1997 M.P. No. 16

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

BETWEEN

DIEP HOAI SUNG
AND 26 OTHERS Applicants

and

(1) THE DIRECTOR OF IMMIGRATION
(2) THE REFUGEE STATUS REVIEW BOARD Respondents

Before : The Hon. Mr. Justice Keith in Court

Date of Hearing : 3rd January 1997

Date of Delivery of Ruling : 6th January 1997

R U L I N G

INTRODUCTION

The Applicants come from Vietnam. There are 27 of them in all. They consist of four families. The heads of the families all claim to have served in, or in conjunction with, the U.S. Special Forces prior to North Vietnam's military victory over South Vietnam in 1975. As a result, they claim that they and their families were persecuted. Eventually, in 1991, they fled to Hong Kong. They applied for refugee status. They were all refused refugee status, and they have been detained since then pending their repatriation to Vietnam. The Director of Immigration proposes to include the Applicants on a flight for persons to be repatriated to Vietnam under the Orderly Repatriation Programme which is scheduled for tomorrow.

The Applicants now apply for leave to apply for judicial review of the decisions refusing to accord them refugee status. That application was filed on Friday morning. The Director of Immigration wished to be heard on whether leave should be granted. I decided to permit her to be heard, because the correspondence exhibited to the evidence filed on behalf of the Applicants shows that the Director of Immigration is concerned about the emerging practice of challenges to the screening process being made at the last minute when the asylum-seeker's removal from Hong Kong is imminent.

Broadly speaking, the Director of Immigration contends that there are two reasons why leave should not be granted. The first relates to the timing of this application. The second relates to the materials currently before the court on which the court is being asked to form a preliminary view of the merits. I propose to deal with each in turn.

THE TIMING OF THE APPLICATION

The decisions which the Applicants wish to challenge were made a long time ago - in 1992, 1993 and 1994. Despite that, the proceedings by which the Applicants seek to challenge those decisions were commenced only four days before the Applicants were due to be repatriated to Vietnam. Mr. William Marshall Q.C. for the Respondents, the Director of Immigration and the Refugee Status Review Board ("the R.S.R.B."), contends that the timing of this application shows that the Applicants are merely seeking to postpone their removal from Hong Kong. Their real purpose in bringing these proceedings is not to challenge the decisions by which they were refused refugee status. Their only aim is to put off the date when they have to return to Vietnam.

There is no doubt that if that was the Applicants' purpose in bringing these proceedings, leave to apply for judicial review of the decisions challenged should not be granted. Mr. Philip Dykes for the Applicants does not suggest otherwise. However, he asserts that the Applicants' purpose in bringing these proceeding is to prevent their repatriation to Vietnam, not to postpone it. Their challenge to the decisions complained of is a genuine one, and not merely an opportunistic response to their imminent removal from Hong Kong. The precise timing of the application was undoubtedly the consequence of the Applicants' imminent repatriation to Vietnam, but the fact of the application was not.

The Applicants' real reason for bringing these proceedings is a question of fact. I cannot determine that question on paper at this stage of the proceedings. The only question which it is proper for me to consider at

the moment is whether the timing of the application is such that it is plain beyond argument that the challenge to the decisions complained of is not a genuine one. On that question, it is quite impossible for me to say that the challenge is not a genuine one. The Applicants applied for refugee status when they arrived in Hong Kong. When their applications were refused by the Director of Immigration, they required the R.S.R.B. to review the question of their status. It would not have been at all surprising for the Applicants to try to challenge, by such means as were available, the confirmation by the R.S.R.B. of the decisions made by the Director of Immigration.

I do not overlook the enormous length of time which has elapsed since they were informed of the decisions of the R.S.R.B. However, there may be many reasons for that. I dealt with them at some length in my judgment in *Tran Van Tien v. Director of Immigration* (HCMP 3644/95). What I cannot say is that the delay is only attributable to decisions on the part of the Applicants not to challenge the decisions complained of. Apart from anything else, the Applicants' solicitors, Messrs. Pam Baker & Co., are well known for their interest in, and concern for, asylum-seekers from Vietnam who are detained in Hong Kong. With so many potential clients and with limited resources, they probably have difficult decisions to make as to which of their clients they should devote their energies to at any one time. It makes absolute sense for them to give priority to those who are in imminent danger of removal from Hong Kong.

