

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :-

THE ATTORNEY GENERAL OF HONG KONG Appellant

- AND -

NG YUEN SHIU (also known as
NG KAM SHING) Respondent

(and Cross-Appeal)

CASE FOR THE APPELLANT

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RECORD

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1. This is an appeal by leave of the Court of Appeal of Hong Kong given on the 2nd of December, 1981 from an Order of the Court of Appeal (McMullin, V.P., Li, J.A. and Baber, J.) dated the 13th of May, 1981. The Court of Appeal allowed in part, with costs, the appeal by the Respondent from an order of the Full Bench of the High Court of Justice of Hong Kong (Roberts, C.J. and Rhind, J.) dated the 4th of December, 1980. The Full Bench had quashed the writ of habeas corpus and dismissed the applications for orders of certiorari and prohibition. The Court of Appeal (McMullin, V.-P., Li, J. and Baber, J.) allowed the appeal from the Full Bench to the extent that the order of the Full Bench was set aside and ordered that an order of prohibition do issue prohibiting the Director of Immigration of Hong Kong from executing a removal order that he had made against the Respondent on the 31st of October, 1980 until the Respondent had been given the opportunity of making further representations to the Director of Immigration on his case. The Court of Appeal further ordered (by a majority of McMullin, V.P. and Baber, J.) that the other orders of the Full Bench be affirmed.

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2. The main questions for determination in this appeal and cross-appeal are:-

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(a) had the Respondent acquired a right to land and/or remain in Hong Kong under Section 8(1)(c) and Section 2(1) (definition of "Chinese resident") of the Immigration Ordinance (Chapter 115 of the Laws of Hong Kong) at the time the Removal Order was made on the 31st of October, 1980?

(b) is the Hong Kong Court of Appeal bound by its own previous decisions in civil cases if such decisions were not made per incuriam?

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(c) does an alien who enters Hong Kong without permission (in contravention of Section 7 of the Immigration Ordinance) have a right to a hearing conducted in accordance with the requirements of the rules of natural justice and the doctrine of fairness on the question of whether or not he should be removed before any removal order is made under Section 19(1)(b)(ii) of the Immigration Ordinance (as it stood on the 31st of October, 1980)?

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(d) if the answer to question (c) above be "no": is such an alien entitled to a hearing conducted in accordance with the requirements of the rules of natural justice and the doctrine of fairness if he is given by the Immigration Official "a legitimate expectation" of being accorded such a hearing?

(e) if the answer to either or both of questions (c) or (d) above be "yes": in all the circumstances of this case, was the Respondent given a hearing sufficient to satisfy the requirements of the rules of natural justice and the doctrine of fairness?

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(f) if the answer to question (d) above be "yes" and the answer to question (e) above be "no": what is the appropriate form of remedy to be granted?

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3. On the 6th of November, 1980, upon an ex parte application on behalf of the Respondent, Mr. Justice Rhind issued a writ of habeas corpus ad subjiciendum directed to the Commissioner of Prisons for Hong Kong in respect of the detention of the Respondent commanding the Commissioner of Prisons to bring the body of the Respondent before the High Court of Justice of Hong Kong on the 20th of November, 1980. In the return to the writ of habeas corpus and subjiciendum the Commissioner of Prisons certified and returned that the Respondent was detained under and by virtue of a

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removal order made under Section 19(1)(b) of the Immigration Ordinance and an order for detention pending removal under Section 32(3A) of that Ordinance - both orders having been signed by the Director of Immigration on the 31st of October, 1980.

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10 4. In the course of the hearing by the Full Bench of the High Court on the question of the validity of the Respondent's detention with the consent of the Crown, the Respondent was granted leave to apply for judicial review seeking the following relief:-

(a) "an order of certiorari to remove into (the High Court) and quash the following orders:- pp.8 and 9.

