IN THE COURT OF APPEAL

1993, No. 164
(Civil)

- Headnote

Application for 'bail' by Vietnamese detained under sl3D(1) Immigration Ordinance, pending hearing of appeal in judicial review proceedings - Inherent jurisdiction of the court to grant bail - Regina v. Sec. of State for Home Dept. ex parte Turkoglu [1987] 3 WLR 992 considered and distinguished.

Held: Court has no jurisdiction in circumstances of the case to grant bail. If in theory such jurisdiction existed, the application would nevertheless have been refused.

IN THE COURT OF APPEAL

1993, No. 164
(Civil)

BETWEEN

LE TU PHUONG	1st Applicant
DINH THI BICH CHINH	2nd Applicant
and	
DIRECTOR OF IMMIGRATION	1st Respondent
REFUGEE STATUS REVIEW BOARD	2nd Respondent

Coram : Hon. Litton, J.A. in Court

Date of hearing : 21 January 1994

Date of delivery of judgment: 1 February 1994

J U D G M E N T

Litton, J.A. :

What I have before me is an originating summons, taken out on behalf of Le Tu Phuong (Mr. Le) and Dinh Thi Bich Chinh (Madam Dinh) former residents of Vietnam who are the Respondents in Civil Appeal No. 164 of 1993. The application is being heard by me as a single judge of the Court of Appeal. The relief sought is that bail be granted to Mr. Le and Madam Dinh and their four dependent children, pending the hearing of an appeal brought by the Director of Immigration and the Refugee Status Review Board against the judgment of Mr. Justice Liu given on 8 September 1993. Mr. Michael Darwyne who appears for them on this application has argued the matter with skill. I am told that this is the first time such an application has been brought in Hong Kong. The four children, all born in Vietnam, are aged respectively 13, 11, 10 and 3. They are not named as parties to the appeal, but nothing turns on this, except that it illustrates the somewhat curious form of these proceedings.

Background

The applicants and their four children arrived in Hong Kong by boat in August 1990, having first travelled overland from Vietnam. They arrived without travel documents and were accordingly detained under the authority of the Director of Immigration in a detention centre pursuant to section 13D(1) of the Immigration Ordinance, Cap. 115. In due course they were examined by an immigration officer pursuant to s4(1)(a) of the Ordinance, under the 'screening' procedure adopted for Vietnamese migrants. In February 1992 a decision was made to refuse the applicants and the four children permission to remain in Hong Kong on the ground that the applicants were economic migrants. This decision was affirmed under s13F(1) by the Refugee Status Review Board on 10 April 1992 and the decision of the Board was conveyed to the applicants on 7 May 1992. The applicants obtained legal aid to challenge the decisions of the immigration officer and the Board by way of judicial review and, in proceedings which lasted a total of 56 days, Mr. Justice Liu made an order on 8 September 1993 quashing the decision of the immigration officer and of the Board, ordering at the same time that if an appeal be lodged within six weeks, his order be stayed until the final disposal of the appeal. An appeal was duly lodged by the Attorney-General on behalf of the Director of Immigration and of the Board, on 20 October 1993. The effect of all this is that the decisions of the immigration officer and the Board remain valid in law, pending the hearing of the appeal, and the applicants and their children are presently in detention under s13D(1) pending their removal from Hong Kong. The appeal is due to be heard on 20 April 1994.

Application to the Superintendent

On 10 December 1993, an application was made by solicitors on behalf of the applicants to the Superintendent

of Whitehead Detention Centre, asking him to exercise his discretion under Rule 28(1) of the Immigration (Vietnamese Migrants)(Detention Centres) Rules to permit the applicants and their children to be absent from the detention centre pending the hearing of the appeal. The grounds for the application are as follows:

> "Life in the Detention Centres is difficult for all detainees, but it is especially difficult now for the Le family because they have endured a long period of anxious waiting for the outcome or their Court case, and having won it, and looked forward to rescreening, have had their hopes put on ice pending the appeal. It is right to say that the appeal is on technical legal grounds, and must be seen as being taken by Government as a matter of general principle.
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> You will be aware of the problems of life in the Detention Centres, especially for women and small children - who are little girls. We are sure you do not need us to point out these problems.
>
> These problems are perhaps made worse for the Le family because they are confined in a special area of Section 8, due to threats to their safety from other detainees.
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> Our clients are Catholics and their plight has attracted the concern and attention of the Catholic Diocese of Hong Kong. The Chancellor, the Rev. Lawrence Lee, has made a formal offer to board and lodging for the Le family in Church premises at St. Raphael's Catholic Cemetery, Cheung Sha Wan, Kowloon.
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> This is a serious offer, and one that has been given much thought and consideration by the Diocese. The terms of the arrangement are spelled out in an Agreement, a copy of which is enclosed. We have inspected the flat, which is large, spacious, clean and very suitable for the Le family, with sufficient bedrooms for the four girls. It has its own kitchen, bathroom and toilet and a large living area. It is in a secluded part of the Church grounds and the building is protected by an outer fence and is under the 24 hour supervision of a warden."