THE MATERIALS BEFORE THE COURT

The core documents on which the legality of the decisions challenged is said to turn are the notes of the Applicants' interviews by the immigration officers, the reasons of those officers for recommending that they be refused refugee status, the transcripts of the Applicants' evidence to the R.S.R.B. (if the R.S.R.B. interviewed them), and the reasons of the R.S.R.B. confirming the decisions made by the Director of Immigration. Mr. Marshall argues that without those core documents the court cannot form a view as to whether the Applicants have arguable grounds for challenging the decisions complained of. Accordingly, Mr. Marshall asks that the application for leave be adjourned to enable the Respondents to file evidence exhibiting those documents. In the meantime, the Director of Immigration will undertake not to effect the removal of the Applicants from Hong Kong.

I make two preliminary observations about this argument:

(i) The head of one of the families (A23) has exhibited all the core documents to his affirmation. In his case, and in the case of the members of his family, I am today in as good a position as I would have been in if I had granted Mr. Marshall the adjournment for which he asks. Nor is it as if none of the core documents have been exhibited by the other Applicants. The heads of the other three families (A1, A5 and A13) have all exhibited to their affirmations the reasons of the R.S.R.B. in their cases.

> (ii) I accept that when an application for leave to apply for judicial review is being made inter partes, there is no jurisdictional bar on the respondent filing evidence. Indeed, in the U.K., respondents who appear on such an application often do file evidence: see Gordon, "Judicial Review: Law and Practice", 2nd ed., para.7-024, n. 84. However, I must guard against turning this application for leave into something which it is not. The whole purpose of requiring leave would be defeated if I went into the matter in any depth. What should be a preliminary sifting to discourage hopeless applications should not become a decision on the merits.

For my part, I am not convinced that the documents identified by Mr. Marshall are indeed the core documents in this case. Broadly speaking, the principal ground on which the Applicants seek to challenge the decisions complained of relates to the R.S.R.B.'s belief that the Vietnamese authorities no longer subject people with their backgrounds to the harsh and persecutory treatment of the past. The R.S.R.B. found that the authorities in Vietnam can be assumed to have "forgiven" the past service of the four principal Applicants in the U.S. Special Forces and the concealing of it when they fled from Vietnam. Having read the reasons of the R.S.R.B. in the four cases, there is, I think, little doubt that that was what the R.S.R.B. found in the cases of three of the four principal Applicants (A1, A13 and A23). The question then would be whether it was open to the R.S.R.B., on

the material which it had relating to "country conditions" in Vietnam, to reach that conclusion. The documents identified by Mr. Marshall as being the core documents in this case do not help on that issue at all.

In essence, therefore, this case is no different from *Tran Van Tien*. In that case, the principal ground on which the Applicants sought to challenge the decisions complained of related to the R.S.R.B.'s belief that ethnic Chinese who had been sent to Ha Tuyen Province would no longer be subjected to the harsh and discriminatory treatment they had received in the past. The R.S.R.B.'s belief was held not to be so "plainly wrong" as to justify the admissibility of evidence which suggested the contrary. That meant that it was very difficult for the Applicants to argue that they had a well-founded fear of being persecuted in the future. In effect, they had to argue that they had been so seriously persecuted in the past that their fear of being persecuted in the future continued to be well-founded, despite the change of attitude towards ethnic Chinese in general, and towards those who had been sent to Ha Tuyen Province in particular. It was only on that latter issue that the documents equivalent to what are said to be the core documents in the present case are relevant.

It follows that I can reach an informed view as to whether arguable grounds exist for challenging the decisions complained of without having seen all the documents which Mr. Marshall described as the core documents. There is, therefore, no need for me to adjourn the application for the documents to be produced.

SHOULD LEAVE BE GRANTED?

No evidence has been filed to support the Applicants' contention that the Board was wrong to believe that the Vietnamese authorities no longer subject people with the Applicants' background to the harsh and persecutory treatment of the past. That is simply what the Applicants assert. Nevertheless, the correctness of that assertion requires further investigation, and in my view leave to apply for judicial review should be granted for that reason.

