1996 M.P. No. 4280
1996 M.P. No. 4308
1997 M.P. No. 16

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

BETWEEN

(1) MOC A PAO
(2) ON CANH PHUONG
(3) DIEP HOAI SUNG
(4) CHENH NHI CONG
(5) CHIENG A UNG
(6) TRAN DI THUONG — Applicants

and

(1) THE DIRECTOR OF IMMIGRATION
(2) THE REFUGEE STATUS REVIEW BOARD — Respondents

Before: The Hon. Mr. Justice Keith in Court

Dates of Hearing: 25th-27th March and 1st-2nd April 1997

Date of Delivery of Decision: 13th May 1997

Date of Handing Down Reasons for Judgment: 19th May 1997

J U D G M E N T

INTRODUCTION

The Applicants comprise a number of families. They fled to Hong Kong from Vietnam in 1990 and 1991. Once in Hong Kong, they applied for refugee status, but their applications were refused. In these proceedings, the Applicants challenge the various decisions that they had not established a well-founded fear of persecution, and were therefore not refugees within the meaning of the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol to it ("the Convention").

Originally, members of 11 families sought judicial review of the decisions challenged in three separate sets of proceedings. Those proceedings were consolidated. Since then, the members of 5 of the 11 families have been offered a re-consideration of their cases by the Refugee Status Review Board ("the Board"). That offer was accepted. Accordingly, these proceedings currently relate to the members of the 6 remaining families. I trust that I shall be forgiven for referring to them for convenience as A1-A6. I shall refer to the husbands in each family as the principal Applicants, and they are the only Applicants named in the heading of this judgment.

THE DECISIONS CHALLENGED

The procedure for determining whether an asylum-seeker from Vietnam should be accorded refugee status was established in consultation with the office of the United Nations High Commissioner for Refugees ("the UNHCR"). That procedure was described in *Tran Van Tien v. The Director of Immigration (No. 2)* (1996) 7 HKPLR 186 at p.190G-I as follows:

> "Put simply, the asylum-seeker is initially interviewed by an immigration officer in order to obtain personal data and to record his claim for refugee status. He will then be interviewed by an immigration officer in greater detail on the basis of a questionnaire drafted by the UNHCR. His family will also be interviewed. The officer's decision, which is made in the name of the Director of Immigration, and which is recorded on the file together with the officer's reasons, is then passed to a senior immigration officer or a chief immigration officer, depending on the apparent complexity of the case, for endorsement or review. An appeal against the refusal of refugee status is by way of review by the Refugee Status Review Board."

According to the Notices of Application, the decisions challenged are both the decisions of the Director of Immigration and those of the Board. However, the decisions of the Director of Immigration are no longer challenged, no doubt for the same reasons as those given in *Tran Van Tien*.

DELAY

The 3 Notices of Application for leave to apply for judicial review were filed in court on 4th December 1996, 9th December 1996, and 3rd January 1997. That was a very long time after the Applicants had been informed that the Board had refused their claims for refugee status. The length of time which had elapsed ranged from 27-52 months. Delays of this

magnitude would in the vast majority of cases make applications for judicial review quite impossible to mount.

In *Tran Van Tien*, I concluded that even though the court had decided, pursuant to Ord. 53 r. 4(1), that there was "good reason for extending the period within which the applications [should have been] made", it was open to the court to revisit the issue of delay at the substantive hearing. I have been confirmed in that view by section 21K(7) of the Supreme Court Ordinance (Cap. 4), and the explanation in *R. v. The Criminal Injuries Compensation Board ex p. Avraam* [1996] COD 246 of the effect of its equivalent in the U.K., namely section 31(7) of the Supreme Court Act 1981. Moreover, when granting leave in one of the present cases, I made the following observation:

> "The circumstances of each of the Applicants are so different that this is not a case in which I can form a concluded view as to whether there has been delay on their part which disentitles them from relief. Accordingly, although I am extending the period within which the application for judicial review may be made, the issue of delay will have to be revisited. In these circumstances, I do not propose to treat section 21K(6) of the Supreme Court Ordinance as limiting the extent to which effect could then be given to any delay on the part of the Applicants."

It was for these reasons that in *Tran Van Tien* I considered at some length the circumstances in which legal advice was available in detention centres for Vietnamese asylum-seekers, the delays in the processing of applications for legal aid, and the reasons given by the individual Applicants for the delay in their cases in launching the proceedings. However, since then the Privy Council has rendered its decision in *Nguyen Tuan Cuong v. The Director of Immigration* (1996) 7 HKPLR 19. The majority found that delays of up to 5 years should not be

held against the Applicants in that case. They noted what Mortimer J.A. had said in the Court of Appeal:

> "It would be a harsh decision to deprive them of a right of review on the grounds of delay when access to legal advice in closed camps must have been limited."

It may be that the majority was deferring to the local knowledge which Mortimer J.A. professed to have, but the absence of any disapproval by the majority of his observation is a powerful reason for not considering in detail the circumstances of the individual Applicants.

There are two other factors which have influenced me. First, the delays in these cases have not caused hardship or prejudice, and it is not alleged that they have been detrimental to good administration. In these circumstances, the court's approach to the question of delay should not be overly technical. As Woolf L.J. (as he then was) said in *R. v. Commissioner for Local Administration ex p. Croydon London Borough Council* [1989] 1 All ER 1033 at p.1046f-g:

> "While in the public field, it is essential that the courts should scrutinise with care any delay in making an application and a litigant who does delay in making an application is always at risk, the [rules]... are not intended to be applied in a technical manner. As long as no prejudice is caused, ... the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably of relief to which he is otherwise entitled."

Secondly, in *R. v. Secretary of State for the Home Department ex p. Ruddock* [1987] 1 WLR 1482, Taylor J. (as he then was) said at p.1485G:

> "... since the matters raised are of general importance, it would be a wrong exercise of my discretion to reject the application on grounds of delay, thereby leaving the substantive issues unresolved."

In the context of that case (which concerned the legality of certain telephone interceptions), I regard Taylor J. as saying that the public interest in having a particular question determined may outweigh the public interest in having challenges to administrative decisions being lodged in court without delay.

