FACV000001ES/2001

FACV1-3/2001

Ng Siu Tung & others v. The Director of Immigration
Li Shuk Fan v. The Director of Immigration
Sin Hoi Chu & others v. The Director of Immigration

Summary of judgment of
the Court of Final Appeal

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1. Main facts

On 29 January 1999, in **Ng Ka Ling & Others v The Director of Immigration**, (1999) 2 HKCFAR 4, the Court of Final Appeal held that art. 24(2)(3) of the Basic Law was not qualified by art. 22(4) so that persons who fell within art. 24(2)(3) and were residing in the Mainland did not require one-way exit permits issued by the Mainland authorities to come to Hong Kong to exercise their right of abode as permanent residents. On the same day, in **Chan Kam Nga & Others v The Director of Immigration**, (1999) 2 HKCFAR 82, the Court of Final Appeal held that Chinese nationals born outside Hong Kong of Hong Kong permanent residents, irrespective of whether they were born before or after at least one of their parents had acquired permanent resident status, fell within art. 24 (2)(3) and had the right of abode in the HKSAR.

During the **Ng Ka Ling** and **Chan Kam Nga** litigation, senior government officials had made various public statements including statements to the effect that the government would abide by the decisions of the courts and would carry such decisions into effect. Letters were written by the Legal Aid Department to individual applicants for legal aid stating that there was no need for them to join in existing proceedings or to commence fresh proceedings.

On 26 June 1999, pursuant to its power under art. 158(1) of the Basic Law, the Standing Committee of the National People's Congress ("NPCSC") issued an interpretation of arts. 22(4) and 24(2)(3) ("the Interpretation") which displaced the interpretation of the Court of Final Appeal on these two provisions in **Ng Ka Ling** and **Chan Kam Nga**. The Interpretation stated: (a) that art. 22(4) qualifies art. 24(2)(3) so that persons falling within art. 24(2)(3) must apply for approval from the Mainland authorities to enter the HKSAR; and (b) that for a person to qualify under art. 24(2)(3), at least one of his parents must already be a Hong Kong permanent resident at the time of his birth. The Interpretation also stated that it "does not affect the right of abode in the HKSAR which has been acquired under the judgment of the Court of Final Appeal on 29 January 1999 by the parties concerned in the relevant proceedings".

On the same day as the Interpretation was issued, the government made a public announcement of a policy to the effect that it would allow persons who had arrived in Hong Kong between 1 July 1997 and 29 January 1999 and had made a claim for the right of abode with the Immigration Department to have their asserted status as permanent resident verified in accordance with the two judgments ("the policy decision"). The policy decision has been referred to as the Concession.

2. Parties in these appeals

During the period leading to the Ng Ka Ling and Chan Kam Nga judgments, many of the applicants in the present appeals who considered that they were in the same position as the parties in those two cases did not join in the litigation or commence fresh proceedings. Some (Group A applicants) were born after at least one of their parents had become Hong Kong permanent residents while others (Group B applicants) were born before their parents had become Hong Kong permanent residents. They came to Hong Kong either illegally or on two-way permits and then overstayed. They arrived in different periods: (1) before 1 July 1997; (2) between 1 and 10 July 1997; (3) between 11 July 1997 and 29 January 1999; (4) between 30 January 1999 and 26 June 1999; and (5) after 26 June 1999.

They now claim that they too should have their claims for permanent resident status verified according to the two judgments, that is, that they are unaffected by the Interpretation, or, alternatively, that they are covered by the policy decision.

There are 5,073 (originally 5,308) applicants in HCAL 81 of 1999, 39 (originally 43) applicants in HCAL 70 of 2000 and one applicant in HCAL 2 of 2000. A total of 17 (originally 19) persons were chosen as representative applicants in HCAL 81 of 1999. Seven were selected in HCAL 70 of 2000. There is the single applicant in HCAL 2 of 2000.

