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HCAL16/2006

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 16 OF 2006

BETWEEN

NG NGA WO	Applicant
and	
DIRECTOR OF HEALTH	Respondent

Before : Hon Chu J in Court

Date of Hearing : 26 April 2006

Date of Decision : 16 May 2006

DECISION

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1. The applicant applies for leave to judicially review the decision of the Director of Health in his capacity as the Registrar of Clinics ("the Registrar"). The Registrar had by letter dated 11 November 2005 indicated that he considered the applicant was not fit to be employed by any clinic registered under Medical Clinics Ordinance (Cap.343).

The facts

2. Since 1964 and until 10 October 2005, the applicant was employed by the Yuen Long Agricultural Mutual Assistance Society ("the Society").

3. In the Form 86A which was prepared by solicitors, it was said that the applicant was registered under section 14 of the Medical Registration Ordinance (Cap. 161) as a medical practitioner with limited registration. It was also said that the applicant was throughout employed by the Society as a medical practitioner in charge of the clinic operated by the Society ("the Clinic"), which is a clinic registered under the Medical Clinics Ordinance.

4. At the hearing for the leave application when the applicant appeared in person, he informed the court that his registration as a medical practitioner with limited registration had ceased after his conviction in 2001. According to the applicant, the Registrar, however, allowed him to remain as the medical practitioner in charge of the Clinic.

5. On 14 July 2005, the applicant was convicted of possession of dangerous drug contrary to section 8(1)(a) of the Dangerous Drugs Ordinance (Cap.134) and was fined $8,000. According to the applicant, the dangerous drug in question was a drug for losing weight. He said he purchased the drug for dispensing in the Clinic after being assured by the manufacturer that it was not dangerous drug.

6. Previously on 5 January 2001, the applicant had already been convicted of an offence of failing to keep a proper record of dangerous drugs, contrary to Regulation 5(1)(a) and 5(7) of the Dangerous Drugs Regulations (Cap.134A) and was fined $20,000.

7. By letter dated 1 August 2005, the Registrar wrote to the Society in which the Registrar indicated that as a result of the conviction, he had doubts as to the applicant's fitness to be employed at a clinic registered under the Medical Clinic Ordinance. The Society was asked to consider suspending the operation of the Clinic until a medical practitioner fit to practise at the Clinic had been employed.

8. In the letter, the Registrar further drew the Society's attention to his power under section 10 of the Medical Clinics Ordinance to cancel the registration of clinic if he is satisfied that any person employed at the clinic is not a fit person. The Society was asked to indicate within 1 month whether it would allow the applicant to continue practise at the Clinic. The letter stated that in the event the Society decided to allow the applicant to continue practising at the Clinic, then the Registrar would proceed to consider whether the applicant was a fit person for the purpose of section 10 of the Ordinance.

9. At the hearing, the applicant informed the court that a copy of this letter was received by him at the time. He further said that the Society had told him that he could work with the Clinic until 10 October 2005.

10. It appears, and the applicant agrees, that the Society had replied to the Registrar by letter dated 31 August 2005. The letter is,

however, not in evidence in these proceedings. The applicant indicated that he was not aware of the contents of this letter, but the Society had told him that they would try to enable him to remain with the Clinic until 10 October 2005.

11. On 31 August 2005, the Registrar wrote to the Society, referring to the Society's above-mentioned letter, and requested it to expedite the recruitment of an appropriate medical practitioner to work as the medical practitioner in charge of the Clinic.

12. The evidence filed by the applicant does not show what, if any, further correspondence or communication was made between the Registrar and the Society after this. What the evidence shows is that the applicant wrote a letter dated 31 October 2005 to the Director of Health. It is a long letter in which the applicant made representations on a variety of matters, including the circumstances leading to the conviction in 2005, his subsequent dealings with Madam Pong, who is the person in charge of the Society as well as his fitness to be employed at a registered clinic.

13. The Registrar wrote to the applicant by letter dated 11 November 2005. The letter referred to the applicant's letter dated 1 November 2005. According to the applicant, he had only written one letter to the Registrar and that was the letter dated 31 October 2005. In this letter dated 11 November 2005, the Registrar stated that in view of the second conviction, he considered the applicant was no longer suitable to be employed by any clinic registered under the Medical Clinics Ordinance.

