HCAL 3261/2001

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF FIRST INSTANCE**

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO.3261 OF 2001

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BETWEEN

LUU THE TRUONG Applicant

and

THE CHAIRMAN OF THE REFUGEE STATUS REVIEW BOARD 1st Respondent

THE DIRECTOR OF IMMIGRATION 2nd Respondent

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Before : Hon Hartmann J in Court

Dates of Hearing : 18, 19, and 20 September, 27 November, 2 December 2002

Date of Handing Down Judgment : 13 December 2002

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J U D G M E N T

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*Introduction*

1. The applicant in this matter is a Vietnamese national. He was born in the province of Ha Tuyen in the northern part of Vietnam. Ethnically, the applicant is Chinese.

2. The evidence indicates that in 1984, while still a teenager, the applicant fled Vietnam. He spent some time in Yunnan Province and then found his way to Hong Kong where he sought recognition as a refugee. He was unsuccessful in this bid. In the result, in May 1997 the applicant agreed to return to Vietnam in terms of a voluntary repatriation scheme.

3. The applicant only remained in Vietnam a matter of weeks over the summer of 1997. But in this relatively brief period he alleged that he was persecuted by reason of his Chinese race and because he was a member of a particular social group; namely, people who had returned to Vietnam having sought asylum in another country.

4. The applicant alleged that his persecution was manifested through an accumulation of matters. He was arrested, interrogated and threatened by security officials. He was denied a dwelling in which to live and — of critical importance — he was denied registration papers, more particularly a document called a *ho khau*. In 1992, in a set of guidelines, the UNHCR said that the *ho khau* operates as a residence permit entitling the bearer to a series of important rights and privileges linked with education, employment, business and such family matters as the issue of marriage and birth certificates. The guidelines state that in principle a person without a *ho khau* cannot enjoy basic rights of Vietnamese citizenship. But the guidelines qualify this by saying that specific cases of deprivation may reveal that only minor inconvenience has resulted and the circumstances of each case must therefore be considered. The guidelines conclude by saying :

> "The significance of possession of a *ho khau* appears to be diminishing in contemporary Vietnam, while issue of a *ho khau* to those who volunteer to return appears to present no problems."

5. As a result of what the applicant said was his persecution, in August 1997 the applicant came back to Hong Kong (without valid travel documents) where, upon apprehension, he sought recognition again as a refugee.

6. The United Nations Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention ('the Convention') defines a refugee in art.1A(2) as one who —

> "… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

7. After investigation, the Director of Immigration declined to recognize the applicant as a refugee. The applicant therefore applied to the Refugee Status Review Board ('the RSRB') in terms of s.13F(1) of the Immigration Ordinance, Cap.115, to have that decision reviewed.

8. S.13F appears in Part IIIA of the Immigration Ordinance which bears the heading 'Vietnamese Refugees'. In terms of s.13AA, Part IIIA of the Ordinance ceased to have application to persons who landed in Hong Kong on or after 9 January 1998. The applicant, however, having arrived before that date, was entitled to seek a review in terms of s.13F.

9. On 26 March 2001, the RSRB informed the applicant that it had determined that he was not a refugee within the meaning of the Convention. The reasons for the RSRB's determination were contained in a lengthy ruling. It is that ruling which is the subject of this application for judicial review.

10. The applicant seeks two orders of certiorari. The first is an order to bring up and quash the ruling of the RSRB dated 26 March 2001. The second is essentially is an order consequential to the first; that is, an order to bring up and quash the decisions made by the Director on 18 April and 7 May 2001 to continue to detain the applicant pending his removal from Hong Kong.

11. As I have said, the subject of the applicant's challenge is the ruling of the RSRB. The applicant challenges the lawfulness of that ruling in four respects. Other than the first challenge, which goes to the standard of proof, all the challenges go to the manner in which the RSRB came to its finding and the reasonableness (in the *Wednesbury* sense) of its findings. The four stated challenges are :

(a) that the RSRB erred in law in applying the wrong standard of proof;

(b) that the ruling of the RSRB was unreasonable in that it gave manifestly undue weight to certain evidence while according manifestly inadequate weight to other evidence;

(c) that the RSRB erred in law in holding that a denial of registration papers to the applicant in Vietnam was not sufficient of itself to found recognition of refugee status;

(d) that the ruling of the RSRB was unreasonable because the evidence, taken as a whole, was not in law capable of supporting that ruling.

*The RSRB*

12. At the outset it is necessary to say something of the RSRB, the tribunal which made the ruling under challenge.

13. The RSRB is a specialist tribunal which, in terms of s.13F of the Immigration Ordinance, conducts an administrative review, sometimes called a 'screening process'. That it is a specialist tribunal has been acknowledged in *Tran Van Tien v The Director of Immigration & Another* [1997] HKLRD 183 in which Mortimer JA said :

> "At the outset, the nature of the "screening" process, with particular reference to the Refugee Status Review Board as the decision-maker in this case, is worthy of note. All those involved in the screening process undergo training or instruction and thereafter, because of the numbers of those seeking refugee status from Vietnam in the past, they gain considerable experience in the field. Further, they deal with one country of origin only, Vietnam. Their knowledge is specific even to particular provinces. They are supplied with detailed, first-hand and up-to-date information about the country conditions.
>
> The immigration officers and the Refugee Status Review Board follow carefully-considered procedures worked out between the UNHCR and the Hong Kong Government. The framework has been given statutory effect. … Some members of the Refugee Status Review Board have visited Vietnam to see the country conditions for themselves. The Refugee Status Review Board is truly a specialist tribunal."

14. In the same judgment, Godfrey JA (at 194) said :

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

15. S.13F of the Immigration Ordinance defines the powers of the RSRB in the following terms :

> "Upon the hearing of the review a Board shall make such decision as to the status of the appellant and as to his continued detention under section 13D(1) as it may think fit, being a decision which the Director [of Immigration] might lawfully have made under this Ordinance, and the Director shall give effect to such decision."

16. In the present case, in carrying out its review, the RSRB made reference to the UNHCR Handbook. The Immigration Ordinance does not mandate its use and it is for the RSRB to be guided by it as is appropriate in each case. As Litton V-P said in *Tran Van Tien v. Director of Immigration* (at 192) :

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

17. In the present case, in carrying out its task of administrative review, the members of the RSRB not only interviewed the applicant but had reference to a great many materials concerning conditions in Vietnam. A list of these materials is given at the beginning of the ruling.

