

CACV000161/1997

Not for Circulation

IN THE COURT OF APPEAL

1997, No.161
(Civil)

NGUYEN NGOC NHAT v
THE REFUGEE STATUS REVIEW BOARD and
THE DIRECTOR OF IMMIGRATION

Coram: Mortimer V-P, Godfrey JA and Rogers J in Court

Date of Judgment: 16 October 1997

JUDGMENT

Mortimer V-P:

The applicant is an asylum seeker from Vietnam. He arrived in Hong Kong on 18 April 1991. He is 28 and is single. He was refused refugee status by the Director of Immigration and he asked for his case to be reviewed by the Refugee Status Review Board. On 29 July 1994 the Board heard his review and confirmed the decision of the Director of Immigration. On 18 August 1994 he was notified that the RSRB had confirmed the Director of Immigration's decision that he was not a refugee. Consequently, he applied for judicial review for the Board's determination. After leave had been granted,

the matter came before Keith J on 3 July 1997 and by judgment of the same day, he granted the application, quashed the Board's decision and ordered it to reconsider the applicant's claim.

The applicant's case

The applicant's case was based upon the treatment meted out to his father who had served in the ARVN and was captured after the defeat of the Southern Forces in 1975.

In his judgment the judge summarised the position and I, for my part, gratefully adopt his summary. He said:

"The Applicant's case before the Board was based on the treatment of his father and its effect on the treatment of him.' His father had served in the ARVN. Following the defeat of the South Vietnamese forces in 1975, he was captured. After 18 months' imprisonment 'for re-education', he managed to escape and joined 'an anti-government organisation for restoring the old regime'. He was arrested within a few months 'for carrying out some kind of anti-government activities'. In the next few years, he had a number of spells in prison 'for re-education' in connection with these activities. When he was released from prison in 1983, he was subjected to a number of restrictions, but apart from that the led an unremarkable life. However, 'he also assisted in anti-government activities'. In November 1989, a close friend informed him that the organisation had been uncovered. He was fearful for his safety, and fled from Vietnam with his second wife (the Applicant's step-mother). He came to Hong Kong where he was granted refugee status. He now lives in the US."

The judge then went on to summarise the applicant's position in these words:

"The Applicant was also subjected to a number of restrictions, including restrictions on his education and employment, but apart from that he lived an unremarkable life until the series of events which led to his flight from Vietnam. The Board correctly summarised what the Applicant had said when he had been interviewed by the immigration officer as follows:

'In December 1989 when working in the street he was arrested because some antigovernment documents belonging to his father had been found in their house. His father had by this time departed from Vietnam. His brother... and sister ... were also arrested. The family home was sealed of and he was detained in a district prison pending further enquiries. He was released in January 1990 with temporary release documents which, he claimed to the Immigration Officer he had lost on the way to Hong Kong.

In January 1990 he applied to reclaim his father's house and was advised personally by the district and provincial police and an officer of the land office that the house had been properly and irretrievably confiscated. The piece of farmland also belonging to his father was also acquired by the authorities. This plot of ground, 0.1 acre in area, had been bought by his father for his mentally disordered children. He was then taken by the district police for enquiries into his father's anti-government activities and disappearance and in June 1990 taken to a labour camp where he was required to grow crops. He remained there until escaping during the Lunar New Year celebrations in February 1991."

The Board disbelieved the applicant and found first that no incriminating document had been found at the family home; and second, that the family home had not been confiscated. The basis upon which, the applicant said, he had been arrested in December 1989 and held until January 1990 was not believed.

In June 1990 he alleged he was taken to the labour camp where he stayed until February 1991 when he escaped and came to Hong Kong. Before the Board he was asked why he was sent to the labour camp - a central matter in this enquiry - he simply answered that his family home had been confiscated because his father had used it for anti-government activities.

The division below

In his finding, the judge held that the Board had made no decision on some of the issues of fact. In particular:

- (1) Was the applicant arrested in December 1989?
- (2) Was he arrested in June 1990? and
- (3) Was he detained in the labour camp from June 1990 until February 1991?

The judge summarised his decision at p. 9B of his judgment in these terms:

"... that is what the Board expressly said in para. 27 of its reasons:

'The incident with the documents and the claimed consequential compulsory acquisition of the family property never having happened, [none] of the there Applicants had a well-founded fear of persecution at the time that they left Vietnam.'

That does not follow. The Board still had to decide whether the Applicant had established his claim to refugee status on the basis of those parts of his story which the Board must be assumed to have accepted. The fact that the Board did not do that meant that its decision was flawed to that extent."

The appeal

The Director of Immigration appeals against the judge's decision with commendably short grounds. The nub of which is this:

"The judge erred in concluding that the Tribunal of Facts should consider matters that flowed from rejected facts. The matters were intimately and closely connected. The rejection by the Board of the arrest of the applicant on account of his father's activities and that the confiscation of property meant that there was neither a starting point or logical basis for an examination of his alleged imprisonment in June 1990 arising from his father's former activities or further consequential events."

It was obviously an important issue whether the applicant had been detained in a forced labour camp from June 1990 until he escaped in February 1991 and whether that could be the basis of well-founded fear of persecution for a convention reason.

The appellant's submissions

Mr Marshall SC - Mr Francis Kwan with him - submits on this:

- (1) that the judge was wrong when he found that the Board had made no decision on the point; and
- (2) in any event this did not matter because the Board rejected the applicant's evidence that the family home had been confiscated and therefore could reach no conclusion upon the reasons for his detention. In those circumstances the detention could not be relevant as the basis for a well-founded fear of persecution for a convention reason.

For my part I agree with the judge that there was no specific finding by the Board whether the applicant did forced labour between June 1990 and February 1991.

