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CACV 218/2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO. 218 OF 2005
(ON APPEAL FROM HCAL NO. 30 OF 2003)

BETWEEN

JULITA F. RAZA	1st Applicant
ERMA C. GEOLAMIN	2nd Applicant
ROSE MARIE V. PASCUAL	3rd Applicant
SOLEDAD A PILLAS	4th Applicant
ENI LESTARI ANDAYANI ADI	5th Applicant
And	
CHIEF EXECUTIVE IN COUNCIL	1st Respondent
DIRECTOR OF IMMIGRATION	2nd Respondent
EMPLOYEES RETRAINING BOARD	3rd Respondent

Before : Hon Ma CJHC, Stock JA & Barma J in Court
Date of Hearing : 25 April and 20 May 2006
Date of Handing Down Judgment : 19 July 2006

J U D G M E N T

Hon Stock JA (giving the judgment of the Court) :

Introduction

1. This case is brought by a number of foreign domestic helpers (FDHs) who contend that a monthly levy imposed as from October 2003 on their employers was and remains in truth exacted from them, the employees, by means of a device, namely, a reduction in the minimum monthly wage contractually payable to them. The minimum wage reduction exercise was, they say, a sham and that the intent and effect of the two measures – the levy and the reduction – was to constitute a levy or tax payable, not by the employers, but by the employees for which levy, as payable by them, there was no legislative authority, wherefore the decisions to impose the levy and the reduction must be quashed. This challenge to those decisions was brought by way of an application for judicial review. The application failed at first instance, and this is the appeal from that decision.

The factual and statutory background

2. The levy of which they complain is known as the employees retraining levy for which provision is made by the Employees Retraining Ordinance, Cap. 423 ('the Ordinance'). By virtue of section 14(3) of that Ordinance, the Chief Executive in Council may from time to time approve a scheme, known as a labour importation scheme, under the terms of which a monthly levy shall be payable by such employers as are designated or covered by the scheme. That levy has been set by Schedule 3 of the Ordinance at $400 per month, and the total sum payable by the employer is $400 multiplied by the number of months specified in the relevant contract of employment between the employer and the imported employee. Once a

category of persons is brought within an approved labour importation scheme, section 14(4) of the Ordinance takes effect as follows:

> "An employer may, under the terms of the labour importation scheme, apply to the Director [of Immigration] for permission to employ such persons as imported employees as the Director may, in accordance with a quota allocated by or with the authority of the Secretary [for Education and Manpower] in respect of that employer under that scheme, grant visas to those imported employees for that purpose."

3. Once the levy is paid, the Director of Immigration is, by section 16 of the Ordinance, required to deposit the levy in an account established for that purpose and to remit it together with any accrued interest to the Employees Retraining Board, a Board established by the Ordinance. By virtue of section 4 of the Ordinance, the function of the Board is to hold the fund upon trust to administer in accordance with the object of the Ordinance which, put broadly, is to provide retraining programmes for eligible employees. The purpose of training or retraining is to arm local workers with such new skills as are demanded by changes in market requirements.

4. Labour importation policy in Hong Kong is as one would expect, and no different from that in many other jurisdictions. Importation of labour is permitted in order to satisfy the needs of local employers who wish to fill job vacancies in respect of which there are no suitable or available local candidates. The policy varies according to the category of skill, so that, for example, foreign professionals are welcomed to settle here and in due course become permanent residents; whereas low-skilled workers who are permitted to work here are subject to a tighter regime that insists upon return or periodic return to their places of origin, so that residence here is for the purpose only of temporary employment and not with a view to acquiring

permanent residence status. There are also in place particular schemes for the admission of persons from the Mainland, the details of which have no bearing on the present case.

5. There has for long been a shortage of local full time domestic helpers, especially those who are prepared to stay overnight at their employer's homes, and the numbers of domestic helpers from abroad has steadily increased so that the number is now in excess of 250,000. Such domestic helpers are admitted on the basis of standard two-year contracts. They enjoy the benefit of a minimum allowable wage (MAW) which is set administratively by the Economic Development and Labour Bureau (EDLB) (and before July 2002 by its predecessor the Education and Manpower Bureau). The object of the MAW is to prevent exploitation of the worker and at the same time to guard against a wage so low as to render uncompetitive those local workers who might wish to obtain such jobs. The first stage of attempted enforcement of this wage finds itself in the fact that the Director of Immigration will not grant a visa to a FDH unless the contract of employment sets a wage that at least meets that minimum. This minimum wage has been a feature of the employment of FDHs since 1973 and is reviewed annually. The reduction by $400 in the minimum in 2003 is said to have been the result of a bona fide annual review.

6. The evidence is that, generally, Hong Kong has enjoyed an adequate supply of low-skilled workers but that where there is a demonstrated need for importation of such workers, such importation has been permitted. That has been effected through a number of labour importation schemes which pre-dated the Ordinance, in particular, a scheme in 1989 for the importation of about 3,000 technicians, craftsmen and supervisors, and two others in 1990 for 2000 and 710,000 workers

respectively, schemes that were renewable annually, and over 52,000 workers were imported under these general schemes until their termination in 1996. There was a further scheme for importation of construction workers to facilitate the construction of the new airport and this was called the Special Labour Importation Scheme (SLS). The idea behind these schemes was, on the one hand, to permit the importation of lower skilled workers when needed and, on the other, to train local workers who became vulnerable to shifts in the economic structure of the Region; and it was thought a good idea that employers who were permitted to turn to lower skilled imported labour should contribute to the cost of training or retraining local employees in need of such training. So, under these schemes, a levy was imposed for the purpose of funding that training. To this policy, legislative effect was given in 1992 by the enactment of the Ordinance.

