1995 HCMP No. 1989

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

BETWEEN

NGUYEN TUAN CUONG AND OTHERS Applicants

and

THE DIRECTOR OF IMMIGRATION Respondent

Before: The Hon. Mr. Justice Keith in Court
Date of Hearing: 19th March 1999
Date of Delivery of Judgment: 19th March 1999

J U D G M E N T

Introduction

This appeal is the latest episode in the saga relating to those asylum-seekers from Vietnam known as the "ECVIIs", the Ex-China Vietnamese Illegal Immigrants. Their plight has been considered many times by the courts, including both the Privy Council and the Court of Final Appeal. The difficulties which their circumstances have presented have been illustrated by the variety of views which different judges have expressed.

Indeed, the hearings in the Privy Council and the Court of Final Appeal themselves produced powerful and intellectually compelling dissenting judgments. Because of the interest which their cases have generated, I made a direction under Ord. 32 r. 13(1) that this interlocutory appeal be heard in court.

The recent history

The history of this litigation is well-known, and I do not propose to repeat it here. In their application for leave to apply for judicial review, the Applicants claimed damages, under Ord. 53 r. 7, "for any period or periods in respect of which it is found that the Applicants were unlawfully detained". In May 1997, Findlay J. ordered that this claim for damages should continue as if it had been begun by writ. On 10th June 1998, two documents were filed in court. The first purported to be an Amended Writ of Summons, which was described as deemed to have been issued from the Registry on 21st July 1995, when the original Notice of Application for leave to apply for judicial review had been filed. The second purported to be the Statement of Claim. I shall have to return to the true status of these documents later.

Eventually, though, two summonses relating to these documents came before Master Kwan on 22nd December 1998. One of the summonses had been issued by the Applicants. It sought leave to re-amend the Writ of Summons, and to amend the Statement of Claim, in order to comply with an order which had been made in the meantime by the Court of Appeal in CACV 163/98 declaring that other asylum-seekers from Vietnam who had not been granted leave to apply for judicial review had been wrongly joined as additional Applicants. The other summons had been issued by the Respondent. It sought to strike out a number of the paragraphs in the

Statement of Claim. Master Kwan gave the Applicants leave to re-amend the Writ of Summons and to amend the Statement of Claim. However, she refused to strike out any of the paragraphs in the Statement of Claim. The Respondent now appeals against that refusal.

The effect of Findlay J.'s order in May 1997

The order of Findlay J. that the Applicants' claim for damages should continue as if it had been begun by writ was made pursuant to Ord. 53 r. 9(5), which provides:

> "Where the relief sought is … damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ; and Ord. 28 r. 8 shall apply as if the application had been made by summons."

As Rogers J.A. observed in the Court of Appeal in CACV 163/98, where an order has been made under Ord. 53 r. 9(5), the proceedings remain judicial review proceedings. They are simply treated as if they had been begun by writ. That is why the parties should continue to be called the Applicants and the Respondent rather than the Plaintiffs and the Defendant, and why the proper respondent should be the Director of Immigration, and possibly the superintendents of the detention centres in which the Applicants were detained, rather than the Secretary for Justice.

The Amended Writ of Summons

Because the claim for damages continues to be made in judicial review proceedings, an order made under Ord. 53 r. 9(5) does not require the issue of new originating process. The fact that an application for judicial

review is to be treated as if it had been begun by writ does not mean that there has to be filed a document purporting to be the writ which was deemed to have been issued. Accordingly, there was, in my view, no warrant for filing the Amended Writ of Summons on 10th June 1998, even though on 4th June 1998 Findlay J. had purported to give leave for it to be filed. Since it was a document which could not have been filed, it was not a document which could have been made the subject of an order for leave to amend by Findlay J. or an order for leave to re-amend by Master Kwan.

The Statement of Claim

Ord. 53 r. 9(5) concludes, as I have said:

> "… and Ord. 28 r. 8 shall apply as if the application had been made by summons."

Ord. 28 r. 8(1) provides:

> "Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof."

Accordingly, the court has power to direct that any of the affidavits stand as pleadings. However, it is not entirely clear what impact the combined effect of these provisions has on the parties' power to file pleadings in the absence of any directions relating to pleadings. One view is that no statement of claim may be filed unless an order has actually been made for one to be filed. The other view is that a statement of claim may be filed without an order to that effect. I conclude that the latter view is correct. Ord. 18 r. 1(1) provides

that, in an action begun by writ, a statement of claim must be served. In my opinion, that includes proceedings which are deemed to have been begun by writ. Accordingly, although no order was made for the filing of a statement of claim, the Statement of Claim was properly filed, and could therefore be made the subject of (a) the Applicants' summons for leave to amend it, and (b) the Respondent's summons to strike out parts of it.

