IN THE SUPREME COURT OF NEW ZEALAND SC 124/2014

[2015] NZSC Trans 12

BETWEEN **JIANYONG GUO**
JIAXI GUO
JIAMING GUO
Appellants

AND **MINISTER OF IMMIGRATION**
Respondent

Hearing: 1 April 2015

Coram: Elias CJ
William Young J
Glazebrook J
Arnold J

Appearances: R M Dillon for the Applicants (via video link)
C A Griffin for the Respondent

APPLICATION FOR LEAVE TO APPEAL

ELIAS CJ:

Yes, thank you, Mr Dillon.

MR DILLON:

Yes. I'm appearing for the applicant. Having heard previous counsel, to some extent I'm standing on the shoulders of giants, and the Court already has the written submissions, so I've tried to –

ELIAS CJ:

I've never heard Mr Hodder and Mr Goddard described as giants before.

MR DILLON:

I think the reference is to the Renaissance when the access to the ancient Greek knowledge suddenly became available and some learned author at that stage recognised that not only that it was nothing new under the sun, but that the developments that they were so proud of were in fact just developments of existing thought, and really my submissions this morning are developments of existing thought.

The first one is just a chronology, and it's as simple a chronology as this: the Supreme Court Act was enacted in 2003, the Immigration Act was enacted in 2009, and there is no reason to suspect that the provisions of the Supreme Court Act were not in contemplation when the scheme of the Immigration Act was developed.

In relation to the Supreme Court Act, section 7 provides jurisdiction in very wide terms, subject only to two provisos. Because it provides jurisdiction in very broad terms and because of those two provisos, it is submitted that that which is not prohibited must be permitted. Section 7 permits a broad jurisdiction and section 7 provides the very means to exclude jurisdiction if that is intended. The example in my written submissions at paragraph 14 are by reference to the Employment Contracts Act of 1991, which had a very clear exclusion of jurisdiction provision, there is no such exclusion in the Immigration Act.

My friend has referred the Court to section 246, where the substantive rights of appeal exist, and concedes that under section 246 this Court has jurisdiction. Having made that concession, it is difficult to see any principle basis for excluding exactly the same rights under section 245. 245 is the gatekeeper provision, but there is nothing in its wording that is any different in terms of this Court's jurisdiction. It is submitted this Court's jurisdiction arises squarely under section 7 and is not prohibited. There is a reason for that scheme. My friend refers to the scheme of the Immigration Act,

but the Immigration Act itself is subject to international covenants that New Zealand is subject to, and that includes, in this particular appeal, recourse to the United Nations Human Rights Committee in the event that all rights of appeal have been exhausted. It is submitted that one would expect that any issue that could be subject to international oversight would have been considered at the very highest levels of New Zealand's own jurisdiction. In other words, this indeed is a very odd type of appeal.

In questioning earlier this morning the Court asked, "Why not start with the originating Acts' right of appeal and progress from there?" The applicants' position is that's exactly what they do, and when the provisions in the Immigration Act are exhausted, that is when the Supreme Court Act takes matters forward and, because the Supreme Court Act says nothing that would prohibit this being taken forward, it is within the jurisdiction of this Court. If it was to be prohibited, that would be expressed under section 7(a), not inferred, which effectively is the submission that counters the applicants' position

Essentially this is an access to justice issue. Conceptually, if one conceives that leave to appeal has been wrongly refused, the effect of not having leave is that no substantive rights can be advanced. And yet my friend has conceded that if the substantive rights were advanced and if they wrong, access to this Court would be available. With respect, the first wrong is the pernicious wrong. The first wrong prevents the substantive matters being address. The effect of that is that section 3 of the Supreme Court Act can never be given effect, because effectively the appellant is knocked out at the earliest stage.

In relation to the Arbitration Act 1996 there was comments about the question of symmetry and, quite clearly, 7(b) of the Act is asymmetric. But on the other hand 7(b), referring to a refusal and not dealing with a grant of leave, is an express prohibition, and to the extent that it is an express prohibition it is consistent with 7(a), which requires, in the appellants' submissions, just such an express prohibition. Nothing can be done about Parliament's intent and the wording Parliament has used. On the other hand, Parliament hasn't used the words, for instance, in 7(b), "The decision concerns leave or special leave to appeal," or similarly in 8(b), "The decision concerns leave or special leave to appeal," but uses the word "refusal". In that context "refusal" is not the same as grant and yet to the extent that there is an argument in the Arbitration Act, effectively the Court is being asked to regard the

word used refusal the same as a grant. It is submitted that that just isn't available on the plain normal reading of the words. It creates a very significant loss which was – will have the result only of confusing everybody and leaving everyone with a game of guessing the inference. That is the effect of the respondent's case on a statute by statute basis. There will be an issue as to whether the Supreme Court has jurisdiction or whether there is an inference that arises for instance from 7(a) that the next level of appeal is prohibited. With respect, that is probably the most wasteful result that one could conceive of because it invites a statute by statute jurisdictional argument –

ELIAS CJ:
There will have to be a statute by statute analysis on your argument but as I understand it you're saying it has to be a specific reference and you don't look to infer in every statute.

