

IN THE SUPREME COURT OF HONG KONG

MISCELLANEOUS PROCEEDINGS

IN THE MATTER OF and
application by PAN ZE-YAN ABLE
and YIN CHANG-WEI JOHNNY for
Judicial Review pursuant to
Order 53 Rule 5 of the Rules
of the Supreme Court

and

IN THE MATTER OF (1) A
decision made by the Director
of Immigration on 3rd February
1992 refusing an application
by the Applicants for a change
of status, to be granted
dependant visas, and (2) A
decision made by the Director

of Immigration on 3rd February
1992 requiring the Applicants
to leave Hong Kong on or
before 7th February 1992

BETWEEN

PAN ZE-YAN ABLE 1st Applicant

AND

YIN CHANG-WEI JOHNNY 2nd Applicant

1992, No. MP 816

BETWEEN

LI JIN-FEI 1st Applicant
YU XING-HUA 2nd Applicant
LI XI-MING 3rd Applicant
LI BI-YI 4th Applicant

AND

DIRECTOR OF IMMIGRATION

Respondent.

1992, No. MP 817

BETWEEN

YAN CHEN CHANG MEI

1st Applicant

YIN WEI HONG

2nd Applicant

YIN RUI ZHEN

3rd Applicant

AND

DIRECTOR OF IMMIGRATION

Respondent

Coram: The Hon. Mr. Justice Mayo in Court

Dates of Hearing: 10 and 11 September 1992

Date of Delivery of Judgment: 11 September 1992

J U D G M E N T

1. All these three applications for Judicial Review cover similar ground. They relate to families who have paid large sums of money to obtain passports from the Kingdom of Lesotho and nationalisation as citizens of that country.

2. The families all originate from China. In each case a response was made to an invitation to apply for citizenship of Lesotho in consideration of a sum of HK\$250,000. It needs to be emphasised that all of the applications were made above board and in good faith. The payments of the said consideration were made to solicitors representing the Honorary Consul here and receipts were issued by the solicitors.

3. The applications were made in the middle of last year. In August, two of the families went to Lesotho to attend a ceremony when Certificates of Naturalisation signed by the Minister of the Interior were presented to them. The 3rd family, the Yins, did not go to Lesotho as Mrs. Yin was in

the late stages of pregnancy. Their daughter, Amy, was born on the 20th December.

4. All of the families applied to the Director of Immigration here in the latter part of November 1991 for a change of their status. In each case a successful business had been commenced in Hong Kong and on the basis of their citizenship of Lesotho they were applying to be allowed to remain in Hong Kong.

5. Towards the end of December rumours began to circulate that 276 Lesotho passports issued to Chinese persons had been cancelled.

6. Unfortunately these rumours proved to be well-founded. On the 10th January 1992 The Director of Immigration received from the British High Commission in Lesotho a notification in this form :

"The Ministry of Foreign Affairs of the Kingdom of Lesotho presents its compliments to all Diplomatic Missions, Consulates and Trade mission accredited to Lesotho and has the honour to advise the latter that the following Lesotho International Passports, as per attached list, have been cancelled and declared invalid with immediate effect.

The Ministry of Foreign Affairs of the Kingdom of Lesotho avails itself of this opportunity to renew to all Diplomatic Missions, Consulates and Trade Mission accredited to Lesotho, the assurances of its highest consideration.

MASERU

3 December 1991"

7. The names of all of the members of the three families were included in the attached list.

8. Some of the victims of this decision, not including any of the families making these applications, resorted to litigation in Lesotho in an attempt to obtain a Declaration that the passports were valid and that the holders thereof were citizens of Lesotho. This litigation did not meet with success. On the 11th February, the chairman of the Military Council and Council of Ministers gazetted an order in these terms :

" ORDER NO. 3 OF 1992

REVOCATION OF SPECIFIED CITIZENSHIP

AND CANCELLATION OF

PASSPORTS ORDER 1992

(Commencem

ent : See

Section 1)

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WHEREAS the persons specified in the Schedule hereto have been granted Lesotho Citizenship and issued with Lesotho passports;

AND WHEREAS the said granting of Lesotho citizenship and issuing of Lesotho passports were unlawful, fraudulent, irregular and against the public interest of Lesotho;

NOWHEREFORE be it enacted as follows BY THE MILITARY COUNCIL.

1. This Order may be cited as the Revocation of Specified Citizenship and Cancellation of Passports order 1992 and is deemed to have come into operation on the 1st day of December, 1991.

