Privy Council Appeal No. 50 of 1987

(1) Elvira Vergara and
(2) Gwenn Arcilla — *Appellants*

v.

The Attorney General of Hong Kong — *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JUNE 1988

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
LORD GRIFFITHS
LORD ACKNER

*[Delivered by **Lord Ackner**]*

The appellants are two Philippine nationals who came to work in Hong Kong as domestic workers. Foreign domestic helpers ("F.D.H.") constitute a special category of full-time live-in contract workers who are only admitted into Hong Kong for a limited period at a time, in order to work for a nominated employer under an approved contract of employment. Since the early 1970's there has been a greatly increased demand for F.D.H., their numbers having risen from a few thousand to the current figure of 38,000. Most of them are Philippine nationals, who have left the Philippines because of unemployment or low wages. Many of them are in great need of reasonable salaries, so that they can support their family or relatives at home through regular remittances.

Each of the appellants had separately been given permission to reside in Hong Kong following approved procedures which their Lordships will describe later. On 24th March 1987, when the appellants were lawfully in Hong Kong, modification of the immigration policy was announced, which applied to all F.D.H. who thereafter sought permission to land or remain in

Hong Kong. It was implemented with effect from 21st April 1987.

Application for judicial review.

On 10th July 1987, the first and second appellants, together with two other F.D.H., obtained leave from Jones J. to apply to the High Court for judicial review. At the beginning of the substantive hearing on 30th July 1987, leave was obtained to amend the relief sought which, in so far as it concerned the appellants, was the following:-

"1. A Declaration that the First Appellant was under no legal obligation to leave Hong Kong after fourteen days from the termination of her employment with Mrs. Mirpuri and that she can lawfully remain in Hong Kong thereafter until 16th September 1987.

2. ...

3. ...

4. ...

5. A Declaration that the permission granted by an officer of the Immigration Department to the [Second Appellant] to remain in Hong Kong until 26th December 1987, in so far as it includes the condition 'or two weeks after termination of the contract, whichever is earlier', is ultra vires the powers given to the said officer under the Immigration Ordinance, Cap. 115.

6. A Declaration that the [Second Appellant] was under no legal obligation to leave Hong Kong after fourteen days from the termination of her employment with Madam Ng Man Chi and that she can lawfully remain in Hong Kong thereafter until 26th December 1987."

This motion was dismissed by the learned judge, and his decision was upheld on appeal by the Court of Appeal of Hong Kong (Sir Denys Roberts C.J., Silke V.-P. and Addison J.) in judgments delivered on 14th October 1987. Leave to appeal to Her Majesty in Council was given by the Court of Appeal of Hong Kong on 19th November 1987.

The relevant statutory provisions.

These are to be found in the Immigration Ordinance (Cap. 115) as amended and the Immigration Regulations which are made thereunder. It is common ground that by virtue of section 7(1) the appellants were not lawfully able to land in Hong Kong without the permission of an immigration officer or assistant.

Section 11 is the principal section dealing with the grant of permission to land and the following sub-sections are of relevance to this appeal:-

"11.(1) An immigration officer or immigration assistant may, on the examination under section 4(1)(a) of a person who by virtue of section 7(1) may not land in Hong Kong without the permission of an immigration officer or immigration assistant, give such person permission to land in Hong Kong but an immigration officer only may refuse him such permission.

(1A) An immigration officer or immigration assistant may, on the examination under section 4(1)(b) of a person who by virtue of section 7(2) may not remain in Hong Kong without the permission of an immigration officer or immigration assistant, give such person permission to remain in Hong Kong but an immigration officer only may refuse him such permission.

(2) Where permission is given to a person to land or remain in Hong Kong, an immigration officer or immigration assistant may impose -

(a) a limit of stay; and

(b) such other conditions of stay as an immigration officer or immigration assistant thinks fit, being conditions of stay authorised by the Director, either generally or in a particular case.

(3) Subject to subsection (9), the permission given to a person to land or remain in Hong Kong shall be deemed to be subject to the prescribed conditions of stay in addition to any conditions of stay imposed under subsection (2).