The issue

The issue for our consideration is simply whether in the light of the Board's rejection of the applicant's evidence on the documents and the confiscation of the house was such a finding necessary or relevant and was the judge right in his decision.

The applicant's submissions

Miss Gladys Li SC, who appears with Mr Paul Harris for the applicant, submits simply that the forced labour from June 1990 to February 1991 was a central issue in the application for refugee status. Simple fairness requires the Board to deal specifically with this point in its reasons. This, she says, is because the Board makes specific findings about the documents and the confiscation which are certainly no less important issues. The general finding in para. 31 of the Board's decision does not cure the admission. It reads:

"Having considered all the matters advanced by the Applicants and the prescribed persons on his behalf, the Board does not accept the credibility of the Applicants' claim for refugee status."

Conclusion

I accept Miss Li's submission on this. I think the judge was right when he said that if the Board disbelieve the applicant on his arrest in December 1991 and more particularly upon his detention in the labour camp between June 1990 and February 1991, the Board must be expected to say so. The necessity to make this finding depends upon the particular circumstances of this case and, in my view, should not be erected into any kind of principle of law or even of practice. Further, the issues facing the Board are always complex. I would not be prepared to say, as the judge did, that silence on the part of the Board on a specific issue of fact in their reasons means that it can be assumed that the Board accepted the applicant's evidence on those matters.

With those minor reservations, for my part, I think the judge's decision was right. I would uphold it and dismiss the appeal.

Godfrey JA:

I agree.

The judge stated, correctly, that the only parts of the applicant's story which the Board expressly said it disbelieved related to the documents and the confiscation of the home. The judge went on to say:

"I must therefore assume that the Board did not reject the Applicant's story about the imprisonment of his father for re-education, about the Applicant's own imprisonment and subsequent detention in a labour camp as a result of his father's anti-government activities, and about his own escape and flight from Vietnam."

I do not share of the view that such an assumption must be made.

It is the duty of the Board in all these cases to find the facts; and of course the applicant is entitled to a statement of the Board's findings. Generally speaking, I do not think it can properly be assumed, in relation to any material fact, that the Board has either

accepted or rejected the applicant's evidence upon that matter when the Board has failed to state what its finding is. If it expressly rejects part of the applicant's evidence, it *may* follow that it rejects the rest of the applicant's evidence; but only if the applicant's evidence must either be accepted or rejected as a whole. If there are discrete matters in the applicant's evidence which require to be considered separately, it cannot be assumed that a finding adverse to the applicant on one part of his story must be treated as a finding adverse to the applicant on the remainder of his story.

In the present case, I do not think it can properly be assumed that the Board rejected the applicant's story about the imprisonment of his father for re-education; about the applicant's own imprisonment and subsequent detention in a labour camp as a result of his father's anti-government activities; and about his own escape and flight from Vietnam. These are important matters, and the Board has not made any express findings of fact in relation to them. They are not matters intimately bound up with the matters relating to the documents and the confiscation of the family home, upon which matters the applicant was disbelieved. They are, in my opinion, discrete matters on which the applicant was entitled to discrete findings of fact.

For these reasons, I too would dismiss this appeal.

Rogers J:

I also agree that this Appeal should be dismissed.

One important ground which the Applicant put forward for having a well founded fear of persecution for a convention reason stemmed from having been detained in a labour camp called the "18 family" from June 1990 until Chinese New Year 1991 when he escaped and managed to come to Hong Kong. When he was interviewed by the Immigration Officer he had said that this had been due to his father's anti-government activities and subsequent disappearance. On the face of the papers there does not seem to be any doubt about the fact that the father had escaped from Vietnam in November 1989 and had been able to satisfy the authorities that he was entitled to refugee status and was allowed to go to the United States.

The Applicant had also told the Immigration Officer that he had been arrested in December 1989 and questioned in respect of documents found in his father's house and that the house and land had been confiscated. This evidence had been disbelieved by the Board. But that was only one of the grounds upon which it seems to me the Applicant was seeking to satisfy the Board that he had a well founded fear of persecution.

The far more important ground seems to me to have been that there had been what amounted to little more than incarceration and the reasons therefor.

Each case must turn on its own facts. But I cannot see that the disbelief of the Applicant in respect of the confiscation of the father's house and land dictates the conclusion that the Board came to a determination or at least expressed it, which covers

the Applicant's case in respect of incarceration. Clearly there were a number of matters upon which the Board did accept the Applicant's evidence, or at the very least proceeded on the basis that those facts were correct. The facts relating to the house and the documents seem to me to be quite separate and distinct from the facts relating to the imprisonment after June 1990. They do not seem to be part and parcel of the same thing.

Whereas I agree that I would not go so far as the Judge below when he also said that the Board must be assumed to have accepted the Applicant's evidence as to his imprisonment, it is, in the circumstances of this case, sufficient to say, as the Judge said at page 7 of the Judgment, "...the Board did not reject the Applicant's story about the imprisonment and subsequent detention in a labour camp as a result of his father's anti-government activities, and about his own escape and flight from Vietnam."

In the circumstances of this case, it seems to me that there was not a determination of the crucial part of the Applicant's case and the Judge below made the right Order.

Mortimer V-P:

Costs will follow the event. The applicant is to have his costs of the appeal.

(Barry Mortimer)
Vice President

(G.M. Godfrey)
Justice of Appeal

(A. Rogers)
Judge of the Court of First
Instance of the High Court

Representation:

Miss Gladys Li SC and Mr Paul Harris (M/s Pam Baker & Co) for Respondent

Mr W. R. Marshall SC and Mr Francis Kwan (Department of Justice) for 1st and 2nd Appellants