Mr. Philip Dykes Q.C. (who argued this part of the case on behalf of the Applicants) has persuaded me, despite my initial misgivings, that there is arguably an important principle at stake in all these cases. It is of the greatest public interest that the Government of Hong Kong complies with the treaty obligations assumed on its behalf by the U.K. in the Comprehensive Plan of Action ("the CPA") adopted at an international conference on Indo-Chinese refugees in June 1989. Section D of the CPA dealt with refugee status. It required claims to refugee status to be determined in accordance with the Convention and the Handbook on Procedures and Criteria for Determining Refugee Status issued by the UNHCR ("the Handbook"). It is at least arguable that if relief is refused because of delay (even though the court would have been satisfied that the Board's decision was flawed), the Applicants will be repatriated to Vietnam without having had their claims to refugee status properly considered as required by the Convention and the Handbook.

For these reasons, I have decided that the delay in bringing these proceedings should not deprive the Applicants of having the decisions they challenge reviewed.

THE FACTUAL BACKGROUND

The broadly unifying theme of the Applicants' cases is that the Applicants are said to belong to the Nung ethnic group. The husband in each family (and in one case the wife as well) served with the U.S. Special Forces during the period of the U.S. involvement in the war in Vietnam. The exception to this theme is the case of Tran Di Thuong (A6). He is not a member of the Nung ethnic group, and did not serve on the military side of the war effort. However, he was a scriptwriter and announcer with the Freedom Broadcasting Service run by the U.S. Intelligence Office. His case is accordingly said to be analogous to the cases of the other Applicants. However, I think that very different considerations apply to his case, and I shall therefore deal with his case when I have considered the cases of the other 5 families.

The term "Nung" denotes a distinct ethnic minority from North Vietnam. They consider themselves ethnically distinct from the Chinese. They were known for their anti-Communist sympathies, and were recruited by the French into battalions to fight the Viet Minh in exchange for a measure of autonomy in their affairs. Following the fall of Dien Bien Phu in 1954, they fled *en masse* to South Vietnam. In due course, many of them became involved in U.S. military operations. In particular, a special anti-guerrilla task force made up of ethnic Nung was established. They were provided with weapons and equipment, and were led by U.S. officers. They were involved in bitter fighting with the Viet Cong, and were hated by them for that reason.

After the fall of Saigon in 1975, the members of the Nung minority were barred from public-sector employment, tertiary education

and association with any Communist mass organisation. Communist Party members who married members of the Nung minority were liable to expulsion from the Party. Many of the Nung minority were resettled in New Economic Zones, and lived in conditions such as those described in *Tran Van Tien*.

The new rulers of Vietnam appealed to members of the Nung minority to disclose the part they had played in the war. They were told that their cases would be treated leniently. In fact, the opposite was the case. Many of those who admitted serving with the U.S. Special Forces were required to undergo "ideological reform": they were sent to labour camps where they were beaten, and some of them remained there for many years. As a result, many of the Nung minority who had served with the U.S. Special Forces concealed that fact from the authorities. When they were exposed, they too were sent to labour camps for "re-education".

This history of the treatment of the Nung minority is contained in two documents. The first is a report by Asia Watch, a human rights pressure group, dated 23rd July 1992. This report was available to members of the Board. The second is a petition sent to the Government Secretariat in March 1993 by an expatriate Nung association in California. It had been prepared by members of the Nung minority detained in Hong Kong. The petition was included in the Immigration Department's files of the 5 families said to be members of the Nung minority. These files were included in the papers considered by the Board. Mr. Denis Mitchell Q.C. for the Respondents did not suggest that there was any material available to the Board which contradicted the claims made in the Asia Watch report and the petition about the treatment in the past of the Nung minority in

Vietnam. Nor has the Board suggested that the claims made in the report or the petition were incorrect or exaggerated.

THE PRINCIPAL CRITICISMS OF THE BOARD

The Board considered the cases of the 5 families said to be members of the Nung minority on various dates in 1992, 1993 and 1994. In the cases of at least some of the 5 families, the Board believed that by those dates the Vietnamese authorities no longer subjected members of the Nung minority who had served with the U.S. Special Forces to the harsh ill-treatment of the past. The Board found that the authorities in Vietnam could be assumed to have "forgiven" that past service and the concealing of it over the years. Two broad criticisms are made of the Board in these circumstances. First, it is said that there was no evidential basis on which the Board could have concluded that there had been so fundamental a change of attitude towards the members of the Nung minority who had served with the U.S. Special Forces. Secondly, it is said that the basis of the Board's belief about the change of attitude towards past service with the U.S. Special Forces and its concealment was never put to the Applicants for possible rebuttal by them.

THE EVIDENCE BEFORE THE BOARD

The Board acts on evidence. That is plain from reg. 11(1) of the Immigration (Refugee Status Review Boards) (Procedure) Regulations. It is obliged to consider certain categories of evidence identified in reg. 11(1), but it also has the power to "receive and consider any evidence which appears to it to be relevant to the issues before it notwithstanding that the evidence would not be admissible in a court of law". That evidence

obviously includes up-to-date information about prevailing attitudes in Vietnam to persons of a particular social group who were at one time regarded with hostility.

To assist the Board in its task of identifying prevailing attitudes in Vietnam, the Board has access to a variety of published and unpublished materials. These materials are collated by the Intelligence Unit of the Vietnamese Refugees Division and are available to members of the Board. But the fact that these materials are available to members of the Board does not mean that each member of the Board has read them and absorbed their contents. Mr. Mitchell told me that the practice is for a copy of any new document which comes into the hands of the Intelligence Unit to be sent to the Chairman of the Board. That document is then circulated to members of the Board. It is then returned to the Chairman and kept in the Board's library. Members of the Board may or may not have photocopied the document for their own retention.

I have already referred to the fact that a number of years have elapsed since the decisions challenged were taken. Not surprisingly, the members of the Board who considered the cases of the 5 families cannot now recall what it was which caused them to conclude that by 1992, 1993 and 1994 there had been a change of attitude on the part of the Vietnamese authorities toward members of the Nung minority who had served with the U.S. Special Forces and who had concealed that service over the years. In those circumstances, the question is whether there was information and intelligence reports available to the Board which was capable of justifying that conclusion.

