

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO.25 OF 1999

BETWEEN

CHEUNG MAN WAI FLORENCE

Applicant

And

THE DIRECTOR OF SOCIAL WELFARE

Respondent

Coram : The Hon Mr Justice Stone in Court

Dates of Hearing : 23rd September and 11th October 1999

Date of Handing Down Judgment : 3rd December 1999

JUDGMENT

The Application

This is an application for judicial review by the Applicant, formerly a Social Work Assistant at the Lady Mcle hose Centre, a voluntary social service organisation subvented by the Social Welfare Department.

Leave to apply for judicial review was granted by this Court on 30th April 1999 after a contested hearing, as the result of which the ambit of the review was significantly restricted, the Court at that time specifically

disallowing leave to apply for an order of *certiorari* to bring up and quash the Code of practice gazetted on 16th October 1998, and for an order to bring up and quash the decision of the Director of Social Welfare dated 19th October 1998 to enforce a 'claw-back' policy, with effect from 1st December 1998, if a subvented agency should appoint a non-registered social worker to fill a subvented social work post.

The Relief Now Sought

Consequent upon the application for leave, the Applicant herein applies for declaratory relief only. In this connection, Mr Dykes S.C., leading Counsel for the Applicant, has refined and reformulated the declaratory relief sought as follows :-

“(1) That the provisions of s.34(1), s.35(h) and s35(i) of the Social Workers Registration Ordinance, Cap. 505 (the SWRO) are inconsistent with Article 144 of the Basic Law inasmuch as they apply to the Applicant being a person who occupied a social work post (Social Work Assistant) as defined in s.2 of the SWRO before 16.1.1998 when the registration provisions of the SWRO came into effect.”

I shall refer to this, as did Mr Dykes S.C., as the 'Basic Law Point'.

“(2) That, on 15.9.1998 (the date of her dismissal), it was not a requirement under the Social Workers Registration Ordinance, Cap.505 for the Applicant, as a person then holding a social work post (Social Work Assistant) to register under the provisions of part III of the SWRO and that her using the description 'Unregistered Social Worker' , to describe her post did not constitute an offence under s.35(h) and (i) of the SWRO.”

I also adopt the terminology used and refer to this as ‘the Construction Point’.

The Decisions in respect of which Relief is Sought

The Applicant’s Notice of Application for leave to apply for Judicial Review canvasses the matter thus :-

“(2) Decisions contained in or evidenced by, three letters dated 7.3.1998, 28.9.1998 and 19.10.1998 from the Director of Social Welfare to all Agency Heads of all Subvented Non-governmental Organisations and the Secretary General of the Legislative Council stating that (i) it is a statutory requirement under the Social Workers Registration Ordinance for all staff in the Social Work Officer (SWO) and Social Work Assistant (SWA) grades to become registered social workers and (ii) it will constitute a criminal offence if they continue to use the rank titles which comprise the words ‘social work’ for the purpose of identifying themselves to their customers.”

Perhaps the document that was most referred to during this application is the first in the sequence of letters of which complaint is made, that dated 7th March 1998, which is in the form of a letter from the Director of Social Welfare to, *inter alia*, subvented non-governmental organisations (including the Lady Mcle hose Centre) :-

“Dear Sir/Madam,

Social Workers Registration Ordinance (Cap.505)

On 6.11.97, I wrote to you to draw your attention to the captioned Ordinance and the registration requirement of Social Work Officer (SWO) grade and Social Work Assistant (SWA) grade staff. In the letter, you were advised to remind

your social work staff (both existing and new) to get registered before the Ordinance came into effect on the relevant date.