.....

(5A) An immigration officer may at any time by notice in writing to any person other than a person who enjoys the right of abode in Hong Kong, or has the right to land in Hong Kong by virtue of section 8(1) -

(a) cancel any condition of stay in force in respect of such person;

(b) vary any condition of stay (other than a limit of stay) in force in respect of such person if the condition as varied could properly be imposed by an immigration officer (other than the Director) under subsection (2)(b);

(c) vary any limit of stay in force in respect of such person by enlarging the period during which such person may remain in Hong Kong.

(6) The Governor may at any time vary any limit of stay in force in respect of any person by curtailing the period during which such person may remain in Hong Kong, and the Director shall in writing notify such person of any such variation.

(7) The Governor may by order applying to all persons or to any class or description of persons, other than persons who enjoy the right of abode in Hong Kong, or have the right to land in Hong Kong by virtue of section 8(1) -

(a) cancel or vary any condition of stay in force in respect of such persons;

(b) impose any condition of stay (other than a limit of stay) in respect of such persons.

.....

(9) The Director of Immigration may exempt any person or any class or description of persons from compliance with all or any of the prescribed conditions of stay.

(10) Any permission given to a person to land or remain in Hong Kong shall, if in force on the day that person departs from Hong Kong, expire immediately after his departure."

Reference should also be made to two other sections of the Ordinance. Section 51 empowers the Governor to give directions to any public officer with respect to the exercise or performance by him of his functions, powers or duties under the Ordinance. It was under this section that the Governor acted when instructing the Director of Immigration to give effect to the new policy decided upon in March 1987 by the Governor in Council. Section 52 empowers the Director of Immigration, in his turn, to give directions to immigration officers and immigration

assistants with respect to the exercise or performance by them of any of their powers, functions or duties under the Ordinance.

The policy of the Immigration Department at the time that the appellants were granted permission to enter.

Before a F.D.H. can land in Hong Kong she must have entered into a contract of employment with her prospective employer. The contract and other relevant documents, which include a medical certificate and testimonials, are required to be submitted to the Immigration Department through the overseas British visa post in the country of the helper's domicile. If the documents are in order, the Immigration Department will authorise the overseas visa post to issue to the helper an employment visa which reads as follows:-

" Seen at the British Embassy
XXXXXXXXXX
.....

Good for a single journey to Hong Kong within three months of the date hereof if passport remains valid EMPLOYMENT SIX MONTHS with Mr/Mrs .....
(Signed) .....
AUTHORITY: DIRECTOR OF IMMIGRATION
HONG KONG .....
D.H. Contract No. .....
CHANGE OF EMPLOYER IS NOT PERMITTED."

Until 21st April 1987, F.D.H. were normally admitted for the purpose of performing the approved contract of employment for an initial period of six months. Thereafter, extensions of stay were normally granted for further periods of six months provided that the contract of employment was still continuing. The endorsements on the passport would read as follows:-

"(i) On arrival
EMPLOYMENT - Permitted to remain until

IMMIGRATION SERVICE
20 APR. 1987
(642)
HONG KONG

(ii) On extension of stay
(ES) EMPLOYMENT
Permission to remain extended until

For employment with
Mr/Mrs. _____

D.H. Contract No.
.....
CHANGE OF EMPLOYER IS NOT PERMITTED

IMMIGRATION SERVICE
1987
(642)
HONG KONG"

After a F.D.H. had ceased employment she was permitted to stay in Hong Kong until the end of the current six-month period of stay. The Immigration Department did not consider that, by virtue of the termination of the contract of employment, it was necessary to apply to the Governor for curtailment of stay under section 11(6) of the Ordinance. Unless there had been a breach of condition of stay, it was not the policy to seek a removal order under section 19. Applications to change an employer were normally approved where the contract was terminated during the second year of employment provided that all other conditions of stay had been satisfied. However, they would not normally be approved where the termination occurred during the first year of employment, although approval had been given in exceptional cases.