The material on which Mr. Mitchell relied fell into three categories:

(i) the Government of Vietnam had given widely-publicised assurances that returnees would not be subjected to persecution;

(ii) the UNHCR had not found any examples of returnees having been persecuted on their return to Vietnam;

(iii) two documents available to the Board showed that members of the Nung minority were not being ill-treated in modern-day Vietnam.

Mr. Mitchell accepted that the facts in categories (i) and (ii) could not by themselves justify the Board's conclusion about the changed attitude in Vietnam to members of the Nung minority who had served with the U.S. Special Forces. If those facts were decisive, the claim of every asylum-seeker from Vietnam to refugee status would have to be refused. Moreover, the fact that no persecution of any returnee has been substantiated by the UNHCR is of limited assistance when it is appreciated that the UNHCR has been able to monitor the treatment of only a limited number of returnees. Members of the Nung minority are a case in point. The evidence is that 423 members of the Nung minority had been repatriated to Vietnam by February 1997. Of that number, 262 had been visited by the UNHCR's monitoring staff. The UNHCR was satisfied that none of them had faced persecution on their return to Vietnam. However, of the 423 returned, only 17 were known to have claimed to have served with the U.S. Special Forces, and there is no way of telling whether those 17 were included in the 262 visited by the UNHCR's monitoring staff. In

any event, I do not know when the 262 were visited by the UNHCR. For all I know, the monitoring visits could have taken place after the Board's decisions in the present cases. Moreover, even if they had taken place before the Board's decisions in the present cases, there is no evidence before me that the information relating to the UNHCR's monitoring of members of the Nung minority, which was conveyed in a letter from the UNHCR's Chief of Mission in Hong Kong to Hong Kong's Refugee Co-ordinator dated 21st February 1997, was actually before the Board 3 years or more earlier when the Board was considering the Applicants' cases.

The two documents in category (iii) are (a) a report dated 22nd September 1992 prepared by Mr. Michael Ho, a diplomat at the British Embassy in Hanoi, and (b) a press release issued by Asia Watch on 17th March 1993:

(a) Mr. Ho's report. Mr. Ho's report was based on visits over the preceding few weeks to members of the Nung minority living in Dong Nai and Thuan Hai Provinces (some of whom were returnees from Hong Kong) and a particular visit to 11 Nung families who had been repatriated from Hong Kong. Mr. Ho reported that he had been informed by everyone he had spoken to that "there was no prejudice against them by the Vietnamese Government, let alone suffering from any form of persecution". His conclusion was:

> "Despite the fact that the 'Nung' in the former South Vietnamese Army were often given the most ruthless anti-communist tasks, neither UNHCR nor we who have been conducting regular and arduous monitoring visits in the past year can find any evidence or sign of persecution."

(b) The Asia Watch press release. The press release was issued on the day that a delegation from Asia Watch had concluded its first visit to Vietnam. In addition to meeting officials, journalists and lawyers, the delegation had visited recent returnees from Hong Kong including members of the Nung minority. The press release said:

> "On the issue of Vietnamese returned from Hong Kong, Asia Watch is satisfied that many of its fears have not been realized. Ethnic Nung returnees, for example, do not appear to have suffered persecution as a group on their return."

It is important to note that these two documents concern the treatment of members of the Nung minority in general. They do not specifically deal with those members of the Nung minority who served with the U.S. Special Forces and who subsequently concealed that service. I note that the Asia Watch report shows that the husbands in two of the 11 families seen by Mr. Ho had served in the military, one with the Security Police and the other with "Special Forces, South Vietnamese Ranger Unit". I do not know whether that service was with the U.S. Special Forces, but even if it was, the Board could not have known whether that previous service had become known to the Vietnamese authorities. Indeed, even if it had, it may have been too soon for the Vietnamese authorities to take any action about it, because the families visited by Mr. Ho had only been repatriated to Vietnam 6-7 weeks earlier.

Accordingly, the only two documents relied on by Mr. Mitchell provided a sufficient basis for the Board to conclude that members of the Nung minority were no longer ill-treated because of their ethnicity. They did not, however, amount to a sufficient basis to enable the Board to conclude that those members of the Nung minority who had served with the U.S. Special Forces and who had subsequently concealed that service

would not be ill-treated. To be fair, in none of the Applicants' cases did the Board expressly seek to rely, in justification of its conclusion about the treatment in modern-day Vietnam of members of the Nung minority who had served with the U.S. Special Forces, on the two documents relied upon by Mr. Mitchell, or on the assurances given by the Vietnamese Government, or on the fact that no case of a returnee having been persecuted had been discovered. All that remains to support the Board's conclusion, therefore, is an important passage in the affirmation of Wilma Croxen, the Chairman of the Board.

In that affirmation, she identified a particular factor which the Board takes into account in cases involving asylum-seekers who served with the U.S. Special Forces. That was the rapprochement in recent times between Vietnam and the U.S. That rapprochement was evidenced by "the re-opening of diplomatic channels, the joint efforts to deal with members of the U.S. forces who were Missing in Action and the re-opening of trade links". The rapprochement is said to be particularly strong now that ambassadors have been appointed and that the attainment of Most Favoured Nation trading status for Vietnam is regarded as a possibility. Mrs. Croxen says that the Board's "general approach was to find that given the length of time since 1975 and the rapprochement between Vietnam and the U.S.A. it was inconceivable that these men would be persecuted for their service".

Whilst the views of the Board must be scrutinised with care, its views must be treated with respect. As has been said in other cases, the Board is very much a specialist tribunal. It spends its whole time dealing exclusively with asylum-seekers from Vietnam. Visits to Vietnam are made. Every new case which a member of the Board considers will add to his knowledge of life in Vietnam (at any rate, as it was before the departure

of the particular asylum-seeker whose case the Board is examining). It may be that it is going a little too far to say that it is "inconceivable" that those who served with the U.S. Special Forces will be ill-treated in the Vietnam of today. But the Board did not have to be certain that ill-treatment would not take place. It had to consider whether there was "a real chance" that it would. In my view, it was open to the Board to infer that the significant easing of tension between Vietnam and the U.S. on the political and diplomatic fronts, and the establishment of economic links, had made the ill-treatment of those who had served with the U.S. Special Forces and who had concealed that service over the years less likely, and that there was no longer a real chance of any ill-treatment amounting to persecution occurring.

