

21/83

O N A P P E A L  
FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N:

MAK YUI MING and

MAK SIU FONG by their next friend  
CHAN SAU LAN

MAN CHIU YING by her next friend  
CHAN WAI PING

Appellants

10 ALL INFANTS

- and -

ATTORNEY GENERAL

Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal by leave of the Court of Appeal of Hong Kong, leave having been granted by order dated the 3rd day of July 1981 and renewed on 29th day of June 1982 to appeal against a decision of the Court of Appeal of Hong Kong (Sir Alan Huggins V-P., Leonard and Cons JJ.A.) whereby the Appellants' appeal was dismissed. The appeal was against the judgment of a Full Bench the High Court (Zimmern, J. and Mr. Commissioner Litton, Q.C.) dated 18th December 1980. A writ of habeas corpus in respect of the 3 Appellants was issued by leave of Penlington J. on 15th November 1980. Return was made by the Superintendent of Prisons who certified that the Appellants were detained by virtue of removal orders made under S. 19(1)(b)(ii), and of orders for

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detention pending removal under S.32(3A) of the Immigration Ordinance (Cap. 115 Laws of Hong Kong) signed by the Director of Immigration on 14th November 1980. At the commencement of the hearing Counsel for the Applicants applied for leave to file an application for judicial review under Order 53, Rules of the Supreme Court, seeking an order of certiorari to quash the orders for detention and removal. With the consent of the Respondent, leave was granted. 10

2. Grounds upon which certiorari was sought were :-

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(1) The Director of Immigration had acted unfairly towards the Appellants.

(2) The Director of Immigration was estopped from denying that the Appellants should be allowed to remain in Hong Kong.

(3) A denial of permission for the Appellants to remain in Hong Kong would be against the rules of natural justice. 20

(4) The Director of Immigration had authorized the Appellants to remain in Hong Kong and had no power to order their removal under S.19(1)(b)(ii) of the Immigration Ordinance.

(5) The Appellants were in the Colony with the authority of the Director of Immigration since 26th October 1980 or alternatively since 11th November 1980 and were not guilty of an offence under S.38(1) of the Immigration Ordinance and could not be removed from Hong Kong by order of the Director of Immigration pursuant to S.19(1)(b)(ii) of the Immigration Ordinance 30

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The writ of habeas corpus was quashed and orders of certiorari refused.

3. The following facts were averred on behalf of the Appellants and, with the exception of fact (2) not disputed by the Respondent :- 40

(1) The Appellants were living in Canton, People's Republic of China, on the 23rd October when they saw and heard an announcement broadcast on a Hong Kong

television channel (narrated by a Hong Kong Immigration Officer) in the following terms :-

10 "This important announcement is directed at all immigrants from China who entered Hong Kong illegally (sic.). A new law has been passed which means all illegal immigrants from China who do not already have an identity card, or who have not applied for registration, must now do so immediately. This is your last chance. If you do not register for an identity card before midnight on Sunday, October 26th you are liable to be repatriated to China.

P. 9, line 20

20 The place to register is the special registration centre in Victoria Barracks on Honk Kong Island. The entrance to the Centre is in Cotton Tree Drive. Special arrangements have been made to keep the centre open day and night until midnight on Sunday. If you are an illegal immigrant who does not have an identity card you must go to the Centre and register immediately. And you should take with you three recent passport photographs of yourself. It is important that you realise this is you last chance. You have until midnight on Sunday. So register now!"

30 (2) The Appellants said they understood the statement to mean that if one could enter Hong Kong and register at a certain place before midnight on October 26th he would be granted Hong Kong citizenship. They accordingly took steps to enter Hong Kong.

40 (3) The Appellants entered Hong Kong illegally by stealth in the early hours of the 25th October and reported at the Special Registration Office at Victoria Barracks before midnight on Sunday October 26th.

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(4) Upon reporting to the Special Registration Office on 26th October the Appellants were each given a card headed

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"Initial Application to Register for an Identity Card" and given an appointment to report again at 1 p.m. 11th November 1980.

(5) The Appellants admitted that they had arrived in the Colony the day before. They were told to return on November 11th to complete the procedure.

