Date: 20040130

Docket: A-38-03

Citation: 2004 FCA 49

CORAM: LINDEN J.A.

SEXTON J.A.

MALONE J.A.

BETWEEN:

MAI HA, THA MAI HA, THIEN MAI HA and

ARCHIEPISCOPAL CORPORATION OF WINNIPEG

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Winnipeg, Manitoba on November 25, 2003.

Judgment delivered at Ottawa, Ontario, on January 30, 2004.

REASONS FOR JUDGMENT BY:
SEXTON J.A.

CONCURRED IN BY:
LINDEN J.A.

MALONE J.A.

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REASONS FOR JUDGMENT

SEXTON J.A.

I. Introduction

[1] This is an appeal from the decision of a judge of the Trial Division of the Federal Court (the "Motions Judge"), dismissing the appellants' application for judicial review of the decision of a visa officer at the Canadian High Commission in Singapore (reported at [2003] 2 F.C. 620). The visa officer had denied their application for permanent residence in Canada as Convention refugees seeking resettlement (hereinafter "CRSRs").

[2] There are two aspects to this appeal. The first aspect concerns the procedural framework in which the visa officer made his determination that the appellants were not CRSRs. In particular, the appellants claim that the duty of fairness required that, in the particular facts of this case, counsel should have been permitted to attend and observe their interviews with the visa officer. As well, the appellants challenge a policy promulgated by the Minister of Citizenship and Immigration (the "Minister") which states that counsel should not be permitted to attend visa office

interviews, on the basis that it fettered the visa officer's discretion to consider the particular facts of their case. The second aspect of the appeal concerns the visa officer's substantive determination that the appellants did not meet the legal requirements of the definition of CRSR.

II. Facts

[3] The appellants, Mai Ha, Tha Mai Ha, and Thien Mai Ha, are sisters ranging in age from 31 to 42, and are citizens of Cambodia. In 1975, the appellants, along with their parents and three other siblings, were forced to flee Cambodia in order to escape the Khmer Rouge. They fled to Vietnam and have been living there since that time. The appellants' parents and their three siblings subsequently immigrated to Canada in the years 1986 and 1994.

[4] On September 8, 1998, the appellants applied at the Canadian High Commission in Singapore for permanent residence in Canada as CRSRs. Their application was sponsored by the St. Ignatius Refugee Committee, which is associated with the appellant, Archiepiscopal Corporation of Winnipeg.

[5] In their applications for permanent residence, the appellants stated that they lived in a refugee camp in Vietnam along with only one other family. They stated that the security was poor in the camp and they were afraid to live there. They also stated that they were not entitled to work anywhere except in the camp, and that their casual work in the camp was not enough to support them. They also further indicated that they had no right to vote, travel or open a business.

Initial consideration of the appellants' applications

[6] After submitting their applications, the appellants were interviewed by a visa officer on May 19, 1999. By letter dated August 24, 1999, the visa officer refused their applications.

[7] The appellants applied for judicial review of the visa officer's decision and, on consent of the Minister, the application for judicial review was allowed. The Minister conceded that when the visa officer determined that the appellants no longer had a fear of persecution in Cambodia, he did not consider the "compelling reasons" exception. Generally, a person ceases to be a Convention Refugee when he no longer has a fear of persecution in the country from which he has fled. However, there is an exception to this general rule if a person establishes that he has compelling reasons for refusing to avail himself of the protection of the country from which he fled.

[8] As a result of this admitted error, the appellants' files were reassigned to another visa officer. The Computer Assisted Immigration Processing System ("CAIPS"), the computer system in which notes concerning visa applicants are recorded, indicated that the new interview was to focus on the issue of whether the appellants had a well-founded fear of persecution in Cambodia:

FOR NEW INTERVIEWING OFFICER... A NEW INTERVIEW MUST FOCUS ON THE REASONS WHY THE APPLICANT DOES NOT (OR DOES) HAVE A

WELL FOUNDED FEAR OF PERSECUTION AND THIS MUST BE DOCUMENTED.

Second consideration of the appellants' applications

[9] On November 10, 2000, the appellants' Winnipeg counsel faxed a letter to the newly assigned visa officer stating that the appellants, through their family in Canada, had instructed him to attend with them at their reinterviews. Consequently, counsel asked that the visa officer inform him of the time and place of the interviews and indicated his understanding that the interview was to focus on the reasons why the appellants do or do not have a well-founded fear of persecution.

[10] On November 20, 2000, the visa office sent a letter to the appellants' counsel advising him that the appellants were on the interview list. In this letter, the visa office did not give any indication that counsel's attendance would not be permitted at the interviews.

[11] Three separate interviews for each of the appellants were scheduled for February 28, 2001.

[12] On February 7, 2001, counsel for the appellants faxed another letter to the visa officer indicating that, as previously stated, he would be attending the interviews of the appellants.

[13] The visa officer received this faxed letter on February 8, 2001. On the same day, the visa officer replied to counsel for the appellants by writing a short note on the bottom right hand corner of counsel's February 7, 2001 letter. The handwritten note simply stated: "Please note that we do not allow lawyers or representatives to attend the interviews. You may wait in the waiting room but you will not be allowed to attend the interview."

[14] The visa officer also recorded his decision not to allow counsel to attend the interview in CAIPS. He stated:

> …handwritten reply prepared - representatives/lawyers are not allowed to attend the I/V.

[15] The Minister had published an Operations Memorandum entitled "Interaction with Practitioners (Lawyers and Consultants)" which stated the policy on the attendance of counsel at interviews. The Memorandum stated:

> The general approach is to limit attendance at interviews to the individual applicants and visa officers should follow this approach which appears to be supported by case law in the Federal Court. The doctrine of fairness does not require that counsel be present at interviews nor does the Immigration Act provide for the right to counsel in this context.

