1997 A.L. No. 38

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

BETWEEN

HOANG DUC PHONG Applicant

and

THE DIRECTOR OF IMMIGRATION Respondent

Before: The Hon. Mr. Justice Keith in Court

Date of Hearing: 29th May 1997

Date of Delivery of Judgment: 29th May 1997

J U D G M E N T

I propose to grant the Applicant leave to apply for judicial review of the decision of the Director of Immigration that he is not a refugee, and to extend his time for doing so. The immigration officer who took the decision took the view that the punishment which the Applicant received for not complying with his orders to shoot innocent women and children did not amount to persecution, nor did it amount to persecution for a Convention reason. In my view, it is arguable that both those findings are findings which no immigration officer, properly directing himself in law and properly applying the provisions of the

Handbook on Procedures and Criteria for Determining Refugee Status issued by the UNHCR, could reasonably have reached.

To undergo re-education in a labour camp for an indefinite period, and which lasted for 18 months before the Applicant escaped, is not insubstantial punishment. According to para. 171 of the Handbook, punishment for desertion or draft-evasion can amount to persecution if the reason for the desertion or draft-evasion is an unwillingness to comply with orders which would offend basic rules of human conduct. By analogy, so too would punishment for actually refusing to comply with such orders. I accept that a soldier's conscientious objection to shooting innocent women and children is more a moral than a political stance. But in my view it is arguable that the phrase "political opinion" in Art. 1 of the Convention is wide enough to include a moral stance of the kind with the Applicant claims he took.

I take into account the possibility that the Applicant's treatment by the authorities in the late 1980s may have indicated a benevolent attitude towards him on the part of the authorities, but there was, as I see it, and as I think Mr. S.H. Kwok for the Director of Immigration concedes, no evidence before the immigration officer that the authorities were aware that the person with whom they were then dealing had escaped from a labour camp, nor were they aware of what he had done to deserve being sent to the labour camp in the first place.

Since the immigration officer's conclusion on the ultimate issue which he had to decide - namely, whether in 1992 the Applicant had a well-founded fear of persecution for a Convention reason if he was

returned to Vietnam - was based, in part at any rate, on his belief that the Applicant had not been persecuted in the past for a Convention reason, and since that finding is in my view susceptible to sucessful legal challenge, it follows that the Applicant should be given leave to apply for judicial review.

(Brian Keith)
Judge of the High Court

Mr. Robert Whitehead, instructed by Messrs. Pam Baker & Co., for the Applicant.

Mr. S.H. Kwok, Crown Counsel, for the Respondent.

…do not disclose a reasonable cause of action. Be that as it may, the summonses eventually came before master _____ on 2nd April 1996. She dismissed the summons, and the publisher of the magazine and it's editor are now appeared against that orders. The parties are agreed to _____ disappear as it was an appeal against the orders under O.18. (19)(1) refusing to strike up the Statement of Claim.

Public Authorities

The right guarantee by the BOR are pickerel of only limited enforcement. That is because section (7)(1) of the Hong Kong Bill of Rights Ordinance (cap. 383) ("BOR") provided that the ordinances (which incorporate the BOR) by_____ "the government and all public authorities". It follows the R.16 of BOR can only be reline on buy the magazine to strike out the _____of the university at the President. If the university is a public authority with the meaning of sections (7)(1). I had argument on _____ you first. If I decided the university would not a public authority, all the arguments on R.(16) would follow away. If so happened the argument on whether the university was a public authority to _____ to hold of the day satisfied for hearing of the appeal, and the end of the argument I decided to reserve judgment on it. It is my judgment on _____ . Although the hearing before me was in changes, I am handing down the judgment in court to enable to get the wide accounts _____.

THE GENNY CHUA CASE

This is not the first time which the court have to decide whether the university is a public authority with the meaning section (7)(1). The _____ arose in R. The Hong Kong Polytechnic XP. Jenny Chua Eyee Yen (1992) to HKPLR 34. In that case, May J. (as he them all) held that the university was a public authority. At the time, the university had not _____ university status. It would still Hong Kong Polytechnic. It only became a university was the Hong Kong Polytechnic Ordinances (cap.1075) was amended in 1994, and became the Hong Kong Polytechnic University Ordinances ("The HKPUO"). However, I would told most material change was made apart from the changes status, and its follows that May J.'s decision on its issue is not distinguishable on their ground.