I should add that some weeks after I had reserved judgment, the Applicants' solicitors sought leave to file a further affirmation. It exhibited the transcript of a telephone conversation on 23rd April 1997 between a journalist and the Vietnamese Vice-Consul in Hong Kong. In it, the Vice-Consul appears to accept that returnees who had concealed their service with the U.S. Army would have to undergo re-education, and the Vietnamese courts would have to decide whether they should be prosecuted for that concealment (assuming that the concealment amounted to lying to the authorities). This evidence would only have been admissible if it demonstrated that the Board's conclusion that there was no longer a real chance of any ill-treatment amounting to persecution occurring was plainly wrong: see *Tran Van Tien v. The Director of Immigration (No. 1)* (1996) 7 HKPLR 173. I do not think that the new evidence demonstrates that. Undergoing re-education does not necessarily amount to persecution. It can in some circumstances involve only a few days "political lessons". It may be that being punished for concealing service with the U.S. Army is

unfair: it would be adding insult to injury to punish people for breaking the law if they only broke the law to avoid the persecution they feared. But the possibility of unfair punishment does not undermine the Board's conclusion to such an extent as to make it "plainly wrong".

REBUTTAL BY THE APPLICANTS

Since the only facts on which the Board could have concluded that there had been a change of attitude to those who served in the U.S. Special Forces was the passage of time and the rapprochement in Vietnamese-U.S. relations, the sting of the criticism that the facts on which the Board relied were not put to them for possible rebuttal has been removed. In these circumstances, the only point which the Applicants can take is that they were not told that the Board was thinking of concluding that the change of attitude which the Board inferred from those facts meant that they were unlikely to face ill-treatment on their return. It is said that if the Applicants had been told that, they could then have drawn the Board's attention to examples of members of the Nung minority who had recently been ill-treated because of the discovery of their war-time service with the U.S. Special Forces.

But could they have done that? At the time that their cases were considered by the Board, did they know of such cases? And were such cases truly examples of recent ill-treatment as a result of a discovery of their war-time service? The only case of significance relied on by the Applicants is the case of Duong Cam Sang. If the Board had called for his Immigration Department file, the Board would have seen that he was a member of the Nung minority who had served with the U.S. Special Forces, and that his service had not been discovered until 1990. The Board would

also have seen his claim that he was arrested and brutally beaten up when his service was discovered, and that he only avoided further ill-treatment by escaping.

Mr. Mitchell pointed out that what Duong Cam Sang actually claimed he was being accused of was associating at that time with former members of the South Vietnamese Army ("the ARVN") and having been at that time an American spy. Accordingly, it is said that although the discovery that he had served with the U.S. Special Forces gave rise to that suspicion, it was for his present activities that his claimed ill-treatment related, and not his past war-time service. That is too refined a distinction for me to go along with. I prefer to reject the Applicants' reliance on Duong Cam Sang's case on another ground altogether.

When Duong Cam Sang's case eventually came before the Board, the Board rejected as "totally implausible" the incident which was said to have given rise to the discovery of his war-time service. Indeed, the Board found that the authorities had been well aware of his service. The Board concluded that he had made up the incident to bolster his claim for refugee status. Accordingly, for those of the Applicants whose claims were considered by the Board after the Board had considered Duong Cam Sang's case, Duong Cam Sang's case could not have helped them at all. For the other Applicants, assuming in their favour that the Board erred in not telling the Applicants of the changed attitude which it was minded to find, thereby not alerting the Applicants or their representatives to the need to draw the Board's attention to Duong Cam Sang's case, no injustice was in fact done, and no relief would have been granted by the court on that ground.

THE INDIVIDUAL APPLICANTS

Against this background, I turn to the cases of the 6 principal Applicants individually.

Moc A Pao (A1)

A1 was born in December 1950. He is a member of the Nung minority. He served as a private in the U.S. Special Forces for 3 months in 1968 and for 6 months in 1969. Although he claims that he was "a combat trooper for much of the time", what he told the immigration officer at his screening interview was that in 1968 he underwent normal military training, and driving of "airborne vessels". As for 1969, he told the immigration officer that

> "... he joined the Special Forces voluntarily and helped to patrol along the Cambodia-Vietnam border against trafficking of weapons. He had taken part in a war for an hour only. Other than that, his duty was patrolling along small rivers with totally 6 airborne vessels, each had 3 passengers capacity."

After demobilisation in 1969 he lived an unremarkable life. He did not disclose his service with the U.S. Special Forces when he was required to give an account of his personal history to the authorities following the fall of Saigon in 1975. That was because he feared that he would be punished. However, in March 1990, he became concerned that his service was about to be disclosed to the authorities by someone to whom he had refused to lend money. That was why he fled Vietnam.

The Board was sceptical about A1's claim that he had kept his service with the U.S. Special Forces a secret from the authorities for so many years. Indeed, the Board rejected his claim that he had "actively"

suppressed his past. I take the Board to have meant by that that he had never positively asserted that he had not served with the U.S. Special Forces. However, the Board gave him the benefit of the doubt as to whether his service had become known to the authorities, and the Board proceeded on the assumption that the authorities had been unaware of it.

There are two passages in the Board's reasons which are criticised by Mr. John Scott Q.C. for the Applicants. First, para. 11 reads:

> "Having considered the Applicant's circumstances in Vietnam until 1990 the Board finds that there is no evidence that he had encountered persecution for a Convention reason in Vietnam and finds that he did not have a well founded fear of persecution for such reasons at that time. In the Board's view, the Applicant's claim to refugee status relies upon events which allegedly occurred from 1990 onwards."

The criticism of the Board is that the Board did not appreciate that what A1 feared was the possibility of persecution. The only reason why he had not encountered persecution was because he had had to conceal the facts which would have given rise to it. I cannot go along with this criticism of the Board. I do not think that para. 11 related to A1's military service at all. The Board was simply saying that the treatment to which he had in fact been subjected prior to 1990 (which had had nothing to do with his military service because that had been concealed) would not have given him a well-founded fear of being persecuted in the future. To be fair, Mr. Scott had no quarrel with para. 11 if that was the correct way to read what the Board was saying.

