Privy Council Appeal No. 16 of 1982

The Attorney General – – – – – – *Appellant*

v.

Ng Yuen Shiu also known as Ng Kam Shing – – *Respondent*

(and Cross-appeal)

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST FEBRUARY 1983

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD SCARMAN
LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
SIR JOHN MEGAW

[*Delivered by* LORD FRASER OF TULLYBELTON]

The question in this appeal is whether an alien, who has entered Hong Kong without permission and contrary to the laws of the colony, has a right to a hearing by the Hong Kong authorities, conducted in accordance with the rules of natural justice, either in every case or in the particular circumstances of this case.

The appeal arises out of the serious immigration problem which faced the government of Hong Kong in 1980. Immigrants from mainland China were pouring into the Colony in increasing numbers. Some of the immigrants had permission to enter, but the majority did not. For some years up until 23rd October 1980 the government of Hong Kong followed the " reached base " policy, under which illegal immigrants from China were not repatriated if they managed to reach the urban areas without being arrested. Counsel for the appellant informed their Lordships that the number of illegal immigrants from China who reached base was in 1978 about 9,000 and in 1979 over 88,000. In 1980 up until 23rd October, 58,400 illegal immigrants from China reached base, a further 80,700 failed to reach base and were repatriated to China, and in addition 58,000 immigrants entered from China legally. That makes a total for the 10 months of over 197,000, which was not far short of the population of the city of Aberdeen. The total population of Hong Kong rose from 4·4 million in 1976 to 5·5 million in 1982, and the government had to take urgent measures to stem the flood of immigrants. On 23rd October 1980 it announced that the " reached base " policy would be discontinued forthwith, and on the same day it issued the Immigration (Amendment) (No. 2) Ordinance 1980 which amended the Immigration

Ordinance 1971 (" the principal Ordinance ") so that it (i) required all residents of Hong Kong to carry proof of identity, (ii) prohibited the employment of illegal immigrants and (iii) conferred upon the Director of Immigration a power to make removal orders under section 19.

There is no doubt that the Director of Immigration had power under section 19 (in the substituted form provided for in the Ordinance of 1980) to order removal of illegal immigrants. There is also no doubt that neither that section, nor any other statutory provision, expressly requires an inquiry to be held before such an order is made. The only question raised in the appeal is whether, at common law, the respondent was entitled to have a fair inquiry held before a removal order was made against him. It is therefore unnecessary to do more than refer briefly to the substituted section 19 which provides *inter alia* as follows:

> " 19.(1) A removal order may be made against a person requiring him to leave Hong Kong—
>
> (*a*) subject to subsection (3), by the Governor if it appears to him that that person is an undesirable immigrant who has been ordinarily resident in Hong Kong for less than three years; or
>
> (*b*) subject to subsection (2), by the Director if it appears to him that that person— . . . .
>
> (ii) has committed or is committing an offence under section 38(1) or section 41, whether or not that person has been convicted of such offence and whether or not the time within which any prosecution may be brought has expired. . . . . . ."

Under section 38(1) of the principal Ordinance a person commits an offence if, having landed in Hong Kong unlawfully, he remains in Hong Kong without the authority of the Director of Immigration.

The respondent was born in China on 16th May 1951. He was taken to Macau by his parents at the age of three. He entered Hong Kong from Macau illegally in 1967. He came to the notice of the authorities in Hong Kong only in 1976 when he applied for an identity card, and he was removed to Macau under a removal order in March 1976. In April 1976 he re-entered Hong Kong illegally and he has remained there until the present time. He was apparently an industrious worker and by 1980 he had become part owner of a small garment factory along with the registered proprietor.

The change of policy announced on 23rd October 1980 was followed by a series of television announcements explaining that all illegal immigrants from China would be liable to be repatriated. Although the announcement only applied to illegal immigrants from China, it naturally caused anxiety to illegal immigrants of Chinese origin who had entered Hong Kong from Macau, including the respondent. On 28th October 1980 a group of illegal immigrants who had entered from Macau submitted a petition to the Governor of Hong Kong outside Government House, where a senior immigration official read out to them a series of questions and answers which had been prepared in the office of the Secretary for Security, dealing with the position of such persons and the actions which they should take. One of the questions, with its answer, was:

> " Q. Will we be given identity cards?
>
> A. Those illegal immigrants from Macau will be treated in accordance with procedures for illegal immigrants 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 merits."

The promise that each case would be treated on its merits is at the root of the respondent's argument before the Board.

The respondent was not present outside Government House and did not hear the announcement and the questions and answers, but he did see a television programme about the subject on the evening of 28th October. Earlier that day he had gone to an office of the Immigration Department to register with the Department and had been told to report to the Immigration Clearance Office on 29th October. He did so and, after being interviewed by an Immigration Officer there, he was detained under powers contained in section 26(*a*) of the principal Ordinance, pending inquiry for the purpose of the Ordinance. He was detained until 31st October. On 31st October the Director of Immigration made a removal order against the respondent. The respondent appealed to the Immigration Tribunal under section 53A of the principal Ordinance, but the Tribunal dismissed his appeal without hearing him, as it was entitled to do. He was notified of the Tribunal's decision on 3rd November. The respondent applied for a writ of habeas corpus, and he was released on bail on 6th November. At the hearing of his application for the writ, he was allowed to apply for judicial review, including orders of certiorari to quash the removal order dated 31st October and also the removal order of 1976, to quash the decision of the Appeal Tribunal, and an order of prohibition to restrain the Director from executing the removal order of 31st October.

