

SUNDAY FEATURES

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When lawyer Theresa Chu (朱婉琪) and three other Taiwanese filed for a judicial review in 2003 after the immigration authority blocked them from entering Hong Kong, they hoped to prove that the government had discriminated against them on the basis of religion — namely, Falun Gong, the spiritual movement banned in mainland China, but not Hong Kong.

Chu and her co-applicants were among 80 Taiwanese denied entry to Hong Kong in February 2003, when they planned to attend a Falun Gong conference. Although they held valid visas, immigration officers stopped them at Hong Kong International Airport and put them on return flights to Taiwan.

The applicants in *Chu Woan-chyi and others v. Director of Immigration* believe pressure from China was behind the incident. But under the “one country, two systems” model, Hong Kong’s government agencies should follow Hong Kong law, under which Falun Gong is legal — and discrimination on the basis of religion is not. The immigration authority denies the group’s religious affiliation played a role in its decision, claiming instead that the Taiwanese in question posed “security risks to the HKSAR [Hong Kong Special Administrative Region].”

Six weeks after being denied entry, Chu and three others launched a court battle that lasted six-and-a-half years. On Sept. 4, they lost the latest round and chose not to appeal, having lost hope of a victory.

But they did not lose over the question of whether immigration authorities wrongfully barred their entry. In fact, the Court of Appeal of the High Court of Hong Kong didn’t even answer that question.

Instead, the ruling focused on the legal principle known as the duty of candor.

When the legality of a government action is being tested in court, the government, under the duty of candor, has an obligation to be honest with the court and provide it with the evidence needed to scrutinize its actions. But in *Chu Woan-chyi and others v. Director of Immigration*, the government breached that duty, the Court of Appeal judges ruled on Sept. 4, and left the court with no evidence to reach a conclusion — something the presiding judge called “a most extraordinary state of affairs.”

The Court of Appeal’s judgment seems at first to be a scathing censure

“It’s clear the government has breached duty of candor and destroyed papers [that could have been evidence in court], or at least lied ... In those circumstances, the court is reasonably expected to rule against the government.”

Law Yuk-kai, director of Hong Kong Human Rights Monitor



Policy of truth

A case brought by four Taiwanese against Hong Kong’s Immigration Department has set a legal precedent in the territory with implications for government accountability, but the jury is still out as to whether it will actually change the government’s behavior

BY CELIA LLOPIS-JEPSEN
STAFF REPORTER

of the government’s behavior in the case — but it is a ruling with a surprise twist that has legal watchdog Hong Kong Human Rights Monitor concerned that the government has ultimately benefited from flouting its obligation.

Chu’s case started at the Court of First Instance of the High Court, directly under the Court of Appeal. To review the Immigration Department’s actions, the court needed documentation detailing why the plaintiffs were repatriated in 2003 — documents it never received. The department cited “security risks” for blocking the plaintiffs’ entry to Hong Kong, but did not provide documents supporting this assertion.

The court nevertheless ruled in the government’s favor, finding that Chu and her fellow plaintiffs failed to prove religious discrimination.

The case took a different turn at the Court of Appeal. The judges, led by Chief Judge Geoffrey Ma (馬道立), said the government had since the case’s outset repeatedly breached its legal duty of candor, which, Ma writes in the Court of Appeal’s judgment, is crucial to “good governance, and proper and transparent administration,” and is rarely violated. Examining this breach of candor therefore became their key task, the judges wrote in their ruling.

Over dozens of pages in the Sept. 4 judgment, Ma dissects the claims made by the government agencies involved in the case — the Immigration Department, the Security Bureau and the Department of Justice — and reveals glaring contradictions.

According to the Sept. 4 judgment, over the course of the judicial review, the defense counsel gave conflicting explanations for failing to produce evidence, variously saying or leading the court to believe: that documents related to the case could not be disclosed because of their sensitivity; that the Department of Immigration had destroyed all related documents but that other government agencies still had related documents; that the other agencies had destroyed their documents as well; or that no other agencies ever had any documents related to the case. (No government officials appeared in court. Their lawyer received instructions from them in writing and at times presented written statements from them.)