14. Thereafter, the applicant's solicitors, Chin & Associates, wrote to the Secretary for Health, Welfare and Food on 17 November 2005, pointing out that the Registrar's decision had deprived the applicant of his right to earn a living, causing him grave hardship. The letter requested the Secretary to exercise his power under section33(5) of the Medical Registration Ordinance to approve a preliminary investigation for a review on the Registrar's decision.

15. After two chasers, the Secretary replied by letter dated 18 January 2006 that section 33(5) of the Medical Registration Ordinance did not confer any power upon the Secretary to review the decision made by the Director of Health under the Medical Clinics Ordinance in his capacity as registrar of clinics.

16. On 10 February 2006, the applicant through solicitors commenced these proceedings. He seeks an order of certiorari to quash the Registrar's decision and declarations that the decision was irrational or unreasonable and/or null and void. He also asks for an oral hearing if leave is not granted on papers.

17. Pursuant to Order 53 rule 3 of Rules of the High Court, the leave application was listed for an oral hearing. As a result of the stay occasioned by the applicant's application for legal aid on 10 March 2006, the hearing was re-listed for 26 April 2006.

Application for adjournment

18. The Director of Legal Aid refused the applicant's application on 13 April 2006.

19. On 24 April 2006, the applicant, acting through solicitors, applied by affirmation to vacate the hearing scheduled to take place two days later with liberty to restore. The affirmation disclosed that the applicant had on 20 April 2006 filed a debtor's petition for his own bankruptcy on the basis that he was unable to pay his debts (Case no. HCB 2961/2006). The applicant is also represented by Chin & Associates in the bankruptcy proceedings. The applicant stated in his affirmation that he was unable to afford legal representation and the refusal of legal aid "has closed all channels to review [his] case". He said he intended to appeal the decision of the Director of Legal Aid and asked that the hearing of the leave application be vacated.

20. By letter dated 25 April 2006, the Court informed Chin & Associates that the hearing date would stand and that application regarding the conduct of the case was to be made at the hearing.

21. In the late afternoon, the applicant through Chin & Associates filed a Notice to Act in Person.

22. At the hearing, the applicant renewed his application to adjourn the proceedings in order that he could make a second application for legal aid. He said that the Registrar's decision to disallow him to work at registered clinics was an open ended one. He contended that the

Registrar should have at least specified a period, at the end of which he could be re-employed. He however accepted that he had fully ventilated his case to the Legal Aid Department when he first made the application for legal aid. Despite that, the Director of Legal Aid was of the view that he had no reasonable cause for bringing proceedings, hence refused legal aid to him. The applicant also accepted that there was no change in circumstances since he made the application in March.

23. Having regard to all these circumstances, it is unlikely that a fresh application for legal aid would be successful. The adjournment sought will not serve any useful purpose in this regard.

24. Additionally, in an application for judicial review, an applicant is expected to state his entire case, including all materials, grounds and arguments in support of the application, to enable the court to decide whether it is a proper case for granting leave to judicial review. This is particularly so for an applicant who is legally represented. In the present case, the papers for the judicial review were prepared by lawyers and legal arguments and authorities were cited in the Form 86A. The applicant has not, whether in his affirmation seeking to vacate the hearing or at the oral hearing, indicated what further or additional materials would or could be raised at the oral hearing and/or if the applicant were to appear by lawyer at the hearing. There is also no indication of any and, if so, what prejudice the applicant would suffer if the hearing were not adjourned.

25. In the light of the above considerations, I refused the application to adjourn the hearing.

The grounds for the intended judicial review application

26. In his Form 86A, the applicant raises two main grounds in support of his intended judicial review application. They are:

(1) Breach of natural justice and procedural impropriety, and

(2) Irrationality.

27. Under the first ground, it is said that the decision affects the applicant's ability to be registered as a medical practitioner, hence his livelihood. Therefore, the applicant has a right to be heard and that he should have been afforded a chance to be heard orally. Additionally it should have been made known to him the factors against him and the reasons for the Registrar's decision.

