7/83

IN THE PRIVY COUNCIL No.16 of 1982

ON APPEAL

FROM THE COURT OF APPEAL HONG KONG

BETWEEN :-

THE ATTORNEY GENERAL — Appellant (Respondent)

- AND -

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

(and CROSS APPEAL)

CASE FOR THE RESPONDENT

Record

1. This is an Appeal from the judgment of the Hong Kong Court of Appeal (McMullin, V-P, Li J.A., Baber J.) dated 13th May whereby it allowed an appeal from the order of the Full Bench of the High Court of Justice dated 4th December 1980, and directed that the Director of Immigration be prohibited from removing the Respondent out of Hong Kong. The Respondent cross-appeals from that part of the judgment of the Court of Appeal which rejected his claim to be a Chinese resident with seven years' residence, or otherwise immune from removal under the provisions of s.19(1)(b) of the Immigration Ordinance, Cap.115 and also from the refusal to issue a writ of habeas corpus or orders of certiorari.

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2. The questions involved in the Appeal and Cross-Appeal (as agreed by Counsel in Hong Kong) are as follows:

(i) Was the decision of the Court of Appeal (Hong Kong) in the case of Attorney General

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v Cheung Kamping correct in law?

(ii) Was the decision of the Court in this appeal, whereby it was decided that it was bound to follow the earlier decision in Attorney General v Cheung Kam-ping correct in law? In civil cases is the Hong Kong Court of Appeal bound by its earlier decision if not made per incuriam?

(iii) If the decision in Attorney General v Cheung Kam-ping is correct in law is the respondent a "Chinese resident" for the purposes of the Immigration Ordinance (Cap. 115)?

(iv) Was the decision of the majority of the English Court of Appeal in Schmidt v Secretary of State for Home Affairs 1969 2 Ch 149 correct in law? If not, does an alien have a right to a hearing conducted in accordance with the requirements of natural justice in his application for permission to remain in Hong Kong?

(v) Was the decision of the English Court of Appeal in R v Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association 1972 2 QB 299 correct in law? Can an entitlement to a hearing conducted in accordance with the rules of natural justice, arise from a "legitimate expectation" of such? If so: to what extent does this affect the Crown's position vis-a-vis the doctrine of estoppel? If so: what is the appropriate remedy to be granted?

(vi) In all the circumstances of this case was the respondent given a hearing sufficient to satisfy the requirements of the rules of natural justice?

In addition your Lordships are asked on behalf of the respondent to consider the following question:-

(vii) On a true construction of the powers contained in s.19(1)(b) and s.13 of the Immigration Ordinance, are these powers subject to a duty to act fairly (as opposed to a duty, in every case, to afford the alien a hearing)? In particular:-

If the case of Schmidt v Secretary of State for Home Affairs 1969 Ch 149 is correctly decided as a matter of English law, does it

follow that the said powers are not subject to any duty to act fairly?

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3. The respondent has twice been the subject matter of purported Removal Orders, once by the Governor on 19th February 1976 under s.19(1)(b) of the 1972 Immigration Ordinance, Cap.115 and once by the Director of Immigration on the 31st October 1981 under s.19(1)(b) of the Immigration Ordinance as revised in 1980.

The facts of this case so far as is relevant, are mainly set out in the judgment of the Full Bench at pp 17 to 21 and in the judgment of McMullin V-P at pp 41 to 43. The respondent relies particularly upon the terms of the questions and answers read out by Mr Lam Yan-Kwong as Assistant Principal Immigration Officer, on the 28th October 1980, and upon the clear indication that each case would be judged upon its merits and would be (individually) investigated before decisions were reached. The respondent also relies upon the finding of the Full Bench that at the interview following his arrest on the 29th October, 1980. Mr Kwong Kam Yuen, the interviewing Immigration Officer did not allow him to say anything other than in answer to specific questions, and that as a result he had no opportunity for putting forward the humanitarian reasons for allowing him to remain in Hong Kong.

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The respondent further relies on the fact that in 1967, when he first came into Hong Kong, there was in force in Hong Kong (only) the Alien Deportation Ordinance, then Cap.240 and the Immigration (Control and Offences) Ordinance then Cap.243. When, in February, 1976 the Governor issued a Removal Order for him to be removed to Macau, the relevant Ordinance was the predecessor of the present Immigration Ordinance, being the Immigration Ordinance, Cap.115, which came into force on the 1st April 1972.

