HCAL 137/1999

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO. 137 OF 1999

BETWEEN

NGO THI MINH HUONG, by her next friend,
NGO VAN NGHIA Applicant

and

THE DIRECTOR OF IMMIGRATION Respondent

Before: Hon Yeung J in Court

Dates of Hearing: 17 & 18 January 2000

Date of Handing Down of Judgment: 24 January 2000

J U D G M E N T

This is an application by the applicant Ngo Thi Minh Huong for leave to apply for judicial review of the decision of the Director of Immigration (the Director) to remove her from Hong Kong.

The applicant was born in Vietnam on 19 August 1988 to her parents, Ngo Van Nghia (the father) and Pham Thi Hong Van (the mother) who married in early 1988.

Before the applicant was born, the father had left Vietnam and arrived in Hong Kong on 7 June 1988. The father was subsequently accepted as a refugee and was permitted to remain in Hong Kong pending overseas settlement. However his attempt to settle overseas has not been successful so far as he had been convicted of trafficking in dangerous drugs and sentenced to imprisonment.

The father is presently permitted to remain and to work in Hong Kong. He now runs a trading company. He is seeking local settlement but the policy of the Hong Kong Government is to continue to pursue overseas settlement for him.

According to the applicant, when she was born the mother was living with the father's parents and she remained with them and the applicant until late 1990 when the mother left the applicant to the care of the father's parents.

As the father's parents were too old and frail to look after the applicant, she was placed in an orphanage in 1991 although contact was maintained.

In 1994, the mother divorced the father and formal custody of the applicant was granted to the mother. However the applicant remained in the orphanage.

In 1995, the father arranged through his parents for the applicant to travel to Hong Kong to visit him for 5 days before returning to Vietnam to live with her grandparents for a while.

The mother had since re-married and has had children with her second husband.

In 1996, the mother applied to have the formal custody of the applicant to be transferred to the father as she was unable to take care of the applicant. The application was apparently successful despite the fact that the father was all the time in Hong Kong. The relevant court documents from Vietnam dated 10 September 1997 suggested that the transfer of the custody of the applicant was the result of an agreement between her parents.

In 1996, the applicant came to Hong Kong as a visitor to visit the father. She overstayed her visa and was removed in January 1998 after her appeal and petition to remain in Hong Kong were rejected. At the time when the order was made by the court in Vietnam transferring the custody of the applicant to the father, the applicant was in fact overstaying in Hong Kong.

The applicant returned to Vietnam and lived with her paternal grandparents.

The applicant returned to Hong Kong illegally and was arrested in May 1999. The Director subsequently decided to remove the applicant from Hong Kong and arrangement was made for her removal on 15 July 1999.

Shortly after the applicant was arrested, the father commenced proceedings in the District Court under FCMP 102 of 1999 seeking formal

custody of the applicant as well as a direction that the applicant should not be removed from Hong Kong without the leave of the court.

On 14 July 1999, the applicant also took out judicial review proceedings - HCAL 84 of 1999 and obtained an interlocutory injunction restraining the Director from removing the applicant from Hong Kong. When the leave application went before Stock J on 26 July 1999, the matter was disposed of by consent as the removal order had then been lapsed by reason of s.18(2) of the Immigration Ordinance. The interlocutory injunction was also discharged.

On 22 July 1999, Deputy Judge Leung granted the custody of the applicant to the father in the absence of the mother. The application that the applicant should not be removed from Hong Kong was refused after the intervention of the Director. Nevertheless the Director was asked to reconsider the matter in the light of the order to Deputy Judge Leung.

The Director made another formal removal order against the applicant on 23 July 1999 and the Immigration Tribunal dismissal the appeal against the removal order without a hearing on 28 July 1999. The removal order made on 23 July 1999 is the subject matter of the challenge in the present proceedings.

