HCMP000622/1990

NOTE

Judicial review - Vietnamese refugees - Screening procedure - Statutory frame work - Statement of Understanding - International agreements.

Leave to Cross-examine deponents. Admissibility of evidence. Approach to mistake of fact by decision maker.

Legitimate expectation that asylum seeker's case will be dealt with fairly and on its merits. Fair procedure in the Immigration Officers' interviews.

Reg. 7 of Immigration (Refugee Status Review Boards) (Procedure) Regulations procedural not substantive.

Effect of administrative appellate tribunal's decision (Refugee Status Review Board) upon flaws in the Immigration Officers' decision making.

Jurisdiction of the Court not ousted by Section 13 F(6) of the Immigration Ordinance Cap. 115.

Legality of detention under Section 13 D(1) of the Immigration Ordinance.

Application for Declaration not pursued.

1990 MP NO 570, 622, 623, 624, 636, 931, 932, 933 and 934

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

MISCELLANEOUS PROCEEDINGS

(Consolidated by orders of the Honourable Mr Justice Penlington J.A. dated 3rd April 1990 and Mr Justice Mortimer dated 24th April 1990)

IN THE MATTER of an application for Judicial Review

R v. Director of Immigration and Refugee Status Review Board ex parte Do Giau and others.

1990 November 19, 20, 21, 22, 23, 26, 27, 28, 29
December 3, 4, 5, 14, 17, 18, 19, 20, 21, 24 MORTIMER J.
1991 January 2, 3, 4, 7, 8, 9, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28
February 18

MORTIMER J:

Consolidation

This hearing began with nine consolidated applications. At an early stage, it became clear both to the parties and myself that it would be impossible to hear and determine all these applications together. By consent therefore, I ordered that Mr Do Giau's application should be heard and determined before the others which will then follow and be heard individually in due course. Mr Do Giau's application was heard first on Mr Fung's application.

The Application

Mr Do Giau (the applicant) is a Vietnamese national. Having left Vietnam he arrived in Hong Kong by boat on 16th July 1988. He was detained on arrival. On 26th July 1989 and 9th August 1989, he was examined by immigration officers and on 23rd August 1989, he was refused permission to remain in Hong Kong as a refugee. This decision was confirmed by a senior immigration officer. On 6th September 1989 he appealed to the Refugee Status Review Board. The Board reviewed the decision on 10th October 1989 and on 13th October confirmed it. On 7th December 1989, he received notice of the Review Board's decision.

Since the refusal of permission to remain as a refugee, he has been detained pending his removal from Hong Kong. Having been given leave (out of time) on 3rd March 1990, he applies for Judicial Review to quash the decisions of the immigration officer, the senior immigration officer and the Refugee Status Review Board together with other relief, and he challenges the legality of the order for detention pending his removal from Hong Kong.

The Historical Background

The applicant is one of 180,000 Vietnamese nationals who have arrived in Hong Kong since the end of the Vietnam war in 1975. They have become known as Vietnamese Boat People. Originally the Hong Kong Government's policy was to grant all Vietnamese nationals who arrived first asylum in Hong Kong pending their resettlement elsewhere. This policy Her Majesty's Government and the Government of Hong Kong confirmed at the International Conference on Indo-Chinese refugees held in Geneva in June 1979 where broadly it was agreed that Vietnamese boat people would be exempt from usual procedures for illegal immigrants and asylum seekers. Inter-alia Hong Kong agreed with the international community to continue granting automatic refugee status to those who arrived from Vietnam on the understanding that the rate of arrival would be matched by a programme for resettlement internationally.

However, by 1985 the international community became less ready to accept Vietnamese refugees for resettlement. As described by counsel, it was the result of "compassion fatigue". On the evidence of the Hong Kong Government Refugee Co-ordinator at that time, Mr Hanson, it was becoming increasingly clear that most of the Vietnamese arriving would not merit refugee status under the relevant international agreements, those being the 1951 Convention and the 1967 Protocol. I accept this as the received opinion but express no view as to its accuracy.

The situation deteriorated. In 1988, 18,000 Vietnamese boat people arrived in Hong Kong and only 2,700 were resettled. The increasing arrivals and the failure of the international resettlement programme under the 1979 Convention provoked a change of Hong Kong Government policy. With effect from 16th June 1988, those who arrived were given a choice. They could continue their journey and be given provisions and other assistance which included the repair of their craft, or they could be detained pending a decision whether or not to give them permission to remain as refugees. If permission was refused, they would be detained indefinitely pending removal from Hong Kong probably by repatriation.

The procedure for determining refugee status and deciding whether or not to give permission to remain as a refugee under which the challenged decisions were taken were not then established.

In September 1988, after consultation and co-operation between the United Nations High Commission for Refugees (the UNHCR) and the Hong Kong Government a general statement

of understanding was reached about Vietnamese asylum seekers arriving in Hong Kong. A copy of the General Statement of Understanding is annexed to this judgment as Annexure 1. A procedure for deciding whether a Vietnamese boat person was to be treated as a refugee was established. Essentially it was the same as used for any asylum seeker but it proved to be too elaborate to cope in a timely way with the numbers involved.

In April 1989, the population of Vietnamese boat people was increasing at the rate of 100 per day. So further consultation between the UNHCR and the Hong Kong Government resulted in the institution of the present procedure which was used in this case although there have been modifications since the time of these decisions. This was agreed policy which was carried out within a legislative framework.

The Legislation

On arrival from Vietnam, the asylum seeker is detained in a Vietnamese detention centre pending a decision whether or not to grant him permission to remain in Hong Kong as a refugee. The relevant power pre-dates the present procedure. It is to be found in Section 13D of the Immigration Ordinance Cap. 115. The relevant part reads:

> "13D (1) as from 2 July 1982 any ... former resident of Vietnam who arrives in Hong Kong not holding a travel document .... may ... be detained under the authority of the Director ... pending a decision to grant or refuse him permission to remain in Hong Kong as a refugee or, after a decision to refuse him permission to remain in Hong Kong, pending his removal from Hong Kong ..."

The decision whether to grant or refuse him permission to remain is taken by an immigration officer after an examination. This is carried out initially by an immigration assistant who records personal details (inelegantly known as the "bio-data"). Later, an immigration officer checks this "bio-data" with the asylum seeker and interviews him to determine whether or not he is to be treated as a refugee. These officers exercise powers under Section 4 of the Ordinance which provides:

> "4(1) For the purposes of this Ordinance, an immigration officer or immigration assistant may: (a) ... examine any person on his arrival or landing in or prior to his departure from Hong Kong, or if he has reasonable cause for believing that such person landed in Hong Kong unlawfully at any time; ... and a person who is so examined may be required by an immigration officer or immigration assistant to submit to further examination."

After an examination or examinations under Section 4(1) (a) the immigration officer may grant or refuse permission to remain in Hong Kong as a refugee.

If he grants permission Section 13A provides both mandatory and available discretionary conditions to such grant. No powers were exercised under this section in the instant or any associated application.

Here, the immigration officer refused permission and the applicant was then detained pending his removal from Hong Kong under the second part of Section 13D to which I have referred.

When a person is so detained after a decision to refuse him permission to remain he must be notified under Section 13D(3) of his right to apply for a review of the decision to the Refugee Status Review Board under Section 13F(1). Sub-section (4) provides methods of service.

Section 13G provides for the setting up of the boards and for the making of regulations about practice and procedure.

The Vietnamese asylum seeker's right to a review is given in Section 13F(1) and Sections 13F(3)-(8) make further provisions. To these I now refer.

> "13F(3) In preparing his case for review under this section an applicant shall be permitted all reasonable facilities to enable him to obtain the assistance of
>
> (a) his legal representative if he has one; or
> (b) in any other case, a prescribed person.
>
> and such representative or person shall be afforded all reasonable facilities to enable him to render such assistance.
>
> (4) Neither the applicant nor his representative shall be entitled to be present when his case is reviewed by the Board.
>
> (5) Upon the hearing of the review the 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 might lawfully have made under this Ordinance, and the Director shall give effect to such decision.

(6) For the removal of doubt, it is hereby declared that the making of an application under this section does not give the person by whom or on whose behalf it is made the right to land or remain in Hong Kong pending the decision of a Board on the application.

(7) A Board when considering any review under this section shall act in an administrative or executive capacity.

(8) A Board shall not be required to assign any reason for its decision and a decision of a Board shall not be subject to review or appeal in any court."

This statutory framework, however, is subject to the Director of Immigration's overriding power at any time to order the removal from Hong Kong of "any refugee or person" detained under Section 13D.

There is no definition of "refugee" in the Ordinance. In Section 2, the definition of "Vietnamese Refugee" is for present purposes limited to those who are permitted to remain in Hong Kong as refugees pending resettlement. Section 2 reads in the material parts:

"Vietnamese refugee" means a person who:

(a) was previously a resident of Vietnam; ... and
(b) is permitted to remain in Hong Kong as a refugee pending his resettlement elsewhere."

For practical purposes whether a previous resident of Vietnam is permitted to remain depends upon the decision in the screening process whether or not to grant permission to remain as a refugee which in its turn depends upon a decision whether or not the asylum seeker is to be treated as a refugee or is a refugee.

The United Kingdom is a signatory to the 1951 International Convention relating to the status of refugees as extended by the 1967 Protocol but the application of these international agreements has not been extended to Hong Kong. However, the definition of "refugee" and the criteria for deciding whether a person comes within the definition are applied in the screening process to which I will now turn.

<u>The Screening Process</u>

As I have indicated when the Hong Kong Government announced its change of policy on 15th June 1988, new procedures for determining refugee status had not been established. They were established after consultation and co-operation with the UNHCR and the "statement of understanding" was reached in September 1988.

By this (inter-alia) the Hong Kong Government:

(1) Affirmed its undertaking that the determination of refugee status would be in accordance with the 1951 Convention and the 1967 Protocol applying humanitarian criteria based on the UNHCR Handbook and taking into account the special situation of asylum seekers from Vietnam.

(2) Agreed a questionnaire (used by the immigration officer in this application) reflecting these criteria as a basis for the interview (i.e. the examination under Section 4 of the Ordinance).

(3) Agreed (in consultation with the UNHCR) to establish procedures for the determination of refugee status.

(4) To advise those "screened out" of their right of objection (then) under Section 53 of the Ordinance and of their right of legal advice.

For its part, the UNHCR (inter-alia):

(1) Declared its readiness to monitor (both generally and on a selective basis) the procedures for determination of refugee status in order to advise the Hong Kong Government on individual cases and determination generally.

(2) Agreed to make available legal advice to those who needed it.

(3) Confirmed that it had been fully consulted by the Hong Kong Government on the establishment of both the criteria and the procedures.

(4) Agreed to brief the Hong Kong Government officers involved in determining refugee status.

These procedures initially established equated with those for asylum seekers originating elsewhere than Vietnam with a right to submit the matter to the Governor-in-Council for final decision.

This procedure was quite inadequate to cope with the number of arrivals. By April 1989, arrivals were such that it would have taken five years to complete the screening. Therefore, after the further consultation to which I have referred, the procedure used in this case was established and it is as follows:

(1) Using the questionnaire as a basis:

a) An immigration assistant interviews the asylum seeker to obtain his family and personal history and details (the bio-data).

b) This is then passed to an immigration officer. He considers the information and later conducts an examination (or examinations if necessary) to establish refugee status. He evaluates the information he receives in accordance with the criteria and determines whether or not the asylum seeker should be permitted to remain in Hong Kong as a refugee.