28. As to the second ground, there is no elaboration or particulars given in Form 86A.

Reasons for the decision on the leave application

29. The test on an application for leave to judicial review has been said by the Court of Appeal to be: whether the material before the court disclosed matters which might on further consideration demonstrates an arguable case for the grant of the relief sought: *Ho Ming Sai v. Director of Immigration* [1994] HKLR 21.

30. The applicant's first ground of challenge relates to the right to be heard. In *R v. Home Secretary, ex parte Doody* [1994] 1 AC 531, Lord Mustill stated that:

> " Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer. "

31. Notwithstanding the principle of fairness, I do not consider that the applicant has a potentially arguable case that there has been a breach.

32. Firstly, the applicant accepts that he was aware of the Registrar's letter dated 1 August 2005 shortly after it was issued. He knew that as a result of his repeated conviction under the Dangerous Drugs Ordinance, the Registrar was having doubts as to his fitness to be employed in a registered clinic. Admittedly at about the same time, the applicant was further made aware by the Society that his employment would be terminated after 10 October 2005 and that this would be brought to the notice of the Registrar. It is open to the applicant, if he so wished, to make representations to the Registrar on his suitability to be employed by a registered clinic.

33. Secondly, the applicant had indeed exercised his right to be heard by his letter to the Registrar dated 31 October 2005. As noted above, this is a lengthy and substantial representation. The applicant has

not indicated in these proceedings what further representations he would wish to make in addition to what was already stated in this letter. Therefore, it cannot be said that he had no opportunity to put forward his case and advance arguments favourable to him before the Registrar made his decision.

34. Thirdly, to the extent that the Form 86A seems to suggest that there is a right to be heard orally. That cannot be right as a matter of law. The right to be heard does not entail a right to make oral submissions. The applicant has not shown any special circumstances or considerations that require the Registrar to hear the applicant orally before making a decision. No unfairness has been shown either.

35. Fourthly, this is not a case that the applicant had not been made aware of the adverse factors against him. On the contrary, the Registrar had by the letter dated 1 August 2005 clearly identified the cause for concern, namely, the applicant had been convicted of an offence under the Dangerous Drugs Ordinance in July 2005, when there was a similar previous conviction in 2001. It cannot be said that the applicant did not appreciate or had difficulty comprehending the case against him. To say the least, his letter dated 31 October 2005 to the Registrar demonstrated that he was well aware of the concerns of the Registrar.

36. Fifthly, even if the applicant can argue that he did not have an opportunity to be heard, which I do not accept, he has not shown what prejudice he has suffered. In *Leung Fuk Wah Oil v. Commissioner of Police* [2002] 3 HKLR 653, Cheung JA observed that:

> "Judicial review is a discretionary remedy. If the breach of the principle of fairness does not produce a substantial prejudice to the applicant, the court is bound to take this into account in deciding whether relief should be given. This is consistent with the concept that the court should not substitute its own decision for that of the decision-maker."

37. On the facts of this case, there is no prospect of the court exercising the discretion to grant the applicant the relief sought.

38. As to the second ground of irrationality, no particulars were given in the Form 86A. In my view, given that the July 2005 conviction was a second conviction under the Dangerous Drugs Ordinance, that the previous conviction was not too long ago, and that the offences were related to the Clinic, there is no room for arguing that the Registrar's decision is irrational in the public law sense.

39. The applicant said at the hearing that the Registrar should impose a time limit. In my view, the applicant has failed to appreciate the nature and effect of the Registrar's decision. Although the Registrar had decided that the applicant was not a fit person to be employed by a registered clinic, the Registrar had not decided that the applicant could never be a fit person to work at a registered clinic. It is neither necessary nor practicable for the Registrar to give duration to his decision. If and when in future the applicant proposes to work for a registered clinic, the Registrar will consider whether he is a fit person having regard to all the relevant circumstances then prevailing.

Conclusion

40. For the above reasons, the applicant has not demonstrated that his intended judicial review application is potentially arguable. Accordingly, the application for leave to judicial review is refused.

(C Chu)
Judge of Court of First Instance
High Court

The applicant, unrepresented, appeared in person.