

HONG KONG / JUDGMENT

SOMPORN YOOTHIP v. SECRETARY FOR SECURITY AND ANOTHER

COURT

Court of Appeal

DECIDED

22 June 2007

CASE / FILE NUMBER

CACV276/2006

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bjbj CACV 276/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 276 OF 2006 (ON APPEAL FROM HCAL 122 OF 2004) BETWEEN SOMPORN YOOTHIP Applicant and SECRETARY FOR SECURITY 1st Respondent COMMISSIONER OF REGISTRATION 2nd Respondent Before : Hon Cheung JA, Yuen JA and Hartmann J in Court Date of Hearing : 6 June 2007 Date of Judgment : 22 June 2007 J U D G M E N T Hon Cheung JA : Permanent resident status AUTONUMOUT A permanent resident status is an important constitutional right as provided for by Article 24 of the Basic Law. Permanent residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode : Article 24. The right of abode means in practical terms not to be deported from Hong Kong. AUTONUMOUT This appeal raises important issues as to how an authority should recognize the rights of a person who may be entitled to claim for permanent resident status.

Facts

AUTONUMOUT The applicant is a Thai national. She came to Hong Kong in October 1992 and was married to a Hong Kong permanent resident on 19 October 1992. She has been living in Hong Kong since 1992 and obtained dependant status from the Director of Immigration (the Director). She remains married to her husband but is separated from him. By October 1999 she had been living in Hong Kong for seven years. In early 2001, the applicant began to cohabit with another Hong Kong permanent resident. She plans to marry him and form a family in Hong Kong. AUTONUMOUT Between 1999 and 2002 she went to the immigration office on several occasions for the purpose of replacing her identity card. One of these occasions was on 29 October 2001 when she filled up a form known as ROP1. The form bears the description APPLICATION FOR A PERMANENT IDENTITY CARD/AN IDENTITY CARD BY A PERSON OF THE AGE OF 18 YEARS OR OVER - REGISTRATION OF PERSONS ORDINANCE CAP. 177 . The form stated that A permanent identity card is issued to a person who has the right of abode in the Hong Kong Special Administrative Region (HKSAR) under the Immigration Ordinance (Cap. 115), Laws of Hong

Kong . Further under Part A of the form there is a question Have you been ordinarily resident in the HKSAR for a continuous period of not less than seven years? Two standard answers were provided same question for the replacement of her lost identity card. On both occasions she did not put a tick on either of the standard answers. She was issued an identity card on both occasions. AUTONUMOUT In July 2003, the applicant was convicted of soliciting for an immoral purpose and living on the earnings of prostitution of others and was sentenced to prison. AUTONUMOUT After the applicant served her sentence, on 13 January 2004 the Secretary for Security (the Secretary) ordered that she be deported from Hong Kong (the deportation order AUTONUMOUT On 27 October 2004 the applicant applied for judicial review seeking to challenge the decision of the Secretary in issuing the deportation order and the decision of the Commissioner of Registration (the Commissioner)(through the registration officer who handled the applicant s application for replacement identity card) made on 29 October 2001 and 23 July 2002 respectively in refusing to issue her with a permanent identity card under Regulation 13 of the Registration of Persons Regulations (). The judgment AUTONUMOUT At the hearing of the judicial review the applicant did not challenge the deportation order. Chung J who heard the application found for the applicant and granted the following relief: The registration officers do and are hereby commanded to notify the Applicant in writing that on or about 29 October 2001 and 23 July 2002 they had refused to issue permanent identity card to her and to inform her that she had a right to appeal against the decisions under s.3D(1) of the Registration of Persons Ordinance (); and The Applicant s applications made under Regulation 13 of the RPR be remitted under O. 53, r. 9(4) with a direction that they be re-considered and that the registration officers reach a decision in accordance with the findings of the court. The appeal AUTONUMOUT The Secretary and the Commissioner now appeal against the decision. The basis of the decision AUTONUMOUT The basis of the judge s decision is that he upheld the applicant s contention that when a foreign national completes a ROP1 and submits it to a registration officer and the materials before the registration officer (whether contained in ROP1 or otherwise available to him) disclose the applicant s potential eligibility to permanent resident status, the act of submission can amount to making a claim for such status. As a corollary, it is incumbent upon the registration officer to refer the ROP1 to the Director as an application made pursuant to Article 24(2)(4) of the Basic Law. In this case the registration officer who handled the applicant s application for replacement identity cards should have referred the matter to the Director of Immigration (the Director) as an application made pursuant to Article 24(2)(4) of the Basic Law. Further he held that insofar as his act therefore also amounted to a refusal to issue a permanent identity card, he should have acted in accordance with s. 3D(2) (Cap. 177) The appellant s case AUTONUMOUT In gist the case of Mr. Chow, SC, counsel for the Secretary and the Commissioner, is that what the applicant did in this case was simply to apply for an identity card and she had made no claim at all for permanent resident status. Hence there was no decision to refuse to issue her with a permanent identity card. Further she did not seek verification of her permanent residence status. Duty to act fairly AUTONUMOUT I agree that the applications made by the applicant were for the replacement of lost or defaced identity cards. However, I am of the view that by virtue of the operation of the Basic Law, Immigration Ordinance (), RPO, RPR and the contents of ROP1, a duty was impressed on the registration officer who handled the applicant s

