1997 A.L. No. 11

H E A D N O T E

Last-minute applications by Vietnamese returnees to restrain the Director of Immigration from removing them from Hong Kong - principles to be applied - practice to be adopted.

1997 A.L. No. 11

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

ADMINISTRATIVE LAW LIST

BETWEEN

(1) NGUYEN PHONG
(2) HOANG THI NAM
(3) NGUYEN THI LAN
(4) NGUYEN THI NHI
(5) NGUYEN THI TU
(6) MIN SAM MUI
(7) HUYNH VAN THUOT
(8) NGUYEN VAN MINH
(9) LE THI VAN
(10) NGUYEN MINH HUYEN
(11) DIN A UNG
(12) LAU CHAN MUI
(13) DIN VAN TAI
(14) DIN VAN NHI
(15) DIN SAM MUI
(16) DIN NGUYEN KIEU
(17) DIN MOC LAN
(18) DIN VAN NGUY
(19) NGO DUC THAT
(20) NONG KIEM PO
(21) DO THI KIM ANH
(22) NONG THANH HOAN — Applicants

and

THE DIRECTOR OF IMMIGRATION — Respondent

Before: The Hon. Mr. Justice Keith in Court
Date of Hearing: 10th April 1997
Date of Delivery of Judgment: 10th April 1997

JUDGMENT

INTRODUCTION

The history of these proceedings is set out in the judgment I delivered on 25th March. The Director of Immigration now wishes to be released from the undertakings which were offered on her behalf by counsel, and which were accepted by the court in lieu of an injunction restraining her from removing some of the Applicants from Hong Kong for the time being. She does not object to such an injunction being granted in its place, but only until such time as the court can consider, on what she calls "the core screening papers", whether the Applicants are likely to be granted leave to apply for judicial review of the decisions refusing them refugee status.

The thinking which lies behind this novel strategy applies to many returnees who are still in Vietnam, not just the Applicants. Mr. William Marshall Q.C. for the Director of Immigration candidly admits that the Direction of Immigration is using the cases of the Applicants as a convenient vehicle for the court to address the very real concerns which she has about last-minute applications by returnees to prevent their removal from Hong Kong.

LAST-MINUTE APPLICATIONS

Last-minute applications for injunctions by Vietnamese returnees to restrain the Director of Immigration from removing them from Hong Kong have been on the increase in recent months. That is because the rate of repatriation has increased quite dramatically. The Vietnamese authorities have been clearing returnees for return in greater numbers than before, and the number of flights to Vietnam has correspondingly increased. In these circumstances, last-minute orders preventing a returnee's removal from Hong Kong play havoc with the arrangements which the Director of Immigration has made for their orderly repatriation to Vietnam. The Vietnamese authorities insist on being informed of the names of those returnees who are to be included on a particular flight. Accordingly, if a returnee is removed from the flight at the last minute as a result of a court order, his place cannot be filled by someone else. Revenue is lost as a result of seats on the flight being empty. Accordingly, the Director of Immigration is very reluctant to agree to a returnee being removed from a flight which he is scheduled to be on.

The Director of Immigration does not wish the momentum of the current pace of repatriation to slacken. She is committed to return as many returnees as she can. She believes that, by the end of April, virtually all the returnees who are going to be cleared for return by the Vietnamese authorities will have been cleared. She believes that last-minute applications of the kind which are being made are likely to increase, and that will have an adverse impact on the number of returnees who will be repatriated to Vietnam.

On the other hand, it has to be acknowledged that last-minute applications of this kind are likely to continue so long as the Director of

Immigration gives only a few days' notice of which returnees are going to be included on a particular flight. Mr. Marshall told me that the arrangements which have been made with the Vietnamese authorities prevent her from giving notice which is significantly longer than that. Moreover, the Director of Immigration is understandably reluctant to give longer notice. The longer the notice, the greater the number of returnees who may wish to apply for an injunction restraining their removal from Hong Kong.

NON-REMOVAL ORDERS

The basis on which orders preventing the Director of Immigration from removing a returnee from Hong Kong are sought is that the returnee wishes to challenge the decision refusing him refugee status. Since it is completely impracticable for that challenge to be mounted from Vietnam, the returnee seeks an order which has the effect of enabling him to remain in Hong Kong in the meantime. The courts have tended to decide whether such an order should be made by considering whether the challenge to the decision refusing the returnee refugee status has an arguable chance of success. If it has, an injunction will be granted. If it has not, an injunction will not be granted. Thus, in *Thoong Coc Duong* (CA 250/96), the Court of Appeal held that if a returnee has been granted leave to apply for judicial review of the decision which triggered the Director of Immigration's power of removal, the Director of Immigration should not be permitted to exercise that power of removal until the application for judicial review has been determined.