In the meantime, the matter was referred to the UNHCR seeking to include the applicant in the dossier of the father. The Director undertook not to remove the applicant pending the consideration by the UNHCR of the matter in a letter dated 24 September 1999 as follows: -

> "Thank you for your letters of 22 and 23 September 1999. Given that Miss Huong's case has been brought to the attention of UNHCR and

> the girl's durable solution is being considered, we undertake not to remove Miss Huong on 28 September 1999 pending further consideration of the case ……"

On 27 September 1999, the UNHCR refused the applicant's claim to be included in the dossier of the father and indicated that it had no objection to the deportation of the applicant to Vietnam as it was unable to ascertain whether if it would be in the best interest of the applicant to remain with her father in Hong Kong SAR or to be reunited with her mother in the SRV at the present time.

The Director decided to remove the applicant which prompted the present application.

In respond to a request by the applicant's solicitors urging the Director to consider the best interest of the applicant, the Director stated the following in the letter dated 8 October 1999: -

> "It is the established policy of the Director of Immigration to achieve an effective immigration control for the Hong Kong Special Administrative Region. For every family unity case, we have to weigh all the considerations before making a decision. Under the principle of family unity in the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, dependants are normally granted refugee status in order to join the family head who is a refugee. They may therefore be granted permission to remain as refugees by the Director.
>
> However, subsequent to the 'Port of First Asylum' policy being dropped and the disapplication of Part IIIA of the Immigration Ordinance (Cap.115) on 9 January 1998, all the illegal arrivals from Vietnam reaching the territory on or after that date are straightly illegal immigrants and the HKSAR Government is no longer obliged to consider their case under the criteria contained in the UNHCR Handbook. The UNHCR, which is expected to be well poised in assessing Miss Huong's case in view of MR. Nghia's refugee status, has communicated its stance in the attached copy letter dated 27 September 1999.

> We have to adhere firmly and consistently to our policy of strict immigration control unless there are exceptional circumstances which justifies a departure. The Director holds a firm line on illegal immigrants intending to join their resident family members in Hong Kong. Otherwise a floodgate effect will be created, in particular for Mainland illegal immigrants cases …….”

It is against the aforesaid factual background that the court have to consider the application by the applicant.

In support of the present application, the applicant raises three matters in her written application: -

> “1. The Director was wrong and had acted unreasonably in failing to consider the applicant’s claim for refugee status. In relying on the conclusion of the UNHCR that it had no objection to the deportation of the applicant, the Director had delegated to UNHCR his own discretion when he then decided to remove the applicant.
>
> 2. The Director failed to provide the applicant with the opportunity to respond to the decision of UNHCR that it had no objection to the deportation of the applicant and was thus acting unfairly and contrary to the principles of natural justice.
>
> 3. The decision of the Director to remove the applicant was in any event unreasonable in the light of the personal and family circumstances of the applicant. The Director had also failed to take into account the all the relevant circumstances in particular the provisions of the United Nations Covenant on Rights of the Child 1989 (“the ROC Convention”).”

Ms Lau on behalf of the applicant indicates that she will not be relying on Ground 2 and she also concedes that the transfer of the custody of the applicant from the mother to the father can not be relied on to strengthen the application. The concession, in my view is properly made in the light of the authorities both in England and in Hong Kong. (*see In re Mohamed Arif* [1968] 1 Ch. 643, *R v. Secretary of State for the Home Department, ex parte T.* [1995] 3 F.C.R. 1, *Nguyen Dang Vu and anor v. AG,* HCMP 4257 of 1993, unreported,

Edilerto J. Zuniga v. Elvan Ramon L. Zuniga and 2 ors. HCMP 788 of 1994, unreported.)

