

SECTION 13 OF THE IMMIGRATION ORDINANCE: IS THE POWER DELEGABLE?

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*Section 13 of the Immigration Ordinance provides that the Director of Immigration may authorise any person who landed in Hong Kong unlawfully to remain in Hong Kong. In *Lai Yau Chik v Director of Immigration*, the Court of First Instance recently held that this power could only be exercised by the Director of Immigration personally. The court appears to have taken the view that the legislature intended to exclude the general principle of delegation in this context. On its terms, this decision has far-reaching consequences for a large number of Hong Kong citizens whose permission to remain in Hong Kong was granted by lesser Immigration Department officials. The author critically assesses this decision in light of the statutory scheme, and the principles of devolution and delegation of statutory powers.*

Introduction

Delegation is an inevitable aspect of modern administration. The sheer volume of administrative decisions means that a minister who is vested with certain statutory powers has to delegate the exercise of those powers to his or her subordinates or other public officers, in order to discharge his or her statutory duties properly. The question in such cases is whether such statutory power is delegable.

Section 13 of the Immigration Ordinance (Cap 115) provides:

“the Director may at any time authorise a person who landed in Hong Kong unlawfully to remain in Hong Kong, subject to such conditions of stay as he thinks fit, whether or not such person has been convicted of that offence, and section 11(5), (5A) and (6) shall apply in the case of any such person as it applies to a person who has been given permission to land in Hong Kong under section 11(1).”

Section 11 deals with the permission to land. Section 7 provides that a person may not land in Hong Kong without the permission of an immigration officer or immigration assistant unless he or she has a right to land. Under section 2, “land” means “enter by land or disembark from a ship or aircraft”.

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Once a person is given permission to land under section 11(1), an immigration officer or immigration assistant may give him or her permission to remain in Hong Kong, subject to such limit of stay or such other conditions of stay as may be imposed.¹ Landing in Hong Kong unlawfully means landing in or entering Hong Kong in contravention of the Immigration Ordinance and various other specified ordinances.² Section 13 provides for the authority to permit an illegal immigrant to remain in Hong Kong. The structure of the ordinance shows that section 11 is designed to deal with persons who land lawfully in Hong Kong (in the sense that permission to land has been given), whereas section 13 caters for persons who enter Hong Kong unlawfully.

Lai Yau Chik v Director of Immigration

The facts of *Lai Yau Chik v Director of Immigration*³ are uneventful. The applicant was born on 10 June 1986 in mainland China. She applied for a certificate of entitlement pursuant to section 2AA of the Immigration Ordinance on the ground that she was a Chinese national born to a Hong Kong permanent resident before 1 July 1997. The case turned on the status of the applicant's father at the time of her birth. Her father obtained the status of permanent resident of Hong Kong on account of seven years of ordinary residence in Hong Kong. He came to Hong Kong illegally from mainland China on 18 April 1979. He applied to the Registration of Persons Department for an identity card on 24 May 1979 and was allocated an identity card number on the same day. Under the then prevailing "touch base policy", an illegal immigrant from mainland China would be permitted to remain in Hong Kong if he or she reached the urban area of Hong Kong and found a home with relatives or otherwise found proper accommodation.⁴

On 26 May 1979, the applicant's father obtained a clearance endorsement. The record card relating to his identity card held in the Registration of Persons Office carried a phrase that he was "cleared by Senior Immigration Office on 26 May 1979". The Immigration Clearance Office Processing Form, which was an internal document, also showed a recommendation by an immigration officer that the father had satisfied all the requirements of the touch base policy and hence his case was cleared. A senior immigration officer put a tick against the box "cleared ex China" and accepted the recommendation of the

¹ See s 11(1A).

² See s 2(2).

³ *Lai Yau Chik v Director of Immigration*, unreported, HCAL No 288 / 2001, (Court of First Instance, 27 June 2001).