(2) This is then considered by a senior officer who may or may not confirm the decision.

(3) If the decision is adverse to the applicant, he is detained pending his removal from Hong Kong by the Director of Immigration and informed of his right to apply to the Refugee Status Review Board for a review within 28 days.

(4) If there is an application for review, the asylum seeker may have the assistance of a lawyer provided by the UNHCR to present his case in writing.

(5) A division of the board, that is a chairman and a member with the assistance of a secretary then reviews the decision and makes a further determination. This is final subject to any proceedings for judicial review.

There is also an agreement between the Hong Kong Government and the UNHCR that the UNHCR may request that an asylum seeker be mandated in and treated as a refugee. This procedure is not relevant to the instant case and I will not refer to it again.

The Vietnamese Refugees Division of the Immigration Department

The Immigration Department has a special division to deal with Vietnamese asylum seekers. This was established in 1988 to cope with the task. Now (and at material times) it comprises four sections:

(1) The Operations Section

(2) The Vetting Section I

(3) The Vetting Section II

(4) The Resettlement Section

The Operations and Resettlement Sections are not relevant to these proceedings. The Vetting Sections provide the immigration assistants and immigration officers who carry out the "screening" examinations.

These officers, who usually have had experience of carrying out examinations under Section 4 of arrivals other than those from Vietnam, are given training for their duties in the screening procedure. This training consists of a 9-day course which includes lectures and workshops. Senior officers brief newcomers upon the criteria for determining refugee status, the procedures in the UNHCR handbook and upon cases which have already been heard. New officers

are asked to familiarize themselves with the UNHCR Handbook and guidance notes for them are provided. Thereafter, seminars are held attended by both experienced officers and newcomers in order to pool their experience and in this the UNHCR assists.

Examining officers are assisted by the provision of detailed information about country conditions in Vietnam in order that they may carry out their task of evaluating the evidence which they receive. This distinguishes them significantly from immigration officers who carry out examinations of asylum seekers from other countries because in those circumstances, initially the examining officer may have little or no information about the country conditions of the origin of the asylum seeker before him.

A special sub-section known as the Intelligence Unit of Vetting Section 1 was established to provide information of country conditions in Vietnam which is collected and kept up to date from all available sources. No fewer than seven box files of information available to the decision-makers in this case are before me. This is some indication of the effectiveness of this unit. The unit also disseminates information which it has collected by means of bulletins which are available to assist immigration officers. Also such officers may approach the Intelligence Unit if they require further information upon any particular case in order to make a decision.

<u>The Immigration Officer's Examination and Decision</u>

The questionnaire is used by the immigration officer as a basis for the examination and although an RSRB circular dated 1st August 1989 (before the interview in this case) indicated that it was thought that this questionnaire had many shortcomings and a new form was devised on particular matters to avoid error, it was not the applicant's case that the present questionnaire was inadequate or unfair provided that it was fully and properly used. The questionnaire used in this case is designed to elicit all information from the asylum seeker relevant to the criteria for refugee status to enable the immigration officer to properly determine the matter. It is open to him to ask further questions. This will usually be necessary to supplement the information he receives. He follows the guidelines provided in the UNHCR handbook on procedures and criteria for determining refugee status which are summarized in the Immigration Department's guidelines provided for him. At the examination, he has the assistance of a Cantonese/Vietnamese interpreter. However, the questionnaire is in English and he records the answers in English. In detail therefore the usual procedure is:

(1) After preliminaries and an explanation to the asylum seeker addressed in Cantonese by the immigration officer and translated into Vietnamese, questions are posed in Cantonese and translated into Vietnamese, the answers are then translated from Vietnamese into Cantonese. The immigration officer then translates into written English the answers which he receives.

(2) The immigration officer having made the translation then records the matter in English on the questionnaire. The officer obtains such information as he requires and notes it on the questionnaire (The questionnaire relevant to this case is before the court). He later makes his decision on the information he receives and records his reasons.

(3) There was a further step in this case. The immigration officer recorded the original answers having translated them into English on pieces of paper (now destroyed) and then later wrote up the notes onto the questionnaire which is before the Court. There are issues about this part of the procedure to which I will return. The officer is required by the regulations - the Immigration (Refugee Status Review Board) (Procedure) Regulations - to keep a record including the questions and answers and to preserve the material upon which he makes his decision. He is also required by inference to give reasons.

It is not a feature of the recommended procedure nor the practice of the immigration officer in this case to read back the notes through the interpreter at the end of or during the interview to check their completeness or accuracy.

The Refugee Status Review Board

This was established in 1989 by Section 13G of the Ordinance. Its powers are in Section 13F and its procedure is provided for in the regulations to which I have referred and by its own practice. The board consists of a chairman, four deputy chairmen, and four members together with administrative staff. Each review is carried out by a deputy chairman and a member, but the chairman may also sit as an additional member. A review is allowed if any one member sitting considers that it should so be allowed.

The Board's powers are to decide upon the status of the "appellant" and his continued detention under Section 13D(1) (the same powers as the Director of Immigration) and the Director must give effect to the Board's decision. (Section 13F(5))

On the review, the Board receives and considers:

(1) The immigration officer's determination and his reasons together with all material upon which the decision was based, including questions and answers.

(2) Representations and documentary evidence from the applicant, possibly assisted by his lawyer.

(3) Oral evidence from the applicant and/or the immigration officer if the Board so requires.

(4) Any other matter which appears to the Board to be relevant.

All this is provided by Regulation 9 Regulation 10 (together with Regulations 5 and 7) and Regulation 11.

The sitting is in private (Regulation 8). Neither the applicant nor his representative is entitled to be present (Section 13F(4)) However, if it thinks fit it may require the attendance of the applicant or the immigration officer to answer questions arising from the papers before it. When one is required to attend, the other has the right to do so and comment upon any answers given. (Regulation 10)

The Board acts in an administrative or executive capacity - though in my judgment this is not a relevant factor in this case - it is not required to give reasons and its decisions are not "open to review or appeal" (Section 13F(8)). But it must keep a summary or record of its proceedings and determinations (Regulation 14).

The practice of the Board has varied over the period of its existence and there is no direct evidence from the members of the Board who conducted the review in this case. However, usually (and in this case) one member of the Board takes primary responsibility for the file and prepares an "aide memoire" upon it. The aide memoire together with the file is passed to the other member so that he or she may consider all the material before the Board. The chairman and member then meet for the review hearing and the aide memoire serves partly as a record of the proceedings (see paragraph 10 of the Chairman's affidavit).

The evidence from the Chairman also shows that the practice has changed during the Board's existence but these changes are not relevant to the instant case. The Chairman's affidavit was sworn in July 1990 and it is not clear at what stage each variation took place.

<u>The Criteria for Determining Refugee Status</u>

I can deal with this briefly because there is no issue between the parties as to the appropriate criteria to be applied by the immigration officer and the Review Board for determining refugee status.

As agreed in the statement of understanding this determination is in accordance with the 1951 Convention and the 1967 Protocol following the UNHCR handbook - this includes therefore both the criteria and the Board procedures. As I have already indicated these are not part of Hong Kong law either domestic or international. The application of the criteria and procedures is declared Hong Kong Government policy for which it alone is responsible.

The importance is that a Vietnamese boat person on arrival in Hong Kong and on his detention pending a decision whether or not to be given permission to remain in Hong Kong as a refugee, has a legitimate expectation that any decision whether he is a refugee will be taken fairly, on its merits and in accordance with the criteria within the statutory framework which I have described.

The guidance notes for officers of Vietnamese Refugee Division is a fair and accurate summary of the criteria and procedures to be applied. These were prepared by Principal Immigration Officer Mr K.F. Yam. He is to be congratulated upon them.

I will refer to the criteria and procedures where (and only where) relevant to this decision.

The Applicant's Case

I have already indicated that the applicant seeks orders to quash the decisions of the immigration officer, the senior immigration officer (consequentially) and of the Review Board refusing him permission to remain in Hong Kong as a refugee. Also, he seeks to quash the decision of the Director of Immigration to detain him pending his removal from Hong Kong on the basis that the Director had no power to order this detention under Section 13D(1) as he was in fact a refugee. Further he seeks consequential declaratory relief. But I have indicated to counsel that if the possibility of declaratory relief arises, I will hear further submissions upon the matter.

Mr Fung, for the applicant, has advanced wide-ranging submissions. These I will seek to summarize. First, he relies much upon the special attitude which the courts have towards asylum seekers and he submits that the decisions made in relation to refugee status by immigration officers must be subjected to particularly rigorous examination. He relies upon the principle enunciated by Lord Bridge in Bugdaycay v. the Secretary of State for Home Affairs [1987] A.C. 514 at 531 F-G. Lord Bridge said:

> "The limitations on the scope of that power are well known and need not be re-stated 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."

In the same case, Lord Templeman said at 537H:

> "In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process."

Mr Fung relies heavily upon this principle submitting that the applicant is one who claims refugee status and against whom a decision has been made which may affect his right to life and liberty.

Mr Fung then submits that the immigration officer's examination lacked fairness and therefore was procedurally irregular or was in breach of the rules of natural justice. Three broad matters are advanced:

(1) Omissions before the examination.

(2) The manner in which the examination was conducted and the failure to record the examination properly.

(3) Omissions at the conclusion of the examination.

I will consider particular allegations when I come to deal with them.

Then Mr Fung says that "a plain mistake of fact" by the decision-maker is a ground upon which in law the immigration officer's decision may be quashed and that the immigration officer made such errors in his decisions and these relate to:

(1) The type of New Economic Zone in which the applicant lived and worked for many years.

(2) The nature of conscriptive labour which his father was required to carry out there and which he was required to carry out.

(3) The consequences of a loss of household registration when he left the New Economic Zone.

(4) The effect of him receiving a draft for military service.

(5) The erroneous recording of the fact that he worked in a state-owned rice mill and its consequences.

Some of these matters are put in other ways. It was argued that the immigration officer wrongly concluded that the applicant was not a target for persecution because he had received papers drafting him for military service and also, that the officer had erroneously recorded his employment in a state-owned rice mill, took this into account adversely to the applicant and therefore concluded erroneously that he was not targeted for persecution. On these matters and others, it is submitted that the immigration officer's decision was unreasonable and perverse in the Wednesbury sense.

Finally, it is said that the immigration officer failed to fulfil the procedural requirements required by the Ordinance in that he destroyed his original notes of the interview and therefore was in breach of Regulation 7(b) because he failed to make available to the Review Board all material upon which his decision was based. In the course of argument, there were further points advanced about the immigration officer which now do not require further consideration.

The decision of the Review Board is attacked as being in breach of the rules of natural justice or procedurally unfair for failing to require the applicant to attend to answer questions when there were disputes of fact between him and the immigration officer, and differences in his evidence as recorded by the immigration officer and as advanced at the review. It is further argued that both the Review Board and the immigration officer applied the wrong standard of proof in reaching the decisions and it is argued that the Review Board's decision was Wednesbury unreasonable.

Finally, in relation to the Review Board, it is said that Board ought to have given reasons for its decision in spite of the provisions of Section 13F(8). And in reply to the respondent's submissions that Section 13F(8) ousts the jurisdiction of the court in this matter, Mr Fung submits that that section is not effective in preventing the Board from reviewing that decision on the basis that it was outside the Review Board's jurisdiction and was a nullity.