In the same letter the solicitors stated that two Hong Kong residents were willing to stand surety for the

applicants' attendance at court and for their "good behaviour" in the meanwhile.

On 21 December 1993 the Superintendent refused to accede to the proposal. He said:

> "Our policy is that all persons detained under section 13D should be treated alike. I do not think that involvement in litigation is a sufficient reason to treat the family of Mr. Le Tu Phuong differently from other long stay families.
>
> I regret that I am unable to accede to the proposal."

I pause here to make this observation: There are still about 30,000 Vietnamese migrants under the care of the Correctional Services Department. It is no easy task to look after so many different people, from babies to septuagenarians, with their different outlooks on life, their different requirements, hopes and expectations. The Department's resources remain over-stretched. It is easy to see why the Superintendent of Whitehead Detention Centre should say that long-stay families should be treated alike.

Application for bail

On 18 January 1994 this originating summons was taken out, seeking an order from this court that bail be granted, pending the hearing of the appeal. The proposal is to have the family lodged in Church premises at Cheung Sha Wan, as set out in the letter to the Superintendent, but refined to this extent, that the family is to be returned to the detention centre on 18 April 1994, two days before the hearing of the appeal. The two sureties have offered to deposit cash, one to the amount of $30,000 and the other $10,000, to reinforce their recognizances.

It is clear that much thought has gone into the proposals and on the material before me there is nothing to suggest that the applicants will not adhere to the

conditions of bail; it is unlikely that they will be a burden on the community during their brief period of residence at Church premises at Cheung Sha Wan. The matter therefore turns on a question of principle: Do I have the jurisdiction to grant bail and if so how should that jurisdiction be exercised?

The court's jurisdiction

What is invoked in this application is the inherent jurisdiction of the Court of Appeal which, Mr. Darwyne submits and I accept, is at least as wide as the inherent jurisdiction of the High Court.

Before I go to the heart of the issue - namely, whether I have jurisdiction to discharge the applicants and their children from their present detention and, in effect, to accede to the "arrangement" as put forward by Mr. Darwyne for their accommodation at Cheung Sha Wan until 18 April 1994 - it is necessary to examine what in practical terms it all adds up to. Much has been said in the course of argument about civil liberty and freedom of the individual. It must be remembered that these concepts have no meaning without the rule of law. The inevitable fact facing the Le family is this: They are former residents of Vietnam; they arrived in Hong Kong without travel documents and have at all times been in lawful detention under the statutory scheme for the treatment of Vietnamese migrants. If the applicants fail in the appeal, they will remain in detention pending their repatriation to Vietnam. If they succeed in the appeal, the decisions of the immigration office and of the Board will be quashed pursuant to Liu J's judgment, and they will be examined again under s4(1)(a) as to their status. They will in the meanwhile remain in detention, together with thousands of others in a similar situation, awaiting screening. The only thing different about the applicants is that they, unlike the others, would have spent an additional few months in detention, enmeshed in the

judicial process. What is sought in this application is not the preservation of the status quo, but a change in the status quo: that, for the span of less than 3 months, they should enjoy such limited liberty as might be afforded to them as guests of the Catholic Diocese, only to return to the detention centre, whatever the outcome of the appeal. It is therefore difficult to see this case as one involving civil liberty, except in a very limited sense. This is to be contrasted with the case of a person charged with a criminal offence who is granted bail pending the hearing: his status, prior to the criminal charge, is that of a free person. Bail in his case is indeed an issue of civil liberty.

The "merits" of the application, Mr. Darwyne submits, are these: (1) The applicants, through no fault of theirs, have become enmeshed in the judicial process. (2) They bear no responsibility whatever for the conduct of the immigration officer and of the Board which has resulted in the judge holding that their decisions were unlawful; and yet, by invoking the judicial process to correct these wrongs, the applicants and their children suffer the 'penalty" of a longer period of detention, simply because of the time it takes for the courts to correct these wrongs. (3) By allowing the applicants to be released from detention pending the hearing of the appeal the court is, in a sense, protecting its own process: or at least correcting a wrong brought about by its own process; the application accordingly falls within the inherent jurisdiction of the court. (4) To disallow bail in these circumstances would be, in effect, to create a positive disincentive for Vietnamese migrants to challenge the decision-making processes under s13D(1) and s13F(1) of the Ordinance.

In the course of argument a number of decisions of the English Court of Appeal have been brought to my attention concerning the court's jurisdiction to grant bail in immigration cases. Most of them are summarised in Regina

v. Secretary of State for the Home Department, ex parte Turkoglu (1987) 3 WLR 992; Charles v. Secretary of State for the Home Department (1992) Imm AR 416 was also brought to my attention.

In Regina v. Chief Immigration Officer, Heathrow Airport, ex parte Suresh Kumar The Times, 22 April 1986, Lawton LJ is reported as follows:

> "It seemed that Parliament had intended that all matters relating to the removal and detention of persons refused entry should be under the control of the Secretary of State for the Home Department, and clearly, he could always grant temporary leave to enter. If that was so, any need for a jurisdiction to grant bail would have to be satisfied in some other way than by calling on the inherent jurisdiction of the court".