(i) an order made by the Director of Immigration on the 31st October 1980 that the Applicant be removed from Hong Kong to Macau and that the Applicant be detained in custody pending for the said removal,

20 (ii) a decision by the Immigration Tribunal on the 3rd November 1980 dismissing the Appeal without a hearing of the Applicant,

(iii) an order made by the Governor on or before 19th February 1976 that the Applicant be removed from Hong Kong to Macau";

(b) "an order of prohibition prohibiting the Director of Immigration from acting upon the removal order made on the 31st of October, 1980." pp.10 and 11

30 5. The Adjudicators of the Immigration Tribunal which summarily dismissed the Respondent's appeal were Tsui Tim-fook and S.S. Tan. Neither of these persons has ever been made a party to the present proceedings nor taken any part in them. pp.96 and 97

6. Both affidavit and oral evidence were adduced at first instance. The following facts were found by the Full Bench of the High Court:-

(a) The Respondent was born in China on the 16th day of May 1951 and taken to Macau by his parents at the age of three; p.17 lines 17-19

40 (b) He entered Hong Kong illegally in 1967; p.17 line 20

(c) In 1976 he applied for an identity card and thus came to the attention of the authorities as being a person who had entered Hong Kong illegally and as a result he was removed to Macau, under a Removal Order signed by p.17 line 23

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the Governor, in March, 1976;

p.17 line 28 (d) In April 1976 the Respondent re-entered Hong Kong illegally (i.e. without permission) and he has remained in Hong Kong since then up until the present time;

p.17 line 35 (e) On the 23rd of October, 1980 the Immigration (Amendment) (No.2) Ordinance 1980 was enacted. This Ordinance:

(i) required all residents of Hong Kong to carry proof of identity,

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(ii) prohibited the employment of illegal immigrants, and

(iii) conferred upon the Director of Immigration a power to make removal orders under Section 19 of the Ordinance;

p.17 line 44 (f) Linked to the enactment of this Ordinance the Government announced on the 23rd of October, 1980 that the previous "reached base" policy would be discontinued forthwith. Under this policy illegal immigrants entering Hong Kong from China would not be repatriated if they managed to reach the urban areas without arrest.

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p.18 line 3 This policy had never applied to illegal immigrants entering Hong Kong from anywhere other than China;

p.18 line 6 (g) Between the 24th and 26th of October, 1980 a series of television announcements was made, in English and Cantonese, explaining that all illegal immigrants who entered Hong Kong from China who did not possess a Hong Kong identity card or who had not registered for the granting of an identity card would be liable to be repatriated unless they registered for a Hong Kong identity card by midnight on the 26th of October, 1980;

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p.18 line 24 (h) On the 28th of October, 1980 a group of illegal immigrants who had been born in China but who had entered Hong Kong from Macau submitted a petition to the Governor, outside Government House, seeking assurances about illegal immigrants who had entered from Macau;

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p.18 line 30 (i) A Senior Immigration Official read to the group the following questions and answers:

"Q : Should we report to Victoria Barracks?

A : No. You should go to Li Po Chun

Chambers individually from 9 o'clock tomorrow morning as have over 2,500 people today.

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Q : Will we be arrested?

A : No. Not during these interviews.

Q : Will we be given identity cards?

10 A : Those IIs from Macau will be treated in accordance with procedures for IIs from anywhere other than China. They will be interviewed in due course. No guarantee can be given that you may not subsequently be removed. Each case will be treated on its merit."