4. The relevant statutory provisions of the old Caps.240, 243 and 115 (in 1972) are as follows:

"

Chapter 240
DEPORTATION OF ALIENS

"3. (1) The Governor in Council may at any time summarily issue a deportation order against any person whom he finds to be an alien -

Deportation order against any alien. Summary procedure.

record

(a) if in the opinion of the Governor in Council he has been deported or banished from the United Kingdom, ... or any part of His Majesty's dominions; or;

(b) if the alien has been convicted in the Colony of any offence; or

(c) in any special case not falling under paragraph (a) or (b), if the Governor in Council deems it to be conducive to the public good to make summarily a deportation order against the alien.

Order against an alien. Long procedure.

(2) The Governor in Council may also at any time issue a deportation order against any person whom he finds to be an alien if upon any inquiry in the manner prescribed in section 4 he is of opinion that the alien should be deported.

G.N.A. 50/62 Regulation 16 makes full provision as to the manner of conducting such an inquiry.

Further, section 4(5):-

"If ... the person expresses the willingness to be questioned about this matter, his evidence shall be taken, but not on oath, by such officer, who may examine and cross-examine him and any witness to such extent as he considers reasonable."

Also, Section 5(2):-

"(2) In proceedings under this Ordinance the Governor may from time to time by warrant authorize the detention of a person already in custody for a further period of ... provided the Governor is satisfied that the said person ought to be detained in order that further inquiry may be made or the existing proceedings completed ..."

Immigration (Control and Offences) Ordinance Cap.243

"3 (1) ... no person -

(a) shall enter the Colony save -
(i) under and in
(ii) accordance with a permit of the Director, or

(b) having entered the Colony in contravention of paragraph (a) ... shall remain therein save under and in accordance with a permit of the Director.

42 (1) Any person who contravenes any of the provisions of subsection (1) of section 3 shall be guilty of an offence and shall be liable to a fine of five thousand dollars and to imprisonment for twelve months.

43 (4) Any immigrant who enters the Colony in contravention of the provisions of this Ordinance or of the regulations made thereunder or ... shall, upon conviction and notwithstanding the provisions of the ... Deportation of Aliens Ordinance, be liable in addition to expulsion from the Colony by order of the Governor ...

45 A complaint may be made or an information laid in respect of an offence under any of the provisions of this Ordinance within twelve months from the time when the matter of such complaint or information respectively arose."

Immigration Ordinance, Cap.115 (as it was in 1972)

"2 (1) Chinese residents means an immigrant who -

(a) is wholly or partly of Chinese race; and

(b) has at any time been ordinarily resident in Hong Kong for a continuous period of not less than 7 years.

(2) Reference in this Ordinance to landing in Hong Kong unlawfully are references to landing in or entering Hong Kong in contravention of this Ordinance the repealed Immigration (Control and Offences) Ordinance or ...

(4) For the purposes of this Ordinance a person shall not be treated as ordinarily

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resident in Hong Kong -

(a) during any period after the commencement of this Ordinance in which he remained in Hong Kong -

(i) without the authority of the Director after landing unlawfully ...

7. A person may not land in Hong Kong without the permission of an immigration officer or immigration assistant unless -

(a) he has the right to land in Hong Kong by virtue of section 8; or

(b) ...

8. (1) The following persons shall have the right to land in Hong Kong, that is to say -

(a) ...

(b) ...

(c) Chinese residents ...

13. The Director may at any time authorise a person who landed in Hong Kong unlawfully to remain in Hong Kong, subject to such conditions of stay as he thinks fit, whether or not such person has been convicted of that offence, ...

19. (1) Subject to subsection (2), the Governor may make a removal order against a person, requiring him to leave Hong Kong, if it appears to the Governor that such a person is -

(a) ...

(b) a person who has committed or is committing an offence under section 38(1) or section 41, whether or not he has been convicted of that offence- or

(c) ...

20. (1) The Governor in Council may make a deportation order against an immigrant, other than a Chinese resident, ..., if -

(a) ...

(b) the Governor in Council deemes it to be conducive to the public good.

(2) Subject to subsection (3), the Governor in Council may make a deportation order against a Chinese resident or a United Kingdom belonger, other than a resident United Kingdom belonger, if - Record

(a) ...

(b) the Governor in Council deems it to be conducive to the public good.

