1996 No. MP 3434

IN THE SUPREME COURT OF HONG KONG
HIGH COURT
MISCELLANEOUS PROCEEDINGS

BETWEEN

VO THI DO and others — Applicants

and

THE DIRECTOR OF IMMIGRATION — Respondent

Before : The Hon. Mr. Justice Keith in Court
Date of Hearing : 14th October 1996
Date of Delivery of Judgment: 15th October 1996

J U D G M E N T

INTRODUCTION

The Applicants in these proceedings for judicial review are asylum-seekers from Vietnam. There are 1,241 of them. They all arrived in Hong Kong between 16th June 1988 and 2nd June 1989. Those dates are significant in the history of Hong Kong's treatment of asylum-seekers from Vietnam. 16th June 1988 was the date when the Government's new policy

of no longer automatically accepting asylum-seekers from Vietnam as refugees took effect. 2nd June 1989 was the date when the legislative amendments which provided for a new screening process to determine whether asylum-seekers from Vietnam should be treated as refugees came into operation. Asylum-seekers from Vietnam who arrived in Hong Kong between those dates fell between the two regimes. On the one hand, their arrival after 16th June 1988 meant that they were denied the automatic grant of refugee status. On the other hand, their arrival before 2nd June 1989 meant that they did not enjoy the sophisticated system established to distinguish those who were escaping for persecution from those who simply wanted a better and more prosperous life overseas.

The 1,241 Applicants were detained on their arrival in Hong Kong. In due course, their claims for refugee status were refused. They have been detained in Hong Kong ever since. In these proceedings, the Applicants seek, amongst other things, the quashing of the decisions of the Director of Immigration to detain them pending the determination of their claims for refugee status, and of the decisions of the Director of Immigration refusing to permit them to remain in Hong Kong as refugees. It is contended on their behalf that the legislative intent up to 2nd June 1989 was such that they should have automatically been accorded refugee status, and that in any event they had a legitimate expectation when they left Vietnam that they would be granted permission to remain in Hong Kong as refugees.

THE CURRENT STATE OF THE PROCEEDINGS

Although the decisions which the Applicants seek to challenge were made many years ago, their application for leave to apply for judicial review of those decisions was filed only last week on 7th October. The application was placed before me. The documentation was lengthy. The Notice of Application and the supporting affirmation with exhibits run to 316 pages. I had begun to read the documents by yesterday but I had not yet finished reading them. I am still some way off deciding whether leave to apply for judicial review should be granted.

THE APPLICATION FOR INTERIM RELIEF

A number of the Applicants have recently been transferred from the detention centres in which they have been held to Victoria Prison. Their solicitors believed that the Director of Immigration proposed to include some of them on an imminent flight for those who were due to be repatriated to Vietnam under the Orderly Repatriation Programme. That flight was scheduled for today. Accordingly, the Applicants' solicitors sought an undertaking from the Director of Immigration that none of the Applicants would be included on that flight. A letter on behalf of the Director of Immigration was faxed to the Applicants' solicitors yesterday. The Director of Immigration was not prepared to give the undertaking sought. He added that 69 people were due to be repatriated on today's flight.

It was against that background that I was informed at 5.00 p.m. yesterday that the Applicants wished to apply ex parte for an order preventing the Director of Immigration from including any of the 1,241 Applicants on today's flight. A hearing was hurriedly convened before me

at which the Applicants were represented by Mr. John Scott Q.C. Having heard briefly from Mr. Scott, I wanted to know whether the 69 Vietnamese migrants referred to in the letter were 69 of the Applicants, or whether the reference was to 69 Vietnamese migrants of whom some may or may not have been among the 1,241 Applicants. The hearing was adjourned to enable the Applicants' solicitors to see whether that information could be obtained. I said that I should be telephoned at home with that information when it was to hand, and that armed with that information, I would make my decision.

Yesterday evening, I was informed that the Superintendent of Victoria Prison had been contacted. He had said that there were 199 Vietnamese migrants who were to be included on today's flight. I therefore inferred that the 69 Vietnamese migrants mentioned in the letter written on the Director of Immigration's behalf referred to 69 of the Applicants. I considered that information together with Mr. Scott's representations, and in due course I decided not to grant the interim relief sought. I telephoned the Applicants' solicitors to tell them my decision. I said that I would give my reasons in court this morning at 9.30 a.m., and that I now do.

