

HONG KONG / JUDGMENT

RE CHEUNG YUK-SAI

COURT

Court of First Instance

DECIDED

16 May 1986

CASE / FILE NUMBER

HCMP698/1986

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bjbj HCMP000698/1986 IN THE SUPREME COURT OF HONG KONG HIGH COURT
MISCELLANEOUS PROCEEDINGS NO. 698 OF 1986

In the matter of an application by Cheung Yuk-sai for leave to apply for Judicial Review and In the matter of a determination of an appeal against removal orders made against Cheung Ching-nuen alias Cheung Ting-wun dated the 6th day of March, 1986

Coram : The Honourable Mr. Justice Nazareth in Court Date of hearing : 16th May, 1986 Date of delivery of judgment : 16th May, 1986

JUDGMENT

In this case Deputy Judge Downey refused the applicant leave to apply for Judicial Review on the basis that the permission to remain claimed had been granted not by the Director of Immigration or the Deputy or Assistant Director, but by a subordinate Immigration Officer. He followed the decision of Penlington, J. in Choy Yi-wong (M.P. No. 2595 of 1985). The applicant appealed to the Court of Appeal. In that Court for the first time the effect of section 43 of the Interpretation and General Clauses Ordinance (Cap. 1) was raised. Section 43 relates to the delegation of his duties by a specified officer. For the purposes of the Immigration Ordinance, the Director of Immigration is the specified officer. If a public officer exercises powers entrusted to a specified officer, then, under the provisions of sub-section (3) of the section, the powers are presumed to have been delegated to him until the contrary is proved. Understandably therefore the Court of Appeal allowed the appeal and granted leave to apply for Judicial Review. And so the matter has come before me. In the ordinary way, I should in all probability upon the evidence available to the Court of Appeal, have remitted the case to be reheard by the Immigration Tribunal. However, the Crown has now put in two affidavits, one of an Assistant Director of Immigration who has

deposed positively that no delegation of powers has been made under the Ordinance. The other is the affirmation of Chui Tak-shing, the Immigration Officer who, it is alleged by the applicant, gave permission to stay. He also denies that the power was delegated. One would have thought that was the end of the matter but Mr. Persaud for the applicant says he would like to test that evidence by cross-examination and furthermore by calling evidence to controvert it. He accepts that he has not filed affidavits but points to the late service of the respondent's new affidavits which apparently were served on his instructing solicitors some 3 or 4 days ago and which reached him only yesterday. Upon my invitation he indicated to me that the nature of the evidence he would wish to lead. This is first of all the evidence of an Immigration Officer who gave evidence in another trial in which Mr. Persaud was involved and who apparently claimed that he had the power to grant permission to stay. His evidence, it is suggested by Mr. Persaud, in addition indicated the existence of a circular setting out the policy or criteria upon which permission to stay is granted, and also that the power has been given to Immigration Officers and not confined to the Director, Deputy Director and Assistant Directors. I would say at once that it strikes me as unlikely that such evidence would be accepted by a Court or Tribunal as rebutting the positive evidence in the affidavits I have mentioned. Mr. Whaley submits that it is inconceivable that the affidavit evidence, a fortiori the actual sworn testimony of the officers concerned could be rebutted by evidence of the nature referred to by Mr. Persaud. He submits with some force that the net result of remitting the case to the Immigration Tribunal would simply be to delay matters, which could hardly be in the interests of justice or the applicant. As I have said, it does strike me as somewhat unlikely that evidence of the nature referred to by Mr. Persaud could indeed rebut the positive evidence in the respondent's affidavits. Nevertheless, sitting here today I would only be able to allow Mr. Persaud to cross-examine the two deponents, who I believe are available. However, Mr. Persaud would not be able to lead the evidence he refers to, not to pursue any investigations that he may wish to make (if there is any scope for such investigations). In these circumstances it seems to me only right that I should afford the applicant an opportunity of doing so; furthermore that would seem to me to be necessary so that justice may be seen to be done. Not without some misgivings therefore I would allow the application, quash the Immigration Tribunal's decision and remit the case to the Immigration Tribunal to determine the issue of fact as to whether the applicant was given permission to stay by Mr. Chui, the Immigration Officer. In determining that issue the first matter the Tribunal will have to consider is whether in fact there was any delegation of the power in question to Immigration Officers. If it finds that there was no such delegation, then that would determine the appeal, for on the basis of the decision of Penlington, J. in *Choy Yi-wong* (M. P. No. 2595 of 1985 unreported) which was followed by Deputy Judge Downey and not questioned by the Court of Appeal, in the absence of delegation, any permission to stay given by the Immigration Officer would be a nullity. If, on the other hand, the Tribunal finds that the power in question was delegated, then it should proceed to determine the other issue of fact as to whether Mr. Chui, the Immigration Officer, did grant permission to stay. Mr. Whaley asks for costs. I think the matter should be deferred since in my view if the applicant in the event succeeds in having the removal order set aside, she should have her costs, otherwise not. Accordingly I quash the order of the Immigration Tribunal and remit the case to that Tribunal for the appeal to be determined in the manner I have

indicated. Costs reserved with liberty to apply. (G.P. Nazareth) Judge of the High Court
Representation: Mr. Norman Persaud instructed by Messers. P.J. Oliver for applicant. Mr. B.
Whaley, Senior Crown Counsel for respondent. PAGE PAGE

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