Ms Lau however relies heavily on the declarations by the Government of the People's Republic of China to the United Nations on the application of the Convention on the Rights of Child (the Convention) to Hong Kong. The relevant clauses of the declarations and reservations are:

> "1. The Government of the People's Republic of China, on behalf of The Hong Kong Special Administrative Region, interprets the Convention as applicable only following a live birth.
>
> 2. The Government of the People's Republic of China reserves, for the Hong Kong Special Administrative Region, the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the Hong Kong Special Administrative Region of those who do not have the right under the laws of the Hong Kong Special Administrative Region to enter and remain in the Hong Kong Administrative Region, and to the acquisition and possession of residentship as it may deem necessary from time to time.
>
> 3. ……
>
> 4. …….
>
> 5. The Government of the People's Republic of China, on behalf of the Hong Kong Special Administrative Region, seeks to apply the Convention to the fullest extent to children seeking asylum in the Hong Kong Special Administrative Region except in so far as conditions and resources make full implementation impracticable. In particular, in relation to article 22 of the Convention, the Government of the People's Republic of China reserves the right to continue to apply legislation in the Hong Kong Special Administrative Region governing the detention of children seeking refugee status, the determination of their status and their entry into, stay in and departure from the Hong Kong Special Administrative Region ……."

In the circumstances, so Ms Lau argues, in so far as cases involving children making claims for refugee status are concerned, the provisions of the

United Nations Convention on the Rights of the Child 1989 have priority over immigration control.

At the outset, I must state I find Ms Lau's submission on this aspect difficult to accept. Article 22 of the Convention obliges "the States Parties to take appropriate measure to ensure a child who is seeking refugee status …… shall ……. receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the Convention and in other international human rights or humanitarian instruments to which the said States are Parties" and such right would include rights to family unity.

The obligation is subject to the express reservation, "except in so far as conditions and resources make full implementation impractical. In particular, in relation to Article 22 of the Convention, the Government of the People's Republic of China reserves the right to continue to apply legislation in the HKSAR governing the detention of children seeking refugee status, the determination of their status and their entry into, stay in and departure from the HKSAR" on top of the blanket reservation entitling the HKSAR to "… apply such legislation in so far as it relates to the entry into, stay in and departure from the HKSAR of those who do not have the right under the laws of the HKSAR to enter and remain in the HKSAR …….. as it may be deem necessary from time to time."

Hong Kong, being what it is: a modern cosmopolitan city with a large population in a small area and a standard of living much higher than many of its neighbouring countries, not to mention its motherland with over 1 billion people, its attraction to illegal immigrants cannot be underestimated. Unless it is allowed to maintain and enforce a strict immigration policy, the continued

stability and prosperity and even the very survival of Hong Kong may well be at stake.

As Godfrey J would observe in *R v. Director of Immigraiton, ex parte Chan Heung-mui* [1993] 3 HKPLR 533 at 548

> "Give me your tired, your poor, your huddled masses, yearning to breathe free… Send these, the homeless, tempest-toss'd to me": such is the lofty ideal which (once) inspired the immigration of a policy of a great country. But Hong Kong is not a great country."

Immigrants from Vietnam had burdened Hong Kong for over 20 years by reason of the "policy of the port of first asylum" until January 1998 with the addition of section 13AA to the Immigration Ordinance Cap. 115. Now illegal immigrants from Vietnam are to be treated just like any other illegal immigrants. There is in my view no obligation whatsoever on the part of the Director to consider the applicant's claim for refugee status, be it an express one or otherwise.

In so far as the applicant seeks to rely on her claim for refugee status or protection under the Convention, she has simply not made out an arguable case.

Ms Lau seeks to rely on a fallback position by suggesting that the Director in any event should take into consideration the applicant's claim for refugee status in the exercise of his discretion under section 13 of the Immigration Ordinance. Such suggestion with respect contradicts a long line of established authorities.

