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HCAL 45/2004

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO.45 OF 2004

BETWEEN

PV Applicant

and

DIRECTOR OF IMMIGRATION Respondent

Before : Hon Hartmann J in Court

Dates of Hearing : 4, 16 and 24 June, 2, 5 and 7 July 2004

Date of Judgment : 7 July 2004

Date of Handing Down Reasons : 16 July 2004

JUDGMENT

Introduction

1. From the mid 1980s until late 2001, when a truce took hold, Sri Lanka was riven by armed conflict. The conflict pitted the Liberation Tigers of Tamil Eedam ('the LTTE'), a movement seeking an independent Tamil state, against the forces of the Sri Lankan Government.

2. The applicant in this matter is a Sri Lankan national. He is of Tamil origin. On 29 December 2000, the applicant came to Hong Kong from Sri Lanka and within a matter of days lodged a claim with the Hong Kong office of the United Nations High Commission for Refugees ('the UNHCR') for recognition as a refugee.

3. The applicant asserted that, as a Tamil, he had been detained and ill-treated by the Sri Lankan authorities on a number of occasions. More particularly, he had been detained in February 2000 as a suspect in a failed bombing attempt. On that occasion he had been tortured and, upon his release, informed that, in the event of any further LTTE campaign in the area, he would be marked for death.

4. The Director of Immigration ('the Director') permitted the applicant to remain in Hong Kong while his claim to be recognised as a refugee was investigated by the UNHCR. In April 2001, the applicant was joined in Hong Kong by his wife and three young children.

5. The UNHCR investigation took some two years. During that time the applicant was able to live with his family and had freedom of movement in Hong Kong.

6. On 17 March 2003, before the UNHCR investigation had been completed, the applicant was served with a removal order pursuant to s.19(1)(b) of the Immigration Ordinance, Cap.115 ('the Ordinance'). At the same time, on the basis that the Director considered him to be a threat to the 'peace, order and security of Hong Kong', the applicant was placed into detention pursuant to s.32(3A) of the Ordinance. That section reads :

> " A person in respect of whom a removal order under section 19(1)(*b*) is in force may be detained under the authority of the Director of Immigration, the Deputy Director of Immigration or any assistant director of immigration pending his removal from Hong Kong ..."

7. The applicant, however, was not removed from Hong Kong and remains here to this day. In the first instance, this was because the applicant's claim to be recognised as a refugee had not been determined by the UNHCR. That determination was, in fact, made in late March 2003. The UNHCR informed the applicant that, by reason of what it believed to be his previous actions in Sri Lanka, he was not entitled to protection under the 1951 Convention. In light of that rejection, the applicant submitted a claim to the Hong Kong Government that he had been a victim of torture in Sri Lanka and was likely to be subjected to the same ordeal if returned to that country. The applicant sought the protection of the Hong Kong Government in terms of the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('the Torture Convention'). The applicant's claim under the Torture Convention is still being investigated. The applicant, I am told, will not be removed from Hong Kong until that investigation is completed.

8. On 30 March of this year, the applicant sought leave to institute judicial review proceedings to challenge the lawfulness of the removal order that had been served upon him in March 2003. In the same papers, as he still remained in detention, the applicant sought interim relief in the form of an order granting him bail pending a resolution of his application.

9. On 3 April 2004, Chu J granted leave to apply for judicial review. In respect of bail, she ordered that there be a directions hearing at an early date.

10. The Director opposed the application for bail. He did so on a number of grounds. Those grounds may be summarised as follows :

(i) That the Court of First Instance has no inherent jurisdiction to grant bail by way of ancillary relief to an application for judicial review. Accordingly, the applicant was restricted to challenging the lawfulness of his continued detention by way of *habeas corpus*, a procedure of an entirely different kind.

(ii) However, if it was held that the Court of First Instance did have jurisdiction to grant bail, that jurisdiction was restricted to reviewing the Director's decision not to grant bail according to accepted principles of public law review; in short, bail could only be granted if it was demonstrated that the Director had in some way erred in law. To express it another way, that the Court of First Instance did not possess an original jurisdiction to determine bail on the merits as it saw them.

(iii) That, as to the documents containing the information upon which the Director had acted to detain the applicant, those documents, both individually and as a class, being of a highly confidential nature, were protected by public interest immunity. Accordingly, none of those documents, nor any of their contents, should in any way be divulged to the applicant.

(iv) That, finally, in so far as the question of bail was to be determined by the court on the merits as it saw them, the

information available to the Director, while it was open to scrutiny by the court, revealed substantial grounds for believing that the applicant had the intention 'to endanger life and property in Hong Kong' and had the 'training, capacity and experience' to fulfil that intention. Accordingly, the applicant should be denied bail.