two applications to refer her to the Director so that her permanent resident status could be verified. Basic Law and Immigration Ordinance AUTONUMOUT I start with Article 24 of the Basic Law first. Of the six categories of permanent residents in Hong Kong, one is in respect of persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region (Article 24(2)(4)). A similar provision is contained in Schedule 1, paragraph 2(d) of the IO. AUTONUMOUT As pointed out by Ribeiro PJ in *Prem Singh v. Director of Immigration* [2003] 6 HKCFAR 26 at page 45 the three conditions that a non-Chinese person must satisfy if he is to qualify for permanent resident status are he has entered Hong Kong with valid travel documents (the entry requirement); he has ordinarily resided in Hong Kong for a continuous period of not less than seven years (the seven year requirement); and he has taken Hong Kong as his place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region (the permanence requirement). AUTONUMOUT Ribeiro PJ further held that a non-Chinese person claiming the right to permanent resident status and hence a right of abode, must apply to the Director for his claim to be verified. A fair and reasonable statutory scheme for the proper verification of a person's claim to right of abode is constitutional and until such claim is verified, the applicant does not enjoy the rights of a permanent resident. Registration of Persons Ordinance and Regulations AUTONUMOUT Section 3(1) of the RPO requires every person in Hong Kong, unless exempted or excluded from its provisions, to be registered under the RPO. The RPR was enacted to implement the system of registration. Under Regulation 3(1) of the RPR the requirement of registration includes an obligation to apply for an identity card. An identity card is defined in the RPO as an identity card issued under the RPO and includes a permanent identity card. Regulation 3(2) expressly provides that if a registration officer is satisfied, on an application to register and apply for an identity card, that the applicant enjoys the right of abode in Hong Kong, he shall, in accordance with these regulations, issue to the applicant a permanent identity card. Under regulation 13(1) a holder of an identity card is required to apply to replace an identity card which has been lost, destroyed, damaged or defaced. Regulation 13(3) repeats Regulation 3(2) by providing that if a registration officer is satisfied on an application for replacement that the person enjoys the right of abode in Hong Kong he shall issue to him a permanent identity card. The form AUTONUMOUT I have already referred to the content of the ROP1 form earlier. On the face of it, the form clearly is to inquire with an applicant whether he satisfies the permanent residence requirement and inform him that a permanent identity card is to be granted if he satisfies the requirement. AUTONUMOUT Mr. Chow explained that the ROP1 is a form that has been used prior to 1997 before the implementation of the Basic Law. At that time a registration officer may issue a permanent identity card to a person of Chinese race who has been in continuous residence in Hong Kong for seven years. This is no longer applicable after the implementation of the Basic Law and the requirement of verification of permanent resident status. AUTONUMOUT While accepting what Mr. Chow said, the facts remain that the same form was still used after 1997 and it still made references to the right of abode and asked whether the applicant has lived continuously in Hong Kong for seven years. Nature of the duty AUTONUMOUT The IO, RPO and

RPR are statutory provisions which implement the permanent resident status accorded by the Basic Law. They are inextricably linked. Under the statutory framework, the Commissioner is expressly required to issue a permanent identity card to an applicant who fulfills the constitutional requirement but because of the intervention of the verification process, the Commissioner can only perform this specific statutory task after the verification process is completed. On this basis then clearly the statutory provisions under the RPO and RPR point towards a duty on the part of the Commissioner, through the registration officers, to assist an applicant, who is, on the face of it, entitled to a permanent identity card, by referring him to the proper authority so that he could fulfill the conditions under the IO in order to be eligible for the permanent identity card. In my view with this background when an applicant notifies the registration officer that he has lived continuously for seven years in Hong Kong by way of the ROP1, it behoves the registration officer to refer the applicant to the Director so that his constitutional right as a permanent resident can be verified. AUTONUMOUT This is the only sensible way for the Commissioner to give effect to this specific right of an applicant especially when the Commissioner had brought upon himself the task of informing an applicant, through the ROP1, of the right of abode and asking him in effect if he falls within this category of persons who enjoys this right. A specific direction to seek verification of permanent resident status must then be given. On this basis it can be said that the act of submission of ROP1 can amount to a claim for permanent resident status. But in my view such a duty clearly exists even without the submission argument. This duty is nothing more and nothing less than a duty to act fairly in ensuring that that person's constitutional right can for all practical purposes be recognised. This is not an onerous task and can be easily discharged by the authority. As Bokhary PJ observed in Prem Singh at pg 33, Any formalism, complication or subtlety by which a claim to a constitutional status or right can be denied or delayed would inevitably erode public confidence in the law. AUTONUMOUT The importance of this duty became more acute when as held by the judge no administrative measures were in place that pointed potential permanent resident claimants in the right direction if the Commissioner's staff could not deal with a potential permanent resident eligibility claim made in a ROP1. The finding of fact AUTONUMOUT The judge, in this case, had heard evidence from the registration officer who dealt with the applicant's applications and also the applicant and her boyfriend who were present at the 29 October 2001 application. These are the findings made by the judge