Unfortunately, May J. gave no reasons for his decision. All he said was that the status of the Polytechnic public authority was "evidence from the authority…(_____ to him)". Those authorities were the Johannesburt (1907) P6-5, Grillfiths Smith (1941) AC 176. The Manners (1976) to WLR 709. However, those authorities were only of assistance to the extend they gave a working definitions of the phrase "public authority". Whether, in the light of that definition, an acedmadic constitutions like Polytechnic was a public authority could not be decided in a vacant. It's at the depend on or all_____ Polytechnic, A.G. is constitution, its functions, it finding, and the extend to which its activities was controlled all over by government. I do not know whether there was an a evidence in relating to matter of that kind before May J. If there was, May J. did not explain why he thought they

led to the conclusion of the Polytechnic across public authority. In a circumstance, why I know May J.'s conclusion, I do not think but I should regard as the particular resistance to me.

A TECHNICAL PROBLEM

However, I technical problem arises here. The question whether the university is a public authority with the meaning sections (7)(1) is not, on the face, something which can be decided on an application to strike up the Statement of Claim as disclosing no reason for the cause of action. No evidence _____ such application: the courts simply looks the Statement of Claim and determine where are, on the summons defects pleaded in its are true, the Plaintiff has a cause of action and law (CO.18) (R.90). Since the question whether the university is a public authority is depended on facts not on the____ pleaded in its Statement of Claim, the root by which the party asked me to decide the issue is not open to them.

The solution is closed at hand, those. The facts which are relevant to the issue as to whether the university is a public authority have been agreed. Accordingly, the procedure difficult can be overcome by treating the hearing of that issue as a trial of that _____ issue on agreed facts. I hope I would not be _____ food work, but that is the only way which is _____ me of striking the right balance between (8) the obvious visual the parties should meet to decide the issue and a hearing and now, and (b) the requirements _____ rule of the Supreme Court.

THE MEANING OF "PUBLIC AUTHORITY"

There is no definition of "public authority" in the Boro. Nor is the phrase define in the interpretation and general Clause Ordinance (cap.1), although the phrase "public ordinance" is defined in it. However, it is defined in whole Laws of England, Forth added. 1, 6. as

> "a person or _____ body in trusted with function to perform for the benefit of the public and not for private profits"

I shall refer to that definition _____ judgment, but I should at the editors _____ acknowledge that the meaning of the phrase "May very according to the statutory contested". In that connection, I have two observations:

(i) The BORO is, used the words of _____D.-P. in Tam Hing Yee v. Wu Tu Wai (1992) 1HKLR 185 at P.189, "in the next _____ of consitution". For that reason, it must be given "a genius interpretation" Law Wilberforce in minister of home affairs the Fisher (1990) AC 319 SP. 328, all "a generals and _____ construction" (law deep pot in alternate general for Ganbia the Jobe (1984) AC 669 B. (700). Accordingly, if I am give the phrase a genius some purpose with construction, I should have regard to the purposes for which the Boro in general, and sections (7)(1) in particular, was an added. The purposes with the Boro was an added was " to provide for the in corporation issue the Laws of Hong Kong of provision should the international covenants on civil and political rights ("the ICCPR") as apply to Hong Kong" : section (2)(3) of the Boro office. Accordingly, it is to the ICCPR to which I am _____ to identify the purpose of

section (7)(1). Unfortunately, I cannot divide any assistance from ICCPR. The purpose of the ICCPR has been described as "the protection of the individual against the positive actions of the status which influence political rights".

Note: Byrnes, "the Hong Kong Bill of Rights and relation between private and individual" in Chan Ghai, "the Hong Kong Bill of Rights: a comparative approach" 1993, P.47.

What the ICCPR does not identify are what constitutes the states for this purpose. It is _____ on what organ of the states if _____. Moreover, the assistance is to be the right from the _____ from the ICCPR another international human rights instruments has been described as "rather limited": Byrnes, OP.6 CIT., T. 98. Since I cannot_____ what the phrase "public authority" in section (7)(1) what intended to cover, I cannot apply a purpose construction to it.

(ii) It is plained the phrase "public authority" was intended to refer to something other than the government. Otherwise, the words "public authority" in sections (7)(1) would be _____. I take the phrase "the government" to refer to the , executive, to judicial organs of the statement. Accordingly, the phrase public of the phrase "public authority" refers to bodies which are not a part of the , executive, an judicial branches of the government of Hong Kong.