[16] The appellants' interviews took place as scheduled on February 28, 2001, without the attendance of counsel. The interviews were conducted in Vietnamese via an interpreter. At these interviews, the visa officers learned that the appellants were living in a rented house in Ho Chi Minh City and working as tailors in this house. The visa officer was aware that there was a system of residence control in Vietnam, but made no inquiry as to whether the appellants' living arrangements were legally in accordance with this system. The visa officer also learned that the appellants had not applied for citizenship in Vietnam. At the interviews, each of the appellants indicated that other people had tried to obtain citizenship in Vietnam but were unsuccessful. Although the visa officer considered that the appellants had a right to apply for Vietnamese citizenship, he had no idea what the outcome of these applications would be.

[17] The visa officer made typewritten notes during the interview. After the interview, he pasted these notes into CAIPS. These notes taken during the interview indicate that the visa officer decided that the appellants no longer had a fear of persecution in Cambodia because the situation there had become stable in the last 25 years. He also wrote that they had a durable solution outside of Canada because they were locally integrated in Vietnam. Finally, he noted that the appellants are free to apply for Vietnamese citizenship.

[18] By letter dated April 11, 2001, he reported these conclusions to the appellants and indicated that their applications for permanent residence had been refused. He stated that the appellants did not meet the definition of CRSR because they did not demonstrate a well-founded fear of persecution. Furthermore, the appellants had another durable solution because they had "become permanently resettled in Vietnam."

[19] The appellants applied for judicial review of the visa officer's decision in the Federal Court. Before discussing the decision of the Motions Judge, however, I think it is useful to set out the relevant statutory scheme.

III. Statutory Scheme

[20] The appellants applied for permanent residence status on the basis that they were CRSRs in Canada. At the relevant time, CRSR was defined in subsection 2(1) of the *Immigration Regulations*, 1978, SOR/78-172 (the "Regulations"):

"Convention refugee seeking resettlement" means a person... who is a Convention refugee	« réfugié au sens de la Convention cherchant à se réinstaller » Personee... qui est un réfugié au sens de la Convention:
(a) who is outside Canada,	a) qui se trouve hors du Canada;
(b) who is seeking admission to Canada for the purpose of resettling in Canada, and	b) qui cherche à être admis au Canada pour s'y réinstaller;
(c) in respect of whom there	

is no possibility within a reasonable period of time, of a durable solution. [emphasis added]	c) à l'égard duquel aucune solution durable n'est réalisable dans un laps de temps raisonnable.

[21] This definition indicates that in order for a person to be considered a CRSR, four requirements must be met. First, the person must be a Convention refugee. Second, the person must be outside Canada. Third, the person must be seeking admission to Canada for the purpose of resettling. Fourth, the person must have no possibility of a durable solution outside Canada within a reasonable period of time.

[22] Only the first and fourth requirements - that a person must be a Convention refugee and not have a durable solution outside Canada - require further elucidation for the purposes of this appeal.

1. The person must be a Convention refugee

[23] First, the relevant portions of the definition of Convention refugee in subsection 2(1) of the *Immigration Act*, R.S.C. 1985, c. I-2 (the "Act") provide as follows:

"Convention refugee" means any person who...	« réfugié au sens de la Convention » Toute personne:
(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	a) qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:
(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country,	(i) soit se trouve hors du pays don't elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays...
... and	
(b) has not ceased to be a Convention refugee by virtue of subsection (2), ...	b) qui n'a pas perdu son statut de réfugié au sens de la Convention en application du paragraph (2).

[24] Subsection 2(2) of the Act sets out how a person ceases to be a Convention refugee. The relevant portions of subsection 2(2) state:

2.(2) A person ceases to be a Convention refugee when...	2.(2) Une personne perd le statut de réfugié au sens de la Convention dans les cas où...
(e) the reasons for the person's fear of persecution in the country that the person left, or outside of which the person remained, ceased to exist.	(e) les raisons qui lui faisaient craindre d'être persécutée dans le pays qu'elle a quitté ou hors duquel elle est demeurée ont cessé d'exister.

[25] However, subsection 2(3) provides an exception to paragraph 2(2)(e) by providing that even when the reasons for a person's fear of persecution have ceased, he may still be considered a Convention refugee if there are compelling reasons. Subsection 2(3) stated:

2.(3) A person does not cease to be a Convention Refugee by virtue of paragraph (2)(e) if the person establishes that there are compelling reasons arising out of any previous persecution for refusing to avail himself of the protection of the country that the person left, or outside of which the person remained, by reason of fear of persecution.	2.(3) Une personne ne perd pas le statut de réfugié pour le motif visé à l'alinéa (2)e) si elle établit qui'il existe des raisons impérieuses tenant à des persécutions antérieures de refuser de se réclamer de la protection du pays qu'elle a quitté ou hors duquel elle est demeurée de crainte d'être persécutée.

2. The person must have no possibility of a durable solution outside Canada

[26] The other requirement that a person must meet before being considered a CRSR is that the person not have the possibility within a reasonable period of time of a durable solution outside of Canada. "Durable solution" is defined in subsection 2(1) of the Regulations as follows:

"durable solution", in respect of a Convention refugee seeking resettlement means...	« solution durable » À l'égard d'un réfugié au sens de la Convention cherchant à se réinstaller, s'entend...
(b) the resettlement of the Convention refugee in the Convention refugee's country of citizenship or of habitual residence in a neighbouring country or in the country of	b) soit de sa réinstallation dans le pays de sa citoyenneté ou de sa résidence habituelle, dans un voisin ou dans le pays

asylum... d'accueil...

IV. Decision Below

[27] The Motions Judge dismissed the application for judicial review of the visa officer's decision not to grant the appellants permanent residence status as CRSRs. First, the Motions Judge found, and the Minister conceded, that the visa officer erred in finding that the appellants did not have a well-founded fear of persecution and thus were not Convention refugees without considering the compelling reasons exception in subsection 2(3) of the Act. However, the Motions Judge determined that this error was irrelevant because the visa officer's conclusion that the appellants had a durable solution in Vietnam was neither unreasonable nor patently unreasonable.