The Respondent's Case

Mr Thomas for the respondent resists the application on each of the specific grounds advanced. He accepts the authority of Bugdaycay's case but points out that this is not authority for a departure from the well-known principles applied by the courts in Judicial Review proceedings which are that it reviews the decision-making process and not the decision itself He submits:

(1) That there was no procedural unfairness relating to the immigration officer's examination or the Review Board hearing.

(2) That if "a plain mistake of fact" is a ground upon which a decision may be flawed, this is limited to mistakes of fact known to or available to the decision-maker at the time of his decision and further that no such mistake is demonstrated in this case.

(3) That no mistake over the application of the proper policy criteria was made nor is it shown that the wrong standard of proof was applied by either tribunal.

(4) That the immigration officer did not wrongly take into account matters relating to the draft or employment in a state-owned rice mill. These were matters for the evaluation of the evidence by the officer.

(5) That the immigration officer's and the Review Board's decisions are not demonstrated to be Wednesbury unreasonable or perverse.

(6) That the immigration officer did follow the statutory procedure in that he made available the notes upon which his decision was in fact made.

(7) That the Director of Immigration had power to detain the applicant pending his removal from Hong Kong once a decision not to permit him to remain as a refugee had been made.

In addition, he makes the general submission that the court must resist, as being outside its proper function, any temptation to evaluate the evidence before the immigration officer or the Board so as to avoid usurping functions which are for them and them alone.

He points out that this case concerns an alien who landed illegally in Hong Kong without travel documents and the screening process is a matter of policy not law. It is submitted that the most the applicant can advance is that he has a legitimate expectation that the policy agreed between the Hong Kong Government and the UNHCR (about which of course, there is no dispute) will be fairly implemented. Therefore, he has only a legitimate expectation that the immigration officer and the Review Board will in the circumstances, fairly consider his application for refugee status in accordance with that agreed policy. What is a fair procedure is to be judged, it is submitted, from all the circumstances. The circumstances to be taken into account are not only the circumstances and nature of the decision itself but also:

(1) The problems created by the number of arrivals and the failure of the resettlement programme.

(2) The fact that the screening arrangements were made with the consent, support and co-operation of the UNHCR.

(3) That the courts distinguish between the exercise of powers to remove those who are unlawfully in Hong Kong and the exercise of powers to refuse entry to Hong Kong.

Then, Mr Thomas submits that even if the applicant can demonstrate some flaw in the decision-making process, the court will only exercise its discretion to grant relief if he can also demonstrate that he has suffered some specific injustice or prejudice and none has been demonstrated here. In any event, he says if the immigration officer's decision is in any way flawed, this is cured by the proceedings before the Review Board.

He emphasizes the nature of the decision-making process and the fundamental nature of the court's approach in that the court must not involve itself in evaluation and assessment of the evidence, and must not be tempted into that evaluation. He points out that the questionnaire is designed to elicit the necessary information upon which that evaluation is made. After considering the credibility of an applicant, the questions which the immigration officer and the Review Board ask themselves (whether in fact a subjective fear of persecution has been shown if the applicant returns, and if he does return whether that fear of persecution is objectively well-founded) are matters which can only be decided by the tribunals themselves. See R v. Home Secretary ex-p Sivakumaran [1988] A.C. 958.

He further points out that in the decision-making process perfection can never be achieved. It is to be expected that misunderstandings will occur, an estimation has to be made of

"country conditions" and there is room for appreciation and evaluation of the evidence, and even for the exercise of discretion by the officer or the Review Board. He relies heavily upon the words of Lord Wilberforce in R v. Home Secretary ex-p Zamir [1980] A.C. 930 at 947 pointing out that this part of the speech of Lord Wilberforce was not overruled in the following case of R v. Home Secretary ex-p Khawaja [1984] A.C. 74.

Finally he submits that the Ordinance clearly provides that the Board does not have to give reasons for its decision and therefore the court cannot decide that it has to do so and the court's jurisdiction to review the Board's decision is ousted. (See Section 13F(8))

Plain Mistake of Fact

I turn now to consider the possible effect of a plain mistake of fact. Early in the hearing Mr Fung submitted that I should admit a considerable volume of evidence contained in Bundle B of "country conditions" in Vietnam. I rejected these submissions and adjourned the application at his request to allow him to test the point before the Court of Appeal. The appeal was dismissed. The submissions on behalf of each party are summarized in my ruling and the Court of Appeal decision, which are annexed to this judgment as Annexures 2 and 3.

I indicated in the ruling at Page 4 d-f that I would be prepared to hold:

> "that if it is demonstrated that a finding of a tribunal depended upon a material and decisive fact (either physical or mental) which is established unassailably to be erroneous (by agreement or otherwise) and that the true fact was known or available to the tribunal at the time of its decision, then, if there is a real likelihood that the tribunal would have come, or might have come, to a different conclusion if the error had not been made, that decision will be vitiated."

For the purposes of the appeal, this was not challenged but I have heard further submissions as it is alleged that such errors were made by the immigration officer.

It is beyond argument that the information relating to country conditions produced by the respondent's witnesses was available to the immigration officer. This covered all the alleged errors save for the effect of the applicant being called up for military service. The question of admitting fresh evidence on this point arose and I admitted limited evidence on the point from both parties to which I will return in due course.

The submissions related to what facts are to be regarded as "available" to the decision-makers. Is the scope of Judicial Review limited to errors of fact actually known to the immigration officer or then available within his department as submitted by Mr Thomas?

Having heard Mr Fung I do not accept that the court powers are quite so limited. If it is demonstrated that a decision-maker made a material and decisive error of fact, which although not actually known to him or available in his department but was then easily available, generally known

and unquestionably true, so that by inference it must be assumed to have been within the knowledge of the department, then if the other conditions are satisfied, this may be sufficient to show that the decision was flawed. But much depends upon the facts of the case. I would just add this that usually a material or decisive fact will be one which is a condition precedent to jurisdiction; or one which is the only or the primary basis for the decision, or a fact which the tribunal had to take into account in order to reach its decision.

In this I am assisted by the passages to which I made reference in my earlier ruling. In my judgment this is not a new ground for judicial review. It comes well within the established ground of "irrationality". (See C.A. Judgment Annexure 3, Sir Derek Cons V.P. at page 11).

I turn to the evidence.

The Evidence

Not all the evidence in the affidavits admitted before me is admissible. In Annexure 4 to this judgment, there appears a list of affidavits or paragraphs thereof which have been admitted.

After the submissions concerning the allegation of plain error of fact about the effect of the applicant's draft for military service, I specifically ruled that in Stephen Denney's affirmation of 18th April 1990, the formal paragraphs 1 - 4 and paragraph 32 together with Nguyen Dinh To's affirmation dated 28th June 1990 formal paragraphs 1 - 9, and paragraphs 86 and 87 should be admitted. I also admitted evidence from the respondent in reply.

Mr Thomas took no objection to the applicant's affidavit being before the court but makes the point that the parts which deal with detail which was not and is not alleged to have been before either the immigration officer or the Review Board are inadmissible. For his part, Mr Fung makes the same point without going into specific detail concerning matters in the respondent's affidavits which are not relevant to this application. Broadly, I agree with both these submissions and it has not been necessary for me to seek detailed argument as this would be impractical and in the end not material to my decision.

On Mr Fung's application, I ordered that the immigration officer, Mr IP Ka-man should attend for cross-examination and I indicated that I would admit his evidence under cross-examination de bene esse. My ruling on that matter is contained in Annexure 5 to this judgment. Having heard the cross-examination and his evidence, I have no hesitation in ruling his evidence in. Although he cannot and could not be expected to recall the examination or its details, his evidence is of value in resolving the factual disputes. The respondent made no similar application for the attendance of the applicant for cross-examination.

The Issues of Fact

There are a number of factual issues between the applicant and Mr IP Ka-man, the immigration officer, concerning the examination he conducted on 9th August 1989.

Broadly, these concern:

(1) Things the applicant alleges were said but not recorded and things recorded which were not said. The applicant suggests that this was either deliberate or consequent upon the double interpretation and the later transcription of the original note.

(2) The applicant's allegation that the examination was conducted in a hostile manner so that either he failed or was not allowed to say what he wanted to say concerning his experience in Vietnam.

(3) Whether the applicant produced documents for the immigration officer's consideration, and if so how he dealt with them.

These issues are set out in paragraphs 35 - 71 of the applicant's first affidavit.

Mr Fung submits that as there was no application to cross-examine the applicant, his evidence is uncontested. What is more, he says that the applicant had no opportunity to establish his allegations orally. This he contrasts with the immigration officer whose evidence has been challenged on cross-examination and who to this extent has given evidence orally. Therefore, Mr Fung argues the immigration officer's evidence is challenged, the applicant's evidence is unchallenged, and in consequence I must accept the applicant's evidence. I reject this submission. A witness who gives evidence on affidavit is in no better nor in any worse position than a witness who gives evidence orally.

The purpose of cross-examining the immigration officer was to establish the applicant's allegations by destroying the immigration officer's credibility. Cross-examination often has this effect. Sometimes it has the contrary effect. There are situations where it is difficult if not impossible to resolve serious factual issues on affidavit alone but in the end, a judge has to resolve factual issues upon all the evidence available to him in order to determine what he accepts and what he rejects on a balance of probability. To that I will now turn.

The Interview

In determining the issues concerning the interviews, I am greatly assisted not only by the affidavits put in by the applicant and the immigration officer together with the immigration officer's oral evidence, but also by the notes of personal particulars (the bio-data) recorded on 26th July 1989 by the immigration assistant, the immigration officer's note of the interview and to a greater extent by the applicant's statement to the Review Board on his application for a review when

he had the assistance of an AVS lawyer. This was his first opportunity of commenting upon the interview.

The affidavit of the interpreter is of less assistance. Unlike the immigration officer, he can vaguely remember this interview as the only occasion when he worked with this immigration officer, but like the immigration officer he cannot remember the detail. I am also assisted by the general information of "country conditions" and all the documents available to the immigration officer and the Review Board.

I address first the question whether the record of interview is an accurate reproduction of the contemporaneous notes made by the immigration officer. I am satisfied that the bulk of the record is a transcript of these notes although the notes are no longer available. It seems to me that it would be quite impossible for the immigration officer to construct that account and indeed he had no reason so to do. It seems to me that they properly represent the immigration officer's interpretation into English of the interpreter's Cantonese. The use of the third person is consistent with interpretation and the making of a running record without recording every question and every answer. However, I am also satisfied that some parts are summaries of the original notes. For example the summarized answers to the questions on page 10 (which is page 598 of the bundle). I conclude that the notes before me are an accurate but occasionally summarized transcription of the immigration officer's original contemporaneous notes.

I turn to the applicant's allegations that the immigration officer failed to give him a hearing because:

(1) The purpose of the interview was not properly explained.

(2) The immigration officer frequently interrupted him - cut him off in mid-sentence and asked him questions on unrelated subjects so that he was not allowed or discouraged from saying that which he wished to say about his treatment in Vietnam.

(3) The immigration officer failed to record some of his answers.

(4) The immigration officer refused to look at documents he produced save for the pictures.

These general allegations are to be found in paragraphs 35 and 36 of the applicant's first affidavit. The applicant's statement to the Review Board contrasts with this. Save in relation to the documents he makes no such allegations against the immigration officer. He says that he is content to rely upon the facts recorded by the immigration officer but "would like to clarify some inconsistencies".