Against that background, I return to the definition of "public authority" in whole principle of laws. The definition focuses the intention of the functions on the other word functions of the body and the purpose on the other word purpose for which those functions are performed. I am not convinced that is a sufficiently comprehensive definition. It takes no account to what seems to me to be a number of

highly significant factors, namely the nature of the body, its constitution and its links with government. A private charity would be a public authority on the definition adopted in whole with laws, and I do not suppose anyone would say that it would invested with the powers of the kind which would made it a public authority. In my view, for a body of to be a public authority within the meaning section (7)(1) of the BORO, it is not sufficient or it to be instructed with functions to perform for the benefits with the public and not for private profit: there must be something in its nature or constitutions, or in the way in which it is round, apart from its functions, which should bring it into the public to the manner. It is a necessary for me to identify what that might be: it may take the form of public finding, of a measure of governmental control or moisture it is formal, or some form of public accountability. The something which is a keen to public ownership there must be.

THE UNIVERSITY

In this circumstances, I turn to the facts should be agreed the correct for the purposes is disappeared. The university is a statutory co-operation established by the HKPUO. It is one of the seven institutions of highly education in Hong Kong. It's objects are "to provide for studies, training and research in technology, science, on the double subjects should learn": section (3)(3) from the HKPUO. It confers of the diplomas and degrees would recognize by the government and the private set of the employment purposes and as a professional qualifications, and by overseas _____ institutions for mission to further studies. It perform those deals for the benefit of the public and not for private profit.

Mr. Wong in lead for the publisher _____ magazine argues the university is “closely associated with, if not subject to control of, with the government”. He points out that.

(a) The governing and the executive body of the university is the council (66), (b) apart from the appointment of staff, any question before the council at any meeting as to be decided by majority over those of the members present (section (10)(7)), (c) (21) out of the council 29 members, I.D. a majority, or appointed by the governor and (d) in his capacity of transcript of university, the Governor receives the university’s financial reports and statements. See but there is not mean that the university is subject to the government to control. The governor’s power to appoint council members should be regarded as an exercise by him, not of operational control over the university to the first, rather with the power to appoint more suitable person to the job. And the formal power which he exercised that which he exercised is that the university have more to do with _____ by prominent public figure of an institution of our learning then with control. In this, the indications are the university is highly independent of government control. No more than two of the council members appointed by the government may be _____ , and there is nothing in the HKPUO which should across to any public officer anything we modely a keen to step the power directions.

On the other hand, university is, for the most part, public . Some of it come comes from the division, private grounds and consultants but I would ask to for the purposes in this

appeal that the comes from the university grounds committee. I would also ask by both parties to treat the facts set out in the government publication “Hong Kong 1996” as correct for the purposes in disappear. That we called “people 138” that public funds _____ the full costs of “charity institution ”. As suppose that _____ only to the university’s building, the contacts in which this statement appear was “finding of education”, it is, I think, more probable with the refer to the all the costs of running university.

CONCLUSION

While like setted in the university not subject to the government control. The next trip is functions, the purpose would those functions is performed and the fact with it is funded to a great extend to a public funds lease me to conclude the university is a public authority with the meaning sections (7)(1) of BORO. Having which that conclusion, I know the university is treated as a “public body” with the purpose of the Prevention of Bibery Ordinance (cap.201). Although no direct assistance to me, that is unmeasured to conclusion I breach.

It follows that the publisher and editor of the magazine can relive on Art. 16 of the BORO as relevant to the common law to contend to the proceedings should be sort out. The hearing of arguments on those something to be fixed after consultation of the council. As , with the costs emptation would arise as a result of this judgment.

There is _____ final matter I would asked. This is a case in which lost before the master are going to appeal . Sentence appeal from the master to a judge take the formal rehearing , what would the points considering with case at all? The rules of the Supreme Court recognize but there may be cases which a hearing before a master should be . Thus, O. 32 R. 12 enable to master to refer to a judge any matter which he thinks should probable decided by a judge. That is the advice which in much experience could be used . Both Mr. Wong and Mr. Joseph Fork for the university as President accept to this who would been appropriate cases for the summons to be referred direct to a judge. That would specially in this case, since the issue to which judgment relays would one of the master cannot to decide themselves, they would some like me she would be by May J.'s decision in the Genny Chua case. I take opportunity to remind the profession within those cases were like to be decision of the master, costs would be saved in a longer if you should make O. 32 R. 12.