2002 CarswellNat 4719
33 Imm. L.R. (3d) 251

Liang, Re

Xiao Dong Liang, Claimant(s)

Immigration & Refugee Board (Convention Refugee Determination Division)

Cooke, Pinkney Members

Heard: March 20, 22, 2002
Judgment: July 18, 2002
Docket: T99-05599

Counsel: Lorne Waldman, Ricardo Aguirre, Max Cheng for Claimant
Don Collision for Minister
Selwyn **Pieters** - Designated Representative, Refugee Claim Officer

Subject: Immigration; Constitutional

Aliens, immigration and citizenship --- Constitutional issues — Charter of Rights and Freedoms — Visitors and immigrants — Arrest and detention

Refugee claimant was arrested and interviewed by Immigration Officer and Chinese-speaking Ontario Provincial Police officer — OPP officer's memo book contained no indication that claimant was informed of his right to counsel upon arrest or before interview — Two days later, OPP officer prepared document entitled "anticipated evidence" for disclosure purposes in whatever proceedings might be initiated against claimant — That document contained statement that claimant was "advised of his rights" — Claimant insisted that he was never informed of his right to counsel and that OPP officer disparaged lawyers when claimant asked if he could contact counsel — Claimant believed that OPP officer was only present as interpreter — Voir dire was held at Convention refugee hearing to determine admissibility of documents prepared by OPP officer, who did not appear at hearing for health reasons — OPP officer's documents, and claimant's account of his conversation with OPP officer, were not admitted into evidence — Claimant was clearly detained within meaning of s. 10(b) of Canadian Charter of Rights and Freedoms when he was interrogated — Detention was justified as there were allegations from China that claimant was mastermind of major criminal organization involved in murder, intimidation and bribery — On balance of probabilities, claimant was not properly informed of his right to counsel — Section 10(b) prohibits police from belittling detainee's lawyer with express goal or effect of undermining his confidence in his lawyer or solicitor-client relationship — That principle applies where police belittle lawyers in general — Violation of accused's right to counsel was not justified under s. 1 of Charter — Evidence in question was conscriptive evidence which would seriously challenge claimant's credibility — Admission of evidence would bring administration of justice into disrepute.

Cases considered by *Cooke Member*:

Dehghani v. Canada (Minister of Employment & Immigration) (1993), 18 Imm. L.R. (2d) 245, 101 D.L.R. (4th) 654, [1993] 1 S.C.R. 1053, 150 N.R. 241, 14 C.R.R. (2d) 1, 10 Admin. L.R. (2d) 1, 20 C.R. (4th) 34, 1993 CarswellNat 57, 1993 CarswellNat 1380 (S.C.C.) — referred to

Erven v. R. (1978), [1979] 1 S.C.R. 926, 25 N.R. 49, 6 C.R. (3d) 97, *(*sub nom. *R. v. Erven)* 30 N.S.R. (2d) 89, *(*sub nom. *R. v. Erven)* 49 A.P.R. 89, 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507, 1978 CarswellNS 22, 1978 CarswellNS 108 (S.C.C.) — followed

Huang v. Canada (Minister of Citizenship & Immigration) (2002), 2002 CarswellNat 3076, 2002 FCT 149, 2002 CarswellNat 298, [2002] 3 F.C. 266, 216 F.T.R. 125 (Fed. T.D.) — followed

R. v. Burlingham (1995), 38 C.R. (4th) 265, 97 C.C.C. (3d) 385, 181 N.R. 1, 124 D.L.R. (4th) 7, 58 B.C.A.C. 161, 96 W.A.C. 161, 28 C.R.R. (2d) 244, [1995] 2 S.C.R. 206, 1995 CarswellBC 71, 1995 CarswellBC 639 (S.C.C.) — considered

R. v. Collins (1987), [1987] 3 W.W.R. 699, [1987] 1 S.C.R. 265, *(*sub nom. *Collins v. R.)* 38 D.L.R. (4th) 508, 74 N.R. 276, 13 B.C.L.R. (2d) 1, 33 C.C.C. (3d) 1, 56 C.R. (3d) 193, 28 C.R.R. 122, 1987 CarswellBC 94, 1987 CarswellBC 699 (S.C.C.) — followed