2. Notwithstanding any other law, it is hereby declared that the grant of Lesotho citizenship to persons whose names are specified in the Schedule is hereby revoked.

3. Notwithstanding any other law, Lesotho passports which were issued to persons whose names are specified in the Schedule, are hereby cancelled.

4. (1) Notwithstanding any other law, no action or other legal proceedings whatsoever, whether civil or criminal shall be instituted in any court of law against,

(a) the Crown;

(b) any member of the Military Council acting in his official capacity;

(c) any member of the Council of Ministers acting in his official capacity;

(d) the Attorney-General;

(e) any person employed in the public service;

(f) any other person acting under the authority of a person so holding office or so employed as aforesaid,

for or on account of, or in respect of any act whatsoever, matter or thing done or purported to be done in connection with or related to the granting or revocation of citizenship or the issuing or cancellation of Lesotho passports.

(2) If any such proceedings have been instituted whether before or after the passing of this order, they shall forthwith by operation of this order, being charged and made void and no order for costs shall be made against the Crown or persons specified in subsection (1) . "

9. It will be noted that this Order purported to have retrospective effect from the 1st December, 1991.

10. Even before the Court had delivered its judgment, the Director of Immigration here was not prepared to continue to consider the applications he had received from the families. He was of the opinion that he was unable to entertain such an application if the applicant did not hold a valid travel document. In addition to this he was not prepared to permit the Applicants to remain in Hong Kong indefinitely.

11. The position is not without its complications as one of the problems which arises in the present case is whether any of the families can now return to China or whether they are stateless persons as defined by Article 1 of the Convention on Stateless Persons :

Article 1

DEFINITION OF THE TERM "STATELESS PERSON"

1. For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.

2. This Convention shall not apply:

i. To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for

Refugees protection or assistance so long as they are receiving such protection or assistance;

ii. To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;

iii. To persons with respect to whom there are serious reasons for considering that:

a. They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

b. They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;

c. They have been guilty of acts

contrary to the purposes and principles of the United Nations."

12. The Director of Immigration seems to be under the impression that none of the Applicants come within this description. In a supplemental affidavit Mr. Ambrose Lee states that inquiries of the relevant

authorities indicate that there would be no objection raised by the Chinese Authorities if the Applicants were to attempt to return to China.

13. It is necessary, however, to consider this evidence in conjunction with the communication which was received from the Immigration Control Office of the Public Security Department of Kwangtung province dated the 2nd September 1992.

" Public Security Department Kwangtung Province

Mr. Li Jin Fei :

Your letter addressed to us has been received and noted. In regard to your and your family members' request for returning to China for permanent stay, under the current regulations, you and your family members do not meet with the conditions for returning to China for permanent stay as you have successfully applied for permanent stay in Lesotho and you have also obtained the passport issued by Lesotho and that your household registration had already been cancelled.

Regards.

Chopped with the chop of
Immigration Control Office Public
Security Department

Kwangtung Province

2nd September 1992"

14. It will, of course, be appreciated that there is a distinction between an informal agreement to permit a person to enter a country as an apparent administrative decision and the legal right of the person to be considered as a national of that country.

15. In any event at the end of January and the beginning of February the Director of Immigration wrote to the Applicants in a similar vein.

" Immigration Department Tel 8293212

In reply please quote this ref VC/A/57120/91

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Dear Madam,

I refer to your application for change of status submitted on 13.12.1991.

As the Lesotho Government has declared your Lesotho passport No. B10568 (issued on 20.8.1991 by the Director of Immigration, Lesotho) to be invalid, I am unable to accede to your application and hereby inform you that your application has been refused.

Please note that you are permitted to remain in Hong Kong up to 9.2.1992 and that you must leave Hong Kong on or before this date.

Yours faithfully,

Mrs. K M LEUNG

for Director of Immigration"

16. These letters are the subject of the relief which is claimed.

17. The relief sought is

"1. Certiorari, to bring up into the High Court for the purpose of being quashed, the said decisions.

2. Mandamus to compel the Director of Immigration to permit the Applicants to remain in Hong Kong pending a final determination by the courts of Lesotho as to whether passport No. B10305 issued to the First Applicant or the certificate of Naturalization in the name of the First Applicant is valid, according to the law of Lesotho.

3. A direction that the grant of leave, shall operate as a stay of the decision that the Applicants leave Hong Kong, pursuant to 053 r3 (10) (a) and 053 r3 (10) (b) Rules of the Supreme Court."

