IN THE COURT OF APPEAL

1996, No. 187
(Civil)

- Headnote -

Judicial review of decision of Refugee Status Review Board confirming decision of Director of Immigration that Vietnamese migrants were not Convention refugees - Section 13F(8) Immigration Ordinance excludes review or appeal of the Board's decision in any court - High Court's jurisdiction limited to supervisory role as regards decision-making process of the Board - High Court judge had concluded that the decision was not perverse or irrational.

Held (Court of Appeal): Judge had applied the law correctly.
Appeal dismissed.

IN THE COURT OF APPEAL

1996, No. 187
(Civil)

BETWEEN

TRAN VAN TIEN and OTHERS	Applicants (Appellants)
and	
THE DIRECTOR OF IMMIGRATION	1st Respondent (Respondent)
THE REFUGEE STATUS REVIEW BOARD	2nd Respondent (Respondent)

Coram: Hon Litton V-P, Mortimer and Godfrey JJ.A. in Court
Date of hearing: 7 - 10 January 1997
Date of delivery of judgment: 15 January 1997

J U D G M E N T

Litton V-P:

Introduction

There are four appellants before us: Nong Van Sui (A1), Chu Van Cam (A2), Voong Khac Luong (A3) and Tran Kai Hung (A4). They are ethnic Chinese and former residents of Vietnam who arrived in Hong Kong without travel documents between April 1990 and February 1991. They were all born in Ha Tuyen Province in northern Vietnam and had spent (together with their families) about a decade in "monitored areas" or "Chinese concentrated areas" in Ha Tuyen Province before they fled. They are part of what is known as the "second wave" of Vietnamese boat-people leaving Vietnam, seeking refuge in Hong Kong: a flood of unplanned arrivals starting in late 1987 or early 1988

which had stretched the resources of the community to its limits, causing the Hong Kong government, with the agreement of the United Nations High Commission for Refugees ("UNHCR") in June 1988 to abandon its previous policy of treating all Vietnamese boat-people as refugees, permitted to remain in Hong Kong pending resettlement elsewhere. By the time the appellants arrived, there was in place the "screening" process established in accordance with a Statement of Understanding made with the UNHCR in September 1988 for the determination of refugee status. This involved applying the guidelines in the UNHCR Handbook on Procedures and Criteria for determining refugee status under the 1951 Convention and 1967 Protocol, taking into account the special situation of asylum seekers from Vietnam. In essence, this involved a three-stage process:

(i) Examination by an immigration officer under s4(1)(a) of the Immigration Ordinance, Cap 115, using a questionnaire form agreed with the UNHCR, to reflect the criteria for refugee status under the Convention;

(ii) a review by the Refugee Status Review Board (RSRB) under s13F if the migrant is determined by the Director of Immigration not to be a refugee; for this purpose the applicant has legal assistance provided by an agency called the AVS;

(iii) a further review by the UNHCR: the Hong Kong Government having agreed with the UNHCR that a rejected migrant would nevertheless be treated as a refugee if "mandated in" after such a review. This constitutes in effect an extra-statutory monitoring of the exercise of judgment by the RSRB.

What has been described above is a very brief summary of the "screening process" for Vietnamese migrants arriving in Hong Kong after 15 June 1988, and would suffice for the purposes of this judgment. A much fuller account can be found in Mortimer J's judgment in The Queen v. Director of Immigration ex parte Do Giau [1992] 1 HKLR 287 at 293-5.

The RSRB

A RSRB is constituted by two persons designated by the Chairman of the Boards appointed by the Governor under s13G(1). A Board may, if it thinks fit, require the applicant or an immigration officer to appear before it for the purpose of answering such questions as the Board may think fit, being questions arising on the papers before it: Reg 10(1) of the Immigration (Refugee Status Review Boards) (Procedures) Regulations.

Section 13F, where relevant, provides:

> " (4) Neither the applicant nor his representative shall be entitled to be present when his case is reviewed by a Board.
> (5) ....
> (6) ....
> (7) A Board when considering any review under this section shall act in an administrative or executive capacity.
> (8) A Board shall not be required to assign any reason for its decision and a decision of a Board shall not be subject to review or appeal in any court."