20 (j) The same official also answered an additional question put to him by a member of the group. The question was whether anyone would get identity cards and the answer was that their cases would be judged on their merits, after investigation. The same official stressed that there had been no amnesty; p.19 line 20

(k) The Respondent went to the Li Po Chun Chambers on the morning of the 28th of October, 1980 where he was given a map and card telling him to attend at the Victoria Barracks Immigration Clearance Office the following morning. On the evening of the 28th of October, 1980 the Respondent saw a television programme dealing with the official statement set out in sub-paragraph (i) above; p.19 line 45

30 (l) On the morning of the 29th of October, 1980 the Respondent relying upon the assurance given outside Government House went to the Victoria Barracks Immigration Clearance Office taking with him various documents including the Removal Order which had been made against him in 1976; p.20 line 5
p.22 line 26

40 (m) He was there interviewed by an Immigration Officer, who asked him a few questions, took his papers and told him to wait in another room. Early in the afternoon, he was arrested and taken by van, with others, to the Victoria Immigration Centre which was inside Victoria Prison. He had been detained for further investigation of his case under Section 26(a) of the Immigration Ordinance; p.20 line 9
p.22 line 12
p.20 line 18

(n) Later the same day he was interviewed by an Immigration Officer who completed a p.20 line 21

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- p.30 line 30
p.31 line 21 printed-form report of interview. The Respondent asked the officer why he was arrested and what steps would be taken against him but received no reply. He was not expressly informed of the purpose of the interview and he was not allowed to make representations beyond answering the specific questions put to him;
- p.20 line 34 (o) The report of this interview was passed to a Chief Immigration Officer who later submitted to the Director of Immigration an application for a removal order in which the material concerning the Respondent was summarised and in which the Respondent's removal to China was recommended; 10
- p.29 line 49
p.30 line 5 (p) Each individual case was considered on its merits and investigated by officers of the Immigration Department before a decision on whether or not to remove the illegal immigrant concerned was reached by the Director of Immigration, before whom the information gleaned by those officers was placed; 20
- p.21 line 6 (q) The Director personally considered the application for a removal order and ordered the Respondent's removal to China under Section 19(1) (b) of the Immigration Ordinance and his detention pending removal under Section 32(3A);
- p.21 line 11 (r) On the 31st of October, 1980 the Respondent was served with a Notice of Removal Order informing him that the Director had made a removal order against him and that he had a right to appeal to the Immigration Tribunal under Section 53A of the Immigration Ordinance against the decision to make the Removal Order; 30
- p.21 line 19
p.21 line 25 (s) The Respondent appealed to the Immigration Tribunal on the 31st of October, 1980. His appeal was dismissed summarily under Section 53C of the Immigration Ordinance on the 3rd of November, 1980 on the grounds that the grounds of appeal would not be sufficient to allow him to succeed. 40
- p.20 line 34
p.123 and 124 7. The Appellant challenges in part the finding of fact described in paragraph 6(o) above wherein it is said that the Chief Immigration Officer who recommended the removal of the Respondent recommended that he be removed to China. The application for a removal order was silent on the question of the country to which the Respondent should be removed although it clearly states that the Respondent came to Hong Kong from Macau where he had lived with his family for most of his life 50

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- and that he had previously been removed to Macau. The minute ("M.1") from the Chief Immigration Officer to the Director of Immigration which accompanied the application for the removal order and which applied to two other illegal immigrants besides the Respondent recommended the removal of the three "to China". The removal order ("M.2") itself orders the removal of the three to China. This was a clerical error. Throughout these proceedings counsel for the Respondent has accepted that this was a clerical error and that should the Respondent fail in these proceedings then he will be removed to Macau. Section 19(1) (b) does not require the Director to state the name of the country to which the subject of a removal order made under that provision is to be removed.
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8. The judgment of the Full Bench was delivered by Roberts, C.J. and in that judgment the Court held that:-
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- (a) The decision of the Court of Appeal in Cheung Kam Ping v. The Attorney General (1980) H.K.L.R. 602 was binding on the Full Bench of the High Court so that the Applicant could not argue for a proposition contrary to the decision in that case;
- p.126 lines 1-33
- p.126 lines 34 to p.127 line 4
- p.15-32
- p.16 line 30 to p.17 line 5
- (b) The undertaking given by the Immigration Department on the 28th of October, 1980 that illegal immigrants from Macau who attended at Li Po Chun Chambers for interviews would not be arrested during those interviews was substantially broken the following day when the Applicant was arrested at Victoria Barracks;
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- (c) This arrest was not illegal and even had it been illegal this, of itself, could not have vitiated the removal order which the Director of Immigration subsequently made. Consequently the detention of the Applicant under an order made under Section 32(3A) of the Immigration Ordinance for detention pending removal was not invalid;
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- (d) The duty to observe the rules of natural justice is to be inferred not from the nature of the process of decision-making but from the nature of the power under which the decision is made: Durayappah v. Fernando (1967) 2 A.C. 337, at 339 (P.C.);
- p.23 line 32-45
- p.25 line 7
- (e) The Director of Immigration does not have a duty to observe the requirements of the
- p.25 line 21