(6) The Appellants attended at Victoria Barracks and completed - 10

P. 73, 74, 75 (a) an Immigration Department Arrival card

P. 76 - 77 (b) Application for an entry permit  
p. 78 - 79 to remain in Hong Kong and  
P. 80 - 81 Registration for Hong Kong  
Identity Card.

P. 11 (7) The Appellants each surrendered the card issued to him on her on 26th October and were given a new form dated 11th November 1980. The new form carried each Appellant's photograph, and various legends including "date of registration 11th November 1980." "Further i/c No.H.141162 Collectable Period 11th December 1980." 20

4. The relevant legislative provisions were :-

(1) Registration of Persons Ordinance Cap.177

S.2(1) The Governor may appoint by name or office an officer to be Commissioner of Registration ..... 30

S.3(1) ..... every person who is not the holder of an identity card issued under this Ordinance shall apply to be registered under this Ordinance.

Registration of Persons Regulations

Reg. 3(1) ..... every person entering Hong Kong who is not the holder of an identity card ..... shall within 30 days from such entry report to a registration officer and register in accordance with these regulations. 40

Reg. 19(1) Any person who without reasonable excuse contravenes regulation 3 (etc) ..... shall be guilty of an offence.

Immigration Ordinance, Cap. 115

S. 13 The Director of Immigration may at any time authorize a person who has landed in Hong Kong unlawfully to remain in Hong Kong subject to such conditions of stay as he thinks fit.

10 S. 19(1) A removal order may be made against a person requiring him to leave Hong Kong -

(b) by the Director if it appears to him that that person .....

(ii) has ... landed in Hong Kong unlawfully.

20 (4) A removal order made against a person shall invalidate any permission or authority to land or remain in Hong Kong given to that person before the order is made or while it is in force.

(5) Where the Director makes a removal order he shall cause written notice to be served as soon as practicable on the person against whom it is made informing him -

(a) of the ground on which the order is made ; and

30 (b) that if he wishes to appeal he must do so by giving written notice (etc) within 24 hours .....

(6) In this section "Director" means the Director of Immigration or the Deputy Director .....

40 S.32(1) A person in respect of whom a removal order under S. 19(1)(b) is in force may be detained under the authority of the Director of Immigration or Deputy Director of Immigration pending his removal from Hong Kong under S.25.

5. It was contended on behalf of the Appellants :-

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- P. 10 (1) The television announcement referred to above was by an agent of the Immigration Department and referred to all illegal immigrants from China, not only those who were in Hong Kong on 23rd October 1980.
- (2) The Appellants were induced to come to Hong Kong by that representation and that having arrived and heard the same representation on the television over and over again were further induced to report at Victoria Barracks. The Director of Immigration was therefore estopped from removing them. 10
- P. 11, line 20 (3) By reason of events at Victoria Barracks from the early hours of the 26th October to 12th November the Director of Immigration was estopped from denying that he had not authorized the Applicants to remain in Hong Kong under S.13 of the Immigration Ordinance. 20
- P. 13 (4) As each of the Appellants had been given a future identity card number, they and each of them had been authorized by the Director of Immigration to stay in Hong Kong under S.13 of the Immigration Ordinance and accordingly removal orders could not be served on them on the 15th November after detention on the 12th November when they had been authorised in writing to collect their Identity Cards on the 11th December 1980. 30
- (5) Notwithstanding any Government policy to the contrary the Director of Immigration by his unequivocal statement must be deemed to have exercised his statutory discretion in favour of granting all such illegal immigrants permission to remain in Hong Kong.
6. On behalf of the Respondent it was contended :-
- (1) The television announcement was not directed at nor could be taken to be directed at persons living in China who has not already illegally entered Hong Kong. 40
- (2) The Appellants could not have been induced to come to Hong Kong by the announcement.

(3) The television announcement was not directed at nor could it be taken to be directed at the Appellants when it was further broadcast after they had illegally entered Hong Kong. The television announcement could not itself be construed as permission for any person at whom it was directed to enter Hong Kong or authorization to remain in Hong Kong.

10 (4) If the Appellants were induced to report at Victoria Barracks by subsequent broadcasts that did not estop the Director of Immigration from ordering their removal. There could be no estoppel with regard to exercise of a statutory discretion.