[28] Next, after considering the factors outlined in *Baker v. Canada*, [1999] 2 S.C.R. 817 ("Baker"), for determining the content of the duty of fairness, the Motions Judge concluded that the duty of fairness does not give persons applying for permanent residence status in Canada as CRSRs the right to have counsel attend their interviews. In particular, the Motions Judge noted that a visa officer's decision is administrative rather than judicial in nature and involves the exercise of considerable discretion. Furthermore, there is no right under the Act to obtain permanent residence status. The Motions Judge also noted the Minister's concerns that permitting counsel to attend interviews would introduce an inappropriate adversarial quality to the process, cause delays and increase costs. According to the Motions Judge, it was sufficient that counsel was allowed to make written submissions. The attendance of counsel at the interview was unnecessary because the matters a visa officer will inquire into at the interview will be within the applicant's knowledge and ability to answer.

[29] Finally, the Motions Judge found that the general policy that counsel cannot attend interviews did not fetter the visa officer's discretion. The statement in the Operations Memorandum was simply a guideline. Decision-makers are entitled to issue guidelines and other non-binding instruments. However, visa officers are always obliged to consider the particular facts of each case when deciding whether or not to allow counsel to attend at interviews. In this case, the Motions Judge noted that while the language of the CAIPS notes and the February 8 response to counsel's request to attend the interview were consistent with an unthinking, fettered adherence to general policy, the affidavit evidence of the visa officer illustrated that he considered the particular facts of the case.

[30] The Motions Judge certified the following two questions of general importance:

1. Is the duty of fairness breached when a visa office refuses to allow counsel to attend at the interview of an applicant seeking admission to Canada as a Convention refugee seeking resettlement?

2. What legal rights or obligations must a Convention refugee seeking resettlement possess outside of Canada in order to be considered resettled so as to have a durable solution?

V. Issues

[31] *Pushpanathan v. Canada* [1998] 1 S.C.R. 982 and *Baker, supra*, clearly indicate that once a question of general importance is certified, the appeal is not limited to these certified questions but rather concerns the judgment below as a whole. As a result, the issues in this appeal are as follows:

1. Did the Motions Judge err in finding that the visa officer did not breach his duty of fairness to the appellants in the particular circumstances of this case when he decided that counsel could not attend the interviews?

2. Did the Motions Judge err in finding that the Operations Memorandum did not operate as a fetter on the visa officer's discretion to permit counsel to attend interviews?

3. What legal rights or obligations must a Convention refugee possess outside Canada in order to be considered resettled so as to have a durable solution?

VI. Appellants' Arguments

[32] First, the appellants argued that the duty of fairness required that counsel be allowed to attend the appellants' interviews in the particular circumstances of this case. When asked during oral argument about the role that counsel would play at the interview, counsel for the appellants responded that they were simply asking that counsel be able to observe the interview without making any oral submissions at that time. According to counsel, in order for his ability to make written legal submissions to the visa officer meaningful, it is crucial for him to attend the interview in order to know what evidence has or has not been elicited as well as if any particular legal issue has arisen and needs to be addressed.

[33] According to the appellants, the particular facts of this case especially demonstrate the need for counsel to have attended their interviews. This is the appellants' second judicial review application. Their first application was successful on the grounds that the visa officer made a legal error by failing to apply the compelling circumstances exception when determining whether the appellants had a well-grounded fear of persecution. Importantly, the Minister admitted that the newly appointed visa officer, whose decision is at issue in this case, made the exact same legal error. Without attending the interviews, counsel for the appellants had no way of knowing - other than by relying on clients who may not understand immigration law or the legal significance of issues discussed at the interview - whether or not the visa officer made any legal errors or elicited all of the relevant evidence. Consequently, counsel will not know that affidavit evidence or supplementary written submissions may be necessary until after the visa officer's decision has already been rendered, and the only remedy is a judicial review application. The ability to make meaningful written submissions on legal and factual issues is especially crucial given that visa officers handle a myriad of duties and receive only minimal training in the specific area of refugees.

[34] Second, the appellants' argued that the Operations Memorandum setting out a policy that counsel should not attend interviews was not simply a guideline expressing rough rules of thumb. Rather, the policy in the Operations Memorandum was an inflexible limitation leaving no scope for the visa officer's discretion to consider the merits of individual cases. As evidence of this, the appellant pointed to the CAIPS notes and the February 8th handwritten note from the visa officer to counsel for the appellants, which demonstrated that the visa officer viewed the policy as applying to all cases.

[35] Third, with respect to the visa officer's substantive determination that the appellants already had a durable solution in Vietnam, the appellants argued that in order for them to have a durable solution outside Canada such that they are not CRSRs, they must not simply be factually integrated in Vietnam but they must also possess certain basic legal entitlements in Vietnam. In particular, the appellants argued that persons with a durable solution must have all of the rights set out in the in the *United Nations Convention Relating to the Status of Refugees* (the "Convention"), such as the rights to employment, housing, education, person status and a right against refoulement. According to the appellants, while as a matter of fact, they may have been living and working in Ho Chi Minh City at the time of the interview with the visa officer, they were not legally entitled to do this.

[36] Furthermore, the appellants argued that the visa officer also erred in finding that the appellants had a possibility of attaining Vietnamese Citizenship within a reasonable period of time based on the fact that they were free to apply for Vietnamese Citizenship. According to the appellants, the relevant question is not whether they are free to apply; the relevant question is whether they have a reasonable possibility of actually attaining Vietnamese Citizenship within a reasonable period of time. As a result, the visa officer's decision should also be set aside on this basis.

VII. Respondent's Arguments

[37] First, the respondent argued that the Motions Judge did not err in finding that the duty of fairness does not require a visa officer to allow counsel to attend at the interviews of applicants seeking admission to Canada as CRSRs. The decision of a visa officer to grant or not grant an applicant status as a permanent resident is administrative, involving the exercise of considerable discretion. If applicants are denied admission to Canada, they are not deprived of any right or benefit nor does such a decision result in their refoulement. The attendance of counsel is not necessary because the purpose of interviews is to obtain facts about applicants not legal arguments. As well, counsel for the appellants had a meaningful opportunity to participate by making written legal submissions. The attendance of counsel at interviews would only result in increased costs and increase the length of each interview, correspondingly reducing the number of interviews that can be scheduled.