11. Having heard submissions, I ruled as follows :

(i) That the Court of First Instance did have jurisdiction to grant bail by way of ancillary relief to an application for judicial review.

(ii) That in determining whether bail should be granted, while the court would give due weight to the Director's reasons for denying bail, it nevertheless had an original jurisdiction to determine the matter on the merits as it saw them.

(iii) That, having examined the documents containing the information upon which the Director had acted to detain the applicant, I was firmly of the view that all those documents, taken individually, demanded to be protected by public interest immunity.

12. In so far as the constraints of public interest immunity allow, my reasons for making these three rulings are contained in this judgment.

13. The consequence of my ruling as to public interest immunity meant, of course, that Mr Dykes SC, leading counsel for the applicant, was unable in any substantive way to advocate the applicant's case with any knowledge of the material which had caused the applicant to be detained.

Put simply, Mr Dykes was reduced to the invidious position of having to 'operate blind'. The inherent unfairness of this, even though I was firm in my view that public interest immunity must prevail, troubled me, the more so as it deprived me of any assistance by way of submissions made on behalf of the applicant as to the weight of the reasons for his detention.

14. In the result, it was brought to my attention by Mr Dykes that the House of Lords in the recent case of *R v. H and Others* [2004] 2 WLR, 335, had approved in appropriate cases a procedure involving the appointment of a 'special advocate'. Mr Dykes submitted that it may be appropriate to adopt the procedure in the present case even though there was (as yet) no statutory basis for it in Hong Kong.

15. As to the nature of the procedure, in *R v. H and Others*, Lord Bingham, giving the considered opinion of the committee, said the following (para.21, p.344) :

> " The years since the decision in *R v. Davis* [1993] 1 WLR 613 and enactment of the Criminal Proceedings and Investigations Act 1996 have witnessed the introduction in some areas of the law of a novel procedure designed to protect the interests of a party against whom an adverse order may be made and who cannot (either personally or through his legal representative), for security reasons, be fully informed of all the material relied on against him. The procedure is to appoint a person, usually called a 'special advocate', who may not disclose to the subject of the proceedings the secret material disclosed to him, and is not in the ordinary sense professionally responsible to that party, but who, subject to those constraints, is charged to represent that party's interests."

16. On the basis that the adoption of the procedure would have to be by agreement, having given the applicant an opportunity to consult with his representatives, I obtained the applicant's consent to the adoption of the

procedure. The Director also agreed, doing so in the general public interest. Being satisfied that, in law, despite its novelty, there was, on a consensual basis at least, nothing to prohibit the appointment of a special advocate, I made a request to the Secretary for Justice that one be appointed to assist the court in the present case. The Secretary agreed to that request. In the event, Mr Duncan SC was appointed as special advocate.

17. My reasons for determining that it was both lawful and appropriate in this case to appoint a special advocate are contained in this judgment together with an explanation of the procedures that were followed.

18. Having taken instructions from the applicant and having been made privy to the material protected by public interest immunity, Mr Duncan was able in the course of an *in camera* hearing to grapple directly with the concerns arising out of the confidential material. He was not able to do so fully, of course, as the applicant himself remained ignorant of that material. But, subject to this material restraint, and while I cannot, of course, speak to the benefit of the procedure on any future occasion, I record that, in my view, Mr Duncan's submissions were of considerable assistance to me. In the result, I granted bail.

19. My reasons for doing so are contained in a confidential ruling made available the day after the *in camera* hearing to the Director and to Mr Duncan. That ruling goes directly to the material protected by public interest immunity, assessing that material in light of the applicant's known circumstances : hence its confidentiality.

Jurisdiction

20. During the course of the hearing, having heard argument, I ruled that this Court possesses an inherent jurisdiction to grant bail by way of relief ancillary to an application for judicial review.

21. In this regard, I chose to adopt what appears to me to be settled law in England that the High Court there possesses that same jurisdiction. I did so on the basis that, if it is recognised that such jurisdiction is vested in the High Court in England, absent a Hong Kong statutory instrument to the contrary or local precedent which binds me to such effect, it must follow that the Hong Kong Court of First Instance possesses the same jurisdiction. That this is so is a consequence of s.12(2)(a) of the High Court Ordinance, Cap.4, which reads :

> "The civil jurisdiction of the Court of First Instance shall consist of—
>
> (a) original jurisdiction and authority of a like nature and extent as that held and exercised by the Chancery, Family and Queen's Bench Division of the High Court of Justice in England."