Leaving aside the issue about the documents, I accept that when the applicant learned the contents of the note, he felt he would have liked to have given further details but I am satisfied

that the absence of the detail was not the consequence of any of the alleged misbehaviour by the immigration officer. Subject to certain matters with which I will deal, the applicant was able to give his account on relevant matters and the account he gave was recorded. If this had not been so, the applicant would have advanced this point early in the application to the Review Board or at least some explanation would have now been given for not having done so. It is proper (even essential) for the immigration officer to seek to limit an asylum seeker's answers to pertinent matters. This was the immigration officer's usual practice, it is a proper practice and no doubt he did so at this interview.

Although the immigration officer was new to the task of interviewing Vietnamese asylum seekers before commencing he attended a training course and additionally he had sat in on other interviews and had studied case files. Further, he had famillarized himself with the guidelines of his department, the UNHCR handbook and information about "country conditions". He inferred that he had earlier experience of interviewing arrivals at the airport but this was certainly only his third case in the Vietnamese Vetting Section. I am satisfied that he followed his practice on this occasion of informing the applicant at the beginning of the interview of its general purpose which was to assess whether or not he was a "political refugee".

His use of this description "political refugee" is challenged as inaccurate. As a definition, it is certainly not adequate but there is no question in my judgment of this colloquial description misleading or prejudicing the applicant in any way. He must have been only too well aware of the purpose of the interview. Also, having been in Hong Kong for just over one year, he cannot have been taken by surprise by the timing of this interview especially after the "bio-data" interview had taken place a few days before.

The immigration officer first checked the bio-data, and where necessary corrected it (See the corrected place of birth on page 1 that is page 586 of the bundle). He then conducted the interview following the questionnaire. Although the form of the questionnaire has since been improved, this questionnaire was designed to elicit from the asylum seeker all information which he could advance to support his claim. It is significant that there has been no criticism of the questionnaire itself provided it is properly and fully used.

There can be no doubt that the double interpretation and the choice of words involved led to some errors and changes of meaning between that which was said in Vietnamese, and that which was eventually recorded in English. Additionally, minor errors may have been made by the applicant in his account and by the immigration officer in his record. These matters may well explain some of the issues, few of which are material to this decision. It is important to note that I deal here with the issues of facts concerning what happened at the interview and not with the immigration officer's evaluation of those facts.

The alleged deficiencies in the immigration officer's note could arise in a number of obvious ways. The applicant's evidence on certain matters could itself have been mistaken or incomplete; the interpreter's version either of question or answer could have been mistaken; his choice of words could have been inappropriate; and the immigration officer's interpretation or choice of words from the Cantonese similarly could have been mistaken or inappropriate; and further he could have erred in transcribing his note. Alternatively, the applicant may have later wished to change what he actually said in order to gain some advantage.

An example it seems to me of obvious error is the recording of the applicant's father's former occupation as a farmer rather than a tailor (or dress maker). This is quite immaterial to the decision but the likelihood is that this error arose because the father now is a farmer in the New Economic Zone. On the other hand, I doubt whether the recording of the word "arable" to describe the land available to the family was an error. It seems to me that the applicant's complaint and therefore his evidence, is not that it was impossible to cultivate the land available, but that the area was too small and it was too poor to provide a livelihood.

The appellant complained that he never said that his mother and four sisters were killed by "stray" bullets but said that they were deliberately shot by the Communists when trying to escape south. In the immigration officer's decision it is of marginal relevance but it illustrates the problem of double interpretation. The word "stray" was the translation at the bio-data interview as well as during the main interview, whereas the translation appearing on the application for review is "during a communist bombardment". This shows that in material matters, it is fundamentally important for the immigration officer to ascertain by eliciting detail or other means that the record is sound.

I am however satisfied that the applicant never said at the interview that he was employed in a "state-owned rice mill". This was recorded as a consequence of an error of interpretation or understanding. I note the immigration officer first checked the bio-data with the applicant. He corrected the applicant's place of birth in his own hand on page 1 (A5 - 586 of the bundle). No similar correction appears in the employment section where the words "self-employed" are recorded at page 5 that is (A5 - 591 of the bundle). The immigration officer gave evidence that he noticed this discrepancy on checking (that is the discrepancy in the bio-data) but did not correct it because the error was obvious from the later note of the interview. This I do not accept. If a discrepancy had been obvious to the officer requiring correction at the time when he checked the bio-data, he would have either corrected the bio-data or at least he would have made some reference to the discrepancy in the later note. Also, it is highly likely that when recording the later inconsistency, not only would he have noted that inconsistency but he would also have asked further questions to resolve it. The applicant raised this matter at the first opportunity in his application for review. (See paragraph 4 A5 - 623).

For the sake of completeness I deal with the issue on the production of documents although I do not consider it material. I resolve this issue in the applicant's favour to a limited extent. Having seen the immigration officer I simply do not accept that he treated the documents with contempt and the applicant with discourtesy. I believe the immigration officer looked at the documents which were handed to him, found (perhaps through the interpreter) that they confirmed that which he was prepared to accept from the applicant and handed them back. He gave evidence that he cannot have seen them because he made no photocopies which was not only the laid down procedure but his practice. A description of this practice does not appear in any of the affidavits nor so far as I know in any of the other documents. If this had been the immigration officer's invariable practice from the beginning it would have appeared in his affidavit. I think the evidence is a later but not dishonest reconstruction. In his submissions to the Review Board the applicant says that he handed the documents to the immigration officer who looked at them and then handed them back to him. I believe and accept this is what happened. As I have said this is not relevant to my decision and nor did it affect the immigration officer's decision either.

The note indicates that the family moved to the NEZ voluntarily but this is not entirely consistent with other passages.

The following statements appear:

(1) In 1986 his (the father's) family was asked to move to the NEZ.

(2) Their farmhouse was confiscated for government usage.

(3) The whole village was moved to the NEZ because they had all served in the South Vietnamese army in the past.

(4) Only those who were voluntarily moved into the NEZ were exempted from conscriptive labour. Mr Do and his siblings did not need to work unpaid labour for the government.

I accept that these statements were made through the interpreter but on the record there is an inherent unresolved inconsistency bearing in mind the problems to which I have adverted.

There is however no such inconsistency on the record about forced labour. It is clearly stated that the father had to do "conscriptive labour" together with all who previously served in the South Vietnamese army but that the applicant and his sibling were not subjected to forced labour. I am satisfied that this is what was said through the interpreter. If the immigration officer had been under the impression that the applicant had been subjected to forced labour he would certainly have asked further questions as to its nature. The probabilities are against such a fundamental and circumstantial error for which the applicant contends.

Similarly, I am unable to accept that the applicant's contention that he explained to the immigration officer that he was deprived of schooling at the NEZ after the 9th grade because of his

"bad background". The circumstantial detail of the account recorded is such that I accept that the record contains the gist of the account which the applicant gave.

Further, if the applicant had said that he was deprived of schooling because of his "bad background", this is such a relevant matter to the immigration officer's enquiry that I am sure it would have been both interpreted and recorded.

In other respects, the note contains little detail of the conditions in the NEZ. Obviously the immigration officer did not investigate "forced labour" any further once told that the applicant did none. However the note does show a surprising lack of detail about the applicant's departure from the NEZ - concerning the question whether or not he was allowed to leave voluntarily and his life after leaving the NEZ and before leaving Vietnam. This is covered by the one sentence "after then, he was working as a husk-rice worker in a state-owned rice mill until his departure from Vietnam."

The Immigration Officer's Decision

There is no dispute that the applicant along with all other arrivals at this time had a legitimate expectation that the agreed and declared policy would be fairly implemented and that the decision would be made as to his status on its merits and in accordance with the criteria. The decision making process is challenged on a number of detailed grounds with which I will now deal.

The Destruction of the Immigration Officer's Contemporary Notes of Interview

In his affidavit of 7th September 1990 (in Nguyen Ho's case but relating to this applicant as well) the immigration officer at paragraph 19 says:

> "During the interview I take down answers of the Vietnamese boat person in English on loose leaf paper which are transcribed onto the questionnaire by me at the office afterwards. All the answers are transcribed on the questionnaire I would keep the original notes for some time and dispose of them later on. On the information put down on the questionnaire I make the decision ..."

By Regulation 7(b) of the regulations:

> "All materials upon which this (the immigration officer's) determination was based, including any questions put to that person and his answers in respect thereof, shall ... be made available ... for inspection .. to the applicant's representative."

Further by Regulation 11(b) the Board is required to consider (inter-alia) this document on the review.

Mr Fung submits that as the immigration officer destroyed this contemporaneous note the Director was unable to comply with Regulation 7(b) to enable the applicant's representative to

prepare for the review and the Review Board were prevented from considering the material upon which the determination was based so Regulation 11 was not complied with. Further he submits that as the regulations were not complied with the review board is deprived of its jurisdiction and the decision is a nullity.

The completed questionnaire and the notes with it were provided in purported pursuance of Regulation 7 and the Board considered the document in purported pursuance of Regulation 11. Mr Fung's submission is limited on this point to the destruction of the contemporaneous notes on the basis that these were the "material" on which the determination was based and not the questionnaire. I cannot accept these submissions. As I have already said save for occasionally summarized entries such as "he gave negative answers" the questionnaire is an accurate transcript of the contemporaneous notes. The questionnaire contains the material upon which the determination of the immigration officer was based. I accept the immigration officer's evidence on the point and in my judgment there was no breach of the regulations on the basis contended for.

For clarity I would add that these provisions in the regulations are procedural and not substantive so a technical breach would not necessarily vitiate the proceedings either of the immigration officer or the Review Board.

However, it would at least be wise to preserve all the contemporary notes of interview whether or not they are transcribed onto a questionnaire later. This I believe would avoid any suggestion that the transcription was at fault and would be available for inspection if required. It is to be noted that in the record of the Seminar Para. 13(v) page 217 there appears the words "under no circumstances should any records of interview be eliminated." I agree with and endorse that advice.

Was the applicant given a fair hearing before the immigration officer?

The contantion is that the procedure followed by the immigration officer was unfair whereas he had a legitimate expectation that his case would be considered fairly and on the merits. There is however no universal standard of fairness or "fair procedure". If no procedure is prescribed for a decision affecting a person the courts will imply such safeguards as are necessary to achieve fairness in all the circumstances. This principle is well established. Lord Bridge expressed it in Llovd v. McMahon [1987] A.C. 625, 702H - 703A when he said:

> " ... the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operatos. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts

> will not only require the procedure prescribed by the statute to be followed. but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

In this case, the circumstances to be taken into account include the importance of the decision to the asylum seeker and its possible effects; the nature of the decision itself; the framework of statute and policy within which the decision is taken; the immigration officer as the decision-maker or the review board in its case; the assistance with which they are provided by way of information about "country conditions" and training; the manner in which the screening process was established - by consultation and agreement with and the assistance of, the UNHCR; the procedure which was in fact adopted (for example, the use of the questionnaire); the provision of a system of review; and the nature of the problem which the screening procedure was designed to resolve.