His application was heard by a full bench of the High Court (Roberts C.J. and Rhind J.) which quashed the writ of habeas corpus and refused the application for certiorari and prohibition. But the court ordered that the removal order be stayed on condition that the respondent's appeal from their decision was entered within seven days. The respondent appealed to the Court of Appeal. On 13th May 1981 the Court of Appeal (McMullin V.P., Li J.A., and Baber J.) allowed the appeal in part. They allowed it to the extent of granting an order of prohibition against the Director of Immigration prohibiting him from executing the removal order of 31st October 1980 before an opportunity had been given to the respondent of putting all the circumstances of his case before the Director. All the other orders made by the High Court were affirmed.

Against that very limited order of prohibition the appellant, the Attorney General of Hong Kong, has appealed to this Board. The respondent cross-appealed on the issue of whether he was an illegal immigrant. He contended that he was a " Chinese resident " as defined in the principal Ordinance and that he was entitled to live in Hong Kong. The contention was stated on behalf of the respondent in his printed case and was not formally abandoned by his Counsel, but Mr. Blom-Cooper who appeared for him submitted no oral argument in support of it. Their Lordships, not having heard argument on the question, express no opinion upon it, and the decision of the Court of Appeal to the effect that the respondent was an illegal immigrant therefore stands.

The argument for the appellant raised two questions—one of wide general importance, the other of more limited scope. The general question, which both the High Court and the Court of Appeal decided in favour of the appellant, is whether an alien who enters Hong Kong illegally has, as a general rule, a right to a hearing, conducted fairly and in accordance with the rules of natural justice, before a removal order is made against him. The narrower question is whether, assuming that the answer to the general question is in the negative, nevertheless the respondent has a right to such a hearing in the particular circumstances of this case. The Court of Appeal answered the latter question in favour of the respondent and therefore made the limited order of prohibition now under appeal. Having regard to the view which their Lordships have formed

on the narrower question, it is unnecessary for them to decide the general question. They will therefore assume, without deciding, that the Court of Appeal rightly decided that there was no general right in an alien to have a hearing in accordance with the rules of natural justice before a removal order is made against him.

The narrower proposition for which the respondent contended was that a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body, if he has " a legitimate expectation " of being accorded such a hearing. The phrase " legitimate expectation " in this context originated in the judgment of Lord Denning M.R. in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, at page 170F. It is in many ways an apt one to express the underlying principle, though it is somewhat lacking in precision. In *Salemi v. MacKellar (No. 2)* (1977) 137 C.L.R. 396, 404, Barwick C.J. construed the word " legitimate " in that phrase as expressing the concept of " entitlement or recognition by law ". So understood, the expression (as the learned Chief Justice rightly observed) " adds little, if anything, to the concept of a right ". With great respect to the learned Chief Justice, their Lordships consider that the word " legitimate " in that expression falls to be read as meaning " reasonable ". Accordingly " legitimate expectations " in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis—see *Reg. v. Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 Q.B. 864. So it was held in *Reg. v. Board of Visitors of Hull Prison, ex parte St. Germain (No. 2)* [1979] 1 W.L.R. 1401 that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it.

The decision of the Court of Appeal in *St. Germain* was approved by the House of Lords recently in *O'Reilly v. Mackman* [1982] 3 W.L.R. 1096, where Lord Diplock, with whose speech the other law Lords present agreed, said this at page 1100H:

> " It is not, and it could not be, contended that the decision of the board awarding him forfeiture of remission had infringed or threatened to infringe any right of the appellant derived from private law, whether a common law right or one created by a statute. Under the Prison Rules remission of sentence is not a matter of right but of indulgence. So far as private law is concerned all that each appellant had was a legitimate expectation, based upon his knowledge of what is the general practice, that he would be granted the maximum remission, permitted by rule 5(2) of the Prison Rules, of one third of his sentence if by that time no disciplinary award of forfeiture of remission had been made against him. So the second thing to be noted is that none of the appellants had any remedy in private law.
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> " In public law, as distinguished from private law, however, such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board on the ground that in one way or another the board in reaching its decision had acted outwith the powers conferred upon it by the legislation under which it was acting: and such grounds would include the board's failure to observe the rules of natural justice: which means no more than to act fairly towards him in carrying out their decision-making process, and I prefer so to put it."

The expectations may be based upon some statement or undertaking by, or on behalf of, the public authority which has the duty of making the

decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.