R. v. Hodgson (1998), 1998 CarswellOnt 3417, 1998 CarswellOnt 3418, *(*sub nom. *R. v. M.C.H.)* 230 N.R. 1, 127 C.C.C. (3d) 449, 163 D.L.R. (4th) 577, 18 C.R. (5th) 135, *(*sub nom. *R. v. M.C.H.)* 113 O.A.C. 97, [1998] 2 S.C.R. 449 (S.C.C.) — followed

R. v. Lim (1990), *(*sub nom. *R. v. Lim (No. 3))* 1 C.R.R. (2d) 148 (Ont. H.C.) — followed

R. v. Stillman (1997), 113 C.C.C. (3d) 321, 144 D.L.R. (4th) 193, 5 C.R. (5th) 1, [1997] 1 S.C.R. 607, 209 N.R. 81, 185 N.B.R. (2d) 1, 472 A.P.R. 1, 42 C.R.R. (2d) 189, 1997 CarswellNB 107, 1997 CarswellNB 108 (S.C.C.) — followed

R. v. Therens (1985), [1985] 1 S.C.R. 613, 13 C.R.R. 193, [1985] 4 W.W.R. 286, 18 D.L.R. (4th) 655, 59 N.R. 122, 40 Sask. R. 122, 18 C.C.C. (3d) 481, 45 C.R. (3d) 97, 32 M.V.R. 153, 38 Alta. L.R. (2d) 99, 13 C.P.R. 193, 1985 CarswellSask 368, 1985 CarswellSask 851 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 1 — referred to

s. 10 — referred to

s. 10(b) — considered

s. 24 — considered

s. 24(1) — considered

s. 24(2) — considered

Immigration Act, R.S.C. 1985, c. I-2
s. 27(2)(g) — referred to

s. 67(2) — referred to

VOIR DIRE to determine admissibility of evidence.

***The Board*:**

1 These are the reasons for the decision of the panel to refuse to consider three documents prepared by Special Constable Stephen Tsai of the Ontario Provincial Police[FN1] or the evidence of the claimant concerning the time he spent with Constable Tsai on October 23, 1998.

2 Prior to the hearing commencing, counsel for the claimant indicated that the evidence of Constable Tsai would be challenged because of the provision of the *Charter of Rights and Freedoms* in that the claimant's right to counsel, as guaranteed by section 10(b),[FN2] was breached.

3 The panel notes the recent decision of MacKay, J. in *Huang*[FN3] in which the Court makes it clear that the Convention Refugee Determination Division (CRDD) must address this issue whenever it arises — that is whenever the claimant is detained within the meaning of Section 10(b).

4 As to how the issue should be addressed, the panel held a *voir dire* on its own motion and in accordance with the direction of the Supreme Court of Canada in *R. v. Hodgson*.[FN4] In *R. v. Hodgson*, Cory, J., as he then was, first quotes, Dickson, J., as he then was, from *Erven v. R.* as saying it "can now be taken to be clearly established in Canada that no statement made out of court by an accused person to a person in authority can be admitted into evidence against him unless the prosecution shows, to the satisfaction of the trial judges, that the statement was made freely and voluntarily."[FN5]

5 We then read the following summary of applicable principles pertaining to the admission of statements made to persons in authority and some of the factors to be taken into consideration with regard to them.

1. The rule which is still applicable in determining the admissibility of a statement made by an accused person in authority is that it must have been made voluntarily and must be the product of an operating mind.

2. The rule is based upon two fundamentally important concepts: the need to ensure the reliability of the statement and the need to ensure fairness by guarding against improper coercion by the state. This results in the requirement that the admission must not be obtained by either threats or inducements.

3. The rule is applicable when the accused makes a statement to a person in authority. Though no absolute definition of "person in authority" is necessary or desirable, it typically refers to those formally engaged in the arrest, detention, examination or prosecution of the accused. Thus, it would apply to person [sic] such as police officers and prison officials or guards. When the statement of the accused is made to a police officer or prison guard a voir dire should be held to determine its admissibility as a voluntary statement, unless the voir dire is waived by counsel for the accused.