Claims for damages in proceedings for judicial review

The ability to claim damages in applications for judicial review is a relatively recent right. The source of the right is section 21K(4) of the High Court Ordinance (Cap. 4):

> "On an application for judicial review the Court of First Instance may award damages to the applicant if -
>
> (a) he has joined with his application a claim for damages arising from any matter to which the application relates; and
>
> (b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages."

This provision came into effect in 1987, and followed the language of section 31(4) of the Supreme Court Act 1981. The Rules of the High Court give effect to this power. Thus, Ord. 53 r. 7 provides:

> "(1) On an application for judicial review the judge may, subject to paragraph (2), award damages to the applicant if -
>
> (a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates, and
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> (b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the

> time of making his application, it could have been awarded damages.
>
> (2) Ord. 18 r. 12 shall apply to a statement relating to a claim for damages as it applies to a pleading."

Ord. 18 r. 12 relates to the particulars which a pleading must contain.

The relevance of these provisions for present purposes is that damages can only be awarded in applications for judicial review where damages could and would have been awarded if the action had been begun by writ. Thus, in relation to the new Ord. 53 in the U.K., it has been said:

> "The new RSC Ord. 53 is a reform concerned with remedies and with public law, not extending, or diminishing, substantive rights in private law. It creates no new cause of action. It enables a claim for damages for breach of a private law duty resulting from unlawful conduct by a public authority to be joined with a public law application to establish the unlawfulness rather than being claimable only in an action begun by writ. This is of value because it avoids the instigation of duplicate proceedings": Supperstone & Goudie, "*Judicial Review*", 2nd ed., p.14.35.

This extract accurately summarises what was said by the Court of Appeal in *Calveley v. Chief Constable of the Merseyside Police* [1989] 1 QB 136 at pp.151-152 and 154. Other authors have expressed the same view. For example:

> "This provision [i.e. Ord. 53 r. 7] permitting a joinder of claims for damages for tort or breach of contract was an entirely procedural reform, designed to prevent multiplicity of proceedings, and did not affect the rule that there is no right to damages for unlawful administrative action *per se*": de Smith, Woolf and Jowell, "*Judicial Review of Administrative Action*", 5th ed., para.19-010.

That principle was recently re-iterated by Laws J. (as he then was) in *R. v. Ealing London Borough Council ex p. Parkinson* (1995) 29 HLR 179 at p.184:

> "… the law recognises no right of compensation for administrative tort; by 'administrative tort' I mean breach of a duty owed by a public body arising only in public law. This principle is clearly established. The public body condemned by the court as having acted irrationally, unfairly, or illegally is not thereby rendered liable to damages."

There are exceptions to that principle, but those exceptions do not apply to the present case.

As Godfrey J.A. noted in CACV 163/98, the only claim for damages which the Applicants could have made as a result of their allegedly unlawful detention pursuant to orders made by the Director of Immigration would be for the tort of false imprisonment. The Applicants' claim for damages can only be permitted to proceed to the extent that it amounts to such a claim. Mr. S.H. Kwok for the Applicants does not dispute that. I have no doubt that the Applicants' claim for damages for false imprisonment arises "from any matter to which the application [for judicial review] relates". The critical question is whether the Applicants' claim for damages does indeed amount to a claim for damages for false imprisonment.

The pleaded case of false imprisonment

In *R. v. Governor of Brockhill Prison ex p. Evans (No.2)* [1998] 4 All E.R. 993, Lord Woolf M.R. said at p.998 b-c,

> "… the tort of false imprisonment has two ingredients, the fact of imprisonment and the absence of lawful authority to justify it. As Lord Bridge of Harwich stated in *Hague v. Deputy Governor of Parkhurst Prison* [1992] 1 AC 58 at p.162: '…if A imposes upon B a restraint within defined

> bounds and is sued by B for false imprisonment, the action will succeed or fail according to whether or not A can justify the restraint imposed on B as lawful'. In the same case, Lord Jauncey of Tullichettle at p.178 said much the same thing: 'imprisonment is either lawful or false and questions of degree do not arise."

It is common ground that the Statement of Claim pleads the first ingredient, namely the Applicants' detention. What is in dispute is whether the Statement of Claim pleads the absence of lawful authority to justify it.

Summarising the Statement of Claim, what is pleaded is that the Director of Immigration initially decided not to screen the Applicants for refugee status. By the time that they were eventually screened for refugee status, their detention had been unnecessarily prolonged, and they would have been released from detention much earlier but for the Director of Immigration's failure to screen them for refugee status initially. Accordingly, it is said that the Applicants' detention became unlawful, in that there was thereafter no lawful authority to justify their detention, at the time when they would have been released from detention had their claims for refugee status been considered when they ought to have been.