The Boards have been described by counsel, accurately, as "specialist tribunals". They were first set up in July 1989. The Boards heard the cases of the four appellants between March to December 1993. By that time the Boards had built up a big fund of knowledge concerning the conditions in Vietnam to which the appellants would be returning if the decisions of the Director of Immigration to deny refugee status were upheld and the appellants were repatriated to Vietnam.

In essence, the function of the Board in each case was to determine whether, at the time of the hearing (March to December 1993), the appellants had, in terms of Article 1A(2) of the 1951 Convention, a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion...."

For this purpose the Board was guided by the UNHCR Handbook. Of relevance are the following statements:

“ (2) ‘Well founded fear of being persecuted’

(a) General analysis

37. The phrase ‘well-founded fear of being persecuted’ is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories by the general concept of ‘fear’ for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant’s statements rather than a judgment on the situation prevailing in his country of origin.

38. To the element of fear - a state of mind and a subjective condition - is added the qualification ‘well-founded’. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term ‘well-founded fear’ therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

39. ....

40. An evaluation of the *subjective element* is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure.

41. Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record ....

42. As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgment on conditions in the applicant’s country of origin. The applicant’s statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant’s country of origin - while not a primary objective - is an important element in assessing the applicant’s credibility. In general, the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.

43. These considerations need not necessarily be based on the applicant’s own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded ....

44. While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under

> circumstances indicating that members of the group could be considered individually as refugees....
>
> 45. Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention ...."

As can be seen, this is a complex set of guidelines. It would be absurd to suggest that they can or should be applied as if they were enshrined in a statute defining rights and obligations.

The Comprehensive Plan of Action

As mentioned earlier the Boards first embarked upon their statutory task some years before, in July 1989. An important fact, which lies in the background of all their decisions, is the holding of an international conference on Indo-Chinese refugees in 1989 and the adoption on 14 June 1989 of a Comprehensive Plan of Action. Of relevance are the following provisions:

> " F. Repatriation/Plan of Repatriation
>
> 2. Persons determined not to be refugees should return to their country of origin in accordance with international practices reflecting the responsibilities of states towards their own citizens. In the first instance, every effort will be made to encourage the voluntary return of such persons.
>
> 3. In order to allow this process to develop momentum, the following measures will be implemented:
>
> (a) Widely publicized assurances by the country of origin that returnees will be allowed to return in conditions of safety and dignity and will not be subject to persecution;
>
> (b) The procedure for readmission will be such that the applicants would be admitted within the shortest possible time;
>
> (c) Returns will be administered in accordance with the above principles by UNHCR and ICM, and internationally funded reintegration assistance will be channelled through UNHCR, according to the terms of the Memorandum of Understanding signed with Viet Nam on 13 December 1988."

Review of the RSRB

As mentioned earlier, the review of the cases of the four appellants took place between March to December 1993. In respect of A2, A3 and A4 the appellants were extensively interviewed by the Board before a determination was made. Inevitably the question of credibility, and the extent to which the Board could rely on the statements made to the immigration officers by the appellants, had to be assessed. The Boards found some aspects of their stories to have been unreliable, particularly so in respect of A2. In each case the Board found (i) that there had been discrimination practised on the appellant and his family whilst in Vietnam, but such discrimination cumulatively did not amount to persecution, and (ii) the appellant had no well-founded fear of persecution if returned to Vietnam.

The legal proceedings

On 28 November 1995 applications for judicial review were lodged on behalf of the appellants by Messrs Pam Baker & Co. There were 120 applicants in all, comprising 61 family units. To enable the matter to be dealt with speedily, the parties agreed that four 'test' cases be determined by the judge Keith J. Hence the four appellants before us.

Originally, in their application for judicial review, the appellants challenged not only the decisions of the RSRB confirming the determinations of the Director of Immigration that the appellants were not Convention refugees, but those determinations as well. Hence the Director of Immigration was made a party to the proceedings. At the hearing before the judge, the challenge to the decision-making process under s4(1)(a) of the Immigration Ordinance was abandoned. The only challenge which remains is to the decision-making process of the Boards.