4. Those persons whom the accused reasonably believes are acting on behalf of the police or prosecuting authorities and could therefore influence or control the proceedings against him or her may also be persons in authority. That question will have to be determined on a case-by-case basis.

5. The issue as to who is a person in authority must be resolved by considering it subjectively from the viewpoint of the accused. There must, however, be a reasonable basis for the accused's belief that the person hearing the statement was a person in authority.

6. The issue will not normally arise in relation to undercover police officers. This is because the issue must be approached from the viewpoint of the accused. On that basis, undercover police officers will not usually be viewed by the accused as persons in authority.

7. If it is contended that the recipient of the statement was a person in authority in the eyes of the accused then the defence must raise the issue with the trial judge. This is appropriate for it is only the accused who can know that the statement was made to someone regarded by the accused as a person in authority.

8. On the ensuing voir dire the accused will have the evidential burden of demonstrating that there is a valid issue for consideration. If the accused meets the burden, the Crown will then have the persuasive burden of demonstrating beyond a reasonable doubt that the receiver of the statement was not a person in authority or if it is found that he or she was a person in authority, that the statement of the accused was made voluntarily.

9. In extremely rare cases the evidence adduced during a trial may be such that it should alert the trial judge that the issue as to whether the receiver of a statement made by an accused was a person in authority should be explored by way of voir dire. In those cases, which must be extremely rare in light of the obligation of the accused to raise the issue, the trial judge must of his or her own motion direct a voir dire, subject, of course, to waiver of the voir dire by counsel for the accused.

10. The duty of the trial judge to hold a voir dire of his or her own motion will only arise in those rare cases where the evidence, viewed objectively, is sufficient to alert the trail judge of the need to hold a voir dire to determine if the receiver of the statement of the accused was, in the circumstances, a person in authority.

11. If the trial judge is satisfied that the receiver of the statement was not a person in authority but that the statement of the accused was obtained by reprehensible coercive tactics, such as violence or credible threats of violence, then a direction should be given to the jury. The jury should be instructed that if they conclude that the statement was obtained by coercion, they should be cautious about accepting it, and that little if any weight should be attached to it.[FN6]

6 In the opinion of the panel, the evidence is sufficient as to inquire as to whether or not Special Constable Tsai was a person in authority.

7 Therefore, on February 27, 2002, the CRDD issued a summons pursuant to paragraph 67(2) of the *Immigration Act*, for Special Constable Tsai to appear on March 20, 2002 to give evidence on this matter. This summons was given to the Minister's counsel to serve on the witness. On March 14, 2002, the Minister's counsel wrote to the Board that Special Constable Tsai "suffered a massive heart attack in April 2000 and has been unable to work since. Unfortunately, he is, as a result, also incapable of appearing as a witness."

8 An officer from Canada Immigration, Robert Bowyer, was present for part of the interview on October 23, 1998. He was neither summoned by the panel nor provided by the Minister, to give evidence in either live or documentary form. The claimant testified that Mr. Bowyer was not present for the pertinent part of the interrogation.

9 The *voir dire*, therefore, related to the three documents provided by Special Constable Tsai[FN7] and the evidence taken on March 20, and 22, 2002 from the claimant.

10 The claimant entered Canada on May 15, 1998 on what was accepted at the time as a valid Dominican passport. The passport stamp indicates permission to remain in Canada until November 14, 1998.[FN8]

11 On October 23, 1998, according to the claimant's testimony, he was riding up Yonge Street, in Toronto, in the car of a friend when "five or six police came forward and pointed a gun at me. They wanted me to raise my hands, wanted me to get off car and then arrested me."

12 The claimant's English is very poor. No interpreter was present.

13 He was taken to Division 32 and waited "for some time" for Special Constable Tsai to arrive.

14 Special Constable Tsai says, frankly, in his notes, that the interview was conducted by Immigration Officer Bowyer and that he, Special Constable Tsai, acted as an interpreter.[FN9] He made no mention of giving a *Charter* warning, although the panel is of the view that good police practice would involve that fact being in his police memo book if it occurred.

