1997 A. L. No. 45

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

VOONG A NHI Applicant

and

THE DIRECTOR OF IMMIGRATION Respondent

Before: The Hon. Mr. Justice Keith in Chambers
and in Court
Date of Hearing: 23rd June 1997
Date of Judgment: 23rd June 1997
Date of Handing Down Reasons for Judgment: 27th June 1997

J U D G M E N T

INTRODUCTION

The Applicant is an asylum-seeker from Vietnam. She is 25 years old and single. She came to Hong Kong with members of her family. The whole of the family were refused refugee status by the Director of

Immigration and the Refugee Status Review Board. They are now awaiting repatriation to Vietnam, though an elder sister of the Applicant has already been returned to Vietnam with her husband.

The complication is that the Applicant's youngest sister, who is 6 years old, is suffering from a condition which requires monthly blood transfusions. Without them, she may not survive. Medical facilities in Vietnam are said to be such that she will not be able to receive the necessary transfusions there now or in the foreseeable future. In those circumstances, the UNHCR has been examining the possible alternatives to repatriation for the child and her family. It is looking at a "durable solution" for them. The Director of Immigration has acknowledged that she has no plans to repatriate the child's parents or their other minor children pending the finding of a durable solution for the family.

However, since the Applicant is not a minor, the Director of Immigration proposed to remove her from Hong Kong on 24th June. Accordingly, on 23rd June, the Applicant sought leave to apply for judicial review of the decision to remove her before a durable solution for the family is found, and applied for an injunction to prevent the Director of Immigration from removing her from Hong Kong in the meantime. I heard that application in chambers on 23rd June. I dismissed it, but said that I would give my reasons for doing so later. That I now do.

THE UNHCR REQUEST

On 10th June, a meeting took place between officials of the UNHCR and officers of the Security Branch and the Immigration

Department. What was agreed at that meeting was set out in a letter dated 20th June from Mr. Jean-Noel Wetterwald, the UNHCR's Chief of Mission in Hong Kong, to the Secretary for Security. The letter records that it had been agreed "between UNHCR and the Government that nuclear family members of medical hold cases would not be repatriated".

It is important to note that it was not agreed that all family members of medical hold cases would not be repatriated. The agreement related only to nuclear family members. In the context of a child who is on "medical hold", that has to be construed as a reference to the child's parents and the child's brothers and sisters who are still minors. Mr. Peter Barnes for the Applicant did not suggest otherwise: the letter of 20th June requested the postponement of the Applicant's repatriation "although" she was not a minor.

Mr. Barnes' instructions, however, were that despite that it had been agreed at the meeting that the Applicant would not be repatriated. Those instructions came from Mr. Wetterwald, but since Mr. Wetterwald was not at the meeting, he was necessarily going on what he had understood to be the position from his officials. On the other hand, Mr. William Marshall Q. C. for the Director of Immigration told me that his instructions were very different. His instructions were that at the meeting it had been agreed that, since the Applicant was not a minor, there was no bar to her repatriation. Those instructions came from Mr. Choy Ping Tai, the Assistant Director of the Vietnamese Refugees Branch of the Immigration Department, who was actually at the meeting.

I have no real alternative but to proceed on the basis that Mr. Marshall's instructions are correct. His instructions, unlike those of Mr.

Barnes, were based on the recollection of someone who was present at the meeting. Moreover, his instructions are consistent with the agreement in principle reached at the meeting of 10th June. If it was agreed in principle that people like the Applicant could be repatriated, it does not make sense for there to have been a separate agreement that, despite that, the Applicant should not be repatriated.

The request in the letter of 20th June for the postponement of the Applicant's repatriation was refused. It is said that the refusal of such a request was without precedent. That assertion was based on what Mr. Barnes was told by one of the UNHCR's officials who was present at the meeting on 10th June. In the light of that, para. 17.1 of the Notice of Application for leave to apply for judicial review reads:

> "Requests by the U. N. for Vietnamese to be put on hold for return have always been complied with by the Hong Kong Government. The view and wishes of the UNHCR, as the principal body charged with the welfare of the Vietnamese asylum-seekers, should and have always carried decisive weight. Having always acceded to prior requests of the UNHCR of this nature, there is no reason why the Director should fail to agree with their request this time. The Director is treating this case as different from all other cases, and is acting irrationally in doing so."