Secondly, in para. 14, the Board said:

> "... on the available evidence the Applicant had stable employment from 1969 onwards and there is no suggestion that

> either the Applicant or his family suffered any adverse treatment by the authorities on account of the non disclosure."

The criticism of the Board is that this is illogical. It was because his military service was not known about that he was not subjected to ill-treatment. I think that what the Board wanted to get across in para. 14 could have been more happily expressed, but I have no doubt that what the Board was saying was that since his military service had not been made known to the authorities, there was no question of A1 and his family having been ill-treated as a result of it.

I should add that Mr. Scott criticised another comment which the Board made in para. 14 of its reasons:

> "The Board also notes the ... record [of A1's wife's screening interview] which states that her husband was not afraid of his military service being discovered since they had led a normal life for many years and in any event no documentary proof of his service remained in existence."

That is said to be inconsistent with something else which A1's wife said at the screening interview, namely that "she was afraid that her husband would be arrested for [his] ex-military service for [the] U.S. Government". However, this argument goes to whether A1 in fact <u>fears</u> persecution. It does not undermine the Board's conclusion that A1's fear of persecution was not well-founded. That was the real basis of the Board's decision to reject A1's claim to refugee status, as is apparent from para. 17 of the reasons:

> "The Board disagrees with the AVS claim that the Applicant faces a serious possibility of long term re-education or imprisonment should he be returned to Vietnam. It is almost twenty years since the fall of Saigon and the Board does not

> accept that a person who served as a private for a period totalling nine months only would face a risk of punishment amounting to persecution on account of his membership of a particular social group. In reaching this conclusion, the Board has taken into account the so-called aggravating feature of failure to disclose the information but finds that the Applicant's low rank and short period of service outweigh any likelihood of the imposition [of] punishment which would be so excessive as to be persecutory."

It is to be noted that the claimed change of attitude towards members of the Nung minority who served in the U.S. Special Forces and who subsequently concealed that service apparently played no part in the Board's reasoning. The Board's reasoning focused on three things: (a) A1's low rank and short service, (b) the length of time which had elapsed (his service having ended about 25 years before his case was being considered by the Board), and (c) such punishment as he might receive on his return would not amount to persecution. If there had been no material on which the Board could have concluded that there had been a change of attitude towards persons whose past service with the U.S. Special Forces had been concealed, it might have been arguable that there was no material on which the Board could have concluded that the passage of time made the future ill-treatment of A1 less likely. But for the reasons I have given, that is not so. In the circumstances, I cannot say that the conclusion which the Board reached was not one which it was recently open to the Board to reach.

On Canh Phuong (A2)

A2 was born in 1934. He and his wife are both members of the Nung minority. They were employed as guards by the U.S. Army. A2 told the immigration officer at his screening interview that he had worked at a base at Danang for 12 years from 1962-1974, and his duties had been to

open and close the gate to the base and to check the credentials of those visiting and leaving it. A2's wife told the immigration officer at her screening interview that she had worked at a base at Danang for 2 years from 1967-1969, and her duties had been to search those visiting and leaving the base. Within a few years of the fall of Saigon, A2 and his wife had settled down to life as peasant farmers.

A2 and his wife never disclosed their service with the U.S. Special Forces. The Board did not doubt that. What the Board may have questioned was why they had concealed their service. The Board noted that A2 and his wife had claimed in their letter of appeal to the Board that it was because "colleagues of theirs were sent to labour camps as a consequence of this background". The Board thought that that was a new claim, but it is possible that all that A2 and his wife were doing was elaborating on what A2 had told the immigration officer at his screening interview, namely that "he was afraid of being re-educated for a long period".

A2 and his wife fled their home in November 1990. The reason which A2 gave at his screening interview for leaving Vietnam related to the fact that his son, who was then 20 years old, had just been conscripted for military service. He did not want his son to undergo military service which he described as "dangerous and tough", and as his son was his only son he was afraid that the family would be without a "successor" if his son met with an accident. However, in his letter of appeal to the Board, A2 gave a different reason for leaving Vietnam. He claimed that his service with the U.S. Special Forces, and that of his wife, had been discovered, and that he had been threatened with "reform through education".

The Board was sceptical about this new reason for the flight from Vietnam. Neither the discovery of their service with the U.S. Special Forces nor the fact that it had prompted their flight from Vietnam had been mentioned by A2, his wife or his son at their screening interviews. But I do not read the Board as having found as a fact that it was untrue. What the Board added was:

> "Furthermore, given the nature of their employment and the fact that such employment occurred over 15 years ago, the Board cannot accept that the applicant and his wife were to be severely punished, if at all, if this new appeal allegation was true."

In order words, on the assumption that what A2 was saying was true, such fear as he and his wife had of being ill-treated on their return to Vietnam was unfounded.

Once again, the claimed change of attitude towards persons who had served with the U.S. Special Forces and who had subsequently concealed their service apparently played no part in the Board's decision. The Board's reasons focused on three things: (a) the nature of their work, (b) the length of time which had elapsed, and (c) such punishment as they might receive on their return would not amount to persecution. For precisely the same reason as I have given in relation to the decision of the Board in the case of A1, I cannot say that the conclusion which the Board reached in the light of those considerations was one which it was not reasonably open to the Board to reach.

Diep Hoai Sung (A3)

A3 was born in January 1950. He is a member of the Nung minority. He joined the U.S. Special Forces in February 1966, using his

brother's identity documents because he was under-age at the time. He served as a private for about 4 years. In December 1969, he became ill and was hospitalised. On his discharge from hospital, he did not return to his previous service. He was later arrested for avoiding military service with the ARVN, and was detained for 15 months. On his release, he joined the ARVN, and served as a private from January 1972 until the fall of Saigon in 1975.

He did not report his service with either the U.S. Special Forces or the ARVN to the new Vietnamese authorities. In December 1975, his service with the ARVN was discovered. He was detained, and underwent re-education for about 4 years, eventually being released in September 1979. However, in December 1979, he was again detained - this time because he was suspected of having served with the U.S. Special Forces and having concealed it. He was interrogated over a period of 4 months, but during that time he never confessed to having served with the U.S. Special Forces, and he was eventually released in April 1980. Thereafter, he was required to report to the Vietnamese authorities every week.

