[English Translation – 英譯本]
CACC 373/2005

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO. 373 OF 2005

(ON APPEAL FROM DCCC 386 OF 2005)

BETWEEN

HKSAR	Respondent
and	
LUO SHUI JI (羅水基)	Applicant

Before: Hon Cheung and Yeung JJA and Chu J in Court

Date of Hearing: 15 February 2007

Date of Judgment: 15 February 2007

Date of Reasons for Judgment: 1 March 2007

REASONS FOR JUDGMENT

Hon Cheung JA (giving reasons for judgment of the Court):

1. These are the reasons for the judgment of this Court of 15 February 2007.

Background

2. The Applicant faced 5 charges. He was convicted of 4 of them by Deputy District Judge William Ng after trial and was sentenced to 5 years and 4 months' imprisonment.

3. On 1 September 2005, the Applicant applied to the Court of Appeal for leave to appeal against conviction and sentence and submitted a "Notice of Application for Leave to Appeal" accordingly. On 9 December 2005, he submitted a "Notice of Abandonment of Application for Leave to Appeal" ("Notice of Abandonment"), and the court dismissed his application for leave to appeal on the same day.

4. On 4 July 2006, the Applicant submitted an affidavit asking the court to treat the Notice of Abandonment as a nullity. On 18 September 2006, he filed a set of perfected grounds of appeal against the conviction on the second charge.

5. Mr. Steven Kwan and Mr. Eugene Yim, Counsel for the Applicant under the Free Legal Service Scheme of the Hong Kong Bar Association, contended that as the perfected grounds of appeal submitted by the Applicant involved a question of law alone, he could, by virtue of the Criminal Procedure Ordinance, lodge an appeal to the Court of Appeal as of right without leave to appeal. Mr. Kwan and Mr. Yim took the view that the Notice of Abandonment submitted by the Applicant earlier on would not affect his appeal.

May only appeal once

6. Section 82 of the Criminal Procedure Ordinance, Cap. 221 of the Laws of Hong Kong, provides as follows:

> (1) A person convicted of an offence on indictment may appeal to the Court of Appeal against his conviction.
>
> (2) The appeal may be —
>
> (a) on any ground which involves a question of law alone; and

(b) with the leave of the Court of Appeal, on any ground which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal;

but if the judge of the court of trial grants a certificate that the case is fit for appeal on a ground which involves a question of fact, or a question of mixed law and fact, an appeal lies under this section without the leave of the Court of Appeal.

7. Although the Ordinance states that if the appeal is on any ground which involves a question of fact alone or a question of mixed law and fact, it may only be lodged with the leave of the Court of Appeal, it does not mean that the Applicant, having submitted a Notice of Abandonment, may submit another Notice of Appeal for appeal without the leave of the court. This is not the intention of section 82, which, in our view, only allows the Applicant to appeal against his conviction or sentence once. If his ground of appeal involves a question of law alone, he does not require the leave of the Court of Appeal before lodging the appeal; otherwise, he must obtain the leave of the Court of Appeal before he may lodge an appeal.

R v. Pinfold

8. The English Court of Appeal stated clearly in *R v. Pinfold*[1988] 1 QB 462 that if an appellant's appeal has been dismissed by the court, he is not entitled to lodge another appeal, subject to the following two exceptions:

1) The decision on the original appeal is a nullity. For example, the appellant submitted a Notice of Abandonment of Appeal and subsequently asked the court to treat that Notice as a nullity;

2) The appellant has suffered injustice by reason of some material irregularity in the appeal procedure. For example, the appellant had not been notified of the hearing, as a result of which he was absent from the hearing, or the counsel acting for him was unable to attend the hearing, as a result of which the court dismissed his appeal.

9. In *HKSAR v. Ma Chiu Sing,* CACC 4/2003, this Court (Stuart-Moore VP, Burrell J and Suffiad J) made mention of the *Pinfold* case but did not go on to explain that case as it was irrelevant to the case in hand.