The Task Force Report

7. In 2002, the Chief Secretary established a Task Force on Population Policy whose function it was to identify "the major challenges to Hong Kong arising from its demographic trends and characteristics, setting the objective of a population policy and recommending a set of coherent policy initiatives which the administration can explore in the short and medium term." The membership of that task force, chaired by the Chief Secretary, included all the major policy Secretaries, for example the Financial Secretary and the Secretary for Education and Manpower, and also the Director of Immigration.

8. Its report was published on 26 February 2003. It noted the changing face of the Hong Kong workforce caused by numerous factors such as the fact that Hong Kong's population was ageing, that substantial numbers

were arriving from the Mainland, many of whom required training, and that the economy was increasingly a knowledge-based one. The Report said, at paragraph 29, that: "The key objective of Hong Kong's population policy is to secure and nurture a population which sustains our development as a knowledge-based economy." To this end, the Task Force made a number of policy recommendations, including policies directed at the influx of those from the Mainland; the training needs of new arrivals; the extension of an immigration policy to cater for those who would make substantial investments in Hong Kong; and the encouragement of family planning.

9. At paragraph 5.50 of its report, the Task Force stated that it had included the question of foreign domestic helpers in its study "due to the substantial size of [that] transient population and its continuing growth. Having reviewed the existing policy, the Task Force considers that a number of improvements should be made to enhance the integrity of the mechanism for admitting FDHs, with a view to minimising abuse and displacement of local jobs by FDHs." The report went on:

> "5.51 We recommend that a monthly levy of the same amount (now at $400) as that imposed under the supplementary labour scheme should be introduced. This will remove the disparity of treatment between these two groups of employers. The income generated will be used for training/retraining purposes. The levy will be paid by employers and will apply to new contracts or renewal of contracts. At the current level, i.e. $400 per month, the proposed levy will generate annual income of $1.14 billion. The levy will be imposed under the Employees Retraining Ordinance. The Ordinance also stipulates that if the imported employees failed to arrive in Hong Kong having been granted visas or having arrived failed to complete the contract of employment, there will be no refund of the levy paid, but the Director of Immigration will take into account the relevant balance if a fresh application for an imported employee is submitted by the employer within four months.
>
> 5.52 The minimum allowable wage (MAW) for FDHs has not been adjusted since February 1999. It is proposed that a cut of $400

> be made to reflect the downward adjustments in various economic indices since the last adjustment in 1999 (eg CPI(A) has fallen by around 10% since early 1999 and the median monthly employment earnings of workers in the elementary occupations by around 16%). This will take effect on 1 April 2003."

The decisions

10. This report was followed by a statement to the Legislative Council on 26 February 2003 by the Chief Secretary, and a press release with its terms, announcing the release of the Report and its objectives and recommendations. He pointed out that at the time there were almost 240,000 foreign domestic helpers and that "because of their considerable and great number, we have to include a review of our foreign domestic help policy as part of our exercise." He referred to the Ordinance and to the levy stating that it was:

> "… a well-established principle that employers turning to imported workers, rather than local employees, should contribute towards the training and retraining programmes. At present, only employers under the Supplementary Labour Scheme are required to pay a levy. We recommend that the same levy, currently $400 a month, should also apply in the employment of foreign domestic helpers. The levy will be imposed under the Employees Retraining Ordinance. This will take effect from October 1, 2003. According to existing arrangements under the Supplementary Labour Scheme, the levy will be paid upfront by the employer and will apply to new contracts and renewal of contracts. To provide flexibility to employers, we will allow an option for the levy to be paid by four instalments, i.e. $2400 each. The first instalment should be paid before the granting of a visa to the foreign domestic helper. …
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> ….
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> Along with a significant downward adjustment in various local economic indicators since the last adjustment to the minimum allowable wage for foreign domestic helpers in 1999, the minimum allowable wage for foreign domestic helpers will be reduced by $400 per month for employment contracts signed on or after April 1 this year. The Labour Department and Immigration Department will step up enforcement actions against abuse of foreign domestic helpers."

11. These decisions, that is to say the approval of a labour importation scheme applying to the whole body of foreign domestic helpers and the reduction in the minimum applicable wage, were explained to the Legislative Council in a brief of the same date. That brief evidenced the fact that the decisions had been taken at a meeting of the Executive Council on 25 February 2003 whereby the Council advised and the Chief Executive ordered that, first, the levy for each foreign domestic helper would be imposed with effect from 1 October 2003 and that the importation of such helpers should be designated as a labour importation scheme under the Ordinance and, secondly, that the minimum allowable wage of foreign domestic helpers was to be reduced from $3,670 to $3,270 per month with effect from 1 April 2003. These are the two decisions that were challenged by the application for judicial review. There was no legislation passed to bring these measures into effect and the measures were not gazetted.

The challenges

12. The notice of application for leave to apply for judicial review is dated 31 March 2003. It asserted:

(1) That the approval of the labour importation scheme by the Chief Executive in Council was not published or gazetted and that the failure to do so renders it of no effect.

(2) That the levy "is in substance a tax on an employer's foreign domestic helper by administrative means" and that since "the two measures amount to a tax payable by foreign domestic helpers" and since no legislative authority for such a tax exists

both measures are ultra vires the power of the Chief Executive in Council.

(3) That the levy is an unlawful discriminatory tax, in that the levy is payable only in respect of foreign domestic helpers and not in respect of other employees, particularly other foreign employee's. This assertion is not pursued on this appeal.