(3) The Governor in Council shall not make a deportation order against a Chinese resident ... except -

(a) on the recommendation of a court under section 21;

(b) after consideration of the report of a Deportation Tribunal under section 23; or

(c) where the Governor certifies that the case concerns the security of Hong Kong ...

...

38. (1) Subject to subsection (2), a person who -

(a) being a person who by virtue of section 7 may not land in Hong Kong without the permission of an immigration officer, lands in Hong Kong without such permission; or

(b) having landed in Hong Kong unlawfully, remains in Hong Kong without the authority of the Director,

shall be guilty of an offence and ...

46. A complaint may be made or an information laid in respect to an offence under this Ordinance punishable only on summary conviction within two years from the time when the matter of such complaint or information arose.

/The section 46 mentioned in the Attorney General v Cheung Kam Ping which set 3 years as the time for a complaint or information in respect of an offence under section 38(1)(b) was only introduced on the 9th July 1976./

The First Schedule to this original Immigration Ordinance deals with repeals and

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amendments. By it, the Deportation of Aliens and the Immigration (Control and Offences) Ordinances were completely repealed. The Second Schedule deals with transitional provisions as follows:-

Paragraph

"11 19(1)(b) shall have effect as if it concluded a reference to a person who has contravened section 3(1)(a)(ii) or (b) of the Immigration (Control and Offences) Ordinance ... and the provisions of this Ordinance shall apply accordingly.

22. The reference in section 38(1)(b) to the authority of the Director includes a reference to a permit of the Director granted under the Immigration (Control and Offences) Ordinance."

The (first) revised edition of the said Immigration Ordinance in 1977 did not have either of these Schedules. Further, section 15(4) of the Ordinance authorising the Revised Edition of Laws of Hong Kong 1965 which is still the current edition (as amended from time to time), states:-

"The Attorney General shall transmit to the Governor a copy of every bookelet published under sections 13 or 14 and with effect from such date as the Governor may specify by notice in the Gazette any such booklet shall be without any question whatsoever in all the courts of justice and for all purposes whatsoever, the sole and only proper law of the Colony in respect of that Ordinance, or in the case of a booklet containing subsidiary legislation only, that subsidiary legislation".

In accordance with that said section, the Attorney General so transmitted the 1977 revised edition of the Immigration Ordinance.

5. As is apparent from the judgments herein, the respondent was arrested (pursuant to s.26 of
p93,94 the Immigration Ordinance) on 29th October 1980. On 31st October 1980 he was issued with a Notice of Removal Order informing him that the Director of Immigration had made a Removal Order against him. He appealed to a Tribunal under s.53A of the Immigration Ordinance, but the Tribunal disposed of the appeal without a hearing on the 3rd
p96 November 1980. The jurisdiction of the Tribunal is limited to deciding only if the appellant before the Tribunal has the right to land in Hong Kong under s.8 of the Immigration Ordinance and

whether he had the permission of the Director to remain when the Removal Order was made. The respondent, once the Tribunal had dismissed his appeal, applied for a writ of Habeus Corpus directed at the Commissioner of Prisons. When the application came before the Full Bench of the High Court, on the 20th November 1980, the respondent obtained leave, with the consent of the Crown, to file an application for judicial review under Order 53 by way of Originating Motion. The relief sought was as follows:

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p1,2

p16,l.10 to 28

p9,10

(i) An order of certorari quashing the removal order made on 31st October 1980 and

(ii) an order of certorari quashing the decision of the Immigration Tribunal made on 3rd November 1980 and

(iii) an order of certorari quashing the removal Order made by the Governor on or before 19th February 1976.

JUDGMENTS

6(a) High Court

The Full Bench (Roberts C.J. and Rhind J.) found (i) that there was no duty placed upon the Director of Immigration to act fairly but (ii) had there been such a duty, the Director of Immigration would have been in breach to the extent that the respondent was not given an opportunity at the interview on 29th October 1980 to advance the arguments for being allowed to stay in Hong Kong on humanitarian grounds, and that there would have been a breach only to that extent; and (iii) that they were bound by the decision of the Court of Appeal in Attorney-General v Cheung Kam-ping to hold that the respondent, at the time of the Removal Order in 1976, was not a Chinese Resident within the meaning of s.8 of the Immigration Ordinance, and was accordingly liable to removal under s.19. The judgment of the Full Bench was delivered by Roberts C.J. He considered the argument that the Director of Immigration was bound by undertakings given on his behalf only in the context of allegation that the undertakings were breached by the arrest of the respondent before investigations were complete. He concluded that the arrest could not be rendered unlawful, and added that even if the arrest was unjustifiable in law, that did not vitiate the Removal Order. He considered the possible duty to act fairly, without reference to any undertaking. He held