⁴ For the policy, see the speech of the Governor at the Legislative Council on 23 Oct 1980 (1980-81) *LegCo Proc* 103. See also *Hong Kong 1981* (Hong Kong: Government Printer, 1981), p 145, and *Attorney General v Ng Yuen Shiu* [1983] 1 HKC 23 at 25. The policy, which took effect on 30 Nov 1974, was discontinued on 23 Oct 1980.

immigration officer on 26 May 1987. The decision of the senior immigration officer was approved by an Assistant Principal Immigration Officer (Investigation Section) on 4 July 1979 and communicated to the applicant's father on 9 July 1979. On the same day, the applicant's father was given an entry permit. The issue for the court was to determine exactly when the seven years of ordinary residence began. If it began to run either on 24 or 26 May 1979, he would have been a Hong Kong permanent resident when the applicant was born; but not so if the seven years of residence only began to run on either 4 or 9 July 1979.

The applicant relied on two main grounds to argue that her father was granted permission to stay in Hong Kong either on 24 or 26 May 1979. First, her father was given an endorsement of clearance on Form ROP 3b on 26 May 1979. The endorsement operated as permission to stay. Second, the internal document of the Immigration Department indicated that the father's case was cleared on 26 May 1979. It is not in dispute that permission to remain can be given either expressly or by implication from words or conduct falling short of an express permission.⁵

Yeung J held that time only began to run either from 9 July 1979, or at the earliest from 4 July 1979 when the decision to allow the applicant's father to stay was made. He reached this decision on the ground, *inter alia*, that internal clearance was made either by an immigration officer or a senior immigration officer, who was not the "Director" within the meaning of the Immigration Ordinance. Only the director can grant an illegal immigrant the authority to remain in Hong Kong under section 13. Under section 2 of the Immigration Ordinance, the term "Director" is defined to mean "the Director of Immigration, the Deputy Director of Immigration and any assistant director of immigration". Therefore, the judge held that:

"to suggest that the father had been granted the authority to remain in Hong Kong by either Mr T C Chan, an immigration officer, or Mr C K Siu, a Senior Immigration Officer on 26 May 1979 is a total disregard for the statutory scheme within which immigration matters operate."⁶

Accordingly, the court held that the permission to remain in Hong Kong was only granted on 4 July 1987 by the assistant principal immigration officer.

A difficulty with this line of reasoning is that the decision made on 4 July 1987 to permit the applicant's father to stay in Hong Kong was made by the assistant principal immigration officer, who was also not an officer within the

⁵ See *Re Wong Shu-hung and Immigration Tribunal* [1985] HKLR 463.

⁶ See p 13 of the judgment.

definition of the term “Director”. Yeung J recognised this difficulty. He was content to rely on the evidence of Mrs Hui on behalf of the Director of Immigration before the Immigration Tribunal who said:

“it means that the case officer had put up the case to the proper authority that is APAIO(I) that is the Assistant Principal Immigration Officer (Investigation Section) to seek permission to allow Mr Lai to stay on limitation.”⁷

With respect, this explanation is hardly convincing. The evidence only shows that the case officer had left it to the assistant principal immigration officer to seek permission; it does not show that permission had been given by the director. It is unfortunate that this aspect of the evidence was never challenged. On the face of it, there is no evidence that permission was given by the director.

Devolution of Power: The *Carltona* Principle

Leaving aside the evidential problem, the more profound implication of the decision is that the power to grant permission to remain in Hong Kong under section 13 can only be exercised by the director. This may have far reaching consequences, as there are many cases under section 13 where the power to grant permission to stay is exercised by an immigration officer. Given the sheer number of illegal immigrants arriving in Hong Kong every year,⁸ it is unthinkable that the power to grant permission to remain in Hong Kong to each and every single illegal immigrant can only be exercised personally by the Director of Immigration, even if one is prepared to extend the office to cover the Deputy Director of Immigration and any assistant director of immigration. It is submitted that the power contained in section 13 does not have to be personally exercised by the Director of Immigration.

Where a statutory power is vested in a minister or a department of state and is exercised by a departmental official, that official is regarded as the *alter ego* of the minister or the department. Under the well-known *Carltona* principle, the courts have recognised that “the duties imposed on Ministers and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the department. Public business

⁷ See p 14, para 59 of the judgment.

