HCAL 36/2011

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 36 OF 2011

BETWEEN

LI NIM HAN	1st Applicant
CHOI KA TAK	2nd Applicant

and

THE DIRECTOR OF IMMIGRATION	Respondent

Before: Hon Lam J in Court
Date of Hearing: 1 November 2011
Date of Judgment: 14 November 2011

J U D G M E N T

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1. This is the second time the intended removal of the 2nd Applicant from Hong Kong was challenged by way of judicial review. He was the only applicant in the first judicial review which culminated in the judgment of the court in HCAL 97 of 2007, 23 July 2008. The court

dismissed the application. Since then there were further developments and the 2nd Applicant still remains in Hong Kong. His wife (the 1st Applicant) now mounts a challenge together with him based on the subsequent developments. Mr Dykes SC, representing the Applicants, told the court at the hearing that he relied exclusively on the right of the 1st Applicant under Article 37 of the Basic Law, which according to his submissions, imports into Hong Kong the European and English jurisprudence on right to family life as applied in an immigration context.

2. I shall not repeat the background facts prior to 2008 which have been fully set out in the judgment in HCAL 97 of 2007. For present purposes, it suffices to note that the 2nd Applicant came to Hong Kong in 1999 by a One Way Permit which was subsequently found to be obtained unlawfully by misrepresentation. When this was discovered, the Director issued a removal order on 1 June 2006. There were other proceedings since the discovery of the unlawful procurement of the One Way Permit in 2003. After the conclusion of criminal proceedings (which resulted in the acquittal of the 2nd Applicant), he married the 1st Applicant on 25 January 2006. They gave birth to a son on 15 April 2008.

3. Since the handing down of the judgment in HCAL 97 of 2007, the Director of Immigration ["the Director"] had conducted two reviews of the case. The first review was conducted in the light of the observation at para.49 of the judgment in HCAL 97 of 2007. Contemporaneous record of the review was kept in the form of an internal minutes prepared by an Immigration Officer on 4 August 2008, which were read and approved by more senior officers within the department. On 14 August 2008, an

Assistant Director endorsed the minutes with his agreement to the recommendation to uphold the removal order.

4. On 11 September 2008, the 2nd Applicant was informed by the Director as to his decision to uphold the removal order after the review. The 2nd Applicant was further advised as to the options of applying for One Way Permit to come to Hong Kong for settlement and Two Way Permit for visits.

5. At the end of 2008, the 1st Applicant was diagnosed as suffering from depression and anxiety. The consultant psychiatrist attending her said the main psychological stressor was the unresolved residency claim of the 2nd Applicant. In the Form 86, it is said that the depression substantially affected her ability to take care of the child of the family who was born on 15 April 2008.

6. On 15 April 2009, the 2nd Applicant wrote a Chinese letter to the Director referring to the illness of the 1st Applicant and urging him to grant him permanent resident status on humanitarian grounds. As recorded in the internal minutes in the immigration file, an immigration officer interviewed the 2nd Applicant on 18 April 2009 and counseled him to return to the Mainland and to apply for One Way Permit. The 2nd Applicant indicated he was unwilling to do so and claimed that he had to take care of the 1st Applicant.

7. The 2nd Applicant wrote another letter to the Director on 24 June 2009. He demanded for the issue of permanent identity card to him and asserted that since he was allowed to marry to the 1st Applicant, he had

a right to remain in Hong Kong. He blamed the Immigration Department for the mental condition of the 1st Applicant and said he had consulted senior counsel on his case and legal proceedings would be forthcoming.

8. He wrote two further letters to the Director on 14 October and 11 November 2009 respectively. He urged the Director to issue a "temporary identity card" to enable him to work in Hong Kong.