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- p.25 line 40 rules of natural justice before making a removal
p.25 line 27 order against alien whose only right to be in Hong
p.25 line 30 Kong arises by licence of the Crown: R. v. Brixton
Prison Governor, ex parte Soblen (1963) 2 Q.B.243;
Schmidt v. Secretary of State for Home Affairs
(1969) 2 Ch. 149 (C.A.): Salemi v. Minister for
Immigration and Ethnic Affairs (No.2) (1977) 14
A.L.R. 1 (H.C.A.);
- p.26 line 28 (f) The decisions in the cases of In Re H.K. 10
p.26 line 35 (An Infant) (1967) 2 Q.B. 617 and Attorney
p.27 line 1 General v. Ryan (1980) 2 W.L.R. 143 are both
distinguishable from the present case since they
dealt with persons who had a conditional right to
stay or to be registered as citizens if they
satisfied specified statutory conditions. These
cases concerned questions analagous to the
p.27 line 7 question considered by the Immigration Tribunal,
namely whether the Respondent was a person who
had a right to land in Hong Kong under Section 20
8(1) of the Immigration Ordinance;
- p.27 line 24 (g) Even if the concept of "legitimate
expectation" is adopted the Applicant here did not
have such an expectation: if an alien seeking
permission to enter legally has no right to a
hearing then a fortiori an alien who enters the
territory illegally has no right to a hearing;
- p.27 line 43 (h) The requirements of natural justice/
fairness are variable and depend upon the
circumstances of the case: Selvarajan v. Race 30
Relations Board (1976) 1 All E.R. 12, at 19.
But at common law the requirement to comply with
p.28 line 4 the rules of natural justice does not arise in
respect of aliens' applications for permission
to reside in the territory: In re Luong Bat Kien
(1973) (unreported) Misc. Proc. No.440 of 1973;
- p.28 line 40 (i) Had the Director of Immigration been
obliged to cmmply with the requirements of the
rules of natural justice/doctrine of fairness
then:- 40
- p.29 line 49 (i) the Director did honour the undertaking
to p.30 line that such case would be considered on its
5 merits and would be investigated before a
decision was reached;
- p.30 lines (ii) there was no evidence to suggest that
6-23 the Director had fettered his discretion
under Section 19 of the Immigration Ordinance
by deciding that any illegal immigrant who
had previously been removed under a removal

order would again be removed irrespective of the merits of his case;

(iii) although the applicant had not been expressly told the reason for his arrest and the interview which followed this did not constitute unfairness because he could have been in no doubt as to the object of the interview;

p.30 lines 6-49

p.30 line 33 and line 43

10 (iv) the Director failed to act fairly to the limited extent that he failed to give the Applicant a chance to make his own representations as to why he should be allowed to remain in Hong Kong on humanitarian grounds.

p.30 line 50 to p.32 line 39

9. By a notice of appeal dated the 10th of December, 1980 the Applicant (Ng) appealed to the Court of Appeal of Hong Kong. By a Respondent's Notice dated the 12th of December, 1980 the Attorney General contended that the Order of the Full Bench of the High Court should be affirmed on grounds additional to those contained in the judgment of the Full Bench.

