由此

HCAL 13/2005

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 13 OF 2005

BETWEEN

LAW CHUN LOY Applicant

and

SECRETARY FOR JUSTICE Respondent
on behalf of
THE CHIEF EXECUTIVE OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

Before : Hon Hartmann J in Court

Date of Hearing : 25 September 2006

Date of Judgment : 25 September 2006

Date of Handing Down Reasons for Judgment : 26 October 2006

R E A S O N S F O R J U D G M E N T

Introduction

1. The applicant joined the Police Force as a constable in 1988. In 1996, he was promoted to the rank of sergeant. In 2003, however, the applicant's career was brought to an end when he was informed that the

Secretary for the Civil Service, acting under delegated power, had directed that he be retired in the public interest. The applicant's retirement was directed pursuant to s.12 of the Public Service (Administration) Order.

2. Some 14 months later, in January 2005, the applicant sought to challenge the lawfulness of the decision to retire him. His application for leave to apply for judicial review was granted by Madam Justice Chu on the papers.

3. The application, however, had been filed out of time. O.53, r.4(1) states that an application for leave must be made promptly and in any event within three months of the decision sought to be challenged. An application that is made out of time will not be heard unless the court agrees to an extension of time. Although Madam Justice Chu granted leave, she did not in any way determine whether she should grant an extension of time. Instead, she referred all issues concerning delay to the substantive hearing.

4. Accordingly, when the matter came before me, the issue of delay was dealt with as a preliminary issue. Having heard submissions, I declined to grant leave to the applicant to make his application out of time. I dismissed the application, saying that I would give reasons later. I do so now.

Applicable principles

5. S.21K(6) of the High Court Ordinance, Cap.4, states that :

> "Where the Court of First Instance considers that there has been undue delay in making an application for judicial review, the Court may refuse to grant-
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

6. What is considered to be an 'undue delay'; that is, an inappropriate, excessive or disproportionate delay, is effectively defined in O.53, r.4(1) which reads :

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

7. A failure to act promptly, therefore, and in any event within three months, constitutes of itself undue delay. In this regard, see *R. v. Stratford-on-Avon District Council, ex parte Jackson* [1985] 1 WLR 1319, at 1325 :

> "… we have concluded that whenever there is a failure to act promptly or within three months there is 'undue delay.' Accordingly, even though the court may be satisfied in the light of all the circumstances, including the particular position of the applicant, that there is good reason for that failure, nevertheless the delay, viewed objectively, remains 'undue delay.' The court therefore still retains a discretion to refuse to grant leave for the making of the application or the relief sought on the substantive application on the grounds of undue delay if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

8. In the result, the court may refuse permission to grant leave unless it considers that there is good reason for extending the period. But even if it considers that there is good reason, it may still refuse to grant leave if it believes that the granting of the relief sought would be likely to cause hardship or prejudice or would be detrimental to good administration.

9. What must also be emphasised is that O.53, r.4(1) does not permit an applicant simply to sit back and wait until the three month period stated in the order is drawing to a close before instituting action. The primary requirement of O.53, r.4(1) is promptness. The fact that an application has been made within three months does not necessarily mean that it has been made promptly. There may be occasions when an applicant who has filed his application for leave within the three months time period will still be judged to be guilty of undue delay.

10. This requirement for promptness has a sound basis in pubic policy. Judicial review provides a relatively quick and straightforward procedure for identifying and redressing public law wrongs. But it must be recognised that the procedure, dealing, as it does, with decisions made by public bodies in the complex business of managing a modern society, not only has the potential to disrupt the orderly administration of public services but also has the potential to cause hardship to, or in some way to prejudice, third parties who, for example, may already have acted upon the decision under challenge. It is for that reason that there is a necessity for the earliest reasonable notification that a public law decision is being challenged and for an early resolution of that challenge. In *R. v.*

Monopolies and Mergers Commission, ex parte Argyll Group Plc [1986] 1 WLR 763, at 774, Sir John Donaldson put it plainly —

> "… good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary."

11. In *O'Reilly v. Mackman* [1983] 2 AC 237, at 280, Lord Diplock spoke of this need for promptness in the following terms :

> "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

12. Within our own jurisdiction, in *Lo Siu Lan and Ma Ki Chiu v. Hong Kong Housing Authority* (unreported, CACV 378/2004), Stock JA said :

> "The right to review the legality of administrative decisions is of course essential to a free society governed by the rule of law. But it is essential too that that freedom be exercised in a framework that reflects a 'proper awareness of the needs of public administration.'"