(4) That the levy is unlawful and unconstitutional since it breaches article 6(1)(c) of the International Labour Convention which, it is said, has domestic effect by reason of article 39 of the Basic Law, and which Convention provides that immigrants lawfully within a territory shall enjoy treatment in respect of employment taxes, dues or contributions payable in respect of the person employed no less favourable than that applicable to those permanently residing here, and that the imposition of the levy constituted treatment in respect of such workers that was less favourable than that accorded to other workers in the territory.

The colourable device

(1) The evidence and the arguments

13. The Government's case in response to the assertion that the wage reduction was in truth a device by which to secure payment of the levy by the foreign domestic helpers can be summarized briefly. It is that the wage reduction was a matter of coincidence in that the annual wage review was in any event due, and that a reduction was warranted because the economic indicators which normally dictate whether there is to be an adjustment and, if so, whether upwards or downwards, dictated a downward

revision. In other words, even had there been no decision to bring the importation of FDHs within the ambit of a labour importation scheme thereby imposing the statutory levy, the minimum wage would have been reduced and would have been reduced by $400. This was explained in detail in the affidavit of Mr Cheung Kin-chung, Matthew, the Permanent Secretary for Economic Development and Labour, sworn on 30 December 2003 for the purpose of the proceedings.

14. The essence of his account in that affidavit was that he was himself involved in the 2003 review of the policy on FDHs and that the matters to which he deposed were within his own knowledge or otherwise were obtained from files and documents to which he had access. The MAW had been reviewed each year since 1973 and had regularly been increased each year save for 1999, when there had been a decrease of 4.9% or $190, and save for 1997, 1998, 2000, 2001 and 2002 in which years there was no adjustment. His evidence was that in conducting its review the Bureau relies upon a basket of economic indicators such as pay trends, price indices and the employment situation, especially that of low-skilled workers. There is no strict mathematical formula, but rather a broad assessment. No revision had been recommended in 2000, 2001 or 2002 because the basket of indicators would have warranted only a small adjustment not worth the disruption to employers and employees that such an adjustment would have created. But by the end of 2002, the cumulative changes in the economy had become significant. Between the first quarter of 1999 and the last quarter of 2002, the consumer price index had fallen by about 10%; nominal wage index for service workers by about 6%; earnings of service workers and shop workers by around 11% and by about 16% in the case of workers in elementary occupations; household income had fallen by 17%; and the unemployment rate had risen from 6.3% to 7.2%. Therefore “in accordance with its

well-tried and established past practice, the EDLB reviewed these factors and made a broad judgment on the appropriate level of the MAW, which was to reduce the MAW by $400 (or 10.9%) from $3670 to $3270 with effect from 1 April 2003."

15. So that was that decision. According to this testimony, the levy decision was another matter altogether. Mr Cheung recited the history of the levy and its purpose, to which we have already referred. He traversed in particular the Task Force Report and its concerns that there was an increasing mis-match between job requirements in Hong Kong and the qualifications of the work force, all of which dictated a concentrated effort directed at training the work force to meet the changing demands; a programme that required funding for which the Ordinance was designed. He pointed out that there was a clear continued justification for the importation of FDHs. On the other hand, there seemed no good reason not to apply to the importation of FDHs the same requirement of a levy as in the case of the Supplementary Labour Scheme or, to put it another way, there was good reason to place it on the same footing. It was, he suggested, reasonable for employers who had the benefit of low-skilled imported workers to contribute to the retraining of local workers, and to require that in the case of FDH employers would remove an anomaly and would serve to provide or contribute towards the provision of much needed training to upgrade local skills in the context of an economic restructuring.

16. It is not suggested, nor could it sensibly be suggested, that the adoption of a labour importation scheme in relation to FDHs, with its concomitant levy requirement, was of itself other than bona fide and reasonable. There are points of law taken as to the levy, to which we shall turn, but this court is otherwise not concerned with the merits of the levy

decision. What this court is for the moment concerned with – and this is the main point in the case – is whether in truth the levy has been imposed on the FDHs. In so far as it is correctly said that no tax may be imposed save by legislation, a levy on a category of employers properly made the subject of a labour importation scheme is legislatively authorized by the Ordinance itself. But it is to the MAW reduction that we must look, for there was no legislative warrant for that reduction, and it is rightly conceded by the Respondent that if that reduction can, within the factual matrix presented, properly be categorized as a tax, then the decision to impose it is unlawful, for it is not the product of legislative authorization. And the only route by which the reduction could properly be so categorized is if it is in reality not a reduction in wage but the imposition of the levy, not on the employer – a step authorized by the Ordinance – but on the employee, a step not so authorized.

17. The case for the appellants is a plea to the common sense of the matter, to the obvious appearance of it all, taken in conjunction with the accepted fact that over 80% of employers of foreign domestic helpers pay their employees the minimum wage. What the appellants say is that the reduction in MAW was made, not for the economic reasons suggested nor as part of a genuine annual review, but in order to mollify the majority of employers of FDHs, to whom the levy would be unwelcome; and if one thinks that to employers $400 is a matter of small significance, one has only to consider the fact just mentioned, that the vast majority actually pay the minimum wage. They point also to the fact that the recommendation to reduce the MAW was contained in the Task Force Report, an odd thing indeed when MAW was not part of the Task Force's remit. Then they pray in aid an article in one of the daily newspapers, an article said to have been forwarded by the leader of a political party and who was also a member of the Executive Council, in which he sought to support a levy and a wage

reduction in the sum of $500 each, thereby lending credence to the suggestion that the two were always linked. Add to all of this the fact that the two decisions were made and announced on the same day and, assert the appellants, the truth becomes evident, that the entire and exact burden of the levy has been passed to the FDHs, through a colourable device, the reduction in MAW, that is in truth a tax.