Section 13 of the Immigration Ordinance empowers the Director to exercise an administrative discretion to allow an illegal immigrant to stay in

Hong Kong. It is not for the court or anyone else to dictate how the Director should exercise such discretion. An illegal immigrant has no right to a hearing, conducted fairly and in accordance with the rules of natural justice, before a removal order was made against him. (*R v. Director of Immigration, ex parte Chan Heung-mui* (supra))

> "It must be always be borne in mind that it is for the Director and not for the courts to administer the scheme of immigration control under the Ordinance." (per Litton JA at p.547)
>
> "I would think it impossible, in the light of the two authorities to which I have referred earlier in this judgment, to contend that s.13 imposes a duty on the Director of Immigration to give any consideration at all, sympathetic or otherwise, to an appeal-…….- by an illegal immigrant to be allowed to remain here." (per Godfrey J)

In *Ho Ming Sai & Ors. v. Director of Immigration* [1994] 1 HKLR 21, Litton JA stated at page 29

> "…There is no question here of anyone needing to make out a case against the applicants, before the Director could lawfully decide to order their removal to China ……."

Godfrey J was more blunt and direct when he stated at page 29

> "……. and this court has no power to decide whether illegal immigrants, however strong the merits of their case, ought to be allowed to remain here or not. Such a power …….. confers it exclusively, on the Director of Immigration."

And then at page 30

> "The Director of Immigration's power, under s.13, to allow an illegal immigrant to stay here is administrative rather then judicial in character. Of course, those on whom administrative powers are conferred are not altogether immune from judicial review. On the contrary, it behoves every civil servant entrusted with administrative powers always to remember the judge at his elbow. But the grounds on which the exercise of such administrative powers will be judicially reviewed are, in my judgment, necessarily much more limited than the grounds on which the court will review the exercise of a power of a judicial, or quasi-judicial character. Certainly, the court would be

> prepared to intervene in the event of any misuse by the Director of Immigration of his power under s.13. If he were to abuse his power illegally (e.g., by refusing to consider an exercise of his powers in favour of an illegal immigrant unless brided to do so) or irrationally (e.g. by refusing to consider an exercise of his powers in favour of any illegal immigrant of Chinese race or nationality) the court would intervene. But, further than that, I do not believe the court would or should go …… But, absent any legislative provisions in that connection here, here is simply no room, in my judgment, for a review of a decision of the Director of Immigration under s.13 on the ground that he has failed to proceed in accordance with the rules of natural justice. In particular, there is no room for any suggestion that he is under some sort of duty, before making up his mind, to disclose to the illegal immigrant all, or any, of the materials on which he proposes to rely in coming to his conclusion."

If the Director is not obliged to disclose any of the materials he relies on in coming to his conclusion, there can be no basis for suggesting that he has failed to take into consideration certain relevant materials.

The aforesaid approach to the Director's duty under s.13 of the Immigration Ordinance met the approval of Chief Justice Li in *Lau Kong Yung and 16 others v. The Director of Immigration* Final Appeal Nos. 10 and 11 of 1999 (Civil).

There is no valid basis for the suggestion that the Director should take into consideration the applicant's claim for refugee status in the exercise of his discretion under s.13 of the Immigration Ordinance.

The Director is perfectly entitled to adopt the attitude as set out in his letter to the applicant's solicitors on 8 October 1999.

The final point made by Ms Lau on behalf of the applicant is that even if the Director was not obliged to take into consideration the applicant's claim for refugee status, the letters dated 24 September 1999 and 8 October

1999 addressed to the applicant's solicitors suggest that he did consider such matter to be relevant and he should have investigated the claim. Instead the Director simple adopted the conclusion reached by UNHCR without himself giving further consideration to the issue.

Such failure was an unlawful delegation of his exclusive discretion and constituted unfairness and unreasonableness in the Wednesbury sense. Ms Lau relies on the cases *R v. Secretary of State for the Home Department ex p. Asif Mohmood Khan* [1984] 1 WLR 1337, *In re Musisi* [1987] 1 AC 514, *Lavender and Son Ltd v. Minister of Housing and Local Government* [1970] 1 WLR 1231 and *Ellis v. Dubowski* [1921] 621.