15 Two days later, Special Constable Tsai prepared a document he entitled "anticipated evidence". One supposes this document was prepared for disclosure purposes for whatever litigation, immigration or criminal, might be anticipated. In this document, he indicates that he wore "plain clothes", that he "joined with the investigators from the Fugitive Squad of the Metro Toronto Police and Immigration Canada Officer Robert Bowyer in the arrest..." and that, at Division 32 "he was advised of his rights."[FN10] This is the only time Special Constable Tsai made a claim about having given any sort of warning regarding the claimant's rights.

16 Finally, Special Constable Tsai, on December 16, 1998, swore a statutory declaration to the effect that he had conducted the interview, apparently alone, as a Special Constable, O.P.P., in the holding cell at #52 Division.

17 The claimant indicates that he thought, at first, that Special Constable Tsai was only an interpreter. A very brief interview with Officer Bowyer occurred and then Officer Bowyer departed.

18 He swears the conversation which followed consisted only of the story he has consistently told since, including at this hearing, to the effect that he did not know until his arrest that day that he was wanted by authorities in China. [Special Constable Tsai's version is that he informed, whoever he was speaking to, on that day, that he knew authorities in China were looking for him before he left Hong Kong in April 1998.]

19 The claimant claims he was never told he had a right to counsel. Rather, he told the panel on numerous occasions that, in fact, he asked permission to contact counsel several times and was told "Lawyers are cheaters. You have to spend a lot of money and, eventually, you go back." Finally, when he mentioned that he knew of another Chinese national who was arrested in Canada being given the right to counsel the claimant, too, was given the right to call a friend and counsel was found.

20 Another fact that the claimant emphasized was that he, somehow, was led to believe that the whole conversation was being subjected to an audio tape. He tells us that only he and Special Constable Tsai were together when the disputed conversation occurred. As the extensive cross-examination by the Minister's counsel continued, he settled into the position that for three hours of interrogation, he thought Special Constable Tsai to be no more than an English-Mandarin interpreter.

21 The claimant tells us that this issue was raised at an Immigration Inquiry before the Adjudication Division and that his recollection was that Special Constable Tsai admitted his version of the facts was wrong. Both the Refugee Claim Officer (RCO) and counsel for the claimant were unsuccessful in obtaining tapes or a transcript of this testimony as it has, apparently, been destroyed in accordance with government policy after three years. We do have, however, the decision of Adjudicator Robert Murrant, dated May 28, 1999 which clearly contradicts the claimant's recollection, and indicates that Special Constable Tsai was consistent and believable in his testimony as to what was said.[FN11]

22 Only the claimant tells us that the conversation was taped. The Minister's counsel makes

no suggestion that a taping occurred. The panel is left with the impression that the claimant was mistaken. Thus, there is no evidence to corroborate either version of what went on.

23 Despite the persuasive argument from the Minister's counsel to the effect that the Special Constable is a man of integrity because he is a police officer of long standing, the panel is persuaded by the view of Doherty, J. who, after a distinguished career as a Crown Attorney wrote in *R. v. Lim* that police are *not* unbiased in criminal cases.[FN12] This *is* a criminal case, although the criminal issues are not within the jurisdiction of the CRDD. The panel is cognizant of the fact that Special Constable Tsai had been informed by a foreign police force that the claimant was wanted for, among other things, murder. That was the reason for the arrest. That had to be why Special Constable Tsai was interested in conducting a lengthy interrogation — much lengthier than the Immigration Officer.

24 Doherty, J. says because police are *not* unbiased, we cannot take the position that they are neutral and the failure to videotape or, at least, audiotape the interrogation should result in an adverse inference against the police.