3. Issues raised by the applicants

Five issues are raised by the applicants. They argue that :-

> (1) Upon the true construction of the sentence "judgments previously rendered shall not be affected" in art. 158(3) of the Basic Law, they all have an accrued right under the judgments in **Ng Ka Ling** and **Chan Kam Nga** and should not be affected by the Interpretation. (The "judgments previously rendered" issue.)
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> (2) Even if they are held to be persons affected by the Interpretation, as a result of the public statements and representations made by the government to the applicants and the manner in which the **Ng Ka Ling** and **Chan Kam Nga** litigation was conducted, they all have a legitimate expectation, to which effect should be given, namely, the expectation that they would receive the same treatment as the parties in those two cases and that their claims for permanent resident status would be verified according to the two judgments. (The "legitimate expectation" issue.)
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> (3) Even if they fail on the first two grounds, in all the circumstances of this case, in view of the grave injustice suffered by the applicants, it would be unfair and an abuse of process for the Director of Immigration to execute the removal orders against the applicants and the court should prevent such an abuse of process by staying the removal orders. (The "abuse of process" issue.)
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> (4) Those applicants who arrived in Hong Kong prior to 1 July 1997 are not subject to art. 22(4) of the Basic Law or the Interpretation and those who arrived between 1 July and 10 July 1997 are not affected either by the Interpretation or the No. 3 Ordinance which was held not to apply retrospectively. (The "Periods 1 and 2" issue.)
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> (5) Those applicants who arrived between 1 July 1997 and 29 January 1999 have a legitimate expectation that, provided they can satisfy the conditions contained in the policy decision, they will be treated as if they were parties to the judgments in **Ng Ka Ling** and **Chan Kam Nga**. (The "Concession" issue.)

4. Conclusions

The majority of the Court of Final Appeal comprising the Chief Justice, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ, (Mr Justice Bokhary PJ dissenting) have reached the following conclusions on the five issues raised in these appeals.

(1) The "judgments previously rendered" issue

Upon the true construction of "judgments previously rendered shall not be affected" in art. 158(3) of the Basic Law, the judgments in Ng Ka Ling and Chan Kam Nga are binding only on the actual parties in those cases. Since the applicants in these appeals were not parties in those cases, they are, unless they can succeed on another issue raised in these appeals, affected by the Interpretation and cannot benefit from the two judgments.

(2) The "legitimate expectation" issue

The statements made by the Director of Immigration on 13 July 1997 and the Chief Executive on 23, 31 July and 22 October 1997 to the effect that the government would abide by the decisions of the courts and would carry such decisions into effect, when considered in the light of the circumstances then prevailing and the test case character of the **Ng Ka Ling** and **Chan Kam Nga** litigation, amounted to a representation to the public that the government would treat persons who were in the same position as the parties in those cases as if they were parties thereto.

The Legal Aid pro forma replies sent to applicants for legal aid between 7 December 1998 and 29 January 1999 in which the Legal Aid Department stated that it was not necessary for them to join in existing proceedings or to commence fresh proceedings, amounted to a representation to those applicants that the government would carry into effect the decisions of the courts in the **Ng Ka Ling** and **Chan Kam Nga** cases and acted as an inducement to those applicants not to take the very action which, if taken, would have placed them in the same position as the parties to those pending cases and within the protection given to judgments previously rendered so that those applicants would also benefit from the two judgments.

The letter dated 24 April 1998 sent by the Secretary for Security to one of the representative applicants, namely, RA13, to the effect that the Immigration Department would follow the judgments of the courts in dealing with applications for certificate of entitlement, amounted to a representation to RA13 that his case would be dealt with in the same way as the parties in the **Ng Ka Ling** and **Chan Kam Nga** cases.

As a result of the Interpretation and the subsequent changes, the Director of Immigration is precluded by law from giving effect in full to the original legitimate expectation of persons to whom these representations were made. He is precluded by law because the Interpretation validated, with effect commencing on 1 July 1997, the relevant provisions in the Immigration Ordinance, namely, that a one-way exit permit is required to establish permanent resident status and that for a person to fall within art. 24(2)(3), at least one of his parents must already be a Hong Kong permanent resident at the time of his birth.

