

HCAL183/2002

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO.183 OF 2002

BETWEEN

SHEM YIN FUN

Applicant

and

DIRECTOR OF LEGAL AID

1st Respondent

REGISTRAR OF THE HIGH COURT

2nd Respondent

Before : Hon Chu J in Court

Date of Hearing : 27 January 2003

Date of Decision : 30 January 2003

DECISION

1. This is an application for leave to judicial review :
 - (1) the decision of the Director of Legal Aid ("the Director") dated 22 July 2002 refusing the applicant's application for legal aid; and
 - (2) the decision of the Registrar of the High Court dated 5 September 2002 dismissing the applicant's appeal against the Director's decision.

BACKGROUND

2. The background leading to this application briefly stated is this.

3. The applicant is a 68 years old widow. Her husband, Tang Chun, died intestate on 16 July 2000. The applicant and her late husband were the 1st and 2nd defendants in High Court Miscellaneous Proceedings No.3289 of 1998 (“the Action”), which were commenced by Standard Chartered Bank in July 1998. After the death of Mr Tang, the applicant, in her capacity as the administratrix of Mr Tang, was substituted as the 1st defendant. Application for Letters of Administration of the estate is, however, still pending.

4. The applicant was the registered owner of a taxi. By a hire-purchase agreement, the applicant hired the taxi from AIG Finance (Hong Kong) Limited (“AIG”). She defaulted in her payment obligations under the hire-purchase agreement and the taxi was repossessed and sold in December 2000. The sale produced a deficit of \$1,014,636 for which the applicant remains liable to pay to AIG. The applicant and her late husband also jointly own a property in Punyu of the Mainland (“the Mainland Property”).

5. For the purpose of defending the Action, the applicant had in December 2000 applied for legal aid (“the 1st LA application”) but was initially refused on the basis that she failed in the means test. She successfully appealed against the refusal and she was granted legal aid to defend the Action.

6. On 13 May 2002, judgment was handed down in the Action against the applicant, both in respect of the claim and the counterclaim. The applicant has appealed against the judgment to the Court of Appeal.

7. On about 13 July 2002, the applicant applied for legal aid for the purpose of the appeal ("the 2nd LA application"). Her application was refused by the Director, which was communicated in a letter dated 22 July 2002. On 3 August 2002, the applicant appealed against the refusal. On 5 September 2002, her appeal was dismissed by the Registrar.

8. On 29 October 2002, the applicant issued her Form 86A applying for leave to judicial review the decisions of the Director and the Registrar. Apart from seeking orders of *certiorari* and declaration, the applicant also requested for an oral hearing of the application if leave is not granted on papers. On 31 October 2002, I directed that the leave application be heard *inter partes*.

THE DIRECTOR'S DECISION

9. The Director refused the 2nd LA application on the basis that he was not satisfied that the applicant's financial resources did not exceed the statutory limit of \$169,700. The Director had assessed the applicant's financial resources at \$428,593.45. The calculations adopted by the Director are as follows :

(I) <u>Income</u>	<u>Amount (HK\$)</u>
Applicant's monthly income	24,552.42
Less	

	Deductions : (1) Allowance under Legal Aid Regulations for supporting 1 dependent	3,940.00	
	(2) Monthly rental/Monthly mortgage payment or accommodation expenses/and rates	12,276.21	
	Monthly disposable income :	8,336.21	

	(II) <u>Capital</u>		<u>Amount (HK\$)</u>
	Money in bank(s)		13,558.93
	Other capital : (1) Mainland property		290,000.00
	(2) Money recoverable		25,000.00
	Less		
	Deductions		0.00
	Total disposable capital :		328,558.93

(III) Financial Resources

(Monthly disposable income x 12) + disposable capital
 = (\$8,336.21 x 12) + \$328,558.93
 = \$428,593.45

THE REGISTRAR'S DECISION

10. The applicant appealed against the Director's refusal on the ground that the Director had failed to take into account her outstanding debts and liabilities in calculating her financial resources. The applicant contended that her liability to AIG should be included in the computation. Had this been done, her financial resources would have been a deficit of \$586,042.55 [i.e. \$428,593.45 - \$1,014,636.00 = (- \$586,042.55)]. In

contending that her financial burden should also be taken into account, the applicant relied on two passages in the decision of the Legal Aid Review Committee chaired by the Registrar in *Leung Kwai Lin Cindy v. Director of Legal Aid* [2000] 4 HKC 516, at 524B-C, 525C-F.

11. The Registrar rejected the argument on the basis that the term “financial resources” for the purpose of a legal aid application is defined by statute. The Legal Aid (Assessment of Resources and Contributions) Regulations, Cap.91B, which applies to the applicant’s legal aid application, contains no provision permitting the Director to take into account the liability of the applicant to AIG. The Registrar also considered that the decision of *Leung Kwai Lin Cindy* is not relevant.