18. In the judgment of the court below, the judge, Hartmann J, said that there was no explanation why the recommendation for reduction was included in a task force report the terms of reference of which did not embrace either expressly or by necessary implication the issue of the minimum wage and the judge added that no explanation was given even in the course of submissions. "But", he concluded:

> "… no bad faith can be implied and, the task force itself being entirely made up of members of the Administration, it appears to have been included as a matter of convenience."

He said that the history behind the two Orders in Council revealed that the two matters arose out of separate and distinct schemes managed according to different criteria and that despite "some lingering concern" it must, he said:

> "… be taken that the Chief Executive in Council acted on the recommendations made in the task force report by relying on the reasoning contained in the report and accompanying papers. That report states quite clearly why the levy was recommended and why the reduction in the minimum allowable wage was recommended. The reasons are in each instance distinct and flow out of entirely different imperatives. Nothing in the report suggests linking the two recommendations in the manner alleged by the applicants and, in my view, there is no ground for inferring the Chief Executive in Council did anything other than act in accordance with the reasons given for the recommendations.
>
> 65. I cannot dismiss the suggestion that the two Orders in Council may have been made at the same time and may have been announced

> together in order somehow to assure employers of foreign domestic helpers. It is difficult to imagine that the Administration, when the announcements were made, would not have appreciated the nexus provided by the common denominator of $400 per month. But a knowing decision to make and announce the orders at the same time in order perhaps to assure employers that, if they chose, the choice being solely one for them, there was some way open to them of relieving the impact of the levy, cannot, in my opinion, of itself be sufficient to show that the two orders had the consequence of constituting the colourable device that the applicants assert.'

(2) Analysis

19. Those who at the time of these announcements perceived a direct connection between the two decisions, the reduction in MAW solely generated by a desire to mollify employers who might object to the levy, cannot be said to have nurtured a surprising perception. There are indicia which clearly suggest as much:

(1) The two measures were recommended as part and parcel of a package in a report.

(2) The recommendation that there be a reduction in the MAW was not part of the remit of the Task Force.

(3) The decisions were taken on the same day.

(4) The amount of the levy and the amount of the reduction in the MAW were precisely the same.

(5) There had been no reduction since 1999.

(6) There is a concession in the skeleton argument for the Respondent that perhaps the timing of the announcements deliberately coincided so as to make it clear that there was some

way open to employers to relieve themselves of the impact of the levy.

(7) It is noticeable that in the various policy papers, including the brief to the Legislative Council, there is no discussion of the likely impact on the levy upon those whom it will affect, namely, a very substantial number of employers. This is a notable omission. It is difficult to believe that in the course of the various discussions of the Task Force and of the Executive Council there was no position paper or discussion paper that contained an assessment of the likely response of employers to the levy or of the line to take to deal with that response, or whether the anticipated response, if adverse, had force.

(8) It is noticeable also that none of the workings of the group that decided upon the $400 reduction in MAW was produced.

20. In these circumstances any proponent of the suggestion that the two measures were "sheer coincidence" – a term used by Mr Cheung – might expect to be met with a request to pull the other leg. Where over 80% of employers of FDHs choose to pay the minimum wage, it is in our opinion fanciful to suggest – as Mr Cheung suggests - that the prospective employee is free to negotiate his or her own wage, for the truth of the matter is that the bargaining positions of these employers and these employees is wholly unequal. The fact is that those employees who are not prepared to accept the minimum wage are at real risk of having no job at all. In that climate, the policy maker who proposes a levy on employers, the vast majority of whom cannot be said to have evidenced generosity of terms, well knows that it is a levy that will be unpopular and were all other factors equal, a decision to

reduce the minimum wage made at the same time and by the same amount would so reek of a device, a sham, as to render spurious a suggestion to the contrary, even where made on affidavit.

21. But all other factors were not equal, for there was uncontroverted evidence from a senior official that the reduction came at a time of economic downturn; and the evidence condescends to detail of that downturn, with figures showing the degree of that downturn, such as falls in wage indices, and in the level of household incomes; figures that support the level of reduction, backed further by the uncontroverted fact that the review of the minimum wage was in fact an annual, and not a sudden, exercise.

22. How then, in the absence of cross–examination or of discovery of documents undermining Mr Cheung's assertions, could the judge below have come to a conclusion other than the reduction was not shown to be a sham? The burden of so showing was on the appellants. Save where what is said is palpably not tenable, or is cogently contradicted by opposing evidence, such as might in some cases emerge from discovery, it seems to us that the affidavit must, in the absence of effective cross-examination, prevail. Yet there was neither cross-examination nor specific discovery. There was no application for either. Cross-examination in judicial review cases is not common place, nor is specific discovery routine, but where the admitted or asserted facts on their face themselves constitute "material which alerts the court to a real possibility that the affidavit is inaccurate or in material respects incomplete", discovery or cross-examination or both may well be ordered: see, for example, *R v Arts Council of England ex p Women Playhouse Trust* [1998] COD 175 and other cases referred to at paragraph 19.4.6 of Fordham's '*Judicial Review Handbook*' Third Edition.