*The historical background*

18. In early 1979 armed conflict broke out between Vietnam and China ('the PRC'). The description of that conflict, and one of its consequences for Vietnamese who were ethnic Chinese, has been given by Litton VP in *Tran Van Tien (supra)*. The description is pertinent to the present case :

> "There was heavy fighting and substantial casualties were suffered on both sides. Although the Chinese Army withdrew about a month later, hostilities and flare-ups of violence along the northern border, particularly artillery shelling, occurred sporadically for a number of years, in the first half of the 1980s. The ethnic Chinese living in the northern provinces of Vietnam were regarded by the Vietnamese Government as 'fifth column', ready at any time to assist the enemy. The Chinese were expelled from the Communist party and ousted from government positions. Among the measures taken against the ethnic Chinese people, as part of the government's war-time strategy, was the relocation to monitored areas."

19. The applicant and his family were among the ethnic Chinese moved to a monitored area. They were moved from their native village, Thi Xa Ha Giang, where the family had a dwelling and re-settled in an area called Hung Thanh Tinh. Once in that monitored area, the applicant and his family were allowed to erect a new dwelling.

20. In seeking refugee status, the applicant complained that, when he returned to Vietnam in mid-1997, although before departure he had been assured he would be given a dwelling, he was in fact denied a place to live. The applicant has always accepted, however, that he never *personally* owned or had rights to a particular home in Vietnam. In a screening interview in 1999 the following is recorded :

"Q When you were cleared for return to Vietnam in 1997, what was said to you by the UNHCR and the Vietnamese Government representatives?

A The UNHCR told me that Vietnam had developed, changed, and its policy was no longer the same. For the sake of a normal life and education for my children, I listened to their advised and volunteered to return to Vietnam.

Q142 What did the UNHCR representatives say about your *ho khau*?

A I told the UNHCR of my circumstances and they said they would arrange for me to return to my former house … I asked them to let me return to Thi Xa Ha Giang, to the family home that was confiscated in 1978 by the authorities before we were sent to a Chinese Concentration Camp.

Q …

A …

Q But how could you apply for a *ho khau* at a house which was never yours?

A It belonged to my father and it was my birthplace.

Q But your father was still alive, any attempt to get the house should be done by him as he was the legal owner, correct?

A I thought I could apply to have the house back because I was the son of my father and I had no place to live on my return to Vietnam."

21. According to the applicant, after he and his family had been moved from their native village to a monitored area, they were subjected to a range of discriminatory restrictions. Freedom of movement was curtailed, gatherings were prohibited and the carrying out of customary rites (in public at least) prohibited as constituting superstition. Ethnic Chinese were subject to heavier taxes than ethnic Vietnamese. The state demanded that all people undertake labour for a fixed period each year.

Ethnic Chinese received no reward for this. Ethnic Vietnamese, however, were rewarded with a ration of rice.

22. In or about 1981, according to the applicant, he and his family were moved to a second monitored area called Minh Huong. This was so that they could be united with the applicant's father who, in the chaos of earlier times, had become separated from them. The same restrictions against ethnic Chinese prevailed in this area.

23. While in the monitored areas, the applicant said that he personally was subjected to ill-treatment by the authorities and was once badly beaten by local militia, suffering a broken elbow.

24. The applicant also spoke of a fracas with an old neighbour, by implication an ethnic Vietnamese. The exact date of this incident is uncertain. In interviews, the year 1988 has been mentioned but that does not fit in with the chronology of the applicant's history. Mention has also been made of it occurring in the applicant's native village. The intended date might therefore be 1978 *before* re-settlement in a monitored area.

25. According to the applicant, the fracas took place when he and a number of other Chinese threw the neighbour, a minor local official, into a river. They were forced to do so, he said. They had no choice in the matter : "if not, we would all have died."

26. According to the applicant, when he returned to Vietnam in the summer of 1997 he learnt that this man — now a senior official "in the village" and presumably with influence — still held a grudge against him.

The grudge ran sufficiently deep apparently to prompt the man to seek the applicant's arrest, a fact which the applicant learnt through friends. In a screening interview in 2000 the following is recorded :

> "Q You say someone wanted to arrest you?
>
> A Yes.
>
> Q Who and what for?
>
> A The Public Security Bureau.
>
> Q Why?
>
> A I only know that I was not allowed to register and I left illegally and I lived illegally.
>
> Q But no one would arrest you for living illegally. Please give us more explanation.
>
> A First, I was not given household registration. Secondly, in fact I was accused of participating in activities against the government. *Thirdly, one of the senior staff of the local authority had personal grudge against me.*
>
> Q Any other reason?
>
> A No."
>
> [my emphasis]

27. In what the evidence indicates must have been about 1984, the applicant and a young woman to whom he was pledged in marriage, Miss Loc Thi Tac ('Miss Loc') fled Vietnam for Yunnan Province in the PRC. A daughter was born to them in the PRC.

28. Some six years later, because of a change of policy in the PRC, the applicant said that he, together with Miss Loc and their daughter, were forced to come to Hong Kong. They were detained here and while in detention sought recognition as refugees.

29. In January 1993, the applicant was informed that the Director of Immigration had declined to recognize his status as a refugee. The applicant then applied to the RSRB for a review of that decision. On 12 July 1993, the RSRB confirmed the decision of the Director, declining to recognize him as a refugee.

30. Although a second child, a son, had been born of their union here in Hong Kong, in early 1997 Miss Loc escaped from detention and remained at large until about March 1998.

31. During her absence, the applicant agreed to return to Vietnam with his two children in terms of a voluntary repatriation scheme. He has said that he agreed to do so because he received assurances from officials of the Vietnamese Government that he would be given back his necessary registration papers and that a family home would be restored to him.

32. According to the applicant, the assurances that he received were not honoured. The history of his return, as he recounted it to immigration officers and the RSRB, may in outline be stated as follows :

(a) All those who flew back to Vietnam with the applicant and his two children were required upon their arrival in Hanoi to complete certain formalities. The applicant was aware of the fact that there were others who came from Ha Tuyen Province. However, they were issued with ‘village return permits’ and were driven away from Hanoi in the morning. The applicant was issued with no such permit and was only driven back to Ha Yuyen Province that evening.