I agree with Mr. William Marshall S.C. for the Respondent that what is not pleaded is the route in law by which on those facts the Applicants' detention is said to have become unlawful by then. However, matters of law need not be pleaded, and in any event the way in which the Applicants' case is put is very well-known. For some time prior to 21st July 1995, the Applicants had been detained pursuant to section 32(1)(a) of the Immigration Ordinance (Cap. 115) ("the Ordinance"), and later pursuant to the second limb of section 13D(1) of the Ordinance. In *R. v. The Governor of Durham Prison ex p. Hardial Singh* [1984] 1 WLR 704, it was held that the

statutory power of detention is subject to various implied limitations. In *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* [1996] 2 WLR 663, the Privy Council held that these limitations apply to the power of detention conferred by section 13D(1). Two of those limitations, suitably adapted to reflect the circumstances of the Applicants, are said to be relevant to their cases:

(i) A power of detention is to be regarded as limited to a period which is reasonably necessary to achieve the purpose for which the power was granted. Accordingly, the power of detention under the second limb of section 13D(1) was limited to such time as was necessary for the Applicants' removal from Hong Kong to be effected.

(ii) The person under whose authority people are being detained must take all reasonable steps within his power to ensure that the only purpose for which the detention could lawfully be authorised is achieved within a reasonable time. Accordingly, the Director of Immigration had to take all reasonable steps within his power to ensure that the Applicants' removal from Hong Kong would be effected within a reasonable time.

Applying these principles, it is said that the Applicants' detention prior to 21st July 1995 was unlawful because it would have ended by then if their requests for permission to remain in Hong Kong as refugees had been considered when they should have been considered. In any event, it is said that the Applicants' earlier detention under section 32(1)(a) of the Ordinance was unlawful because it had not been preceded by valid orders for their removal from Hong Kong. These arguments were raised in paras. 120, 128 and 129 of the grounds on which relief was sought in the Notice of Application for leave to apply for judicial review. The fact that the Statement of Claim does not expressly refer to section 32(1)(a) or section 13D(1), and does not plead the legal route by which on the facts the Applicants' detention is said to have become unlawful by 21st July 1995, does not justify making an order which has the effect of striking out the Applicants' claim altogether. I note that the Statement of Claim includes a number of averments which could be regarded as pleading the non-existent tort of unlawful administrative action, but those averments are properly pleaded if they are treated simply as a recitation of the history of the Applicants' treatment at the hands of the immigration authorities.

I appreciate that the Respondent's case is that there was at all relevant times lawful authority to justify the Applicants' detention, namely the orders for their detention made initially under section 32(1)(a) of the Ordinance, the orders for their detention made subsequently under the second limb of section 13D(1) of the Ordinance, and from 9th January 1997 the orders for their detention made under the first limb of section 13D(1) of the Ordinance. But the issues at the trial will be whether prior to 21st July 1995, when the Notice of Application for leave to apply for judicial review was filed, their detention under section 32(1)(a) had been unlawful, and

whether there had come a time when their detention under the second limb of section 13D(1) had ceased to be lawful.

Conclusion

For these reasons, I think that Master Kwan was entirely correct to refuse to strike out parts of the Statement of Claim, and this appeal must be dismissed. However, I cannot depart from this appeal without saying that the Applicants' advisers should seriously consider whether the Applicants' interests are best served by continuing with the present claim for damages. The present claim has two extremely significant drawbacks:

(1) Because their claim was made in the Notice of Application for leave to apply for judicial review which was filed on 21st July 1995, the Applicants' claim, on the face of it, will only succeed if it is found that their detention had become unlawful by then. If it had not, the claim for damages would have to be dismissed on the ground that the claim was made prematurely. That applies even if their detention in fact became unlawful sometime after 21st July 1995.

(2) As the Court of Appeal held in CACV 163/98, only those Applicants who had obtained leave to apply for judicial review could be treated as claimants for damages in these proceedings. Other asylum-seekers in the same position as the Applicants cannot claim damages in these proceedings.

Neither of these drawbacks would apply to a new action begun by writ claiming damages for false imprisonment. The asylum-seekers who unsuccessfully sought to be joined in the present claim would be able to be plaintiffs in a new action begun by writ, and the plaintiffs in that action would not be denied damages if their detention only became unlawful after 21st July 1995. I leave it to the Applicants' advisers, of course, to decide what is the best way forward for the Applicants.

Finally, although I have dismissed this appeal, the case was not one which a master would have found easy to decide. It required an understanding of the law relating to applications for judicial review which masters will not normally be familiar with. It also required a thorough understanding of the history of this litigation. The Rules of the High Court recognise that there may be cases in which a hearing before a master should be dispensed with. Thus, Ord. 32 r. 12 enables a master to refer to a judge any matter which he thinks should properly be decided by a judge. I have on previous occasions said that this is a device which in my experience could be used more often than it is. Both Mr. Kwok and Mr. Marshall accepted that this would have been an appropriate case for the summons to strike out parts of the Statement of Claim to be referred directly to a judge.

(Brian Keith)
Judge of the Court of First Instance

Mr. Kwok Siu Hay, instructed by Messrs. Wilkinson & Grist, for the Applicants

Mr. William Marshall S.C. and Mr. Wesley Wong, of the Department of Justice, for the Respondent