# CLEAN AIR FOUNDATION LTD AND ANOTHER v. THE GOVERNMENT OF THE HKSAR [2007] HKCFI 757; HCAL 35/2007 (26 July 2007)

HCAL 35/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 35 OF 2007

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BETWEEN

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| CLEAN AIR FOUNDATION LIMITED | 1st Applicant |
| GORDON DAVID OLDHAM | 2nd Applicant |
| and | |
| THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION | Respondent |

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Before : Hon Hartmann J in Court

Date of Hearing : 11 July 2007

Date of Handing Down Judgment : 26 July 2007

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J U D G M E N T

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Introduction

1. The applicants in this matter have sought leave to apply for judicial review pursuant to O.53,

r.3 of the Rules of the High Court. Their application, as filed, may be characterised as a broad, frontal attack on what is asserted to be a failure of Government to tackle the problems presented by air pollution.

2. The first applicant is a limited liability company, its principal aim being the protection of the 'environmental rights' of Hong Kong people.

3. The second applicant is an environmental advocate. In his supporting affidavit, he has said that he established the Clean Air Foundation in order to galvanise the support of Hong Kong residents in actively promoting the improvement of Hong Kong's air quality.

4. The applicants have contended that Hong Kong's air is so polluted that it is poisoning the people who live here; shortening their lives. It is, in addition, harming Hong Kong as a business and financial centre. They have asserted that Hong Kong's air contains almost three times more particles of soot and other pollutants than the air in New York and Paris and more than double the amount in London.

5. It has been asserted that Government has a legal duty, indeed a duty entrenched in the Basic Law, to guarantee the right to life of all residents. This includes the duty to provide the best possible health care. However, in failing to take more stringent steps to combat air pollution, Government has failed in that duty.

6. It has failed, so it appears to have been asserted, because it has not ensured that there is adequate legislation in place and/or has not pursued effective policies. This failure, it has been said, is not simply an example of poor governance. It goes further and constitutes a breach of the Basic Law, the Bill of Rights and various international covenants which have been extended to Hong Kong.

7. I have described the application, as filed, as constituting a broad, frontal attack on Government's failings. Among the asserted failings the following have been described :

(i) By way of immediate measures, a failure to rationalise bus routes and service scheduling to facilitate higher transport occupancy; a failure also to provide regulations for better ventilation in the construction of under-story bus termini.
(ii) By way of medium term measures, a failure to impose a mandatory requirement that all diesel vehicles move to *Euro IV* and *Euro V* standards and a failure to impose a moratorium on the use of sulphur rich fuels in power generation.
(iii) By way of long term measures, a failure to create a policy "(common virtually everywhere in the world) to provide a specific fraction of the construction cost of new rail lines as a direct grant to the rail company to allow additional services in the most congested parts of Hong Kong and allow extension of the system to more medium density areas in order to reduce road traffic and corresponding pollution."

My initial concern

8. Having read the application, I was concerned that, despite the importance of the subject matter, it did not engage the supervisory jurisdiction of this court. I was concerned that, no matter how the application was worded, it was in reality an attack on Government policy. But matters of policy, of course, provided they are lawfully determined and executed, are not matters for this court.

9. In a recent judgment, Reyes J, in dismissing an application for leave to apply for judicial review, said the following; in my view, a succinct and entirely correct statement of principle —

> " I fully sympathise with Mr Ng's concerns about the deteriorating quality of the environment around Tai Kok Tsui, where he lives. But the Court can only apply law. The Judiciary cannot manage the environment. That is the role of the Executive." [*Ng Ngau Chai v. The Town Planning Board* (unreported) HCAL 64/2007 dated 4 July 2007]

10. In the circumstances, I directed that there be an oral hearing. Because of the broad and potentially profound ramifications of the application, I also invited the putative respondent, the Government, to be represented in order to render assistance.

11. This judgment goes to the single question of whether leave to apply for judicial review should be given.

The test for leave

12. The burden which the applicants must discharge in order to obtain leave is not an onerous one. The test was considered in *R. v. The Director of Immigration, ex parte Ho Ming Sai* (1993) 3 HKPLR 157, at 161 and 170, Kempster JA stating it to be —

> " … whether the material before [the judge] disclosed matters which, on further consideration, might demonstrate an arguable case for the grant of the relief sought."

