JUDGMENT UPDATE

Ch'ng Poh v The Chief Executive of the Hong Kong Special Administrative Region

HCAL 182/2002 (3 December 2003)

Background

Under BL 48(12), the CE was given the power to pardon persons convicted of criminal offences as follows:

> "The [CE] of the [HKSAR] shall exercise the following powers and functions : ...
>
> (12) [t]o pardon persons convicted of criminal offences or commute their penalties ..."

In July 1994, the applicant was convicted by the High Court of two offences. In January 1996, the applicant's appeal against conviction was dismissed by the CA. The applicant's application for leave to appeal to the Privy Council was dismissed in July 1996. In January 2000, the applicant petitioned the CE for a pardon or the agreement of the CE to exercise his powers under s 83P of the Criminal Procedure Ordinance (Cap 221) to refer the case to the CA for fresh consideration. The petition was subsequently rejected by the CE. The applicant then applied for judicial review to seek an order to bring up and quash the decision of the CE to reject his petition. An important constitutional issue arisen in that case was whether and how far the CE's decision made under BL 48(12) was subject to judicial review.

Prerogative power of mercy under BL 48(12)

The judge was of the view that, in Hong Kong, the power vested in the CE under BL 48(12) was to be read within the context of the Basic Law. BL 11[1] defined the basis of executive power. That power was to be found not by looking to the history of the royal prerogative but by looking at the Basic Law itself (which was to protect the fundamental freedoms of all residents). It was evident that the Basic Law, while giving the CE certain prerogative powers, did not seek to place him above the law. Instead, his powers were defined by and constrained by the Basic Law. When the CE acted pursuant to BL 48(12), he acted within the greater constitutional scheme, a scheme which looked to the protection of the rights of all residents according to law.

The judge referred to a decision of the South African Constitutional Court[2], *President of the Republic of South Africa and Another v Hugo* 1997(6) BCLR 708 (CC). Goldstone J, at 723, said that the approach of the English courts was not open to South Africa and that the Constitution :

> "... obliges us to test impugned action by any organ of state against the discipline of the interim Constitution and, in particular, the Bill of Rights. That is a fundamental incidence of the constitutional state which is envisaged in the Preamble to the interim Constitution, namely :
>
> "... a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms; ..."

[1] BL 11 provides : "In accordance with Article 31 of the Constitution of the [PRC], ... the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law ..."

[2] Please refer to p 15 for more information on the South African Constitutional Court.

> In my view, it would be contrary to that promise if the exercise of presidential power is above the interim Constitution and is not subject to the discipline of the Bill of Rights. ”

The judge said that it would offend the Basic Law if, for example, those advising the CE in respect of his discretion under BL 48(12) were able "with impunity to subvert the honesty of that advice on the basis of racial, sexual or religious grounds or were able with impunity to refuse to put before the [CE] evidential material which did not for whatever reason suit their private ends. If such was the case, the [CE] would not, in making a determination on the basis advice, be discharging his obligations in terms of the Basic Law. That is because the Basic Law, as a document of constitution that safeguards the rights and freedoms of all residents in accordance with law (BL 4 [3]), does not permit such pollution of lawful process, executive or otherwise."

Conclusion

The judge was satisfied that under the Basic Law, while the merits of any decision made by the CE pursuant to BL 48(12) were not subject to the review of the courts, the lawfulness of the process by which such a decision was made was open to review. Accordingly, the applicant's challenge in respect of BL 48(12) was not vitiated by a lack of jurisdiction.

SIDELIGHTS

Constitutional Review in Leading Common Law Jurisdictions

For those of us living under the rule of law, legislation has our trust and respect. And indeed, statutory laws are enacted after meticulous deliberations. But what would happen if a certain law were found to be inconsistent with another law, or even with the constitution? Who would have the final say on matters like this? In this article, we will take a look at how leading common law jurisdictions such as the US, Canada and Australia handle the subject of constitutional review.