pp.35-38

pp.39 and 40

10. The Appeal came before McMullin, V.-P., Li, J.A. and Baber J.

11. In outline, the submissions made on behalf of the respective parties were:-

(A) The Appellant (Ng Yuen-shiu)

(i) The Court of Appeal is not bound by the Court's earlier decision in Cheung Kam Ping v. The Attorney General because the exception to the rule in Young v. Bristol Aeroplane Company Ltd (1946) A.C. 163 in respect of decisions in criminal cases was founded on the protection of the liberty of the subject and was not or should not be confined to criminal cases but should also embrace cases such as this which concern the liberty of the subject.

R. v. Taylor (1950) 2 All E.R. 120;

R. v. Gould (1968) 1 All E.R. 849;

Klauser v. The Queen (1968) H.K.L.R.201.

(ii) Natural justice is but fairness writ large and juridically and is therefore present in every case - only the application

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is flexible depending upon the circumstances of each case.

Ridge v. Baldwin (1964) A.C. 40;

Furnell v. Whangarei High Schools Board
(1973) A.C.660.

(iii) Natural justice encompasses fairness.

(iv) Irrespective of matters of estoppel, the exercise of a discretion must take heed of legitimate expectantions excited in the minds of persons affected by the exercise of the discretion by the official exerising the discretion.

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Regina v. Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association
(1972) 2 Q.B. 299 (C.A.);

Re L. (A.C.) (An Infant) (1971) 3 All E.R.743;

Breen v. Amalgamated Engineering Union (1971)
2 Q.B. 175;

Lever Finance Ltd. v. Westminster (City) London Borough Council (1971) 1 Q.B. 222
(C.A.);

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Cinnamond v. British Airports Authority (1980)
2 All E.R. 368.

(v) The legitimate expectation excited in the mind of the Appellant (Ng) was that his case would be investigated and decided on its own merits.

(vi) Aliens as such are not outside the scope of the requirements of fairness. If the Director of Immigration acted unfairly then the removal order is void.

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Cooper v. Wandsworth Board of Works (1863)
14 C.B. (W.S.) 180;

Durayappah v. Fernando (1967) 2 A.C. 337;

In re Pergamon Press Ltd. (1971) 1 Ch. 388

Fairmount Investments Ltd v. Secretary of State for the Environment (1976) 2 All E.R. 865.

(vii) The fact that when the Director makes a decision under Section 19 (removal) or Section 13 (permission to remain) of the Immigration Ordinance his decision is made in respect of an alien does not relieve the Director from a duty to comply with the rules of natural justice.

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(viii) The decisions in Schmidt v. Secretary of State for Home Affairs (1969) 2 Ch. 149 (C.A.) Rex v. Leman Street Police Station Inspector and Secretary of State for Home Affairs, Ex parte Venicoff (1920) 3 K.B. 72, and Reg. v. Governor of Brixton Prison, Ex parte Soblen (1963) 2 Q.B. 243 (C.A.) should be distinguished from this case on the ground that they dealt with matters of national or public security and should not receive wider application.

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(ix) The "minority" viewpoint in the decision in Salemi v. Minister for Immigration and Ethnic Affairs (No.2) (1977) 14 ALR 1 (H.C.A.) should be followed.

(B) The Respondent (The Attorney General)

(i) The Court of Appeal is bound to follow its previous decision in Cheung Kam Ping v. The Attorney General.

Davis v. Johnson (1978) 1 All E.R. 1132

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de Lasala v. de Lasala (1979) 2 All E.R. 1146

(ii) The exception to the rule in Young v. The Bristol Aeroplane Coy Ltd. whereby the Court of Appeal is not bound by its own previous decisions in criminal cases is confined to criminal cases and in any event if the rule should be enlarged it should only be enlarged by the Privy Council.

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(iii) The return to the writ on its face showed a valid authority for the detention which is therefore prima facie valid.