25 He says, in part,

Having reviewed the evidence concerning the interviews of Mr. Lim on July 8 and July 20, and having read the statements which Mr. Lim is alleged to have made and signed, I am left with a distinct impression that the statement-taking process used by the Holdup Squad and the members of the York Regional Police Department was designed to both minimize the active involvement of the accused and preclude resort to any independent source of information (apart from the accused's testimony, should he elect to testify on the voir dire) as to what went on in the statement-taking process. The police appear to have set the stage for a battle of credibility on the voir dire and excluded any independent source of information which could have supported one side or the other.

The failure of the police, who were in total control of the interview process — and who, on their evidence, were dealing with a co-operative accused — to have resort to devices which could have provided a video or audio record of the procedure suggests the reasonable inference that the police did not want an independent electronic record of that process, because that record would not have supported their oral evidence as to Mr. Lim's ability to understand and speak English. I draw that inference.[FN13]

26 In the circumstances of the opportunity to provide corroboration in the form of a videotape or an audiotape, which he failed to do, and in the circumstances of his failure to provide an observer as a corroborating witness, — all of which was possible from Special Constable Tsai's position — but would have been impossible for the claimant — the panel must find adversely with respect to Special Constable Tsai's evidence. Further, the discrepancies in his three documents as to his role and who was doing the interrogation reflect adversely on his evidence.

27 The panel respects the finding of Adjudicator Murrant but we did not hear the evidence as he did and we are not bound by his credibility findings.

28 This is not to say that the panel found the claimant, necessarily, to be truthful. He does, unquestionably, have a lot to lose — and he did present himself as a clever, calculating witness whose recollection of the facts was — as in his recall of the evidence taken at the inquiry, — coloured by what he wanted to have occurred. It is hard to believe, and the panel does not, that Special Constable Tsai would have reversed himself under cross-examination at the inquiry, only to have the Adjudicator find he did not. Further, even if the claimant had been given all his rights pursuant to the *Charter*, the panel does not suppose that, in the circumstances of the *voir dire*, this claimant would have so proclaimed.

29 What the panel is left with is little or no persuasive evidence from anywhere — specifically

from the Minister — to the effect that those rights were given.

Was the claimant "detained" within the means of Section 10(b)?

30 A person is detained when an "agent of the state assumes control over the movement of [the] person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel."[FN14] This was the starting point for Mr. Justice Iacobucci in *Dehghani v. Canada*.[FN15]

31 There is no question that, in this case, he was detained within the meaning of Section 10(b).

Was the detention justified?

32 The allegations from China are to the effect that the claimant was, along with his brother, the mastermind of a major criminal organization involved in murder, intimidation and bribery.[FN16] This information resulted, in the opinion of Officer Bowyer, in reasonable grounds to suspect that he is a person referred to in Paragraph 27(2)(g) of the *Immigration Act*.[FN17]

33 The panel finds that the detention was justified.

Was there a violation of the claimant's right to retain and instruct counsel and be informed of that right without delay?

34 The panel finds, on a balance of probabilities, that the claimant was not properly informed of his right to retain and instruct counsel in order to make a meaningful choice as to what to do next.

35 The panel finds that he raised the issue himself and was likely informed, only then, that the right existed but was advised not to exercise it as it was a waste of money. The panel finds that, while the claimant, eventually, was able to contact a friend who retained counsel on his behalf, he was not given opportunity for a confidential consultation with the counsel before the interrogation.

36 In *R. v. Burlingham*, Justice Iacobucci says "... Section 10(b) specifically prohibits the police... from belittling an accused's lawyer with the express goal or effect of undermining the accused's confidence in his or her lawyer or the solicitor-client relationship."[FN18] Surely, the suggestion that any lawyer will cheat him and will be unsuccessful on his behalf is indicated in what is meant by this prohibition.

Was the violation justified as a reasonable limit under Section 1?

37 The Minister's counsel agrees that the violation is not so justified.

38 As MacKay, J. said in *Huang*:

It is trite law that if an individual's Charter rights are infringed, the onus is on the Crown to justify the infringement under section 1 of the Charter, as a reasonable limit, prescribed by law, which is demonstrably justified in a free and democratic society. The Minister has not addressed this issue directly. I conclude that, *prima facie*, the violation of the applicant's rights under Section 10(b) was not justified under Section 1.[FN19]

Should the statements of Special Constable Stephen Tsai and the claimant's evidence of the conversation, be excluded pursuant to Section 24(2) because of the violation of the claimant's rights under Section 10(b)?