The appellant's case in essence

What is submitted in essence on behalf of the appellants is this: (1) On the facts found by the Boards the only possible conclusion was that between about 1979 and about 1990 (when the appellants fled from Vietnam) the appellants, as ethnic Chinese removed to monitored areas in Ha Tuyen Province in North Vietnam, were discriminated against by the Vietnamese authorities to such an extent that, cumulatively, the treatment amounted to persecution in the Convention sense; to hold otherwise was irrational or perverse: in other words, *Wednesbury* unreasonable; (2) it must follow that the Board's conclusion in each case that the appellant had no "well-founded fear of persecution" if returned to Vietnam was vitiated by a fundamental error which went to the root of the jurisdiction of the Board; (3) as Keith J, in the exercise of his supervisory jurisdiction under s21K(1) of the Supreme Court Ordinance held otherwise, he was in error and accordingly this court should intervene.

As can be seen, counsel's submissions are in effect, global, made on behalf of the appellants as a class. This was, in the circumstances, inevitable, having regard to the nature of the proceedings. The grounds for the application for judicial review, lodged in accordance with Order 53 r3(2)(a), are in general terms; it is not suggested that there are circumstances peculiar to individual applicants which singled them out for particular treatment by the Court; no application has ever been made to amend the grounds. The grounds start with the following statement:

> " (A) Factual Background
>
> (i) Before 1979
>
> 1. The Applicants are ethnic Chinese whose families generally migrated to Vietnam from China two or three generations ago and settled in and around the urban areas of Ha Tuyen Province, the most northerly area of Vietnam. Prior to 1978, many worked as government officials, some holding high ranking positions. Others held professional and urban jobs such as private traders. Some were farmers. The ethnic Chinese community as a whole in Ha Tuyen Province was vibrant and prosperous.

2. Diplomatic relations between China and the Socialist Republic of Vietnam deteriorated dramatically in 1978. The Vietnamese government turned against its own ethnic Chinese community. Discrimination against and persecution of the ethnic Chinese became official government policy. This anti-Chinese policy was at its most severe in the 6 provinces bordering China. The authorities dismissed the Chinese from their jobs and removed their children from the schools. Public meetings were convened in which the Chinese were ordered to leave for China. Police and militiamen harassed them in their homes. Between May and December 1978, almost three hundred thousand ethnic Chinese fled or were forced to leave Vietnam for China. The border was officially closed in July 1978 but about 40,000 managed to make it across the border after July. With the assistance of the United Nations High Commission for Refugees ('UNHCR'), some were resettled in China and granted citizenship.

3. Many Chinese families, however, remained in North Vietnam. Some could not gather their families together in time before the border was closed. Others remained because family members were ill."

The appellants' families were among those covered by this description. The grounds lodged on their behalf then go on to describe how, when war was threatened or erupted between China and Vietnam, the various applicants' families were removed to monitored areas and their freedom of movement was restricted; paragraphs 10 to 31 then describe the harsh and discriminatory conditions in those areas for ethnic Chinese, leading eventually to their flight to Hong Kong round about 1990.

The limited jurisdiction of the courts

It is worth emphasising, once again, the limited role of the courts in these cases. The duty of determining refugee status is given, first of all, to the Director of Immigration and then, on review, to the RSRB whose *decision shall not be subject to review or appeal in any court*: section 13F(8). As this court said in Le Tu Phuong v. Director of Immigration and another [1994] 2 HKLR 212 at 220-221, it is only when the High Court, in the exercise of its supervisory jurisdiction under Order 53 of the Rules of the Supreme Court, concludes that the decision of the RSRB is a nullity that the court can properly intervene: that is to say, the RSRB has acted outside its jurisdiction and failed

to come to a "decision" in terms of the Ordinance. The RSRB would have done so if, on the unquestioned material before it, the only rational decision is that, at the time of the decision, the appellant had a well-founded fear of persecution. This, as can be seen, is an extreme proposition. To say that a statutory board, charged with the duty of reviewing the determination of refugee status, has acted irrationally or perversely is a strong statement. As Lord Russell of Killowen said in Secretary of State for Education v. Tameside MBC [1977] AC 1014 at 1075B:

> "History is replete with genuine accusations of unreasonableness, when all that is involved is disagreement, perhaps passionate, between reasonable people."

Accordingly, in the scheme of things, the courts have only a limited role to play. It would, to adopt Lord Ackner's reasoning in Reg. v. Home Secretary, ex parte Brind [1991] 1 AC 696 at 757, be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits of the exercise of the Board's judgment and on that basis to quash the decision. If no reasonable Board properly directing itself would have reached the impugned decision, the Board has exceeded its powers and thus acted unlawfully: the High Court in the exercise of its supervisory role would quash that decision: that decision would, in effect, be perverse or irrational.