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p17,l.1-5

p23,l.20-30

p23,l.38

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p23, 1.47ff

that he was bound by authority to hold that the courts will not grant the protection of the rule of natural justice to some classes of persons, in particular aliens. He cited R v Brixton Prison Governor ex parte Soblen 1963 2 QB 243- Schmidt v Secretary of State for Home Affairs -969 2 Ch 149- and Salemi v MacKellar (No 2) 1977 137 C.R. 386 in support of this proposition. He distinguished A.G. v Ryan 1980 3 WLR 143 and Re H.K. (An Infant) 1967 2 QB 617 on the basis that the aliens were seeking, in these cases, recognition of a statutory right. He observed

p28, 1.29-39

that:- "Had it been open to us to do so, we might well have been inclined to prefer the dissenting judgment of Murphy J. in the Salemi case. As he put it succinctly ... "I do not read s.18 as enabling a Minister to exercise his discretion (to order deportation) in bad faith, without regard to the interest of the person affected, and in a manner which denies natural justice'".

6(b) Court of Appeal

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By Notice of Appeal dated 10th December 1980, the respondent appealed to the Hong Kong Court of Appeal. That Court (McMillan V-P; Li J.A.; and

p47,1.30 to p52,1.50; p73,1.50 p54 to p61, 1.25 p.76, 1.20 to 1.48 p77,78

Baber J.) held (i) that in normal circumstances the Director of Immigration was not under any duty to act fairly but (ii) in the circumstances that pertained after the open announcement on the 28th October 1980 that individual cases would be treated on their merits the Director was obliged to allow the respondent an adequate opportunity to state what he considered to be the merits of his case and that accordingly the respondent was entitled to some relief. The Court of Appeal

p44 1.30

further held that it too was bound by the decision in Attorney-General v Cheung Kam-ping and was accordingly obliged to find against the respondent on those matters which now form the subject matter of the cross-appeal. All three judges of the Court delivered reasoned judgments. McMullin V-P and Li J.A. both followed Soblen's case (supra) and R v Inspector of Lemon Street Police Station ex parte Venicoff 1920 3 KB 72 and held that, in order for a duty of fairness to arise in relation to the respondent, he must be able to show that he had a "legitimate expectation" of being allowed to remain and that, considerations of the undertaking apart, he was unable to do so. Therefore with Baber J. the Court further held that the undertaking to investigate each case on the merits bound the Director of Immigration and following the

Liverpool Taxi Drivers case (supra) granted the respondent appropriate relief. Record

7. Following the judgment of the Court of Appeal, both parties were granted final leave to appeal to Her Majesty in Privy Council on the 2nd December 1981. p82,83

8. The respondent submits that this appeal should be dismissed with costs for the following amongst other

10 R E A S O N S

(a) There is in law no general principle to the effect that a duty to act fairly does not arise in relation to aliens applying for leave to remain in a host country or resisting attempts to deport or remove them. On the contrary, it is submitted that whenever a government official is called upon to exercise a statutory power that is capable of radically affecting the vital interests of an individual, that statutory power is subject
20 to the implied condition that it be exercised fairly. The nature and extent of the duty to act fairly will, it is conceded, vary according to the actual circumstances that the official confronts, so that the requirements of fairness will alter, not merely from one statutory power to another, but according to the individual circumstances in which a given statutory power falls to be exercised. In some circumstances there will be no requirement to hold a hearing or to receive
30 representations before making a deportation or removal order. In other circumstances there will be a duty to receive representations before making the same. But in either instance the official will nevertheless be under the duty to act fairly.

(b) The respondent submits that as a matter of general principle the statutory powers of removal or deportation fulfil the requirements of powers which are to be exercised subject to a duty to act fairly. The dicta of Lord Upjohn in
40 Durayappah v Fernando 1967 2 AC 337 at p.349 are relied upon. He states that there are three relevant matters to be considered in deciding whether the principles of natural justice (which is another way of expressing fairness in the administrative process) are to be applied:

> "These three matters are: first, whether the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly,
50 in what circumstances or upon what occasion

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is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other."