On these matters, I have had heard detailed submissions. Mr Thomas submits that one of the circumstances to be taken into account is that the courts distinguish between the exercise of a power to remove a person lawfully within the jurisdiction and the exercise of an immigration officer's power to refuse a person to remain. He cites in support R v. Home Secretary, Ex-p Khawaja [1984] 1 A.C. 74, 122-124 per Lord Bridge, 126-8 per Lord Templeman and 114D per Lord Scarman. Whereas I accept that the nature of the decision and its likely effect must be taken into account, the distinction drawn in Khawaja's case is between decisions on the facts which are purely within the province of the immigration officer and a jurisdictional fact which the court itself will decide. Here the decisions are firmly within the immigration officer's province.

Mr Thomas further submits that I ought to take into account the resources available or made available for dealing with the problem. I have no satisfactory means of considering this objectively but as the procedure was established by the Hong Kong Government it seems to me that it is the duty of those who establish the procedure to establish one which is objectively fair in all the circumstances.

However, it is right to give some consideration to the problem and its magnitude for it would benefit little an asylum seeker if he were detained for years awaiting a decision which is then taken following the fairest procedure which man could devise. It is, of course, not the duty of either the decision-maker or those who institute the procedure to establish or to seek to establish one which is the fairest that can be devised. A procedure which is fair in all the circumstances is what is required and that will also be a procedure which is practical.

It follows from this that what has been decided to be a necessary feature of a fair procedure in other jurisdictions and in other circumstances even in asylum cases where the same

criteria are applied are not necessarily applicable here and I do not find myself greatly assisted by many of those decisions. The circumstances of the present case are paramount.

Also, the applicant's contentions overlap. One provision may cure what otherwise would be a defect. The procedure which was in fact followed during the decision making must be considered in the round.

Omissions before the Examination

I deal with the applicant's contention that the immigration officer's decision was unfair because of prior omissions. He submits that the applicant was not given adequate notice to prepare for the interview, that he ought to have been given counselling or at least information about the criteria upon which his refugee status would be accessed, that he ought to have been given copies of all documents held by the immigration department; that he ought to have been informed of the nature of the examination and its purpose and ought to have been given the questionnaire to consider.

The applicant waited over a year for his first interview which took place on 26th July 1989 when his personal details (the bio-data) were recorded. There is no evidence of the length of notice given to him before this interview. I assume in his favour that he was simply called in for the interview. The second interview took place 15 days later and he was informed on the day before that it would take place. He must have realized from his experience in the camp that once the personal particulars had been taken the main interview would soon follow.

It is axiomatic that if there is a hearing sufficient notice to attend must be given; that if allegations are made against the person he must be informed of their nature; and if he himself has to present a case he must be given sufficient time for preparation and to gather his thoughts.

So far as the bio-data interview was concerned no preparation for this was required and in any event it was all checked and where necessary corrected in the second interview.

Having been in detention awaiting interview for over one year and having had the bio-data interview and having received one day's notice for the main interview I do not accept that the applicant had no reasonable time to gather his thoughts and prepare what he wanted to say or do at the interview. Indeed it is evident from his own account that he had prepared himself to the extent of getting together relevant documents and taking them with him to the interview. No allegations were advanced against him so he did not need time to rebut or prepare a case in those circumstances. He was not given any counselling or direct information about the criteria but clearly he must have known of the general nature of the inquiry from the documents which he took himself and from his general experience in the camp. Indeed the documents he produced not only show this but his year's sojourn in detention awaiting the screening process with others in the same position must have at least sparked some inquiry.

Much more importantly, the questionnaire upon which the interview is based is specifically designed to elicit from the asylum seeker all available evidence which may assist his claim. Further, the immigration officer is trained and instructed to ensure that the applicant presents his case as fully as possible, to conduct the interview in a non-adversarial manner and to encourage the interviewee to answer fully and freely all inquiries. Where necessary the immigration officers were encouraged by their training to seek detail from the applicant (see the seminar notes).

In all these circumstances, I do not accept that this part of the procedure adopted was unfair because of the prior omissions alleged. It was designed to fairly and reasonably elicit from the asylum seeker all evidence and information which would be relevant to the inquiry and that I believe was done in this case.

Did the immigration officer conduct the interview fairly?

The applicant's contentions on this were usefully and accurately summarized by Mr Thomas as follows:

(1) That the interview was superficial, perfunctory and rushed.

(2) That the immigration officer indicated bias or predisposition to reject the claim.

(3) That he did not consider the documents proffered by the applicant which would have had a material effect on the decision.

(4) That the immigration officer did not properly or accurately record the applicant's statements.

I have already decided some of the issues of fact upon which these contentions are based. Suffice it to say that I reject the allegation of bias or predisposition to reject the claim; I accept the documents were produced but I reject the contention that these would have had any effect on the decision because the facts contained therein were accepted. As to the recording of the applicant's statements I accept that this was done in good faith but that errors were made.

As to the allegation that the interview was superficial, perfunctory and rushed, I would not describe the interview in those terms and to that axtent I reject the allegation. But as I have indicated there is a lack of evidence and detail in the note about the reasons for the applicant leaving the NEZ and his activities between that time and his departure from Vietnam. As it happens, the only information recorded about this period is totally erroneous. I conclude that the reasons for these omissions are either the immigration officer's then lack of experience in conducting interviews or more likely the effect on his mind of the error relating to state employment. I will return to consider the effect and materiality of these errors and omissions.

<u>Did the examination conclude fairly?</u>

The applicant contends that fairness requires:

(1) That the note of interview should be read back to the applicant as a check upon its accuracy and completeness (i.e. the note which has now been destroyed).

(2) That the record (now available) ought to have been read back or made available to the applicant after it had been compiled from the notes for him to check, and

(3) The immigration officer's provisional conclusions ought to have been put to the applicant at an interview for his comment.

I have already dealt at some length with the obvious problems which arise from double interpretation. It goes without saying that double interpretation ought to be avoided where possible, but having regard to the scale of the problem faced in the screening process I am quite satisfied that this double interpretation cannot be avoided in any practical way. It is and should be regarded as an unusual feature of the process, regrettable, unavoidable but nevertheless of considerable importance in this inquiry. Anyone who has had experience of double interpretation must be well aware of the difficulties and problems which it creates.

Having regard to the risks of error and misunderstanding and the importance of the record in the decision making process and the likely effect of the decision I have no doubt that fairness requires that the contemporaneous note of the interview should be read back again through interpretation to the asylum seeker at the end of the interview, or during it, in order to check a) its accuracy, and b) its completeness. This would give the opportunity to check the correctness of the note and also it would give the opportunity to add anything with which on second thoughts the applicant may wish to deal. Further, it would give the immigration officer the opportunity to ask supplemental questions if he considers further details may be of value to his enquiry or fair to the applicant.

Had this been done in this case there is a real likelihood that the error about his employment in a state-owned rice mill would have been corrected and that further details about his departure from the NEZ and his situation between leaving the NEZ and Vietnam would have been obtained.

Also, there is a real likelihood (not certainty) that the apparent inconsistencies in the record would have been resolved. In particular, it may well have become clear whether the applicant really said at the interview that the family's move to the NEZ was voluntary and more information about the conditions there may have been elicited. See R v. Secretary of State for Home Department Ex p. Thirukumar [1989] Imm A.R. 270, 282 per Parker L.J.

> "I conclude by saying that we are informed that it is now the practice for an applicant seeking asylum to have each page of the questionnaire read over to him

> and then signed by him as correct. This is, in my view, very desirable for it will thereafter avoid disputes as to what was and what was not said by the applicant."

Whereas I do not share the learned Lord Justice's confidence that future disputes would be avoided in this way by the signing of each page by the applicant after double interpretation because that would be of little value, a note by him in his own hand that this had been done would be helpful and perhaps disputes would be reduced. I wholeheartedly accept the principal underlying this statement of Parker L.J. although it was obiter and therefore not dealt with in the Court of Appeal in the same case - reported [1989] Imm A.R. 402.

The importance of checking this note is increased when one looks at the whole procedure in the round. It is at this stage that the fact the applicant had received no counselling becomes relevant. Although he could give a perfectly satisfactory and full account of his own experiences, his fears and the conditions in Vietnam as he saw them, it is in the nature of the proceedings that he will only get a fair deal if the immigration officer is careful to sympathetically elicit full information and to ensure (as far as he is able) that the information he receives and records and upon which his decision is based, is both full and accurate.

As a general rule, I do not think that fairness requires the immigration officer to put his provisional conclusions to the asylum seeker. Of course, in borderline or difficult cases, he may wish on second thoughts to try to elicit further information and if he is inclined to disbelieve the asylum seeker on a particular and material matter, he may wish to enquire from him whether there is any way in which he can add to his account or possibly support his account with other evidence. But all this depends upon initial checking of the note as an accurate and full account.

The Immigration Officer's Reasons

These reasons are challenged as defective. There is no dispute that the immigration officer was obliged to give reasons and that those reasons had to deal with the substantial issues before him and had to be proper, adequate and intelligible see Westminster Council v. Great Portland Estates plc [1985] A.C. 661, 673D-E per Lord Scarman approving in re Poyser and Mills' Arbitration [1964] 2 Q.B. 467, 478 per Megaw J. (as he then was).

I summarize the immigration officer's reasons.

The applicant did not establish a well founded fear of persecution within the 1951 Convention and the 1967 Protocol and was therefore refused permission to remain in Hong Kong on the following grounds - which I paraphrase:

(1) That although the applicant's father was persecuted when he was sent to re-education between 1976 and 1981 because he had served in the South Vietnamese army, this persecution ceased when he was able to join his family

in the NEZ as arable land was allotted for them and he was able to start a new life there.

(2) His and the family's move to the NEZ was the consequence of government policy to develop and redistribute land and they were not restricted in developing the land for cultivation.

(3) Although Do's father had to do some conscriptive labour, this was not persecution as he only worked for three days per month and it was in the common interest. Further, he was not singled out for discrimination as there were a lot of other workers working with him and he was still able to earn a living by his cultivation.

(4) That although Mr Do's father suffered discrimination to a certain extent and this may have troubled the family, it was not intolerable.

(5) The applicant was not himself ill-treated and therefore was not himself persecuted and it is noted that all Mr Do's siblings were able to maintain a standard of living.

(6) Finally, that in spite of the family background (that is the father's and possibly the brother's service in the South Vietnamese army) the family was not a target for persecution (and therefore there was no well-founded fear of persecution) because:

a) He had been called up for military service and;

b) He had been given employment in a state-owned factory.

When considering these reasons it is necessary for the court to remind itself once more not to usurp the function of the immigration officer. It is for him and him alone to evaluate the evidence.

The immigration officer knew from the information about "country conditions" available to him that NEZs fell broadly into two categories. The first being a "benign" variety where people were asked to go in order to develop and redistribute land which had either previously been cultivated or was cultivable and where people could genuinely seek to start a new life. The second being basically punitive colonies part of the purpose of which was to persecute those who were perceived as enemies of the state and their families, often situated in mountainous territory where the land was poor and the conditions seriously life threatening. The occupants were not allowed to leave the latter category and if they did, they were deprived of the advantages of household registration.

Clearly, the immigration officer's evaluation of the evidence he heard and recorded was that the family moved to the NEZ voluntarily and that it was of the "benign" variety where the

family could genuinely make a living and the father could start a new life after his re-education. This was an important matter. If this was an appeal or a rehearing it would be vulnerable but I cannot conclude on the information the immigration officer received and recorded that his decision was perverse or unreasonable in the Wednesbury sense. Nor was there any plain mistake of fact in this evaluation such as could render the decision on this basis flawed.