23. Had there been no adverse change in economic circumstances or had they improved, then the case for a reduction in the MAW would have been absent and the decision would palpably have been a sham. But that was not the evidence; and there were produced no documents to show that the reasons provided by Mr Cheung were not the true reasons. There was no request for minutes of the meetings of the Task Force or of the Board or of any position or discussion papers which might have revealed whether or not there had been an earlier official proposal along the lines, say, of that allegedly made by Mr Tien, the Executive Council member who, it is said, submitted the press article to which we have referred. Discovery of such papers may well have made no indent upon the Government's assertions: indeed, they may well have supported them. But in the event all there was was Mr Cheung's uncontradicted testimony which on its face cannot be said to be self-evidently untenable. To the contrary, what he asserts is not implausible. To pit against it a newspaper article is to get nowhere. That article was not direct evidence from a member of the Executive Council, nor evidence of what the Government itself ever proposed or discussed and, so far as one knows, may have represented the views only of the political party to which that member belonged. So at the end of the day, the question boils down to a question of evidence, and the evidence upon which the respondent relied has not effectively been gainsaid and the assertion of a sham or colourable device which it is incumbent on the appellants to make good, has not been made good; for which reason this limb of the appeal must fail. It may well be that the timing of the decisions was deliberate, to lessen such grievance as the majority of employers may have nurtured, but so long as the MAW decision was a bona fide decision, timing is by the by.

The International Labour Convention

24. Article 39 of the Basic Law provides that:

> "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

25. By this route, namely, the reference in Article 39 to international labour conventions, the appellants seek to import article 6(1)(c) of the International Labour Convention No. 97:

> "Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:
>
> …
>
> (c) employment taxes, dues or contributions payable in respect of the person employed."

26. The argument is that the levy is imposed upon employers in respect of migrant workers who are domestic helpers but does not apply in respect of workers who are Hong Kong permanent residents and that therefore the levy constitutes, even if not a tax, then at least a due or contribution such that the treatment of that immigrant lawfully within Hong Kong is less favourable than that applied to Hong Kong permanent residents.

27. The suggestion has been made on behalf of the respondent that absent local legislation the Convention has no domestic effect in Hong Kong, although it is accepted that its application to Hong Kong as a matter of international law gives rise to legitimate expectations that might avail those in the position of the appellants who seek to pray it in aid. It seems to us arguable that the Convention has domestic effect to this extent, that if there is a provision in law in Hong Kong that does restrict labour rights in a manner prohibited by the Convention as applied to Hong Kong, that restriction would contravene Article 39 through that Article's requirement that the restrictions on rights enjoyed by Hong Kong residents shall not contravene the provisions of Article 39(1); but it is not necessary to decide the point, because the respondent accepts that at the least there is created the legitimate expectation to which we have referred. Although we very much doubt that the levy is the type of payment at which the Article is directed, we can nonetheless for the purpose of this appeal proceed on the further assumption, though without deciding the point, that the phrase "in respect of the person employed" is sufficiently wide to embrace a due or contribution payable not by the employee but by the employer in respect of the employment.

28. The argument advanced on behalf of the appellants in relation to the Labour Convention in question is, in my judgment, unsound; and the answer to it is straightforward. The requirement of Article 6 applies to those who are workers lawfully within the territory. It envisages that once a person becomes a worker here, he or she shall enjoy equality of treatment as a worker. Yet the levy is imposed and takes effect before that status is conferred. It is one of the conditions precedent to the establishment of that status. That is clear from the terms of section 14 as well as from the terms of the particular scheme which has been approved in the case of foreign domestic helpers.

29. Section 14(1) stipulates that:

> "A levy, to be known as the Employment Retraining Levy, shall be payable by an employer to the Director [of Immigration] in respect of each imported employee *to be* employed by him under a contract of employment and granted a visa under subsection (4)." (Emphasis added).

Sub-section (4) provides that an employer may 'under the terms of the labour importation scheme' approved under sub-section (3):

> "… apply to the Director for permission to employ such persons as imported employees as the Director may, in accordance with a quotas allocated by or with the authority of the Secretary [for Education and Manpower] in respect of that employer under that scheme, grant visas to those imported employees for that purpose."

30. What is envisaged by the statute – and it accords with the common sense of the matter – is that before a person may become a foreign worker, he or she must obtain a visa to come to Hong Kong for that purpose. That is nothing new. So also before the visa will be granted, there must be in place a contract of employment and an agreement by the employer that, in consideration of the granting of a visa, he will pay the levy. That is also made clear by the terms of the particular scheme approved in this case, that is, the scheme for the importation of foreign domestic helpers, for it stipulates that the levy was to be paid to the Director 'before the issuance of [the] employment visa'. Some reliance is placed by counsel for the appellants on the fact that certain governmental announcements have said that the levy may be paid in instalments. That is neither here nor there, for the contractual obligation to pay the levy is incurred as a condition of the grant of the visa. We cannot think that the requirement of the Convention with which we are here concerned was ever intended to extend so as to preclude the type of worker immigration filtering policy that is evidenced by schemes such as

these labour importation schemes. These Conventions seek to protect the working conditions of those migrant workers already lawfully in the host state for the purpose of such work, and not to dictate who may or may not come for that purpose or the conditions precedent to the issue of visas. The point is made by the International Labour Office in Geneva at page 151 of a document entitled 'Migrant Workers' issued at or as a result of the International Labour Conference 87th Session 1999, that:

> "It should be recalled here that equality of opportunity and treatment as provided for in article 10 of Convention No. 143 applies only to migrant workers and their families *lawfully* within the territory. It is only once the worker has been admitted to a country of immigration for purposes of employment that he or she will become entitled to the protection provided for in this part of the Convention. Article 10 does not therefore affect the right of a State to admit or refuse to admit a foreigner to its territory; nor is its purpose to regulate the issue or renewal of residence or work permits. The provisions of part II refers to the period *after* the migrant is regularly admitted to the territory of the receiving country. It is only when residence and work permits contain restrictions or conditions contrary to the principle of equality of opportunity and treatment laid down in article 10 of Convention No. 143 that States may have to amend or modify the law or practice in accordance with article 12(2)." (Emphasis added).