A14 fled Vietnam in 1990. He did not give his service with the U.S. Special Forces as the reason for his flight from Vietnam at his screening interview. The reasons he gave were the fact that he had had no household registration and that he had found his obligation to report every week oppressive. His service with the U.S. Special Forces related to why he did not want to return to Vietnam. He feared that the punishment he would receive for his illegal departure from Vietnam would be more severe in the light of his previous service with the U.S. Special Forces.

There is an important issue as to the basis upon which the Board approached A3's case. Mr. Scott contended that the Board may have approached his case on the footing that A3 may already have been punished for his service with the U.S. Special Forces, and that that may have contributed to the Board's finding that he would not be punished for it in the future. I do not think that the Board fell into that error. I think that the Board appreciated that he was only suspected of having served with the U.S. Special Forces, but was released from detention in April 1980 without further punishment (apart from the weekly reporting) because that service was not conclusively established. If the Board had concluded otherwise, it would surely have said so.

It was against that background that the Board's conclusion in A3's case was as follows:

> "Whilst the Board believes that his detention for a 4 year period may have been persecutory in 1975 and 1979, given the fundamental changes that have taken place in Vietnam throughout the 1980s, the Board believes the applicant does not have a well-founded fear of <u>future</u> persecution. In support of this conclusion, the Board notes that there has been a significant amelioration of the authorities' treatment of persons with backgrounds similar to the applicant particularly those residing in Ho Chi Minh City."

Fundamental changes in an asylum-seeker's country of origin can remove the basis of any fear of persecution. That is recognised in one of the cessation clauses in the Convention (Art. 1C(5)) and in para. 135 of the Handbook. The Board's finding that Vietnam underwent a period of fundamental change in the 1980s is not challenged. I see no reason why it was not open to the Board to conclude that the wind of change which was blowing through Vietnam in the 1980s continued into the 1990s. That is where the Board's "general approach" as described by Mrs. Croxen to the

cases of persons who served with the U.S. Special Forces is so important. It was the passage of time and the rapprochememt in Vietnamese-U.S. relations which entitled the Board to conclude that there had been "a significant amelioration" in the treatment of those who had served with the U.S. Special Forces. When the Board's decision is seen in that light, the Board's conclusion was one which it was reasonably open to the Board to reach.

Chenh Nhi Cong (A4)

A4 was born in May 1950. His real name is Vong Cun Sang. Although he claims in his supporting affirmation to be a member of the Nung minority, I have not been able to find any reference to that in any of the papers before the Board. There is no reference to his ethnicity (other than that he is ethnic Chinese) in either the notes of the screening interview or in his letter of appeal to the Board. Nor is there any reference to it in the decisions of the immigration officer or the Board.

Be that as it may, A4 served with the U.S. Special Forces from 1967 until his discharge in 1972. He had been an infantryman. After his discharge, he concealed that service, and he led a relatively normal life. However, in February 1976 a friend asked him to buy provisions for a group of guerrillas. A4 did not wish to get involved, but agreed to do so when his friend threatened to prevent him from cultivating his land. He continued to do so until July 1976 when he heard that his friend had been arrested. He was scared that the assistance he had given to the guerrillas would be revealed. He went on the run, and assumed the new identity by which he is now known. However, in September 1977 he was arrested, and questioned about guerrilla activities. He was released 2 months later. In

January 1978, he and his family tried to flee Vietnam because they did not have Ho Khau for where they were living. They were arrested, and A4 was detained for a year. Following his release, he again led an unremarkable life until March 1990 when he had a dispute with a local cadre. It is unnecessary to relate what that dispute was about, but fearful that reprisals were going to be taken against him and his family in connection with this dispute, A4 fled Vietnam.

Not surprisingly, the Board concentrated in its reasons on the events in A4's life which had given rise to his problems: the assistance he gave to the guerrillas, the interrogation to which he was subjected because of the suspicion that he had assisted them, and his dispute in 1990 with the cadre which precipitated his flight from Vietnam. The Board found that his treatment in Vietnam had not amounted to persecution. There is no challenge to that finding.

A4's service with the U.S. Special Forces did not feature much in the Board's reasons. That was because the main focus of the Board's attention was on the reasons why he left Vietnam. But the ultimate question which the Board had to determine was whether A4 had a well-founded fear of persecution in the future. Part of his case was that he would be persecuted on his return to Vietnam because of his service with the U.S. Special Forces, and because he had concealed that service. On that issue, the Board simply said:

> "... there is no indication that he would have been [persecuted] even if his service in the U.S. army was found out, and there is no evidence that he will be persecuted should he return to Vietnam."

The Board did not identify the basis on which it concluded that A4 would not have been persecuted if his service with the U.S. Special Forces had been disclosed. Since the Board was not told that he was a member of the Nung minority, the Board would have been entitled to conclude that the materials which might have been relevant to the cases of the other Applicants did not apply to him. In any event, the Board's decision in his case was in August 1992, just after the Asia Watch report in July 1992 (and the Board is unlikely to have seen it for that reason) and well before the petition of March 1993. I have not been told whether there were materials available to the Board in August 1992 which detailed the treatment in Vietnam in the 1970s and 1980s of ethnic Chinese who were not members of the Nung minority once their previous service with the U.S. Special Forces had been revealed.

However, one can leave aside the question whether A4 would have been persecuted before he had left Vietnam if his war-time service had been discovered. The question which the Board ultimately had to decide, as I have said, was whether in August 1992 A4 had a well-founded fear of persecution in the future. Mr. Scott argued that in saying that there was "no evidence" that he would be persecuted on his return to Vietnam, the Board reversed the burden of proof, and failed to give A4 the benefit of doubt required by the Handbook. I cannot accept that argument. I think that what the Board was saying was that such information as there was suggested that A4 would not be persecuted on his return. The Board did not identify what that information was, but again that is where the Board's "general approach" as described by Mrs. Croxen to the cases of persons who served with the U.S. Special Forces is so important. The passage of time and the improvement in Vietnamese-U.S. relations entitled the Board to reach the conclusion which it did.