Treating a Notice of Abandonment of Application for Leave to Appeal as a nullity

10. In our view, the Applicant must obtain the leave of this Court to treat the Notice of Abandonment submitted by him as a nullity before he may lodge a further appeal against his conviction. In *HKSAR v. Lai Siu Cheung* [2005] 1 HKLRD 1, this Court (Stuart-Moore VP and Jackson J) explained in detail the legal principles governing this type of application:

(1) The right of appeal is conferred by statute. Once an applicant has abandoned an appeal, which has accordingly been dismissed, the Court of Appeal does not have any inherent jurisdiction to entertain the reopening of the appeal unless the act of the abandonment is treated as a nullity, or the matter is referred to the Chief Executive under section 83P of the Criminal Procedure Ordinance. Only under the following circumstance may the court treat an applicant's act of abandonment of an appeal as a nullity: the act of abandonment was not the result of the applicant's deliberate and informed decision, in other words, the mind of the applicant did not go with his act of abandonment.

(2) Whether an applicant's act of abandonment will be regarded as a nullity depends on his understanding of the effect or consequences of the document he was signing or, perhaps, misapprehending the effect of an appeal were he to persist. If the erroneous advice relied upon by the applicant relates to the nature or effect of the act of abandonment, the Notice of Abandonment will be regarded as a nullity. If the applicant who, properly informed, knew the nature and effect of the document he was signing and, with that knowledge, deliberately signed the document, it will be hard pressed to show that that act is a nullity.

(3) If the applicant signed the Notice of Abandonment of Appeal pursuant to erroneous legal advice as to the prospect of success of the appeal, the Notice will not be declared a nullity because wrong advice given as to the merits of an appeal is not advice that goes to the nature of, or to the signing of, the Notice.

(4) The Court of Appeal's refusal to entertain a renewed appeal in such circumstances does not leave the applicant without remedy: section 83P of the Criminal Procedure Ordinance provides the remedy for appropriate cases.

11. The Applicant said that he abandoned his application for leave to appeal because at that time he had not been granted legal aid. We do not consider this reason to be in accord with the aforesaid legal principles. The Applicant must show that at that time he did not intend to abandon his appeal. He clearly had not erroneously abandoned his appeal or misapprehended the consequence of such abandonment; the act of abandonment was made after consideration. Therefore, we will not treat the Notice of Abandonment submitted by him earlier on as a nullity.

Grounds of appeal

12. In any event, the Applicant has failed to put forward sufficient grounds of appeal. Therefore, even if his explanation regarding abandonment of appeal were in accord with the aforesaid legal principles, we would not grant him leave to appeal.

13. The Applicant is lodging an appeal only against his conviction on one of the four charges on which he was convicted, i.e. the second charge of assisting the passage within Hong Kong of an unauthorized entrant, contrary to section 37D(1)(a) of the Immigration Ordinance, Cap. 115 of the Laws of Hong Kong. The particulars of charge stated that the Applicant assisted the passage within Hong Kong of an unauthorized entrant, i.e. the 2nd defendant at trial (D2), on 4 March 2005. The facts of the case revealed that on 4 March 2005, the Marine Police chased after and intercepted a motorized sampan, with the Applicant and D2 on board, in the Hong Kong waters to the south of the Ninepin Group Islands, Sai Kung. The sampan was on fire and sank. The Marine Police rescued the Applicant and D2. The Applicant admitted that he was a fisherman residing in Nanao, Shenzhen, Mainland China. At the material time, he was navigating the sampan, with D2 on board, from Nanao to Dangan Island for the purpose of picking buddhist pine trees. On their return journey, they came across a police launch. The Applicant was not authorized to enter Hong Kong. At trial, Counsel for the Applicant did not dispute that D2 was an unauthorized entrant.

14. The ground of appeal now put forward by Mr. Kwan and Mr. Yim is that D2 was not an unauthorized entrant.

Immigration Ordinance

15. Section 37D(1) of the Immigration Ordinance provides as follows:

> (1) Subject to subsection (2), any person who, on his own behalf or on behalf of any other person, whether or not such other person is in Hong Kong —
>
> (a) arranges or assists the passage to, or within, Hong Kong;
>
> (b) offers to arrange or assist the passage to, or within, Hong Kong; or
>
> (c) does or offers to do an act preparatory to or for the purpose of arranging or assisting the passage to, or within, Hong Kong,

of a person who is, or of a conveyance which carries, an unauthorized entrant, commits an offence and is liable —

i) on conviction on indictment to a fine of $5,000,000 and to imprisonment for 14 years; *(Amended 82 of 1993 s.8)*

ii) on summary conviction to a fine of $350,000 and to imprisonment for 3 years. *(Amended L.N. 25 of 1996)*

16. According to section 37A of the Immigration Ordinance:

'unauthorized entrant' (未獲授權進境者) means a person belonging to a class or description of persons who, by an order made under section 37B, are declared to be unauthorized entrants, other than a person who under subsection (2) of that section is excepted from the declaration in such order.