I do not think that this argument is an arguable one for two reasons:

(i) Mr. Barnes told me that the UNHCR did not normally follow up such requests. It was simply <u>assumed</u> that all such requests had been granted in the past. That is not a sufficient basis to assert that all such requests

had in fact been granted, especially as Mr. Marshall told me that that was strongly disputed, that there were cases in which such requests had been made, but that in some of these cases the request had been refused after discussion with UNHCR officials.

(ii) Even if such requests had always been granted in the past, the undisputed fact was that an agreement had been reached on 10th June as to how such cases should be handled in the future. Since it was proposed to treat the Applicant according to the terms of that agreement, the fact (if it be the case) that such requests had always been granted in the past was immaterial.

THE DURABLE SOLUTION

Is it arguable that it was *Wednesbury* unreasonable for the Director of Immigration to decide to remove the Applicant from Hong Kong before a durable solution for the whole of the family could be found? I do not think that that is arguable. The only durable solutions are the settlement of the family in a third country, or the family being permitted to remain in Hong Kong. The prospects of the settlement of the family in a third country are not good. I can take judicial notice of the difficulties in finding third countries willing to accept families who had (unlike the

Applicant's family) been declared refugees, and the additional difficulty in finding a third country which would do so knowing that it would be committing itself to costly medical treatment for the Applicant's sister. In those circumstances, it may be that the only realistic durable solution is the integration of the family in Hong Kong, but it is not likely that the whole of the family would be permitted to remain. It is likely that the only members of the family who would be permitted to remain would be the Applicant's parents and their minor children.

In this context, I do not think that the Applicant can rely on the principle of family unity. As paras. 181-188 of the Handbook on the Procedures and Criteria for Determining Refugee Status issued by the UNHCR make clear, the principle only applies to family members of persons who have been declared refugees, and in any event it applies only to the minor family members of refugees.

FAILURE TO TAKE RELEVANT CONSIDERATIONS INTO ACCOUNT

It is contended on behalf of the Applicant that the Director of Immigration failed to give adequate consideration to the plight of the Applicant on her return to Vietnam. She has no financial means of support, and since she is to be returned alone she will not have the support of other members of her family. It is not good enough, so it is said, for the Director of Immigration to refer to the repatriation of her elder sister: the Applicant has not heard from her sister, and even if she located her sister her sister might not be able to accommodate her. Moreover, it is said that the Director of Immigration failed to give adequate consideration to the impact

of the Applicant's removal from Hong Kong on the other members of her family in Hong Kong. They would be deprived of her support and the help she gives in looking after her youngest sister.

I cannot go along with this argument. It is tantamount to saying that the Director of Immigration would have to consider the personal circumstances of all asylum-seekers who had been refused refugee status before deciding whether to effect their removal from Hong Kong. In any event, the letter which the Secretary for Security wrote to Mr. Wetterwald on 20th June in reply to his letter shows that these considerations were taken into account.

CONCLUSION

It was for these reasons that I concluded that leave to apply for judicial review of the decision to remove the Applicant from Hong Kong should be refused, and that the Director of Immigration should not be restrained from removing her until a durable solution for the whole family could be found.

Finally, the hearing on 23rd June was in chambers. It should have been in court, but I did not know the nature of the application until a few minutes before it was made. Since the Applicant was not legally aided, and since Mr. Barnes was appearing for her on a *pro bono* basis, Mr. Barnes

could not have appeared for her if the application had been made in court. I have tried to make up for that by handing down these reasons in court.

(Brian Keith)
Judge of the High Court

Mr. Peter Barnes, of Messrs. Pam Baker & Co., for the Applicant.

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