However, notwithstanding the changes resulting from the Interpretation, the Director of Immigration has a discretion under ss. 11, 13 and 19(1) of the Immigration Ordinance, Cap 115, to allow persons, who do not satisfy Part 1B of the Immigration Ordinance, to enter and reside in Hong Kong. He cannot, however, lawfully exercise such discretion in respect of a broad, innominate class of persons since to do so will undermine the legislative scheme as a whole. Even if he could, he would be entitled to decide that whatever expectations these persons might have, they are overridden by the overwhelming force of immigration policy which underlies the immigration legislation validated by the Interpretation. Representees of the general representations made by the Director of Immigration

and the Chief Executive cannot succeed on this ground.

But in respect of the representees who were recipients of the Legal Aid pro forma replies and RA13 who received the letter dated 24 April 1998 from the Secretary for Security, exercise of the Director of Immigration's discretions under ss.11, 13 and 19(1) of the Immigration Ordinance treating them as exceptional cases would not undermine the statutory scheme as validated by the Interpretation. Since the Director of Immigration did not consider their legitimate expectation or the extent to which such expectation could be lawfully addressed under these provisions at the time when he made the removal orders against these applicants, such orders must be quashed. These applicants are entitled to a fresh exercise of the Director of Immigration's discretions under ss.11, 13 and 19(1) of the Immigration Ordinance so that the substantial unfairness to them generated by the Director of Immigration's failure to give effect to their legitimate expectation can be duly taken into account.

(3) The "abuse of process" issue

The making of a removal order and its execution do not form part of the curial process. It is an exercise by the Director of Immigration of his statutory powers. The removal orders against the applicants in these appeals and the execution of such orders do not amount to an abuse of the process of the court.

(4) The "Periods 1 and 2" issue

Those applicants who are Group A applicants (i.e., born after at least one of their parents had become a Hong Kong permanent resident) and who arrived in Hong Kong prior to 1 July 1997 (i.e., before the provisions of the Basic Law, particularly art. 22(4), took effect) are entitled to have their permanent resident status under art. 24(2)(3) verified in Hong Kong without the need to obtain one-way exit permits. After they have established their status, they are entitled to exercise their right of abode in Hong Kong.

Those applicants who are Group B applicants (i.e., born before either one of their parents had become a Hong Kong permanent resident) and who arrived in Hong Kong prior to 1 July 1997 are affected by the time of birth limitation in art. 24(2)(3) as interpreted by the Interpretation. They do not fall within art. 24(2)(3) and are not entitled to benefit from the judgment in **Chan Kam Nga**, unless they can succeed on another issue raised in these appeals.

Those applicants, whether they are Group A or Group B applicants, who arrived in Hong Kong in Period 2 (i.e., between 1 July and 10 July 1997) are caught by art. 22(4) as interpreted by the Interpretation which requires them to obtain one-way exit permits before coming to Hong Kong for the purpose of settlement. They are not entitled to benefit from the judgment in Ng Ka Ling, unless they can succeed on another issue raised in these appeals.

(5) The "Concession" issue

The policy decision announced by the Chief Executive on 26 June 1999 was a decision reached by the Chief Executive in Council as to who would be unaffected by the Interpretation. This policy decision must be considered in the light of the history of the **Ng Ka Ling** and **Chan Kam Nga** litigation, the events leading to the Interpretation, the object of and rationale behind the policy decision and the context of right of abode claims.

According to the policy decision, in order to benefit from the **Ng Ka Ling** and **Chan Kam Nga** judgments, an applicant must have been in Hong Kong within the period between 1 July 1997 and 29 January 1999 and must have lodged a claim for right of abode to the Immigration Department during that period. As implemented, the claim had to be one made (1) to the Immigration Department; (2) during this Concession period; and (3) while the applicant was present in Hong Kong. When the

policy decision is considered in the light of its preceding history, it is reasonably clear that the Executive Council intended the policy to benefit only those who had lodged claims for right of abode with the Immigration Department or whose claims had been referred to the Immigration Department by government agencies in the course of their duty. There was no misinterpretation of the policy decision by the Director of Immigration in laying down these requirements.

There was also no misapplication of the policy decision on the part of the Director of Immigration in making it a requirement that a record be kept by the Immigration Department of a relevant claim for right of abode.