⁸ In the year 2000, on average, 23 illegal immigrants were arrested each day, making a total number of 8,395 arrested illegal immigrants. This represented a 30% drop from the 1999 figures. See *Hong Kong 2000* (Hong Kong: Government Printer, 2001), p 419.

could not be carried on if that were not the case.”⁹ Accordingly, the assistant principal immigration officer, in approving the recommendation of the senior immigration officer, was in fact exercising the power as the *alter ego* of the Director of Immigration. Based on the above reasoning, it is difficult to see why the senior immigration officer, in accepting the recommendation of the immigration officer and putting a tick against the box “cleared ex China” on 26 May 1987, was not equally exercising the power as the *alter ego* of the Director of Immigration.

The *Carltona* principle envisages that power is devolved.¹⁰ An alternative justification for the decision is that the power under section 13 can be delegated. According to section 43(3) of the Interpretation and General Clauses Ordinance, where any ordinance confers any power upon a specified public officer and such power is exercised by any other public officer, the specified public officer shall, unless the contrary is proved, be deemed to have delegated the latter public officer to exercise the power.¹¹ Thus the *Carltona* principle or the delegation principle provides a better explanation for the decision. This approach also avoids the problem that some of the decisions made under section 13 in the past may be open to challenge for want of authority. The difficulty with this solution, however, is that neither the Interpretation and General Clauses Ordinance nor the *Carltona* principle can displace clear statutory provisions. The Immigration Ordinance does draw a distinction between an immigration assistant, an immigration officer, and the Director.¹² Indeed, the ordinance sets out clearly, albeit in a somewhat unusual manner, the rank of officers that can exercise different types of power. Thus, an immigration officer or a chief immigration assistant (but not a senior or assistant immigration assistant) may, on the arrival of an aircraft in Hong Kong, require the captain of the aircraft to furnish him or her with a notice containing the names and nationalities of the crew and a notice containing the prescribed particulars of the passengers.¹³ He or she may also

⁹ *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 at 563. See also *Local Government Board v Arlidge* [1915] AC 120; *R v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 AC 254.

¹⁰ Strictly speaking, under the *Carltona* principle, there is no delegation. An officer is not said to be a delegate, but rather he is the *alter ego* of the minister or the department. Thus, a distinction is drawn between devolution and delegation: see *R v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 AC 254 at 283-4. In the *Carltona* situation, it is not necessary to show that the minister has personally delegated his authority to the officer. The authority can be conveyed informally and generally by the officer's hierarchical superiors in accordance with departmental practice. See also de Smith, Woolf and Jowell's, *Principles of Judicial Review* (London: Sweet & Maxwell, 1999), pp 236-237.

¹¹ Cap 1, Laws of Hong Kong.

¹² Under s 2, “immigration assistant” means any member of the Immigration Service of the rank of chief immigration assistant, senior immigration assistant or immigration assistant. “Immigration officer” means any member of the Immigration Service of or above the rank of assistant immigration officer.

¹³ See s 6(3).

examine any person on arrival or landing in or prior to that person's departure from Hong Kong,¹⁴ but only the director may require the owner or the captain of a ship or aircraft to produce for examination the passengers arriving or departing in that ship or aircraft.¹⁵ In a similar vein, an officer above the rank of chief immigration officer may detain a person for not more than 48 hours, whereas further detention not exceeding five days can only be authorised by an officer above the rank of principal immigration officer.¹⁶

The Legislative Scheme: Contrary Intention?

In general, the legislative scheme seems to be devised in such a way that the more important powers are reserved for the director alone. Thus, a removal order should only be made by the director.¹⁷ While this is a laudable objective, it gives rise to two problems.¹⁸

First, the distinction is not always rationally or consistently maintained. For example, the director may impose conditions of stay under section 13, yet an immigration officer or a chief immigration assistant may vary the conditions.¹⁹ The chief executive may at any time vary any limit of stay in force in respect of any person by curtailing the period during which such person may remain in Hong Kong.²⁰ In such a case, the director, but not an immigration officer or immigration assistant, must write to notify the person affected of such variation. It is difficult to see why the duty to write to a person whose conditions of stay have been varied by the chief executive should fall on the director personally and cannot be discharged by his or her subordinates. Nor can one see the rationale for the provision that applications from illegal immigrants to remain in Hong Kong must be personally considered by the director and not by his or her subordinates, given the sheer volume of such applications. The drafting is also inconsistent. For example, whereas the term "Director" includes a Deputy Director of Immigration and an assistant director of immigration, some provisions refer to the "Director of

¹⁴ See s 4(1).