MR DILLON:
Exactly. It is guess the inference or it is expressly prohibited and it's submitted that 7(a) deals with being expressly prohibited. Now Mr Goddard's submissions dealt with effectively the words "to the effect that" an Act might make provision prohibiting an appeal and has used the words to the effect that, as effectively the wriggle room to allow the inference argument to be raised. It is submitted that the words "to to the effect that" in section 7(b) is merely a device to avoid an argument that only the words, quote, "There is no right of appeal against the decision," which is the balance of section 7(a), would be required to prohibit jurisdiction. In other words there is some room for the formula to be rather wider than using those precise words. It is not so wide though that there is no express provision. One has to guess the inference from the scheme of the Act. It s submitted that certainty is required and certainty is in the public interest in terms of access to justice issues, particularly to access to this Court. And it is not as if having the need for an express provision opens the floodgates to appeals to this Court. Leave is still required, section 13 still has to be overcome, it is submitted that is the effect of substantive gate keeping provision.

In essence clear words are required. If clear words are not present, an appeal is jurisdictionally based but must still overcome section 13. The force of that submission can be tested with the hypothetical question, and it is a speculative questions because I have not had the opportunity to investigate the answer to it. But

the question is this. Are there any statutes that provide express rights of appeal to this Court.

WILLIAM YOUNG J:
There are a few actually.

ELIAS CJ:
Criminal ones.

WILLIAM YOUNG J:
The Crimes Act, for instance, or Criminal Procedure Act.

MR DILLON:
If it is so that there are such express rights then the "to the effect that" provision in 7(a) may have a wider meaning. But if not, and particularly in the civil sphere, it is submitted that 7(a) must be limited and require express prohibition. But perhaps that argument runs both ways. If there are express rights of appeal, then there should be express prohibitions if there is no right of appeal.

ELIAS CJ:
Well Mr Dillon, is there – you have covered a lot of these points in your written submissions which we have read. Is there anything additional that you want to bring to our attention?

MR DILLON:
I don't believe so. The only other point was the reference to the *Geogas SA v Trammo Gas Ltd* [1993] 1 Lloyd's Rep 215 (CA) case in the House of Lords.

ELIAS CJ:
Yes.

MR DILLON:
Mr Goddard, I don't have that case in front of me so I was listening carefully to Mr Goddard's excerpts. One of the excerpts referred to the fact that there was existing case law in England to the effect that there was no distinction between a grant or a refusal of leave in relation to the particular statute under consideration regarding appeals to the House of Lords. With respect, 7(b) and 8(b) expressly use

the word “refusal”. That maybe more relevant to the question of the Arbitration Act than the Immigration Act, but on the other hand it does show a very straightforward interpretation is all that is required to conclude that jurisdiction is available for these appellants to this Court. Those are the submissions for these appellants. Thank you Your Honour.

ELIAS CJ:
Thank you Mr Dillon. Ms Griffin, do you want to be heard in response?

MS GRIFFIN:
About five minutes Ma’am. Did you want to do that now?

ELIAS CJ:
Yes, we’ll do that now, thank you.

MS GRIFFIN:
And the only point that I want to say in response is picking back up on my friend Mr Dillon’s suggestion that my concession about section 246 somehow makes it unprincipled to take a different view –

WILLIAM YOUNG J:
I don’t think it does. But it doesn’t because that’s a substantive appeal, appeal and then right to come here.

MS GRIFFIN:
Yes Sir, and that’s exactly my point. If you just allow me to just elucidate that very briefly as to why particularly. Of course it’s what Mr Goddard said about the nature of leave refusals and appeals from that. But it is also when you look at how 246 plays out to. You see the perfect interaction there between sections 8(b) and sections 7(b) in the Supreme Court Act because the High Court and Court of Appeal are both engaged on leave refusal or grant decisions against a substantive High Court judgment. So what you find there, of course, is if the High Court refuses leave, section 8(b) would otherwise there apply but when the Court of Appeal has become seized of it, and the Court of Appeal refuses leave against the substantive High Court judgment, 7(b) applies, but of course you still have the leap frog provision under section 14 for a substantive refusal.

So 246 has, aligns very clearly with the Supreme Court Act there how it would work, and that's why I say you can contrast it then to 245 where all of a sudden it appears to be a misstep there and the question for this Court is whether or not the Supreme Court Act and the Immigration Act has actually contemplated that there should actually be three leave considerations. Is that, when you look at both 245 and 246, they both are talking about two leave decisions, two prospects of leave refusal, before you get into substantive, and that's the policy question I leave but the question is to whether this Court, it's open to this Court to decline jurisdiction.

ELIAS CJ:
Thank you Ms Griffin.

MS GRIFFIN:
Thank you Your Honours.

ELIAS CJ:
Mr Dillon, was there anything arising out of that?

MR DILLON:
No, nothing further to add to the submissions, thank you.

ELIAS CJ:
Thank you Mr Dillon. Thank you counsel for your submissions. We will consider our approach in this matter and deliver a reserved judgment.

COURT ADJOURNS: 1.04 PM