The immigration officer's decision that the father's conscriptive labour was not persecution is less easy. Especially as it appears from the note and the reasons that only those sent to the NEZ involuntarily and who had served in the South Vietnamese army were required to do this labour. Mild persecution remains persecution. The immigration officer also concluded that the work was for the common good but I cannot think that this was decisive.

In the end, it is difficult to demonstrate that this matter renders the decision unreasonable. On the assumption that the immigration officer wrongly described the father's treatment as not persecution it was open to him to take into account that there were a number of others there working together and that the work required was light because the issue was not whether the father was persecuted but whether the applicant had a well-founded fear of persecution. The nature of the treatment of the father is therefore relevant however it is described. It would be difficult if not impossible to conclude that there was any likelihood if this point stood alone that the decision would have been different for the matter has to be considered as a whole.

On the evidence in the record the applicant himself did not actually suffer persecution if it is accepted that he did no forced labour. There was no evidence of him being deprived of household registration and the NEZ to which he went with his family was found to be of the "benign" variety. However, it is clear from the immigration officer's final reasoning that he accepts that the applicant - as the son of a South Vietnamese soldier who had been to re-education for many years - was a potential target for persecution as a member of a "bad family" which he describes as a "vice element". It seems to me that the nub of his decision was founded upon his view that anyone who was called up for military service could not be a target and further - as complete confirmation of this - anyone who had been given employment in a state-owned enterprise was not in fact a target for persecution and could not regard himself as being such. So this point was relevant to the immigration officer's decision on both subjective and objective aspects of the fear of persecution and whether it was well founded.

Conclusion on the Immigration Officer's Decision

I now turn to the heart of the matter relating to the immigration officer's decision. In law there is no technical procedural irregularity or breach of natural justice. Actual injustice or a real risk of it must be shown. Although not in a judicial review Cumming Bruce L.J. succinctly stated the principle in George v. Secretary of State [1979] P.C.R. 609 at 621:

> "... I do not for a moment accept that, on the authorities, there is any ground for the view that there is such a concept known to the law as a technical breach of natural justice. "A breach of natural justice" means that because of what has happened ..... either somebody has actually suffered injustice, or there is a real risk that somebody has suffered injustice."

Of course, some irregularities are so fundamental that injustice can easily be inferred. There are many illustrations. Here, the failure to read back the note did involve a real risk of injustice, if not actual injustice because it is probable that:

(1) The error about state employment would have been corrected.

(2) Clarification of the inconsistencies in the note would have been elicited especially about the possible voluntary nature of the NEZ and the applicant's departure from it.

(3) Further details would have been disclosed about the period between him leaving the NEZ and departing from Vietnam.

I am also of the opinion that the immigration officer's understanding that the applicant had obtained state employment was a most material factor in his decision. The reasons show that he regarded this (inter-alia) as being important if not conclusive that the applicant could not have had a well founded fear of persecution.

Also, the immigration officer's understanding about employment probably coloured his thinking during the interview to the extent that he did not seek further details about the departure from the NEZ and the period thereafter because it would be unnecessary for his determination. If the employment point had been rectified he would undoubtedly have gone into this in detail.

In all these circumstances, I have no doubt that the failure to read the note back was more than a "technical" irregularity. It was one which led to a real risk of injustice in that there was a real risk that it affected the decision.

That is not to say however that it actually would have done so. I mention before leaving it that other parts of the record are against the applicant's case. His reasons for leaving Vietnam is one example. In making my decision I have that well in mind.

I also find as part of my decision, that having taken into account and relied upon in a most material manner that the applicant said in the interview that he had state-employment when on my finding he said no such thing, this renders the decision unreasonable in the Wednesbury sense. That matter was taken into account by the immigration officer when he should not have done so.

I am satisfied that but for the effect of the review to the RSRB (with which I will deal) the immigration officer's decision was flawed on the grounds of procedural irregularity, (a breach of

natural justice) and unreasonableness and subject to the effect of the review the decision must be quashed.

Now having determined that matter, it is unnecessary for me to deal with other submissions about the immigration officer's decision but should I be wrong I will indicate what my decision would have been about certain other matters.

I turn to the alleged plain mistake of fact concerning military service. There is no dispute that the applicant told the immigration officer that he been called up for military service. There is an issue whether a bribe was paid to avoid it but this is not material. The applicant's contention is that in assuming that no one who was a "target" for persecution would be called up, the immigration officer made a plain mistake of fact which was material to and flaws the decision on the basis which I have indicated. The foundation for the immigration officer's view seems to be in the notes of the seminar held on 18th March 1989 which would be available to him. Paragraph 2.2(i) - at page 2118 - reads:

> "Military Services"
>
> 2.2(i) As far as information gathered, the ethnic Chinese and the offspring of the former South Vietnamese servicemen were not allowed to serve in the army probably for reason of their doubtful integrity."

I have admitted evidence from the applicant so that I can consider the point. This indicates that after 1979 targeted persons were no longer exempt from military service. However having admitted the evidence, I am satisfied that there is no plain mistake of fact here made by the immigration officer upon information available to him (in the way I have considered) of such materiality that flaws this decision. Also, this is not a plain and unassailable mistake of fact. It is not of such a nature and so well known that I am prepared to infer that it must have been available to the immigration officer.

The point was material to the decision, but even subjecting this decision-making process to rigorous examination the evaluation of the evidence on this point is in my judgment within the province of the immigration officer. Were the court to strike down the decision on this basis, it would be in serious danger of substituting its own evaluation of this matter for that of the immigration officer.

Again, it is likely that the immigration officer would have asked for more detail about the call-up had the error about employment been resolved.

The Standard of Proof

In any event, the applicant contends that the immigration officer and the RSRB failed to apply the proper criteria to his case because he applied the wrong standard of proof.

The standard required of an asylum seeker to establish his case is that there must be demonstrated a reasonable degree of likelihood that he will be persecuted for a convention reason if he is returned to his own country (See Lord Keith in R v. Secretary of State for Home Affairs ex-p Sivakumaran [1988] A.C. 958 at 994F.

In the guidelines "realistic likelihood" is the suggested test. The applicant submits that the immigration officer and the Board adopted a different test in that they were looking for severe personal experience of persecution and that is not necessary. Both the Board and the immigration officer accepted that neither the applicant nor his siblings had been persecuted. This factor was part of their evaluation of the case on the evidence. Undoubtedly, the nature of experience is a relevant factor. If a person has in fact suffered persecution this will often increase the likelihood that subjectively he fears persecution and that objectively his fear is well founded. If he has not suffered such persecution, he must rely on other factors. In the guidance notes, it is suggested (inter-alia) that "the assessment officer should determine whether persecution has taken place or is realistically likely to occur."

I do not accept that reference to this relevant factor indicates that the wrong standard of proof was being applied in the evaluation of the evidence. In any event it is not material to my decision.

Are these defects cured by the RSRB review?

The applicant requested a review of the immigration officer's decision. It was considered with his further evidence and submissions on 10th October 1989 and rejected on 13th October 1989. Significantly no record is made in either the aide memoire (page 661 and 662) or the record of proceedings (page 663) of the applicant's challenge to the evidence that he worked in a state-owned factory. This remained a material matter on which the Review Board's decision must have been based. At page 661 there appears the sentence

> "V.B.P. 1 (who is the applicant) ..resumed schooling 1980, quitted in 1984 at M4 for lack of interest drafted for military service, exempted through bribery, worked as a husk rice worker in a state-owned rice mill until he left Vietnam."

In the comments in the aide memoire, there appear the words "and the applicant could work in a state-owned factory". In the record of proceedings, the last sentence of the body of the record reads:

> "The principle applicant (that is this applicant) worked in a state-owned factory and was able to lead a normal life."

Nowhere in any record of proceedings does the issue which was then extant between the immigration officer and the applicant as to his employment appear.

Mr Thomas submits that even if the immigration officer's (and therefore the senior immigration officer's) decision is flawed the court should exercise its discretion not to allow relief because those flaws are cured by the Review Board on its review.

In unusual circumstances, I am satisfied that in deciding whether or not to quash a flawed decision the court will take into account the nature of any appellate-type hearing in order to decide whether that flaw has been cured. See Calvin v. Carr [1980] A.C. 574 - an application of the principle not in judicial review but in a contractual context.

A clear example would be if the lower tribunal made an error of law which was later completely rectified on appeal. In judicial review however, the court will examine the circumstances of any appeal and will ascertain whether in fact any flaw demonstrated was remedied. See Lloyd v. Mcmahon (supra) at page 79G per Lord Bridge - again not a judicial review case but the reasoning is helpful.

If an appeal has in fact cured a flaw then the court will consider the matter and exercise its discretion whether or not to grant relief in all the circumstances. I agree with Cooke J. (as he then was) when he said in Reid v. Rowley [1977] 2 N.Z.L.R. 472 at 484 Line 10-16:

> "As I see it the general principle is simply that, in the absence of provision clearly to the contrary, the court always retains jurisdiction to redress a breach of natural justice by a domestic or administrative tribunal but the exercise of a right of domestic or administrative appeal may tell against the grant of a discretionary remedy - the extent, if any, to which it does so depending on all the circumstances."

I turn to examine the circumstances relating to the Review Board's hearing. I have decided here that the applicant did not get a fair hearing - that is before the immigration officer - as a consequence of which one and perhaps more serious errors were made. These are matters which could be rectified by the Review Board. Here, the appellant was able to bring to the notice of the Review Board errors which he complained had been made by the immigration officer. He did so. His statement and the submissions of the AVS lawyer on his behalf were considered or ought to have been considered.

Undoubtedly the powers of the Review Board give it a right of review at which complaints can be made, new evidence can be given and the matter can be considered completely de novo - by that I mean that the hearing is not limited or need not be limited simply to the evidence before the immigration officer. An entirely new case could be presented on both sides.

However, although the review can be said to be an independent consideration of the case, it cannot be said in this case that it reached the same results after a full rehearing and that neither its procedure in dealing with the matter on paper nor its decision had been influenced by the immigration officer's decision.

Indeed, the record of proceedings suggests that the immigration officer's flawed decision substantially influenced the Board. This is a matter upon which I have already touched and I will further consider when dealing with the submission that the court's jurisdiction to review the Review Board's decision is ousted by the Ordinance. I do not rehearse the points here but they are relevant.

Further, the applicant himself ought not to have been placed at the disadvantage of seeking to correct, in a written statement, something which on my finding he never said to the immigration officer and which influenced both his decision and the decision of the Review Board. The record of proceedings before the Review Board shows that this error was never corrected and became part of the Review Board's decision. Indeed the issue of fact was either never appreciated or was never considered.

I reject the respondent's submission that I ought to exercise my discretion not to allow relief on the basis that flaws in the immigration officer's decision were cured by the Review Board review. They were not so cured. Relevant to this consideration are some points with which I will deal when considering the ouster clause - to which I now turn.

The Ouster Clause

Section 13F(6) reads:

"A decision of the Board shall not be subject to review or appeal in any court."

Mr Thomas argues that the effect of this section is that court has no jurisdiction to review the Board's decision in this particular case and that the decision must stand.

He submits that the word "review" in the ordinance is appropriate to cover judicial review. This I accept.

Further, he submits that the section protects the decision of the Board from review by the court unless its decision is a "nullity" by reason jurisdictional error of this I believe there is no doubt and I also accept this submission. See Insomniac v. Foreign Compensation Commission [1969] 2 A.C. 147 where Lord Reid expresses the majority decision in his speech at page 171B - E.