(b) On arrival in Ha Tuyen, the applicant was arrested and he and his children were held for some three days in a police station. While there his children were separated from the applicant. The applicant was interrogated. He was questioned about his departure from Vietnam in 1984, how it had been managed and who he had associated with. The suggestion was made that he had assisted others to depart. He was questioned as to whether he had ever involved himself in anti-Vietnamese activities. The interrogation involved threats made against him; threats for example of possible arrest and imprisonment for having fled Vietnam illegally.

(c) In 1982, the applicant's mother had died. Subsequent to her death, like himself, his family members had fled Vietnam. He therefore no longer had close family in Vietnam. The authorities were aware of the fact that he had two sisters in Yunnan and during his interrogation he was told that he should leave Vietnam and join them in Yunnan. When he asked for help in obtaining documentation to allow him to leave, his interrogators refused to assist.

(d) After three days the applicant was released from custody, being told he should go to China. However, he made his way with his children to Minh Huong, in which he had lived immediately before his departure from Vietnam in 1984. He found shelter with a friend and approached a local official to ask for assistance. This was denied him. He was told that, as he did not possess the important *ho khau* registration document and had no remaining family in the area, he could not live there. A further attempt to persuade the official (in the company of a security official) failed and the applicant then made his way to his native village.

(e) Back in his native area, he stayed with an old school friend. He again approached a local official to see if the family home

could be returned to him or if he and his children could settle in the area. His requests were refused. He was told that once ethnic Chinese left Vietnam their *ho khau* documentation was cancelled and that without such documentation he could not reside in the area. Indeed, the friend was told to offer him no further hospitality because he did not possess the necessary papers.

(f) Leaving his children in care, the applicant made his way across the border into the PRC to seek help from an aunt. His aunt was unable to assist him and after a few days he returned to Vietnam where he found lodgings with a friend. Plans were made to return to Hong Kong and for a sum of about US$300, after some 20 days or so, he came back to this jurisdiction, leaving his children in Vietnam.

(g) The applicant accepted that he made no attempt to seek help from the UNHCR during his time in Vietnam nor from more senior government officials in order to obtain his necessary papers and a place to dwell. In this regard, in an interview conducted in September and October 1998, the following is recorded :

> "Truong [the applicant] was asked whether he had contacted the UNHCR in Vietnam or any higher-level Vietnamese authorities there in relation to his failure in the resumption of his house, household registrations and identity card. He said that it was useless to do so as he learnt from some ethnic chinese who also returned from Hong Kong that the UNHCR in Vietnam could not help them and that they were forced to the Sino-Vietnamese border by the Vietnamese government."

33. After his return, during the course of his screening, the applicant was asked why he should have been treated differently from others from Ha Tuyen Province who had returned with him to Vietnam. The transcript of one interview reads :

"Q Why were you singled out when other returnees who were from the same batch that returned to Ha Tuyen were also ethnic Chinese?

A Not all of them were Chinese.

Q The Board has interviewed many cased from Ha Tuyen and it is aware that very few people who came to Hong Kong from the Ha Tuyen area were ethnic Vietnamese. Almost all were ethnic Chinese.

A I did not know why I was discriminated against. Perhaps it was because my address was unclear, and that I had lived in China for a long time before going to Hong Kong."

34. As to his failure to obtain accommodation, the same interview reads :

"Q In your appeal letter, you said that the Vietnamese authorities said they would give you a house. Correct?

A Yes.

Q You mean that you asked for your father's house back?

A The UNHCR promised me that the authorities might return houses and property that were confiscated from Ethnic Chinese.

Q The Board has dealt with many people in Hong Kong who were Ha Tuyen residents, who have since returned to Vietnam, and were returned their confiscated houses and property. What makes your case different?

A I was unfairly treated because the authorities said that my father's whereabouts was not known, my mother died, and other siblings scattered."

35. Although the applicant was screened to determine whether he should be recognised as a refugee, immediately on his return it appears that he was informed that, as a 'double backer', he would not be able to avail himself of a further screening process to determine whether he should be

recognised as a refugee under the Convention. He would therefore be detained pending his removal.

36. It was during his time — when he believed he had no recourse to a review tribunal — that the applicant learnt that Miss Loc had been found and was awaiting return to Vietnam. In the result, he wrote a series of letters to the Security Bureau of the Hong Kong Government asking to be re-united with Miss Loc so that he could return to Vietnam with her and settle down with her and their children. More will be said of these letters later in this judgment.

37. Miss Loc, it seems, was returned to Vietnam to Ha Tuyen Province and was able within a relatively short period of time to obtain her registration papers. Indeed, shortly thereafter she was also granted a passport for the purposes of marrying a Hong Kong resident.

38. The applicant himself was scheduled to be flown back to Vietnam on 26 May 1998. His return, however, was cancelled when, just before his return, he and two others issued *habeas corpus* proceedings to challenge the refusal of the Director to conduct an investigation to determine whether they were entitled to be recognized as having refugee status. Those proceedings were settled when the Director agreed to conduct an investigation.

39. As stated earlier in this judgment, the investigation resulted in the Director refusing to recognise the applicant as a refugee under the Convention. That refusal led to an application in terms of s.13F(1) of the Immigration Ordinance for a review of the Director's decision. That

application in turn led to the ruling of the RSRB dated 26 March 2001, the lawfulness of which is challenged by the applicant.

*The jurisdiction of this Court*

40. Before proceeding to consider the challenges of the applicant, it is necessary to be reminded of the essentially limited jurisdiction of this Court in matters of this kind. This jurisdiction has been defined by Litton V-P in *Tran Van Tien v. Director of Immigration supra* (at 189). I can do no better than repeat his words :

> " The duty of determining refugee status is given, first of all, to the Director of Immigration and then, on review, to the RSRB whose *decision shall not be subject to review or appeal in any court*: section 13F(8). As this court said in *Le Tu Pluong v Director of Immigration & Another* [1994] 2 HKLR 212 at 220-221, it is only when the High Court, in the exercise of its supervisory jurisdiction under Order 53 of the Rules of the Supreme Court, concludes that the decision of the RSRB is a nullity that the court can properly intervene: that is to say, the RSRB has acted outside its jurisdiction and failed to come to a 'decision' in terms of the Ordinance. The RSRB would have done so if, on the unquestioned material before it, the only rational decision is that, at the time of the decision, the appellant had a well-founded fear of persecution. This, as can be seen, is an extreme proposition. To say that a statutory board, charged with the duty of reviewing the determination of refugee status, has acted irrationally or perversely is a strong statement. As Lord Russell of Killowen said in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 at 1075B:
>
> > History is replete with genuine accusations of unreasonableness, when all that is involved is disagreement, perhaps passionate, between reasonable people.
>
> Accordingly, in the scheme of things, the courts have only a limited role to play. It would, to adopt Lord Ackner's reasoning in *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 at 757, be a wrongful usurpation of power by the judiciary to substitute its view on the merits of the exercise of the Board's judgment and on that basis to quash

> the decision. If no reasonable Board properly directing itself would have reached the impugned decision, the Board has exceeded its powers and thus acted unlawfully: the High Court in the exercise of its supervisory role would quash that decision: that decision would, in effect, be perverse or irrational."