9. On 1 December 2009, solicitor for the Applicants wrote to the Immigration Department referring to the medical condition of the 1st Applicant. After stating that the 1st Applicant was a permanent resident in Hong Kong, the letter said,

> "We have senior counsel's opinion that if Mr Choi Ka Tak is removed, the right of Ms Li Nim Han, a permanent resident, "to raise family freely" as protected by Article 37 of the Basic Law will be seriously affected. The decision to remove Mr Choi will effectively require his wife and infant son to move to the mainland with him or else separate. (For your further information, the son of Ms Li Nim Han and Mr Choi is only one and a half years old [a copy of his birth certificate is attached])
>
> Because you do not seem to have considered the case of our client from this angle and because of the diagnosis of Doctor on 22 December 2008, we invite the Director to reconsider Mr Choi's situation and allow Mr Choi to stay in Hong Kong under s 13 Immigration Ordinance.
>
> If the Director is prepared to look at the case again, we would be happy provide you more information about the present situation of the family and the likely consequences of an enforced separation.
>
> We trust that your department will reconsider our client's case and revert to us as soon as possible. We look forward to receiving a favourable reply from your side."

10. In view of these developments, the Director conducted a second review of the case on 6 January 2010. According to the internal minutes, after the review, it was concluded that the case did not merit special consideration on humanitarian/compassionate grounds. The solicitor was informed as to the decision of the Director to uphold the removal order by a letter of 26 March 2010. The letter also mentioned that the removal of the 2nd Applicant had been temporarily suspended as he had applied for legal aid to appeal against the judgment in HCAL 97 of 2007. The Director indicated that he would execute the removal order as soon as practicable if there was no indication that the 2nd Applicant was actively pursuing the appeal.

11. After some correspondence, on 28 December 2010 solicitor for the Applicants indicated that they were preparing for judicial review to challenge the decision of the Director set out in the letter of 26 March 2010. Eventually, the present Form 86 was filed on 30 May 2011.

The scope of the challenge: the 1st Applicant's right under Article 37

12. It should be stated at the outset that the Applicants do not and cannot rely on any rights under the Hong Kong Bill of Rights in the present proceedings. Though there are provisions dealing with different aspects of family life in Articles 14 and 19 of our Bill of Rights, the Applicants cannot rely on them to override the power of the Director to enforce the removal order against the 2nd Applicant because Section 11 of the Hong Kong Bill of Rights Ordinance Cap.383 provides,

> "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."[1]

13. Neither can the Applicants rely on the ICCPR in conjunction with Article 39 of the Basic Law. This is the result of the immigration reservations made in respect of Hong Kong when the United Kingdom acceded to the ICCPR and the words "as applied to Hong Kong" in Article 39: see the explanation by Stock J (as he then was) in *Santosh Thewe v Director of Immigration* [2000] 1 HKLRD 717 at p.721H to 722H; and more recently the judgment of the Court of Appeal in *Ubamaka v Secretary for Security* [2011] 1 HKLRD 359.

14. Further, no matter how one interprets the right under Article 37 of the Basic Law, it cannot be an absolute right to have one's family members to enter and remain in Hong Kong without regard to immigration control. Mr Dykes sensibly and properly did not argue for such a right on behalf of the Applicants. Given the non-resident status of the 2nd Applicant, counsel had to accept that he could only enjoy the right conferred under Chapter III of the Basic Law "in accordance with law" under Article 41. Since the law does not give him any right of abode in Hong Kong (as he is not a permanent resident as prescribed by Article 24) and he has no right to enter or remain in Hong Kong, he cannot rely on Article 37 to resist a removal order.

15. Though there are references to the United Nations Convention on the Rights of the Child in the Form 86, it was no longer pursued at the hearing. In the light of my analysis below as to Article 37 and the

[1] See also *Hai Ho Tak v Attorney General* [1994] 2 HKLR 202

authorities[2] cited by Mr Chow SC, the Applicants cannot succeed by reference to that Convention.

16. Mr Dykes therefore focused on the 1st Applicant's right under Article 37.

The substance of Article 37 rights

17. Article 37 of the Basic Law provides,

> "The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law."

18. The Chinese version, which should have precedence in the event of discrepancy[3], must also be borne in mind,

> "香港居民的婚姻自由和自願生育的權利受法律保護。"

19. As submitted by Mr Chow, we are not concerned with the freedom of marriage in the present case. The 1st and 2nd Applicants are married and there is no suggestion that they were prevented from doing so. The arguments revolved around the right to raise a family.