There is a subsidiary ground on which the decisions challenged are attacked. It is claimed that the R.S.R.B.'s belief about the change of attitude towards past service with the U.S. Special Forces and its concealment was never put to the Applicants for possible rebuttal by them. I do not know whether the R.S.R.B. admits not putting that to the Applicants. I do not know what the Applicants' response would have been if it had been put to them (though if their affirmations are anything to go by, all that they could have done would have been to assert that it was not true). Nor do I know what weight the R.S.R.B. would have attached to those assertions. I can guess at what the answers to those questions might be, but nevertheless I believe the issue requires further investigation. I therefore grant leave to apply for judicial review of the decisions challenged for this reason as well.

REMOVAL FROM HONG KONG

When I decided to permit the Respondents to be heard on the application for leave, I directed that the hearing be held on Friday afternoon. That was because I knew that the Director of Immigration's policy is that once a Vietnamese asylum-seeker has obtained leave to apply

for judicial review of the decision to refuse to accord him refugee status, the Director of Immigration will not normally effect his removal from Hong Kong pending the substantive hearing of the application. That was based on what Mr. Marshall told me in *Do Manh Tuan v. Director of Immigration* (HCMP 830/96). I have quoted that in other cases frequently since then. Accordingly, the Applicants would only have come within the terms of that policy if, by tomorrow, I had granted them leave to apply for judicial review.

I mention this because Mr. Marshall tells me that the Director of Immigration's policy is not quite that. Her policy is to refrain from removing from Hong Kong asylum-seekers from Vietnam who have not been granted refugee status only if the court has ordered that they be not removed. I rather doubt whether the legality of that policy can survive the decision of the Court of Appeal in *Thoong Coc Duong v. Director of Immigration* (CA 250/96): at least two members of the Court, Litton V.-P. and Bokhary J.A., took the view that a stay on the removal of the asylum-seeker from Hong Kong logically followed from the grant of leave to apply for judicial review of the decisions which triggered the Director of Immigration's power of removal. It may be that, in the light of that decision, the Director of Immigration's policy will in future be in line with what I had previously thought it was.

Theses considerations do not affect the present case, though. That is because Mr. Marshall conceded that if leave was granted, it would be appropriate to make an order preventing the removal of the Applicants from Hong Kong until such time as their application for judicial review is disposed of. What he argued was that that order should take the form of an

interlocutory injunction. The one form which the order could not take was that of a stay under Ord.53 r.3(10)(a) of the Rules of the Supreme Court. The court's power under that rule to direct that the grant of leave should operate as a stay relates only to a stay "of the proceedings to which the application relates". Those words have been construed by the Court of Appeal in England not to be confined to judicial and quasi-judicial proceedings. In *R. v. Secretary of State for Education and Science ex p. Avon County Council* [1991] 1 QB 558, it was held that the language is wide enough to enable the court to impose a stay on "the process by which the decision challenged has been reached, including the decision itself". It remains to be seen whether that view of Ord.53 r.3(10)(a) is likely to survive the view expressed by the Privy Council in *The Minister of Foreign Affairs Trade and Industry v. Vehicles and Supplies Ltd.* [1991] 1 WLR 550. But even on a broad construction of Ord.53 r.3(10)(a), Mr. Marshall contends that its language is still not wide enough to enable the court to impose a stay, not merely on the proceedings in which the decisions challenged were made (i.e. the decisions of the R.S.R.B. refusing to accord the Applicants refugees status), but also on the exercise of a statutory power (i.e. the Director of Immigration's power to order the removal of the Applicants from Hong Kong) which is triggered by the decisions challenged.

I do not need to rule on that argument today. Mr. Dykes would be content for the order preventing the Applicants' removal from Hong Kong to take the form of an interlocutory injunction. I prefer to proceed by way of undertakings, but if the Director of Immigration is not prepared to undertake that the Applicants will not be removed from Hong Kong until such time as their application for judicial review has been determined or

otherwise disposed of, or until further order in the meantime, I shall grant the Applicants an interlocutory injunction to that effect.