41. Because of the specialist status of the RSRB, its experience and the in-depth data available to it in respect of what are termed "country conditions", Litton V-P went on to say—

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

42. It should be said, of course, that Mortimer JA in the same judgment accepted the clear responsibility of any court of review to exercise care. As he said (at 192) :

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

43. It has been said that this Court must employ 'most anxious scrutiny' in cases of this kind. As Godfrey JA said in *Refugee Status Review Board v. Bui Van Ao* [1997] 3 HKC 641 (at 648) :

> "I do not see any ground on which the court can hold that the Board was not entitled so to conclude even after subjecting its decision-making process to a 'most anxious scrutiny', as I think we are bound to do (and as indeed we have done): compare *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 at 531, [1987] 1 All ER 940 at 952c, per Lord Bridge."

44. However, in my judgment, this does not mean that this Court can usurp the function of the RSRB which is recognised as a specialist tribunal endowed with a knowledge of country conditions (past and present) far beyond anything to which this Court can aspire. Refugee cases, almost by definition, implore the misery of the human condition and evoke considerable sympathy. But sympathy is not the determining factor. As I have said, the determining factor is the law.

*Application of a wrong standard of proof*

45. On page 2 of its ruling, the RSRB directed itself as to the definition of a refugee under art.1A(2) of the Convention, saying that it contained four key elements :

> " • An applicant must be outside his or her country.
>
> • An applicant must fear persecution. Not every threat of harm or interference with a person's rights for a Convention reason constitutes 'being persecuted'. Generally it is accepted that persecution requires some serious punishment or penalty or some significant detriment or disadvantage. The persecution which an applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion.
>
> • An applicant's fear of persecution for a Convention reason must be a 'well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear.
>
> • In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality. Whenever the protection of the applicant's country is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee."

46. As to how it should determine whether an applicant is a refugee under the Convention, the RSRB continued :

> "Whether an applicant is a person to whom Hong Kong has obligations under the Convention is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future."

47. From this, the RSRB directed itself that —

> " The Board's task is not to dwell on the past or on matters that are not relevant to the Applicant's claims for refugee status. Rather it is to make an assessment about whether the Applicant faces *a real chance of persecution* in the future. In making this assessment the Board must necessarily draw on the events in the past." [my emphasis]

48. It is not disputed that the burden rests on an applicant to demonstrate that he is a refugee in terms of the Convention. The UNHCR Handbook states (in para.45) that "an applicant for refugee status must normally show good reason why he individually fears persecution".

49. However, in the present case, Mr Pun, for the applicant, has argued that in directing itself that the applicant must demonstrate a "real chance of persecution" if he returns to Vietnam the RSRB placed too onerous a burden of proof upon him. That direction, said Mr Pun, is wrong in law and vitiates the ruling. In my judgment, however, there has been no misdirection by the RSRB as to the standard of proof. I say so for the reasons which follow.

50. To begin, it is necessary to return to the definition of a refugee in Art.1A(2) of the Convention which provides that the term 'refugee' shall apply to any person who —

> "… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence … is unable or, owing to such fear, is unwilling to return to it. …"

51. In determining whether a person should be recognized as a refugee, it is necessary therefore to determine whether that person has a 'well-founded fear' of being persecuted for what may compendiously be called a Convention reason, that is, for reasons of race, religion, nationality membership of a particular social group or political opinion.

52. The phrase 'well-founded' imports an objective element into the determination. Fear is, of course, subjective and the determination of refugee status will therefore require an evaluation of whether an applicant is, in fact, in fear. But proof of fear itself is not sufficient. That fear must objectively be well-founded. As Lord Goff expressed it in *R v. Secretary of State for the Home Department, ex parte Sivakumaran* [1998] AC 958 (at page 1000) :

> "For the true object of the Convention is not just to assuage fear, however reasonably and plausibly entertained, but to provide a safe haven for those unfortunate people whose fear of persecution is in reality well-founded."

53. The authorities support the principle that in demonstrating he has a well-founded fear of persecution an applicant for refugee status does not have to demonstrate that it is more likely than not that he would have been or will be persecuted. Stevens J, delivering the majority opinion in the United States Supreme Court in *Immigration and Naturalization Service v. Cardoza-Fonseca* (1987) 94 L Ed 2nd 434 expressed it graphically when he said that there was no room for the view that because an applicant had only a 10 percent chance of being shot, tortured or otherwise persecuted he had no 'well-founded fear'. It need not be shown that the situation will probably result in persecution, he said, it is enough that persecution, is a 'reasonable possibility'.

54. Lord Keith in *Sivakumaran* (at page 994) held that the standard had been accurately expressed by Lord Diplock in an earlier decision of the House in *R v. Governor of Pentonville Prison, ex parte Fernandez* [1971] 1 WLR 987 when he held that the test was not based on the balance of probabilities but that —

> "A lesser degree of likelihood is, in my view, sufficient; and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court. 'A reasonable chance', 'substantial grounds for thinking', 'a serious possibility' – I see no significant difference between these various ways of describing the degree of likelihood. …"

55. Lord Goff in *Sivakumaran* (at page 999) expressed the standard that is required to be demonstrated in the following terms :

> "The objects of the Convention will surely be fulfilled if refugee status is afforded in cases where there is a real and substantial risk of persecution for a Convention reason."

56. No authority has been placed before me to suggest that any different standard has been adopted by our courts in Hong Kong. That being the case, in my view, the statement by the RSRB in its ruling that its task was to assess whether the applicant faced 'a real chance' of persecution cannot be faulted. A 'real chance' of persecution is no different in essence from a 'real and substantial risk' nor a 'reasonable chance' nor a 'serious possibility' of persecution.