13. That test had been adopted some ten years earlier in *Inland Revenue Commissioners. V. National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 at p. 644A. In that judgment, Lord Diplock had stated the nature of the test and the manner of its determination in the following words :

> " If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."

14. While the burden which the applicants must discharge is not onerous it does not follow that

there is no burden at all. The purpose of having a leave application is, as I understand it, to ensure that only those applications which are at least *prima facie* arguable are permitted to go to a full hearing.

15. What must be remembered is that every application which goes to a full hearing requires the public authority cited as the respondent, if it wishes to oppose the application, to go to expense – often very considerable expense – to be adequately represented. It means that public officers must be diverted from their normal duties in order to assist in preparation. If an application is fundamentally misconceived, a full hearing is a waste of public resources.

Looking to the relief sought

16. The applicants have sought two declarations. The first declaration is intended to be a 'foundation' declaration, setting out the exact nature of the Government's obligations under the Basic Law, the Bill of Rights and the international conventions. It is to the following effect :

> " Article 28 of the Basic Law and/or Article 2 of the Hong Kong Bill of Rights Ordinance, in providing for protection of a 'right to life' and the 'right to health', as provided by Article 12 of the International Covenant on Economic, Social and Cultural Rights, imposes upon the Government an affirmative duty to protect the residents and the economy of Hong Kong from the known harmful effects of air pollution …"

17. Art.28 of the Basic Law and art.2 of the Bill of Rights provide for the right to life in the context of detention, trial and punishment. The question arises, therefore, of whether, on a purposive interpretation, the constitutional protection can be extended to matters of air pollution control. In this respect, Mr John Scott SC, leading counsel for the applicants, has referred to an emerging international jurisprudence to the effect that the right to life may, depending on the circumstances, impose on public authorities an obligation outside of the context of crime and punishment; for example, to provide vaccines in the case of epidemics or to protect against identified environmental hazards such as nuclear waste. I accept therefore that it is at least *prima facie* arguable that the constitutional right to life may apply in the circumstances advocated by the applicants; that is, by imposing some sort of duty on the Government to combat air pollution.

18. As for art.12 of the International Covenant on Economic, Social and Cultural Rights, it is more directly in point. It reads :

> " 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
> (a)…
> (b)The improvement of all aspects of environmental and industrial hygiene …"

19. Art.12, of course, looks to the progressive achievement of the highest attainable standard of health. Put simply, it recognises that Rome wasn't built in a day. But that being said, I accept that it must be *prima facie* arguable that it imposes some sort of duty on state authorities to combat air pollution even if it cannot be an absolute duty to ensure with immediate effect the end of all pollution.

20. In respect of the second declaration, during the course of argument – indeed, over the lunch adjournment – it was materially amended. As originally drafted, it had been very broad in effect, reflecting what I understood to be the central thrust of the applicants' case; namely, that the current legislation was simply inadequate. As originally worded, the second declaration was to the following effect :

> " The Air Pollution Control Ordinance, Cap.311, and its subsidiary legislation, as enacted by the Legislative Council or as promulgated by the Environmental Protection Department, is inconsistent with the Government's legal commitments under Article 28 of the Basic Law; Article 2 of the Hong Kong Bill of Rights; Article 6 of the International Covenant on Civil and Political Rights; Article 12 of the International Covenant on Economic, Social and Cultural Rights; and the International Labour Convention No.148 Working Environment (Air Pollution, Noise and Vibration)."

21. What was originally sought, therefore, was simple enough. It was a declaration to the effect that existing air pollution legislation (the Air Pollution Control Ordinance and its subsidiary legislation), by failing to meet with the duties imposed on Government under the Basic Law, the Bill of Rights and the international conventions, was inconsistent with those instruments and therefore legally invalid.

22. The immediate problem that I had with the second declaration, as originally worded, was that it was simply too broad in scope and, arising from that, materially erroneous. On a plain reading, the second declaration originally suggested that the entire Air Pollution Control Ordinance and all subsidiary legislation made under it has no force in law. That could not be right. Nor, in fact, did the applicants contend it to be so. There are, for example, regulations which control noxious or offensive emissions, regulations which control pollution caused by industrial processes, by construction works and the like. It was not suggested that these are legally invalid. Indeed, it must be that they play a very real and effective role in combating air pollution.