Chieng A Ung (A5)

A5 was born in 1927. Although he claims in his supporting affirmation to be a member of the Nung minority, I have not been able to find any reference to that in any of the papers before the Board. Like A4, there is no reference to his ethnicity (other than that he is ethnic Chinese) in either the notes of the screening interview or in an AVS submission to the Board. Nor is there any reference to it in the decisions of the immigration officer or the Board.

In 1955, A5 joined the ARVN. He attained a first-class sergeant's rank by the time he was discharged in 1968. In November 1969, he began to work for a U.S. agency, the Pacification Security Co-ordination Division MACCORD ("the PSCDM"), as a security guard. He was subsequently promoted to the post of assistant supervisor. A5 said at his screening interview that the PSCDM was a civilian agency which worked closely with the South Vietnamese Government and the police force, and was involved in intelligence work. That was expended on in an AVS submission to the Board as follows:

> "PSCDM is a branch of [the division]... which was responsible for the pacification program. It concerned itself mainly in intelligence, propaganda and counter espionage... The pacification program was a joint military and civilian operation that sought to neutralize the effectiveness and influence of the Communists in... South Vietnam, particularly in the rural areas. The civilian branches of the pacification program... not only determined policy but often directed operations of its military counterpart. Pacification agencies and those linked to them employed methods such as assassinations, arrests and bringing about defection of the Viet Cong."

A5 remained with the PSCDM until 1975 when he fled the advancing North Vietnamese forces. He and his family settled in another

part of Vietnam. He discovered that attempts were being made to obtain information about his background, but he managed to conceal both his service with the ARVN and his employment with the PSCDM. He then lived an unremarkable life until 1990. What precipitated his flight from Vietnam was his association in 1990 with a monk. For a variety of reasons, A5 eventually began to suspect that the monk was not a monk at all, that the monk may have been engaged in resistance activities, and that he, A5, may have been regarded by the authorities as being implicated in these resistance activities because of his association with the monk. He feared that as a result his own background would be investigated further and his war-time activities would be revealed. These are the reasons which persuaded A5 to flee from Vietnam.

As I read the Board's decision, the process of reasoning by which it reached the conclusion that A5 did not have a well-founded fear of persecution was as follows:

(i) The Board was unable to accept that the Vietnamese authorities would have been able to discover, from an independent source, A5's service with the ARVN and his employment by the PSCDM.

(ii) If A5 was returned to Vietnam, it was "highly unlikely", given the passage of time, that he would be interrogated in such a way as to make him confess to his war-time service and employment.

(iii) Even if the Vietnamese authorities discovered his war-time service and employment, he would not be persecuted as a result of it. What the Board said was

> "... country of origin information indicates that there has been a significant amelioration throughout the eighties of the authorities' treatment of persons with similar backgrounds and ethnicity to the Applicant. This phenomena has continued in the nineties. The advent of the nineties has witnessed the lifting of the American trade embargo and dialogue between both nations indicates that they are progressing towards full diplomatic recognition. Any stigma that the Applicant's employment with PSCD may have attracted in the early eighties has diminished with time."

All three steps in the Board's process of reasoning are challenged by Mr. Scott, but I only need to deal with step (iii), because if step (iii) cannot be successfully challenged, the Board's decision must stand.

It is plain from the extract of the Board's reasons which I have quoted that the Board accepted that "persons with similar backgrounds and ethnicity" to A5 had been subjected to a measure of ill-treatment. The Board must have found that to say that there had been "a significant amelioration" in their treatment. It is true that the Board said that that amelioration in their treatment continued throughout the 1980s. I have not been referred to any "country of origin information" which indicates that in the 1980s there was a relaxation in the treatment of those who had served with the U.S. Special Forces. But the crucial point is whether there had been a change of attitude in the 1990s to those who had served with the U.S. Special Forces. On that question, it is noteworthy that in this case the Board expressly referred to the improvement in Vietnamese-U.S. relations in the 1990s. In the case of A5, therefore, the Board's ultimate conclusion was entirely consistent with the "general approach" referred to by Mrs. Croxen. Accordingly, that ultimate conclusion was one which the Board was entitled to reach.

Tran Di Thuong (A6)

I have already mentioned that A6 was not a member of the Nung minority, and did not serve on the military side of the war effort. Indeed, his circumstances are so different from the other Applicants that I propose to consider his case independently of them.

A6 was born in November 1947. He was drafted into the ARVN in 1967. After initial training, he was attached to the ARVN's Psychology Branch. The function of the Branch was to disseminate propaganda in order to damage the morale of the Viet Cong. There he worked as an interpreter, and part of his duties included interpreting for military consultants from Taiwan who were advising the ARVN. In 1970, he was selected to work for the Freedom Broadcasting Station which was run by the U.S. Intelligence Office and the Vietnamese Military Service. He worked there as an announcer and scriptwriter, writing scripts which were critical of the Viet Cong. He continued working for the broadcasting station until 1975. In addition, A6 had, in 1964, joined the Taiwanese National Party. As a member of the Party, he identified members of the Viet Cong and reported on their activities.

After the fall of Saigon in 1975, A6 did not disclose his work for the broadcasting station or his membership of the Taiwanese National Party. Moreover, he played down his role in the ARVN's Psychology Branch. In consequence, the re-education to which he was subjected was limited to just 3 days "political lessons". However, he remained under the surveillance of a public security officer, Ut Dong. That was because he was ethnic Chinese and had disclosed that part of his duties included interpreting for military consultants from Taiwan who were advising the

ARVN. He was visited by Ut Dong twice a month, and was required to report to Ut Dong what he had been doing.

In the years between 1975 and 1991, A6 led an unremarkable life, though he secretly retained his links with the Taiwanese National Party. The only active role he played for the Party was to report matters of interest to the Party. He did so on 4 occasions, the last occasion being in 1979. They related to the arrest of some of his colleagues in 1975, the change of currency in 1975, the anti-Chinese campaign in 1978 and the Cambodian attack in 1979.