20. Mr Dykes contended that the right to raise a family is, in substance, the same as the right to respect for family life under Article 8 of the European Convention on Human Rights ["ECHR"]. Building on this

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[2] *Chan To Foon v Director of Immigration* [2001] 3 HKLRD 109; *C v Director of Immigration* [2008] 2 HKC 165 para.147; *Chan Mei Yee v Director of Immigration* HCAL 77 of 1999, 13 July 2000; *Mok Chi Hung v Director of Immigration* [2001] 2 HKLRD 125 at 133-135.

[3] See *Gurung Deu Kumari v Director of Immigration* [2010] 5 HKLRD 219 at para.60

premise, counsel submitted that recent English authorities [4] on the applicability of Article 8 to immigration control should also be followed in Hong Kong.

21. On the strength of the English cases, Mr Dykes advanced the following submissions,

> "16. In respect of 1st Applicant, her case is simple: as there is no prohibition in the BL on residents marrying non-residents, DOI must take into account her and her child's rights under Article 37 when deciding on whether to remove the 2nd Applicant because the decision may result in sundering family ties. If he fails to do so the court will require DOI to go through the decision-making process again and show that he has given weight to it.
>
> 17. The Applicants are <u>not</u> contending that the 2nd Applicant derives a 'right' to remain through marriage to the 1st Applicant and fathering a resident child. Such a contention is untenable.
>
> 18. Taking Article 37 into account in the context of this case means that the DOI must consider include:-
>
> (a) the length of time the non-resident party has been in the HKSAR;
>
> (b) the duration of the marriage;
>
> (c) the children, if any; their ages and needs;
>
> (d) the nature of the dependencies within the marriage;
>
> (e) the ties of the family to the HKSAR;
>
> (f) the economic support that the parties to the marriage provide to each other and any children;
>
> (g) the length of residence in the HKSAR of a resident party;

[4] *R (Razgar) v Home Secretary* [2004] 2 AC 368 para.17 to 20; *Huang v Home Secretary* [2007] 2 AC 167; *Beoku-Betts v Home Secretary* [2009] 1 AC 115; *Chikwamba v Secretary of State* [2009] 1 All ER 363.

(h) the connections one or both spouses have in any place outside the HKSAR;

(i) any dependencies outside the marriage that depend on one or other party to the marriage, e.g. a family business employing other persons;

(j) the impact of separation on the family members with resident status, particularly the impact on children."

22. In his oral submissions, Mr Dykes stressed he did not contend that Article 37 gives a right to the 1st Applicant to insist on the Director permitting the 2nd Applicant to remain in Hong Kong. But he contended that Article 37 gives her a right to insist on the Director going through a decision making process in the exercise of his discretion under Section 13 of the Immigration Ordinance having regard and respect for her family life and removal would only be enforced if it is proportionate. The proportionality test advocated by Mr Dykes is the one set out at para.17 of the judgment in *R (Razgar) v Home Secretary* [2004] 2 AC 368. At para.20, Lord Bingham said a fair balance must be struck between the rights of the individual and the interests of the community. His Lordship elaborated on it in *Huang v Home Secretary* [2007] 2 AC 167.

23. Counsel attacked the decision of the Director in the second review for failing to pay any regard to the Article 37 right of the 1st Applicant as there was no reference to it in the letter of 26 March 2010. Further, drawing support from the observation of Lord Scott in *Chikwamba v Secretary of State* [2009] 1 All ER 363, counsel submitted (somewhat obliquely) that as the 2nd Applicant could apply for return to Hong Kong by way of One Way Permit, it would not be proportionate to execute the removal order. In *Chikwamba*, Lord Scott said at para.6,

> "So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. This is elevating policy to dogma. Kafka would have enjoyed it."

24. As mentioned, this edifice is built upon the foundational premise that the right to raise a family under Article 37 of the Basic Law is equivalent to the right to respect for family life under Article 8 of the ECHR. But is that premise sound in law?

25. As a matter of language, in terms of its English version, Article 37 is more specific and limited in scope than Article 8. Actually, the parallel in our statute book with Article 8 is Article 14 of our Bill of Rights. Article 14 reads,

> "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence …
>
> (2) Everyone has the right to the protection of the law against such interference or attacks."