[38] Second, the respondent argued that the Motions Judge did not err in finding that the Operations Memorandum did not operate as a fetter on the visa officer's discretion to permit counsel to attend interviews. The Operations Memorandum establishes a flexible general policy and does not preclude visa officers from considering the particular circumstances of each individual case. Furthermore,

the affidavit of the visa officer indicates that he did not view the policy in the Operations Memorandum as fettering his discretion.

[39] Third, the respondent argued that provided a refugee has some level of integration in the country of first asylum, such as access to housing and employment, and is neither at risk in the country of asylum nor at risk of refoulement, then he or she should be considered resettled for the purposes of having a durable solution outside Canada. The Motions Judge did not err in finding that the visa officer's conclusion that the appellants were already resettled in Vietnam because they live and work as tailors in Ho Chi Minh City was not unreasonable. In any case, the visa officer also concluded that the appellants had the possibility of a durable solution because they could apply for Vietnamese citizenship. The Motions Judge did not make a reviewable error in reaching this decision.

VIII. Analysis

Issue 1: Did the Motions Judge err in finding that the visa officer did not breach his duty of fairness to the appellants in the particular circumstances of this case when he decided that counsel could not attend the interview?

[40] At the outset, I would like to note that the question certified by the Motions Judge is problematic because it requires this Court to make a general pronouncement as to whether the duty of fairness generally requires that counsel should be allowed to attend the interviews of all applicants seeking admission to Canada as CRSRs. The certified question reads:

> Is the duty of fairness breached when a visa office refuses to allow counsel to attend at the interview of an applicant seeking admission to Canada as a Convention refugee seeking resettlement?
>
> Since the content of the duty of fairness will always vary depending upon the facts, the Court must instead answer the question of whether the duty of fairness was breached in the particular circumstances of this case. According to L'Heureux-Dubé J., speaking for the Supreme Court of Canada in *Baker, supra* at para. 21: "As I wrote in *Knight v. Indian Head School Division No. 19,* [1990] 1 S.C.R. 653, at p. 682: 'the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.' All of the circumstances must be considered in order to determine the content of the duty of procedural fairness."

[41] The fact that the content of the duty of fairness must be determined on the particular facts of each case is also supported by Jones and de Villars in *Principles of Administrative Law* (1999) at pages 297-298:

> In conclusion, neither the principles of natural justice nor the Charter entitle a person to representation by counsel in all proceedings by all administrative tribunals or statutory delegates. Both the common law principles of natural justice and constitutionally entrenched fundamental justice require a decision-maker to consider whether, in the circumstances of each individual case, a party before the decision-maker is entitled to counsel. Decision-makers who

> deny representation to counsel in circumstances which the court later rules are sufficiently serious or complex so as to require counsel, or in which there is a sufficiently difficult question of law that the party cannot adequately present his case without representation by counsel, will be reviewable on both natural justice grounds and on the basis of a breach of fundamental justice. Each case turns on its own unique circumstances, because there is neither an absolute right to counsel nor an absolute discretion to deny counsel. [emphasis added]

Standard of Review

[42] When the Motions Judge determined that the duty of fairness did not require the attendance of counsel at the interviews, she did not discuss "standard of review" or "pragmatic and functional approach" but instead proceeded to make her own determination as to the content of the duty of fairness by applying the factors in *Baker, supra*. In my opinion, the Motions Judge was correct in not applying the pragmatic and functional approach to determine the standard of review in this case. Since the issue at hand involves a determination of the content of the duty of fairness that the visa officer owed to the appellants as opposed to the visa officer's ultimate determination on the merits of the case, the pragmatic and functional approach need not be applied and the Motions Judge was correct in proceeding to conduct her own determination as to the content of the duty of fairness.

[43] In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18 at para. 21, the Supreme Court of Canada stated that: "[i]n every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach." However, the Court clarified this statement in *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28 ("CUPE"), by distinguishing between the standard of review to be applied to the ultimate decision of an administrative decision-maker as opposed to the procedural framework in which the decision was made. In *CUPE, supra*, the Ontario Minister of Labour's appointment of a labour arbitrator was being challenged on the grounds that it was not consistent with subsection 6(5) of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H-14, and that it was not made in accordance with the duty of procedural fairness. Binnie J., speaking for a majority of the Court stated at para. 100:

> The second order of business is to isolate the Minister's acts or omissions relevant to procedural fairness, a broad category which extends to, and to some extent overlaps, the traditional principles of natural justice... The unions, for example, question whether the Minister was right to refuse to consult with them before making the appointments. These questions go to the procedural framework within which the Minister made the s. 6(5) appointments, but are distinct from the s. 6(5) appointments themselves. It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions. It is only the ultimate exercise of the Minister's discretionary s. 6(5) power of appointment itself that is subject to the "pragmatic and functional" analysis, intended to assess the degree of deference intended by the legislature to be paid by the courts to the statutory decision maker, which is what we call the "standard of review".

...

> The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.
>
> On occasion, a measure of confusion may arise in attempting to keep separate these different lines of enquiry. Inevitably some of the same "factors" that are looked at in determining the requirements of procedural fairness are also looked at in considering the "standard of review" of the discretionary decision itself. Thus in *Baker, supra*, a case involving the judicial review of a Minister's rejection of an application for permanent residence in Canada on human and compassionate grounds, the Court looked at "all the circumstances" on both accounts, but overlapping factors included the nature of the decision being made (procedural fairness, para. 23; standard of review, para. 61); the statutory scheme (procedural fairness, para. 24; standard of review, para. 60); and the expertise of the decision maker (procedural fairness, para. 27; standard of review, para. 59). Other factors, of course did not overlap... The point is that, while there are some common "factors", the object of the court's inquiry in each case is different.