22. As to the position in the Queen's Bench Division in England, this was authoratively stated by Sir John Donaldson M.R. in *R v. Secretary of State for the Home Department, ex parte Turkoglu* [1988] QB 398. As to the nature of the jurisdiction to grant bail, he said (at 400F) :

> " ... in my judgment bail is to be regarded in civil proceedings —as it is in criminal proceedings—as ancillary to some other proceedings. It is not possible, so far as I know, to apply to any court for bail in vacuo. It is essentially an ancillary form of relief."

In looking to the jurisdiction of the High Court, as opposed to the Court of Appeal, the Master of the Rolls said :

> " In my judgment you cannot apply to the High Court for bail unless the High Court is seized of some sort of proceedings. It may be seized of an application for leave to apply for judicial review or it may be seized of the substantive application. So long as it is seized of either of those applications, you can apply to the High Court and the court can grant or refuse bail."

23. The existence of the inherent jurisdiction was recognised more recently in a further judgment of the English Court of Appeal, that of *R (Sezek) v. Secretary of State for the Home Department* [2002] 1 WLR 348 in which Gibson LJ said (at 354A) :

> " We own to having some doubts as to whether there is room for an inherent jurisdiction to grant bail in relation to a civil appeal in judicial review proceedings when Parliament has given the Secretary of State the power to detain and the substance of the complaint is the exercise of that power. *But in light of the authorities we accept that the High Court has the power in judicial review proceedings to make ancillary orders temporarily releasing an applicant from detention.*" [my emphasis]

24. The Court of Appeal in *Sezek* recognised therefore that, while it was not the easiest of issues to resolve, the jurisdiction did exist.

25. Although I was not bound by the two authorities to which I have referred, they are persuasive and I saw no reason to part from their conclusions.

26. Mr Marshall, however, advanced the proposition that in *Sezek* the Court of Appeal, by couching its language in the way it did, recognised that it was "too late to go back"; in short, that it was now bound to a finding it itself would not have reached. But it was not "too late" for

Hong Kong, said Mr Marshall. This Court should recognise that, when our legislature vested powers of detention in the Director pursuant to the Ordinance, it did so on the basis that the Court of First Instance would not be able to encroach upon those powers unless it was demonstrated that the Director had exercised them in an unlawful manner.

27. I did not agree. By way of a general observation, it was my view that if this Court is given the power, when seized with an application for judicial review, to grant all forms of interim ancillary relief, even if it temporarily compromises a decision made by a decision-maker who has been given sole power by the legislature to make that decision, I did not see why that power should not include the power, when appropriate, to secure the liberty of the subject.

28. In support of his submissions, Mr Marshall relied on a judgment of Litton JA (as he then was) in which, sitting as a single judge of the Court of Appeal in respect of an application for bail pending appeal, he did not find *ex parte Turkoglu* to be persuasive authority in respect of the application then before him. The judgment in question is that of *Le Tu Phuong and Another v. Director of Immigration and Another* [1994] 2 HKLR 127.

29. The first question, of course, was whether the judgment, being a judgment of the Court of Appeal, was binding on me in this instance. I was satisfied it was not. It is to be emphasised that Litton JA did not come to a finding that the English Court of Appeal in *ex parte Turkoglu* had wrongly stated the law as it is applied to the High Court of England and therefore to our Court of First Instance. Litton JA was concerned

rather with the jurisdiction of the Hong Kong Court of Appeal and in respect of that concern was of the view that Sir John Donaldson's conclusions were *obiter*.

30. In my view, the judgment by Litton JA was heavily governed by the factual imperatives peculiar to Hong Kong at the time; namely, the on-going Vietnamese migrant crisis and the terms of the specific statutory regime put in place to govern that crisis. I have not read the judgment as attempting to settle *in definitive terms* any question of jurisdiction.

31. It is true that he expressed a degree of caution as to whether either court had that inherent jurisdiction but it went no further than that. For example, he said (at 132) :

> " 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." [my emphasis]

32. I accept of course that the inherent jurisdiction of this Court is not, unlike the universe, the result of a 'big bang', forever expanding without limit. But it seems to me, with respect, that the powers outlined by Litton JA long recognised as falling within this Court's inherent jurisdiction can themselves equitably and appropriately encompass the

power (when necessary) to secure personal liberty. May that not, for example, do justice between the parties? May that not also constitute a material step in the process of securing a fair and just determination of the real matters in controversy?

33. In all the circumstances, for the reasons given, I was of the view that the jurisdiction of the High Court, now recognised in England, should, by way of the nexus created by s.12(2)(a) of the High Court Ordinance, be recognised in this jurisdiction too.