THE DIRECTOR OF IMMIGRATION'S PROPOSALS

The Director of Immigration has formulated a number of proposals which address how to get a speedy and informed resolution of the problem. The legality of most decisions refusing refugee status is apparent from "the core screening papers". They are:

(i) the notes made by the immigration officer who interviewed the returnee of what the returnee said in the course of his screening interview,

(ii) the reasons for the recommendation of the immigration officer to the Director of Immigration that the returnee be refused refugee status,

(iii) any submissions made to the Refugee Status Review Board ("the Board"),

(iv) a transcript of any evidence given to the Board, and

(v) the Board's reasons for refusing the returnee refugee status.

What the Director of Immigration proposes is as follows. She will assemble, for each family of returnees in Hong Kong, a bundle of the core screening papers. When she is informed that an application for leave to apply for judicial review is about to be made, the returnee's solicitors will be provided with that bundle as soon as possible. The court will also be provided with the bundle once the application has been filed, and a short *inter partes* hearing will take place. If the Board's decision refusing the returnee refugee status is based on the prevailing political climate in

Vietnam, or on an improvement in the conditions which the returnee can reasonably expect to face, the Director of Immigration will also provide copies of the materials on which the Board based that view.

If the judge grants leave to apply for judicial review, the Director of Immigration will not oppose an order restraining her from removing the returnee from Hong Kong. Indeed, the Director of Immigration is prepared to offer re-screening to any returnee who obtains leave to apply for judicial review of the decision refusing him refugee status. That concession would not apply to those who have already been re-screened. In their case, the proposal is that the grant of leave would result in the Director of Immigration applying for an expedited hearing of the substantive application. On the other hand, if leave to apply for judicial review is refused, the Director of Immigration will proceed to repatriate the returnee when she chooses. If it is proposed to appeal against the refusal of leave, the Director of Immigration proposes that the returnee should do so immediately. If leave is granted on appeal, the Director of Immigration will treat the returnee as if leave had been granted at first instance.

These proposals make sense to me. It is obviously sensible for applications for leave to apply for judicial review in these cases to be considered *inter partes* because anything else could be said to be unfair to the Director of Immigration. If leave is granted *ex parte*, the application for an injunction (which, being an application for interim relief, should only be granted after an *inter partes* hearing) will, by reason of the decision of the Court of Appeal in Thoong Coc Duong, have been decided on an *ex parte* basis. In any event, an *inter partes* hearing ensures that the court has the core screening papers, and any papers relating to "country conditions". It

should then be possible in most cases for the court to make an informed decision as to whether or not to grant leave.

I should add three caveats to this. First, one must at all times be on guard against turning this *inter partes* hearing into a mini-substantive hearing. Otherwise, one would be re-writing Ord. 53. Secondly, I cannot speak for other judges, and I cannot lay down a rule of practice for all cases. Accordingly, all that I am saying is that the proposals make sense to me. Thirdly, it may not be necessary for these proposals to apply to a case in which the judge has the core screening papers, the case does not turn on "country conditions", and the judge is satisfied that an *inter partes* hearing is likely to add nothing to his knowledge of the case or his understanding of the issues. In such a case, the judge may feel that an *inter partes* hearing is unnecessary - either because it is plain to him that leave should be granted, or because it is plain to him that leave should be refused.[*]

NON-REMOVAL ORDERS WHERE LEAVE HAS NOT BEEN SOUGHT

However, these proposals only address part of the problem. The problem relates not just to those cases in which applications for leave to apply for judicial review of the screening decisions are in the process of being made. The problem also applies to those cases in which the application for an order preventing the Director of Immigration from removing the returnee from Hong Kong is made before the application for leave to apply for judicial review of the screening decisions has been filed. The principles which the court has applied in such cases are as follows:

[*] This third caveat is a post-judgment addition.

(i) The application requires the court to strike the right balance between (a) the undesirability of interfering with the Director of Immigration's power to remove returnees when she chooses, and (b) the desirability of ensuring that the returnee's proposed challenge to the decision refusing him refugee status will not be frustrated by his removal from Hong Kong in the meantime.

(ii) In most cases, that balancing exercise requires the court to form a provisional view as to whether the proposed challenge has any prospect of success, i.e. whether leave to apply for judicial review is likely to be granted. If leave is likely to be granted, an order restraining the removal should be made. If leave is not likely to be granted, the order should not be made: *Do Manh Tuan v. The Director of Immigration* (HCMP 830/96).

(iii) The grant of legal aid to enable a returnee to challenge the decision refusing him refugee status does not by itself justify an order restraining his removal. The court should still consider whether leave to apply for judicial review is likely to be granted. That was decided in the present case.

(iv) If there is insufficient time for the court to consider whether leave is likely to be granted, the court may be forced to make an order restraining the returnee's removal, if only to buy time for an informed decision to be made: *Phung Hoan v. The Director of Immigration* (HCMP 288/97).