*The relevant date subsequently announced by the Social Workers Registration Board was 16.1.98 and up to present more than 7,000 social work staff have either registered or submitted their applications. For social workers in your organisation who have still not yet submitted their applications for registration, **I should be grateful if Agency Heads would remind them again that it is a statutory requirement under the Social Workers Registration Ordinance for staff in the SWO and SWA grades to become registered social workers and that it would constitute a criminal offence and if they continue to use the rank titles which comprise the words 'social work' for identifying themselves to their customers.***

In fact the above registration requirement has become one of the pre-requisites for appointment of staff (either new or existing) to fill these subvented SWO and SWA grade posts – please refer to my previous letter of 6.11.97. If this requirement is not complied with by your subvented staff occupying these subvented posts, the Department has the right to claw back the relevant portion of subvention upon verification during inspection. In view of this, I have to request you to ensure as soon as possible (if you have not yet done so) that all the subvented SWO & SWA grade posts are filled by registered social workers.

I look forward to receiving your cooperation in this matter... ”(emphasis added)

This letter was followed by an explanatory letter dated 7th September 1998 to all social work officers, an explanatory letter dated 28th September to the Secretary General of Legco, and finally, a letter dated 19th October 1998, once again to all subvented non-governmental organisations, which reads, in

part :-

“Dear Sir/Madam,

Social Workers Registration Ordinance (Cap.505)

Since the enactment of the Social Workers Registration Ordinance (Cap.505), I have written to you twice on 6 November 1997 and 7 March 1998 respectively to draw your attention to the Ordinance, especially on the registration requirement of appointing social workers to fill the subvented SWO and SWA grade posts. In the latter letter, I have stated that the Department has the right to claw back the relevant portion of subvention for those subvented social work posts not filled by registered social workers.

*Since the Ordinance came into effect on 16.1.1998, nine months have been allowed for social workers to complete their registration. Our Department will now strictly enforce the clawing back policy with effect from **1 December 1998**. Should any subvented SWO and SWA grade posts in your agency not be filled by registered social workers by that date, we will withhold/claw back the relevant portion of subvention provided.*

I count on your full co-operation to enforce the legal requirement of the Social Workers Registration Ordinance.”

I have chosen to set out parts of the letters in issue not least because, in my view, they should be read not in isolation but as part of a sequence of correspondence whereby the Social Welfare Department took the opportunity to advise its agency heads, subvented organisations and social workers as to that Department’s concerns about the perceived necessity to comply with the requirements of the new legislation, namely the **Social Workers Registration Ordinance, Cap.505**(“**SWRO**”) which was enacted in April 1997 and came into

force on 6th June 1997.

The Factual Background

I turn now to describe the particular position of the Applicant herein, Miss Florence Cheung.

In 1996 she obtained a Diploma in Social Work (with Distinction) from the City University of Hong Kong, and on 1st September 1996 began working as a Social Work Assistant for the Lady Mcle hose Centre, which is a voluntary organisation subvented by the Social Welfare Department.

The enactment of the *SWRO*, which provides for a registration system for some (albeit not all) social workers in Hong Kong, constitutes the backdrop to the correspondence rehearsed earlier in this judgment, as to the content of which complaint is now made.

However, for reasons which are not entirely clear, but which appear to be rooted in personal conviction, Miss Cheung steadfastly refused invitations to apply for registration as a registered social worker under the *SWRO*. As a consequence of this decision not so to register, she received three letters from her employer, the Lady Mcle hose Centre, dated 31st March, 29th April and 11th May 1998 respectively, wherein she was urged to register in order to avoid committing an offence under this new legislation. Indeed, those in charge of the Lady Mcle hose Centre were clearly exercised by Miss Cheung's refusal in this regard, the letter of 29th April 1998 to Miss Cheung stating :-

“... I have received your letter dated 14.4.1998. I understand that you have expressed your position of not considering to apply for registration at this stage. I have already sent all the matters relating to your decision of not applying for registration to the Management Committee for consideration.

The Management Committee called a meeting on 23 April 1998 and discussed the captioned matter. The Committee finally made the following decisions : (1) To request you to apply for registration a.s.a.p. in order to comply with the requirements of the Social Workers Registration Ordinance; (2) Our organisation will inquire about the situation for subvention for those non-registered social workers from the Social Welfare Department through our Sheung Kung Hui Diocesan Welfare Council; (3) To send a letter to seek for the correct implementation guidelines from the Social Workers Registration Board for the non-registered social workers...”