GROUND FOR JUDICIAL REVIEW

12. The application for judicial review is made on the sole ground that the decisions of the Director and the Registrar involve an error in law, namely, the failure to take into account the applicant’s liability to AIG and also the failure to apply or correctly apply the decision of *Leung Kwai Lin Cindy*.

THE ISSUES

13. For the purpose of the present leave application, the putative respondents advance no argument on whether the Registrar’s decision is amenable to judicial review, having regard to section 26(4) of the Legal Aid Ordinance, Cap.91 (“the Ordinance”). The Director expressly reserves his position on the point. The point that calls for consideration at

this stage is therefore confined to whether the Director and the Registrar had committed an error of law in their decisions.

THE THRESHOLD

14. The threshold test for granting leave to judicial review has been stated to be : whether the material before the Court discloses matters which on further consideration demonstrate an arguable case for the grant of the relief sought : *IRC v. National Federation of Self-Employed and Small Business Ltd* [1982] AC 617, at 644 *per* Lord Diplock, applied in *R. v. Director of Immigration ex parte Ho Ming Sai* (1993) 3 HKPLR 159, at 161, 170.

15. In *R. v. Legal Aid Board ex parte Hughes* (1992) 24 HLR 698, at 702-703, Lord Donaldson MR considered that in an *ex parte* application, leave to judicial review should only be granted if *prima facie* there is already an arguable case for granting the relief claimed. This approach differs from that adopted in *Ho Ming Sai* in that leave will only be granted on the strength of an arguable case, as opposed to a case that may be arguable.

16. The difference in approach was recognized by Keith JA in *Wong Chung Ki & Anor v. The Chief Executive and Anor* (unreported), CACV 1/2000. In his judgment, Keith JA observed :

“The issue as to which is the correct test will have to be addressed at some stage, but I do not think that this is the appropriate case in which to do so, because in my view on either test the Applicant should be granted leave. However, it may be that the test should be a flexible one so that, for example, if the issue in the case is, say, one of statutory construction, the applicant has to show that his construction is arguable, whereas

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
O
P
Q
R
S
T
U
V

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

if the issue in the case is, say, one of procedural unfairness, the applicant only has to show that once the facts are investigated, he may then have an arguable case that the decision challenged should be squashed. It is sufficient for me to state that I do not regard the present case as a relatively straightforward one involving simply the construction of Art. 25 of the ICCPR, as Mr Benjamin Yu SC for the Respondents contended.”

17. In the same case, Godfrey VP referred to *Atkin’s Court Forms*, (2nd Edition), Vol.23(2), 1998 Issue, p.177, which states :

“The threshold test is whether or not there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law. Leave should only be refused on the other hand if there is no *prima facie* arguable case at all.”

The vice-president accepts that there is room for flexibility and for debate on the question of the threshold test and considers that the Court should adopt a common sense approach.

18. In a case like the present where the sole ground for judicial review turns on a construction of the statute and does not involve any investigation of fact, I consider that the Court ought to adopt a more flexible approach. Leave should only be granted if the point of law is arguable for it is very difficult, if not impracticable, to draw a meaningful distinction between an arguable point of law and a potentially arguable point of law. But in the present case, for the reasons set out hereafter, it makes no practical difference to the outcome whether the threshold test is one of arguability or potential arguability.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

THE STATUTORY FRAMEWORK FOR DETERMINATION OF FINANCIAL ELIGIBILITY

19. Section 5(1) of the Ordinance provides :

“ (1) Legal aid to which this section applies shall, subject to and in accordance with this Ordinance, be available for any person whose financial resources do not exceed \$169,700, for the civil proceedings mentioned in Part I of Schedule 2, except proceedings mentioned in Part II of that Schedule.”

Section 10(1) of the Ordinance further provides :

“ (1) Subject to subsections (2) and (3), the Director may grant to a person a certificate that that person is entitled under the provisions of this Ordinance to legal aid in connection with any proceedings if the Director is satisfied that—

- (a) ...
- (b) in the case of legal aid to which section 5 applies, subject to section 5AA, the financial resources of that person do not exceed the amount specified in that section in respect of financial resources; and
- (c) ...”

Section 5AA relates to the Director’s power to waive the limit of financial resources whether the applicant’s proceedings involve issues of human rights. It is irrelevant to the present consideration.