R. v. Governor of Risley Remand Centre Ex parte Hassan (1976) 1 W.L.R. 971

(iv) A writ of habeas corpus is not to be granted on a mere technicality (such as the fact that the removal order was incorrectly expressed to provide for removal to China

instead of removal to Macau).

In re Kek Peng-teng and others (1969)
H.K.L.R. 564 (C.A.)

(v) The original detention of the Appellant (Ng) at Victoria Barracks was effected under Section 26(a) of the Immigration Ordinance which provides for detention for 48 hours to allow inquiries to be made. Irrespective of the morality or propriety of that detention the detention had ceased well before the writ of habeas corpus was issued. The present detention was effected under Section 32(3A) of the Ordinance which provides for detention pending removal under a removal order - so that, if the removal order is valid, the detention is valid.

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(vi) The discretions of the Director of Immigration under s.19(1)(b) and (its converse) S.13 of the Ordinance are discretions possessing a large policy content and will generally be exercised in accordance with the immigration policies of the Government for the time being (in Hong Kong : the Executive Council).

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British Oxygen Co. Ltd. v. Minister of Technology (1971) A.C. 610.

(vii) An alien illegally present in Hong Kong has no legal right to have his case for being allowed to remain determined according to the requirements of the rules of natural justice/doctrine of fairness.

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Schmidt v. Secretary of State for the Home Office.

(viii) If the Appellant (Ng) had no legal right to have his case for being permitted to remain in Hong Kong determined according to the requirements of natural justice/doctrine of fairness then he does not have rights in issue in these proceedings so that:

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- (a) no order of certiorari could issue;
- (b) no order of prohibition could issue;
- (c) no declaration of rights could be made in lieu of (a) or (b).

(ix) The concept of "legitimate expectation" expounded in R. v. Liverpool Corporation and other cases as being something different from or additional to the rights of subjects is misconceived and the "majority" decision of the High Court of Australia in Salemi v. Minister for Immigration and Ethnic Affairs (No.2) should be followed.

10 (x) The Director of Immigration cannot create an estoppel (whether it be described as a "legitimate expectation" or otherwise) which would prevent or hinder the exercise of his statutory discretion under Sections 19 and 13 of the Ordinance

Maritime Electric Co. Ltd. v. General Dairies Ltd. (1937) A.C. 610

Southend-On-Sea Corporation v. Hodgson (Wickford) Ltd. (1962) 1 Q.B. 416.

20 (xi) Alternatively, if the Director of Immigration had a duty to comply with the rules of natural justice/requirements of fairness in considering the case of the Appellant (Ng) then, in all the circumstances of the case, the Director discharged his duty as the opportunity to be heard afforded the Appellant by the Director's officers was sufficient to satisfy the requirements of the rules of natural justice/doctrine of fairness.

30 Re Pergamon Press (1971) 1 Ch.388, at 403 (C.A.)

Selvarajan v. Race Relations Board (1976) 1 All E.R. 12, at 19. (C.A.)

12. Judgments in the Court of Appeal were delivered on the 13th of May, 1981. The Appeal was allowed in part with costs to the Appellant (Ng). pp.40-78

13. The first judgment was delivered by McMullin, V.-P. who held that:- pp.41-68

40 (a) The decision of this Court in Attorney General v. Cheung Kam-ping was not decided per incuriam. p.45 line 8

(b) The substance of the case was whether the Director of Immigration was under a duty to act fairly. p.46 line 6

(c) The status of the Appellant (Ng) is not even that of a bare alien as he has already p.50 line 39

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been refused leave to remain in Hong Kong. He stands before the Court as one who at best had a hope or expectation of attracting the sympathetic consideration of the Director under Section 13 of the Ordinance.