Shortly thereafter, by a Note dated 11th May 1998 to the Executive Director of the Centre from the Senior Supervisor with regard to “working arrangement for non-registered colleagues of the Neighbourhood Level Community Development Project of the Fu Yung Shan, Lo Wai New Village”, the following procedures were proposed to Miss Cheung and five of her colleagues, who signed this document to indicate their understanding and agreement thereto :-

“In order to avoid any possibility of contradicting with the law by employing non-registered colleagues [social workers], the Team called a meeting and made the following internal departmental decision concerning non-registered colleague [social worker] Ms Cheung Man Wai : Before the Social Welfare Department and the Registration Board answer the inquiries of our organisation, our Team will make the arrangement as follows :

1. Ask Ms Cheung Man Wai to return her staff card and

name cards, instead, she would be given a non-social work staff card;

- 2. Make internal working arrangement to avoid Ms Cheung Man Wai to do out-reaching external work such as paying home visits, contacting the government departments and attending external meetings;*
- 3. All the external work which must be taken up by Ms Cheung Man Wai will have to be accompanied by another registered colleague [social worker];*
- 4. When providing services, Ms Cheung Man Wai must state clearly that she is not a registered social worker.*

Ms Cheung Man Wai and other colleagues of the Team must abide to the above arrangements to minimize the chance of contradicting with the law by colleagues who have not registered.

I duly understand the above arrangement and agree to do so.

Signed by :

*Yuk Fung Yin King
Chiu Shuk Yi
Kam Shuk Yin
Cheung Man Wai
Deng Yue Kai”*

During the hearing of this application, there was some disagreement as to precise translation of this document, but for present purposes I do not think it greatly matters, given that the main thrust of this letter remains clear.

Finally, on 15th August 1998 Miss Cheung's employer, the Lady

Mclehose Centre, after taking legal advice and after receiving the ‘Guidelines’ from the Social Welfare Department and the Hong Kong Council of Social Services, wrote to her giving formal notice that her employment was to be terminated at noon on 15th September 1998 absent proof that Miss Cheung had indeed applied for registration.

This was duly followed by a formal Letter of Termination of 15th November, given Miss Cheung’s failure to apply to register, and in light of “*the fact that you explicitly stated that you refused to register*”.

Thereafter, Miss Cheung chose to pursue the matter by way of application for judicial review, proceedings for which were filed on 22nd February 1999. At bottom, her complaint is that, absent the advice received by her employers from the Director of Social Welfare, her position would not have been terminated.

The Social Workers Registration Ordinance, Cap.505

The preamble to this Ordinance which came into force on 6th June 1997 is couched thus :-

“An Ordinance to provide for the registration of social workers and disciplinary control of the professional activities of registered social workers, and for related matters.”

The sections which have attracted the greatest attention in the context of

this application are parts of sections 34 and 35, and for ease of reference I set out below the relevant extracts therefrom :-

“34. Use of title

(1) Subject to subsections (3) and (4), a person whose name does not appear on the Register shall not be entitled to use --

- (a) the description ‘registered social worker’ or ‘註冊社會工作者’;*
- (b) the initials ‘R.S.W.’; or*
- (c) the description ‘social work’ or ‘社會工作’ or ‘social worker’ or ‘社會工作者’ or ‘社工’*

whether in combination with any other description or any initials or otherwise, to describe his profession as being the social work profession or his social work professional qualifications.

(2) The Board may apply to a judge for an order restraining any person whose name is not on the Register from contravening subsection(1). ...

35. Offences and penalties

Any person who –

...

(h) not being a registered social worker ...knowingly permits the use of, or uses, in connection with his business or profession –

- (i) the description ‘registered social worker’ or ‘註冊社會工作者’;*
- (ii) the initials ‘R.S.W.’;*

(iii) the description ‘social work’ or ‘社會工作’ or

*‘social worker’ or ‘社會工作者’ or ‘社工’; or
 (iv) any initials or abbreviations of words
 intended to cause, or which may reasonably
 cause, any person to believe that the person
 using the initials or abbreviations, as the case
 may be, is on the Register;*

*(i) not being on the Register, advertises or represents
 himself as a registered social worker or
 knowingly permits himself to be so advertised or
 represented;*

...

commits an offence and is liable on conviction to a fine...”

