



Summary of Judgment

**Fernandez Yvette Dingle and Fernandez Eloisa Valerie, suing by her mother and next friend, Fernandez Yvette Dingle v
Commissioner for Labour and Director of Immigration**

HCAL 3215/2019

Decision : **Application for leave to apply for judicial review dismissed**
Date of Hearing : **28 January 2021**
Date of Judgment : **10 February 2021**

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 throughout the whole employment period (“**Live-In Requirement**”). The Live-In Requirement is specified in the Standard Employment Contract (“**SEC**”) between the employer and the FDH. If an employer and FDH wish to vary the terms of the SEC to depart from the Live-In Requirement, they must reach an agreement and obtain prior consent of the Commissioner for Labour (“**Commissioner**”).
2. In the present case, the 1st Applicant was an FDH who was not able to reach an agreement with her employer on her live-out arrangement during her maternity leave. She requested the Commissioner and the Director to waive the Live-In Requirement imposed on her during her maternity leave. The Director referred the 1st Applicant to the Commissioner, and the Commissioner informed the 1st Applicant that her request could not be processed as there was no agreement between her and her employer on the live-out arrangement. The 1st Applicant considered that the Director and the Commissioner refused her application for waiving the Live-In Requirement and applied for leave to judicially review the alleged refusal decisions.
3. A rolled-up hearing was conducted before Mr Justice Chow (“**Chow J**”) on 28 January 2021.



Grounds of Review

4. The Applicants' grounds of review were:

- (1) **Ground 1:** The correct interpretation of the SEC was that there was no restriction to where an FDH could stay when the FDH was on leave, including but not limited to maternity leave. Otherwise, it would be a restriction to the FDH's liberty of movement in breach of Article 8 of the Hong Kong Bill of Rights ("**BOR 8**").
- (2) **Ground 2:** The Commissioner and the Director each failed to give independent consideration of the Applicants' circumstances in the exercise of their discretion on whether to grant a waiver of the Live-In Requirement.
- (3) **Ground 3:** The Government's policy or "mode of consideration" was in breach of or had significantly increased the risk of the breach of fundamental right to family life of the Applicants under Articles 14 and 19(1) of the Hong Kong Bill of Rights and/or the 2nd Applicant's right to protection as a child under Article 20 of the Hong Kong Bill of Rights.
- (4) **Ground 4:** There was legitimate expectation that the Government's policies would comply with the obligations in the international treaties applicable to Hong Kong. The Applicants relied on Article 9 of Convention of Rights of the Child ("**CRC**") and Article 9(1) of International Labour Organization Maternity Protection Convention.

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

(Full text of the CFI's judgment at

https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2019/HCAL003215_2019.doc)

5. CFI refused to grant leave for the Applicants to apply for judicial review for the following key reasons:-

- (1) The **present judicial review application is based on a false premise** that the Commissioner and/or the Director have power to grant a waiver of the Live-In Requirement. The correct position is that the Live-In Requirement is a matter of "contract" between the employer and the FDH, and a matter of "undertaking" given by the FDH to the Director in the FDH's visa application.



The Director has power not to enforce the “undertaking” and the Commissioner has power to consent to a variation of the SEC, yet they have **no power to waive the Live-In Requirement** in the absence of the employer’s consent. There is no proper basis for the 1st Applicant to seek a “waiver” of the Live-In Requirement from either the Director or Commissioner. (paras. 2, 26-27, 31)

- (2) In the present case, the Director could not be criticized for referring the 1st Applicant to the Labour Department regarding her application for a “waiver” of the Live-In Requirement. This is because the Commissioner’s prior consent was required before there could be any variation of the place of residence of the 1st Applicant under Clause 3 of the SEC. In any event, the Director had no power to grant any waiver. (paras. 28-29)
- (3) The 1st Applicant’s employer did not agree to allow the 1st Applicant to stay out of her residence during the 1st Applicant’s maternity leave. In the absence of an agreement between parties, the Commissioner was entitled to adopt the practical approach in not further processing the 1st Applicant’s application for a “waiver” (assuming he had the power) and not giving his prior consent to a variation of Clause 3 of the SEC. (para. 30)

6. Further, the Applicants failed to make out any of the grounds of review.

- (1) **Ground 1** – Even if the construction of SEC is in favour of the 1st Applicant in respect of where she could stay during her maternity leave, it would necessarily mean that there was no proper basis for any waiver of the Live-In Requirement to be sought from, or granted by, either the Director or Commissioner. Further, the 1st Applicant was an FDH who did not have the right to enter and remain in Hong Kong within the meaning of section 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383) (“**HKBORO**”). She would hence not be entitled to rely on BOR 8 to challenge the decisions of the Director and the Commissioner. (paras. 36-37)
- (2) **Ground 2:** This ground fails since neither the Director nor the Commissioner has any power to waive the Live-In Requirement. (para. 38)
- (3) **Ground 3:** The respective responses given to the 1st Applicant by the Director and the Commissioner cannot be properly regarded as reflecting or constituting any general “policy” or “mode of consideration” of or by the



HKSAR Government. The Applicants are in any event excluded from reliance on the Hong Kong Bill of Rights by section 11 of HKBORO. (para. 39)

- (4) **Ground 4:** There was no domestic embodiment of the international treaty obligations by local legislation. Hence, the relevant obligations cannot be brought by the backdoor by requiring the Government to exercise a discretion consistently with the treaty obligations, or take it in account as a relevant factor in the exercise of a discretion, no matter in the general sense or through the doctrine of legitimate expectation. In any event, Article 9 of CRC is subject to a reservation of immigration control. (paras. 40-42)
7. CFI dismissed the Applicants' application for leave to apply for judicial review with costs to the Commissioner and the Director. (para. 43)

Civil Division

Department of Justice

February 2021