Keith J plainly had these principles in mind when, under the heading "the test of refugee status" in his judgment (p17), he asked himself the question whether the RSRB's conclusion was "so outrageous in its defiance of logic ... that no sensible person who had applied his mind to the question to be decided could have arrived at it": adopting Lord Diplock's formulation in Council of Civil Service Unions v. Minister for Civil Service [1985] AC 374 at 410G. Counsel for the appellants says that, by omitting the words "or of accepted moral standards" in Lord Diplock's judgment, Keith J had erred by erecting too high a threshold. This submission is unsound. The Board, in reviewing the determination of refugee status, was exercising judgment, by reference to the

Convention criteria. It was not dealing with moral standards. The question of "moral standards" has nothing to do with the case. Lord Diplock's test is, in effect, the same as that of Lord Ackner in ex parte Brind referred to earlier.

Were the decisions of the RSRB perverse or irrational?

The foundation of Mr Sarony QC's argument on behalf of the appellants is that the Boards' findings that the appellants were not victims of persecution in the Convention sense, on the unquestioned material before the Boards, were perverse. If that argument be sound then, Mr Sarony submits, the further findings in 1993 (when the Boards determined these cases) that the appellants had no well-founded fear of persecution are vitiated by fundamental error as to a jurisdictional fact: If a person has been the victim of persecution, it must as a matter of common-sense be assumed that he would fear continued persecution if returned, unless the improvements in country-conditions, known to the applicant, were such that the well-founded fear could be said to have been dissipated. This, Mr Sarony submits, accords with para 45 of the Handbook which says:

> "45. Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention ...."

The emphasis there is, as Mr Sarony rightly points out, upon improvements in country conditions, the fact of past persecution having been established.

Mr Sarony argues that as the Board did not approach its determination this way, but decided each case on the basis that the discrimination never amounted to persecution, this court must, Mr Sarony says, quash the Board's findings and remit the cases to the Board for fresh determination.

The first question is: Can the Board's finding that the appellants were discriminated against, but not persecuted in the Convention sense, be impeached as being perverse or irrational?

A2, A3 and A4 were in their teens when their families were relocated to the monitored areas in Ha Tuyen Province. A1 was about 9 years old when his family was relocated. Thereafter they and their families led the lives of farmers and, as ethnic Chinese, were subjected to a variety of discriminatory measures, the details of which are set out in Keith J's judgment. These include things like a 9p.m. curfew, prohibition on the use of the Chinese language and of harbouring strangers, discriminatory levies of taxes, compulsory unpaid labour etc. In relation to each of the appellants there were also claims of injustices and violence practised by Vietnamese officials on themselves and on members of their families. When they were moved to the monitored areas, their old homes were confiscated. Thereafter they ceased schooling.

Whether these matters operating cumulatively on each of the appellants amounted to persecution in the Convention sense is a matter of degree. The appellants were found to have exaggerated their claims. The extent of such exaggerations had to be judged against the known back-drop of conditions prevailing in the monitored areas and in the northern provinces generally. Where, for instance, the appellants complained of discrimination in relation to education and medical services on account of their ethnic origin, to what extent were these facilities available to the minorities and to the ethnic Vietnamese living within those areas? The Boards dealing with these appellants were specialist tribunals, hearing something like 15 to 20 cases and interviewing some 5-6 applicants weekly, since July 1989. They had acquired knowledge of country conditions in the course of their work, and had received briefings on those conditions from different sources from time to time. They were in a far better position to determine such matters than High Court judges: A fact which Keith J recognised when, dealing with an application to put

forward additional evidence, and with reference to a report prepared in May 1993 by Dr P.A. Hase, a Deputy Chairman, the judge said:

> "His report is a classic illustration of the ability of members of the Board to use the knowledge they acquire from determining claims for refugee status from asylum-seekers from Vietnam to add to their stock of knowledge about country conditions. In this respect, members of the Board are far better placed than I to judge whether their received wisdom was plainly wrong, because, unlike them, all that I have to go on are the documentary materials, as amplified by the evidence of the Applicants and the views of two people who have recently visited Ha Tuyen Province for the purpose of making affirmations in the present case."