- (a) although Wong (i.e. the registration officer) has advised the applicant matters relating to her right to seek permanent resident status, his advice was too brief; whatever might have been the real reason, the applicant and her boyfriend did not understand what Wong was saying and therefore did not pay attention to it; the applicant and her boyfriend were unaware of the applicant's entitlement to seek verification of her permanent resident status until after the date of the said deportation order; in making the findi 8lENE\ /n8lENE\ d them; although the applicant could read the Thai language, she could not write it (except her own name). Further, she could not read or write Chinese or English and was only able to understand simple Chinese used in daily casual conversation. I infer from this the applicant must have received little education; on the occasions when she was accompanied by her boyfriend to

go to the Immigration Department Yuen Long office, both Wong and her boyfriend spoke to her in Chinese which made her understanding of Wong's advice even more difficult; if the applicant had known of the requirement to declare to the Director laid down by Art. 24(4), Basic Law, she would have done so as early as 26 September 1999. In so concluding, I note that the respondents have not suggested any reason why she did not want to take Hong Kong as her place of permanent residence. AUTONUMOUT The findings could only mean that the judge was not satisfied that the registration officer had clearly and unambiguously directed the applicant to seek verification of her permanent resident status from the Director. Had the registration officer properly advised the applicant, I really cannot see any reason why she would not have followed the advice and applied for verification of her permanent resident status. After all, by 2001 she had already been in Hong Kong for more than seven years and according to her application for judicial review she had taken Hong Kong as her place of permanent residence. AUTONUMOUT This breach of duty resulted in the applicant not having her permanent resident status being verified when she lodged her applications for replacement of identity cards in 2001 and 2002. This is a situation where judicial intervention was justified. I prefer to deal with the issue on the basis that the breach of duty was the failure by the registration officer to give proper direction for verification of the applicant's permanent resident status rather than to say that the breach was in respect of the registration officer not issuing the applicant with a permanent identity card. Form of relief AUTONUMOUT The judge was correct to grant relief to the applicant. However, the form of the orders needs to be reviewed. First, the judge dealt with both of the decisions of 29 October 2001 and 23 July 2002. It should be noted that in respect of the application dated 23 July 2002, the applicant did not answer either or to the question whether she had been in continuous residence for seven years. Without going into the difficult question of whether the registration officer was under a duty to review the file of the applicant to see what answer she had previously given in respect of her earlier application on this topic, I think it is sufficient for the purpose of the applicant's case to quash the decision of 29 October 2001 because the verification process had not been pursued. There shall be an order accordingly. Second, the first order made by the judge was on the premise that the registration officer could, in fact, grant the applicant a permanent identity card before verification by the Director. This is not correct. In my view for all practical purposes, particularly after the substantial lapse of time, it is sufficient for this court to grant the relief now suggested by Mr. Dykes, SC, counsel for the applicant, namely A declaration that the Applicant's application for replacement identity card dated 29 October 2001 should be treated by the 2nd Respondent as application for verification of eligibility for permanent resident status under Schedule 1, Immigration Ordinance made by her on that date. AUTONUMOUT The declaration is in the form made by the Court of Final Appeal in Prem Singh. The situation in Prem Singh is, of course, different from the present one. However, once it is recognised that the applicant was prevented from having her constitutional right as a permanent resident being verified as a result of the breach by the registration officer, the only effective remedy to be granted is the one that I have just stated.

Conclusion

AUTONUMOUT In the circumstances, I would dismiss the appeal and replace the relief by the two orders set out in paragraph 27 above. I would make a provisional costs order that the applicant is to have the costs of the appeal including the costs of the application to amend the respondent s notice. The applicant s own costs are to be taxed in accordance with the Legal Aid Regulations. Hon Yuen JA : AUTONUMOUT I agree. Hon Hartmann J : AUTONUMOUT I agree. (Peter Cheung) (Maria Yuen) (M. J. Hartmann) Justice of Appeal Justice of Appeal Judge of the Court of First Instance Mr. Anderson Chow, SC, instructed by Secretary for Justice, for the 1st and 2nd Respondents Mr. Philip Dykes, SC, instructed by Messrs Barnes & Daly, assigned by Director of Legal Aid, for the Applicant PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk S T U V A B C D E F G H I J K L M N O P Q R S T U V r p# r p# "@AB9D % &0 % &0 % &0 % &0 % &0 % &0 [sz%0p / Jz @m2z]C]6 q.=>+ uxB26I]C]6 [sz% & 6" abc-Cheung-CACV.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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