(Maritime Electric Co. Ltd. v. General Dairies Ltd. /1937/ A.C. 610

20 Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd. /1962/ 1 Q.B. 416

(5) The Director of Immigration at no time authorized the Appellants to remain in Hong Kong, gave permission to the Appellants to remain in Hong Kong, or was estopped from denying he had given the Appellants permission to remain in Hong Kong.

30 (6) None of the documents issued to the Appellants was capable of being regarded by the Appellants as authorization or permission to stay in Hong Kong either indefinitely or for a limited period of time.

(7) The television announcement was not proved to have been made by the Director (or Deputy Director or an Assistant Director) of Immigration.

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40 (8) The document dated 11th November, 1980, expressly stated that an Identity Card could not be issued unless an endorsement from the Immigration Clearance Office and a Hong Kong Entry Permit was obtained from the Director of Immigration.

P. 11

7. At the hearing Zimmern J. held :-

(1) "The very first line of the

P. 10 line 29

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P. 10 announcement made it clear that it was only directed to immigrants from China who had already entered Hong Kong albeit illegally. It was not a representation which applied to them who were then in their home in Canton. There was nothing in the language of the announcement which could have led them or anyone to believe that if they crossed the border illegally they would be accepted for registration as illegal immigrants." 10

P. 10 (2) "If they acted on the announcement in their own wrong belief they take the consequence of their own acts. I see no ground for any estoppel here. The Court is being asked to condone a crime to find an estoppel or a representation which was never made to them."

P. 12 (3) "It is submitted on their behalf that as each of the applicants had been given a future identity card number, they and each of them had been authorized by the Director of Immigration to stay in Hong Kong under S.13 of the Immigration Ordinance and accordingly Removal Orders could not be served on them on 15th November after detention on 12th November when they had been authorised in writing to collect their Identity Cards on 11th December 1980. I am quite unable to understand this argument. I can see nothing in the whole procedure which supports this contention." 20 30

P. 13, line 11 (4) "The first card and the form of 11th November 1980 were issued by the Registrar of Persons and not by the Director of Immigration, through they might be the same person ..... The Director of Immigration has not so far as I can see authorized any of them to remain in Hong Kong under S.13 of the Ordinance." 40

8. Mr. Commissioner Litton Q.C. held :-

P. 16, line 41 (1) "The television announcements ..... were not expressed in terms of an authorization. Nowhere does it say: 'you are hereby authorised to remain in Hong Kong'."

(2) "..... I cannot see how the announcement could have amounted to an administrative



act on the part of the Director exercising a statutory discretion on a wholesale basis in complete contradiction to the policy of the Government, I would hold that the Director did no such thing."

10 (3) "The form dated 26th October says nothing more than that the Applicant has applied to be registered under the Registration of Persons Ordinance and has been given an appointment at 1 p.m. on 11th November 1980." P. 18, line 24

(4) "The 'Application for an entry permit to remain in Hong Kong and registration for Hong Kong Identity Card' form ..... indicates clearly that the Director of Immigration had not yet considered in relation to the particular applicant whether he (or she) should be permitted to stay in Hong Kong." P. 18, line 31

20 (5) "The arrival card ..... is completed for the purposes of an immigration officer examining a person on his arrival in Hong Kong. This cannot be proof that a decision had been made authorizing him to stay." P. 18, line 40

30 (6) "The Immigration Department, Registration of Persons Office form .... its effect is unequivocal. No promise of any kind had been made either with regard to the grant of authority to stay or with regard to the issue of an Identity Card." P. 20, line 30

(7) "I would hold that the Director of Immigration has not exercised his discretion under Section 13 in respect of any of these Applicants." P. 21, line 5

40 (8) "Their case is founded on an unlawful act: landing in Hong Kong unlawfully. I cannot see how in these circumstances an estoppel can arise in favour of the Applicants." P. 21, line 42

(9) "I am satisfied that the removal orders were properly made and it must follow that the Applicants were lawfully detained pending removal. I too would quash the Writ of Habeas Corpus and also the application for judicial reviews." P. 22, line 20

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9. The Appellants appealed on the grounds that the Full Bench erred in fact and law in :

P. 23, 24

(1) finding that the Director of Immigration had not exercised his discretion in favour of the Appellants and granted them permission to stay in Hong Kong under S.3 of the Immigration Ordinance.