Quite apart from the question of jurisdiction referred to earlier, it would be an intrepid if not foolhardy judge who would feel confident, on the same material as that before the Board, to substitute his own judgment for that of the Board.

It must be remembered that in February 1979 the Chinese Army had invaded northern Vietnam in force, and occupied a number of provincial centres. This was avowedly to "teach the Vietnamese Government a lesson" for its interference in the internal affairs of Cambodia. There was heavy fighting and substantial casualties were suffered on both sides. Although the Chinese Army withdrew about a month later, hostilities and flare-ups of violence along the northern border, particularly artillery shelling, occurred sporadically for a number of years, in the first half of the 1980s. The ethnic Chinese living in the northern provinces of Vietnam were regarded by the Vietnamese government as "fifth column", ready at any time to assist the enemy. The Chinese were expelled from the Communist party and ousted from government positions. Among the measures taken against the ethnic Chinese people, as part of the government's war-time strategy, was the relocation to monitored areas.

Since the mid-1980s, as relations with China improved, there were attempts by the government to gradually reintegrate the ethnic Chinese back into Vietnamese society and to restore to them full rights of citizenship. Ho

Khau (household registration) previously taken away was restored; identity cards issued. In December 1988 border trade resumed. As Mrs Wilma Croxen, Chairman of the RSRBs said in para 23 of her third affirmation, "many of the Ha Tuyen cases speak of reduced policing from 1988 as well as visits to relatives in China being allowed over the 1988 Chinese New Year. The fact of the exoduses themselves occurring at around this time show travel outside the [monitored] area was possible which indicates a lack of supervision and/or roadblocks. Some applicants have mentioned itinerant traders newly visiting the area at around this time. Presumably surplus crops or other materials to trade must have been there to attract them: In addition, families were well settled in the areas concerned and the land was by then more productive. This is borne out by reports by applicants of increased crop yields".

Against such a background, it is impossible to conclude that the decisions of the RSRBs that the discrimination practised on the appellants did not amount to persecution were perverse or irrational. Effectively, the main plank of the appellants' argument fails.

In the course of the hearing before us, this question arose: Assuming that Mr Sarony's main point succeeds, should this court now, in 1997, step into the shoes of the judge and in our discretion order under s21K(1) of the Supreme Court Ordinance that the cases be remitted back to the Board for re-consideration? After all, things have moved on since 1993 when the Boards first considered these cases, and country-conditions have continued to improve. There is some evidence to the effect that monitored areas as such have disappeared and Chinese citizens enjoy virtually full rights in Vietnam. Would the Board not inevitably conclude that, whatever the circumstances in the past, when these appellants were youngsters, they now have no well-founded fear of persecution?

Having regard to our conclusion on the main point, this question - a weighty one - need not be answered.

Threat to freedom on account of race

Para 51 of the UNHCR handbook says:

> " (b) Persecution
>
> 51. There is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution."

There is no doubt that, within the monitored areas, freedom of movement was restricted by the imposition of the 9p.m. curfew; the appellants were also prohibited from travelling outside the area without permission. Nothing suggests that these were not matters which the RSRBs took fully into account.

However, counsel argues thus: The Board was bound, in determining refugee status, to apply the UNHCR Handbook; since by para 51 of the Handbook "threat to freedom on account of race" is "always persecution", the Board was bound to so find. It's failure to so find is an error of law which vitiated the decision of the Board.

This argument is untenable. It gives to the Handbook a status in law which it does not possess. As the Preface to the Handbook states:

> "(v) The 'criteria for determining refugee status' set out in this Handbook are essentially an explanation of the definition of the term 'refugee' given by the 1951 Convention and the 1967 Protocol ... As the Handbook has been conceived as a practical guide and not as a treatise on refugee law, references to literature etc have purposely been omitted.
> (vi) ....
> (vii) The Handbook is meant for the guidance of government officials concerned with the determination of refugee status in the various Contracting

> States. It is hoped that it will also be of interest to all those concerned with refugee problems."

These are guidelines, to be applied sympathetically and with common-sense. These are not legal propositions, carved in tablets of stone, which bind the exercise of judgment by the Boards.