I do not agree that the letters dated 24 September 1999 and 8 October 1999 can be construed as any indication that the Director considered the claim by the applicant as a refugee itself to be a relevant consideration at all.

The removal order was made on 23 July 1999 and the applicant was scheduled to be removed on 28 September 1999. The applicant's solicitors then indicated to the Director and the removal order would be challenged in a letter dated 22 September 1999. It was also pointed out to the Director that UNHCR were then considering the durable solution with respect to the applicant. It the letter dated 23 September 1999, the applicant's solicitors emphasised,

> "We consider that it would be inappropriate for you to remove the girl while UNHCR are considering her future. The policy of the Director has consistently been to await the outcome of any decision by the UNHCR with respect to refugee applicants, Vietnamese and otherwise. Durable solutions for minor children fall within that general practice. We therefore ask that you undertake, in writing, not to remove Ngo Thi Minh Huong pending the UNHCR's determination of the case."

The letter dated 24 September 1999 was written by the Director in response to the letters dated 22 and 23 September 1999 from the applicant's solicitors.

It was proper and prudent for the Director to wait for the decision of the UNHCR not because the Director was concerned primarily with the applicant's claim for refugee status, but such claim might result in matters relevant to the consideration of the Director.

As I have observed in the course of Counsel's argument, it was possible that a successful claim by the applicant might result in the enhancement of the father's chance to be settled overseas and this might affect the Director's decision. If the Director were to ignore the request of the applicant, he would be criticised for failing to take into consideration relevant matters and his decision might be subject to a judicial review application.

The steps taken by the Director at the request of the applicant to wait for any development which might constitute a change of circumstances in favour of the applicant should not and could not be turned into a weapon to attack the Director for having acted unreasonably and unfairly.

To accept the argument of Ms Lau is to make the Director "to leap through more and more hoops of fire", something bewailed by Litton J in the *Lau Kong Yung* case (supra) and at the same time erect a brick wall at the end of the last hoop.

I share Mr Wong's sentiment that it would indeed be a sad day for Hong Kong if the court is to encourage the executive in its administrative acts to simply do what it is barely required and necessary under the law less the

government be subject to criticism for the very reason of having acted generously and sympathetically towards a person who ultimately does not have a favourable decision made against him.

The applicant is an illegal immigrant. She has no right to enter Hong Kong and she has no legitimate expectation to be allowed to remain in Hong Kong. Indeed if the Director were to do anything to create such an expectation, he would be acting contrary to the whole scheme of the Immigration Ordinance, which is to regulate the lawful entry of persons into Hong Kong, either on a temporary or a permanent basis.

The only hope that the applicant had was a compassionate consideration of her case by the Director. The Director did not consider right to exercise his discretion in favour of the applicant. At the request of the applicant, the Director suspended the execution of the removal order pending the consideration of the applicant's case by the UNHCR. The decision of UNHCR did not create any change of circumstances and had not changed the decision of the Director. The applicant's only hope had failed.

The Director was perfectly entitled to issue a removal order against the applicant. There was no procedural irregularity and the decision was not Wednesbury unreasonable.

The applicant has not demonstrated an arguable case and there is nothing fit for further investigation which might demonstrate an arguable case for the grant of the relief sought by the applicant.

In the circumstances, the application for leave to apply for judicial review must be dismissed and I so order. I also make an order nisi that the

applicant is to pay the costs of the Director to be taxed if not agreed. The applicant's own costs are to be taxed in accordance with the Legal Aid Regulations. The orders on costs are orders nisi to be made absolute 14 days after the handing down of the judgment.

WALLY YEUNG
Judge of the Court of First Instance
of High Court

Miss Selina Lau, instructed by Messrs Barnes & Daly assigned by DLA, for Applicant

Mr Wesley W C Wong, SGC, for Respondent