[44] The fact that the pragmatic and functional approach need not be applied to questions of procedural fairness is also supported by the Ontario Court of Appeal in *London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859 at para. 10:

> When considering an allegation of a denial of natural justice, a court need not engage in an assessment of the appropriate standard of review. Rather, the court is required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to. The Court does this by assessing the specific circumstances giving rise to the allegation and by determining what procedures and safeguards were required in those circumstances in order to comply with the duty to act fairly.

[45] While the Motions Judge took the right approach by proceeding to determine the content of the duty of fairness without determining the standard of review on a pragmatic and functional approach, I disagree with her ultimate determination regarding the content of the duty of fairness in the circumstances of this case. Since in *CUPE, supra*, the Supreme Court held that procedural fairness questions are questions of law, the standard of review to be applied by this Court when reviewing the determination of the Motions Judge that the duty of fairness did not include a right to counsel is correctness. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

Content of the Duty of Fairness in the Circumstances of this Case

[46] In my opinion, the factors elucidated in *Baker, supra* for determining the content of the duty of fairness demonstrate that the appellants' counsel should have been allowed to attend and observe the interview.

i. The nature of the decision being made and the process followed in making it

[47] The first factor identified by the Court in *Baker, supra*, is the nature of the decision being made and the process followed in making it. The Motions Judge found that this factor did not indicate that the content of the duty of fairness should be increased in this case on the basis that the nature of the decision being made was administrative and involved the "considerable exercise of discretion." With respect, I disagree that a "considerable exercise of discretion" is involved in this case. Ultimately, the visa officer must determine whether applicants meet the relevant legal requirements as set out in the Act and Regulations. Even if the visa officer has some residual discretion to deny an applicant who meets all of the requirements contained in the Act and Regulations for admissibility (and thus does not fall into any of the inadmissible classes of persons), which was not argued in this case, in my opinion, such a discretion should not be characterized as considerable.

[48] Furthermore, I note that in the particular circumstances of this case, the nature of the decision being made by the visa officer has a significant legal element, which suggests that counsel should have been allowed to attend the interview. The appellants were successful in a prior judicial review application on the grounds that the visa officer made a legal error by concluding that the appellants did not have a well-founded fear of persecution, without considering the compelling reasons exception in subsection 2(3) of the Act. The Minister has conceded that the visa officer made the same legal error in this case. Also, there is a serious legal question, that has been certified for consideration by this Court, as to whether the meaning of durable solution extends to the appellants' situation in Vietnam.

[49] During the interview, the visa officer asked the appellants questions of a legal character. The visa officer stated the following in his affidavit:

> I specifically considered Article 20 of the Law on Nationality of Vietnam (the "Law") which states, in part, that "a foreign citizen or stateless person who is residing in Vietnam and makes an application for granting Vietnamese nationality may be granted Vietnamese nationality" if he/she satisfies certain conditions, which are listed under that Article. I considered the conditions of the Article and the definitions contained in the Law, and I put this Law before the Applicants in order for them to respond to it. From my review of the relevant Article, I found that the Applicants were eligible to apply for citizenship in Vietnam, and after reading the relevant Article the Applicants did not raise any doubts as to their eligibility under the Law. [emphasis added]
>
> In the circumstances of this case, where the visa officer has clearly indicated that he "put" questions of a legal nature before the appellants, this strongly suggests that counsel should have been present. The interview in this case was about more than simply establishing the facts; it also involved the consideration of legal issues.

[50] Furthermore, speaking again of the interview, the visa officer stated in his affidavit:

> I then explained to each of the Appellants my concerns. Their fears are not well founded and there is another durable solution as they are resettled in Vietnam. I explained that I believed that they are permanently resettled in

> Vietnam and that they are basically "de facto" citizens. I asked each Applicant if she has anything to address my concerns and she did not really address them.
>
> In my opinion, the fact that the visa officer asked the appellants at their interviews if they had anything to address his concerns that they already had a durable solution in Vietnam, which is a legal definition, also suggests that the attendance of counsel at the interview would have been of great assistance in this case. Even though the appellants have only asked that counsel be allowed to observe the interview, this opportunity to observe will alert counsel to the visa officer's legal concerns, which he can later address in written submissions.

[51] In the past when the courts have addressed the issue of whether the duty of fairness includes a right to counsel in particular circumstances, one of the primary factors considered was whether the questions are of a legal or complex nature such that the individual's ability to participate effectively without a lawyer was in question. See for example: *Laroche v. Royal Canadian Mounted Police Commission* (1981), 131 D.L.R. (3d) 152 (F.C.A.) and *Howard v. Stony Mountain Institution* (1984), 11 Admin L.R. 63 at 103 (FCA). As the previous analysis indicates, the interview had a substantial legal component.

[52] In making the argument that the duty of fairness does not require that counsel should be permitted to attend visa office interviews, the respondent relied heavily on the fact that lawyers are free to make written submissions. However, without having an opportunity to observe the interview, counsel may not be aware of the visa officer's particular legal concerns in order to be able to address them effectively in written submissions. For example, during oral arguments, counsel for the appellants argued that the CAIPS notes in this case indicated that the second interview of the appellants was to focus on whether or not they had a well-founded fear of persecution. However, in this case, the issue of whether or not the appellants had a durable solution in Vietnam ended up being a major issue in the interview. Without observing the interview where the issue of durable solution was discussed, counsel cannot be expected to have been aware of the need to address this issue in his written submissions. Applicants for refugee status will often not understand legal concepts such as durable solution and, if such issues arise during the interview, may not be able to effectively report this to counsel.

[53] Furthermore, since counsel was unable to observe the interviews in this case, he was also unaware of whether all of the relevant evidence had been elicited. For example, the visa officer learned of the fact that the appellants were no longer living in the refugee camp but were, as a matter of fact, living and working as tailors in Ho Chi Minh city. However, the visa officer did not inquire into whether the appellants were entitled, as a matter of law, to live and work in Ho Chi Minh City. In these circumstances, if counsel were aware that this arose as a legal issue at the interview, he could have provided written submissions on the appellants' legal status in Vietnam.