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases, the word jurisdiction has been used in a very wide sense and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question.
>
> There are many cases where although the tribunal had jurisdiction to enter the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in

> the course of the inquiry to comply with the requirements of natural justice. It may in perfect in good faith have misconstrued the provisions giving it power to act so that if it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which under the provision setting it up it had no right to take into account. I do not intend this list to be exhaustive but if it decides a question remitted to it for decision without committing any of these errors, it is as much entitled to decide that question wrongly as it is to decide it rightly."

An identical provision to that in the instant case was considered in the Attorney General v. Ryan [1980] A.C. 719. A decision which preceded the enactment of the Hong Kong Ordinance. This decision applied the principle in Anisminic. Lord Diplock gave the judgment of the Board and at page 730C - F he said:

> "It is by now well-established law that to come within the prohibition of appeal or review by an ouster clause of this type, the decision must be one which the decision making authority, under this act the minister, had jurisdiction to make. If in purporting to make it he had gone outside his jurisdiction it is ultra-vires and not a "decision" under the act. The supreme Court, in the exercise of its supervisory jurisdiction over inferior tribunals, which include executive authorities exercising quasi-judicial powers may, in appropriate proceedings either set it aside or declare it a nullity: (Anisminic Ltd). It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. As Lord Selborne said as long ago as 1885 in Spackman v. Plumstead District Board of Works [1885] 10 App. Cas. 229, 240, "there would be no decision within the meaning of the statute if there were anything done contrary to the essence of justice." See also Ridge v. Baldwin."

In South-East Asia Fire Bricks [1981] A.C. 363 a wider ouster clause was considered and found to exclude the court's jurisdiction despite an error of law made within its jurisdiction. A fortiori argues Mr Thomas the court cannot review a decision for error of fact within its jurisdiction and that is an end of the matter because the Board in this case had jurisdiction to enter upon a review of the immigration officer's decision.

The question for my consideration is whether the Board's decision (right or wrong) was made within its field of inquiry or jurisdiction so that it is protected from review by this court or whether the decision is properly to be held to be a nullity so as not to be a decision at all within the Review Board's jurisdiction.

The decision of the Board is attacked in a number of ways and its convenient to deal with those submissions at this stage.

It is said that the Board ought to have given reasons and that they did not. They simply expressed conclusions. I am unimpressed by this submission. The Ordinance specifically provides that the Review Board need not assign any reasons for its decision and that is fatal to this argument.

I do however accept the associated submission that (apart from the effect of an ouster decision) the right not to give reasons does not protect an inferior decision-maker from review. In this case, for example, although reasons do not have to be given or assigned, there is a record of the proceedings and this record can certainly be considered.

It is then said that the Board ought to have exercised its powers under Regulation 10 to hear the immigration officer and the applicant orally, because the issue of fact between them could only properly be resolved in this way. It is necessary to look at the issues raised in the application for review in order to approach this problem. From the way they are expressed in the applicant's submissions to the Review Board I am not able to say that an oral hearing was absolutely necessary in order to ensure a fair hearing. The procedure the Board adopts is set out in the regulations and is within its own discretion. The weight to be given to matters raised is within its own jurisdiction to decide right or wrong but that is not to say that there are no circumstances in which an oral hearing will be necessary to ensure that an applicant has a fair deal. I do not propose to consider this point further having regard to the decision which I am about to make.

Similarly, on the same point it is not open to the court to review the Review Board's decision on its evaluation of matters before it provided that it is not unreasonable, perverse or unlawful. Many criticisms have been advanced about the Board's evaluation of the evidence and they are summarized in the grounds relied upon.

The applicant also contends that the Board's decision was a nullity because under Regulation 11 copies of the documents required under Regulation 7 were not available to it. I have already dealt with this matter and I reject the submission.

Two matters stand out in the record of proceedings and the "aide memoire" or summary of the Review Board:

(1) There is no mention or record in the "Record of Proceedings" or the "Summary" of the challenge to the evidence that he worked in a state-owned factory.

(2) That Dr. Wai's recommendation (accepted by Mrs. CHAN) to confirm the decision was on a similar basis to that of the immigration officer which was broadly:

(a) that the father of the applicant was persecuted

(b) that the applicant was not

(c) that he worked in a state-owned factory and was able to lead a normal life, and

(d) that he was an economic migrant.

Whereas the issue about conditions in the NEZ was considered by the Board and must have been resolved adversely to the applicant from the statement, "... they could lead a normal life in the NEZ with farmland allocated for development".

The issue concerning "state employment" was not appreciated or was completely overlooked and ignored. This was taken into account as an undisputed fact which was part of the applicant's evidence to the immigration officer. When considering the immigration officer's decision I have adverted to the importance of this error. The effect is that in making its decision the Review Board relied upon evidence which had never been given to the immigration officer. The applicant was placed in the position of seeking to correct this error in his written submission to the Review Board. His efforts failed. His evidence on the point was overlooked. He remained unheard on the point and evidence he had never given was accorded weight.

The results of the procedural irregularity or unfairness in the immigration officer's decision were repeated and continued through the Review Board hearing. On this matter, the Review Board failed to comply with the requirements of natural justice. It failed to take into account that which it was required to consider and based its decision on evidence never given which it had no right to take into account.

I am satisfied that these flaws are of such a nature that the Review Board's decision is a nullity so that Clause 13F(6) does not oust the court's jurisdiction to review that decision. It should be quashed as a nullity.

The Conclusion

Having reached this decision that the Review Board's decision is a nullity and should be quashed, it follows from my earlier ruling upon the immigration officer's decision that it also must be quashed. These decisions are quashed as decisions made in breach of the rules of natural justice, or put more simply, they are quashed because the applicant never received a fair deal in all the circumstances. It follows that the senior immigration officer's decision also must be quashed.

There is one final submission with which I must deal. Is the Applicant's Detention under Section 13D(1) Lawful?

Although at one time it appeared that the applicant's submissions were wider, in the end they were limited to a challenge to the legality of his detention pending removal from Hong Kong after the decision to refuse him permission to remain as a refugee had been made. Specifically, this related to the order of the Director of Immigration under Section 13D(1) dated 6th September 1989 and the order of the Review Board that he should continue to be so detained after its decision.

In summary, the argument is that the power to detain pending removal from Hong Kong under the section is limited to the detention of those who are not in law and in fact "refugees"; that the decisions of the immigration officer and the Review Board on this were wrong; that the applicant is a refugee in accordance with the criteria; and therefore the Director of Immigration had no power to detain under this section and the Review Board had no power to continue the detention.

It follows, it is submitted, that the court itself will enquire into and decide whether or not the applicant is a refugee in order to decide whether or not the power was properly exercised because on a proper construction of the section this fact is a condition precedent to the exercise of the power which seriously affects liberty and even life.

Section 13D gives the Director of Immigration two separate powers of detention in respect of a resident or former resident of Vietnam:

(1) To detain pending a decision to grant or refuse him permission to remain in Hong Kong as a refugee, OR (emphasis added)

(2) To detain pending his removal from Hong Kong after a decision to refuse him permission to remain in Hong Kong.

For completeness, if a decision by an immigration officer is made granting him permission to remain as a refugee, a power to detain arises under Section 13A. But I can leave that as being irrelevant to my further consideration.

As I have indicated earlier, a "Vietnamese Refugee" is defined by Section 2 of the Ordinance as "a person who is permitted to remain in Hong Kong as a refugee ..."

Any provision giving a power of detention must be strictly construed. Such powers may only be exercised strictly in accordance with the section. The power to detain pending removal from Hong Kong can be exercised after a decision refusing permission to remain in Hong Kong has been made. The condition precedent or fact which triggers the power is the decision to refuse permission to remain in Hong Kong not the decision as to refugee status. On this, the section is unambiguous. That decision having been taken in this case, the power to detain was lawfully exercised by the Director of Immigration. The decision itself remains lawful and effective until quashed and even if the Review Board's decision was outside its jurisdiction and void rather than voidable, the Director of Immigration's order for detention remains unaffected.

Consequently, my ruling is that the applicant's detention pending removal from Hong Kong was lawful.

[After time for consideration Counsel for the applicant did not pursue his application for a declaration that the applicant is a refugee.]

J.B. Mortimer
Judge of the High Court

Mr Daniel Fung, Q.C., Mr G.J.X. McCoy & Mr Michael Darwyne (Robin Bridge & John Liu) assigned by D.L.A. for all Applicants.

Mr Michael Thomas, Q.C., & Mr Bernard Whaley (Attorney Ceneral's Chambers) for Respondents

Annexure 1

Statement of an Understanding reached
between the Hong Kong Government and
UNHCR concerning the Treatment of Asylum Seekers
arriving from Vietnam in Hong Kong

1 The Hong Kong Government reaffirms that, notwithstanding the heavy burden placed upon the Territory by the sudden influx of people from Vietnam, all refugees will be treated according to established international standards and will have access to resettlement. It further reaffirms its undertaking that the determination of refugee status will be in accordance with the 1951 Convention and 1967 Protocol relating to the status of refugees and UNHCR guidelines. It further reaffirms its commitment to treat those asylum seekers determined by this procedure not to be refugees in a humane and dignified manner pending their safe repatriation to Vietnam. The

Hong Kong Government will make every effort to ensure that satisfactory conditions of accommodation are provided for all Vietnamese as and when resources allow.

2 The UNHCR, while expressing its understanding of the administrative difficulties faced by the Hong Kong Government, declares its concern for and interest in the fate of all asylum seekers arriving from Vietnam. It reaffirms its responsibility to ensure the protection of all asylum seekers arriving from Vietnam. In pursuit of that responsibility the UNHCR affirms its readiness to assist in the care of all asylum seekers in Hong Kong and to participate by monitoring the procedures (including the appeals procedures) for the determination of refugee status, in order to advise the HKG on measures necessary to fulfill its undertaking to abide by established and accepted international standards.

3 The two sides will continue to discuss any matter which concerns the treatment of asylum seekers arriving from Vietnam in Hong Kong.

4 Bearing these conditions in mind, both sides have reached the following understanding on specific points.

A GENERAL

(1) Access

For UNHCR officials:

Hong Kong Government continues to recognise UNHCR's right of access to all asylum seekers, refugees and persons determined not to be refugees for the purposes of discharging its responsibilities concerning protection, assistance and durable solutions. Appropriate arrangements will be made between the Hong Kong Government and UNHCR for the exercise of this right.

For legal advisers:

Hong Kong Government will continue to permit any asylum seeker, refugee or person determined not to be a refugee to have access to his legal adviser, for the purpose of consultations in connection with any legal proceedings to which he is or will be a party in accordance with the Hong Kong law.

(2) Services provided by Voluntary Agencies

The Hong Kong Government and the UNHCR will consider jointly the need for services in all centres for asylum seekers, refugees and persons determined not to be refugees. Where a need for services is agreed, these will be provided by voluntary agencies designated by UNHCR following consultation with the Hong Kong Government.

(3) Funding

The UNHCR will continue to meet the costs of the care, maintenance and social services required by all asylum seekers, refugees and persons determined not to be refugees as provided in project agreements with Hong Kong Government and voluntary agencies, and subject to the availability of funds for this purpose. These include the costs of food, water, fuel, transport, relief items, education and training, recreational activities and legal advice.