United States

In *Marbury v Madison* (1803) 5 U.S. 137, Marshall C.J., when delivering a landmark judgment of the Supreme Court of the United States in 1803, said that it was the duty of the courts to say what the law was; that if both a particular law (which was in opposition to the Constitution) and the Constitution applied to a certain case, then the court had to either decide the case in accordance with the law, disregarding the Constitution; or decide the case in accordance with the Constitution,

[3] BL 4 provides : "The [HKSAR] shall safeguard the rights and freedoms of the residents of the [HKSAR] and of other persons in the Region in accordance with law."

A Solicitor v The Law Society of Hong Kong & Secretary for Justice (Intervener)

FACV No. 7 of 2003 (19 December 2003)[1]

On 19 December 2003, the CFA held that the finality provision in section 13(1) of the Legal Practitioners Ordinance (Cap 159) (the "Ordinance") was invalid.

Reasoning for invalidity of the finality provision

Section 13(1) of the Ordinance provided that an appeal shall lie to the CA against any order of a Solicitors Disciplinary Tribunal and it included a provision that "the decision of the [CA] on any such appeal shall be final" (the "finality provision"). The finality provision was held invalid for the following reasons :

(a) The finality provision was not part of the laws of Hong Kong on 1 July 1997 :

Appeals to the Privy Council from Hong Kong were regulated by the Judicial Committee Acts[2] and two Orders in Council[3]. These two Orders in Council provided that appeals from Hong Kong would lie (1) as of right, from any final judgment of the CA where the matter in dispute amounted to more than a specified monetary amount, or at the discretion of the CA; or (2) by special leave of the Privy Council. Pursuant to section 2 of the Colonial Laws Validity Act 1865[4], the finality provision was absolutely void and inoperative because it barred any possibility of an appeal to the Privy Council from a decision of the CA on an appeal from the Solicitors Disciplinary Tribunal. Since the finality provision had no force at all prior to 1 July 1997, it could not be part of "the laws previously in force in Hong Kong" maintained by BL 8 and 18(1).

(b) The finality provision was inconsistent with the Basic Law :

In the absence of the finality provision, any appeal to the CFA from a judgment of the CA under section 13(1) of the Ordinance was already limited by section 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance (Cap 484). Such an appeal was only permitted where the CA or the CFA at its discretion granted leave on being satisfied that the question involved in the appeal was one "which, by reason of its great general or public importance, or otherwise" should be submitted to the CFA for decision. By imposing an absolute bar on appeals to the CFA even in cases where such criteria were satisfied, the finality provision did not satisfy "the proportionality test" implicit in BL 82 and was thus unconstitutional.

The proportionality test under BL 82

BL 82 vested the power of final adjudication in the CFA. The function of the CFA was similar to the previous role of the Privy Council in relation to Hong Kong and was to exercise a final appellate power upon appeal from an intermediate appellate court such as the CA. The CFA was of the view that, since it was not the intent of BL 82 to give every party to every dispute a right to have the dispute resolved by the CFA, the CFA's power of final

[1] Reported at [2004] 1 HKLRD 214.

[2] The Judicial Committee Act 1833 and the Judicial Committee Act 1844.

[3] The Order in Council of 1909 as amended in 1957 (S.I. 1957 No. 2059) and the Order in Council of 1982 (S.I. 1982 No. 1676).

[4] This provision provided that "[a]ny Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, ... shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative."

adjudication might, by implication, be regulated and limited by statutes. But such limitation could not be imposed arbitrarily by the legislature. The limitation imposed had to pursue a legitimate purpose and there had to be reasonable proportionality between the limitation and the purpose sought to be achieved. These dual requirements were collectively called "the proportionality test".

In ascertaining the purpose of a particular limitation, matters such as the subject matter of the dispute, whether it concerned fact or law, whether it related to substantive rights and obligations or only procedural matters, what was at stake, the need for speedy resolution and the cost implications of dispute resolution, including any possible appeals, would have to be considered. In applying the test, it would be necessary to examine the nature and extent of the limitation and whether such limitation was consistent with the public interest, which had many facets including the proper administration of justice.

Whether a particular limitation imposed by statute satisfied the proportionality test would depend on an examination of all the circumstances. There might be instances where a statutory limitation providing that a decision of the CA or the CFI on appeal, whether from a statutory tribunal or a lower court, shall be final might be able to satisfy the test.