The new policy.

Although in theory the policy outlined above should have given rise to no problems, in practice it proved defective and was publicly criticised. Some F.D.H. were deliberately breaking their contracts early in the six-month period in order to work in other part-time or full-time jobs until the period of stay had expired, or in order to find another employer. This gave rise to complaints by the employer who had made all the arrangements to bring the F.D.H. to Hong Kong and had paid the travel expenses. It also gave rise to complaints by local people who wished to secure employment as part-time domestic helpers and who found themselves in competition with F.D.H. who had only been admitted to work full-time. Moreover it resulted in some cases in the employment of F.D.H. in jobs for which, under general policy, foreign nationals were not admitted, for example, bars and clubs.

Accordingly, on 24th March 1987, the Acting Governor, on the advice of the Executive Council, ordered that in future all F.D.H. landing in Hong Kong, or subsequently applying for extension of stay in Hong Kong, should ordinarily be subject to a new condition of stay to the effect that they would be allowed to remain in Hong Kong for the remainder of their current six-month limit of stay or for two weeks after the termination of their contract, whichever is the shorter period. The Director of Immigration was however at liberty to make provision to suit the particular circumstances of a particular case. Furthermore, a change of employer would not normally be allowed, either in the first or second year of the contract, save in exceptional circumstances.

Thereafter, whenever F.D.H. landed in Hong Kong in order to take up an approved contract of employment,

a stamped endorsement was placed in their passport at the port of entry by an immigration officer or assistant in these terms:-

"EMPLOYMENT Permitted to remain until .....
or two weeks after termination of contract, whichever is earlier. For employment with Mr/Mrs. .....
D.H. Contract No. .....
CHANGE OF EMPLOYER
IS NOT PERMITTED."

Whenever F.D.H. applied for and were granted extensions of stay during the subsistence of an approved contract of employment, a stamped endorsement was placed in their passport by an immigration officer or assistant at the offices of the Immigration Department in these terms:-

"EMPLOYMENT - Permission to remain
extended until .....
or two weeks after termination of
contract, whichever is earlier.
For employment with Mr./Mrs. .....
D.H. Contract No. .....
CHANGE of EMPLOYER
IS NOT PERMITTED."

In each case, the first blank was ordinarily filled by inserting a date six months after the expiration of the previous six-month period. The name of the employer and the contract number were also written in.

Immigration officers, in applying the new policy, did pay regard to the need to adapt it to meet exceptional or extenuating circumstances and F.D.H. have been granted extensions of stay beyond the two week period following the termination of their employment. There have been cases where they have been permitted to change their employers without leaving Hong Kong, as indeed occurred in this case.

The circumstances of the appellants.

1. The first appellant. She had first landed in Hong Kong on 16th March 1986. Subsequently her stay in Hong Kong had been extended. At the date when leave was given to bring proceedings for judicial review (10th July 1987), she was in Hong Kong with permission to remain in Hong Kong until 16th September 1987 for the purpose of employment with Mrs. Bina Mirpuri. This permission to remain for six months was granted on 12th March 1987 under the former policy and expired the day before the Court of Appeal began to hear the appeal.

She stated an oath that for some months previously she had in fact been working for the mother of her

ostensible employer, that as a result of injury she had been advised by a doctor not to work, that this led to disputes with her employers, that she had complained to the Labour Department, and that on 29th June 1987 she had been forced to leave the premises where she was employed. She maintained that the contract had not been validly terminated and that she was owed wages. The Department of Immigration was unaware of these matters until after proceedings had been instituted.

Since these proceedings were instituted she has been permitted to remain in Hong Kong, to change her approved employment and to remain until 15th August 1988 or two weeks after termination of her contract, whichever is earlier.