26. By way of comparison, Article 8 of the ECHR states that,

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

27. It is not necessary for me to discuss whether the English approach should apply to a complaint of breach of Article 14. As explained earlier, the Applicants cannot rely on Article 14 or its equivalent in the ICCPR based on Article 39 of the Basic Law. In the light of Section 11 and the immigration reservations, there cannot be any application of Article 14 in our immigration control regime. The purpose of this comparison is to show that there exist other constitutional provisions in our statutes dealing with the protection of family life generally but there are specific reservations excluding such protection in the context of immigration control.

28. Coming back to Article 37, can it be construed as conferring upon the 1st Applicant a right (in terms of qualifying the manner in which immigration control is exercised in respect of her husband) which she cannot derive from Article 14 of the Bill of Rights? In my recent judgment in *Vallejos Evangeline Banao v Commissioner of Registration* HCAL 124 of 2010, 30 September 2011, I examined the proper approach in construction of provisions in the Basic Law by reference to several Court of Final Appeal authorities. As discussed in that judgment, the court should adopt a purposive approach in the interpretation of the Basic Law, having regard to the language of the text in the light of the relevant context. The context includes other provisions in the Basic Law. In respect of interpretation of constitutional guarantees for fundamental rights and freedoms, the court should give generous interpretation to the articles in Chapter III of the Basic Law. Whilst the court must avoid a literal, technical, narrow or rigid approach, the language cannot be given a meaning which it cannot bear.

29. Article 37 was considered by A Cheung J (as he then was) in *Gurung Deu Kumari v Director of Immigration* [2010] 5 HKLRD 219. In respect of the right to raise a family in Article 37, His Lordship interpreted its meaning in light of the Chinese version, viz. "自願生育", and its context in terms of article 49 of the Constitution of the People's Republic of China. "自願生育" in Article 37 should be contrast with "計劃生育" in article 49. The purpose of Article 37 was to provide expressly that Hong Kong residents are not under a duty to practise family planning as in the Mainland.

30. This approach in the interpretation of Article 37 is reinforced by the explanations on the draft Basic Law given by the chairman of the drafting committee at the Third Session of the seventh National People's Congress on 28 March 1990 before the promulgation of the Basic Law. Commenting on the fundamental rights and freedoms under Chapter III, amongst other things, the following were said,

> "The rights, freedoms and duties of Hong Kong residents are prescribed in the draft in accordance with the principle 'one country, two systems' and in the light of Hong Kong's actual situation. They include such specific provisions as protection of private ownership of property, the freedom of movement and freedom to enter or leave the Region, the right to raise a family freely and protection of private persons' and legal entities' property. …"

31. In *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, at p.224E, the Court of Final Appeal regarded the explanations of 28 March 1990 as admissible extrinsic material to which reference can be made in aid of interpretation of the Basic Law.

32. Thus, the right to raise a family freely in Article 37 is to provide for a different regime from that practised in the Mainland as to family planning.

33. At para.58 in *Kumari*, His Lordship concluded,

> "… The 'right to raise a family freely' sits comfortably well with the interpretation, based on the Chinese version, that it is a right to procreate and to foster children, and has nothing to do with the maintenance or taking care of a parent by an adult child, or the formation or maintenance of a family comprising such a parent and adult child."

34. So construed, it is impossible for the 1st Applicant to contend that her right under Article 37 would be infringed by the execution of the removal order. She is at liberty to raise her child in Hong Kong freely. It is clear from the Chinese text that this limb of Article 37 has nothing to do with spousal relationship. Nor is it about the right of a child to paternal support. Therefore, Article 37 is not about a general right to family life to anchor her contention that the Director must give proportionate consideration to grant permission under Section 13 of the Immigration Ordinance to the 2nd Applicant to remain in Hong Kong. As pointed out in correspondence, the 2nd Applicant can apply to join the family lawfully through the One Way Permit system or to visit the family regularly through the Two Way Permit system. Alternatively, the 1st Applicant could go to the Mainland with the child. The evidence shows that actually they (without the 2nd Applicant) have been visiting the Mainland and the son had spent substantial periods there.