The Issues for Decision

(1) The Basic Law Point

The argument here is in short compass, and involves a perceived clash between the terms of this new legislation and the Basic Law. In a nutshell, the argument is thus : that the effect of the Basic Law is to preserve the *status quo* of those who were in employment before the establishment of the HKSAR, that at the time the Basic Law was adopted there was no requirement for social workers (whether within Government or working for a subvented agency) to register with a central registry, and that any change in policy as incorporated in new legislation cannot affect the rights guaranteed by the Basic Law.

In this regard, Article 144 of the Basic Law mirrors Article 100 (which

relates to public servants serving in Hong Kong Government departments) and provides thus :-

“ Article 144 The Government of the Hong Kong Special Administrative Region shall maintain the policy previously practised in Hong Kong in respect of subventions for non-governmental organizations in fields such as education, medicine and health, culture, art, recreation, sports, social welfare and social work. Staff members previously serving in subvented organizations in Hong Kong may remain in their employment in accordance with the previous system”
(emphasis added)

So, the argument goes, Miss Cheung, who became a social worker in April 1996, can pray in aid the *status quo* prior to the enactment of the Basic Law. There is, however, disagreement as to the relevant dates to be applied. The Applicant's primary contention is that the 'cut-off dates' for both the Basic Law and the *SWRO* were the dates on which they were enacted : for the Basic Law April 1990 and for the *SWRO* 6th June 1997. Alternatively, it is argued that the 'cut-off date' for the Basic Law is 1st July 1997, the date upon which it came into effect and the 'cut-off date' for the *SWRO* was 16th January 1998, the date on which the particular requirement of registration (as opposed to the Ordinance) came into force.

But in either case it is asserted that the requirement to register is unconstitutional because, prior to the relevant date, there was no such requirement.

So far as the relevant date is concerned, the answer seems to me to be

tolerably clear. Mr. Mok submitted, and I agree, that the relevant date could only sensibly be construed as 30th June/1st July 1997, which is made clear by the wording in Article 142, part of which reads :-

*“ Persons with professional qualifications or qualifications for professional practice obtained **prior to the establishment of the Hong Kong Special Administrative Region** may retain their previous qualifications in accordance with the relevant regulations and codes of practice.” (emphasis added)*

He further pointed out that in a decision relating to the meaning of the words “*the laws previously in force in Hong Kong*” under Article 160, the Court of Appeal has held that the “cut-off date” was neither the date of the Joint Declaration nor that of the promulgation of the Basic Law, but “*could only be 30th June 1997*” when the Basic Law came into effect : see *HKSAR v. Ma Wai Kwan David* [1997] 2 HKC 315 at 316.

Mr. Mok further submitted that the statutory system of registration was established, at the latest, by 6th June 1997, when the *SWRO* came into operation, and that accordingly it was this which was the “previous system”, within the meaning of Article 144. He argued, further, that if indeed the word “previous” had the meaning ascribed to it by the Applicant, that is prior to the promulgation of the Basic Law on 4th April 1990, then the Applicant herself (who was first employed by a subvented agency on 1st September 1996) accordingly would not have been “previously serving in the subvented organizations” to qualify for protection under Article 144.

In my view, Mr Mok’s analysis as to the relevant ‘cut-off dates’ is

correct. Perhaps more to the point, however, is that the Applicant's argument fails to pay due (or indeed any) regard to the specific provisions of **Article 142** :-

“ Article 142 The Government of the Hong Kong Special Administrative Region shall, on the basis of maintaining the previous systems concerning the professions, formulate provisions on its own for assessing the qualifications for practice in the various professions.”

Which provides the statutory context for the provisions of Article 144, and also **Article 145**, viz. :-

“ Article 145 On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs.”

Pursuant to this Article the Government has the duty and is obliged to develop and improve the social welfare system as Hong Kong society requires, and I find it difficult to understand how the provisions of Article 144 could, in effect, stultify this requirement given that the legislation complained of falls squarely within the area of the development of the social welfare system.