2. The second appellant. She had first landed in Hong Kong on 16th August 1985. Subsequently her stay in Hong Kong had been twice extended. Following notification of termination of her employment she had been permitted to remain as a visitor for two months. She then left Hong Kong with a re-entry visa for employment purposes, and returned on 26th April 1987 to resume employment with Madam Ng Man Chi. On landing she was given permission to stay for only two months because her passport was then due to expire. After she had produced a new passport, her stay in Hong Kong was further extended on 3rd June 1987. At the date when leave was given to bring proceedings for judicial review, she was in Hong Kong with permission to remain until 26th December 1987 or two weeks after termination of her contract of employment with Madam Ng Man Chi, whichever was the earlier. This was granted on 3rd June 1987 under the modified policy.

She stated on oath that on 15th June 1987 she was forced to leave her place of employment by her employer who claimed that she (Miss Arcilla) had been absent from work without permission and that the contract was terminated. Later, on 21st July 1987, after the commencement of these proceedings, she attended at the offices of the Department of Immigration seeking permission to change her employer. Subsequently she was permitted to remain in Hong Kong and to change her authorised employment and thereafter to remain until 2nd May 1988 or two weeks after termination of her contract, whichever was the earlier.

Relief now claimed.

It is common ground that the new policy, which after due publicity came into effect on 21st April 1987, has thereafter operated to the exclusion of the original policy. Having regard to this fact, and the change in the appellants' circumstances since these

proceedings were launched, the first and sixth of the declarations sought from Jones J. are now wholly academic. Accordingly it was common ground that their Lordships should only be concerned with the application for the fifth declaration, with the necessary alteration of the tense, having regard to the passage of time. The live issue which falls to be determined remains, namely whether the imposition of the condition now stamped ("the chop") on the passport on the grant or the extension of the permission "or two weeks after termination of contract, whichever is earlier" is ultra vires the powers given to the officer under section 11(2) of the Ordinance.

The appellants based their contention that the condition is ultra vires on two grounds. These are:-

1. That on the true construction of the Ordinance, the officer has no power to impose such a condition. This submission was rejected by the Court of Appeal.

2. That the condition was "*Wednesbury* unreasonable" [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223]. This point was not taken either before Jones J. or the Court of Appeal.

1. Section 11(2) - its true construction.

Under this section, where permission is given to a person to land or remain in Hong Kong, an immigration officer or immigration assistant may impose a "limit of stay". The words "limit of stay" are defined in section 2(1) of the Ordinance as meaning "a condition of stay limiting the period during which a person may remain in Hong Kong". The appellants' contention is that this condition can only limit the period during which a person may remain in Hong Kong by specifying a specific date. In their Lordships' view this is too narrow a interpretation of the definition. A permitted period may not only be limited by reference to a stated date, but by reference to a contingent event or by reference to the earlier in time of two events, each of which is certain to happen. Such conditions "limit the period during which a person may remain" and there is nothing in the Ordinance which would suggest that such conditions are excluded from the definition. On the contrary, having regard to the subject-matter of the legislation, namely the control of immigration, it is to be expected that the power to impose conditions limiting the stay would be flexible rather than rigid, as the appellants' interpretation would suggest.

However, if the correct view is that the definition is ambiguous, then their Lordships are entitled, in

ascertaining its true meaning, to have regard to the Immigration Regulations which came into force on 1st April 1972, contemporaneously with the Ordinance.

In expressing their readiness to use these Regulations, if necessary, as an aid to construction of the Ordinance their Lordships are pleased to follow the decision of the House of Lords in the case of *Hanlon v. The Law Society* [1981] A.C. 124. In his speech, which was concurred in by all the other members of the Appellate Committee, Lord Lowry said at page 193G/194B:-

> "A study of the cases and of the leading textbooks ... appears to me to warrant the formulation of the following propositions:
>
> (1) Subordinate legislation may be used in order to construe the parent Act, but only where power is given to amend the Act by regulations or where the meaning of the Act is ambiguous.
>
> (2) ...
>
> (3) Regulations which are consistent with a certain interpretation of the Act tend to confirm that interpretation.
>
> (4) Where the Act provides a framework built on by contemporaneously prepared regulations, the latter may be a reliable guide to the meaning of the former."