The exercise of the jurisdiction

34. In *Sezek* (para.23 *supra*), the Court of Appeal said the following as to the nature of the jurisdiction and the manner of its exercise :

> " In our judgment this court is exercising an original jurisdiction and it is not judicially reviewing the decision by the Secretary of State. But given that the Secretary of State is designated by the 1971 Act as the person to decide whether a person against whom a deportation order is in force should be detained, and given his experience in this area, it is plainly right that great weight should be given to the fact that the Secretary of State has decided that person should be detained and to the reasons why he has opposed the release of that person. The language used by Sir John Donaldson MR in *Vilvarajah v. Secretary of State for the Home Department* [1990] Imm AR 457 that the jurisdiction is 'in the nature of a judicial review' may reflect those considerations."

35. I was satisfied that this was the correct approach and it was the approach I adopted.

36. I was of the view that, if this Court is possessed of an inherent jurisdiction to grant bail by way of relief ancillary to an application for judicial review, that jurisdiction was of the same nature as the jurisdiction to grant any other form of interim relief; for example, injunctive relief, and should be exercised in like manner. As such, it was an original jurisdiction, the court being required to consider the merits as it saw them.

37. Obviously, however, as the Director and designated officers under him were given the authority to decide whether a person should be detained pursuant to s.32(3A), it followed, in my view, that their reasons for coming to their decision must be accorded considerable weight. It was not for the court to ignore the experience of the Director and his officers.

Public interest immunity

38. In terms of a certificate signed by the Chief Secretary for Administration on 14 June 2004, public interest immunity was claimed by the Director in respect of a range of documents which related directly to the reasons for the applicant's detention or which made reference of a revealing nature to those reasons.

39. Public interest immunity has been described as a general rule of law founded on public policy that any document may be withheld or an answer to any question refused on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.

40. It is the court which determines whether public interest immunity exists. In this regard, see, for example, *Conway v. Rimmer and Another* [1968] 1 All ER 874, per Lord Reid (at 888) :

> " I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice."

41. In fulfilling that balancing exercise, I was given copies of the documents in respect of which public interest immunity was claimed. Having considered them, I was firmly of the view that each and every document — not as a class but as individual documents — should properly be the subject of immunity and that an order should be made for their non-disclosure. I came to that conclusion on the basis that disclosure would not only reveal the identity of sources whose anonymity was fundamental to the order and safety of Hong Kong but would constitute a gross breach of solemn confidential arrangements necessary to the good governance of this Territory.

The appointment of a 'special advocate'

42. As I have said earlier, the consequence of my order of non-disclosure was that Mr Dykes, the applicant's counsel, was unable to advocate the applicant's case as to why he should no longer be detained with any knowledge of the real reason for his detention in the first place. That not only placed Mr Dykes in an invidious position, it deprived me of the benefit of submissions made in the interests of the applicant going to the weight of the reasons for his on-going detention. It was for these

reasons that the procedure of appointing a special advocate was adopted. I understand it is the first time the procedure has been adopted in Hong Kong.

43. The procedure, however, is not without precedent. In *R v. H and Others* (para.14 *supra*), Lord Bingham spoke of the procedure being put to effective use in the United Kingdom. He observed (at 345D) :

> "The courts have recognised the potential value of a special advocate *even in situations for which no statutory provision is made*. Thus the Court of Appeal invited the appointment of a special advocate when hearing an appeal against a decision of the Special Immigration Appeals Commission in Secretary of State for the Home Department v. Rehman [2003 1 AC 153, paras.31-32, and in R v. Shayler [2003] 1 AC 247, para.34, the House recognised that this procedure might be appropriate if it were necessary to examine very sensitive material on an application for judicial review by a member or former member of a security service." [my emphasis]

Lord Bingham continued :

> " There is as yet little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate or special counsel to represent, as an advocate in PII [public interest immunity] matters, a defendant in an ordinary criminal trial, as distinct from proceedings of the kind just considered. But novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure protection of a criminal defendant's right to a fair trial."

44. Lord Bingham was aware of the ethical problems and the practical difficulties. He concluded, however, that these problems should not deter a court from appointing a special advocate when the interests of justice required it. As to the ethical problems, Lord Bingham commented :

> " Such an appointment does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession. While not insuperable, these problems should not be ignored, since neither the defendant nor the public will be fully aware of what is being done."

45. As to the practical difficulties, Lord Bingham observed that the appointment may cause delay, add to expense and, as with many new procedures, offer opportunities for exploitation. But, as I have said, he concluded that the interests of justice, when required, should nevertheless prevail.