In the instant case, it is submitted that the statutory provisions expressly allow the Director of Immigration a discretion to allow a person who has landed in Hong Kong unlawfully to remain (see s.13 of Cap.115). The sanctions of deportation or removal are severe sanctions. (See dicta of Judge Learned Hand cited in Soblen's case (supra) at p254). It is submitted that, were it not for the existence of a line of authority including Soblen's case, Salemi, Schmidt, and Venicoff, there would be no difficulty in holding that the power was subject to a duty to act fairly. It is to be observed that, in the
p28,l.30 instant case, the Full Bench might well have so held had it not been for the existence of contrary authority.

(c) The line of authorities referred to above are critically examined by Stephen J. in Salemi v McKeller (No 2) (supra) at p.443 ff. The respondent relies upon that passage and observes:

(i) Both Ex parte Venicoff and Soblen's case were decided before the decision in Ridge v Baldwin 1964 AC 40. In Ex parte Venicoff the Earl of Reading C.J. observed:- "As soon as we come to the conclusion that this is an executive act (which at that time was a perogative power) left to the Home Secretary and is not the act of a judicial tribunal, the argument fails." It is submitted that the distinction between judicial and non-judicial decisions is no longer good law.

(ii) In Soblen's case Denning M.R.; Donovan L.J. and Pearson L.J. were heavily influenced by the fact that Parliament had not attempted to alter the law laid down in Venicoff's case despite the fact that it had on numerous occasions made fresh orders concerning aliens. No such consideration arising from the legislative history of Cap.115 applies in the case of Hong Kong.

(iii) In Soblen's case the court was heavily influenced by the consideration that notification of a hearing to a person who might be liable to deportation might give that person the opportunity to abscond and

thus frustrate the purpose of legislation. In Hong Kong, the provisions of s.26 of Cap.115 mean that no such consideration arises in the case of the power to remove because there is a power to detain for inquiry and pending removal.

(iv) In Soblen's case, Denning M.R. expressly reserved his opinion on the question of whether an alien might have, in some circumstances, a right to be heard before the execution of a deportation order. Schmidt v Secretary of State for Home Affairs 1969 2 Ch 149 Widgery L.J. observed, at pp 173 - 174, that different considerations might apply to the making of a deportation order than to the refusal of an extension of leave to remain.

(d) It is accordingly submitted that:-

(i) the cases decided before Ridge v Baldwin (supra) are to be treated with reserve because they rely upon a false distinction between judicial and non-judicial acts.

(ii) The English authorities do not indicate that an alien has no right to be heard before he is actually deported. In so far as they indicate that there is no right to a hearing before the making of a deportation order, this is because of the consideration, irrelevant in the instant case, that the alien might otherwise abscond. There is no derogation from the general concept that the Secretary of State has a duty to act fairly, only that in certain circumstances the duty is complied with even though no oral representation is afforded to the alien.

(iii) There is therefore no reason, properly grounded in authority, for holding that the power to remove is not subject to an implied condition that it be exercised fairly.

(e) The respondent respectfully cites and adopts the following passage from De Smith: Judicial Review of Administrative Action, 4th edition, p164, 165:-

> "The first leading case in which the courts refused to apply the rule at all in a situation where it clearly ought to have been applied was Venicoff's case (1920). The Home Secretary had been empowered by a

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recent legislation to deport an alien whenever he deemed this to be "conducive to the public good." When a deportation order was impugned, it was held that he was exercising purely executive functions, importing no duty to act judicially. The court laid emphasis on the amplitude of the Secretary of State's discretion, the context of emergency, and the impracticability of giving prior notice in such a case; the impact of a deportation order on personal liberty was treated as an irrelevant consideration, and the feasibility of requiring a hearing after the order had been made but before it was executed was not canvassed in the judgments. In 1962 the Court of Appeal nevertheless reaffirmed the unsatisfactory rule that an alien deportee has no implied legal right to any hearing. This rule has now been modified by statute".