35. Mr Dykes submitted that the right under Article 37 should not be construed in such a narrow manner. I cannot agree. Counsel (with the

assistance of his junior who is Chinese proficient) has not been able to refute the meaning of the Chinese text and the context of Article 37 in terms of Article 49 of the Constitution. Counsel however sought to rely on para.60 of the judgment of A Cheung J. It reads,

> "Secondly, the above interpretation of the English version does not mean that ***if it read on its own***, the English wording could not have been given a more generous or wider interpretation along the lines of the European jurisprudence on the European Convention. However, to the extent possible, both the English and Chinese versions must be read in harmony with each other in order to arrive at a uniform interpretation. And that can be achieved by giving the English wording its ordinary and natural meaning. Nonetheless, the bottom line is that if there should be any discrepancy between the two texts, the Chinese text shall prevail …" (my emphasis)

36. With respect, I cannot see how this paragraph takes Mr Dyke's argument further. In the first sentence, His Lordship referred to the possibility of the English text being given a more generous interpretation if it were read on its own. But the following sentences explained why, in the interpretation of the Basic Law, the English text should not be read on its own.

37. Further, as shown by paragraph 40 of the judgment, the reference by A Cheung J to the wider interpretation along the line of European jurisprudence was in respect of the interpretation of the word "family" going beyond the immediate family. There was no discussion as to the incorporation of the test of proportionality in the exercise of immigration control in that judgment. Thus, one must not assume His Lordship had this in mind when he spoke of a more generous interpretation along the line of the European jurisprudence in the first sentence.

38. In any event, as observed by the Court of Final Appeal, the text must be construed in light of the relevant context. As A Cheung J pointed out, Article 49 of the Constitution formed part of the relevant context. In addition, at para.59 of the judgment, His Lordship referred to the constitutional protection of family afforded by the ICCPR as applied to Hong Kong by the Bill of Rights. If I may add, such protection is entrenched by Article 39. Article 39, being another provision in the Basic Law, also supplied the context as to the scope of Article 37. It would be surprising that Article 37 would give rise to a protection which is deliberately excluded by the immigration reservations incorporated by Article 39.

39. As recognized by the Court of Final Appeal, the Joint Declaration may also provide the relevant context. In this connection, in Section XIII of Annex I to the Joint Declaration, it was provided that the provisions of the ICCPR as applied to Hong Kong shall remain in force, thus (like Article 39) incorporating the immigration reservations. In the same section of Annex I, the right to raise a family freely was referred to in the first paragraph. Though it is not conclusive, it serves as a pointer to the need for consistency in the interpretation of “the right to raise a family freely” with the immigration reservations.

40. Section XIV of Annex I to the Joint Declaration set out the categories of persons who enjoy right of abode in Hong Kong and further provided,

> "Entry into the Hong Kong Special Administrative Region of persons from other parts of China shall continue to be regulated in accordance with the present practice.
>
> The Hong Kong Special Administrative Region Government may apply immigration controls on entry, stay in and departure from the Hong Kong Special Administrative Region by persons from foreign states and regions."

41. These provisions subsequently manifested in the Basic Law as part of Articles 22 and 154 respectively. The relevant part of Article 22 reads,

> "For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region."

42. This is the statutory underpinning for the One Way Permit system. The system was challenged in *Ng Ka Ling* (1999) 2 HKCFAR 4 and restored by the 1999 Interpretation by the Standing Committee of the National People's Congress on Articles 22(4) and 24(2)(3) of the Basic Law. The effect of the 1999 Interpretation was summarized in the judgment of the Court of Final Appeal in *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 at p.326-7.

43. Article 24(2)(3) of the Basic Law specifically deals with persons of Chinese nationality born outside Hong Kong of Chinese citizens who are permanent residents under Article 24(2)(1) or (2). According to the 1999 Interpretation, such persons have to apply for One Way Permit before they could join their parents in Hong Kong. That applies equally to persons who are of tender age.

