b of the Immigration Ordinance, which makes it an offence to land in Hong Kong and remain without the express authority of the Director of Immigration. 10
- (ii) removal orders were made by virtue of s.19(1)(b)(ii)
- (iii) orders for detention pending removal under s.32(3A) of the Immigration Ordinance.

5. The Appellants submit that this appeal should be allowed with costs for the following amongst other

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REASONS

6. The Court of Appeal erred in finding against the Appellants on ground 4 of their Notice of Appeal (allegation of want of fairness and/or breach of the rules of natural justice), and in holding that the instant case raised no issue of procedural law akin to those raised in the case of Ng Yuen-Shiu (now Privy Council Appeal No 16 of 1982). It is submitted that the terms of the Television Announcement and the general circumstances of the ending of the "reached base" policy created in the Appellants a legitimate expectation that they would be allowed to remain in Hong Kong. The Director of Immigration was accordingly under a duty to act fairly towards them. In the circumstances of this case, fairness demanded that persons who had come to Hong Kong in the belief that the "reached base" policy would last until 26th October 1980 should not be removed automatically as illegal entrants but should only be removed (if at all) after a full consideration of all the facts of the individual case, (including those matters set out in the affidavit evidence herein), and an opportunity for the Appellants to state any humanitarian reasons why they should be allowed to stay in Hong Kong. 30 40

p.24
Line 20
p.33
Line 5

p.56-58;
p.59-60;
p.61;

7. Even if (as is not conceded) the terms of the Television Announcement cannot be relied upon as creating any legitimate expectation in the Appellants, it is submitted that the power to remove is always subject to a general duty of fairness, the contents of that duty varying from case to case. The arguments advanced on the general duty to act fairly on behalf of Ng Yuen-Shiu in his printed case are expressly adopted. If, in accordance with those submissions, such a general duty exists, it is further submitted that it placed a relatively onerous burden on the Director of Immigration in the days between 23rd and 26th October. There was a widespread mistake about the timing of the ending of the "reached base" policy. The policy, (the essence of which was that illegal entrants who had reached Hong Kong from mainland China would be automatically allowed to remain) had been in existence for a considerable time. Accordingly, the Director was in any event under a duty to consider the matters set out in the affidavit evidence herein and to allow the Appellants to state any humanitarian reasons why they should be allowed to remain in Hong Kong.

p.62
Line 25

8. There is no evidence that any opportunity to allow the Appellants to state any humanitarian grounds for allowing them to stay in Hong Kong was ever given, or that the Director consider material of the sort contained in the affidavit evidence.

9. Alternatively, the proper inference to be drawn from the facts is that the Appellants were actually given permission to stay in Hong Kong pursuant to s.13 of Cap 115. The following matters are relied upon:-

- (a) The terms of the Television Announcement itself, and
- (b) The issuing of the form headed "Immigration Department, Registration of Persons Office" on November 11th 1980. This form was chopped with a stamp reading "Registered on 11th November 1980 for Hong Kong identity card No H141146".

p.53

10. Alternatively, the Director of Immigration is estopped from denying that he had granted permission to the Appellants to stay in the colony. The Court below disposed of the "estopped" argument primarily on the basis that there was no effective representation to the Appellants as they were outside Hong Kong when

Record

they first heard it (see Zimmern J, record p.10 Line 30; Mr Commissioner Litton Q.C., record p.21 Line 20). It is submitted that it must have been apparent to all that the announcement would be heard in Canton by persons who knew of the existence of the "reached base" policy; and that to such persons the announcement would indicate that the policy would end on the 26th October. The announcement must be construed against that background, and against that background it instituted an announcement to persons outside Hong Kong that they had a "last chance" to register before 26th October.

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RICHARD DRABBLE

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