This, so it seems to us, accords with the sense of an international instrument of the type under consideration, that all those lawfully within a territory, whether permanent residents or not, should enjoy like protection from discrimination and exploitation. But that is a matter quite separate from the right of a State to determine who shall and who shall not lawfully come to its territory to work.

Was approval an administrative or a legislative act?

31. The question arises whether the order of the Chief Executive in Council approving the labour importation scheme was subsidiary legislation.

If it was subsidiary legislation, then it has not come into operation because section 28(2) of the Interpretation and General Clauses Ordinance, Cap. 1 provides that 'subsidiary legislation shall be published in the Gazette', and sub-sections (3) and (4) stipulate the precise time upon which such legislation shall come into effect. Subsection (3) provides that subsidiary legislation shall come into operation at the beginning of the day on which it is published, or if provision is made for it to commence on another day, then at the beginning of that other day. This is to be read subject to subsection (4) which enables the person who makes the subsidiary legislation to provide for its commencement on a day to be fixed by notice. It must follow that if it is not ever published and if no date is specified for it to come into operation, it does not come into operation at all.

32. But the first question is whether the instrument in question constitutes subsidiary legislation, for if not, then the question of publication on a specified date is irrelevant. This necessarily takes us back to section 3 of Cap. 1 which defines subsidiary legislation as follows:

> "'subsidiary legislation' and 'subordinate legislation' … mean any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect."

Our attention was also drawn to section 34 of the Interpretation and General Clauses Ordinance, which requires that all subsidiary legislation be laid on the table of the Legislative Council at the next sitting after the publication of the legislation in the Gazette, allowing the Council within a stipulated period to pass permissible amendments.

33. The argument for the appellants is that the Order in Council approving the Scheme for FDHs was legislative, not administrative, and

because, as is common ground, it has not been gazetted, it has not taken effect.

34. For the purpose of this appeal, no point is taken by the respondent as to the standing of these appellants to pursue this issue. The argument as to standing would be that the subsidiary legislation issue is an issue that arises only if the taxation point fails; that if that point fails, what is left is an attack on the levy, yet the levy is directed at the employers only. As against that, it may be contended that but for the levy, employers may well have been less inclined to resort to the minimum wage that resulted from the decision on the same day. But, as we say, it is not necessary to decide this point.

35. The argument runs along these lines: that a key feature of a legislative act is that it determines the content of a law and is to be distinguished from an executive act that merely applies a law. The making of the labour importation scheme, it is said, bears the characteristics of a legislative act. It entails the formulation of rules and does so in the absence of any legislative guidance as to what may or may not be prescribed. The respondent, on the other hand, invites the court to endorse the finding of the judge at first instance that the order was an executive act. The act that is challenged, it is contended, is no more than the act of approval by the Chief Executive, an act of approval being by its nature executive; that the scheme itself carries loose language ill-suited to legislative schemes; that no penalties are provided for non-payment of the levy; and that it is evident from the history of this scheme and its predecessors that approval was never intended by the legislature to be other than an executive act.

36. In the search for guiding principles or definitions, it is unsurprising, if a little disheartening, to find as a constant theme that the distinction is often a difficult one:

> "The distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy of expediency or administrative practice. Legal consequences flow from this distinction.
>
> Since the general shades off into the particular, to discriminate between the legislative and the administrative by reference to these criteria may be a peculiarly difficult task, and it is not surprising that the opinions of judges as to be proper characterisation of the statutory function is at variance."
>
> *De Smith, Woolf and Jowell 'Judicial Review of Administrative Action'* 5th ed., page 1006, para A-011 – A-012.

37. That is a passage often cited by the authorities, not least in the courts of Australia where the issue arises with regularity because of the provision in the Administrative Decisions (Judicial Review) Act 1977 that renders amenable to review under that legislation any 'decision of an administrative character made, proposed to be made, or required to be made under an enactment.' The cases, and a list of suggested relevant indicia, have been comprehensively reviewed in *RG Capital Radio v Australia Broadcasting Authority* (2001) 113 FCR 185, though no one factor is likely to be conclusive, a point emphasized in that judgment.

38. We find at para [43] of that judgment that: "Perhaps the most commonly stated distinction between the two types of decision is that legislative decisions determine the content of rules of general, usually

prospective, application whereas administrative decisions apply rules of that kind to particular cases." The reference to the characteristic of prospectivity is an echo of what was said by the (Australian) Administrative Review Council in a 1992 report "*Rulemaking by Commonwealth Agencies*", namely, that: "In broad terms, legislative action involves the formulation of general rules of conduct, usually operating prospectively. Executive or administrative action, by contrast, applies general rules to particular cases." This concept, the application of general rules to a particular case, seems to me of especial signifance in the present case, as is the suggestion that 'the primary characteristic of the activities of administrators in relation to enactments of the legislature is to maintain and execute those laws.': see Gummow J in *Queensland Medical Laboratory V Blewett* (1988) 84 ALR 615, 633- 634. Yet, one must in all analyses of this type pause to note that each suggested indicator does not always hold good. So, for example, as is pointed out in *RG Capital Radio*, an act may be legislative in character, although directed at a named individual. Such an example was His Majesty's Declaration of Abdication Act 1936. "Nor is legislation always abstract or prospective or innovative, although it is commonly all of these things": see, for the example and this citation, *Miers & Page 'Legislation'* 2nd ed., page 2.