In a phone interview, Hong Kong legislator Albert Ho (何俊仁), chairman of the Democratic Party, recounted the requests made by his law firm Ho, Tse, Wai & Partners (which represented Chu and the others at the Court of First

Instance) that the government submit evidence in the case — something that should not have been necessary because, as Ma notes in the Court of Appeal’s judgment, “the respondent [government] in such proceedings is expected to, and usually does, discharge its duty of candor.”

“In the Court of First Instance we pressed quite hard for discovery [compulsory disclosure of evidence], but the government did not give a candid answer. In fact, it gave inconsistent explanations,” said Ho, who himself was denied entry to Macau last December for unclear reasons when he planned to observe a demonstration there.

“Sometimes [the defense counsel] said the [evidence] was in files held by the Immigration Department and other government departments, and that this matter [the security risks posed by the plaintiffs] was known to officials at high levels,” Ho said. But when pressed for the documents, the counsel eventually “said the files had all been destroyed.”

At the last hearing at the Court of First Instance on March 8, 2007, the presiding judge expressed dismay and incredulity at the government’s failure to submit hard evidence.

“Is it credible that suddenly all the

Government files and papers have been washed clean?” the judge asked.

The answer, according to the defense, was yes.

The defense counsel returned from the lunch break to say he had consulted “the highest level of those responsible,” and that all documents at all government agencies related to the incident had been destroyed four years earlier, before the case had even reached court.

Court of First Instance Judge Michael Hartmann asked: “Why did we have to go through all of this in the first place then? Why not simply have said [back then]: all of this material ... it’s destroyed.”

But, Ma notes in the Court of Appeal’s judgment, officials from the Department of Immigration and the Security Bureau submitted affidavits claiming that the four Taiwanese posed “security risks.” What did they base their knowledge on if not documents, he wonders.

Ma also says the government repeatedly implied documents existed by declining to disclose them without any “intimation of the non-existence of relevant documents.” For example, the court had been told earlier that documents in the case were too sensitive to show the court — a claim called “public interest immunity.”

Even if the documents had been destroyed, as claimed in March 2003, there is cause for concern. In Hong Kong, the legality of a government action may be appealed in court up to three months after that action. This destruction date would mean potential court evidence was eliminated well before the deadline for seeking judicial review.

Ma’s conclusion is straightforward: “[T]he duty of candour has been breached,” he writes. “Even to this day, over six years since the date the 4 Applicants were denied entry, it is still unclear just what was the basis for this statement [that they posed security risks], nor is it clear as to whether any documents exist to support it. It is a most extraordinary state of affairs.”

Ironically, although the judges ruled that the government breached the duty of candor, they still found in its favor. Yet in Hong Kong’s legal system, if the government breaches the duty of candor, the court is expected to rule against it because it hindered the investigation.

“Normally, where the duty of candour has been breached in such a way in relation to the disclosure and presentation of relevant facts, the consequence in judicial review proceedings [as in other proceedings] is that the court is entitled to draw adverse inferences,” Ma explains in the judgment.

But Ma declines to “draw adverse inferences” in this case. He cites two key reasons for finding in the government’s favor.

Ma says the Taiwanese applicants should have pushed harder for evidence in the case: “If the Applicants had conducted themselves differently by, for example, making the necessary discovery applications or applying for cross-examination of various deponents [the government officials who submitted written statements to the court], these judicial proceedings would have taken a much different course and, depending on what evidence emerged, the court may have been driven to arrive at a quite different result.”

The Taiwanese should have applied to cross-examine Acting Security Bureau Secretary Timothy Tong (湯顯明) at the Court of First Instance, Ma says.