44. If Mr Dykes were correct, it would tantamount to a substantial inroad to Article 22(4) and the One Way Permit system. It would also be a significant negation of the immigration reservations which as explained in many cases in Hong Kong play an important role in our immigration policy. Our courts have emphasized from time to time the difficult problems faced by Hong Kong in terms of influx of migrants and our need for tight immigration control. I shall not repeat what had been said in earlier cases. The difference between the situation in Hong Kong and that in the United Kingdom called for the making of the immigration reservations when United Kingdom acceded to the ICCPR. Thus, this distinction must be borne in mind when one considers whether English cases based on European jurisprudence on immigration matters should be applied here.

45. Mr Dykes tried to downplay the practical effect of his interpretation of Article 37 by saying that the Director would only be obliged to consider his exercise of discretion under Section 13 of the Immigration Ordinance in a manner consistent with respect for the family life of people like the Applicants and he could still decide to exercise such discretion against them after due consideration.

46. With respect, the implication is not as simple as that. The proportionality test as applied in the English cases is based on Article 8(2) of the ECHR which mandated that there should not be any interference of family life other than such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and

freedoms of others. Though it referred to the striking of fair balance between rights of individual and the interests of the community, it has evolved to this proposition in *Chikwamba v Secretary of State* [2009] 1 All ER 363 at p.377f,

> "… only comparatively rarely, certainly in family cases involving children, should an art 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad."

In *EB (Kosovo) v Home Secretary* [2009] 1 AC1159, at para.12 Lord Bingham said,

> "…it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child."

47. It is difficult to reconcile an interpretation of Article 37 giving it these effects with the immigration reservations and the reading of Article 24(2)(3) with Article 22(4). It would also drive a coach and horses through our immigration scheme for dependant immigrants which was upheld by Stock J in *Santosh Thewe v Director of Immigration* [2000] 1 HKLRD 717. Whilst it may be suggested that as there is no equivalent to Article 8(2) of ECHR in our Article 37 and as such our proportionality test may be applied more stringently, but how should the different considerations be weighed? Once it is accepted that the English proportionality approach cannot be incorporated in a wholesale manner and more weight should be given to the community's interest in maintaining a tight immigration control, there may be little difference in substance between the humanitarian consideration which the Director, at his sole discretion, may

entertain from time to time on a case by case basis and a diminished application of the English approach.

48. Mr Dykes submitted there is a difference. It is well established in Hong Kong that the court would not intervene on humanitarian grounds in respect of the decisions of the Director as the Director does not have any legal duty to consider such grounds: *R v Director of Immigration, ex p Chan Heung Mui* (1993) 3 HKPLR 533 at p.543; *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 at p.330, 332, 339 and 347. Counsel therefore contended that Article 37 supplied the statutory basis for requiring the Director to take account of a particular facet of humanitarian consideration: the effect of splitting a family by the execution of a removal order. Failure on the part of the Director to do so could then be challenged by judicial review. Presumably, if the Director fails to get it right in terms of *Wednesbury* reasonableness (or enhanced *Wednesbury* reasonableness) it would also be a ground for judicial review. In other words, Article 37 becomes the launching pad for a judicial review on humanitarian ground which hitherto has not been possible.

49. I cannot accept this construction of Article 37. As explained above, interpreting the text with both the Chinese and English versions in mind, the right to raise a family freely is not a right to family life. Bearing in mind the context set out above, even if one were to give it the most generous and liberal interpretation, I cannot see how the right to raise a family under Article 37 (or its Chinese wordings “自願生育” which should have precedence) can embrace a right to require the Director to

consider the effect on a family in the exercise his discretion under Section 13 of the Immigration Ordinance.

50. In view of this conclusion, Article 37 is not engaged in the present case and the application for judicial review must fail. In this respect, I arrive at the same conclusion as that of Stock J in *Santosh Thewe v Director of Immigration* [2000] 1 HKLRD 717 though conceptually through a slightly different route. With the benefit of understanding as to the meaning of the Chinese text, the context supplied by article 49 of the Constitution and reading Article 24 together with Article 22 in the light of the 1999 Interpretation, I am able to say that as a matter of construction Article 37 is not about the right to family life with the effect as contended by Mr Dykes. Thus, there is no need for me to resort to the restriction provided for under Article 39.