39. The second factor suggested in *RG Capital Radio* as a hallmark of legislation is parliamentary control, though its absence is not conclusive. In the present case under appeal there is no control by the legislature, no power reserved to amend or veto a labour importation scheme and no express requirement for publication, to be contrasted with the requirement in the Ordinance that if there is to be an amendment to the tariff, it may only be done by notice in the Gazette: see section 31(1). In this regard *RG Capital Radio* refers at para [53] to *Aerolineas Argentinas v Federal Airports Corporation* (1995) 63 FCR 100 in which it was held that the act of fixing

charges for aircraft landings at various airports was a decision of an administrative character with the courts giving weight "to the facts that the determination was not subject to disallowance by Parliament and that notification in the gazette was not a precondition to the determination's coming into effect".

40. We see in *RG Capital Radio* the suggestion that the requirement in the relevant legislation for widespread public consultation before approval of a licensing plan tended, in that case, to point to a legislative rather than an administrative consequential act, because the point of the consultation was one of the vehicles by which the objects of the legislation could better be promoted. That is not in that case surprising since one of the matters the decision makers had there to consider was public demand for new broadcasting services within the licence area. In the case of the Employees Retraining Ordinance and the approval of a labour scheme under section 14, there is no requirement for consultation.

41. Other indicia suggested by the judgment in *RG Capital Radio* include:

(1) Whether the decision involves complex policy considerations for if so, that might suggest that the act, the determination, is one of a legislative character;

(2) Whether there is a power vested in the executive to amend, vary or control the plan or act in question, for if so that would tend to suggest a matter of an administrative kind; and

(3) Whether the measure has a binding quality or effect (as opposed, say, to one that provides guidance only: see *Vietnam Veterans*

Association of Australia New South Wales Branch Inc v Alex Cohen & Ors [1996] 981 FCA 1, 19).

42. With those general principles or indicia in mind, we must now turn to what it is that is identified by the appellants as the legislative act that should have been gazetted. We see from the Notice of Application for Leave (adopted by the Notice of Motion) that what is sought is a declaration "that the approval by the Chief Executive in Council on 25th February2003 of a labour importation scheme for foreign domestic helpers is ultra vires section 14(3) of the [Ordinance] since a record of the approval has not been published." The Order in Council, in its relevant part was one by which the Chief Executive in Council ordered that:

> " … an employee's retraining levy (the levy) of $400 per month for each foreign domestic helper (FDH) be imposed on employers of FDHs with effect from 1 October 2003. The levy will be paid either in a lump sum for the standard contract period of 24 months before visas granted for the FDHs or by four equal instalments with the first instalment paid before visas granted. *The importation of FDHs should be designated as a labour importation scheme* under the [Ordinance] so that the levy will be used for the training and retraining of the local workforce." (Emphasis added).

43. We have also the scheme conditions approved by the Chief Executive in Council in this case, a document headed "Scheme for importation of foreign domestic helpers (FDHs)". Its text reads as follows:

> "The scheme conditions approved by the Chief Executive in Council with respect to the importation of FDHs are as follows:
>
> We envisage that Permanent Secretary for Economic Development and Labour (Labour) (PSL), on the authority delegated by SEM, would set out, as a matter of policy, the eligibility criteria for employers importing FDHs, as follows:
>
> (a) For every FDH to be employed, the employer must have a household income of no less than $15,000 per month (or 4.6

times of the revised MAW) or assets of comparable amount to support the employment of an FDH for the whole contractual period. (The existing level is $14,680 or four times the MAW.) Hence, if an employer intends to hire two FDHs, he/she must have at least $30,000 monthly household income or comparable assets and so on. The monthly household income of $15,000 can be adjusted by the Government from time to time.

(b) The FDH and the employer shall enter into a standard employment contract.

(c) The FDH shall only be required to perform domestic duties as per the Schedule of Accommodation and Domestic Duties for the employer attached to the standard employment contract.

(d) The FDH shall not be required or allowed by the employer to take up any other employment with any other person during his/her stay in Hong Kong and within the contract period specified in Clause 2 of the standard employment contract.

(e) The employer undertakes to pay the FDH salary that is no less than the minimum allowable wage announced by the Government and prevailing at the date of application for employing the FDH.

(f) The FDH shall work and reside in the employer's residence as specified in Clause 3 of the standard employment contract. Employers who obtained D of Imm's approval before the implementation date of this new policy can continue to let their FDHs live out, so long as they continue to employ FDHs without a break of more than 6 months.

(g) The FDH shall be provided with decent accommodation and reasonable privacy. (Examples of unsuitable accommodation are: the FDH having to sleep on make-do beds in the corridor with little privacy, or sharing a room with an adult or teenager of the opposite sex.)

(h) Employers found breaching any statutory provisions, any provisions of the employment contract or any of the above conditions may be debarred from employing FDH(s) for a period of time.

(i) The bona fides of the employer and FDH are not in doubt; there is no known record to the detriment of the employer and

> the FDH; and the employer is a bona tide resident in Hong Kong.
>
> The Immigration Department would, as an administrative agent of PSL, vet the applications to ensure that the applications fulfil the requirements of the quota. As a matter of policy and for administrative efficiency, those employers who satisfy the eligibility criteria in paragraph 3 above would be regarded by PSL as being allocated a quota in respect of their application for employment of FDHs with a contract period of two years. A levy shall be paid to the D of Imm in accordance with the ERO before the issuance or employment visa.
>
> Should an employer wish to continue to hire the same FDH upon the expiry of the two-year period, he/she will be required to submit a fresh application."