(v) There may be exceptional cases in which the order should not be made, even though the court has not formed a provisional view of the merits. An example was *Vo Thi Do v. The Director of Immigration* (HCMP 3434/96) in which 1,241 returnees sought to challenge the decisions refusing them refugees status, not on the basis of facts relating to their individual cases, but on the basis of legal arguments arising from facts common to all of them which could have been brought before the court years earlier.

I think that the Director of Immigration's proposals can be adapted for use in those cases in which an application for leave to apply for judicial review has not been filed. On being informed that an application for an injunction to restrain her from removing the returnee from Hong Kong is about to be made, she can still provide the returnee's solicitors and the court with copies of the core screening papers, and a short *inter partes* hearing can still take place. The only difference is that the judge is not considering whether leave should be granted. He is only considering whether leave is likely to be granted. For all practical proposes, I believe that the answer to both questions would be the same. The Director of Immigration's proposals as to what should happen in the event of leave being granted and leave not being granted would then apply, depending on whether the judge thought that leave was likely to be granted or not granted. Again, I cannot speak for other judges, and there is no question of my laying down a rule of practice. I have no power to do that. All that I am saying is that the Director of Immigration's proposals can suitably be adapted to meet the other kind of case which her proposals do not expressly address.

OTHER MATTERS

I should add that if these proposals were adopted by a judge in a particular case, they would not alter the existing practice in any significant way. In order to decide these last-minute applications, judges are considering the merits of the challenge to the underlying decisions refusing the returnee refugee status. The advantage of the proposals seems to me that the judge will always have the core screening papers, and the benefit of short submissions on behalf of the Director of Immigration, to enable him to consider the merits of the application in an informed way.

Finally, I do not actually think that there is very much in the Director of Immigration's proposals with which those who are concerned for the rights and welfare of Vietnamese returnees have cause to challenge. They want time to be able to place the relevant materials before the court, and they understandably say that the lack of notice to them makes that difficult. Mr. Marshall hopes to meet that concern by increasing the notice to one week. There may not be time for a returnee who is refused an injunction - either because he is refused leave, or because the judge decides that leave is unlikely to be granted - to appeal to the Court of Appeal, but I fear that that is going to happen whatever arrangements are in place. In my view, the real problem is the one which has been there all the time, and that is to find a judge with sufficient time to consider the merits of the case properly.

THE CASES OF THE APPLICANTS

I now turn to the cases of these Applicants. The Director of Immigration offered her undertaking in the present case in lieu of the injunction which I would otherwise have granted. She now wishes to be

released from that undertaking so that there is no technical impediment to any appeal from the order which I would otherwise have made. I am prepared to release her from that undertaking, provided that in its place there is substituted the injunction which I would otherwise have made. That is where the problem lies. The Director of Immigration wants the injunction to continue only until the court can decide, on the core screening papers, whether the Applicants are likely to be granted leave to apply for judicial review of the screening decisions. The injunction which I would have granted would have continued until the applications for leave to apply for judicial review of those decisions have been determined. In order to ensure that the Applicants did not delay in making those applications, undertakings were given on their behalf that they would apply for leave to apply for judicial review of those decisions within 14 days of (a) the issue of legal aid certificates for that purpose, or (b) the refusal on the part of the Director of Immigration to agree to their re-screening, whichever was the later.

The Applicants have now all been issued with legal aid certificates. They were issued on 22nd March, and faxed to their solicitors on 25th March. The 14-day time limit for the filing of the applications for leave to apply for judicial review will therefore begin to run from the day when the Director of Immigration refuses re-screening. Accordingly, there is, in the case of those Applicants in respect of whom the undertaking given by the Director of Immigration on 24th March related, a time-table which has already been laid down with which I am not inclined to interfere. That is not to say that I would make similar orders in other cases. Now that I have had the benefit of a clear expression of the Director of Immigration's concerns, and a clear set of proposals to overcome the problems which last-

minute applications of this kind raise, I for my part would be prepared to proceed on the basis of these proposals, subject, of course, to the proviso that it would always be open to the court to depart from these proposals in an appropriate case.

For these reasons, therefore, I release the Director of Immigration from the undertaking which she gave through counsel on 24th March, but in its place I make an order restraining her from removing the relevant Applicants, A1-A5, A6 and A11-A18, from Hong Kong until their applications for leave to apply for judicial review of the decisions refusing them refugee status have been determined. The undertakings given by Mr. Matthew Gold on 24th March on behalf of all the Applicants naturally remain in place.

Finally, I do not think that the eight other applicants need be treated in the exceptional way as the 14 Applicants to whom the Director of Immigration's undertaking related. I made no order in their cases, and for that reason their cases are in my opinion no different from any other returnee awaiting his repatriation to Vietnam.

(Brian Keith)
Judge of the High Court

Mr. Philip Dykes Q.C., instructed by Messrs. Pam Baker & Co., for the Applicants

Mr. William Marshall Q.C. and Ms. Joyce Chan, of the Attorney-General's Chambers, for the Respondent