39 Section 24 reads:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

40 As set out above, the panel concludes under Section 24(1) that the statement was obtained in a manner that infringed or denied rights guaranteed by Section 10(b) of the *Charter*.

41 Section 24 (2) addressed the remedy. The so-called *Collins*[FN20] test seems to still be the appropriate law to apply. The test is summarized by Iacobucci, J. in *Burlingham* as follows:

¶28 In Collins, supra, at pp. 283-85, Lamer J. (as he then was) set forth a number of criteria to be examined in determining whether the admission of evidence obtained in violation of a Charter right would tend to bring the administration of justice into disrepute. In a subsequent decision, Jacoy, supra, Lamer J. then explicitly grouped these factors into three categories: (1) those affecting the fairness of the trial; (2) those relating to the seriousness of the violation; and (3) those relating to the effect on the reputation of the administration of justice of excluding the evidence. It appears that, when the s. 24(2) analysis was first developed by this Court in Collins, the impact of the evidence on the fairness of the trial was determined to be the most important consideration under s. 24(2) in terms of triggering the exclusionary effect of the Charter remedy. In Collins, supra, at p. 284, Lamer J. held:

If the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of the other factors, the evidence generally should be excluded.

[Emphasis in original.]

42 In *R. v. Stillman*,[FN21] the Supreme Court further developed a two-step test for fairness analysis and essentially that if that test is not met — that is, if it would not be fair to the claimant to admit the evidence — it is unnecessary to consider the second and third grounds in *Collins*.

43 As credibility is crucial to this hearing and the alleged admission of this conscriptive evidence would seriously challenge the claimant's credibility, the panel finds admission of the statements would be highly prejudicial.

Conclusion

44 The panel will not admit or consider any of Special Constable Tsai's three statements, or the claimant's recounting of his conversation with Special Constable Tsai on October 23, 1998.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefore;

(b) to retain and instruct counsel without delay and to be informed of that right;

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Order accordingly.

FN1. Exhibit R-8, items M-9, M-10 and item 5 of exhibit M-1 dated December 16, October 23, and October 25, 1998, respectively.

FN2. Canadian Charter of Rights and Freedoms

FN3. *Huang v. Canada (Minister of Citizenship & Immigration)* [2002 CarswellNat 298 (Fed. T.D.)] (F.C.T.D., no. IMM-5816-00), MacKay, February 8, 2002.

FN4. [1998] 2 S.C.R. 449 (S.C.C.).

FN5. [1979] 1 S.C.R. 926 (S.C.C.) at 931.

FN6. Hodgson, Ob. cit., paragraph 48.

FN7. Ob. cit., footnote 1.

FN8. Exhibit M-1, page 9 (page 855 of the transcript of the appeal from the first hearing).

FN9. Exhibit R-8, item M-10.

FN10. Exhibit R-8, item M-1.

FN11. Exhibit R-8, item M-6, pages 5 and 6.

FN12. (Ont. H.C.)

FN13. Ibid., p. 3.

FN14. *R. v. Therens*, [1985] 1 S.C.R. 613 (S.C.C.) at 641-2.

FN15. *Dehghani v. Canada (Minister of Employment & Immigration)*), [1993] 1 S.C.R. 1053 (S.C.C.), where *R. v. Therens* is quoted at 1065-6.

FN16. Exhibit M-1, item 3.

FN17. Note Exhibit R-8, item M-1, p.9.

FN18. [1995] 2 S.C.R. 206 (S.C.C.) at paragraph 14.

FN19. Huang, Op. Cit., paragraph 22.

FN20. As set out in *R. v. Collins*, [1987] 1 S.C.R. 265 (S.C.C.) by Lamer, J., as he then was.

FN21. [1997] 1 S.C.R. 607 (S.C.C.).

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