23. The amended declaration has sought to be more specific. It has contended that the current legislation fails in respect of two discrete areas. The amendment has been made by adding the following to the original declaration; namely —

> " … in that the Government has failed to take the following steps pursuant to the duty referred to in [the first declaration]; namely, to—
> · Adopt up-to-date air quality objectives sufficient for the Secretary for the Environment to discharge his duties pursuant to S.7 of APCO.
> · Revise the Air Pollution Control (Motor Vehicle Fuel) Regulations, Cap. 311,

so as to prohibit the use (as opposed merely the sale) of the pre-Euro and Euro 1 diesel in Hong Kong and the importation into Hong Kong of such fuels."

24. In my view, to some degree, the amendment confuses what is, or is not, contained in the legislation with the failure of Government to take steps under that legislation.

25. The amended declaration seeks, first, a declaration that the Air Pollution Control Ordinance and its subsidiary legislation is inconsistent with the Government's obligations under law, not because the legislation is itself lacking but because the Government has failed to take action under that legislation; more particularly, s.7 of the Ordinance, to adopt 'up-to-date' air quality objectives.

26. I do not see how it can be *prima facie* argued that s.7 is itself lacking. The section reads as follows :

" (1) The Secretary shall, after consultation with the Advisory Council on the Environment, establish for each air control zone air quality objectives or different objectives for different parts of a zone.

(1A) The Secretary may publish air quality objectives for an air control zone by issuing a technical memorandum which may specify different objectives for different parts of the zone.

(2) The air quality objectives for any particular air control zone or part thereof shall be the quality which, in the opinion of the Secretary, should be achieved and maintained in order to promote the conservation and best use of air in the zone in the public interest.

(3) Any air quality objective may be amended from time to time by the Secretary, after consultation with the Advisory Council on the Environment."

27. As I read the section, it makes direct provision for the Secretary for the Environment, in consultation with a statutory body, not only to introduce air quality objectives but to update them whenever necessary. The contention must be, therefore, that the Government has failed to use its powers under the section to introduce what the applicants describe as 'up-to-date' air quality objectives.

28. That contention, however, demands an examination of what steps Government has taken to introduce updated air quality objectives and whether, bearing in mind all relevant social, economic and political factors, those steps, whether prudent or not, have been lawful. In short, what is required is an examination of Government policy.

29. The amended declaration seeks, second, a declaration that the Air Pollution Control Ordinance and its subsidiary legislation – the Air Pollution Control (Motor Vehicle Fuel) Regulations – is inconsistent with the Government's obligations under law because, while it prohibits the sale of diesel fuel in Hong Kong which does not meet specified levels of purity, it does not prohibit the importation or use of such diesel.

30. What is demanded in respect of this second issue is an examination of why the legislation prohibits the sale of certain diesel fuel but does not prohibit its importation or use. In my view, this also requires an examination of Government policy.

Policy

31. Art.62 of the Basic Law provides that it is for the Government to formulate and implement policies. Art.48 provides that it is for the Chief Executive, once a policy has been formulated, to decide whether, and to what degree, it should be executed.

32. A policy may, of course, be unlawful. But because a policy is considered to be unwise, short-sighted or retrogressive does not make it unlawful. It has long been accepted that policy is a matter for policy-makers and that to interfere with the lawful discretion given to policy-makers would amount to an abuse of the supervisory jurisdiction vested in the courts. In *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155, at 1160, Lord Hailsham explained the principle in the following terms :

> " the remedy by way of judicial review … is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and … administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner … [and not] to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."

But are matters of policy inherent in this application?