This dictum was considered in ex parte Turkoglu, at 994, but the Court of Appeal concluded that as it was seised of the matter - the migrant having appealed to the Court of Appeal against the High Court Judge's refusal to grant bail pending his appeal to the Court of Appeal against the judge's dismissal of his application for judicial review - the court had jurisdiction to grant bail pending appeal. In ex parte Turkoglu the Secretary of State had invited the Court of Appeal to accede to the application for bail, upon terms as to sureties. The Secretary of State had adopted this position because whilst he himself had the power under the Immigration Act 1971 to grant temporary admission to the applicant, he did not have the power to require sureties and was not prepared to grant temporary admission without sureties.

The case therefore turned on the question of the powers of the Court of Appeal to grant bail in immigration cases. The court came to the view that, whilst it could not grant bail in vacuo, so long as there was an underlying substantive proceeding to which bail would be ancillary, the

court had jurisdiction. Sir John Donaldson M.R. identified two sources of jurisdiction: (1) where the court was concerned with an appeal against any refusal or grant of bail by the High Court, the court had jurisdiction under s16(1) of the Supreme Court Act, 1981, the Hong Kong equivalent of which is s13(2)(a) of the Supreme Court Ordinance which states:

> "(2) The civil jurisdiction of the Court of Appeal shall consist of
>
> (a) appeals from any judgment or order of the High Court in any civil cause or matter"

(2) where an application was made direct to the Court of Appeal - that is, not an appeal against a refusal of bail by a lower court - the jurisdiction was the inherent jurisdiction of the court. This is what I am concerned with in the present case. There was, however, no discussion of this aspect of the case in ex parte Turkoglu, as Sir John Donaldson was there dealing with McCowan J's refusal of bail in the High Court, McCowan J having erroneously concluded that he was no longer seised of the matter (see p.995H). Sir John Donaldson was therefore concerned only with the situation in (1) above, and his observation on the inherent jurisdiction of the Court of Appeal was, as I view the matter, therefore obiter.

As I understand the common law position, the court has an inherent jurisdiction to prevent the abuse of its process, to do justice between the parties and to secure a fair and just determination of the real matters in controversy. It is difficult to see the present application sitting comfortably within this legal framework. If, for instance, one of the issues on appeal was whether the applicants should have been detained at all, I can envisage the beginning of an argument that, under the inherent jurisdiction, bail should be considered pending the determination of that issue. The bail application would be

ancillary to a process which might eventually result in the applicant's liberty. In the circumstances of the present case, the legality of the applicants' detention is not remotely in issue on the appeal; the appeal is merely concerned with the decision-making process of the immigration officer and the Board.

Counsel were unable to refer me to any authority in which the jurisdiction to grant bail in immigration cases was analysed and discussed. In considering this question, I bear in mind the fact that the United Kingdom and other similar jurisdictions have not shared Hong Kong's experience regarding the influx of Vietnamese migrants. Recent Hong Kong history has been well-summarised in Mr. Justice Jones' judgment in Re: Tran Quoc Cuong and Khuk The Loc (1991)2 HKLR 312 at 317. In 1989 alone more than 34,000 Vietnamese migrants arrived in Hong Kong. To deal with such large numbers of migrants, a system of detention became inevitable. There was simply no other way the Government could look after them otherwise. So stretched were the Territory's resources that at one stage a number of vehicular ferries were pressed into service and designated as detention centres. If organisations such as the Catholic Diocese wish to offer their services to alleviate the problem of looking after so many people by the Government, it is a matter of dialogue and arrangement between these organisations and the Government. The courts have no role to play in this regard. The existing Rules - Rule 28(1) of the Immigration (Vietnamese Migrants) (Detention Centres) Rules- empower the superintendent in charge of each detention centre to permit a detainee to be absent from the centre on such terms as he may specify; but, during such absence, the detainee is deemed to continue in the legal custody of the superintendent: see Rule 28(2). Within this legal framework, the Government can as it sees fit enter into arrangements with the Catholic Diocese and other similar organisations for them to partially take over the

responsibility of looking after some of the detainees: for instance, families such as the applicants. This is a pure matter of executive discretion.

Given the statutory framework, it is difficult to see how, even if I had the power to grant bail, I could properly have exercised it in this case. On the material before me, I have no doubt that if I should grant bail to the applicants the Catholic Diocese would discharge its responsibilities properly. But what if the offer had come from some lesser known institution? How is the court to supervise the quality of the "board and lodging" to be provided by such organisation? Courts must act according to principle, not simply on the perceived "merits" of individual cases.

Conclusion

The applicants have not persuaded me that I have jurisdiction to grant bail in the circumstances of this case. If the jurisdiction should, in theory, exist, I would nevertheless have declined to accede to this application to grant bail. The application is accordingly dismissed.

(Henry Litton)
Justice of Appeal

Michael Darwyne (M/S Pam Baker & Co.) for Applicants
W.R. Marshall Q.C., T. Law (Crown Prosecutor) for Respondents