At the end of the day I am unable to discern any prospect of success within the Applicant's argument under the Basic Law head. Accordingly, I reject the submissions in this regard, and decline the declaration as sought.

(2) The Construction Point

The Applicant's case under this head is that the statements contained in the three letters from the Director of Social Welfare are wrong in law and are therefore misleading.

Argument in this regard focused primarily upon the first letter in the sequence, and in particular the passage :-

“...I should be grateful if Agency Heads would remind them again that it is a statutory requirement under the Social Workers Registration Ordinance for staff in the SWO and SWA grades to become registered social workers and that it would constitute a criminal offence [and] if they continue to use the rank titles which comprise the words ‘social work’ for identifying themselves to their customers...”

The main point within the Applicant's case is that the advice tendered to the effect that it was “a statutory requirement” under the Ordinance for all staff in the SWO and SWA grades to register was plainly incorrect. Equally, says the Applicant, if a person does not use in connection with his business or profession the descriptions, initials or abbreviations of the words prescribed in the **SWRO** when he performs his duties, no offence will be committed, so that he cannot be convicted of any offence if he makes clear to his client that he is **not** a registered social worker under the **SWRO**.

Mr Dykes S.C. for the Applicant has pointed out that, perhaps oddly, there is no definition of ‘social work’ or ‘social worker’ in the **SWRO**, the target of the legislation being persons who occupy a social work post, but that he has located such definitions in another Ordinance, the *Social Work Training*

Fund Ordinance, Cap.1100, and as such the Applicant falls squarely within the definition of “social worker” therein as “a person who is trained for ... any social work”. In so far as it be relevant, he says, the Applicant clearly matched that description.

It followed therefore (and I take this to be the principal argument) that a person may hold a social work post and not be a registered social worker (because there is no requirement to register), but that so long as there is no claim to be a registered social worker, the provisions of the *SWRO* and in particular section 35(h)(iii) would not be offended. Hence the manner in which the relevant declaration now sought is couched. And if this be correct, said Mr Dykes, there is a need for the declaration. The Lady Mcle hose Centre had dismissed the Applicant on the strength of the incorrect advice that registration was necessary, and that Centre might wish to reconsider its decision to employ her, or for that matter another non-governmental organization might wish to do so. Indeed, he said, “*other social workers in a similar position should know their rights*”.

Mr Mok, on behalf of the Director, strongly opposed the grant of any such declaration. He conceded at the outset that one sentence in the first letter was legally incorrect, in that there is no statutory requirement to register within the *SWRO*. He maintained, however, that when read together and in context, the tenor and content of the relevant correspondence made it crystal clear that by reason of the provisions of the *SWRO*, a social work officer or a social work assistant would have to be registered because, by virtue of appointment to that grade, in order actually to do the job a person would already be using the title

‘social worker’ or the description ‘social work’, perhaps in combination with other terms, in connection with the practice of this profession. In other words, said Mr Mok, there can be no doubt that the purpose of the *SWRO* is to ensure that a social worker providing such services by way of business or profession should register, failing which the person would risk prosecution if that person uses or permits the use of the description ‘social work’ or the title ‘social worker’, and that it was wholly fanciful to suggest that there could be no risk of prosecution if the Lady Mclechose Centre continued to employ Miss Cheung in a professional capacity as a “Social Work Assistant” absent the required registration. In the circumstances, therefore, it was not feasible, concluded Mr Mok, for such a subvented agency to be able to employ such an unregistered person, nor indeed for the Director to permit or acquiesce in such employment, and it was “wholly fanciful” to suggest that there would be no risk of prosecution if the Lady Mclechose Centre had continued to employ her as a “Social Work Assistant”; indeed it would have been irresponsible to permit such a person to continue to perform professional social work services as a social work assistant without making sure that there was no risk that an offence might intentionally or inadvertently be committed.