46. To state it again, I was firmly of the view in the present matter that the interests of justice should prevail. I was not, however, prepared to impose the procedure on the applicant. He was given an opportunity to discuss the matter with his legal representatives and the procedure was adopted only after the applicant had given his unqualified consent. The Director also gave his consent, recognising that it was a course dictated by the interests of justice.

47. As to the appointment of a special advocate, it had to be a counsel acceptable to the Director *and* to the applicant. It was agreed that the Secretary for Justice, fulfilling her role, to use Lord Bingham's phrase, as 'an independent, unpartisan guardian of the public interest', should be asked to take on the responsibility of appointing counsel and meeting any necessary charges. The Secretary for Justice agreed to accept this responsibility.

48. The approach made to the Secretary for Justice was in accordance with the procedure approved by the House of Lords in *R v. H and Others*, Lord Bingham saying the following (at 353) :

> " It is very well-established that when exercising a range of functions the Attorney General acts not as a minister of the Crown (although he is of course such) and not as the public officer with overall responsibility for the conduct of prosecutions, but as an independent, unpartisan guardian of the public interest in the administration of justice: see *Halsbury's Laws of England*, 4th ed, vol 44(1) (1995), para.1344; *Edwards, The Law Officers of the Crown* (1964), pp.ix, 286, 301-302. It is in that capacity alone that he approves the list of counsel judged suitable to act as special advocates or, now, special counsel, as when, at the invitation of a court, he appoints an amicus curiae. Counsel roundly acknowledged the complete integrity shown by successive holders of the office in exercising this role, and no plausible alternative procedure was suggested."

49. As I understood it, the Secretary for Justice approved a number of counsel so that the applicant would be entitled to a choice. Once the applicant had made his choice, the following procedure was adopted :

(i) Mr Duncan, the special advocate, having not yet seen the documents subject to public interest immunity, took instructions of a general nature from the applicant and only thereafter was he shown confidential material.

(ii) Mr Duncan did not take further instructions from the applicant. The difficulties of doing so without unwittingly divulging what Mr Duncan now knew of the confidential material were obvious.

(iii) An *in camera* hearing then look place at which Mr Duncan was able to make his submissions and Mr Marshall, for the Director, was able to reply to them. It goes without saying

that neither the applicant nor his legal representatives were present at this hearing.

(iv) With the *in camera* hearing concluded, the special advocate having discharged his responsibilities, I adjourned back into open court to allow the applicant, through his legal representatives, to make final submissions.

(v) My decision, granting bail to the applicant upon certain terms and conditions, was then given. As for my reasons, as they arose directly from confidential material, they themselves had to remain confidential. My written ruling concerning the merits was made available to the Director and to the special advocate but was otherwise secured so as to be seen only by another court appraised of the matter.

An expedited hearing of the judicial review

50. As I had granted bail to the applicant by way of relief ancillary to his claim for judicial review, I considered it appropriate (in the particular circumstances of the case) to direct an expedited hearing of the judicial review itself.

The principles governing bail

51. In my confidential ruling, I said the following as to the jurisprudence that governed my consideration of the merits :

> " ... the common law has long sought to protect the liberty of the subject, especially in respect of executive detention.
>
> As Mr Duncan pointed out, the relevant sections of the Criminal Procedure Ordinance, Cap.221, state that in criminal proceedings bail *shall* be granted unless it appears to the court that there are 'substantial grounds for believing' that an applicant

> will flee, obstruct the course of justice or commit an offence : see s.9D and 9G.
>
> While I do not go so far as to say that the relevant provisions of the Criminal Procedure Ordinance should be of full and direct applicability in this case, I am of the view that they provide valuable guidance. As such, in my judgment, the applicant should not be denied his liberty unless I have substantial grounds for believing that he still constitutes a threat to what the immigration authorities have described as 'the peace, order and security of Hong Kong'. To put it another way, unless I am of the view, in the light of all the evidence available to me, that there is a real possibility that the applicant [still constitutes that threat], I am obliged to order that he be given bail."

Costs

52. As to costs, I ordered that they be reserved, the matter to be considered after determination of the application for judicial review.

(M.J. Hartmann)
Judge of the Court of First Instance,
High Court

Mr Philip Dykes, SC leading Mr Stanley Ma, instructed by Messrs Barnes & Daly, assigned by Director of Legal Aid, for the Applicant

Mr Peter Duncan, SC instructed by Department of Justice, appointed as special advocate, for the Applicant

Mr William Marshall, SC leading Mr Lee Tin Yan, GC of Department of Justice, for the Respondent