The grounds supporting the applications are :

"1. The 2 decisions of the Director of Immigration are, in the special circumstances Wednesbury unreasonable.

2. The Director of Immigration acted in ignorance of or otherwise failed to properly take into account, a material consideration, that the Applicants were Plaintiffs in a representative action against the Attorney General of Lesotho, in the High Court of Lesotho, in which the Plaintiffs seek, inter alia, a Declaration that the Applicants are citizens of Lesotho and that Passport No. B10305 issued in Maseru, Lesotho on 12 July 1991

by the Director of Immigration, Lesotho, is valid and lawful.

3. The Director of Immigration has failed to take into account that the Applicants have formally renounced their former citizenship of the People's Republic of China. That the Applicants have no other travel document other than the abovementioned Lesotho passport and are stateless, pending the decision of the Courts of Lesotho.

4. That the second decision of the Director of Immigration would render the Applicants stateless and that by Article 31 of the Convention Relating to the Status of Stateless Persons 1954, and further by customary international law, the Applicants may not be expelled or required to leave Hong Kong save on grounds of national security or public order. In the premises the Director of Immigration has acted contrary to law.

5. The Director of Immigration has failed to take into account or sufficiently take into account, the fact that the Applicants have acted at all times openly and bona fide.

6. The Director of Immigration has failed to take into account or sufficiently take into account, the fact that his second decision is likely to have irreversible consequences for the Applicants and their family,

especially if removed to the People Republic of China, as it is unlikely that the Applicants would be later permitted to depart from the People Republic of China."

18. The main argument advanced by Mr. McCoy for all of the Applicants is that it was wrong for the Director of Immigration to require the Applicants to leave the territory as they were stateless persons.

19. Article 31 of the Convention relating to the Status of Stateless Persons (September 28th 1954 360 U.N.T.S. 117) provides :

Article 31

EXPULSION

1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent

authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

20. Mr. McCoy accepted that a treaty does not form part of the municipal law of Hong Kong. However, he submitted that statelessness was clearly a concept known to the common law in England and in Hong Kong. His authority for this being a passage from the judgment of Russell J. as he then was at p.81 in Stoeck v. Public Trustee 1921 2 Ch 67 :

"The definition appears to contemplate, or at all events it will include, the case of a denationalized German who has not acquired any other nationality. The dearth of direct authority in English law upon this point is not to be wondered at. In truth the question of statelessness can have seldom arisen as an important or practical question. The division into subjects and aliens is clear and sufficient for the ordinary purposes of the common law; and the stateless person would be one of the aliens. But the present case has raised the question, and, upon consideration of the arguments addressed to me and the statutory enactments before referred to, I hold that the condition of a stateless person is not a condition unrecognized by the municipal law of this country."

21. He went on to submit that the aspirations contained in a Treaty should be a reflection of the Common Law unless this brought about some inconsistency. This was in accordance with the view expressed by Lord Atkin in his speech at p.167 in Chung Chi Cheung 1939 AC 160.

" Their Lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute international law, and alone is consistent with the paramount necessity, expressed in general terms, for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries. It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."

22. According to Mr. McCoy there could be no doubt that the Applicants came within the said definition of being Stateless Persons. They had automatically lost their Chinese Nationality by virtue of Article 9 of The Nationality Law of the People's Republic of China.

" Article 9 Any Chinese national who has settled abroad and who has been naturalized there or has acquired foreign nationality of his own free will automatically loses Chinese nationality."

He also placed reliance upon Article 3 :

" Article 3 The People's Republic of China does not recognize dual nationality for any Chinese national."

23. It was an undisputed fact that Lesotho Passports had been issued to the Applicants and that the Order cancelling or purporting to cancel the passports had only related back to the 1st December 1991.

24. The Applicants had been lawfully in Hong Kong prior to this date and had used the passports for the purpose of travelling before coming to Hong Kong.

25. As it had been clearly incumbent upon the Director to conform with the treaty obligations of Hong Kong it was undoubtedly unreasonable in the Wednesbury sense for the Director to make the Orders complained of.