SIDELIGHTS

Constitutional Review on the Mainland

The Constitution of the PRC[1] (the "Constitution") empowers the NPC and the NPCSC to supervise the implementation of the Constitution[2]. The Legislation Law[3] prescribes the powers of the NPC and the NPCSC to annul laws or regulations which contravene the Constitution. In particular, the NPC has the power to alter or annul any inappropriate laws enacted by the NPCSC, and to annul any autonomous regulations or separate regulations which have been approved by the NPCSC but contravene the Constitution[4]. Likewise, the NPCSC has the power to annul any administrative regulations which contravene the Constitution; and any local regulations, autonomous or separate regulations which contravene the Constitution, the law or the administrative regulations.[5]

The Legislation Law also provides a mechanism by which any of the following organisations or units

[1] Adopted by the NPC in 1982 and amended in 1988, 1993, 1999 and 2004.
[2] Articles 62 and 67 of the Constitution.
[3] Adopted by the NPC on 15 March 2000 and effective as of 1 July 2000.
[4] Article 88(1) of the Legislation Law.
[5] Articles 67(7) and 67(8) of the Constitution and Article 88(2) of the Legislation Law.

The Director of Immigration v Lau Fong

FACV No. 10 of 2003 (26 March 2004)[1]

Background

When the respondent attempted to enter Hong Kong on 4 October 1999 holding a Hong Kong identity card, she was refused permission to land under section 11(1) of the Immigration Ordinance (Cap 115) (the "Ordinance"). She was informed that she would be removed to the Mainland under section 18. She was detained under section 32 pending removal. Amongst other grounds for these decisions, the Director of Immigration (the "Director") maintained that the respondent's identity card was vitiated by her fraudulently obtained one-way Permit, and that her non-permanent residence status should be revoked.

Facts

On 23 December 1995, the respondent, a Chinese national, was granted permission to land in Hong Kong under section 11(1) of the Ordinance and permission to remain until 23 December 1996 under section 11(2) of the Ordinance. She held a one-way Permit which was issued to her on 21 November 1995. The respondent then obtained a Hong Kong identity card with the one-way Permit as a supporting document. Subsequently, her permission to land and remain in Hong Kong was extended to 8 June 2005.

When the respondent was interviewed by an immigration officer on 6 February 1996, she said that she applied for the one-way Permit as the wife of a Hong Kong permanent resident, Leung Wai Ming ("Leung"), and that they were married in the Mainland in April 1990. This was in conflict with her earlier statements and with travel records as set out below.

- The respondent first entered Hong Kong on 9 January 1993 in transit to Bangladesh and carried a PRC passport. She married Leung in Bangladesh on 12 January 1993.
- The respondent entered Hong Kong using a Bangladeshi passport (in the name of Uasha Chakma, a woman ostensibly born in Bangladesh) on 16 January 1993. On the basis that she was married to a Hong Kong permanent resident, she was permitted to remain in Hong Kong until 16 April 1993. She overstayed and was arrested in May 1993 when she went into hospital to give birth to a daughter.
- On 8 September 1993, the respondent stated under caution that, about late 1991, she commenced a relationship in Shenzhen with a married man, Ng Kam Chuen ("Ng"). In or about August 1992, she discovered that she was pregnant with Ng's child. As she did not wish to give birth to an illegitimate child, she flew to Bangladesh to enter into a sham marriage with Ng's friend, Leung (who did it for payment).
- Leung's travel records revealed that he did not leave Hong Kong between October 1989 and 16 May 1990.

[1] Reported in [2004] 2 HKLRD 204.

The Director was informed by the Mainland authorities on 28 June 1999 that the respondent's one-way Permit had been obtained by fraud. The Mainland authorities provided the Director with a letter from the Public Security Bureau of Dalian City stating that a marriage certificate relating to the respondent and Leung was issued on 11 April 1992.