The event which precipitated his flight from Vietnam was his attendance at the funeral in September 1991 of a former general in the ARVN, who had undergone re-education from 1975 to 1988. Ut Dong had seen him there. A6 was subsequently told that Ut Dong had spoken to the general's nephew, who had told Ut Dong that A6 had got to know the general when A6 had worked in the ARVN's Psychology Branch. A6 feared that his connection with someone who had been such an important member of the ARVN military machine that he had had to undergo re-education for 13 years would result in the whole of his war-time service and his membership of the Taiwanese National Party being discovered. He believed that he would have to undergo long term re-education. He decided to flee Vietnam.

Subject to one possible exception, this was the account of events which, broadly speaking, A6 consistently gave - whether to the immigration officer at his screening interview, to the Board in the form of an AVS submission, and when interviewed by the Board. The exception relates to his claim that the last time he reported on matters of interest to the

Taiwanese National Party was in 1979. That was what he said at the end of his interview by the Board. The Board took the view that he had contradicted himself at the beginning of the interview. I do not agree. The relevant part of the transcript reads:

> "Q. Did you also report on individuals?
>
> A. If the Communists arrested the comrades of the Nationalist Party, *we* reported that back to Taiwan.
>
> Q. Right up to 1991 before you left Vietnam?
>
> A. Yes, until 1991 when I left Vietnam." (My emphasis)

The Board thought that A6 was claiming that he had continued to make reports right up to 1991, though the word he had actually used was "we", i.e. not necessarily him, but other people who had, like him, secretly retained their links with the Taiwanese National Party.

There were three other features of A6's version of events which the Board expressed scepticism about:

(i) The Board noted that the 4 topics which A6 admitted making reports about were matters of common knowledge. The Board therefore regarded "the claimed necessity of secret reporting to be highly implausible". I do not think that that follows. The topic may not have been secret, but A6 would still have wanted to conceal the fact that he was making reports to the Taiwanese National Party.

(ii) The Board regarded it as "plainly ludicrous" that none of the letters which he claimed he had sent to the Taiwanese National

Party had been censored. However, that would have been far from ludicrous if he had only sent letters on 4 occasions. That is what I have assumed the Board found: since the Board found that A6 had "fabricated the material aspects of his claim in order to create a claim to refugee status on political grounds", I assume that the Board rejected as an exaggeration what it believed his initial claim to have been that he had continued to make reports up to 1991. In any event, the Board's conclusion took no account of A6's evidence to the Board that the letters were addressed to an individual and used a code to make it appear as if the information being given was innocuous.

(iii) The Board asked A6 why he went to the general's funeral when he was being "constantly closely monitored by Ut Dong". The Board rejected A6's answer ("It did not occur to me that I would be followed because a lot of other people would also attend the funeral") "for reasons which are self-evident". For my part, I do not regard it as self-evident that A6 was lying. He was not being "followed" by Ut Dong. His evidence was that Ut Dong visited him twice a month. In any event, there is no reason why the Board should not have accepted the other part of A6's answer which was:

> "[The general] died in his nephew's house. He had no other relative. His nephew came to ask me to assist in the arrangement of the funeral. I couldn't turn that down since he had been my boss and we were party comrade. I just could not refuse to help."

All in all, I am left with the uneasy feeling that the Board was looking for reasons to reject A6's version of events. But even if that

anxiety on my part is unwarranted, and the Board was entitled to regard part of A6's story with scepticism, it looks as if the Board decided that simply because A6 had been less than truthful on collateral issues, he must have "fabricated the material aspects of his claim". That does not necessarily follow. It sometimes happens that a person is shown to have been so obviously untruthful that none of his evidence can be relied upon. However, for the reasons I have given, I do not think that it was open to the Board to conclude that this was such a case. The fact of the matter is that the parts of A6's evidence which the Board was sceptical about did not relate to his time in the ARVN's Psychology Branch, or his time as an announcer and scriptwriter with the broadcasting station, or the fact that he was under the scrutiny of a public security officer.

What the Board should therefore have done was to determine whether his concern that his connections with the ARVN general, and the possible discovery of the full extent of his war-time service and his links with the Taiwanese National Party, gave him a well-founded fear of persecution. Because the Board rejected the material aspects of his claim by a process of reasoning which does not stand up to scrutiny, the Board did not address this central question. To that extent, therefore, the Board's decision was flawed.

RELIEF

Mr. Mitchell argued that even if any of the decisions of the Board were flawed, it would not be appropriate for any relief to be granted. If the Board had to re-consider any of the Applicants' cases, it would inevitably come to the conclusion that there was no chance whatever of any of the principal Applicants establishing that they have a well-founded fear of

persecution in the modern Vietnam of 1997. That may well be the conclusion to which the Board might come in the case of A6, but I cannot say that the Board will inevitably do so. Accordingly, this is a case in which A6 is entitled to have his case re-considered by the Board.

The orders which I make, therefore, are that there be an order of *certiorari* quashing the decision of the Board in the case of A6, and an order of *mandamus* directing the Board to re-consider his claim to refugee status. The applications of all the other Applicants for judicial review must be dismissed. At present, I see no reason why costs should not follow the event. In the circumstances, the order *nisi* which I propose to make is that the Applicants should pay to the Respondents five-sixths of the Respondents' costs to be taxed if not agreed, but since the Applicants are legally aided, that order will not be enforced without the leave of the court.

Finally, I know that the Director of Immigration wishes to repatriate to Vietnam as soon as possible the principal Applicants whose applications have been dismissed together with their families. I am not prepared to grant the equivalent of a stay of execution pending a possible appeal from this judgment. However, the Applicants' solicitors should have a few days to consider applying to a Justice of Appeal for the grant of the equivalent of a stay of execution on the footing that grounds of appeal exist and to make such an application if it is thought to be appropriate. To preserve the Applicants' position in the meantime, the Director of Immigration should not be permitted to remove the Applicants and their families from Hong Kong until noon on Saturday 24th May. Accordingly, unless the Director of Immigration is prepared to undertake that she will not remove the Applicants and their families until then, there will be an injunction restraining her from doing so.

(Brian Keith)
Judge of the High Court

Mr. John Scott Q.C. and Mr. Philip Dykes Q.C., instructed by Messrs. Pam Baker & Co., for the Applicants

Mr. Denis Mitchell Q.C., instructed by the Attorney-General's Chambers, for the Respondents