- p.52 line 20 (d) The legitimate expectation contemplated in Schmidt v. Secretary of State for Home Affairs and Salemi v. Minister of Immigration and Ethnic Affairs (No.2) was in each case 10
- p.52 line 36 a legitimate expectation of being allowed to remain. On the facts of this case the Appellant (Ng) had no legitimate expectation of being allowed to remain.
- p.53 line 1 (e) The firmer proposition contended for here is that the applicant had the legitimate expectation that the undertaking given to him by the authorities that his case would be heard on its merits would be honoured.
- p.55 line 20 (f) This Court is not bound by the decision 20 of the English Court of Appeal in Schmidt v. Secretary of State for Home Affairs although we should be slow to depart from it unless the latest trend of authority in England and elsewhere should draw us towards a more liberal approach to the status of an executive act in such special circumstances as is now being considered.
- p.59 line 41 (g) The Court is not compelled to choose 30 between the Decisions in Lever Finance Ltd. v. Westminster L.B.C. (1971) 1 Q.B. 222 and R. v. Liverpool Corporation on the one hand and those in Maritime Electric Coy Ltd. v. General Dairies Ltd. (1937) A.C. 610 and Southend-On-Sea Corporation v. Hodgson (Wickford) Ltd. (1962) 1 Q.B. 416
- p.60 line 5 on the other because if the Court were to decide that the Appellant (Ng) had not received the kind of hearing that he had been promised there could be no question of 40
- p.60 line 20 fettering the Director's discretion. Rather it is to be supposed that the Director was anxious to have a full exposition of all relevant circumstances in order to fairly exercise his discretion.
- p.60 line 36 (h) Where there is an honest desire to act justly the want of pertinent information is just as much a fetter in this area of human conduct as in any other. The obtaining of that pertinent information removes rather 50 than creates a fetter to the proper exercise

of the discretion : Stephen, J in Salemi v. Minister of Immigration and Ethnic Affairs (No.2), quoting Roskill, L.J. from R. v. Liverpool Corporation.

10 (i) This narrower aspect of a legitimate expectation gives rise to a right to be heard. These "rights" invoke the duty of the Court to see that justice is manifestly seen to be done. p.61 line 12 p.61 line 22

(j) An order of prohibition will issue to prevent the Director of Immigration executing the removal order until a further opportunity is given to the Appellant (Ng) of putting all of the circumstances of his case before the Director - after which it is entirely within the Director's discretion whether the Appellant should be removed or permitted to remain. p.61 line 52 p.62 line 15

20 (k) This Court should not seek to extend the exceptions in the rule in Young v. Bristol Aeroplane Coy Ltd. in respect of previous decisions in criminal cases to previous decisions in civil cases involving the liberty of the subject. The more so since the Court of Appeal in Hong Kong will shortly have three divisions sitting simultaneously this was one of the factors behind the decision of the House of Lords in Davis v. Johnson (1978) 1 All E.R.1132. p.66 line 45 p.67 line 35 p.68 line 7

30 (l) In the light of that decision and the decision of the Privy Council in Attorney General of St. Christopher, Nevis and Anquilla v. Reynolds (1980) A.C. 637 the time has come when the Hong Kong Court of Appeal should, in civil matters, consider itself bound by its own previous decisions on points of law subject to the three exceptions stated in Young v. Bristol Aeroplane Coy Ltd. p.68 line 32

40 14. Li, J.A. also decided that the appeal from the decision of the Full Bench of the High Court should be allowed although he would grant more extensive relief than would McMullin, V.-P. (and Baber, J.). His reasons for allowing the appeal were as follows:- p.68-77

50 (a) The finding by the Full Bench that the fact that the Director of Immigration had only permitted the Appellant (Ng) to answer set questions and not to present his own case was unfair conflicts with its earlier conclusion that p.70 line 4 to p.71 line 25