13. In summary, any person who seeks by way of judicial review to challenge a public law decision is from the outset under a clear warning : 'sleep on your rights and, even if your cause is meritious, you may find the gates locked against you'. In the present case, for the reasons which I shall give, I am satisfied that the applicant slept on his rights, there being no good reason for him doing so, certainly not for a material proportion of the time that constituted the overall period of delay. I am also satisfied

that the delay was prejudicial to the requirements of good administration in the public service. Hence the locking of the gates against him.

The relevant history

14. In late 1999, the applicant was charged with a criminal offence of conspiracy to obtain property by deception. Those proceedings, however, were discontinued, the applicant being acquitted.

15. In October 2000, the applicant was charged with a disciplinary offence, the particulars of the charge arising out of matters incidental to the earlier criminal proceedings. The applicant was convicted and was reduced to the rank of constable. The applicant challenged the lawfulness of this decision by way of judicial review and in June 2002 a judgment was given in his favour. He was reinstated to the rank of sergeant.

16. Approximately a year later, in mid-2003, the applicant was informed that consideration was being given to direct his retirement in the public interest. The applicant was invited to make representations. By letter dated 13 November 2003, the applicant was notified of the decision to direct his retirement.

17. If the applicant was to comply with O.53, r.4(1) in challenging that decision, he was obliged to file his application for leave within three months; that is, by about 13 February 2004.

18. The applicant applied for legal aid. The date when he did so did not appear to be in the papers before me. By letter dated 29 January

2004, however, he was informed that his application had been refused. The applicant appealed. That appeal was heard with the minimum of delay and was determined in his favour. It was not until 7 April 2004, however, that the Legal Aid Department sent a letter to the assigned solicitors, Lau, Chau & Co. By that date the applicant was almost two months out of time.

19. The applicant himself cannot be blamed for any notable lack of expedition in pressing his claim for legal aid and if this had been the sum total of the delay I would have found that there was good reason for granting an extension of time.

20. The applicant's solicitors, however, appear to have acted in ignorance of the fact that, from the day they received instructions, their client was already well out of time and that – by definition – there was already 'undue delay' and accordingly a real need for speed. It was only on 30 April 2004 – some three weeks after they had been assigned – that the solicitors wrote to the Legal Aid Department seeking various documents related to the applicant's claim which seemingly they understood the applicant had filed in support of his claim for legal aid.

21. On 11 May 2004, the Legal Aid Department replied to the following effect :

> " The documents were provided to us for the sole purpose of making an assessment of the merits of [the applicant's] application for legal aid in connection with his retirement in the public interest. Further conditions that they should not be used for any other purposes and that the provisions of the Personal Data (Privacy) Ordinance were to be strictly observed in relation to their use and transfer were imposed. Please seek discovery of the documents in the intended proceedings."

22. The solicitors chose not to query what on the face of it were the startling contents of this letter. Instead, an attempt was made to obtain pre-action discovery from the Police Force. Not surprisingly, this request was refused.

23. It was only on 6 July 2004 that the applicant's solicitors wrote to the Legal Aid Department to ask again if the documents could be supplied to it, suggesting that, if required, their client's written consent could be obtained. On 14 July 2004, the Legal Aid Department replied by saying simply that it was unable to accede to the request.

24. If the papers in the possession of the Legal Aid Department had been obtained by them from a third party, for example from the Police Force itself, subject to the condition that the papers would not be passed on, the refusal to let the solicitors have the papers would be understandable. However, as I understand it, the papers were the property of the applicant and had been submitted by him in support of his application for legal aid. If that is the case, it means that the Legal Aid Department refused to give back the applicant's own papers to him or to his lawyers to enable him to pursue a legal action dependent on those papers. I find that inexplicable.

25. In the circumstances, if the papers were the property of the applicant himself, I do not see how he personally can be blamed for this period of delay; that is, up to about mid-July 2004.

26. However, after the second written refusal of the Legal Aid Department to supply the papers, the solicitors then, it appears, attempted to obtain relevant documentation from the applicant himself. Sufficient

papers to enable the application for leave to be filed were obtained from the applicant. However, this process was not completed until about the end of the year, perhaps early into the new year; that is, in January 2005. In short, the process took a period of at least five months.