However, having regard to the context and the circumstances in which the claims came to be made, the Director of Immigration has in certain cases departed from a rational approach in applying too strict a construction of what amounts to a "claim" falling within the policy decision. Any document which clearly (1) identifies a person as a Hong Kong permanent resident and another person as his child; (2) provides some details such as his or her date or place of birth; and (3) asks for the child to come to Hong Kong either to settle or to enjoy his or her right of abode, should be rationally understood as a claim to the right of abode. A rejection of a document which falls within these criteria would amount to a misapplication of the policy decision.

5. Relief

As a result of the conclusions reached above, the Court would make the following orders:

RA3 in HCAL81 of 1999 - Ms Lo Po Lai (who succeeds on the "Periods 1 and 2" issue as a Group A Period 1 applicant):

(1) the appeal is allowed;

(2) the removal order made against her is quashed;

(3) a declaration that she is a permanent resident with the right of abode in Hong Kong under art. 24(2)(3).

There are persons in the same position as Ms Lo. According to the applicant' written case, there are 32 such persons.

RA11 in HCAL81 of 1999 - Mr Chan Kei Yui (who succeeds on the "legitimate expectation" issue) :

(1) the appeal is allowed;

(2) the removal order made against him is quashed;

(3) the Director of Immigration is directed to consider the exercise of his discretions under ss. 11,13 and 19(1) of the Immigration Ordinance in accordance with this judgment.

This judgment noted that the Legal Aid Department had issued about 1000 pro forma replies to applicants for legal aid, including Mr Chan.

RA13 in HCAL81 of 1999 - Mr Yuan Zhi Wei (who succeeds on the "legitimate expectation" issue) :

(1) the appeal is allowed;

(2) the removal order against him is quashed;

(3) the Director of Immigration is directed to consider he exercise of his discretions under ss. 11,13 and 19(1) of the Immigration Ordinance in accordance with this judgment.

Ms Li Shuk Fan in HCAL2 of 2000 (who succeeds on the "Concession" issue):

(1) the appeal is allowed;

(2) a declaration that she falls within the policy decision.

The appeals in respect of the other representative applicants are dismissed.

The parties are directed to consult together for the purposes of drawing up and submitting to the Court for approval a draft of formal orders to be made by the Court for disposing of these appeals in accordance with this judgment in respect of each of the representative applicants and of each person represented by them. In the event of disagreement, the parties should make written submissions to the Court and if necessary, apply for directions concerning the making of such written submissions.

There will be no order as to costs in these appeals. The applicants' own costs are to be taxed in accordance with the Legal Aid Regulations.

6. Dissenting judgment of Mr Justice Bokhary PJ

Mr Justice Bokhary PJ would allow all these appeals. He accepts the applicants' "previous judgments unaffected" argument. On that basis, he would allow all these appeals to the fullest extent in favour of all the applicants by (i) quashing all the removal orders and (ii) declaring that all the applicants are Hong Kong permanent residents with the right of abode here.

Even if he were to proceed on the "legitimate expectation" ground alone, Mr Justice Bokhary PJ would still allow all these appeals so as to (i) quash *all* the removal orders and (ii) make a declaration in favour of all the categories of representees, in other words, *all* the applicants. Such declaration would be that the Director of Immigration must, in exercising his discretionary powers, including his powers under sections 13 and 19 of the Immigration Ordinance, Cap 115, take into account all the applicants' legitimate expectation of being treated as far as possible in the same way as the abode-seekers who were named parties in **Ng Ka Ling** and **Chan Kam Nga**. Mr Justice Bokhary PJ would spell it out in the declaratory order that such treatment is possible to the following extent. The Director can exercise his discretionary powers: (i) to authorise all the applicants to remain in Hong Kong; and (ii) to refrain from making a removal order against any of them. The Director can thus exercise his discretionary powers so as to enable all of them to stay here to make Hong Kong their home and build up seven years' ordinary and continuous residence in Hong Kong. Such residence would, by virtue of art. 24(2)(2) of the Basic Law, gain all of them Hong Kong permanent resident status and therefore the right of abode in Hong Kong.

In addition to what he holds in the applicants' favour on their "previous judgments unaffected" and "legitimate expectation" arguments, and without in any way derogating therefrom to any applicant's disadvantage, Mr Justice Bokhary PJ respectfully concurs in everything decided by the other members of the Court in favour of the applicants or any of them on any of the applicants' other arguments.

(month=1-2002)