1997 A.L. No. 80

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ADMINISTRATIVE LAW LIST

BETWEEN

TRAN THANG LAM
and OTHERS Applicants

and

THE DIRECTOR OF IMMIGRATION Respondent

Before : The Hon. Mr. Justice Keith in Chambers
Date of Hearing : 15th December 1997
Date of Delivery of Judgment : 15th December 1997

J U D G M E N T

This is an application for the production for inspection of documents in a pending application for judicial review. The documents which the Applicants want the Respondent to produce for inspection are the

documents referred to in the two affirmations of Choy Ping Tai . These documents are said be relevant to three issues which the application for judicial review is said to raise:

(i) Was it open to the Respondent to conclude, on the material before her, that the Applicants had settled in China before coming to Hong Kong?

(ii) If so, was it open to the Respondent to conclude, on the material before her, that the Applicants, if they were returned to China, would (a) be protected against *refoulement* to Vietnam, and (b) be "treated in accordance with basic recognized human standards"?

(iii) Did the Respondent afford the Applicants a proper opportunity to have their claims to be resettled in a country other than China considered?

The Applicants' summons for production of documents for inspection did not identify the particular classes of documents which should be produced for inspection. However, those classes have now been identified in the Applicants' skeleton submissions prepared for the hearing. Those classes fall into four categories, and it is necessary for me to deal with each in turn.

(i) *Return to China*. By August 1994, 502 persons classified as ECVIIs remained in Hong Kong. They had not been returned to China because the Chinese authorities had not been able to identify them from the particulars which had been supplied. These ECVIIs were discussed at meetings which took place in March 1994 and March 1995 between officers of the Immigration Department and the Chinese authorities. The production of the minutes of those meetings is sought. I decline to order their production. Those meetings related to how the return to China of the ECVIIs should be effected, not how they had been treated in the past or how they would be treated in the future.

(ii) *Resettlement overseas*. In May 1997, the Refugee Co-ordinator began to explore the possibility of the resettlement overseas of the ECVIIs still in Hong Kong. The evidence is that the local consulates of the countries concerned informed the Refugee Co-ordinator that they were not prepared to accept their resettlement. The one exception was France whose consulate indicated that it required more information about the family concerned. The production of what are presumed to be the letters from the various consulates is sought. I decline to order their production. Those letters, if they exist, related to whether resettlement overseas was possible, not to whether the Applicants' claims to be resettled in a county other than China were properly considered.

(iii) *Country conditions*. The evidence reveals that the immigration officers who interviewed the Applicants were trained in country conditions, i.e. the conditions prevailing in China about the way in which ECVIIs had been treated in the past. The Applicants originally sought production of any documents which set out these country conditions.

However, Mr. Philip Dykes S.C. for the Applicants no longer argues that their production is necessary, because Mr. Choy has set out in his affirmations in these and earlier proceedings the extent of his knowledge of country conditions, on the basis of which the immigration officers received their training.

(iv) *The screening documents*. This is the category of documents with which I have had the most difficulty. Ten of the Applicants have filed detailed affirmations setting out their treatment in China. They claim that their treatment in the past shows they had never settled in China, and is a strong indication that, if they were returned to China, they would not be treated in accordance with "basic recognized human standards". However, what they asserted in their affirmations is not the point. What is to the point is what they said in their screening interviews with immigration officers, and in any written statements they made which were produced to the Immigration Department. That is deposed to at some length by Mr. Choy in the evidence filed on behalf of the Respondent. Indeed, it was said that what had been said at these interviews and in those statements was what caused the Respondent to conclude they should be returned to China.

However, what Mr. Choy has done has been to *summarise* the claims made by the Applicants rather than to produce the primary documents themselves, i.e. the notes of the screening interviews and the statements submitted to the Immigration Department. Mr. Dykes argues that the Applicants are entitled to the production of the primary documents on which the summaries were based, in order to see whether the summaries are accurate. If the summaries are found to have been accurate, no harm will have been done by their production. If the summaries are found to have been

inaccurate, the court will have been saved from deciding the case on the erroneous assumption that the summaries were accurate.

For his part, Mr. William Marshall S.C. for the Respondent is worried that an exercise to check the accuracy of the summaries will turn into an exercise to search for any other grounds on which to attack the decisions challenged. I agree, as does Mr. Dykes, with Mr. Marshall that that would be an impermissible "fishing" expedition, but I do not think that it would be right for me to deny the Applicants the production of the screening documents for inspection simply because what Mr. Dykes claims to be a legitimate exercise (to check for inaccuracies) could develop into the illegitimate exercise of fishing for possible additional arguments.

I was initially attracted to Mr. Dykes' argument about the need to check for inaccuracies, but in the end Mr. Marshall has persuaded me that the production of the screening documents for inspection should not be ordered. In *R. v. Secretary of State for Home Affairs ex p. Harris* (unreported, 10th December 1987), the Court of Appeal in England held that an applicant for judicial review is not entitled to go behind an affidavit in order to seek to ascertain whether it is correct or not, unless there is some material available outside that contained in the affidavit to suggest that in some material respect the affidavit is not accurate. That statement of the law was approved and adopted in *R. v. Secretary of State for the Environment ex p. London Borough of Islington* [1992] C.O.D. 67. There is nothing in the present case which suggests at present that Mr. Choy's summaries of the screening documents are inaccurate. If it subsequently transpires that there is material which suggests that there are material inaccuracies in his summaries, I would have little hesitation in ordering the production of the screening documents for

inspection. At present, however, no such potential inaccuracy is apparent. For these reasons, the production of the screening documents for inspection cannot be ordered.

That, I think, disposes of the various classes of documents to which this application relates, and this application must accordingly be dismissed.

(Brian Keith)
Judge of the Court of First Instance

Mr. Philip Dykes S.C., and Mr. Matthew Chong, instructed by Messrs. Pam Baker & Co., for the Applicants.

Mr. William Marshall S.C. and Miss Joyce Chan, of the Department of Justice, for the Respondent.