One such case was *Reg. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299. Liverpool Corporation had the duty of licensing the number of taxis which they thought fit, and for some years the number had been fixed at 300. In 1971 a sub-committee of the council recommended increases in the number of licensed taxis for 1972 and again in 1973, and no limitation on numbers thereafter. The chairman of the relevant committee gave a public undertaking on 4th August 1971 that the number would not be increased beyond 300 until a private bill had been passed by Parliament and had come into effect, and his undertaking was confirmed by him orally and by the town clerk in a letter to two associations representing the holders of existing taxi licences. In November 1971 the sub-committee resolved that the number of licences should be increased in 1972, before the private bill had been passed, and the resolution was approved by the full committee and by the council in December. The association of licence holders applied to the court for an order of prohibition and certiorari. The Divisional Court refused the application, but the Court of Appeal granted an order of prohibition against the corporation from granting any increased number of licences without first hearing any representations which might be made by or on behalf of persons interested therein, including the appellant association. It is important to notice that the court order was limited to ensuring that the corporation followed a fair procedure by holding an inquiry before reaching a decision: provided such procedure was followed the decision was left with the corporation to whom it had been entrusted by Parliament. Lord Denning, M.R. at page 308C said this:

> ". . . . . the corporation were not at liberty to disregard their undertaking [not to increase the number without holding an inquiry]. They were bound by it so long as it was not in conflict with their statutory duty.
>
> "It is said that a corporation cannot contract itself out of its statutory duties. In *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation* [1926] A.C. 355 Lord Birkenhead said, at page 364, that it was 'a well established principle of law, that if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties.' But that principle does not mean that a Corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it."

Roskill L.J., as he then was, said at page 310C:

> "It is for the council and not for this court to determine what the future policy should be in relation to the number of taxi licences which are to be issued in the City of Liverpool. It is not for this court to consider population growths or falls or the extent of the demand for taxis within or without the city . . . . . All those are matters for the council. This court is concerned to see that whatever policy the corporation adopts is adopted after due and fair regard to all the conflicting interests. The power of the court to intervene is

not limited, as once was thought, to those cases where the function in question is judicial or quasi-judicial. The modern cases show that this court will intervene more widely than in the past."

Their Lordships see no reason why the principle should not be applicable when the person who will be affected by the decision is an alien, just as much as when he is a British subject. The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.

In the opinion of their Lordships the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty, is applicable to the undertaking given by the Government of Hong Kong to the respondent, along with other illegal immigrants from Macau, in the announcement outside the Government House on 28th October, that each case would be considered on its merits. The only ground on which it was argued before the Board that the undertaking had not been implemented was that the respondent had not been given an opportunity to put his case for an exercise of discretion, which the Director undoubtedly possesses, in his favour before a decision was reached. The basis of the respondent's complaint is that, when he was interviewed by an official of the Immigration Department who recommended to the Director that a removal order against him should be made, he was not able to explain the humanitarian grounds for the discretion to be exercised in his favour. In particular he had no opportunity of explaining that he was not an employee but a partner in a business which employed several workers. The evidence of the respondent, contained in an affidavit to the High Court, was that at the interview he was not allowed to say anything except to answer the questions put to him by the official who was interviewing him. The learned Chief Justice, giving the judgment of the full bench, concluded that the respondent " should have been asked whether there were any humanitarian reasons or other special factors which he would like to be taken into account before a decision was reached. If this had been done, he would not have been able to claim that he had no opportunity of making it clear that he was a proprietor of a business and not just a technician ". When the appeal was before the Court of Appeal the learned Vice-President pointed out that " this is the narrow factual basis upon which the appeal stands ". It was emphasised by Baber J. in two striking sentences as follows:

> " It is a pity that he was not expressly asked at his interview on 29th October 1980 ' have you anything to say as to why you should be allowed to remain in Hong Kong? ' and his answer recorded. This would have been an adequate opportunity to state his case and had this been done these proceedings would have been unnecessary."

Their Lordships consider that this is a very narrow case on its facts, but they are not disposed to differ from the view expressed by both the Courts below, to the effect that the Government's promise to the respondent has not been implemented. Accordingly the appeal ought to be dismissed. But in the circumstances their Lordships are of opinion that the order made by the Court of Appeal should be varied. The appropriate remedy is not the conditional order of prohibition made by the Court of Appeal, but an order of certiorari to quash the removal order made by the Director on 31st October against the respondent. That order of certiorari is of course entirely without prejudice to the making of a fresh removal order

by the Director of Immigration after a fair inquiry has been held at which the respondent has been given an opportunity to make such representations as he may see fit as to why he should not be removed.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed and that, in substitution for the order of prohibition made by the Court of Appeal, an order of certiorari should be made quashing the removal order dated 31st October 1980 by the Director of Immigation. There will be an order for costs to the respondent. There will be no order on the cross-appeal.

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In the Privy Council

THE ATTORNEY GENERAL

v.

NG YUEN SHIU ALSO KNOWN AS NG KAM SHING

(AND CROSS-APPEAL)

DELIVERED BY
LORD FRASER OF TULLYBELTON

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