Conclusion

These appellants have no cause for complaint. Their cases were fully investigated by the immigration officers concerned; the determination that they did not qualify as refugees was not arrived at lightly. Their cases were reviewed by the RSRB which, in each case, gave detailed and convincing reasons for confirming the decision of the Director of Immigration - even though the statute does not require the Board to give any reasons. Their cases were then looked at again by the UNHCR. The matter then went on judicial review before Keith J who examined the cases of the appellants with admirable care and decided not to intervene. The thoroughness of the judge in setting out the individual circumstances of each of the appellants and their families in his judgment removes the necessity of repeating those details here. Finally, the matter came before this court where submissions were entertained over four days. Such is the sophistication of the legal processes of this territory in dealing with asylum-seekers from Vietnam.

These appeals have no merit. They must be dismissed.

Mortimer JA:

I agree.

No one who has considered the discrimination to which each of these appellants and their families were subject in the "Chinese Concentrated Areas"

in Ha Tuyen Province can be other than profoundly sympathetic but this is not the issue for our determination. We are concerned only with Keith J's refusal to strike down the decision of the Refugee Status Review Board in each case.

At the outset, the nature of the "screening" process, with particular reference to the Refugee Status Review Board as the decision-maker in this case, is worthy of note. All those involved in the screening process undergo training or instruction and thereafter, because of the numbers of those seeking refugee status from Vietnam in the past, they gain considerable experience in the field. Further, they deal with one country of origin only, Vietnam. Their knowledge is specific even to particular provinces. They are supplied with detailed, first-hand and up-to-date information about the country conditions. Some has been put before us – see for example, the report of Dr Hase.

The Immigration Officers and the Refugee Status Review Board follow carefully considered procedures worked out between the UNHCR and the Hong Kong Government. The framework has been given statutory effect. The resources – both human and financial – which have been devoted to the process, may have been matched elsewhere in the world but certainly have not been bettered. Some members of the Refugee Status Review Board have visited Vietnam to see the country conditions for themselves. The Refugee Status Review Board is truly a specialist tribunal.

Now that is not to say for one moment that the decision-making process must not be reviewed with the greatest care. Human lives and happiness are at stake. Where it is demonstrated that a Board has erred in its decision making, the decision must be struck down.

These applications for judicial review were made initially on the basis that all who had spent time in the "Concentrated Areas" had for that very reason a well-founded fear of persecution and ought to have been "screened in". The fallacy of this approach was rectified by the judge at an early stage. He

rightly ordered that these four representative cases should be heard first. Inevitably, the written application was not properly focused to deal with these four cases individually. However, the judge overcame this in his very careful analysis of the law, the facts and the issues with which I find myself in entire agreement. I do not propose to rehearse them. He concluded that he was unable to find that any of the decisions was “irrational”. Nothing advanced in the appeal has caused me to doubt either his reasoning or his conclusions. For the reasons given by the Vice President – and also those to be given by Godfrey JA which I have also had the opportunity of considering in draft – I would dismiss the appeal on behalf of each appellant.

Godfrey, J.A. :

I, too, agree.

I find it for my part surprising that in each of these cases, the Board, on the material before it, in fact determined that the applicant had not established that well-founded fear of persecution which is the one condition he had to satisfy in order to justify his claim to refugee status.

But I remind myself that the Refugee Status Review Board has a wealth of experience in dealing with the task entrusted to it, i.e. the determination of an applicant’s claim to refugee status; and, in addition, a wealth of constantly up-dated information as to current conditions in Vietnam.

I also remind myself that the Board, in three out of the four cases with which we are concerned, saw and heard the applicants before coming to its conclusion; an obvious advantage, when matters of credibility are relevant to the decision (as here they were) which the court does not have.

And, finally, I remind myself that the Immigration Ordinance, Cap.115, does not allow the courts of Hong Kong to participate in the decision-making or appellate processes which control and regulate the right to enter and remain in Hong Kong. This is not surprising. Applications for leave to enter and remain do not in general raise justiciable issues. Decisions under the Ordinance are administrative and discretionary rather than judicial and imperative. Such decisions may involve the immigration authorities in making inquires abroad, in consulting official and unofficial organisations and in making value judgments. The only power of the court is to grant relief in respect of any decision under the Ordinance which is made in breach of the provisions of the Ordinance or which is the result of procedural impropriety or unfairness or is otherwise unlawful : see for a statement to the same effect in relation to immigration into the United Kingdom *R. v. Home Secretary, Exp. Bugdaycay* [1987] AC 514, per Lord Templeman at p.535 F-H.

