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**Summary of Judicial Decision**

**Lubiano Nancy Almorin v Director of Immigration  
HCAL 210/2016; [2018] HKCFI 331**

**Decision** : **Application for judicial review dismissed  
(under appeal in CACV 112/2018)**  
**Date of Hearing** : **3, 4 and 9 October 2017**  
**Date of Judgment/Decision** : **14 February 2018**

**Background**

1. The Applicant is a foreign domestic helper (FDH) who challenged the requirement that all FDHs working in Hong Kong must reside at their employers' residence as the place of employment (Live-In Requirement). Under the current policy, for an application for an FDH visa to be granted, the FDH and the employer concerned must have agreed and undertaken that the FDH will live at the place of employment as specified in the Standard Employment Contract (SEC) and will only perform domestic duties at the employer's household as specified in the SEC.
2. The Applicant argued in her Notice of Application for Leave to Apply for Judicial Review (Form 86) that:-
  - i. the imposition of the Live-In Requirement by the Director of Immigration (the Director) as a condition of stay is *ultra vires*;
  - ii. the Live-In Requirement heightens the risk of breaching FDHs' fundamental rights;
  - iii. the Live-In Requirement is discriminatory against FDHs; and
  - iv. the Live-In Requirement is irrational and amounts to an unlawful fettering of the Director's discretion.
3. The judicial review application was substantively heard on 3, 4 and 9 October 2017 before the Court of First Instance (CFI). On 14 February 2018, the CFI dismissed the Applicant's judicial review application with costs to the Director.
4. The Applicant has filed a Notice of Appeal appealing against the CFI's judgment to the Court of Appeal.

**Issues in dispute**

5. Whether the Director has power to impose the Live-In Requirement on the FDHs.
6. Whether there exists any customary international law prohibiting forced labour.
7. Whether the rights to safe and healthy working conditions, adequate rest, leisure, limitation on working hours, and periodic holidays with pay under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and



the Migration for Employment Convention (MEC) can be enforced or relied upon in the domestic court.

8. Whether the Live-In Requirement, imposed only on FDHs admitted under the FDH Scheme but not on imported workers admitted under the Supplementary Labour Scheme, constitutes discrimination against FDHs, and if so, whether the differential treatment is nevertheless justified.
9. Whether the Director is acting irrationally or wrongfully fettering his discretion for failing to provide for any general exception to the Live-In Requirement.

### **Department of Justice's Summary of the Court's rulings**

(Full text of the CFI's judgement at [http://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=113714&QS=%2B&TP=JU](http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=113714&QS=%2B&TP=JU))

10. As a matter of fact, the Live-In Requirement is not imposed as a condition of stay on an FDH. It is a matter of "contract" between the FDH and the employer, a matter of "undertaking" given to the Director and an eligibility criterion for the exercise of the Director's discretion to grant an FDH visa. In any event, the Live-In Requirement can properly be regarded as a functional requirement to the FDH's employment and is thus not beyond the Director's power to impose it as a condition of stay. Even if the Director has no such power, the Director can achieve the same result by way of the SEC and undertaking and applying it as an eligibility criterion for permitting employment of FDHs in order to give effect to Hong Kong's labour and immigration policies. (paragraphs 43-52)
11. There was not sufficient evidence before the CFI to prove that prohibiting forced labour is regarded as part of customary international law. (paragraphs 58-72)
12. For FDHs' rights to adequate rest and limitation on working hours under ICESCR and MEC, the relevant provisions in both ICESCR and MEC have not been given "domestic effect" and are not directly enforceable in Hong Kong. The Employment Ordinance (Cap. 57) cannot be regarded as domestic legislation incorporating MEC and ICESCR. (paragraphs 73-80)
13. A domestic helper would necessarily be exposed to a risk of ill-treatment by the employer regardless of whether he/she lives in the employer's residence. The real cause of the problem lies in the employer, instead of the fact that the FDH is required to live in the employer's residence. There was no sufficient evidence before the CFI that the Live-In Requirement unacceptably or significantly heightens the risk of violation of fundamental rights of FDHs. In any event, the Applicant is precluded from invoking the right against 'servitude' and 'forced or compulsory labour' under Article 4(2) or 4(3)(a) of the Hong Kong Bill of Rights to challenge the Live-In Requirement because of section 11 of the Hong Kong Bill of Rights Ordinance, which shall exclude the application of that article in the circumstances. (paragraphs 81-95)



14. FDHs admitted under the FDH Scheme and imported workers admitted under the Supplementary Labour Scheme are plainly not in comparable or analogous positions in so far as the Live-In Requirement is concerned. It is clear that there is enough of a relevant difference between them to justify the differential treatment and such is not discriminatory. In any event, the Live-In Requirement satisfies the test for justifying a differential treatment which is otherwise discriminatory as it is rationally connected to pursuing the legitimate aim of meeting the demand of Hong Kong families for live-in domestic services and is no more than is necessary to accomplish the legitimate aim. Ultimately, it is a matter of choice for an FDH to decide whether to accept the Live-In Requirement in order to be permitted to come to work in Hong Kong. (paragraphs 100-109)
15. The Live-In Requirement, being a lawful policy, would not become unlawful nor should the Director be regarded as acting irrationally or wrongfully fettering his discretion merely because there is no general exception to the Live-In Requirement based on the parties' mutual consent. (paragraphs 110-112)

(press release of the Government in relation to the CFI's judgment at <http://www.info.gov.hk/gia/general/201802/14/P2018021400770.htm>)

**Civil Division**  
**Department of Justice**

**June 2018**