26. Ms. Harstein for the Director emphasised the heavy burden which had to be discharged by the Applicants if they were to establish that they had become stateless persons. She also argued that the question as to whether the Applicants were nationals of China was determined in accordance with the Municipal Law of the People's Republic of China. Her authority for this was the passage on p.82 of the judgment of Russel J. in Stoeck v. Public Trustee 1921 2 Ch 67 :

" There remains for consideration the contention that the words "German national" in the Treaty of Peace Order, and s. IV. of Part X. of the Treaty of Peace, mean or include a German national according to English law. I confess I have difficulty in following this. Whether a person is a national of a country must be determined by the municipal law of that country. Upon this I think all text writers are agreed. It

would be strange were it otherwise. How could the municipal law of England determine that a person is a national of Germany? It might determine that for the purposes of English municipal law a person shall be deemed to be a national of Germany, or shall be treated as if he were a national of Germany; but that would not constitute him a national of Germany, if he were not such according to the municipal law of Germany. In truth there is not and cannot be such an individual as a German national according to English law; and there could be no justification for interpreting or expanding the words "German national" in the manner suggested."

27. Miss Harstein was highly critical of the evidence which had been adduced by the Applicants in this connection. She drew attention to the fact that the copy of the Nationality Law of the People's Republic of China was in the English language and that it seemed unlikely that the original version of the law had been in English. It was very much more likely to have been in Chinese. Her main contention though was that it was impermissible for Counsel to make submissions as to what the law meant. This was clearly the province of an expert in the field and was provided for by s.59 of the Evidence Ordinance Ch. 8. She cited as an example the question as to what the words "settled abroad" meant. Did it extend to persons who on their own testimony were temporarily residents in Hong Kong. It was also possible that according to Chinese municipal law Hong Kong might be regarded as being part of China.

28. Although two of the families had visited Lesotho for the ceremony I have referred to none of the Applicants have given evidence that it was their intention to take up residence in Lesotho. It was accordingly a

moot point whether it could be argued that any of the Applicants could be deemed to have "settled" in Lesotho. Certainly it had not been proved by the Applicants that this was the case.

29. Also it was not entirely clear from the wording of Article 9 whether the requirement for the Chinese National to have settled abroad was to be read separately or in conjunction with the other requirements referred to in the Article.

30. Miss Harstein was also critical of the certificates which had been produced which had been issued by the Chinese Authorities. I have earlier in this judgment referred to the certificate issued by the Public Security Department of Kwangtung Province. There was also a certificate issued by the Public Security Station of Nam Hoi District :

" T R A N S L A T I O N

Nam Hoi District Public Security Station Kau Kong Despatch office

Proof

It is certify that the couple of Li Jin Fei and Yu Xing Hua as well as their children Li Xi Ming and Li Bi Yi have gone to Lesotho for permanent stay on 14th December 1991. Their account for citizenship has been cancelled. It is hereby certified.

Despatch office of Nam Hoi Kau Kong

Chopped with the chop of Public Security Station of Nam Hoi District

3rd February 1992"

31. It was important to note that there is no evidence as to what material was placed before these authorities which satisfied them that it was appropriate to make the statements which were made. It seems to have

been the impression of officials in both Districts that what was contemplated was that the Applicants would stay permanently in Lesotho. As we know from the evidence this does not appear to have been the Applicants' intentions.

32. If all of the evidence which is presently before the Court had been made available to the Chinese authorities, including the fact that the Lesotho passports had been cancelled, it is quite possible that these certificates would never had been issued or have been issued in a different form.

33. I accept that the Applicants have a heavy burden to discharge if they are to establish they are stateless. I also accept that this has to be proved in accordance with the law of the People's Republic of China.

34. I agree with Miss Harstein that considerable caution needs to be exercised by a Court in attempting to interpret the provisions contained in Laws of another jurisdiction. I am satisfied that the Applicants have to demonstrate that they have relinquished their Chinese Nationality in accordance with People's Republic of China Law. It is my view that on the evidence which lies before me they have failed to prove this. The consequence of this is that none of the Applicants has succeeded in establishing that they are stateless persons as defined by the Treaty.

35. It was accordingly not incumbent upon the Director to adhere to the requirements of the Treaty and his decision to order the Applicants to

leave Hong Kong cannot be attacked as being Wednesbury unreasonable.

36. For the reasons I have given, I would dismiss these motions. I will hear the parties on costs.

(Simon Mayo)

Judge of the High Court

Representation:

Mr. G.J.X. McCoy, Mr. Rickie Chan and Mr. Simon Chui instructed by George Y.C. Mok & Co. for Applicants in MP 816/92 and MP 817/92.

Mr. G.J.X. McCoy, Mr. Rickie Chan and Mr. Simon Chui instructed by Charles Yeung Clement Lam & Co. for Applicants in MP 385/92.

Miss Victoria Hartstein (Attorney General's Chambers) for Director of Immigration/Respondent.