57. On behalf of the applicant, Mr Pun submitted that the true standard should be one of a 'reasonable possibility' (as adopted by the United States Supreme Court in *Immigration and Naturalization Service v. Cardoza-Fonseca supra*) and that this standard was lower than that of a 'real chance'. I do not accept that to be the case. I see no real difference between 'a reasonable chance', for example, and 'a reasonable possibility'. They express the same thing. A 'reasonable' chance of prosecution cannot but be a 'real' chance. Equally, if there is a 'chance' that chance must amount to a 'possibility'.

58. In summary, as I have said, I am satisfied that the direction which the RSRB gave to itself was in accordance with law. In any event, a study of the ruling itself shows that, in coming to its conclusions, the tribunal was sure of its findings; by which I mean that it came to confident conclusions not conclusions dependent on a fine balance being drawn on the burden of proof. By way of illustration, the ruling of the tribunal concluded :

> "The Applicant's claims that he has a fear of persecution because of his ethnicity and because he is from the Ha Tuyen area do not give rise to a well founded fear of persecution. The Applicant's claim as one involving an adverse political opinion being

> imputed to him similarly is not made out and his circumstances do not give rise to a well founded fear of persecution. Having considered the applicant's claims from all available evidence, and having considered the Applicant's claims both individually and cumulatively *the Board has no doubt* that the Applicant is not a refugee under the Convention." [my emphasis]

*'Persecution' : its meaning under the Convention*

59. Before turning to the remaining grounds of challenge, all of which relate to the manner in which the RSRB determined the evidence and the reasonableness of its findings, it is necessary to say something of the meaning of 'persecution' as that word is used in the Convention. During the course of the hearing, in challenging the manner in which the RSRB considered the evidence before it, Mr Pun, for the applicant, contended that, by implication at least, it had determined matters on the basis that the actions of low level officials or of private citizens could not — by definition — amount to persecution in terms of the Convention and that accordingly the applicant's treatment at the hands of local security officials, village heads and the like, no matter the level of its severity, could not be persecution.

60. I reject that submission as misconceived. I am satisfied that the RSRB well understood the concept of persecution and in that comprehension understood that under the Convention it is to be distinguished from discrimination or muddled and antagonistic bureaucratic treatment.

61. Para. 51 of the UNHCR Handbook speaks of 'persecution' under the Convention in the following terms :

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

62. In *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489 (at 503) Lord Lloyd said :

> " … it has been settled law since the decision of Nolan J in *R v Immigration Appeal Tribunal, Ex p Jonah* [1985] Imm AR 7, 13 that persecution should be given its ordinary dictionary meanings. So far as I know the correctness of that decision has not been challenged."

63. In the same judgment, Lord Clyde (at 512) said :

> " It appears that the word carries with it some element of persistence or continuity. To use Professor Hathaway's language (*The Law of Refugee Status*, p 101) it is 'sustained or systemic'. But the term is left underfined so as to include a wide variety of types of behaviour. In relation to such questions the ordinary use of the word should provide sufficient guidance and its application will be a matter of the facts and circumstances of each particular case."

64. Persecution is something graver than discrimination although, often by definition, discrimination is enclosed within persecution. As was said in *R v. Immigration Appeal Tribunal, ex parte Jonah* (cited with approval in *Horvath supra*) the test of persecution 'is and must be kept at a high and demanding level'.

65. During the course of its ruling, the RSRB specifically considered the nature of persecution under the Convention and how it must

be distinguished from other forms of ill-treatment that offend the dignity and rights of a person. In this regard, the following was said :

> " It is important to bear in mind that discrimination *per se* is not enough to establish a case for refugee status. A distinction must be drawn between a breach of human rights and persecution. Not every breach of a claimant's human rights constitutes persecution: UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, para 54:
>
> > 'Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, eg, serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.'
>
> Various threats to human rights, in their cumulative effect, can deny human dignity in fundamental ways and should properly be recognised as persecution for the purposes of the Convention. The Board accepts that ethnic Chinese in Vietnam may face some discrimination. The Board has perused the reports of the US Department of State since 1993 and notes that there is no specific reference in the section covering racial discrimination to ethnic Chinese though other ethnic minorities are identified as victims of abuse in some reports. Acts of regular but petty discrimination are undesirable and annoying but do not necessarily amount to the denial of human dignity in the sense of the refugee Convention. The standard of a sustained or systemic denial of core human rights is simply not met by the allegations made by the Applicant of discrimination."

66. I do not see how the above passage can be criticised as constituting a misunderstanding of 'persecution' under the Convention. That it is a matter of degree has been fully comprehended. Nor, on a reading of the RSRB's ruling, am I able to detect any suggestion that, while low-level officials may be able to discriminate, their actions, no matter how unrestrained, are incapable of amounting to persecution. To

the contrary, what is demonstrated in the ruling is that, on the evidence before it, the RSRB found that the treatment suffered by the applicant, while worthy of criticism, did not amount to persecution. In its findings, for example, the following was said :

> "There is no doubt that the Appellant's situation is complicated and perhaps more complicated than many of those who have returned to Vietnam from various countries under the CPA because of his long absence and the disintegration of his family unit. He separated from his cohabitant at whose home he was last registered in Vietnam so his personal life has infringed on his situation upon return. He lived in China for a short time. He has been in Vietnam for only about one month over about the last ten years. The Board notes from the country information above that low level bureaucracy is a problem for some returnees to Vietnam. *However, the Board does not accept that these problems amount to persecution in terms of the Convention*. The Board has considered the information provided by the Applicant's solicitor relating to difficulties faced by some returnees. However, the independent evidence indicates that over one hundred thousand persons have return to Vietnam and the Board does not accept that the Applicant will encounter difficulty amounting to persecution upon return to Vietnam. The Board does not accept that the Applicant's difficulty relating to formal registration amounts to persecution or that he will face persecution for a Convention reason should be return to Vietnam. The Applicant's former cohabitant was able to obtain her documents from Vietnamese authorities. Even if a bribe was paid the Board does not accept this is an indication that she was not entitled to such documents. The Board has no doubt that the Applicant will receive appropriate documentation in due course as have over one hundred thousand returnees. *The Board is satisfied that any difficulty the Applicant faced or may face in relation to documentation is not such that it gives rise to a well founded fear of persecution in the sense of the Convention*."
> [my emphasis]

67. Persecution, of course, may be against a group or an individual and the RSRB had to consider whether the applicant's allegations were to considered within the context of group persecution or persecution only of the applicant as an individual.

