THE THORNY ISSUE OF PERMANENT RESIDENCE FOR HONG KONG’S FOREIGN DOMESTIC WORKERS

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Introduction

On 30 September 2011, Hong Kong’s Court of First Instance (CFI) delivered a groundbreaking judgment in which it was held that the government’s refusal to entertain applications for permanent residence from foreign domestic workers was unconstitutional. This decision was widely celebrated by migrants and their advocates, who heralded the decision as a breakthrough in challenging a visa regime that treats migrants from less wealthy countries as disposable labour. The decision also sparked strong nativist sentiments from various sections of Hong Kong society, notably the government, who promptly lodged an appeal against the ruling. On 28 March 2012, the Court of Appeal (CA) overturned this judgement, with the case now expected to proceed to Hong Kong’s Court of Final Appeal (CFA), or even the National People’s Congress in Beijing should the CFA rule against the government. This article introduces the background to this controversial legal battle, briefly examines the courts’ reasoning and argues that maintaining the current blanket ban on the settlement of foreign domestic workers is both disproportionate and inherently discriminatory.

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Background

Since the 1970s foreign domestic workers, mainly women from the Philippines, Indonesia and Thailand, have played a significant role in Hong Kong’s development. Government statistics show that their number has increased steadily from just 881 in 1974 to 285,681 by the end of 2010.¹ These workers contribute enormously to the city’s prosperity and social fabric. In addition to freeing up Hong Kong women to participate in the local labour market, foreign domestic workers shoulder a significant proportion of childrearing and elderly care responsibilities, which would otherwise fall on publicly-funded services. A study carried out by the Asian Migrant Centre (AMC) in the mid 2000s estimated that foreign domestic workers contribute at least HK$ 13.8 Billion annually to the local economy – almost one percent of the territory’s GDP.²

Whilst Hong Kong is one of the few jurisdictions in Asia to protect the labour rights of domestic workers, advocates have long called for the reform of the territory’s restrictive immigration polices. Under the government’s prevailing “Foreign Domestic Helper Scheme”, migrants are treated as guest workers with no right to sponsor dependents or apply for permanent residence, irrespective of their length of stay. Furthermore, they must leave Hong Kong within two weeks, in the event that their employment is prematurely terminated. These restrictions are in stark contrast to the

¹ These were the figures relied on by the Hong Kong government in the recent litigation. See Vallejos v Commissioner of Registration unreported HCAL 124/2010, 30 September 2011, CFI, para. 37.
relatively relaxed government’s policies towards other expats, who are not subject to the “two week rule” and routinely receive permanent residency after seven years’ stay.³

Legal challenge

In 2010, Ms Evangeline Vallejos, a foreign domestic worker, challenged the constitutionality of the immigration policy that excludes her from permanent residence. Ms Vallejos, a Philippines national who has been employed in Hong Kong as a domestic worker since 1986, is in many ways typical of her generation. Having lived and worked in Hong Kong for much of her adult life she has made the city her home, yet has no right to remain beyond her standard two-year employment contract, which may or may not be renewed and can be terminated at short notice.

Having been thwarted in her attempts to register for a permanent identity card, Ms Vallejos argued in an application for judicial review that the Immigration Ordinance provision,⁴ which effectively bars all domestic workers from qualifying for permanent residence contravenes the territory’s Basic Law.⁵ The CFI agreed, holding that foreign domestic workers may be considered as “ordinarily resident” in Hong Kong and thus eligible to acquire permanent residence.

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³ See n 1 above, para. 40, which contrasts the visa regime for foreign domestic workers and other foreign nationals admitted under the government’s general employment policy.
⁴ Section 2(4) of the Immigration Ordinance states that “a person shall not be treated as ordinarily resident in Hong Kong while employed as a domestic helper who is from outside Hong Kong”.
⁵ The Basic Law is Hong Kong’s primary constitutional document under the “one country two systems” arrangements since the territory was returned to Chinese sovereignty in 1997. Article 24(2)(4) specifies *inter alia* that persons may qualify for permanent residents if they are “not of Chinese nationality who have entered Hong Kong with valid travel documents, have *ordinarily resided* in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region” [emphasis added].
This ruling sparked heated debate from both sides of an already polarised society. Some legal scholars criticised the CFI’s judgment for misapplying the ordinary residence test, whilst the government unsuccessfully attempted to stay execution of the court’s order. Meanwhile, a number of politicians made incendiary statements predicting that Hong Kong would soon be swamped by up to half a million domestic workers and their dependents, placing an unbearable burden on public services and increasing competition for grassroots jobs.

These claims were conveniently left to hang by government officials but have been strongly refuted by migrant rights activists. Based on anecdotal evidence, AMC has observed that many foreign domestic workers who would likely qualify for permanent residence have no intention to bring their dependents to Hong Kong due to the high cost of living. In any case, assuming the Immigration Department continues to apply a housing and maintenance test for workers wishing to sponsor their dependents, very few are likely to have their visa applications approved.

In any case, the debate surrounding the socio-economic and political implications of a change in settlement policy is immaterial as the legal battle currently before the courts turns solely on the interpretation of the term “ordinarily resident”. In a

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7 See Vallejos v Commissioner of Registration unreported HCAL 124/2010, supplementary decision, 28 October 2011, CFI.

disappointing ruling in which the judge presumed to speak on behalf of Hong Kong society, the CA overturned the decision of the lower court and held that foreign domestic workers could not be considered “ordinarily resident”. The court reasoned that their “stay in Hong Kong is for a very special, limited purpose from society’s point of view”.  

It further held that: “Whether compared with the abode of a local person or with the residence of a foreigner who has been given a work visa to come and take up employment here, a foreign domestic helper’s stay is highly regulated, ‘out of the ordinary’, exceptional or ‘far from regular’, particularly from society’s perspective”.  

The court’s resort to institutionalised notions of difference among foreign workers holding different types of work permit serves only to artificially discriminate between foreign domestic workers and other expats. It is worth pointing out that expats are also only admitted to Hong Kong to work for very special, limited purposes. Under the Immigration Department’s current eligibility criteria, in order to work as a “professional” in Hong Kong applicants must also fill vacancies that “cannot be readily taken up by the local work force”. However, they face no similar restrictions obtaining permanent residence.

**Concluding remarks**

Hong Kong’s foreign domestic workers’ battle for permanent residence has highlighted the government’s double standards in its immigration policies. These policies and the

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10 Ibid., para. 117.

public’s polarised reaction to the courts’ conflicting rulings on the issue have only accentuated the city’s class and racial divides. One can only hope that Hong Kong’s Court of Final Appeal will uphold the CFI’s original ruling and allow foreign domestic workers the same rights enjoyed by other expat workers.