The power to make regulations is given to the Governor in Council *inter alia* for the purpose of "providing for any matter or thing which is or ought to be or may be prescribed under this Ordinance" (see section 59(a)). It will be recalled that section 11(3) provides that, subject to any exemptions that the Director of Immigration may grant, permission given to a person to land or remain in Hong Kong shall be deemed to be subject to the prescribed conditions of stay, in addition to any conditions of stay imposed under section 11(2). Regulation 2 of the Immigration Regulations provides for these mandatory conditions of stay. Thus regulation 2(4) makes specific provision, where permission is given to a person to land in Hong Kong for employment. Such permission "shall be subject to the condition of stay that he shall only take such employment or establish or join in such business as may be approved by the Director". Significantly regulations 2(2) and 2(5), in prescribing conditions of stay, limit the period of stay by reference respectively to a contingent event or two alternative periods.

Regulation 2(2) provides that "Permission given to a person to land in Hong Kong in transit shall be subject to the condition of stay that he shall not remain in Hong Kong after the departure of the ship on which he arrived in Hong Kong".

Regulation 2(5) provides that "Permission given to a person to land in Hong Kong as a contract seaman shall be subject to the condition of stay that he shall not remain in Hong Kong after the departure of a specified ship or later than fourteen days after the date of landing, whichever is earlier".

It is not suggested on behalf of the appellants that these Regulations are ultra vires and yet "condition of stay" is not used in the restricted sense for which they contend.

2. "*Wednesbury* unreasonableness".

To succeed under this heading, the appellants must establish that the decision to impose the new condition was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" per Lord Diplock in *CCSU v. Minister for the Civil Service* [1985] 1 A.C. 374 at 410. If the decision was so irrational or so perverse, it is surprising that this point was not taken either at first instance or in the Court of Appeal in Hong Kong. The basis of the attack is not that the abuse by F.D.H. of their permission to land or remain in Hong Kong, as described earlier, did not take place or did not necessitate greater regulation or control of the F.D.H. The respondent's evidence of the urgent need for more effective restrictions was not challenged. Mr. Scrivener Q.C., on behalf of the appellants, based his submissions essentially on two separate contentions which can conveniently be considered under the following headings.

Additional vulnerability.

Mr. Scrivener contended that the new "chop" imposed a wholly unreasonable increase in the vulnerability of the F.D.H. In order to assess the strength of this submission it is important to contrast the vulnerability of these girls under the new style approval with the old style approval. The gist of the judgments at first instance, and in the Court of Appeal, is that the first appellant had permission to remain in Hong Kong and that such permission was subject to an implied limit of stay, namely the period during which her contract of employment subsisted. Jones J. also held that the implied condition governed the original permission to enter. The suggestion that such a limit existed was contrary to the submission of the Attorney General made before

Jones J. Although counsel for the Attorney General in the Court of Appeal adopted the judgment of Jones J., Mr. Michael Thomas Q.C., appearing before their Lordships, did not seek to argue for such an implication. He submitted that the express words of the chop "EMPLOYMENT - Permission to remain until (six months period)" did not suggest any such implication - quite the contrary. Moreover no such limit was mentioned in the application form or the explanatory notes issued to the F.D.H. in the Philippines, and no such limit was ever enforced. In their Lordships' judgment, under the old style permission, if the F.D.H. employment ceased prior to the expiration of the stated limit of stay, the F.D.H. was entitled to remain in Hong Kong for the balance of the period. However by virtue of Regulation 2(4) she was not entitled to take any new employment unless and until it was approved by the Director. Since these girls were encouraged to (see clause 5(d) of their contract of employment) and did remit part of their salary to their family or dependents in the Philippines, it was most unlikely, if their employment was terminated during the period of their stay, that they would financially be in a position to remain unemployed for the balance of the permitted stay. Accordingly, particularly as the date of the expiration of the six-month period approached, these girls were in a vulnerable situation vis-a-vis a ruthless employer. Moreover, if the contract terminated after the initial six-month period had expired and her limit of stay had been enlarged for a second or subsequent period of six months, although the F.D.H. would be permitted to find a new employer, she would have to obtain a "release letter" from her former employer, confirming that he/she did not object to her change of employment. Indeed in the appellants' written case it was conceded that even under the old policy the F.D.H. were vulnerable to abuses on the part of their employers - "F.D.H.s in their isolation are always at risk of physical and even sexual abuses, and may be afraid to complain to the authorities because they cannot afford to lose their jobs or prejudice their prospect of future employment in Hong Kong".