[54] Finally, the appellants' interviews with the visa officers cannot be classified as taking place at a preliminary stage in the decision-making process, and in

this way, the Supreme Court of Canada's decision in *Dehghani v. Canada (Minister of Citizenship and Immigration)*, [1993] 1 S.C.R. 1053 ("Dehghani") that the principles of fundamental justice did not include the right to counsel in the case of an immigrant arriving at a Canadian airport and being interviewed upon arrival is distinguishable from the present case. In *Dehghani, supra*, the Supreme Court was considering whether a person should be entitled to counsel at the pre-hearing or pre-inquiry stage of the process. In making its determination, the Court specifically relied on the fact that Dehghani would be later entitled to a full inquiry at which he would have the right to have counsel present. In this case, the interview is one of the appellants' last chances to make their case to the visa officer. Unlike in *Dehghani, supra*, they do not get another hearing where they will be entitled to have counsel present.

ii. The nature of the Statutory Scheme and the terms of the statute pursuant to which the decision-maker operates

[55] According to *Baker, supra*, at para. 24, the fact that there is no right of appeal from the visa officer's decision suggests that greater procedural protections should be afforded to the appellants in this case. While people applying for permanent residence status as CRSRs may bring judicial review applications, importantly, the scope of the reviewing judge's authority may be limited with respect to the substantive issues of the case, and therefore cannot be equated to an appeal right.

[56] The respondent argued that the fact that the appellants are entitled to reapply for a visa if their applications are initially unsuccessful also lowers the content of the duty of fairness. In *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 ("Chiau"), this Court considered this argument:

> Moreover, a refusal to issue a visa is not final, in the sense that the individual may always apply again. However, it must also be acknowledged that, when an applicant is refused a visa under paragraph 19(1)(c.2) of the Act, subsequent applications by that person are likely to be subject to a higher level of scrutiny than they might otherwise have attracted. [emphasis added]
>
> Not only will a subsequent application be subject to a higher degree of scrutiny, but also there is no guarantee that the visa officer will decide to interview the appellants in a subsequent application. As a result, simply because the appellants can theoretically continue to apply for Canadian visas *ad infinitum* should not serve to limit the content of the duty of fairness that they are owed in the circumstances of this case where the visa officer decided that their cases merited interviews. Similarly, simply because visa officers are not obliged to interview all applicants in all cases does not diminish the procedural protections that they owe to those applicants whom they do decide to interview. Once visa officers decide to conduct an interview, they must do so in accordance with the duty of fairness.

[57] Subsection 8(1) of the Act provides:

8.(1) Where a person seeks to come into Canada, the burden of proving that that person has a right to come into Canada or that his admission would not be contrary to this Act or the regulations rests on that person.

Since subsection 8(1) places an onus on the appellants, the Motions Judge found that the visa officer did not have an obligation to inquire into whether the appellants were legally entitled to work and live outside of the refugee camp in Vietnam. In these circumstances, it is important that counsel should be able to observe the interview so that if any relevant evidence is not elicited at this time this can be dealt with in written submissions to the visa officer. While in *Khan v. Canada (Minister of Citizenship and Immigration)*, [2002] 2 F.C. 413 ("Khan") this Court found that the fact that the onus is on the visa applicant to establish admissibility tended to reduce the content of the duty of fairness, this case is distinguishable in that it did not deal with the special case of an applicant seeking admission to Canada as a refugee nor did it deal with the issue of whether the content of the duty of fairness included the right to have counsel attend at an interview.

iii. The importance of the decision to the individual or individuals affected

[58] Given that the appellants were applying for permanent residence status on the basis that they are CRSRs, the visa officer's decision to grant the appellants' application is potentially of great significance. Even though the appellants have lived in Vietnam for many years and may not be in immediate danger there, based on the available evidence, the stability of their situation in Vietnam is not entirely clear. Indeed, the appellants argued that they are living and working in Ho Chi Minh City illegally. They submit that, legally, they are only entitled to live and work at a refugee camp which they consider to be unsafe. At the interview, the visa officer did not inquire into whether it was legal for the appellants to live and work in Vietnam. The appellants, not being lawyers, should not be expected to be able to address these issues during the interview.

[59] When considering the importance of the decision to the appellants, the Motions Judge made the following statement: "While, on a subjective basis, the decision is of great significance to an applicant, on an objective basis a negative decision does not deprive an applicant of any right or benefit. This factor, therefore, does not support enlargement of the content of the duty of fairness." With respect, the Motions Judge failed to appreciate the significance of the fact that the appellants are applying for admission to Canada as Convention refugees.

[60] The respondent also relied on the following statement of this Court in *Chiau, supra* at paras. 39 and 41:

> First, it is necessary to consider the seriousness of the impact on the individual of an adverse administrative decision. The visa officer's decision in this case did not deprive the appellant of any legal right, since non-citizens have no right at common law or under statute to enter Canada (*Chiarelli v. Canada (Minister of Employment and Immigration*), [1992] 1 S.C.R. 711, at page 733), although the statutory scheme under which immigration control is administered does not leave admission decisions to the untrammelled discretion of the Minister or her officials. Nor did Mr. Chiau have any connection with Canada that rendered the refusal of a visa a particular hardship.
>
> ...

> While, as I have noted, it was not disputed that the duty of fairness applies to the determination of visa applications, the nature of the individual interests at stake in this case suggests that the procedural content of the duty to which the appellant was entitled before the visa officer rendered his decision was at the lower end of the spectrum. [emphasis added]
>
> Not only did *Chiau, supra* not deal with the issue of whether the duty of fairness included the right to counsel, but also the Court limited its conclusion regarding the content of the duty of fairness to the particular facts in that case, which differ substantially from those in the case at bar. In *Chiau, supra*, importantly, Chiau was a famous Asian actor, and he was not applying for status as a Convention refugee but rather he was applying for status as a permanent resident in the self-employed class. Furthermore, the Court's statement at para. 43 of the judgment that, as a matter of fact, "applicants are normally not permitted to be accompanied by counsel" at visa office interviews cannot be taken as a conclusion that, as a matter of law, the duty of fairness normally does not require the attendance of counsel at interviews, especially where someone is applying for status as a Convention refugee. In any event, because the *Chiau* case did not involve any issue of the right to have counsel present at interviews, this statement must be taken as *obiter*.