(f) The respondent also respectfully adopts the passage in Professor Wade's Administrative Law, 4th Edition, at p.483 to p.485, dealing with the cases concerning aliens. The learned author observes, at p.483:-

> "Public policy requires that the Home Secretary should have drastic powers of deportation, refusal of entry, and so forth. But there is no necessary reason why these, like drastic powers over citizens generally, should not be required to be exercised fairly, particularly since the consequences for the alien are often extremely severe.

and at p.484, commenting on Schmidt's case:-

> "The Court of Appeal struck out their claim for a declaration that the decision was void, holding that they had no right to remain and "no legitimate expectation" of being allowed to do so. The absence of right or legitimate expectation is not a convincing reason for not enforcing the duty to act fairly in the making of a decision drastically affecting individuals ... /and the author then refers, through a footnote, to the following cases of R v Brighton Corporation, ex parte Thomas Tilling Ltd 1916 85 LJKB 1552 (Sankey J); R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association 1972 2 QB 299; R v Gaming Board for Great Britain, ex parte Benaim and Khaida 1970 2 QB 417; R v Herrod ex parte Leeds City District Council 1976 QB 540/"

(g) It follows from the above that the respondent respectfully adopts the reasoning of the minority in Salemi v MacKellar (No 2) 1977 137 C.L.R. 396, and contends that R v MacKellar, ex parte Ratu, ibid, 461, and Pagliari v Attorney-General 1974 1 N.Z.L.R. 86 were wrongly decided.

(h) It is accepted that if the categorisation of cases (where the duty to act fairly arises or might arise) into (i) forfeiture cases (ii) application cases and (iii) exportation cases is adopted (see per Megarry J. in McInnes v Onslow-Fane 1978 1 WLR 1520 at p.1529), the instant case is, excepting the press-statement, an application case. However, it is submitted that the distinction between "application" cases and "expectation" cases is unsatisfactory, and certainly should not be followed in the field of statutory as opposed to private law. The reasoning of Professor Wade, cited above, is respectfully adopted. If a public official is charged with the making of a vital decision affecting the interests of an individual, that official must act fairly towards the individual. If no information that the individual can give can affect the decision of the official, it may be that there is no duty to receive representation. If, however, the context of the decision is such that information available to the individual will assist in the making of the decision the official must be open to representations (see per Roskill L.J. in 1972 1 QB p.310 at g to h). In the instant case, it is submitted that a decision to remove an individual who has been in Hong Kong for some years will always require consideration of the existence or otherwise of compassionate circumstances, and in any event the press - statement made it clear that each application would be treated on its merits (i.e. having regard to individual circumstances).

(i) If, contrary to the argument advanced above, your Lordships hold that the statutory powers contained in s.19(1)(b) and s.13 of Cap.115 are not subject generally to an implied duty to act fairly, the Respondent submits that such a duty arose in the peculiar circumstances of this case by virtue of the official statement made through a press-announcement by Mr Lan Yan-Kwang, an Assistant Principal Immigration Officer, on 28th October 1980. The Hong Kong Court of Appeal was right to follow the case of R v Liverpool Corporation, ex parte Liverpool Taxi Fleet

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Operators' Association 1972 2 QB 299, and that case is rightly decided. No question of principle concerning the estoppel by a statutory body of itself from exercising statutory powers arises, because an undertaking by a statutory authority to give a hearing before the exercise of a statutory power does not prevent the power being exercised in accordance with the scheme and general aims of the legislation. On the contrary, such a hearing will positively assist the making of a decision in accordance with that evidence.

14. The respondent submits that this cross-appeal should be allowed with costs for the following amongst other

R E A S O N S

(a) It is submitted that in 1967, the fact of entering and of remaining in Hong Kong without permission from the Director of Immigration, created by the old section 3(1) of the Immigration (Control and Offences) Ordinance, Cap.243 and made an offence by section 42(1), was wholly divorced from any removal or deportation at least unless there had actually been a conviction. At that time an alien could normally only be deported by the Governor in Council, summarily, if he had been convicted of any offence, or if they deem it to be conducive to the public good; otherwise only after a full inquiry called the long procedure. In other words by 1968, when under section 45 of the Immigration (Control and Offences) Ordinance, the Respondent could no longer even be prosecuted for unlawfully entering or remaining in Hong Kong, he was as protected from deportation or removal, as an alien who had been in Hong Kong for 50 years. It is submitted he was therefore lawfully in Hong Kong from 1968, at least until the 1st April 1972 when the original Immigration Ordinance became law. Such offences as had been committed by the Respondent of entering and remaining in Hong Kong were statute-barred, because these offences being non-continuing ones, see in particular, Vaughan v Biggs /1960/ 2 A.E.R. 473; Singh (Gurdev) v The Queen /1974/ 1 A.E.R. 26 and Grant v Borg /1982/ 1 W.L.R. 638. It is submitted that the case of Li Tam-Fuk v The Queen 1981 H.K.L.R. 122 conflicts with Grant v Borg and is wrongly decided. The only reason the interim provisions were dropped in the 1977 Edition of Cap.115 must be that these provisions were not necessary 5 years after the Immigration Ordinance had originally come into force. In other words, because a

