1997 H.C.M.P. No. 140

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

BETWEEN

DUONG QUOC QUAN Applicant

and

(1) THE DIRECTOR OF IMMIGRATION

(2) THE REFUGEE STATUS REVIEW BOARD Respondents

Before: The Hon. Mr. Justice Keith in Court

Date of Hearing: 29th April 1997

Date of Delivery of Judgment: 29th April 1997

J U D G M E N T

INTRODUCTION

The Applicant is an asylum-seeker from Vietnam. He came to Hong Kong seeking asylum here. He was refused refugee status by the Director of Immigration and the Refugee Status Review Board ("the Board"). He applied for leave to apply for judicial review of the decisions refusing him refugee status. He was granted leave to apply for judicial review by Stock J. on 13th February. However, he has since then accepted an offer that his case be re-considered by the Board. There is, therefore, no need for his application for judicial review to proceed.

That is not quite the end of the matter. Agreement has not been reached as to the order which should be made disposing of the case. In addition, the parties cannot agree what the proper order for costs should be.

THE FORM OF ORDER

The order which the Applicant seeks is an order that he be given leave to discontinue his application for judicial review pursuant to Ord. 21 r. 3 of the Rules of the Supreme Court. The order which the Respondents seek is an order that the Applicant's application for judicial review be dismissed.

I do not believe that I can make the order sought by the Applicant. That is because Ord. 21 r. 3 has no application to this case. Ord. 21 r. 3 applies only to actions (whether begun by writ or otherwise). Notwithstanding the definition of "action" in section 2 of the Supreme Court Ordinance (Cap. 4) (which applies unless the context otherwise requires), an application for judicial review is not an action. The fact that

Ord. 21 r. 3 does not apply to applications for judicial review is confirmed by a note in the Supreme Court Practice 1997, Vol. 1, para. 21/2-5/1 to the effect that Ord. 21 rr. 2-5 "apply only if the action was begun by writ or by originating summons". Indeed, Ord. 53 r. 9(5), which permits certain applications for judicial review to continue as if they were an action begun by writ, proceeds on the assumption that the original application for judicial review was not an action within the meaning of Ord. 21 r. 3.

However, that does not mean that the order sought by the Respondents does not have its problems either. The problem with the order which the Respondents seek is that it assumes that there has been either a decision by the court on the merits, or an acceptance on the part of the Applicant that he is not entitled to the relief sought. Neither of those assumptions are correct. The only reason why the Applicant is not proceeding with the case is because he is content with the offer of re-consideration of his case by the Board.

There is yet another problem which, in my view, applies to both the orders sought. The Board can only re-consider the Applicant's claim to refugee status if its earlier decision is treated as being of no effect. Technically, that can only be done if the court has quashed the Board's earlier decision by an order of *certiorari* or has declared that it was of no effect. However, the problem with that is that such an order again assumes either a decision by the court on the merits or an acceptance on the part of the Respondents that the Applicant was entitled to the relief sought. The Respondents for their part make no such concession. The reason why the Applicant was originally offered a re-consideration of his case by the Board was because a re-consideration of his case was thought to be less expensive and time-consuming than defending an application for judicial review.

The problem over the Board's power to re-consider the Applicant's claim without its previous decision being quashed or declared to be of no effect is not easily overcome. The Board's re-consideration of the claim can only in these circumstances be an extra-statutory concession granted to the Applicant. In order to give that extra-statutory concession legitimacy, the Board is prepared to undertake through Ms. Margaret Crabtree who appears on its behalf today to treat its earlier decision relating to the Applicant as of no effect.

Bearing all these considerations in mind, I have decided that the right course to take is simply to permit the Applicant to discontinue his application for judicial review. He does not need leave to do so since Ord. 21 r. 3 does not apply to his case. Once the Applicant has discontinued his application, there are no proceedings in which the court can make any further order (save as to costs). Accordingly, the order of the court is:

> "Upon the Applicant having accepted an offer to have his claim to refugee status re-considered by the Refugee Status Review Board,
>
> And upon the Applicant having for that reason discontinued his application for judicial review of the decisions challenged in his Notice of Application filed on 13th January 1997,
>
> It is ordered that there be no order on the Applicant's application for judicial review of those decisions."

There is one other matter which concerns Ms. Crabtree. It is said that the discontinuance of the application by the Applicant will not prevent the Applicant from subsequently reviving his challenge to the earlier decision of the Board. The doctrine of *res judicata* is said not to apply because there has not been a decision by the court on the merits. That

concern, however, can be met by a suitable undertaking from the Applicant which Mr. Nigel Kat on his behalf is prepared to give. The undertaking is that the Applicant will not hereafter seek to challenge by way of judicial review or otherwise the decisions challenged in the Notice of Application filed on 13th January 1997. The order I make, therefore, is subject to this undertaking and to the undertaking given by Ms. Crabtree to which I referred earlier.

COSTS

The Respondents' case on costs is beguilingly simple. They contend that the costs of the proceedings should be paid by the Applicant. Prior to the issue of the proceedings, the Applicant's solicitors had requested the Respondents to re-consider the Applicant's case. In due course, the Applicant was offered a re-consideration of his case by the Board. That offer was not accepted and these proceedings were issued. However, since that offer has now been accepted, the Respondents contend that the issue of these proceedings was entirely avoidable.

For his part, the Applicant contends that he was entitled to reject the offer of a re-consideration of his case by the Board since the Board was not prepared to accept certain legal principles identified by his solicitors in correspondence. The thinking behind that stance was this. The Applicant's case was that the Board had erred in law in rejecting his claim to refugee status. There would be absolutely no point in a re-consideration of his case if the Board was going to make the same errors. The fact that his case would be considered by a different panel of the Board made no difference. His insistence, therefore, that any re-consideration of his case be conditional upon the Board's acceptance of certain legal principles was

intended to prevent the Board from falling into error again. Since those advising the Board were not prepared to advise the Board to accept those principles (because to do so might be regarded as fettering its discretion), the Applicant had no alternative but to proceed with his application for judicial review, because the principles which he claims should be applied to his case could then be determined. As it is, the reasons why he has now decided to accept the offer of a re-consideration of his case by the Board (even without a statement of acceptance by the Board of the legal principles asserted on his behalf) are the likelihood of an extended period of detention and uncertainty over his future if a final decision in his case is not made before the resumption by China of sovereignty over Hong Kong.

In my judgment, there is considerable merit in both arguments - though since the Applicant is legally aided, and since all the legal costs of these proceedings come from public funds, this argument about costs has an air of unreality about it. As it is, the arguments are so evenly divided, in my view, that the correct order to make as to costs is that there should be no order as to costs, save for Legal Aid taxation of the Applicant's costs.

(Brian Keith)
Judge of the High Court

Mr. Nigel Kat, instructed by Messrs. Pam Baker & Co., for the Applicant
Ms. Margaret Crabtree, Senior Crown Counsel, for the Respondents