It is certainly true that the F.D.H. vulnerability, vis-a-vis her employer, was increased by the change of policy, because although the termination of her employment did not *ipso facto* render her continued residence in Hong Kong illegal, it provided her with a very limited period in which either to return to the Philippines or to explain her problems to the immigration authorities with a view to their approving her obtaining other employment. It has not been suggested that the period of fourteen days in which to leave the Philippines was too short, or that the girls were unaware of their entitlement to seek help from the immigration authorities, or that there

was a lack of understanding or ability to assist by the immigration authorities, when they were thus contacted. Indeed the situation of these two appellants, as described above, establishes the sympathetic treatment which they in fact received. Their Lordships' attention was drawn by Mr. Scrivener to an undated letter written by the second appellant and received by the Director of Immigration on 17th June 1987, two days after the girl alleged she had been summarily dismissed by her employer. In the final paragraph of this letter she maintains a claim for one month's salary in lieu of notice, cost of her passage home and the travelling allowance as stipulated in her contract and seeks the assistance of the Director. This letter was in fact exhibited to the affirmation of Peggy Dee, acting Principal Immigration Officer. She stated that the second appellant's employer had not by then notified the Immigration Department of the termination of the contract and that, before an officer of the Immigration Department had had the opportunity to investigate the case in order to discover the second appellant's intentions and circumstances in which the contract had been terminated, she had in fact made her application for judicial review. Miss Dee further stated that upon receipt of that letter the Department was ready and willing to consider the circumstances of the second appellant's case, and indeed has since done so with the results described above.

Bearing in mind the clear and undisputed need to deal with the abuses by the F.D.H. described above, their Lordships are quite unable to accept that the new policy, because it involved this increase in the girls' vulnerability, can be categorised as so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the problem would have made such a decision.

Uncertainty. The two-week period during which the F.D.H. must either pack up and leave Hong Kong, or alternatively enlist the assistance of the immigration authorities, as the two appellants successfully did, begins to run "after the termination of the contract". Mr. Scrivener submitted that it might on occasions be very difficult to establish when the contract terminated and therefore the girl would not know when she was at peril of committing a criminal offence (see section 41) which provides that any person who contravenes a condition of stay in force in respect of him shall be guilty of an offence and shall be liable on conviction to a fine of $5,000 and to imprisonment for 2 years. Their Lordships consider that there is an air of unreality about this contention. These contracts of employment, generally speaking,

terminate by effluxion of time, as a result of a notice of termination being given, by mutual agreement or by the girl walking out of her employment or being shown the door. Of course, the principles of the law of contract concerning discharge by breach may permit of nice questions which have yet to be finally resolved as to the effect of unaccepted acts of wrongful repudiation involving the relationship of master and servant. While making due allowance for the existence of such cases, in practice they will arise extremely rarely. The uncertainty which they are capable of creating cannot have the effect of rendering the new policy so unreasonable as to amount to an abuse of power and therefore be ultra vires. From a practical point of view the immigration authorities can reasonably be expected to deal sympathetically with such cases. Moreover the F.D.H., who finds herself in this rarefied realm of uncertainty, can take comfort from the knowledge that the burden will lie upon the prosecution, if the authorities are minded to prosecute, to establish beyond a reasonable doubt that she has remained for longer than two weeks in Hong Kong after "the termination of the contract".

For the reasons stated above their Lordships will humbly advise Her Majesty that this appeal should be dismissed.