statute has to be interpreted on the day it came into force, it was necessary to have interim provisions, so as to still keep, inter alia, the two and three years provisions for prosecution of offences under the older Immigration (Control and Offences) Ordinance (as amended in 1976) which had been repealed. See Sharpe v Wakefield, Justices of Westmorland (1889) 22 Q.B.D. 239, especially the judgment of Lord Esher MR at 242. So, the Respondent by 1968 had acquired a 'status' of remaining lawfully in Hong Kong, even though he had landed without the permission of the Director of Immigration. It is submitted that in those days when the influx of illegal immigration of persons of Chinese race from China and elsewhere, was deliberately lax and therefore fairly well controlled, the permission of the Director of Immigration to remain in Hong Kong was to be presumed after the expiry of one year in which no complaint had been made or information laid in respect of such offences of landing and remaining, because of the time limit as laid down by section 45. The respondent further craves in aid in support of these submissions and as underlining them, section 43(4) of the said Immigration (Control and Offences) Ordinance under which an immigrant could be expelled by the order of the Governor only upon conviction for such offence.

(b) The respondent further submits that by 1972, before the passing of the Immigration Ordinance, Cap.115, he had an accrued right not to be deported or removed save by the Governor in Council under the terms of the Deportation of Aliens Ordinance. This right, under the terms of this (original) Immigration Ordinance, accrued into a total right not to be deported or removed almost at all after 7 years from 1968, in other words, by 1975. The respondent further submits that because the original unlawfulness of his entry and remaining in Hong Kong in 1967 had ended by 1968, the terms of the Immigration Ordinance of 1972 do not again make his remaining unlawful. The wording of section 2(2) and (4) of the Immigration Ordinance 1972 do not expressly take away that right and the status of an "ordinarily resident". The respondent relies on s.23(c) and (d) of the Interpretation of General Clauses Act (Cap.I), and argues that he had a right lawfully to remain as a resident of Hong Kong by the time the 1972 Ordinance came into force, which was not in any way revoked by this new Ordinance, see Hamilton Gell v White /1922/ 2 KB 422 and Heston and Elseworth District Council

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v Grout 1897 2 Ch.D. 307 and compare Quilter v Mapleson (1882) 9 Q.B.D. 672. Further, a construction of ss.2(2)(i) 2(4)(i) 18 and 19 of Cap.115 as to render an immigrant, who had ceased to be liable to removal under Cap. 243 because the relevant time limits had expired, once more liable to removal would give s.19 retrospective effect, and it submitted that such a result is to be avoided unless demanded by the language of the statute.

16. The respondent further submits in particular that the wording of section 2(4) in the 1972 Immigration Ordinance is not enough to exclude from the definition of a Chinese resident, a person who had been at commencement of the Immigration Ordinance, a perfectly normal, lawful, resident of Hong Kong. It is said in the Cheung Kam-Ping case that a resident of Chinese race can never take up the status of a Chinese resident if he originally illegally came in and remained in Hong Kong because he can never come within section 8(1) of the Immigration Ordinance. That fallacy is said to be founded upon the case of In Re Abdul Mannan /1971/ 1 W.L.R. 859 which itself was founded on another case of Adlam v The Law Society /1968/ 1 W.L.R. 6. In the Adlam case the solicitor could have been subject to disciplinary proceedings if not criminal proceedings on 4 separate occasions over the past 5 years. Therefore it was held that he had not been lawfully continuously in practice for the last 5 years. In the Respondent's submission, unless it is an offence to continue to remain in Hong Kong after the time limit under section 45 of Cap.243, the Respondent was lawfully in Hong Kong by 1968, despite his original entry and remaining being without the permission of the Director of Immigration. The Respondent would again stress that he was entitled at least to the benefit of the procedure for (ordinary) deportation laid down under sections 4 and 5 of the then current Deportation of Aliens Ordinance, which gave him a right to be heard, the summary proceedure in section 3 having been replaced by section 20 of the Immigration Ordinance of 1972.

