Summary of Judicial Decision

Kwok Cheuk Kin & Lui Chi Hang, Hendrick
v
Director of Lands & Secretary for Justice

Heung Yee Kuk ("Interested Party")

HCAL 260/2015; [2019] HKCFI 867

Decision : Application for Judicial Review partly allowed
Date of Hearing : 3-7 December 2018
Date of Judgment/Decision : 8 April 2019

Background

1. The Small House Policy (**"SHP"**) is a policy allowing an eligible male indigenous inhabitant of the New Territories (**"NTII"**) to apply for permission to build for himself a small house once during his lifetime, by way of:

   i. a Free Building Licence ("**FBL**") on land owned by the applicant himself at nil premium;

   ii. a Private Treaty Grant ("**PTG**") of Government land at concessionary premium set at approximately two-third of the full market value; or

   iii. a Land Exchange ("**Land Exchange**") at nil premium for the private land portion and concessionary premium for the Government land portion.

2. The Applicants applied for judicial review challenging (i) the decisions of the Director of Lands (**"Director"**) on and after 8 June 1991 (i.e. the enactment date of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("**BOR**")) to implement and to continue to implement the SHP (**"Director's Decisions"**), and (ii) Schedule 5, Part 2, Paragraph 2 of the Sex Discrimination Ordinance (Cap. 480) (**"SDO Exemption"**), which provides that Part 4 of the said Ordinance shall not render unlawful any discrimination between men and women arising from the SHP.

3. The Applicants argued in their Re-Amended Notice of Application for Leave to Apply for Judicial Review (**"Re-Amended Form 86"**) that:-

   i. the SHP is unconstitutional in that it discriminates against persons of non-indigenous status in contravention of Articles 25 and 39 of the Basic Law (**"BL 25"** and **"BL 39"**), and/or Article 22 of s.8 of the BOR (**"BOR 22"**);

   ii. the SHP and SDO Exemption are unconstitutional in that they discriminate against female indigenous inhabitants based on sex in contravention of BL 25, BL 39 and BOR 22; and

   iii. the SHP and the way it is implemented are unconstitutional in that the

Government has failed in its duty to manage, use or develop the land in Hong Kong for the benefit of all Hong Kong citizens in contravention of Article 7 of the Basic Law (**"BL 7"**).

4. The Applicants alleged that the SHP and the benefits conferred on NTIIs under the SHP do not fall within the protection under Article 40 of the Basic Law (**"BL 40"**) providing that *"[t]he lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administrative Region"*. The Applicants sought a declaratory relief that the Director's Decisions and SDO Exemption are unconstitutional.

5. The judicial review application was heard on 3-7 December 2018 before the Court of First Instance (**"CFI"**). On 8 April 2019, the CFI allowed the Applicant's judicial review application in so far as it related to PTG and Land Exchange, and directed that:-

   i. the parties shall further file and exchange written submissions on the form of relief and on the issue of costs within 21 days from the date of the judgment; and

   ii. the judgment shall not take effect until after the expiration of 6 months from the date thereof, with liberty for the Government and Interested Party to apply for a longer stay pending any possible appeal to the Court of Appeal.

Issues in dispute

6. The main issues in dispute are:-

   i. Whether the benefits conferred on NTIIs under the SHP are (a) "traditional" and (b) "lawful" within the meaning of BL 40. In considering Issue (i)(b), a sub-issue is whether the rights and interests which could be regarded as "traditional" within the meaning of BL 40 may nonetheless be challenged on the ground of discrimination, or other grounds of unlawfulness.

   ii. Whether the SHP and the way it is implemented have resulted in the Government's failure in its duty under BL 7 and thus, are unconstitutional.

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

(full text of the CFI's judgment at *https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=121196&QS=%2B&TP=JU*)

7. With regard to Issue (i)(a), the CFI accepted the Government's submission that the "traditional" rights and interests protected by BL 40 were those traceable to the rights and interests of NTIIs before the commencement of the New Territories Lease in 1898. The CFI expressed that a right or interest could be regarded as "traceable" if it captured or reproduced the essential feature(s) of a right or interest that was enjoyed by NTIIs before the commencement of the New Territories Lease. (paragraphs 55 and 115)

8. Having considered the expert evidence adduced by the Applicants and the Government, the CFI held that the rights and interests under the SHP in the form of FBL could be regarded as "traceable" to the "traditional" rights and interests of NTIIs, as that form of land grant started in about 1906 was made on the understanding that prior to the New Territories Lease, NTIIs were entitled to build houses on their land without having to seek the approval of, or make any payment to, the Imperial authorities or Subsoil land-owner (under the Subsoil-Topsoil system being practised for many years prior to 1898, as described by the Government's expert, Dr. Patrick Hugh Hase, and accepted by the CFI). (paragraphs 62, 66 and 116)

9. As for the rights and interests in the form of PTG or Land Exchange, the CFI held that they could not be regarded as "traceable" to any "traditional" right or interest of NTIIs. In particular, the CFI concluded on the expert evidence that New Grants made by the Government to NTIIs since about 1904 were not made in recognition of, or based on any understanding of the existence of, any right of NTIIs to acquire land to build houses before the New Territories Lease in 1898. Land was sold by the Government to the villagers to address their housing needs, but that would be nothing more than ordinary land administration by a government. (paragraphs 86, 96 and 117)

10. Having come to its decision on Issue (i)(a), the CFI held, in respect of Issue (i)(b), that it would not be consistent with the purpose of BL 40 to allow the rights and interests which could be regarded as "traditional" to be challenged on the ground of discrimination, or other grounds of unlawfulness. The CFI rejected the Applicants' submissions that "lawful" meant lawful according to both Qing Law before the New Territories Lease of 1898 and the domestic law of Hong Kong in 1997, and accepted the Interested Party's submissions that "lawful" in the present context was merely descriptive of the traditional rights and interests enjoyed by NTIIs. (paragraphs 128-129)

11. Accordingly, the CFI held that the right and interest in the form of FBL was a lawful traditional right and interest within the meaning of BL 40, but not PTG or Land Exchange. (paragraph 130)

12. In light of the above conclusions, the CFI found it unnecessary to consider Issue (ii), and allowed the present application for judicial review in so far as it related to PTG and Land Exchange. (paragraphs 135 and 147)

13. The CFI expressed its views that the fact that a part of the SHP was unlawful did not mean a Small House Grant made thereunder was unlawful, and such Small House Grant remained a valid land grant unless there was some basis to set it aside and it had been set aside by the Court. (paragraph 134)

Civil Division
Department of Justice
8 April 2019