Ma also says Ho, Tse, Wai & Partners should not have narrowed their request for documents from the government in July 2006 from all “relevant documents” to the documents that Tong and Commander of the Airport Division Choy Tak Po relied on to make statements to the court.

However, Ma ordered each side to pay its own court costs rather than making Chu and the other applicants pay the government’s legal fees. Ma says in the ruling that this is because of the government’s breach of candor.

In Hong Kong, which uses a common law system modeled on England’s (in which court precedent, not codified statutes, comprises the bulk of the law), Ma’s judgment could have lasting implications.

Considering the severity of the criticism, the ruling in the government’s favor is surprising, Ho said.

Ho called the ruling “disappointing,” but said the strength of the court’s position on candor in the ruling may still have potential for future judicial reviews.

“We look forward to using this judgment in future proceedings,” Ho said. “The judgment laid down certain benchmarks: The government should at least keep files until a case is complete [and they have] this duty of candor.”

“I hope this is intended to be a final warning to the government that next time they cannot expect to get away so easily,” he said. “But maybe this is just wishful thinking.”

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A PARTIAL TIMELINE OF EVENTS

Feb. 21 to Feb. 22, 2003

Eighty Taiwanese Falun Gong practitioners are denied entry to Hong Kong.

April 3, 2003

Four of these 80 apply for a judicial review at the Court of First Instance of the High Court of Hong Kong, alleging that they were discriminated against based on their religion.

2004 to 2005

The Hong Kong government submits statements to the court from senior Immigration Department, Airport Division and Security Bureau officials stating that the four applicants were denied entry to Hong Kong because they posed “security risks.” However, it does not provide any documents to support this assertion.

Nov. 21, 2005

In response to repeated requests from Ho, Tse,

Wai & Partners (HTW) (the law firm representing the four applicants) and from the court, the Department of Justice submits a list of documents related to the February 2003 incident to the court, but says these documents were all “destroyed in accordance with standard Immigration Department practice” on March 12, 2003, before the case reached court.

June 2006

HTW tells the court that relevant documents must exist elsewhere in the government’s files, because the statements from senior officials were submitted to the court in 2004 and 2005 — after the documents were allegedly destroyed. HTW asks the Department of Justice what the officials’ statements were based on.

July 2006

The Department of Justice responds that the statements were not based solely “on

those documents which [we] have already provided to [you] and no other documents or materials.” Later, the Court of Appeal will say this “suggested” that the officials relied on other documents that still existed when the statements were submitted. HTW asks that the department submit the documents that the officials based their statements on.

August 2006

The Department of Justice submits a letter saying that the officials’ statements were not based on documents that have not been submitted to the court. Later, the Court of Appeal will say “this was in fact quite the opposite” of what the department said a month earlier.

March 2007

The case closes at the High Court’s Court of First Instance. The court expresses dismay that

the government failed to submit documents related to the case, but rules in the Immigration Department’s favor. The “lack of substantive contemporary documents” was “of concern,” the judgment says. The “reasonable man on the street would probably have difficulty accepting that Government would have destroyed all of its records going to why some 80 people were refused entry to Hong Kong ...”

March 2009

Hearings begin at the Court of Appeal of the High Court.

September 2009

The Court of Appeal rules in favor of the government. The court concludes that the government violated its legal obligation to be honest and forthcoming with evidence when government actions are being reviewed by the judiciary.

“Regretfully ... the duty of candour has been breached,” the judgment says. However, the court also finds that the Taiwanese applicants should have pressed the government further for documents related to the case and applied to cross-examine certain officials. Based on the latter conclusion, the court dismisses the applicants’ appeal and says the government “can consider [itself] extremely fortunate” that it has won despite violating the duty of candor.

Source: Court of Appeal of the High Court of Hong Kong’s Sept. 4, 2009, judgment in *Chu Woan-chyi and Others v. Director of Immigration*. This judgment, as well as the Court of First Instance judgment, can be read online on the Hong Kong Judiciary Legal Reference System Web site: legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp. The case number is CACV 119/2007.