



Clean Air Foundation LTD and Another v. The Government of the HKSAR

[2007] HKCFI 757; HCAL 35/2007

Country: China

Region: Asia

Year: 2007

Court: Hong Kong Special Administrative Region Court of First Instance

Health Topics: Environmental health, Public safety

Human Rights: Right to a clean environment, Right to health, Right to life

Facts

The applicants were a group that advocates for improvement of Hong Kong's air quality. They alleged that the Hong Kong government did not enact adequate legislation or effective policy to combat air pollution and that this failure was a breach of the government's legal duty to ensure the right to life and the right to health for all residents.

The applicants sought two declarations. First, the applicants sought a declaration that the government has a duty to protect the residents of Hong Kong from air pollution pursuant to Article 28 of the Basic Law of Hong Kong and Article 2 of the Hong Kong Bill of Rights Ordinance, which provide for the right to life in a criminal context, and pursuant to Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which includes the right to health.

Second, the applicants sought a declaration that current legislation failed in two specific areas and that this failure constituted a breach of the government's legal duty. The first area was section 7 of the Air Pollution Control Ordinance (APCO), which states that the Secretary for the Environment may introduce and update air quality objectives after consulting with an advisory council. The applicants alleged that the government failed to adopt up-to-date objectives under this section. The second area was the Air Pollution Control (Motor Vehicle Fuel) Regulations, which prohibits the sale of pre-Euro and Euro 1 diesel fuel, but not its use or importation. The applicants asserted that the government failed to revise these regulations to prohibit the use of this fuel.

Decision and Reasoning

The Court dismissed the application and held in favor of the government.

The Court held that it was arguable that the right to life as provided for in Article 28 of the Basic Law and Article 2 of the Bill of Rights could extend to air pollution and impose a governmental duty to combat air pollution. Similarly, the Court held that it was arguable that the provision for the right to health in Article 12 of the ICESCR could create the same governmental duty.

However, The Court rejected the argument that the Air Pollution Control Ordinance was inconsistent with the government's legal obligations. The Court referred to Article 48 of the Basic Law, which provides that once a policy has been formulated, it is for the legislature to decide if it should be executed, and to what degree. The Court held that examining the steps taken by the government to introduce up-to-date air quality objectives under section 7 of the APCO would require an examination of policy, which is the domain of the legislature.

The Court rejected the argument that the Air Pollution Control (Motor Vehicle Fuel) Regulations were inconsistent with the government's legal obligations. They held that this argument, which is based on the regulation allowing importation and use of certain diesel fuels, would also require an examination of government policy. The Court stated that while there may be more effective ways of dealing with this issue, that discussion is based on merit, not legality.

The Court stated that the government must make policy decisions based on a range of social and economic priorities and that it has wide discretion to do so. The Court stated that whether or not the legislature chooses to pursue certain policies is not an issue of the legislature acting outside of its powers. The application was

dismissed.

Decision Excerpts

“If Government has the power under s.7 of the Air Pollution Control Ordinance to update air quality objectives, either generally or in respect of particular areas, it is inevitable there will be reasons why it if, in fact, there has been no updating that it has declined to do so. Those reasons will be based on social and economic factors and, importantly, on an assessment of whether, all matters being taken into account, there is sufficient benefit to be obtained at this time in adopting more stringent objectives.” Para. 38.

“If the sale of certain diesel fuel is prohibited but its importation or use is not, there must be underlying social and economic reasons! Yes, there may be ways of dealing more effectively with the problem. During the course of argument, mention was made of measures adopted in Singapore. But that itself reduces the issue to one of merit rather than one of legality.” Para. 39.

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