(2) holding that the Director of Immigration was not estopped from denying that he had granted the Appellants permission to stay in the Colony. 10

(3) holding that the Director of Immigration had the power to order the detention and removal of the Appellants.

(4) failing to hold that the Director of Immigration in not exercising his discretion in favour of the Appellants by granting them permission to stay, or alternatively, his exercise of discretion to detain and remove the Appellants, was unfair and contrary to the rules of natural justice in all the circumstances of the case. 20

(5) The Appellants had been given a legitimate expectation that they would be allowed to remain in Hong Kong and would not be removed.

10. The Court of Appeal dismissed the Appeal by the Appellants. The reasons given by the learned Justices of Appeal (Sir Alan Huggins, V-P.) were as follows :- 30

P. 30, line 20

(1) "..... the wording /of the announcement/ was clear: those who did not apply for the registration would remain liable to repatriation. Nowhere was it said that those who did apply would necessarily be allowed to remain. Even less did it promise immunity from repatriation to persons to whom the announcement was not addressed." 40

P. 30, line 29

(2) "..... no one who first heard it /the announcement/ before his arrival could fairly understand that it applied to him even if he head it again after entering the Colony ....."

- (3) "... it was made very clear in the receipt for the applications for registration that the issue of identity cards was dependant upon clearance by the Immigration Department .... nowhere in the documents was there anything to suggest that permission to remain either permanently or temporarily had in fact been given." P. 30, line 42
- 10 (4) "... nor was it suggested that any oral statement was made which could be interpreted as giving permission." P. 31, line 5
- (5) "... the Appellants were seeking to establish the unlawfulness /of the removal orders/ by means of an estoppel. That they could not do." P. 31, line 30
- 20 (6) "... I am unable to see that any estoppel could arise, for the Appellants have since their arrival in the Colony done nothing as a result of the announcement which they were not obliged by law to do." P. 31, line 30
- (7) "... this is a very different case /from NG Yuen-shiu v. A.G. /1981/ HKLR 352, P.C. Appeal 16 of 1982/ because the other deals with a matter of procedure and this with substantive rights." P. 33, line 5
- (8) "... it does not necessarily follow that their /the Appellants'/ expectation was reasonable or legitimate." P. 33, line 10
- 30 (9) "... nothing which was said ... persuaded me that the Appellants had any right in law or equity which prevented the Director from exercising his statutory duty under the Ordinance or fettered his discretion when he did so." P. 34, line 12

11. The Respondent submits that this Appeal should be dismissed with costs for the following amongst other

R E A S O N S

- 40 (1) The Appellants at no time had the authorization of the Director of Immigration to remain in Hong Kong either temporarily or permanently pursuant to S.13 of the Immigration Ordinance.

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- (2) The television announcement could not possibly be regarded as authorizing the Appellants to remain in Hong Kong.
- (3) No act or statement of the Director of Immigration or Commissioner of Registration estopped the Director of Immigration from making removal orders under S.19(1) of the Immigration Ordinance. 10
- (4) Having lawfully made a removal order under S.19(1) of the Immigration Ordinance the Director of Immigration was empowered under S.32(1) of the Immigration Ordinance to detain the Appellants pending their removal from Hong Kong.
- (5) No act or statement of the Director of Immigration or Commissioner of Registration estopped the Director of Immigration from denying that the Applicants had been authorized to remain in Hong Kong under S.13 of the Immigration Ordinance. 20
- (6) There was no failure to observe the rules of natural justice or requirements of "fairness".
- (7) No act or statement of the Director of Immigration operated to give the Appellants a legitimate expectation that they would be authorized to remain in Hong Kong or that their removal would not be ordered under S.19(1) of the Immigration Ordinance. 30
- (8) No reasonable person living in the People's Republic of China and hearing and seeing the television announcement could reasonably have taken the announcement as applying to him or her. 40

NEIL KAPLAN Q.C.

S. PETER GRAHAM

No. 48 of 1982  
IN THE PRIVY COUNCIL

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FROM THE COURT OF APPEAL OF HONG KONG

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CHAN WAI PING

ALL INFANTS

Appellants

- and -

ATTORNEY GENERAL

Respondent

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CASE FOR THE RESPONDENT

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