In addition, Mr Mok submitted that the three letters did not reflect any ‘decisions’ per se. The only ‘decision’ so reflected was that the Government would ‘claw back’ a portion of subvention for those subvented social work posts not filled by registered social workers. However, leave had not been granted to challenge this decision, and it did not remain a live issue upon the present application.

It followed, submitted Mr Mok, that the Applicant is and was misusing

the procedure of a declaratory remedy by “creating an artificial issue (which has no practical significance to the Applicant) in order to score a political victory”. The jurisdiction of the Court to declare whether particular conduct involves the commission of a criminal offence was exercised in exceptional cases only, he argued, such as that in *Airedale N.H.S. Trust v. Bland* [1993] 2 WLR 316, which was where authoritative guidance was needed as to whether doctors caring for a patient in a vegetative state would risk prosecution for murder by discontinuing life support treatment. In that case, Lord Goff expressly acknowledged (*op.cit.*) at 366 that “*I recognise that strong warnings have been given against the civil courts usurping the function of the criminal courts...*”, albeit he stated that the jurisdiction existed (“*It would be a deplorable state of affairs if no authoritative guidance could be given to the medical profession in a case such as the present*”), whilst

Lord Browne-Wilkinson observed (*op.cit.*) at 382-383 :-

“ *Before turning to the strict legality of what is proposed, I must say something about the procedure adopted in this case. The application asks the court to make declarations as to the legality of proposed future actions, i.e., if granted, the declarations will purport to decide whether the proposed discontinuance of life support will constitute a crime. In general the court sets its face against making declarations as to the criminality of proposed future actions. But I agree with my noble and learned friend, Lord Goff of Chieveley, that in this case it is absolutely necessary to do so. ...*”

Clearly the present case bears no resemblance to *Bland*, and in so far as the second limb of the declaration trespasses upon this rarely-used jurisdiction, it must clearly fail in *limine*. Nor, for that matter, do I accept the assertion that the Applicant will be assisted by the proposed declaration. She has clearly

decided not to become a *registered* social worker, despite being afforded abundant chances so to do, and this refusal appears to be based upon her own philosophical objection to the registration system (and, for that matter, to the claw-back system and the Code of Practice, albeit leave was not given in relation to these matters), and Mr Dykes' suggestion that a declaration may assist if she seeks work again with a subvented agency in my view carries little real weight, given that for her own reasons, she clearly has set her face against registration.

Nor does the present application challenge the reasonableness of the decision to make registration one of the prerequisites for the appointment of staff to full subvented SWO and SWA grade posts. Indeed, the relief sought is but a bare declaration based upon the admittedly incorrect assertion in the first of the letters complained of that it is a statutory requirement to register, although it is plain on a fair reading of the sequence of correspondence that the criminal aspect which was principally arousing concern lay not in failure to register *per se* but in the event that social workers in the relevant grades continued to use their rank titles in the course of their jobs absent such registration.

After considering all the evidence, together with the legal submissions, in the exercise of my discretion I am disinclined to grant the relief sought under this head, which at bottom crystallises upon but one sentence in one letter as the 'hook' upon which to hang the present application. The position is plain. If this lady wishes to continue to practise the profession for which she is well-qualified, and if she wishes to do it with a subvented organisation, then no

doubt she will have to accept the terms of the employment offered, which by reason of the subvention policy will almost certainly involve the element of registration. If, on the other hand, she chooses not to accept any such terms, that is a matter for her. This Court makes no comment upon the wisdom or otherwise of this piece of legislation. That is not its job. In my judgment, however, this application is but a thinly veiled collateral challenge to this Ordinance *via* recourse to alleged ‘decisions’ said to be contained in correspondence from the Director of Social Welfare. I reject such challenge which, in my view, has demonstrated little merit.

Order

It follows from the foregoing that this application for judicial review is dismissed. I make an order *nisi* that the costs of the application be to the Respondent, to be taxed if not agreed.

(William Stone)

Judge of the Court of First Instance

Mr Philip Dykes, S.C. leading Mr Hectar Pun, inst’d by M/s Tsang, Chan
& woo, for the Applicant

Mr Johnny Mok, inst’d by Department of Justice, for the Respondent