



Summary of Judicial Decision

**Comilang and another v Director of Immigration (FACV 9/2018)
Luis and others v Director of Immigration (FACV 10/2018), [2019] HKCFA 10**

Decision : **The Appellants' Appeals Dismissed**
Date of Hearing : **28 February 2019 – 1 March 2019**
Date of Judgment/Decision : **4 April 2019**

Background

1. The 1st Appellants are foreign national mothers, with no right to land or remain in Hong Kong. They applied for an extension of stay in Hong Kong to take care of their respective minor children (the other Appellants), who are either Hong Kong Permanent Residents (with right of abode) or Hong Kong residents. The Director of Immigration (“the Director”) refused the 1st Appellants’ applications.
2. The Appellants challenged the Director’s refusal decisions by way of judicial review, on the basis that the Director failed to take into account a series of rights under the Basic Law (“BL”), the International Covenant on Civil and Political Rights as incorporated under the Hong Kong Bill of Rights (“HKBOR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), the Convention on the Rights of the Child (“CRC”) and the best interests of the child principle at common law (collectively “the Asserted Rights”).
3. The mothers contend that they are entitled to assert those rights directly on their own behalf. The minor children also assert the relevant rights on their own behalf, contending that the rights confer an entitlement to have their mothers granted permission to stay in Hong Kong to take care of them, or at least that the Director is legally obliged to take the Asserted Rights into account in deciding whether to grant the extensions of stay sought by their mothers.
4. On 12 January 2016, the Court of First Instance (“CFI”) dismissed the judicial review. It held that Director has no obligation to take into account the Asserted Rights in making the relevant decisions.
(full text of the CFI’s judgement :
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=102193&QS=%2B&TP=JU)
5. The Court of Appeal (“CA”) dismissed the Appellants’ appeals on 26 March 2018.



It held that none of the Asserted Rights was engaged and that the immigration reservation reflected in section 11 of the Hong Kong Bill of Rights Ordinance (“HKBORO”) and BL 154(2) would prevent the application of the Asserted Rights.

(full text of the CA’s judgement :

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=114344&QS=%2B&TP=JU)

6. The Appellants’ appeals to the Court of Final Appeal (“CFA”) were heard on 28 February 2019 and 1 March 2019.

Issues in dispute

7. The CFA had to decide the following questions:-
 - (i) whether the Director is obliged as a matter of law to take into account the parent-and-child family’s enjoyment of applicable fundamental rights while living in Hong Kong; and
 - (ii) whether section 11 exempts the Director from considering the Basic Law rights of a child member of the family when decisions are made in respect of a non-Hong Kong resident family member.

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

(full text of the CFA’s judgement at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=121147&QS=%2B&TP=JU; press summary issued by the Judiciary at

https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2018/FACV000009_2018_files/FACV000009_2018ES.htm)

8. The Court affirmed the constitutional status of section 11. It excludes immigration legislation governing entry into, stay in and departure from Hong Kong and the application of such legislation from the scope of the HKBOR. Moreover, section 11 is not confined to rights in the HKBOR and extends to cognate rights in the Basic Law, requiring them to be interpreted consistently with section 11 as laying down a coherent scheme in the specified immigration context. (paragraphs 28-35)
9. Section 11 excludes reliance by the mothers on HKBOR rights. Likewise, they



cannot rely on BL 37 (right to raise a family freely) which is constitutionally subject to the section 11 exception. (paragraphs 38-41)

10. Concerning the children, section 11 bars their reliance on HKBOR rights. The question is not who has the fundamental rights but rather the content of the decision under challenge and to whom the decision specifically relates. Likewise, section 11 also limits the application of cognate rights in the Basic Law, whether they are invoked directly or in connection with the enjoyment of another right (such as BL 24, see paragraph 11 below). It would frustrate the evident purpose of section 11 and BL 39 (which provides that the provisions of the ICCPR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region) if a person who has no right to enter and remain is able to circumvent that position by relying on another person's rights. (paragraphs 51-61)
11. As to the argument that the Director's refusal of entry to the mothers had the effect of interfering with the right of abode of the children under BL 24 (which has no equivalent in the HKBOR) because they would have to leave Hong Kong in order to be cared for by their mothers, such argument depends in reality on an asserted family unity right. However, section 11 already limits the application of such rights in the HKBOR and cognate rights in the BL. (paragraphs 66-69)
12. The Court also rejected the Appellants' reliance on other rights arising under (i) the ICESCR and (ii) the CRC and (iii) the common law principle of the best interests of the child:
 - (a) The ICESCR is an international treaty and under the common law dualist principle is not self-executing. Unless and until made part of Hong Kong domestic law by legislation, its provisions do not confer or impose any rights or obligations on individual citizens. Even so, they are subject to section 11. (paragraphs 74-77)
 - (b) The CRC is also an unincorporated international convention. Even if article 3 of the CRC has been implemented through BL 37 or provisions of the HKBOR, those rights are all subject to section 11. (paragraphs 78-83)
 - (c) The common law principle of the best interests of the child is one which operates in the context of custody and wardship issues. It has no



application in the present immigration context. (paragraphs 84-88)

13. The Court concluded that the Director is not duty bound to take into account the Asserted Rights relied upon when exercising his discretion to refuse permission to stay to the Appellant mothers since such rights are disengaged by section 11.

Civil Division

Department of Justice

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