68. In my view, the extended passages to which I have referred in paras.65 and 66 above plainly demonstrate that the RSRB was engaged in an assessment of the *nature* of the ill-treatment suffered by the applicant in order to determine whether that ill-treatment amounted to persecution under the Convention. That, I am satisfied, is the manner in which the matter should be approached and indeed has been judicially recommended. In this regard, see the comments of Lord Lloyd in *Horvath supra* (at 509) :

> "… the fact-finding tribunal should *first* assess the ill-treatment, and answer the question whether it amounts to persecution for a Convention reason …"

*Denial of registration papers*

69. The applicant has contended that the RSRB erred in law in finding that the denial of registration papers to him on his return to Vietnam was not sufficient of itself to constitute persecution under the Convention. That contention, of course, is based on the premise that the RSRB came to a determination that the applicant was in fact 'denied' his papers. But, in my view, on a reading of the RSRB's ruling, there is no such determination. To the contrary, the RSRB rejected the applicant's evidence that he had been denied his *ho khau* and could expect that denial to persist if he was returned to Vietnam. In this regard, the RSRB said the following (page 18) :

> "The Applicant claims he was and would be refused a *Ho Khau*, identification documents and accommodation if he returns to Vietnam. The Board does not accept this to be the case. The Board makes these findings for the following reasons.
>
> • The country information referred to above indicates that over 100,000 people have returned to Vietnam and most have been given appropriate documentation. Indeed the Applicant's cohabitant returned to the area where the

> Applicant previously resided and received documentation promptly and later returned to Hong Kong with appropriate documentation.
>
> • The Applicant's return is part of an international agreement monitored by the UNHCR that has generally been adhered to and his circumstances are not special.
>
> • The independent country information referred to above indicates that even the Vietnamese aid groups admit that 'few returnees are subjected to open persecution …. [although] many are dogged by low-level bureaucratic harassment-delays in getting household registration and access to schools, extra fees, needless red tape, added scrutiny from local officials' (ibid.). For the same reasons mentioned below the Board does not consider this amounts to persecution in the sense of the Convention.
>
> • When asked why he thought he might have been discriminated against the Applicant told the Second Board; 'Perhaps it was because my address was unclear, and that I had lived in China for a long time before going to Hong Kong.' He indicated to this Board that difficulty arose because he 'had no home, no brothers, no siblings there. The authorities took me to the Public Security Station and I stayed there for a few days. I had no house and nowhere to go.' "

70. The RSRB accepted that the applicant's situation was perhaps more complicated than that of others returning to Vietnam and accepted, on the basis of 'country information' available to it, that low-level bureaucracy could be a problem for some returnees. The RSRB rejected the contention, however, that these problems — in light of the objective evidence known to it — amounted to persecution in terms of the Convention and manifestly, on a full reading of the ruling, came to a finding that the problems encountered by the applicant *as an individual* while not to be dismissed, did not constitute persecution of him.

71. In my judgment, it would be a misinterpretation to say that the RSRB came to a determination that denial of *ho khau* can never of itself amount to persecution. The RSRB made no such determination. What was determined was that, while the applicant may have faced difficulties with low-level bureaucrats, that of itself did not amount to persecution and did not amount to final denial of papers by the state. Indeed, the RSRB went on to say that it had "no doubt that the applicant will receive appropriate documentation in due course as have over one hundred thousand returnees."

72. Mr Pun, for the applicant, argued that the RSRB had not looked to the applicant as an individual. It had made its determination based on the experience of others. It had failed therefore, to look to the applicant's personal circumstances and make the required findings. As he expressed it : "why should the applicant not be the exception?"

73. I am satisfied, however, that the RSRB did look to the personal circumstances of the applicant. Quite rationally, however, it examined those circumstances against the broader objective evidence. In this regard, para.42 of the UNHCR Handbook states :

> "… it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgment on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin—while not a primary objective—is an important element in assessing the applicant's credibility."

74. The RSRB rejected the applicant's evidence that, upon his return to Ha Tuyen Province, he was threatened with expulsion, arrest and imprisonment. It was satisfied that he had exaggerated his claims :

> "The Applicant claims that after his return to Vietnam in 1997 he was detained for 3 days. The Public Security Officers threatened him with arrest, imprisonment and expulsion to China for being a member of an organisation that was against the government. The Applicant now claims he first left his village in November 1984 and that when he went back to Vietnam 13 years later that officials showed him photos of a variety of people. The Board notes that the Applicant claims he left Vietnam as a 16-year-old (if he left for China in 1984). The Board does not consider it plausible that authorities would seek to question him about his involvement in an organisation as a teenager or that he would be accused of being a 'snakehead' in the circumstances he describes. The Board does not accept his claim that he was threatened with expulsion, arrest and imprisonment and finds that he has exaggerated this claim. Indeed it is his evidence that he was 'encouraged to travel to Minh Huong in Ha Tuyen to try to get papers there'. Later he stayed with a friend whose relation is a PSO."

75. The RSRB also rejected the applicant's claim that an old neighbour — whom the applicant and others had once thrown into a river — was now an influential figure and was seeking to cause him harm. In this regard *inter alia* the RSRB said :

> " The Board rejects this claim because despite at least 5 previous opportunities including in the very detailed statement the Applicant wrote to the first Board he made no mention of this incident. The Board does not accept that the Applicant is being truthful when he claims he did not consider this incident important previously but now his circumstances have changed. The Board has no doubt that if he was the victim of a deliberate assault by Vietnamese officials because of his race he would have raised this matter on one of the many prior opportunities he had to do so. *The Board has no doubt that this aspect of his claim is a fabrication.*"

76. From these and other findings it is apparent that the RSRB did not consider the applicant's circumstances to be special; in short, that there was no reason why he should be singled out for treatment amounting to persecution when thousands of other ethnic Chinese returnees had been allowed to settle down in relative freedom.

