IN THE COURT OF APPEAL 1997, No. 72 (Civil)

CONG VAN HA v DIRECTOR OF IMMIGRATION

1997, No. 118 (Civil)

CONG VAN HA, CONG HIEN TUONG, CONG HIEN QUYNH and CONG HIEN PHUONG v DIRECTOR OF IMMIGRATION and the REFUGEE STATUS REVIEW BOARD

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Mortimer and Godfrey JJA and Cheung J in Court
18 June 1997

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# J U D G M E N T

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**Mortimer JA:** This is an adjourned appeal against Yeung J's refusal to allow the applicant Cong Van Ha to amend her application for judicial review to allege that she did not have a fair hearing before the immigration officer on the ground that he failed to record some, and omitted to record other, material matters during the screening interview.

The application to amend was made on the first day of the hearing and it took three days. It was made at the last minute. Issues of fact concerning the procedure adopted during the decision-making were raised 5½ years after the event. On the face of it, it was an application unlikely to succeed. Indeed, it did not.

*The Judge's discretion*

The judge gave reasons for the exercise of his discretion to refuse. Some of those reasons are seriously flawed. The account given by the applicant compared with that that recorded by the immigration officer differed. She says she advanced more than appears in the notes. But based on those accounts, the judge formed an adverse view of the applicants' credibility. In this passage, he said:

> "It is not difficult to understand why she chose to place emphasis on certain events which were not mentioned in the earlier documents or in her earlier letter. It will be naive for the court not to recognise that people in Cong's position will have their knowledge on the criteria for refugee improved with the passage of time. It will also be naive for the court not to recognise that their stories of what had happened to them when they were in Vietnam would be tailored in accordance with such improved knowledge in order to increase of their chances of being screened in as refugees. It will be difficult if not impossible to place any reliance on their evidence in such circumstances to expect the court to resolve the dispute as to fact as to what was said or not said in the interview between two persons, both of whom cannot reasonably be expected to have any independent recollection of the event and at least one of them would be likely to tailor her evidence in order to achieve her purpose will put the court in an almost impossible position in the circumstances of the present case."

Later he said:

> "I am satisfied that the proposed amendment is just a logical step of bringing her case in line with her recently improved story."

That view of the applicants' credibility was not one the judge was entitled to take on the affidavit and the documents.

Further, in another passage, the judge said:

> "It is not the primary function of the court to resolve disputes or mistakes as to fact."

That is usually the position but sometimes and relevant to this application it is the task of the judge on a judicial review to decide facts. Not, of course, facts which are in the province of the decision-maker.

There are two obvious circumstances in which the facts are the judge to decide. The first is where there is a dispute about facts upon which the jurisdiction of the decision-maker depends. Secondly, and relevantly, where there is a dispute about what took place before the decision-maker. On that matter, the judge was also wrong.

He rightly decided that the application came late. The reasons for rejecting the application he set out in this passage:

> "The interview took place of course almost 6 years ago. No one in my view, either Yip or Cong, can reasonably be expected to have independent recollection of what was said or not said during the interview."

In the usual way that would have been an overwhelming point. But unfortunately that was not the situation here. It is clear from the affidavits themselves that the witnesses both had some independent recollection of the interview and of course contemporaneous notes were made by the immigration officer.

Now as those reasons for refusing the application were plainly wrong it falls to this Court to exercise its own discretion. I turn to that matter.

*This court's discretion*

It is true to say that these points were not raised with any clarity in the application itself. There are two paragraphs in the 1st applicant's first affirmation, paras. 4 and 5, which touch upon the point but which do not condescend to any detail. But, in accordance with his duty to set out all the relevant facts within his knowledge, the immigration officer does engage the dispute about what happened in the interview. More importantly perhaps, when doing so, he concedes that the omissions complained of, and relied upon, were material to his decision. It follows that such errors, if established may involve a risk of injustice.

This being a refugee case, for my part, I would allow the amendments. I think fairness requires this and in those circumstances I would allow the appeal.

It follows that the matter may have to go back to the judge. That will involve him handling this matter with considerable care. The issues of fact will have to be clearly defined and of course it may be necessary to order the witnesses attend for cross-examination. But those matters are in the future. I would for my part allow this appeal.

Godfrey JA: I agree.

Cheung J: I also agree that the appeal is allowed.

Mortimer JA: We allow the appeal and we will hear counsel upon any consequential orders we should make.

| (Barry Mortimer) | (G.M. Godfrey) | (P. Cheung) |
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| Justice of Appeal | Justice of Appeal | Judge of the High Court |

Mr Nigel Kat (M/s Pam Baker & Co) for Applicants
Mr Anthony Chan (Crown Solicitor) for Respondent