Court of Appeal

The CA held that the respondent should have been treated as a person who had been permitted to remain in Hong Kong and was therefore a non-permanent resident. It concluded that, following *Gurung Kesh Bahadur v Director of Immigration* [2002] 2 HKLRD 775[2], section 11(10) of the Ordinance did not apply and the procedure of section 11(6) or section 19 of the Ordinance should have been followed. The Director's decisions were quashed. The Director appealed to the CFA.

Non-permanent resident status

The CFA said that BL 24 defined the non-permanent residents of the HKSAR, and they "shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the Region but have no right of abode"; that BL 31[3] conferred on non-permanent residents the "freedom to travel and to enter or leave the Region", and that their status as non-permanent residents rested on their having qualifications prescribed by the laws of Hong Kong.

The CFA emphasized that under the statutory scheme established by the Registration of Persons Ordinance (Cap 177), an identity card was valid until declared invalid and that it was an official document which recognized and confirmed that, in the case of a non-permanent resident, the holder, subject to the relevant qualifications, had the status of a non-permanent resident of Hong Kong.

The issue

The issue was whether the respondent's status as a non-permanent resident could be determined on the procedure which was adopted by the Director, ie, examination under section 4(1), the application of sections 7(1), 11(10), 18 of the Ordinance and detention pursuant to section 26. The CFA said that there were strong indications of a legislative intent that such procedure could not apply to a case where the question in issue was whether a person, having an unexpired permission to remain in Hong Kong and claiming the status of a non-permanent resident supported by the holding of an identity card, no longer enjoyed that status because, in the view of the Director (or his officers), the permission and the issue of the card were induced or affected by fraud or deception.

The reasons given by the CFA were :

- The provisions for examination under section 4(1)(a) and refusal of permission to land under section 11(1) prescribed no procedure which complied with the requirements of procedural fairness. There was nothing which required an immigration officer to outline the case to the individual or to afford an opportunity to the individual to answer that case. The absence of such requirements strongly suggested that the procedure was intended to apply only in simple and straightforward cases, instead of important cases where an issue of resident status was involved.

- The CFA said that the procedure under sections 4(1)(a), 7(1), 11(10), 18 and 26 of the Ordinance contrasted with the procedure (in respect of an order for removal) prescribed by section 19. Section 19(5) required the Director to cause written notice to be served on the relevant person informing him of the ground on which the order was made and of the appeal procedure. The section 19 procedure not only provided safeguards which were absent in the procedure adopted by the Director, but it also provided for a determination of the relevant issue by a quasi-judicial tribunal on the facts.

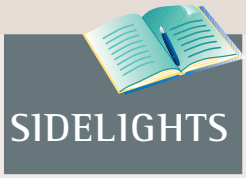
[2] For a summary of the judgment, see Issue No. 4, pp 8-9.

[3] BL 31 provides : "Hong Kong residents shall have freedom of movement within the [HKSAR] and freedom of emigration to other countries and regions. They shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization."

The CFA was of the view that the procedure adopted by the Director was not authorized by the Ordinance and the actions of the Director amounted to an interference with the exercise by the respondent of her constitutional freedom to travel because (a) such actions were based on an administrative decision that her permission to remain in Hong Kong had been procured by fraud; and (b) such decision was taken under a procedure which did not incorporate the safeguards appropriate to the determination of the important issue of status under the Basic Law.

Conclusion

The appeal by the Director was dismissed.



Margin of Appreciation

The doctrine of margin of appreciation is an integral part of the supervisory jurisdiction over national conduct by the supra-national European Court of Human Rights established under the European Convention on Human Rights. The doctrine applies where an international court gives a margin of appreciation (ie, a degree of deference) to the executive, legislative or judicial organ of a nation. In other words, when an international court is exercising its supervisory function over national institutions, it recognizes that, because of their direct and continuous contact with the vital forces of their countries, national institutions are in principle better placed to evaluate local needs and conditions than an international court.

Although a national court cannot directly apply the doctrine when considering issues arising within its own country, the underlying principle of the doctrine has been adopted by the English courts. For example, Lord Hope in *R v DPP, ex p Kebilene* [2000] 2 AC 326 at p 381B commented as follows :

> "In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the [European] Convention."