(c) The respondent submits that it is with this background in mind that the judgment of Lord Denning M.R. in the In Re Abdul Mannan case must be read. By the English legislation, a deserted seaman who has remained in the UK after his ship has left can be sent off again at any time, whenever he is picked up and found to be a deserted seaman. In other words, the applicant continued to be guilty of the offence of desertion of his ship. In this case there was a time limit of 12 months after which he became an

ordinary Chinese resident. In the respondent's submission, that "ordinary residence" status was not taken away by Cap.115. The respondent would also refer to The King v Chapman /1931/ 2 K.B. 606 at 609. In a multi-racial cosmopolitan city state of Hong Kong where its population is 99% Chinese race, the intention of the legislature was simply to put Chinese residents of 7 years' standing on practically the same footing as Chinese subjects of the British Crown because they happened to be born in Hong Kong. In the Respondent's submission, for the word 'subject' in the context of the Chapman case, read 'individual'. The respondent also refers to Davies v de Silva /1934/ A.C. 106 at 109 and The Queen v The Overseers of the Parish of Tonbridge (1883-4) 13 Q.B.D. 339 judgment of Brett, M.R. at page 342. In the respondent's submission, the Immigration Ordinance, read in its ordinary sense, does not make a legal residence between 1968 and 1972 immediately unlawful so as coming within the meaning of section 3(1) of Cap.115. No absurdity, inconvenience or palpable injustice is caused by diminishing the authority of the Director over such a previously lawful residence in Hong Kong.

(d) The respondent further or alternatively submits that because there is no provision in the Immigration (Control and Offences) Ordinance, Cap.243 similar to section 19 of the Immigration Ordinance, by some date in 1968 the respondent has completed 12 months of residence and since he could no longer be prosecuted or removed from the territory of Hong Kong under the said Immigration (Control and Offences) Ordinance, he had acquired something in the nature of a vested right to remain, even if it was on a tolerated basis. Again such a person remaining thereafter must be regarded as remaining lawfully within the territory. Therefore, the new Immigration Ordinance in 1972 must have the clearest possible language to show that the status was again to be at risk. The very fact that in the next edition of the Immigration Ordinance in 1977, the transitional provisions have been excluded, in the respondent's submission, shows that for instance, paragraphs 11 and 22 refer to the position where a person is still prosecutable for the offence of remaining in Hong Kong without a permit from the Director and the repealed Cap.243. Otherwise the position will arise as envisaged in the judgment of Li J.A. in the Attorney General v Cheung Kam-Ping, of a person (possibly) not being subject to a removal order in 1978 whereas another person, with a longer residence in Hong Kong, like your respondent, being subject to a removal order in

(e) In the final alternative, the respondent says that the Governor in making his 1976 Removal Order has exceeded his powers under section 19(1)(b) in that the section empowers him to make a removal order only where the person has committed a section 38(1) offence, whether or not he has been convicted of that offence. The Respondent submits that where a person has not been convicted, the Governor's power to make a removal order is limited to situations where a prosecution can be brought. Therefore, whether or not the Respondent had acquired the status of a Chinese resident by 1976 the Removal Order was again null and of no effect in law. For all these reasons, under the facts of this case, the respondent is to be taken as being resident in Hong Kong from 1967 to the 31st October 1981 and thereafter to date, and neither the Governor's Removal Order of 1976 nor the Director of Immigration's Removal Order of 1981 are valid or enforceable.

(f) If the Board wishes to consider paragraph 2(ii) above, (which is not in fact necessary for the decision of this Appeal), the Respondent says it is the criminal test that should have been applied. The liberty of the person is at stake, even if it is a civil proceeding. Therefore it is submitted R v Taylor /1950/ 2 AER 170 applies, and the Court of Appeal is at liberty to reconsider the correctness in law in its earlier decision, see also R v Gould /1968/ 1 AER 849 and R v Newsome /1970/ 2 QB 711 and 716. The facts in the case of Attorney General of Saint Christopher, Nevis and Anguilla v Reynolds /1980/ A.C. 637 were, it is submitted, so different as not to be comparable.

LOUIS BLOM-COOPER

RICHARD DRABBLE

IN THE PRIVY COUNCIL No.16 of 1982

ON APPEAL

FROM THE COURT OF APPEAL HONG KONG

BETWEEN:-

THE ATTORNEY GENERAL — Appellant (Respondent

- AND -

NG YUEN SHUI also known as NG KAM SHING — Respondent (Applicant)

(and CROSS APPEAL)

CASE FOR THE RESPONDENT

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