20. “Financial resources” is defined in section 2 of the Ordinance to mean “financial resources as determined in the prescribed manner”. Similarly, “income”, “disposable income” and “disposable capital” mean “income, disposable income or disposable capital as determined in the prescribed manner”. Section 2 of the Ordinance further defines “prescribed” as “prescribed by regulations made under section 28”. The

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

relevant regulations made under section 28 is the Legal Aid (Assessment of Resources and Contributions) Regulations (“the Regulations”).

21. Regulation 2A of the Regulations provides :

“ For the purpose of the definition ‘financial resources’ (財務資源) in section 2 of the Ordinance, the financial resources of an aided person shall be assessed by multiplying that person’s monthly disposable income by 12 and adding his disposable capital to that sum.”

22. “Disposable capital” and “disposable income” are defined under Regulation 2 of the Regulations to mean “disposable capital or disposable income as determined or to be determined by the Director under [the Regulations]”. Regulation 4 of the Regulations further provides :

“ Save as otherwise provided by these regulations-

- (a) the income of the person concerned shall be determined in accordance with Part I of Schedule 1 and his disposable income in accordance with Parts I and II of Schedule 1; and
- (b) the disposable capital of the person concerned shall be determined in accordance with Schedule 2.”

23. It is evident from these provisions of the Ordinance and the Regulations that the Director has no general discretion in assessing the financial resources of legal aid applicants. The method of calculations or assessment is prescribed by the statute. It follows that the Director has no general power to include or exclude any income or capital, or any outgoing or debt.

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

24. Given that "financial resources" has been statutorily defined to be the sum of the monthly disposable income multiplied by 12 and the disposable capital, the applicant, in contending that the liability owed to AIG should be taken into account, must demonstrate that the liability is relevant to the computations of the disposable income and/or the disposable capital. It is the applicant's case that the liability owed to AIG is relevant to the computation of the disposal capital of the applicant.

25. The rules for computing disposable capital are set out in Schedule 2 of the Regulations. Only paragraphs 1 and 2 are relevant for the present purpose. The material part of paragraph 1 of Schedule 2 provides :

" Subject to the provisions of these regulations or rules, there shall be included in the computation of the amount of the capital of the person concerned the amount or value of every resource of a capital nature ascertained as on the date of the application"

In the case of a resource that does not consist of money, paragraph 2 of Schedule 2 provides that the amount or value of the resource shall be, *inter alia*, the amount which the resource would realize if sold in the open market.

26. The liability owed by the applicant to AIG is a debt. It is no different from any ordinary debt. It is not of a capital nature, even though it arose out of a hire-purchase agreement for a taxi previously registered in the applicant's name. Firstly, the applicant was only a hirer and not the owner of the taxi under the hire-purchase agreement. Secondly, by reason of the taxi being repossessed and sold by AIG, the applicant could no longer have any proprietary right or interest in the taxi. The liability due to AIG therefore does not come within the ambit of paragraphs 1 and 2

and Schedule 2. As such, it cannot be taken into account in computing the "disposable property" of the applicant. It also follows that, as a matter of statutory construction, the Director cannot have regard to the liability in assessing the financial resources of the applicant.

DECISION OF LEUNG KWAI LIN CINDY

27. In *Leung Kwai Lin Cindy*, the appellant was refused legal aid to prosecute her appeal before the Court of Final Appeal on the ground that her financial resources exceeded the statutory limit. She appealed against the refusal to the Review Committee, which was designated by section 26A of the Ordinance to hear appeals against refusal of legal aid for appeals to the Court of Final Appeal. The appellant's husband had a flat with an outstanding mortgage loan that exceeded the market value of the flat, producing therefore a negative value of some \$400,000. The monthly mortgage repayment was partly paid by the husband's employer and partly by the husband himself. The appellant argued that part of the repayment subsidized by the employer should be excluded from the computation of disposable income because the amount was deducted by the employer from the husband's salary at source. The appellant also argued that the negative value of the flat should be included in computing the disposable capital of the appellant.

28. The appeal was allowed by the Review Committee. The Registrar who chaired the Committee considered that the amount of mortgage loan payment that came from the employer should be deducted from the amount of disposable income. Alternatively, he was of the view that the negative value of the flat should be added to the disposable capital either by reason of paragraph 6 of Schedule 2 of the Regulations, which

does not concern us, or paragraph 1 of Schedule 2 of the Regulations : at pp.523B-524.

29. Mr Malcolm Merry, member of the Review Committee, also agreed that the negative value of the flat should be taken into account in determining the financial resources of the appellant. He was, however, of the view that the negative value is related to the computation of disposable capital rather than income or disposable income : at pp.526I-527A.