33. In an affirmation made to assist the court, Mr Tse Chin Wan, the Assistant Director of the Environmental Department, said the following :

> " In relation to the manner in which air pollution control in the HKSAR is implemented, I wish to emphasize that air pollution control cannot and is not solely effected through legislation under the Air Pollution Control Ordinance. Air pollution control is a complex matter where competing social, economic and policy considerations must be taken into account and balanced by the Government. I confirm that the Air Pollution Control Ordinance is only part and parcel of a comprehensive framework of administrative measures adopted to combat air pollution in the HKSAR. Moreover, the air quality of the HKSAR is under the pervasive influence of emissions from sources in the Pearl River Delta (PRD) region e.g. power plants, industrial establishments and vehicles. The effect control of air pollution in the HKSAR requires actions to be taken not only in HKSAR but also in the PRD region. Accordingly, the HKSAR cannot effectively combat air pollution solely by the enforcement of the Air Pollution Control Ordinance against local emission sources, but it must also work within the Guangdong Provincial Government to reduce emissions in the entire PRD

region.”

34. Mr Tse continued by observing that :

“ Certain air pollution control measures are extremely costly and would have a great impact on a wide range of issues and policy areas including energy, transportation, industrial production and the livelihood of citizens in general. It is necessary to take into account the wider social, economic and policy context when considering whether to adopt such measures and how they should be implemented.”

35. In summary, as I understand it, Mr Tse said that combating air pollution requires not only legislative measures but administrative measures too and, when necessary, measures of a political nature, especially in connection with cross-border issues. Mr Tse spoke of the Pearl River Delta Regional Air Quality Management Plan, a cross-boarder plan which seeks measured reductions in air pollutants in both Hong Kong and the Pearl River Delta area. In giving examples of domestic administrative measures, he spoke of the scheme for replacing diesel taxis with taxis powered by liquefied petroleum gas, a scheme that was now 99% successful.

36. Deciding on the relevant emphasis in respect of this complex, interlocking mix of legislation, administrative schemes and political initiatives is a matter of policy. And policy, as I have said, is for Government.

37. I believe it is inevitable that the two discrete issues contained within the second declaration can only be determined upon an exhaustive analysis of relevant Government policy.

38. Take the first issue, the asserted failure to adopt ‘up-to-date’ air quality objectives. 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 – 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.

39. In respect of the second issue, it is obvious that it must turn on an issue of policy. If the sale of certain diesel fuel is prohibited but its importation or use is not, there must be underlying social and economic reasons. And, of course, there are. Fuel may be imported for the purpose only of re-export, presenting no threat of pollution within Hong Kong’s borders. As for actual use, ships may come into Hong Kong waters powered by the otherwise prohibited diesel fuel; trucks may deliver produce across the border from the Mainland powered by the same fuel. Are they to be prevented from entering unless that fuel is first jettisoned? 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.

40. The applicants, of course, submit that the application does not seek merely to review the

wisdom of Government's policies in respect of air pollution. This court is not being asked to change its role to some sort of commission of inquiry. This application, it has been said, seeks to determine whether Government has met its obligations in law.

41. I am unable to agree. The real issues here are not issues of legality, they do not go to the Government acting outside of its powers. In my judgment, they go to the merits of the policies adopted by Government; more accurately perhaps, to why Government at this time has not chosen to pursue certain policies.

42. Take for example, the issue of Government prohibiting the sale of certain diesel fuel in Hong Kong but not prohibiting vehicles from the Mainland entering Hong Kong under the power of that diesel. How possibly can this court decide that this decision fails to reach a fair balance between the duty Government has to protect the right to life and the duty it has to protect the social and economic well-being of the Territory? It cannot do so, not without shouldering aside the discretion vested in Government to decide just how serious a threat those cross-border vehicles present to air pollution and what price must be paid in terms of economic well-being if those vehicles are prevented from entering under the power of the diesel.

Conclusion

43. In all the circumstances, leaving aside the other issues raised in opposition to this application for leave, I am satisfied that it must be refused on the basis that it is fundamentally misconceived. While it purports to seek the determination of issues of law, on an objective assessment it is clear that it seeks in fact to review the merits of policy in an area in which Government must make difficult decisions in respect of competing social and economic priorities and, in law, is permitted a wide discretion to do so. While issues of importance to the community may have been raised, it is not for this court to determine those issues. They are issues for the political process.

44. For the reasons given the application for leave, as amended, must be dismissed.

45. There will be no order as to costs.

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

Mr John Scott, SC and Ms Romi Williamson, instructed by Messrs Oldham, Li & Nie, for the 1st and 2nd Applicants

Mr John Bleach, SC and Mr Jin Pao, instructed by Department of Justice, for the Respondent