JURISDICTION

In their Notice of Application for leave to apply for judicial review, the Applicants seek the following interim relief:

> "... a stay of proceedings under Ord. 53 r.3(10)(a) [of the Rules of the Supreme Court] so as to prevent the Applicants from being forcibly removed from the jurisdiction until the determination of the application for judicial review herein or until the Court otherwise orders."

However, the court's power to make a direction under Ord. 53 r. 3(10)(a) only arises where leave to apply for judicial review has been granted. The Applicants have not yet obtained leave to apply for judicial review: I am still in the process of considering their application. Accordingly, another jurisdictional source for the power to make the order sought had to be identified. In my view, such a source exists. It is the court's power to grant an interlocutory injunction provided for by section 21L(1) of the Supreme Court Ordinance (Cap. 4). For the reasons given in the judgment I delivered on 19th July 1996 in *Van Can On v. The Director of Immigration* (HCMP 2037/96), I believe that that is a sufficient jurisdictional basis on which to grant the relief sought.

THE MERITS OF THE APPLICATION

The application for the interim relief now being sought on behalf of the Applicants requires me to strike the right balance between (a) the undesirability of interfering, even for a limited period, with the Director of Immigration's power under the Immigration Ordinance (Cap. 115) to effect the removal of the Applicants from Hong Kong when he chooses, and (b) the desirability of ensuring that the applications of 69 of the Applicants for judicial review will not have been frustrated by their removal from Hong Kong in the meantime. It was that latter consideration which was stressed on behalf of the 69 Applicants. If they were to be removed from Hong Kong today, there would be no point in their applications for judicial review being maintained. They would be a dead letter, because even if the ultimate outcome was the quashing of the decisions challenged, that would come far too late for the 69 Applicants if they had already been repatriated to Vietnam.

I recognised the force of that argument, but I rejected it for the following reasons:

(i) The Director of Immigration's policy is that once a Vietnamese migrant 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 the removal of the migrant from Hong Kong pending the substantive hearing of the application. I know that to be the case from what I was told in *Do Manh Tuan v. The Director of Immigration* (HCMP 803/96). That is a responsible policy for the Director of Immigration to adopt. It is based on the recognition that he should stay his hand in those cases where the court has ruled that there is an arguable case for saying that the decision which triggered his power to effect the removal of the migrant from Hong Kong should be quashed. But where the court has not yet made such a ruling, the Director of Immigration should be entitled to proceed on the basis that the considered view that the migrant should not be accorded refugee status is a final one.

(ii) If it were otherwise, any Vietnamese migrant could temporarily put off his removal from Hong Kong simply by filing an application for leave to apply for judicial review of the decision refusing to treat him as a refugee. I accept that that reprieve would only be for the short time it takes for the court to consider whether leave should be granted. It is therefore arguable that this reprieve should not be denied in a case where the Director of Immigration intends to effect the migrant's removal from Hong Kong very shortly after the decision refusing to accord the migrant refugee status has been made. This case, however, could not be

further from that. The Applicants are seeking to challenge decisions which were made many years ago. They seek to do so, not on the basis of the facts relating to their individual cases, but on the basis of legal arguments arising from facts common to all of them. There may well be understandable reasons why these decisions have not been challenged before now, but the fact remains that these proceedings have been lodged on behalf of 69 of the Applicants on the basis of legal arguments which have always been available to them just when the Vietnamese authorities have agreed to take them back, and just when the Director of Immigration has decided to effect their removal from Hong Kong.

(iii) The problems facing the Director of Immigration over the repatriation of Vietnamese migrants under the Orderly Repatriation Programme should not be underestimated. I know from previous cases that (a) the rate at which the Vietnamese authorities are prepared to accept returnees under the Orderly Repatriation Programme is very slow, (b) each proposed returnee has to have been vetted by the Vietnamese authorities before he can be repatriated, and (c) the Vietnamese authorities require to be informed of the names of those returnees who are to be included on any particular flight. The effect of my granting the relief sought would have been that 69 fewer returnees would have been returned on today's flight, and there would be little or no chance of those numbers being made up on subsequent flights. In short, the Director of Immigration's plans for the orderly repatriation of Vietnamese migrants to Vietnam would have been adversely affected by a temporary reprieve for the 69 Applicants.

CONCLUSION

These, then, were the reasons why I concluded last night that the application for an order restraining the Director of Immigration, and any other public officer acting under delegated powers, from effecting the removal from Hong Kong on today's flight of the 69 Applicants who it was proposed to include on that flight had to be refused.

(Brian Keith)
Judge of the High Court

Mr. John Scott Q.C. and Mr. P.Y. Lo, instructed by Messrs. Pam Baker & Co., for the Applicants.