[61] In *Baker, supra*, the Supreme Court of Canada expressly recognized that a person does not necessarily have to have a legal entitlement to enter or remain in Canada in order to be entitled to increased procedural protections. Rather, the Court simply stated: "The more important the decision is to the lives of those affected and the greater its impact on that person or persons, the more stringent the procedural protections that will be mandated." The fact that the appellants are applying for permanent residence status as Convention refugees suggests that this decision is potentially of great importance in their lives.

iv. Legitimate expectations of the appellants

[62] While it is true that the visa officer waited until February to inform counsel that he could not attend the interview even though counsel indicated his intention to attend as early as November, I do not think that this was sufficient to give the appellants a legitimate expectation that counsel would be permitted to attend their interviews.

[63] In any case, I think it is relevant that when the visa officer eventually responded to counsel, he stated: "Please note that we do not allow lawyers or representatives to attend the interviews." This letter leaves the impression that counsel are never allowed to attend interviews, which is inaccurate as a matter of law. As a matter of law, the respondent has conceded that visa officers must consider the particular facts of each case before making a determination as to whether counsel should be allowed to attend an interview. As a result of this general statement that counsel cannot attend interviews, the appellants may have assumed it would be futile to attempt to ask the visa officer to reconsider his decision by pointing to particular facts in their case.

v. The choice of procedure made by the agency

[64] According to *Baker, supra*, some consideration also has to be given to the fact that an agency has chosen a particular procedure. In this case, the respondent has argued that it introduced the general policy that counsel should not attend interviews because permitting counsel to attend would introduce many efficiency concerns, such as increased costs and increased time spent on each interview, leaving less time for other interviews. According to *Khan, supra*, in determining the content of the duty of fairness the Court must guard against imposing a level of procedural formality that would unduly encumber efficient administration.

[65] In addressing this factor, I note that, in the circumstances of this case, the appellants are only requesting that counsel be allowed to observe their interviews. They are not requesting that counsel be able to make oral submissions or object to questions during the interviews. Given the limited role that counsel will play during the interview, I do not think that this Court is imposing a level of procedural formality that would unduly encumber efficient administration, and I do not think that the respondent's efficiency concerns are warranted. I also note that the fact that the respondent allows counsel to attend similar interviews which take place in Canada is also a relevant consideration. The respondent has not argued that the system in Canada has become inefficient as a result of the attendance of counsel. Finally, this Court is not saying that the duty of fairness will always require the attendance of counsel. Visa officers are required to consider the particular circumstances of each case.

vi. Conclusion as to the Content of the Duty of Fairness in this case

[66] Considering all of these factors together, in my opinion, the duty of fairness in this case includes the right to have counsel attend and observe the appellants' interviews. Observing the interview provides counsel with an opportunity to learn of any legal issues that arise which can later be addressed in written submissions. Furthermore, if relevant evidence is not elicited during the interview, counsel can subsequently file an affidavit with the visa officer. Importantly, the respondent has not challenged the fact that counsel is entitled to make written submissions; on the contrary, it has relied on this as negating the need for counsel to attend the interview. In the circumstances of this case, in order for counsel to have a meaningful ability to make written submissions on the appellants' behalf, he should be able to observe the interview.

[67] Finally, I also note that the appellants counsel was willing to attend the interview during the scheduled time. I do not think that the duty of fairness requires that the visa officer should have to reschedule the interview to accommodate counsel, provided that the appellants receive sufficient advance notice of the date and time of the interview. Also, in this case, the appellants have obtained their own counsel.

[68] Concluding this issue, the duty of fairness depends on the particular circumstances of each case. Factors that are significant in one case may or may not be significant in another case. On the facts of this case, the duty of fairness required that counsel should be allowed to attend the appellants' interviews in order to observe and take notes. This does not, however, mean that counsel are always permitted to attend interviews. All that the appellants requested in this case was that their lawyer be allowed to attend the interviews in order to observe. As a result, I do not decide

whether in other circumstances a more active or more limited role for counsel would be required.

[69] Because the appellants were denied their right to procedural fairness during the interview, the case must be sent back to a different visa officer to hold another interview and reconsider the appellants' cases.

Issue 2: Did the Motions Judge err in finding that the Operations Memorandum did not operate as a fetter on the visa officer's discretion to permit counsel to attend interviews?

[70] Since there is no provision in the Act expressly providing a right to counsel in the circumstances of this case, whether or not counsel is permitted to attend a particular interview is within the discretion of the visa officer. However, both the previous analysis as well as the Supreme Court of Canada's decision in *Prassad v. Canada (Minister of Citizenship and Immigration)*, [1989] 1 S.C.R. 560, indicate that this discretion must be exercised in a manner that is consistent with the duty of fairness. Visa officers must consider the particular facts of each case to determine the content of the duty of fairness.

[71] While administrative decision-makers may validly adopt guidelines to assist them in exercising their discretion, they are not free to adopt mandatory policies that leave no room for the exercise of discretion. In each case, the visa officer must consider the particular facts.

[72] In my opinion, the Motions Judge erred when interpreting the policy contained in the Operations Memorandum. In my opinion, the policy at issue is more than a mere guideline and it operated as a fetter on the visa officer's discretion to consider the particular facts of the case when deciding whether to permit counsel to attend the interviews.