27. The papers show that the application for leave was signed only on 17 January 2005 and filed the following day; that is, on 18 January 2005.

28. At best, therefore, it took the applicant and his solicitors some five months – from mid-July to at least mid-December to obtain sufficient documentation to enable the application for leave to be drafted.

29. The documentation that was obtained was located by the applicant himself and delivered to the solicitors. In a late affirmation (signed on 18 September 2006), the applicant attempted to explain why it took him so long to locate sufficient documentation to enable his counsel to proceed on his behalf. In this regard, he said :

> "7. … my forced retirement came as a big blow to me. And after that, I remained at home tediously everyday without caring anything happened to or surrounding me. I had tried my utmost effect to prepare and compile one complete set of the documents to DLA to support my application for Legal Aid.
>
> 8. After having been informed by my solicitors that they had no recourse to obtain the complete documents, I had endeavoured to retrieve and supply to my solicitors all the documents relating to this matter. Whenever I managed to find anything which I believed might be relevant to this case, I would send them to my solicitors as soon as I could.
>
> 9. In spite of the fact that I had tried to search my house from top to bottom, I could only find the documents and supply

> them to my solicitors from time to time in a piecemeal fashion.
>
> 10. Unfortunately, almost on all occasions, after my solicitors had checked the documents, they told me that most of the copy documents provided to them were incomplete or were duplicate copies of the earlier documents only, and the full scenario was not clear. Also, I had met my solicitors time and again to confirm and collate the documents and what further documents they wanted from us. I was also informed by my solicitors and verily believe that they had liaised with Counsel closely to check what sort of other documents that were needed.
>
> 11. Only in late 2004, I managed to provide with my solicitors the basic requisite documents that were necessary and capable of enabling my solicitors and Counsel to prepare and drat the Original Notice."

30. In my view, it is plain that the applicant, who was living in a small apartment, would have been able to gather together his papers in a matter of a day or so if he had resolved to do so. There is no suggestion that the applicant at this time was suffering from any medical disability; that is, one recognised by the science of psychiatry, which prevented him from acting promptly to instruct his solicitors. No doubt the applicant was despondent but that alone cannot excuse a delay of some five months or more in completing what must have been a relatively simple task.

Conclusion

31. In summary, in my judgment, the applicant's explanation, even on its face, cannot excuse his delay at this time.

32. In the end result, therefore, a decision which was made on 13 November 2003 was only formally challenged on 18 January 2005, more than 14 months later.

33. As I have said, the applicant, in my view, must bear personal responsibility for at least five months of that delay and that alone would justify a refusal to grant him an extension of time. But, even if the applicant was not found to be at fault for any portion of the delay, in the present case, in my view, it is plain that an overall delay of some 14 months was detrimental to good administration.

34. What is or is not detrimental to good administration must of course depend on the circumstances of each individual case : in this regard, see, for example, *R. v. Dairy Tribunal ex parte Caswell* [1990] 2 AC 738 at 749. In the present case, the applicant had been retired from the service. Steps will have been taken to replace him, the consequence of that no doubt going right the way down the administrative ladder to the bottom rung of recruitment. After a year surely the administrative arm of the Police Force was entitled to work on the basis that no further provision would have to be made for the possibility that the applicant would be returned to active duty. Equally important, the applicant himself will not have acted as a police officer for an extended period of time, an extra burden being placed on the Police Force therefore to bring him ‘up to speed’, in the event of his challenge being found eventually to have merit. In my judgment, it is almost self evident that the proper administration of the Police Force would be damaged by a delay of the kind that has arisen in this case. The Police Force is a professional organisation which demands the highest standards from its officers – men and women, it must be remembered, who, if necessary, will place themselves in harm’s way to protect the public and who must at all times be sufficiently trained. To remain efficient and effective therefore the Police Force’s administration

must know without delay which officers are seeking by way of legal challenge to be reinstated.

35. It was for the reasons given that I came to the conclusion that there was no basis for extending time to the applicant to pursue his judicial review application. Costs followed the event.

(M.J. Hartmann)
Judge of the Court of First Instance,
High Court

Mr Philip Dykes, SC and Mr Philip Wong,
instructed by Messrs Lau, Chan & Ko, for the Applicant

Mr Simon Westbrook, SC instructed by Department of Justice,
for the Respondent