30. Mr Hui draws assistance from the following passages in the decision :

“Ms Ling suggests to us that when a property becomes a liability, the property itself has no value. She suggests to put a zero against the value of the property. That I do not agree; I consider negative value is also a value that can be assessed and should be included to determine the total financial resources.” (per the Registrar at p.524B-C)

and :

“ Ms Carol Ling, who appeared on behalf of the Director, explained to us that the Legal Aid Department’s practice, where the value of a property is less than the outstanding balance of the loan secured upon the property, was to regard the property as having no value and that, similarly, when calculating an applicant’s financial resources, the practice was to disregard any debts owed by the applicant. This practice is based upon the Department’s interpretation of ‘value’ in para 1 of Sch 2 as meaning ‘positive value’. There is some support for this approach both in the general meaning of ‘value’, which usually connotes positive worth, and in the use of ‘resource’ in para 1, resource having similarly positive connotations. But the approach seems to me to be unrealistic and, in the context of the ascertainment of financial resources and of an ordinance the declared purpose of which is to make provision for the granting of legal aid to persons of limited means (see the long title to Cap 91), contrary to the statutory intendment. In ascertaining the financial means and resources of a person, it seems to me obvious that that person’s financial burdens should be taken into

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

account. (If an applicant for legal aid has deliberately increased his or her financial burdens, that is, of course, a different matter).

... In normal times, when the value of the capital asset would exceed the outstanding balance of the loan, the capital is readily realizable. The problem is that currently the capital is not realizable, or rather there is no capital asset but instead there is a liability....” (per Mr Merry at pp.525C-F, 526f)

31. Mr Hui submits that the decision illustrates that the meaning of value can include both positive and negative value, and that the financial burden of a legal aid applicant should also be taken into account in order to fulfil the statutory intendment. Mr Hui further argues that if contingent liability, as represented by the negative value in *Leung Kwai Lin Cindy* case, can be taken into account, there is no reason not to consider a present and established liability, such as the debt due to AIG. Mr Hui therefore argues that the Director and the Registrar were wrong in not following the decision of *Leung Kwai Lin Cindy*.

32. For my part, I do not accept that a failure or refusal to follow *Leung Kwai Lin Cindy* decision *per se* can amount to an error of law. The Review Committee is an administrative body. Its decisions are not binding either on the Registrar or any master hearing legal aid appeals.

33. As to the reasonings underlying the decision of the Review Committee in *Leung Kwai Lin Cindy* case, I do not propose to express any view on the Registrar’s reasoning (at p.523) relating to the computation of disposable income since the issue does not arise in the present case.

34. With regard to the reasonings of the Registrar and Mr Merry on the computation of disposable capital and the passages quoted above, it

A
B
C
D
E
F
G
H
I
J
K
L
M
N
O
P
Q
R
S
T
U
V

must be borne in mind that they were made in the context of discussions on the computation of disposable capital. Accordingly, when the Registrar said that the negative value should also be considered, he was referring to the computation of the value of a capital resource. Similarly, when Mr Merry commented that a person's financial burdens should be taken into account, he was dealing with the Director's practice of attaching no value to property that has a value less than the outstanding balance of the loan secured upon the property.

35. Contrary to Mr Hui's submissions, the Review Committee did not decide or rule as a matter of construction that in determining financial resources, any form of financial burden, irrespective of its nature, should be taken into account.

36. Properly understood, the reasonings of the Review Committee have no application to the present case. The applicant does not own the taxi, and the Director is not concerned with the value of the taxi in assessing her financial resources. The liability due to AIG is in no way analogous to the negative value of a property because it is a debt and not a liability affecting the value of a capital resource.

37. As to the argument that it is unfair that a contingent liability, arising out of the property having a negative value, can be taken into account whereas the present liability to pay AIG cannot be included for assessing the financial resources of an applicant, it is an irrelevant consideration given that the method of calculating financial resources is statutorily defined and prescribed.

CONCLUSION

38. For the reasons aforesaid, there is plainly no room for arguing that the applicant's liability owed to AIG should be taken into account in assessing the applicant's financial resources. The rules for computation prescribed by the statutes simply do not permit this to be done. Given that the appeal hearing before the Registrar is a hearing *de novo*, the Registrar has no greater power than the Director. It therefore follows that the debt due to AIG could not be taken into account by the Registrar.

39. In the circumstances, neither the Director's decision or the Registrar's decision can be said to be erroneous in law. The application for leave to judicial review must fail.

40. Accordingly, I dismiss the application and make an order *nisi* that the applicant pays the Director the costs of the application.

(C. Chu)
Judge of the Court of First Instance
High Court

Mr David Hui Tai Wai, instructed by Messrs Joseph Li & Co.,
for the Applicant

Mr Anderson Chow, instructed by Department of Justice,
for the 1st Respondent

The 2nd Respondent not appearing