7/83

No. 16 of 1982

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN:

THE ATTORNEY GENERAL OF HONG KONG

Appellant

- and -

NG YUEN SHIU (also known as NG KAM SHING)

Respondent

(and Cross-Appeal)

CASE FOR APPELLANT ON RESPONDENT'S CROSS APPEAL

1. The Removal Order dated 31st October 1980, the subject matter of these proceedings, was made pursuant to the terms of section 19(1)(b)(ii) of the Immigration Ordinance Cap. 115.

2. By the Immigration (Amendment) (No. 2) Ordinance No. 62/80 section 19 of the Immigration Ordinance was repealed and replaced by the following:-

> "19. (1) A removal order may be made against a person requiring him to leave Hong Kong -
>
> (a) subject to subsection (3), by the Governor if it appears to him that that person is an undesirable immigrant who has been ordinarily resident in Hong Kong for less than 3 years; or
>
> (b) subject to subsection (2), by the D Director if it appears to him that that person -
>
> (i) might have been removed from Hong Kong under section 18(1) if the

time limited by section 18(2) had not passed; or

(ii) has committed or is committing an offence under Section 38(1) or section 41, whether or not that person has been convicted of such offence and whether or not the time within which any prosecution may be brought has expired.

(2) A removal order shall not be made under subsection (1)(b)(ii) against a person who has the right to land in Hong Kong by virtue of section 8(1).

(3) A removal order shall not be made under subsection (1)(a) against an immigrant who is a United Kingdom belonger except after consideration by the Governor of the report of a Deportation Tribunal under section 23, unless the Governor certifies that the departure of the immigrant from Hong Kong is necessary in the interest of the security of Hong Kong or for political reasons affecting the relations of Her Majesty's Government in the United Kingdom with another country.

(4) A removal order made against a person shall invalidate any permission or authority to land or remain in Hong Kong given to that person before the order is made or while it is in force.

(5) Where the Director makes a removal order he shall cause written notice to be served as soon as is practicable on the person against whom it is made informing him -

(a) of the ground on which the order is made; and

(b) that if he wishes to appeal he must do so by giving to an immigration officer or immigration assistant written notice of his grounds of appeal and the facts upon which he relies within 24 hours of receiving the notice of the order.

(6) In this section "Director" means the Director of Immigration or the Deputy Director of Immigration."

3. The Appellant submits that the Respondent's cross appeal should be dismissed with costs for the following amongst other

R E A S O N S

(a) When the Respondent entered Hong Kong illegally in 1967 he committed an offence under section 3 of the Immigration (Control and Offences) Ordinance Cap. 243. That offence was a continuing offence. The judgment of Leonard J.A. in Li Tim-fuk v. Queen /1981/ H.K.L.R. 122 on the virtually identically worded section 46 of Cap. 115 is to be preferred to the English decisions of Singh (Gurdev) v. Queen /1973/ 1. W.L.R. 1444 and Grant v. Borg which were based on different statutory provisions and construed with the aid of reference to earlier legislation in the same series.

(b) The offence committed by the Respondent continued until the 1st April 1972 whereafter he committed a continuing offence under section 38 of Cap. 115 which came into force on the said date.

(c) If, contrary to the Appellant's submissions the Respondent's offence was no longer liable to prosecution 12 months after he entered and remained without permission his presence in Hong Kong was still unauthorised and thus unlawful. The Respondent acquired no legal right to remain in Hong Kong merely because he could no longer be prosecuted by reason of his presence not being detected prior to the expiry of the 12 month limitation period. Similarly the Director of Immigration's permission cannot be presumed merely because the Respondent escaped detection. As Lord Bridge stated at p. 646 of Grant v. Borg:

> "It is right to add that these conclusions with respect to criminal liability under s.24 in no way affect the liability of the immigrant who remains beyond the time limited by his leave to deportation ....."

(d) By 1972 the Respondent had acquired no vested right to remain in Hong Kong.

(e) When Cap. 115 came into force on the 1st April 1972 the Respondent was not and has never since been a "Chinese Resident". He had not been in Hong Kong for 7 years. Neither was he ordinarily resident (see section 2(4)). To be ordinarily resident a person has to be lawfully ordinarily resident (see In re Abdul Manan /1971/ 1 W.L.R. 859; R. v. Secretary of State for Home Department ex parte Margueritte the Times July 20, 1982 and Cheung Kam-ping v. Attorney General /1980/ H.K.L.R. 602).

(f) After the introduction of Cap. 115 the Respondent committed and continued to commit an offence against Section 38(1) thereof.

(g) By the time the Respondent was removed on the 19th March 1976 he was still in Hong Kong without permission and was not ordinarily resident there.

(h) Even if (which is not admitted) the Respondent as from April 1975 ceased to be liable to prosecution by virtue of section 46(2) of Cap. 115, nevertheless his status was never that of a Chinese resident. He has not been in Hong Kong lawfully for 7 years.

(i) Section 19 of Cap. 115 did not retrospectively turn the Respondent's lawful presence in Hong Kong into an unlawful one. His presence in Hong Kong has always been unauthorised and thus unlawful.

(j) The 1976 Removal Order was validly made. There is no warrant for limiting the scope of section 19(1)(b) of Cap. 115 to a situation where the Respondent could have been prosecuted for an offence. In any event, if the Appellant is correct the Respondent was committing a continuing offence.

(k) The Appellant submits that the Court of

Appeal in Cheung Kam-ping v. Attorney General was wrong to hold that the offence created by section 38(1)(b) of Cap. 115 was a non-continuing offence. The Appellant submits that the later decision of Li Tim-fuk v. Queen is to be preferred on this point.

(1) The Appellant submits that the Court of Appeal in Cheung Kam-ping v. Attorney General was correct in holding that periods of unlawful residence in Hong Kong did not count in computing periods of ordinary residence for the purposes of section 8 of Cap. 115 (as defined in section 2(4)).

NEIL KAPLAN, Q.C.

BARRIE BARLOW
(Counsel for the Appellant)

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(and Cross-Appeal) Respondent

CASE FOR APPELLANT ON RESPONDENT'S CROSS APPEAL

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