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- p.71 line 28 each case was considered on its merits and was investigated by officers of the Department before a decision was made. The Director cannot be said to have considered the Appellant's case on its merits.
- p.71 line 34 (b) The only "merits" of an illegal immigrant will be humanitarian grounds and the Director of Immigration and his Department prevented the Appellant (Ng) from: 10
- p.71 line 38 (i) presenting his case on such grounds, and
- p.71 line 40 (ii) gathering material for that purpose. Accordingly the Director of Immigration did not act reasonably and fairly towards the Appellant (Ng). He issued the removal order in breach of his earlier undertaking.
- p.71 line 42
- p.71 line 44
- p.72 line 10 (c) The Appellant's case is that he has a right to be heard founded on either a legitimate expectation to remain in Hong Kong or on a legitimate expectation created by the Government's undertaking that it would consider his case on its merits. There is no substance in the first claim : Schmidt v. Secretary of State for Home Affairs. 20
- p.72 line 19
- p.73 line 50 (d) A right to be heard will only arise where there is a legitimate expectation of some legal right.
- p.76 lines 31-47 (e) The Government undertakings not to arrest the Appellant (Ng) pending on interview and to consider his case on its merits were both breached. These assurances bind the Director of Immigration: R. v. Liverpool Corporation; Lever Finance Ltd. v. Westminster L.B.C. (1971) 1 Q.B. 222. 30
- p.76 line 36 (f) Even if the Appellant had no right to be heard the assurance that his case would be considered on its merits granted him that right.
- p.76 line 51 (g) The removal order was made in breach of the undertaking and the Director's decision was thus unreasonable and therefore unfair. The assurance was not given erroneously and it does not prevent the Director of Immigration from acting in accordance with his statutory duty. 40
- p.77 line 3
- p.77 line 8 (h) The removal order was invalid. The only justification for the Appellant's arrest

was the removal order so that there is no further ground for detaining the Appellant (Ng). The writ of habeas corpus should issue as should orders for certiorari and prohibition.

p.77 line 17

(i) This Court should be bound by its own previous decisions.

p.77 line 19

15. Baber, J. agreed with McMullin, V.-P. that the appeal should be allowed only to the extent of issuing an order of prohibition restraining the Director of Immigration from executing the removal order until the Appellant has had an opportunity of making within a reasonable time further representations for the reason that the Appellant (Ng) was led reasonably to believe that his case would be decided on its merits and he was not given a reasonable chance to state his case on what he considered were its merits.

p.77 line 28

p.77 line 30

p.77 line 45

16. Counsel for the Appellant (The Attorney General) will submit that the order of the Court of Appeal dated the 13th of May, 1981 so far as the same ordered that an order of prohibition do issue to prohibit the Director of Immigration from executing the removal order against the Respondent (Ng) ought to be set aside and that the order of the Full Bench of the High Court dated the 4th of December, 1980 ought to be restored, and the Respondent directed to pay the Appellant's costs in this appeal and below for the following amongst other

R E A S O N S

1. When the Director of Immigration considered the Respondent's case the Respondent had no legal rights in issue so that he had no right to a hearing.

2. A "legitimate expectation" does not confer legal rights.

3. The Director of Immigration cannot fetter his statutory discretion under Sections 19 and 13 of the Immigration Ordinance by creating an estoppel.

4. Alternatively, if the Director of Immigration had a duty to consider the Respondent's case in accordance with the requirements of the rules of natural justice/doctrine of fairness then in all the circumstances of this case the hearing accorded the Respondent satisfied the requirements

Record

applicable to the exercise of the discretion
under Section 19 of the Immigration Ordinance.

N.T. KAPLAN, Q.C.

B.G.J. BARLOW
(Counsel for the Appellant)

ON APPEAL
FROM THE COURT OF APPEAL OF HONG
KONG

BETWEEN:-

THE ATTORNEY GENERAL
OF HONG KONG Appellant

- AND -

NG YUEN SHIU (Also
known as NG KAM SHING) Respondent

(and Cross-Appeal)

CASE FOR THE APPELLANT

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