[73] In *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104 (Ont. C.A.) ("Ainsley"), the Court offered some guidance on how to determine whether a policy is or is not mandatory:

> There is no bright line which always separates a guideline from a mandatory provision having the effect of law. At the centre of the regulatory continuum, one shades into the other. Nor is the language of the particular instrument determinative. There is no magic to the use of the word "guideline", just as no definitive conclusion can be drawn from the use of the word "regulate". An examination of the language of the instrument is but a part, albeit an important part, of the characterization process. <u>In analyzing the language of the instrument, the focus must be on the thrust of the language considered in its entirety and not on isolated words or passages</u>. [emphasis added]
>
> In *Ainsley, supra*, the Court ultimately found that a policy adopted by the Ontario Securities Commission was mandatory in nature even though, on its face, the policy stated that the Commission would merely be "guided" by the policy.

[74] Although the policy in this case also contains words, such as "general approach" and "should", that if considered in isolation might suggest that the policy is merely a guideline, the thrust of the policy as a whole is that it is mandatory in nature. The policy provides as follows:

> The general approach is to limit attendance at interviews to the individual applicants and visa officers should follow this approach which appears to be supported by case law in the Federal Court. The doctrine of fairness does not require that counsel be present at interviews nor does the Immigration Act provide a right to counsel in this context.
>
> Importantly, the policy seems to indicate that the duty of fairness never requires that counsel be present at interviews, which the previous analysis indicates is an incorrect statement of the law. The policy provides absolutely no indication that visa officers have a duty to consider the particular circumstances of each case when deciding whether or not the duty of fairness mandates that counsel be allowed to attend an interview. Overall, the policy leaves the impression that visa officers do not have a duty to consider the particular facts of each case.

[75] Furthermore, the policy does not articulate guidelines or criteria to assist visa officers in determining whether or not to exercise their discretion to allow counsel to attend interviews, but rather simply provides that counsel should not be allowed to attend. This policy cannot possibly be classified as a guideline because it provides no guidance to visa officers as how to exercise their discretion other than to deny the attendance of counsel in all cases. The policy as a whole leaves the impression that it is intended to be mandatory.

[76] The objective evidence that is available on the record also indicates that the visa officer viewed the policy as fettering his discretion to consider the particular circumstances of the case. The visa officer's handwritten reply to counsel for the appellants on February 8, 2002 provided: "Please note that we do not allow lawyers or representatives to attend the interviews. You may wait in the waiting room but you will not be able to attend the interview." Importantly, the handwritten note does not simply state that counsel in this case would not be permitted to attend the interviews of the appellants; rather, it goes further and indicates that all lawyers are not allowed to attend interviews. There is absolutely no indication in this handwritten note that the visa officer considered the particular facts of the appellants' case. The visa officer's notes, as recorded in CAIPS, also provide insight into how he viewed the policy at issue. His notes simply state: "representatives/lawyers are not allowed to attend the interview."

[77] Finally, the respondent presented no evidence that lawyers have ever been allowed to attend these interviews which also indicates that the policy is mandatory as opposed to a mere guideline. As a result, the Motions Judge committed a legal error when interpreting whether the policy at issue was mandatory in nature and thus operated to fetter the visa officer's discretion in this case.

[78] Importantly, as previously mentioned, decision-makers are free to enact guidelines to assist them in the exercise of the discretion as long as these guidelines

are not mandatory and as long as visa officers consider the particular facts of each case in determining the content of the duty of fairness. An example of a validly worded guideline is provided in *Ken Yung Yhap v. Canada (Minister of Employment and Immigration*), [1990] 1 F.C. 722:

> It is important... that officers realize that these guidelines are not intended as hard and fast rules. They will not answer all eventualities, nor can they be framed to do so. Officers are expected to consider carefully all aspects of cases, use their best judgment [*sic*], and make the appropriate recommendations.

Issue 3: What legal rights or obligations must a Convention refugee possess outside of Canada in order to be considered resettled so as to have a durable solution?

[79] Because this case is being sent back for redetermination by a different visa officer and because new evidence and legal arguments may well be introduced that were not before this Court, I think the Court should avoid commenting on whether the appellants do or do not have a durable solution in Vietnam. Furthermore, it would be unwise and inappropriate for this Court to attempt to set out in a factual vacuum all of the legal rights and obligations that CRSRs must generally possess outside of Canada, in all cases, in order to have a durable solution. Whether an applicant has a durable solution will depend in large measure on the facts of each case. Because the facts in the present case are not entirely clear on the record before this Court, and because the visa officer must now make a new determination, I decline to answer the second certified question.

IX. Conclusion

[80] I decline to answer the first certified question as framed by the Motions Judge:

Is the duty of fairness breached when a visa office refuses to allow counsel to attend at the interview of an applicant seeking admission to Canada as a Convention refugee seeking resettlement?

Instead, I think it is more appropriate to answer the question whether the duty of fairness owed to the appellants in the particular circumstances of this case entitled them to have counsel attend and observe their interviews. This question should be answered in the affirmative. As a result, the appellants' right to procedural fairness in the determination of their refugee claims has been breached. The appellants were entitled to have their counsel observe their interviews in order that he could make effective written submissions on their behalf.

[81] Because of my answer to the first certified question, it is unnecessary to answer the second certified question:

What legal rights or obligations must a Convention refugee seeking resettlement possess outside of Canada in order to be considered resettled so as to have a durable solution?

[82] Finally, I find that the policy contained in the Operations' Memorandum, stating that counsel should not attend interviews, is invalid because it fettered the visa officer's discretion and duty to consider the particular facts of each case when deciding whether counsel should be permitted to attend interviews.

[83] This appeal should be allowed with costs both here and below. The appellants' cases should be sent back to another visa officer to hold new interviews and reconsider the appellants' claims.

"J. EDGAR SEXTON"

J.A

" I agree

A.M. Linden"

"I agree

B. Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE TRIAL DIVISION DATED DECEMBER 17, 2002,

IN COURT FILE NO. IMM-2355-01.

DOCKET: A-38-03

STYLE OF CAUSE: Mai Ha, Tha Mai Ha, Thien Mai Ha, Archiepiscopal Corporation of Winnipeg v. The Minister of Citizenship and Immigration

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: November 25, 2003

REASONS FOR JUDGMENT BY: SEXTON J.A.

CONCURRED IN BY: LINDEN & MALONE JJ.A.

DATED: January 30, 2004

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