No doubt, an "irrational" decision is an unlawful decision; but the judge below felt unable to characterise the Board's conclusions as "irrational" and I agree with him. The word "irrational" bears, I think, emotive overtones (if not overtones quite as strong as, say, the phrase "outrageous in its defiance of logic or accepted moral standards"); but, in this context, it means no more, when used in relation to the decision of a tribunal, than this : that the decision in question is one to which no tribunal, properly directing itself as to the relevant law, could reasonably have come. It is now, I believe, settled, for reasons of high constitutional principle, that the court will strike down a decision of an administrative tribunal if that decision falls outside the bounds of reason, even if (as here) the legislation which establishes the tribunal provides that its decisions "shall not be subject to review or appeal". But, just as the court is zealous to protect people against an abuse of power by an administrative tribunal (e.g., when the tribunal makes, in the sense indicated, an

"irrational" decision), so the court must be zealous to confine its exercise of its own power within proper limits.

The court, it must be emphasized, has no power to substitute its own view of any particular case for that taken by a Refugee Status Review Board, however strongly it may be inclined to disagree with the Board. The court's power is limited to examining the propriety of the Board's conduct. So far as rationality is concerned, it is only when the decision of the Board is so unreasonable that no reasonable tribunal, properly directing itself as to the relevant law, could possibly have come to that decision, that the court is entitled to infer that something must have gone wrong with the Board's decision-making process (even if it cannot identify exactly *what* went wrong) and to quash the decision.

Faced with this steep hurdle, Mr. Neville Sarony Q.C., in his reply for the applicants, attempted to elevate to the status of "a discrete point of law"; as he described it, the proposition that an applicant who has been deprived of his freedom previously to fleeing from Vietnam must be entitled as a matter of law to a finding by the Board that he has been persecuted and so to the quashing of any decision which did not proceed on that basis.

In effect, it is said that proof, by an applicant for refugee status, of discriminatory conditions (amounting to persecution) which had affected him in the past *compels* a decision that his fear of persecution in the future is well-founded. If this were correct, then indeed the Board here did misdirect itself in law.

But I do not think this *is* correct. No doubt, the Board ought to start by presuming, as a matter of fact, where persecution in the past is established, that an applicant's fear of persecution in the future is likely to be well-founded. But any such presumption of fact must in its nature be rebuttable, and, in the

end, the Board must decide for itself in the case of any individual applicant for refugee status whether his fear of future persecution is well-founded or not.

The background to these cases is disturbing. The concern of state authorities over an ethnic minority constituting a potential "fifth column" within the state is as old as history (or older) : see, e.g., Exodus 1, 10. All too often (as in the example cited), the protective measures taken by the state over this concern lead to discrimination and persecution of the ethnic minority and, sometimes, to acts of brutality and worse by public officials against its members. To return a refugee from that state back to such conditions would, to any right-minded person, be unthinkable.

If it had been proved that, in the cases before us, the Board had lost sight of what I consider to be this fundamental humanitarian consideration, I, for my part, would not have hesitated to quash its decisions. But it has not been so proved. On the contrary, it is clear that the Board examined each of these cases with great care, as one would expect. It may well be that from time to time members of the Board suffer from compassion fatigue; they are only human, and they have a large case-load to get through, with many of the cases before them exhibiting an almost identical pattern. But whether that is so or not, unless it can be positively established, in any particular case, that the Board failed properly to discharge its duty under the legislation establishing it, the court is powerless to intervene. We cannot quash the decisions of the Board as an act of mercy, however disturbing we may find these cases. We cannot, consistently with our duty to uphold the rule of law, create such a precedent. To adapt Portia's words, it must not be; for many an error, by the same example, would rush into the state.

If anything can be done to assist those whose claims to refugee status have been lawfully rejected by a Refugee Status Review Board it must be done by the Office of the United Nations High Commissioner for Refugees

("UNHCR") which, under an agreement in that behalf which it has made with the Hong Kong government, may request that an asylum seeker whose claim to refugee status has been so rejected may nevertheless be treated as a refugee.

For these reasons, I agree (as I have indicated) that we must dismiss these appeals.

(Henry Litton)	(Barry Mortimer)	(G.M. Godfrey)
Vice President	Justice of Appeal	Justice of Appeal

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