17. Furthermore, section 37B of the Ordinance states that:

(1) The Governor in Council may by order declare 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 2AAA, to be unauthorized entrants.

(2) A declaration under subsection (1) may be made subject to such exceptions as are specified in the order.

18. The Governor to which the aforesaid section 37B(1) refers is the Hong Kong Governor prior to 1 July 1997, and the relevant order is the Immigration (Unauthorized Entrants) Order made on 7 August 1979 ("Immigration Order"). The Immigration Order, which is a subsidiary legislation, provides as follows:

2. Declaration of unauthorized entrants

(1) Subject to the exceptions specified in sub-paragraph (2), the following persons are declared to be unauthorized entrants —

(a) all persons resident or formerly resident in Vietnam;

(aa) all persons who leave, or seek to leave, the People's Republic of China when not in possession of documents issued in that country permitting them to do so in accordance with its laws;

(b) all persons resident or formerly resident in Macau;

(c) all persons who are or have been in Macau, whether in transit or in any other circumstances whatsoever.

(2) The following persons are excepted from the declaration in subparagraph (1) —

(a) any person holding a travel document —

(i) in relation to which an exemption has been granted under section 61(2) of the Ordinance; or

(ii) which bears an unexpired visa issued by or on behalf of the Director of Immigration; and

(b) any person who has been granted permission to land by an immigration officer or immigration assistant.

Basic Law

19. In support of the argument that D2 was not an unauthorized entrant, Mr. Kwan and Mr. Yim have cited the Basic Law and the Interpretation and General Clauses Ordinance, Cap. 1 of the Laws of Hong Kong ("IGCO"). Article 1 of the Basic Law states that:

> The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China.

Article 8 of the Basic Law states that:

> The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

IGCO

Section 2A(1) and (3) of the IGCO provides that:

> (1) All laws previously in force shall be construed with such modifications, adaptations, limitations and exceptions as may be necessary so as not to contravene the Basic Law and to bring them into conformity with the status of Hong Kong as a Special Administrative Region of the People's Republic of China.
>
> (3) In all laws previously in force words and expressions listed in Schedule 8 shall be construed according to that Schedule.

The relevant provision in Schedule 8 to the IGCO is:

> **Construction on and after 1 July 1997 of words and expressions in laws previously in force**
>
> ...
>
> 17. Any reference to the People's Republic of China or to China (or to similar names, terms or expressions) shall be construed as a reference to the People's Republic of China as including Taiwan, the Hong Kong Special Administrative Region and Macau.

The Applicant's argument

20. Mr. Kwan and Mr. Yim submitted that the Immigration Order, which has not been amended since 1 July 1997, was the law previously in force in Hong Kong to which section 2A(1) of the IGCO refers. It is argued that when the Immigration Order was made in 1979, persons who left or sought to leave China certainly included those who entered Hong Kong directly from Mainland China. However, after 1997, the Immigration Order cannot be interpreted in a way that contravenes Article 1 of the Basic Law. As from 1997, Hong Kong is an inalienable part of China, and "persons who leave, or seek to leave China" under the Immigration Order cannot include those who entered Hong Kong directly from Mainland China. Any interpretation of "China", to which the Immigration Order referred, which excludes Hong Kong or Mainland China is unconstitutional.

Discussion

21. It is clear that Article 1 of the Basic Law is absolute in the sense that no ordinance or subsidiary legislation can contravene it. However, we do not agree with the argument of Counsel for the Applicant. It is well-known that Hong Kong is a tiny but densely populated place. It is necessary for the government to control the entry into Hong Kong of people from other territories in order to maintain a reasonable allocation of social resources such as employment, education and medical services. The legislative intent of the Immigration Ordinance and the Immigration Order is to control the entry into Hong Kong of people from other territories. People subject to such control include those to whom paragraph 2(1)(aa) of the Immigration Order refers, namely those who leave, or seek to leave, China when not in possession of documents issued in that country permitting them to do so in accordance with its laws.