The availability issue

51. I would briefly address another point relied upon by Mr Chow. In *Hai Ho Tak v Attorney General* [1994] 2 HKLR 202, the Court of Appeal considered a challenge to the decision of the Director to remove a wife and mother (who had entered illegally) based on the right of the husband and the children (who were permanent residents) under Articles 14 and 19 of the Hong Kong Bill of Rights. Having held that the wife/mother could not mount such challenge because of Section 11 of the Bill of Rights Ordinance, Mortimer JA (as he then was) rejected the challenge by the husband and son in the following terms at p.207.

> "… if reliance upon these rights to challenge the decision to remove them is permissible, this would be a strange if not absurd result of the legislation. The person most affected by the removal

> order would be unable to challenge the decision for interference with his rights under the Bill whereas those closely but less affected would be able to do so and in appropriate circumstances have the decision struck down.
>
> The principle that the court will interpret statutory provisions so as to avoid absurdity arises only if the provision is ambiguous. In my judgment, however, s.11 of the Bill is not obscure or ambiguous, the meaning is clear."

52. Mortimer JA expressed his agreement with the conclusions of Godfrey JA on the construction of Section 11 at p.210 of the report. For our purposes, I only need to refer to proposition (3) at p.210,

> "In particular … the Ordinance may not be invoked by the person not having the right to enter and remain in Hong Kong. That being so, it would be the height of absurdity if it could be invoked by someone else, e.g. another member of his family. If the person not having the right to enter and remain in Hong Kong could not himself invoke the provisions of the Ordinance relating to *his* rights as a member of the family, it cannot make sense to allow other members of the family the right to invoke those provisions in relation to *their* rights as members of the same family. And s.11 should not be construed so as to attribute a non-sensical intention to the legislature."

53. *Hai Ho Tak v Attorney General* [1994] 2 HKLR 202 was applied by Hartmann J (as he then was) in *Chan To Foon v Director of Immigration* [2001] 3 HKLRD 109.

54. In the present context, we are not concerned with Section 11. Rather, Mr Dykes relied on Article 37. Does the same logic apply? In *Marilyn G Aringo v Director of Immigration* HCAL 96 of 2004, 5 Sept 2005, Hartmann J applied this logic to reject a challenge based on Article 37, see para.43 of the judgment.

55. Amongst the English authorities relied upon by Mr Dykes, there is a case where the court decided a different approach should be adopted in light of the European jurisprudence on human rights. In *Beoku-Betts v Home Secretary* [2009] 1 AC 115, the House of Lords held that where a breach of right to respect for family life was alleged, the immigration authorities should consider the complaint with reference to the family unit as a whole and if the removal of a family member would be disproportionate in that context each affected member was to be regarded as a victim. That was decided in the United Kingdom legislative settings: the point of debate was whether other family members' rights could be considered under Section 65 of the Immigration and Asylum Act 1999. If not, separate proceedings have to be brought by such members under section 7 of the Human Rights Act 1998. Thus, there was no issue as to whether members other than the one subject to a removal order can assert his or her right to family life to challenge such order. The only issue was by what avenue this right should be decided.

56. As mentioned above, the immigration reservations highlighted the different situations in Hong Kong as compared with that in the United Kingdom. Cases in Hong Kong have to be decided with reference to the local circumstances which call for a tight immigration control regime. In view of this, bearing in mind the well-established difference in the two systems, I do not see any room for preferring the approach in *Beoku-Betts* to *Hai Ho Tak* in the immigration context.

57. Thus, I agree with Mr Chow that in any event the 1st Applicant cannot assert her Article 37 right to achieve what, in respect of the removal of the 2nd Applicant, he could not lawfully assert by himself.

Results

58. The application is therefore dismissed with costs, such costs to be taxed if not agreed.

(M H Lam)
Judge of the Court of First Instance
High Court

Mr Philip Dykes, SC and Johnny Fok, instructed by Messrs Damien Shea & Co., (D.L.A.), for the Applicants

Mr Anderson Chow, SC and Abraham Chan, instructed by Department of Justice, for the Respondent