77. The RSRB noted that returnees who faced difficulties could obtain assistance from UNHCR monitors in Vietnam. It noted (from a Canadian research paper) that :

> "As of August 1997 the UNHCR employed eight international monitors in Vietnam. Of these, five are in the northern areas of the country and three are based in Ho Chi Minh City in the south. These monitors conduct 'individual case monitoring of Vietnamese returnees. … Proficient in Vietnamese, the monitors' role is to assist in the smooth integration of returnees, help in the distribution of financial assistance, and investigate allegations of persecution, harassment, or mistreatment by Vietnamese authorities.' "

78. The RSRB further noted that :

> "UNHCR monitoring officers enjoy free access to all returnees. On many but not all monitoring visits, UNHCR staff may be accompanied by officials from the local Departments of Labour and Social Affairs who are in charge of reintegration of returnees. The presence of these officials often allows many questions relating to assistance, vocational training and other matters to be resolved on the spot. Whenever necessary, monitoring officers can discretely make special arrangements to ensure strict confidentiality of information returnees may wish to communicate in private. In addition, many returnee-visitors to UNHCR offices in Hanoi and Ho Chi Minh City are being interviewed by the monitoring staff without any government officials present."

79. The applicant, of course, had not at any time sought the help of the UNHCR monitors.

80. The RSRB directed itself that it had to take into account the applicant's full history and clearly did so. But even against the full background of his history the RSRB was satisfied that there was nothing which marked the applicant for persecution. As to political beliefs, the RSRB said :

> "The Applicant claims that he was accused of participating in anti-government activity. The Board does not accept this to be the case. The Applicant has had no involvement in political matters despite being free to participate while in Hong Kong. The Board was left with no doubt that the Applicant has no political profile and is not at risk of being perceived as a political opponent of the Vietnamese government."

81. Looking broadly to his activities past and present in so far as they had or may have a political dimension, the RSRB said :

> "The Applicant also claimed he was threatened because of his political activities in Hong Kong but he has not been involved in any activity in Hong Kong that would cause concern amongst Vietnamese officials. The Board has no doubt that he will not be imputed with a political opinion as a result of any activity in Hong Kong. The Board has no doubt that the Applicant does not have the profile of any of those person mentioned in the country information above who have encountered difficulty. He is not from a vulnerable group among returnees in Hong Kong camps and he is not a dissident intellectual, prominent individual nor has he expressed views that are critical of the Vietnam communist party. The Applicant has not acted in a leadership capacity within the camp or engaged in anti-Communist or other political activities since he last returned to Hong Kong. There is no evidence to suggest that he is known to have been interviewed in asylum camps by the Hong Kong Security Branch or the Defence Liaison Office of the United States Consulate."

*Failure to consider the 'cumulative' effect of the applicant's ill-treatment*

82. During the course of his submissions, Mr Pun, for the applicant, came to focus on one central complaint. As I understand it, it was to the effect that the RSRB had a duty to look to each and all of the incidents which the applicant said constituted his history of ill-treatment in Vietnam, from those which took place when he was young to those which took place when he returned to Vietnam in the summer of 1997. It was necessary to do so, said Mr Pun, because the applicant's fear of persecution rested on the cumulative toll of his ill-treatment over the full span of that time.

83. Let me say first that I do not accept that a tribunal of fact is obliged to determine *all* of the issues of fact raised during a hearing. There can be no such rigid rule. What must be determined are those issues of fact which are material.

84. Nor does it follow that a failure to make a determination on a particular issue of fact implies acceptance of what has been alleged. As was said by Godfrey JA in *Nguyen Ngoc Nhat v. Refugee Status Review Board* [1997] HKCU 1 259 :

> "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 finings. 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 findings 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 party of his story

> must be treated as a finding adverse to the applicant on the reminder of his story."

85. The RSRB was aware of the request by the applicant that it should consider the cumulative effect of his claims. This was noted on page 12 of its ruling under the heading : 'the applicant's submission to the Board after the interview'. Later in the ruling the RSRB directed itself in the following terms : "Importantly, the Board must take into account the entire history of the matter". But taking the entire history into account does not imply that the RSRB must make findings on each incident alleged by the applicant in that history.

86. The RSRB took as a starting point the decision of the applicant to return voluntarily to Vietnam in 1997. In this regard, the following is recorded :

> "The Board has no doubt that the Applicant had no well-founded fear of persecution when he re-availed himself of the protection of Vietnam by volunteering to return in 1997. The Applicant demonstrated that in 1997 he was neither unable nor unwilling to return to his home area in Vietnam. The Board notes his claim that there was pressure upon persons to return to Vietnam at that time. However, the Board has no doubt that had the Applicant a genuine fear of persecution in the sense of the Convention at that time he would not have *volunteered* to return to Vietnam in 1997 with his children."
> [my emphasis]

It is implicit in this finding that, whatever travails the applicant may have suffered in Vietnam when he was a young man, by 1997 he was prepared to return *with his children* to the country and was prepared to do so without any well-founded fear of further persecution.

87. In its ruling, the RSRB noted the objective fact that fundamental changes had taken place in Vietnam and that the persecution of ethnic Chinese was now very much the exception, certainly not systemic as it had been in and around the early 1980s. The applicant, in volunteering to return, was not therefore volunteering to return to a country still mired in the old ways. It is an objective fact that the adoption of the Comprehensive Plan of Action at a conference on Indochinese refugees in Geneva in 1989 put into place an internationally monitored mechanism for return of people like the applicant subject to guarantees by the Vietnamese Government that they would not be prejudiced by reason of their history (unless, of course, criminal in kind).

88. Mr Pun, for the applicant, contended that the applicant had no choice but to 'volunteer' as he had exhausted all other alternatives. The RSRB, however, as a specialist tribunal, would not have been ignorant of the circumstances in which the applicant, like many others, volunteered to return; of the assurances given to such persons and benefits received by them. It was for the RSRB as the tribunal of fact to determine such matters not for this Court later — without a full understanding of the relevant historical context — to 'second guess' matters.

89. The RSRB went on to find that, even after his return from Vietnam to Hong Kong in 1997, the applicant had expressed a willingness to return to Vietnam yet again if he could be together with Miss Loc (to whom he had been betrothed and with whom he had had his two children). In this latter regard, the RSRB referred to three letters which the applicant had written to the Hong Kong authorities in 1998, letters written over a short span of time —

(a) In the first (undated) letter written in late February 1998, learning that Miss Loc was in detention, the applicant had written :

> "… I submit this letter to ask for your assistance to arrange for our continued staying together. If we can return to Vietnam, we hope that we can go together.
>
> …
>
> When I returned to Vietnam, I had no home, brothers, household or fixed place of lodging. And my wife did not have fixed household too. Therefore, my family of four were in state of separation. Under such condition, I decided to leave my two children behind and came illegally again to Hong Kong. I hope that no matter wherever we are, my family members shall reunite together and have fixed lodging and household."