44. The purpose of the Ordinance is to make provision for a fund for the retraining of Hong Kong resident employees who require retraining, for the collection of a levy from employers who engage imported employees, and for the administration of the fund by a Board whose task is also to identify retraining priorities and to engage the services of training bodies for the purpose of providing retraining. The accounts of the Board are required to be laid on the table of the Legislative Council (section 13). The amount of the levy is set in the legislation (section 14(2) and Schedule 3) and may only be altered by the Chief Executive in Council by notice in the Gazette (section 31). And section 14(3) provides, as we know, that the Chief Executive in Council may from time to time approve a labour importation scheme under the terms of which a levy shall be payable.

45. There is no requirement in the Ordinance itself that that approval be gazetted, or that an approved scheme be laid on the table of the Legislative Council. That is to be contrasted with the provisions of sections 13 and 31. There is no requirement for public consultation before the scheme is approved. No legislative control over the operation of an approved scheme is

envisaged. No penalty is provided for failure to pay the levy or for breach of any of the conditions imposed by the scheme. All that is threatened under the conditions suggested by the particular scheme with which we are concerned is that employers in breach of an employment contract might be debarred for a time from employing foreign domestic helpers. As for the conditions, they provide nothing new. They evidence long-standing administrative policy for workers within this particular category. All these factors militate against the characterization for which the appellants contend.

46. The background to the making and nature of such schemes is a mixture of labour and immigration policy, the starting point for which is that there exists for foreign workers not admitted to Hong Kong no right to live or work in Hong Kong without prior express permission, and the policy that is evidenced by this Ordinance as well as by other legislation is that importation of foreign labour is an exception rather than a rule. Where special need is identified by those who are closest in touch with labour and economic trends, importation is permitted, though it is permitted to employers as a privilege for which they may be required in turn to contribute to the training of local workers. Against that background, the labour importation schemes that preceded the one now under consideration were schemes in respect of clearly identified categories of worker. The decision made by the Chief Executive was a decision of that kind, namely, the identification of a category of person who would be permitted to come to Hong Kong under conditions the general tenor of which are hardly complex or new, but more particularly the identification of a category of worker to whose employers the levy would apply. Put another way, by the act of approval under section 14 the Chief Executive was identifying a category of employer to whom the levy would be applied. That was the essence of the power conferred upon him, and if it went further than that, it went further

only in so far as he was identifying a category of employer required to apply to the Director of Immigration for permission to engage workers from abroad, in this instance foreign domestic helpers. And thus it is that we arrive at the kernel of the matter, which is that what the Chief Executive was doing when he made the order under challenge was to give effect to the Ordinance in a particular way. He was executing in a particular instance a power given to him. That was not making law. It was in our judgment executing it, and we are satisfied that the act of approval was not a legislative act but an executive or administrative one, and that accordingly, this particular ground of appeal must fail.

To whom the levy applies

47. There is a rather strange addendum to the relief that the appellants sought, which was a declaration "that any employer who enters a contract of employment with the first applicant after the 31 March 2003 is not obliged to pay a levy pursuant to section 14(1) of the [Ordinance] if immediately prior to the entry of the contract the first applicant lawfully resides in Hong Kong." The first applicant was chosen for this purpose because she has lived here for a long time and has enjoyed regular renewal of contracts.

48. The judge at first instance referred to this point as one raised as a *query* by the applicants, as to which the point should be made that the courts do not provide advisory opinions. Furthermore, given that the decisions that are expressly made subject to challenge by the Notice of Motion were only two decisions, namely, the decision to impose the levy and the decision to reduce the minimum allowable wage, we have some difficulty in understanding the source of the declaration sought. Be that as it may, the

judge said in this regard that the terms of the Scheme, which it was for the Chief Executive to approve or not, as he saw fit, specifically required an employer who wished to renew a contract with the foreign domestic helper upon the expiry of a two-year period to submit a fresh application and, accordingly, he declined the declaration sought. The point is pursued on appeal even though the judge's determination of the matter is not challenged in the grounds of appeal. We ought, strictly, to decline to deal with this issue, but given the fact that the judge dealt with it, that it falls within a narrow compass, and that it will serve to resolve such doubt as is said to exist on the matter, we shall address it.

49. The point is, with respect, a bad one. Section 14(2) itself provides for a levy to be payable "multiplied by the number of months specified in the contract of employment". That envisages payment of the levy for each contract of employment, and it matters not how many there are. Furthermore, the Order in Council itself provided that: "The levy will be paid either in a lump sum for the standard contract period of 24 months before visas are granted for the FDHs or by four equal instalments with the first instalment paid before visas are granted." It must follow that the levy is payable for each standard contract period of 24 months. There is no warrant for reading into any of this a rule that it is payable only in respect of the first contract period. Still further, the scheme itself requires that "should an employer wish to continue to hire the same [helper] upon the expiry of the two-year period, he/she will be required to submit a fresh application." Each time a foreign domestic helpers secures fresh employment, there is, in the context of this scheme, a fresh importation, and upon each importation the levy is payable. The judge made no error in this regard.

Conclusion

50. For the reasons we have provided, this appeal is dismissed. There will be an order nisi that the costs of the appeal be to the respondent, to be taxed if not agreed and that there be no order as to the costs of the respondent's notice. The appellants' costs are to be taxed in accordance with the Legal Aid Regulations.

(Geoffrey Ma)	(Frank Stock)	(Aarif Barma)
Chief Judge, High Court	Justice of Appeal	Judge of the Court of First Instance

Mr John Griffiths SC & Mr Phillip Ross instructed by Messrs Massie & Clement assigned by the Legal Aid Department for 1st, 2nd, 3rd, 4th & 5th Applicants

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