22. This legislative intent is also apparent from the wording of the relevant provisions. When interpreting the legislative intent of the Immigration Order, the court cannot merely look at the literal meaning of the Order, but also has to consider the Order in conjunction with section 37D(1) of the Immigration Ordinance. The focus of these provisions is plainly on territorial distinction, i.e. the distinction between Hong Kong itself and places outside the territory of Hong Kong. This legislative intent or focus is not affected by the reunification of Hong Kong with China on 1 July 1997. Article 22 of the Basic Law serves to indicate that the relevant provisions do not contravene the principle of "Hong Kong is an inalienable part of China" under the Basic Law. Article 22 provides as follows:

> For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region […] shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region.

23. Furthermore, according to the Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China:

> 1. The provisions of Article 22(4) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China regarding 'For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval' mean as follows: People from all provinces, autonomous regions, or municipalities directly under the Central Government, including those persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents, who wish to enter the Hong Kong Special Administrative Region for whatever reason, must apply to the relevant authorities of their residential districts for approval in accordance with the relevant national laws and administrative regulations, and must hold valid documents issued by the relevant authorities before they can enter the Hong Kong Special Administrative Region. It is unlawful for people from all provinces, autonomous regions, or municipalities directly under the Central Government, including persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents, to enter the Hong Kong Special Administrative Region without complying with the appropriate approval procedure prescribed by the relevant national laws and administrative regulations.

24. And the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong states that:

> 165. Entry into the Hong Kong Special Administrative Region of person from other parts of China shall continue to be regulated in accordance with the present practice.

25. The aforesaid provisions all show that there is a territorial distinction between Hong Kong and other parts of China as far as immigration matters are concerned. This distinction is not in conflict with the exercise by Mainland China of its sovereignty over Hong Kong, and is indeed expressly retained by the relevant laws.

26. Paragraph 17 of Schedule 8 to the IGCO cited by the Applicant is not applicable to the Immigration Order. Paragraph 22 of Schedule 8 states that "This Schedule applies unless the context otherwise requires", and the context of the Immigration Order is clearly the entry into Hong Kong of unauthorized entrants from other parts of China, which is outside the territory of Hong Kong.

27. A fundamental axiom of statutory interpretation is that a statute cannot be interpreted in such a way as to render the statute absurd. If the principle of Hong Kong being an inalienable part of China is forced upon section 37D(1) of the Immigration Ordinance merely because Hong Kong is indeed an inalienable part of China, section 37D(1) will be given this absurd meaning: as Hong Kong is part of China, persons who have not been granted approval by China for leaving China would still have not left China even if they arrived in the territory of Hong Kong. Such an interpretation would render section 37D(1) meaningless. Nor does Hong Kong need such a provision because it would not have any legal effect on those defendants who have assisted the entry into Hong Kong of unauthorized entrants from China.

28. The Applicant cited the judgment of Ma J (as he then was) in *Shandong Textiles Import and Export Corp. v. Da Hua Nonferrous Metals Co. Ltd.* [2002] 2 HKLRD 844 on the question of whether Mainland arbitral awards can be enforced in Hong Kong. Ma J pointed out that Mainland arbitral awards made between 1 July 1997 and February 2002 were not "Convention Awards" within the meaning of the Arbitration Ordinance. Although he did refer to Article 1 of the Basic Law, his judgment was made on the basis of the definition of "Convention Awards" in the New York Convention and cannot be applied generally to other circumstances or other ordinances. In our view, before determining whether a statutory provision contravenes the Basic Law, the legislative intent or context of that provision must first be ascertained.

Conclusion

29. For the above reasons, the application is dismissed.

(Peter Cheung) Justice of Appeal	(Wally Yeung) Justice of Appeal	(Carlye Chu) Judge of the Court of First Instance

Mr. Patrick Cheung, Deputy Principal Government Counsel, and Ms. Sally Yam, Senior Government Counsel, for the Respondent

Mr. Steven Kwan and Mr. Eugene Yim, assigned by the Free Legal Service Scheme of the Hong Kong Bar Association, for the Applicant

Translated by the Judgment Translation Unit of the Judiciary and approved by Mr. Edmund Cham, Solicitor