(b) In the second letter (dated 5 March 1998), learning that Miss Loc was to be repatriated, he had written :

> "My wife has already returned to the detention center awaiting return to Vietnam. Thus, I request the Security Bureau to arrange us to return to Vietnam together on the same flight. Now, my wife has been assigned a number for returning to the native place. Thus, we beseech the Security Bureau to arrange us to return to Vietnam together, or to allow my wife to apply for postponement to return to the native place with me in the next flight."

(c) In the third letter (dated 12 March 1998), written immediately after Miss Loc had been returned to Vietnam, the applicant had said :

> "I sneaked into Hong Kong again to look for my wife. She returned to the camp on 13—2-98 and returned to the native place on 11-3-98 and I had written to the camp management and the welfare office on many occasions requesting for reunion with my wife and returning to the native place together. Now, my wife had returned to the native place. My situation is very difficult because we have no fixed abode in Vietnam. Therefore, I submit this letter and beg for assistance for letting me to return to Vietnam earlier to reunite with my wife and children so that I can make arrangements and plans for their living.

> I hope I can obtain the assistance from the Hong Kong Security Bureau to arrange me to be repatriated to Vietnam by the next scheduled flight. With sincere thanks!"

90. Mr Pun protested that the RSRB failed to consider these letters in proper context. But again it seems to me that it was a matter for the RSRB as the tribunal of fact — the tribunal which had interviewed the applicant at length — to draw what inferences it deemed appropriate from those letters. The RSRB took into account the applicant's claim that he was 'emotionally upset' at the time he wrote the letters but went on to say :

> " However the applicant wrote three letters over a period of about two weeks. The Board has no doubt that these statements and his actions indicate a willingness to return a second time and they are a true reflection of the fact that the Applicant did not fear persecution upon return to Vietnam."

91. I do not see how that finding can be criticised as being irrational or perverse, by which I mean *Wednesbury* unreasonable. The Board was doing no more than using the content of the letters (and the desires expressed in them) to come to a finding that the applicant did not himself — at that time — fear that upon his return he would be the subject of persecution as that term is understood under the Convention : the subject of some discrimination or difficulties perhaps, but not persecution.

92. In summary, the RSRB was satisfied that, even after his alleged ill-treatment in Vietnam in the summer of 1997, the applicant was still prepared the return to the country again without fear that he, as individual, would be the victim of persecution.

93. Having made such a fundamental finding, I fail to see how it can be said that the RSRB was nevertheless obliged to go back further to the applicant's early history in Vietnam and make findings in respect of that history, incident by incident. The material fact (found by the RSRB) was that in 1998 the applicant had no subjective fear of persecution if he returned Vietnam. That finding made it unnecessary to pick over the bones of old history, a history very sadly shared (in greater or lesser degree) by many thousands of ethnic Chinese whom the RSRB was satisfied as an objective fact, had been able to return to Vietnam and build their lives again in relative freedom.

94. In the circumstances, I am satisfied that the RSRB did give due consideration to what the applicant (and his solicitors) requested; namely, the cumulative effect of his alleged ill-treatment in Vietnam over the years. In that context it made such material findings as were necessary. It may not have exhaustively determined each and every issue of fact raised but it was not required to do so.

*The ruling gave undue weight to certain evidence and inadequate weight to other evidence*

95. I can find no substance in this challenge. The weight to be given to matters of evidence is for the tribunal of fact. That does not mean that a tribunal of fact is free to ignore relevant considerations or to marginalise them. But in the present case I fail to see how it can be said that was done.

96. What must be remembered is that the RSRB was at all times constrained to make its findings in accordance with the terms of the

Convention and to give such weight to matters as it deemed appropriate within that context.

97. Refugee matters are complex. The RSRB in a long ruling covered all material considerations of fact even if it did not dissect each and every matter that the applicant, in understandably advocating his own interests, would have wished.

98. I can find no distortion by way of over or under emphasis, certainly no distortion that would warrant this Court in striking down the ruling. As Litton V-P commented in *Tran Van Tien* (*supra*), history is replete with genuine accusations of unreasonableness when all that is involved is disagreement, perhaps passionate, between reasonable people.

*The ruling was unreasonable because the evidence, taken as a whole was not capable of supporting it*

99. Within the context of this application (that is, as argued) this essentially amounted to an appeal point. I was asked to weigh the evidence and, in looking to the merits, substitute my own decision for that of the RSRB. That I cannot and will not do.

100. I have much earlier in this judgment emphasised two matters : the specialist nature of the RSRB (and through that its particular knowledge) and the limited jurisdiction of this Court.

101. I need only say that over an extended period of argument I never gained the impression that the determination of the RSRB in this

matter was fundamentally misconceived in any material consideration let alone in its ultimate determination.

*Conclusion*

102. The hearing of this matter went well beyond its estimated time. Mr Pun's submissions on behalf of the applicant were long, intricate and varied. Every point seemed to raise a new point, taking us at times some considerable distance from the specific challenges inscribed in the applicant's notice of motion. Much of what was raised in this free-ranging sortie trespassed, I think, on the merits, a matter for the RSRB and not for this Court. Leeway was given because I was aware of the fundamental importance of the issues : the right to life free of persecution. As Lord Bridge said in *R v. Secretary of State for the Home Department, ex parte Bugdaycay* [1987] 1 AC 514 (at 531) :

> "… the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the court's power of review. The limitations on the scope of that power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

103. In the present case, however, I can find nothing to suggest that the decision of the RSRB was in any way unlawful. The material facts were determined rationally and determined, I am satisfied, within the context of the applicable law correctly interpreted.

104. In the circumstances, the application for judicial review must be dismissed.

105. As for costs, I assume that the applicant has been legally aided. There will therefore be an order *nisi* that there be no order as to costs. That order will be made final 30 days after the date of handing down this judgment unless an application is made within that time seeking a different order.

(M.J. Hartmann)
Judge of the Court of First Instance,
High Court

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Mr Nicholas Cooney, instructed by Department of Justice,
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