



Summary of Judicial Decision

Lubiano Nancy Almorin (Applicant) v Director of Immigration CACV 112/2018

Decision : **Applicant's Appeal Dismissed**
Date of Hearing : **17-18 March 2020**
Date of Judgment : **21 September 2020**

Background

1. Under the immigration and labour policy in Hong Kong, the Director of Immigration ("**Director**") would only grant an employment visa to a foreign domestic helper ("**FDH**") if the FDH undertakes to abide by the requirement that all FDHs must reside at their employer's residence ("**Live-In Requirement**"). The Live-In Requirement is specified in the Standard Employment Contract ("**SEC**") between the employer and the FDH. The Applicant, an FDH, applied for judicial review to challenge the constitutionality and lawfulness of the Live-In Requirement.
2. CFI dismissed the judicial review application and upheld the Live-In Requirement, on, *inter alia*, the following grounds:-
 - (a) FDHs' purported right to rest day under the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**") was not given effect in Hong Kong by way of domestic legislation;
 - (b) There was no sufficient evidence that the Live-In Requirement heightened the risk of violation of fundamental human rights of the FDHs;
 - (c) The immigration reservation provided for in section 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("**HKBORO**") ("**Immigration Reservation**") applied in this case.
3. The Applicant appealed to the Court of Appeal ("**CA**"). The main grounds of the Applicant's appeal are that the CFI erred in holding that the right to rest days has not been given domestic effect by the Hong Kong Employment Ordinance (Cap. 57) ("**EO**"); and that the Live-In Requirement did not unacceptably increase the risk of violation of that right. In the appeal, the Director and the Commissioner for Labour ("**Commissioner**") sought to vary the judgment below on the ground of heightened risk (i.e. the constitutionality of a government measure may not be challenged on the basis that it increases or



heightens the risk of violation of fundamental rights) and to affirm the judgment on other grounds.

Issues in dispute

4. The principal issues in dispute before CA are:-

- (1) The effect of the Immigration Reservation and the reservation under Article 6 of ICESCR (“**ICESCR 6 Reservation**”) in respect of the present challenge;
- (2) Whether the right to adequate rest and limitation on working hours, as provided in Articles 7(b) and 7(d) of ICESCR (“**ICESCR 7 Right**”), have been given legal effect in Hong Kong by way of the EO;
- (3) Whether the constitutionality of a government measure may be challenged on the basis that it increases or heightens the risk of violation of fundamental right;
- (4) Whether the Live-In Requirement has causal connection to the risk of harm relied on by the Applicant; and
- (5) Whether the Live-In Requirement is justified if answers to (2) to (4) above are affirmative.

Department of Justice’s Summary of the Court’s rulings

(Full text of the CA’s judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130932&QS=%2B&TP=JU)

5. On **Issue (1)** i.e. the effect of the Immigration Reservation and ICESCR 6 Reservation, CA held that insofar as the right to rest day is concerned, there is nothing in the Immigration Reservation nor the ICESCR 6 Reservation to water down the protection conferred by section 17 of EO. This is because no challenge under ICESCR Article 7 could succeed in light of the availability of protection to FDH under section 17 of EO, without making good the argument of the heightened risk. (paras. 37-38)
6. CA went on to hold that an FDH could not rely on the argument of heightened risk of breach of the ICESCR 7 Right to challenge the Live-In Requirement by reason of the Immigration Reservation. In particular, the Immigration Reservation applies to cognate rights under the Basic Law and HKBORO. It



- precludes the FDH, being a person not having the right to enter and remain in Hong Kong, from relying on the ICESCR 7 Right, which is a cognate right to the right against forced labour under BOR 4(3). (paras. 39-56)
7. CA further held that the Live-In Requirement falls within the scope of the ICESCR 6 Reservation (i.e. reserving the Government's right to impose restrictions on the taking of employment in Hong Kong). The Applicant's heightened risk argument in respect of ICESCR 7 Right would frustrate the ICESCR 6 Reservation and is not permissible. (paras. 57-67)
 8. On **Issue (2)** i.e. domestication of ICESCR 7 Right, CA held that the implementation of international treaty obligations through the laws of Hong Kong involves an objectively manifested intent on the part of the legislature. In the present case, CA could not find any basis to support the finding that the Hong Kong legislature had acted to incorporate or implement the ICESCR 7 Right into the domestic law. (paras. 68-110)
 9. On **Issue (3)** i.e. the constitutionality of a government measure on a heightened risk basis, CA ruled that the approach for judicial review based on a mere heightened risk of encroachment of fundamental rights was not applicable in Hong Kong. Such approach is an unwarranted expansion of judicial review and would involve the courts in risk and benefit analyses, which are beyond the institutional competence of the courts in Hong Kong. CA nevertheless left open the question as to whether there could be challenges on the basis of "unacceptable or significant risk" of encroachment of rights. (paras. 111-129)
 10. On **Issue (4)** i.e. the causal link between the Live-In Requirement and the risk of harm relied on by the Applicant, CA held that the Applicant is subject to a high threshold in proving the causal connection. In this case, the high threshold cannot be met. (paras. 142-145)
 11. On **Issue (5)** i.e. the justification for the Live-in Requirement, CA held that the issue of justification did not arise for consideration as Issues (2) to (4) were answered in the negative. (para. 146)

Civil Division

Department of Justice

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