Finally, I wish to add that I understand entirely the Director of Immigration's concern about last-minute applications of this kind. Because the application for leave to apply for judicial review is made when removal from Hong Kong is so imminent, the application is invariably accompanied by a claim for interlocutory relief to prevent the Applicants' removal from Hong Kong for the time being. Generally speaking, interlocutory relief should not be granted unless the respondent has had an opportunity of being heard on the point. That was underscored, without being expressly stated, in *R. v. Kensington and Chelsea Royal L.B.C. ex p. Hammell* [1989] QB 578. And yet the urgency of these last-minute applications means in many cases that even if the Director of Immigration is told of the proposed application, she may well not have sufficient time to instruct counsel to deal with the matter properly. Not surprisingly, she believes that the courts are being rail-roaded into granting interlocutory relief having heard one side only.

That concern is less tenable, of course, in view of the decision of the Court of Appeal in *Thoong Coc Duong*. Moreover, it should be recorded that the Director of Immigration has partially resolved the problem herself by instructing Mr. Marshall to write a letter to the Applicants' solicitors requiring them to produce it to the court when a last-minute application is being made. The letter is dated 14th December 1996. It enables the court to decide in general terms whether the Respondents should be heard. The Applicants' solicitors complied with that request in this case. However, the letter was "buried" in one of the exhibits, and I

confess that I might have overlooked it if a copy of it had not been faxed to my clerk by the Attorney-General's Chambers on Friday morning. I am not, of course, suggesting that it was buried deliberately, i.e. to conceal its existence while notionally complying with the duty of candour. I just think that it would be safer in future if the Applicants' solicitors brought this letter to the specific attention of the judge.

DIRECTIONS

Now that I have granted leave to apply for judicial review, there are three further directions I wish to give for the future conduct of this case:

(i) Consolidation. Two cases raising substantially the same issues as those which arise in this case have already been consolidated by consent. They are *Moc A Pao v. Director of Immigration* (HCMP 4280/96) and the *Thoong Coc Duong* case (HCMP 4308/96). They are due to be heard on 20th March. The hearing is estimated to last five days. My current view is that the present case should be consolidated with them. However, I have not heard full argument on the issue. I therefore propose to make an order for consolidation now, but I give the parties liberty to apply to set aside that order, provided that the application to set aside is lodged within the next seven days. I appreciate that the cases of all the individual Applicants have to be considered separately, but if that means that the hearing of so many cases together proves unwieldy, consideration can be given to treating some of the Applicants as "test" Applicants. If that was thought to be appropriate, I could consider that at a short hearing for directions.

(ii) Filing of Evidence. If the hearing of the case is to take place with the others on 20th March, the time for the Respondents to file their evidence will have to be abridged by a modest length of time. I direct that the Respondents file their evidence by 4.30 p.m. on Monday 25th February. Again, I have not heard argument on this issue. I therefore give the parties liberty to apply to vary that order, provided that the application to vary is lodged within seven days.

(iii) Delay. I have already touched on the question of delay in the context of the genuineness of the Applicants' wish to challenge the decisions complained of. But delay has another relevance, and that is whether, despite the delay, "there is good reason for extending the period within which the application [for leave should have been] made": see Ord.53 r.4(1). I repeat here what I said when granting leave to the Applicants in *Tran Van Tien*:

> "The circumstances of each of the Applicants are so different that this is not a case in which I can form a concluded view as to whether there has been delay on their part which disentitles them from relief. Accordingly, although I am extending the period within which the application for judicial review may be made, the issue of delay will have to be revisited. In these circumstances, I do not propose to treat section 21K(6) of the Supreme Court Ordinance (Cap.4) as limiting the extent to which effect could then be given to any delay on the part of the Applicants."

Accordingly, if I were to decide, on the material before me at the substantive hearing, that time should not have been extended, I shall not feel inhibited from refusing to grant relief on that ground, even if the case

does not fall within section 21K(6). I do not overlook the fact that in *Nguyen Tuan Cuong v. Director of Immigration* (PCA 28/96), the Privy Council found by a majority that delays of up to 5 years should not count against Vietnamese asylum-seekers held in closed detention centres. In reaching that conclusion, the Privy Council was clearly deferring to the local knowledge which Mortimer J.A. professed to have that "access to legal advice in closed camps must be limited". But in the final analysis, it is the circumstances of each Applicant which has to be considered, and it would, I think, be wrong to prevent the Respondents from relying on delay if the individual cases of the Applicants warrant it.

(Brian Keith)
Judge of the High Court

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

Mr. William Marshall Q.C., of the Attorney-General's Chambers, for the Respondents.