¹⁵ See s 5(1).

¹⁶ See s 26.

¹⁷ See s 19. Section 19(6), which defines "Director" to include a Deputy Director and an assistant director, seems redundant.

¹⁸ There could be a third problem. If the power vested in the Director can only be exercised by the person holding that office, the reverse may also be true. Thus, if the statute confers a power on an immigration officer, then in the absence of an express provision to the contrary, the power can only be exercised by that immigration officer. In exercising the statutory power, he is not bound by any direction from his superior, including the Director of Immigration. This problem is resolved only by s 52, which expressly provides that any immigration officer or immigration assistant shall, in the exercise or performance of any powers, functions or duties under the Immigration Ordinance, comply with the directions given by the Director of Immigration.

¹⁹ See ss 11(5A) and 13.

²⁰ See s 11(6).

²¹ See, eg ss 32(2A) and (3A), 53A, and 53B.

Immigration, the Deputy Director of Immigration or any assistant director of immigration".²¹ Yet in other cases, it appears that "Director" must include an officer acting on his or her behalf.²²

Secondly, and more importantly, such a rigid and fine allocation of powers by statute may serve as a recipe for disaster in that the distinction may easily be overlooked in the practical operation of the ordinance. For instance, permission to land can be given either by an immigration officer or immigration assistant under section 11, whereas a refusal to give permission can only be made by an immigration officer. Either an immigration officer or an immigrant assistant can impose a condition of stay,²³ but such condition can only be varied either by an immigration officer or a chief immigration assistant, but not a senior immigration assistant or immigration assistant.²⁴ It would not require a great deal of imagination to envisage situations where such a hair-splitting distinction is overlooked in practice. To avoid such problems, the legislature, in its recent amendment to provide for a certificate of entitlement, now provides that a certificate of entitlement shall be considered by the director "acting through an immigration officer".²⁵ While this formulation will avoid accidental oversight in practice, it also reinforces the view that the term "Director" in other contexts in the Immigration Ordinance can only mean the director personally.

Conclusion

The case of *Lau Yau Chik* highlights that the right of abode of many Hong Kong permanent residents who came to Hong Kong illegally and were permitted to remain in Hong Kong under section 13 might be invalid. It is most unfortunate that the court does not seem to have considered the question of delegation of power at all. The case also shows that the problem could affect the residency status of the children of those immigrants. It is unsatisfactory that an important right such as the right of abode should be dependent on who exercised the power to grant permission to remain in Hong Kong many years ago. To the persons affected, it makes no difference whether the permission was given by the director or by one of the immigration officers. It may come as a shock, therefore, to learn many years later that one's permission to

²² See s 36(1), which provides that an immigration officer and any police officer may require a person who is detained to enter into a recognisance with such number of sureties as the Director or such police officer may reasonably require. The reference to the "Director" in this case must be wide enough to cover an immigration officer, especially when a police officer can decide whether recognisance is required and the number of sureties that is required. Similarly, in ss 36(3) and 37F, the reference to an application by the Director can only be a reference to the office, the power of which can be delegated, and not to the officer personally.

²³ See s 11(1).

²⁴ See s 11(5A).

²⁵ See ss 2AB(6), 2AC(6).

remain in Hong Kong was given by the wrong officer of the state and is therefore invalid. To some extent, the problem lies in legislative drafting as well. The inconsistent drafting may well be a result of piece-meal amendments that were made to the Immigration Ordinance over a long period of time rather than a deliberate decision to draw up a fine legislative scheme for allocation of power. It is unfortunate that the solution adopted for the certificate of entitlement scheme is not applied in other contexts. There is an urgent need here for legislative action to rationalise the exercise of powers under the Immigration Ordinance.