(4) Consultation

The Hong Kong Government and the UNHCR will continue their practice of close co-operation and consultation on any matters affecting persons of concern to the UNHCR. Observations, complaints or comments on camp conditions or management arrangement will be reported promptly to the camp or centre management. The Hong Kong Government and the UNHCR will convene regular liaison meetings with individual centre managements.

(5) Resettlement or Other Durable Solutions

UNHCR will continue to use its best endeavours to secure the speedy resettlement or other durable solutions for all refugees in Hong Kong and appropriate durable solutions for all other persons of concern to UNHCR.

B DETERMINATION OF REFUGEE STATUS

(1) The Hong Kong Government confirms that appropriate humanitarian criteria for determining refugee status will be applied. These criteria, based on the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol, take into account the special situation of asylum seekers from Vietnam. The attached questionnaire, which will be the basis for interview, reflects the elements of such criteria.

(2) Hong Kong Government confirms its commitment to the establishment and operation of procedures for determination of refugee status which are in accordance with the UNHCR Handbook.

(3) The UNHCR confirms that it has been consulted fully on the establishment of the criteria and the procedures to be used by the Hong Kong Government for the determination of refugee status. UNHCR will brief the Hong Kong Government's officers involved in determination of refugee status.

(4) UNHCR will monitor the determination procedures. Monitoring includes observing the procedures on a selective basis and advising the Hong Kong Government both on individual cases and on determination generally.

(5) The Hong Kong Government will advise persons determined not to be refugees of the right of objection under Section 53 of the Immigration Ordinance (Chapter 115) and of their right of legal advice in preparing an objection against refusal of refugee status. UNHCR will make arrangements to ensure that legal advice is made available to all those who need it.

C TREATMENT OF ASYLUM SEEKERS AND PERSONS DETERMINED NOT TO BE REFUGEES

(1) The Hong Kong Government confirms that the conditions for asylum seekers and persons determined not to be refugees will, subject to exceptional security requirements, be no more restrictive than those that applied in closed centres prior to 16 June 1988.

(2) The Hong Kong Government confirms that asylum seekers and persons determined not to be refugees will not be confined to their dormitories from dusk to dawn. The Hong Kong Government reserves the right exceptionally to confine occupants to their dormitories when security requirements make this necessary. Such measures will be adopted only on a temporary basis to be discontinued when normal conditions return.

(3) Hong Kong Government will continue to provide adequate food and medical facilities to asylum seekers and persons determined not to be refugees and will continue to pay particular attention to the dietary and medical requirements of new arrivals.

D TREATMENT OF REFUGEES

(1) Accommodation of new refugees

Those persons arriving after 15 June 1988 who are determined to be refugees will be accommodated in Refugee Centres.

(2) Opening of closed centres

The Hong Kong Government will start an immediate and progressive opening of the closed centres in situ, which will include a progressive lifting of restrictions on the freedom of movement of the residents to leave the centres for purposes of education, employment, vocational training, social and recreational purposes. It is envisaged that this process will be substantially completed within 6 months. The UNHCR through the voluntary agencies will progressively assume responsibility for the management of the closed centres to be opened. The timetable for the transfer of management responsibility will be established between the Hong Kong Government and UNHCR.

(3) San Yick

UNHCR does not consider San Yick to be suitable for accommodation. The Hong Kong Government will commence a progressive relocation of residents from San Yick as a matter of urgency. It is envisaged that most, if not all, residents of San Yick can be renoused by the end of 1988. In the meantime, the Hong Kong Government will implement the opening of San Yick as quickly and to the maximum extent possible.

(4) Tuen Mun Area 46A

The Hong Kong Government intends to develop an open refugee camp at Tuen Mun Area 46A a quickly as possible and to do so with the intention of transferring refugees to the new camp once the new accommodation becomes available. The accommodation at Area 46A will be based on a temporary housing area or similar design. The planning of the new camp will be the subject of continued discussions between the Hong Kong Government and the UNHCR.

UNHCR confirms its commitment to take full responsibility for the management of the centre at Tuen Mun Area 46A to the exercised through its operational partner and to meet all of the operating costs of the centre. In addition UNHCR will launch an international appeal in early 1989 for funds towards the capital cost of developing the centre.

(5) Buildings and Land

The Hong Kong Government will offer licences or leases on all open centres to be run by the operational partners of the UNHCR. Upon the commencement of those licences or leases, the licensees or lessees will be responsible for the maintenance of buildings and fixed assets.

(6) Education

All refugee children will have access to schooling under programmes organised and run by the operational partners of the UNHCR. These programmes will comprise adequate primary and secondary education under the direction of the UNHCR. UNHCR and the Hong Kong Government are looking for suitable additional premises.

(7) Medical Services

UNHCR will provide medical services at all refugee centres.

(8) Vocational Training and Emplovment

The Hong Kong Government will allow access to vocational training and employment opportunities outside the closed centres. UNHCR will appoint a voluntary agency to run job placement services for refugees.

Annexure 2

IN THE COURT OF APPEAL 1990, No. 185 (Civil)

BETWEEN

NGUYEN HO	1st Appellant
NGUYEN CUONG	2nd Appellant
NGUYEN NGOC LANH	3rd Appellant
NGUYEN TAM LOC	4th Appellant
DO GIAU	5th Appellant
DAO DUC LINH	6th Appellant
TO DANG MINH	7th Appellant
TRAN THI VAN	8th Appellant
DANG NGOC CUONG	9th Appellant
ALL OF WHITEHEAD DETENTION CENTRE HONG KONG, ASYLUM-SEEKERS	

and

DIRECTOR OF IMMIGRATION	1st Respondent
REFUGEE STATUS REVIEW BOARD	2nd Respondent

Coram: Hon. Sir Derek Cons, VP, Kempster & Clough, JJA
Date of hearing: 6th, 7th & 10th - 13th December 1990
Date of delivery of judgment: 13th December 1990

JUDGMENT

Sir Derek Cons, VP:

Ever since 1975 a number of people commonly known as the Vietnamese boat people have left Vietnam in search of asylum and resettlement elsewhere. In the beginning those arriving in Hong Kong were automatically treated as refugees and held here pending resettlement elsewhere. However in more recent years the pattern of resettlement has failed to match the pattern of arrival, so much so that by 1988 there had accumulated a vast backlog of boat people held here with little or no prospect of imminent resettlement elsewhere. For that reason the policy of granting automatic refugee status was discontinued as from the 15th June 1988. Thereafter arrivals who chose not to continue their travel further would only be accorded refugee status if they fell within the definition of a refugee contained in the 1951 United Nations Convention Relating to the Status of Refugees as amended by the 1967 Protocol thereto. Those who did not fall within that definition would face indefinite detention and possible repatriation.

The Convention and the Protocol as such do not apply to Hong Kong. Though the United Kingdom has signed both agreements, they have not been extended to Hong Kong as they have to other dependent territories. The use of the definition was part of an understanding reached between the Government of Hong Kong and the United Nations High Commission for Refugees ("UNHCR") by which in effect the application of the Convention and Protocol was extended to Hong Kong, thereby restricting the ambit of the discretion otherwise conferred on Immigration Officers by Section 13A(1) of the Immigration Ordinance. This has been common ground throughout these proceedings.

It may be convenient here to set out the definition of a refugee:

> "any person who owing to a 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."

It is to be noted that the definition contains both a subjective and an objective element, i.e. the possession of the fear and that the fear is well-founded.

To implement the new policy a screening process was set up in consultation with the UNHCR. The first system introduced proved too cumbersome in practice and was subsequently streamlined into the process applied in relation to the cases with which we are now concerned. Put simply the asylum-seeker is interviewed by an Immigration Officer on the basis of a questionnaire drafted by the UNHCR. The officer's decision, which is recorded on the file together with his reasons therefore, is then passed to a Senior Immigration Officer or Chief Immigration Officer depending on the apparent complexity of the case for endorsement or review. If ultimately the refugee status is denied the applicant will be notified officially by the Director of Immigration.

In consideration of individual applications the Immigration Officers are required to apply the guidelines contained in a Handbook on Procedures and Criteria for Determining Refugee Status published by the office of the UNHCR in January 1988. The officer has also the assistance of Guidance Notes for Officers of the Vietnam Refugees Division, a booklet which contains a synopsis of the UNHCR Handbook and additional information prepared by a Principal Immigration Officer of that Division. In addition 6, or pernaps 7, of the 20 officers who figure in the cases touched upon by this appeal had the benefit of attendance at a seminar organised by the Department on the 18th March 1989.

Appeal against rejection is by way of review by the Refugee Status Review Board, a body set up under Section 13G of the Ordinance. In preparation for the review the asylum seeker may have assistance from his own legal representative or from a member of the Agency of Volunteer Services, an organisation which we understand consists of lawyers from various jurisdictions who give their services free of charge. The case files of all applicants rejected are automatically sent to this Agency. Neither the asylum-seexer nor his legal representative is entitled to be present at the review but the Board may request the attendance of the asylum-seeker at its discretion.

There is no appeal from the decision of the Board, but the avenue of judicial review has not been closed. That avenue has been taken by the 9 Appellants in the present instance, all of whom were denied refugee status by Immigration Officers, the Board in each case subsequently refusing to interfere. In the court below the Appellants sought various orders of certiorari and mandamus, and declarations in respect of every stage of the screening process.

During the course of the hearing before Mortimer, J., Mr. Fung, who appears for all 9, sought to introduce "expert" evidence of conditions in Vietnam, firstly in the form of particular written testimony from a member of the Institute of East Asian Studies in the University of California and from a journalist who was born in North Vietnam and has lengthy personal experience of persecution and imprisonment until he escaped in September last year; and secondly in the form of extracts from reports published by Amnesty Inteernational and by the International League of Human Rights. This evidence forms part of a much larger body of material contained in a box folder which has been labelled Bundle B.

Objection to the admission of such evidence was taken by Mr. Thomas who appears for the Director of Immigration and the Board. He is fearful that if allowed it might eventually place an impossible burden on the authorities, bearing in mind the number of screened-out boat people currently held in Hong Kong and the infinite variety of conditions in Vietnam that might be put forward for consideration. After argument extending over some days the judge rejected the application. The sole question for our consideration is whether he was right to do so. In the meantime he has adjourned the further nearing of the applications.

The principles upon which fresh evidence may be admitted in applications for judicial review have been set out by the English Court of Appeal in R. v. Secretary of State for the Environment: ex. p. Powis [1981] 1 WLR 585 and accepted in general by this Court in Re PC 17503 Lo Wing Tong [1990] 1 HKLR 325 at 337. I do not see these principles as having been extended by Bugdaycay v. Secretary of State for the Home Department [1987] 1 AC 514. The report gives little indication of when or how the evidence there relied upon came into those proceedings and Lord Bridge is careful to point out, albeit with respect to a different aspect of judicial review, that refugee status questions are not to be treated differently (p. 523) although within the limitations of judicial review the court is entitled to submit decisions thereon to a more rigorous examination (p. 531). A similar view was expressed by this Court in Madam Lee Bun & Lee Ching Ming v. Director of Immigration Civil Appeals 54 & 55/90 unreported 29th June 1990.

Mr. Fung submits that the proposed evidence should be admitted for any of 3 reasons. The first is set out in the first part of the first ground of appeal contained in the Re-amended Notice of Appeal:

> "The Learned Judge erred in law in failing to appreciate that a Court of law on hearing an application for judicial review of an adverse refugee status decision made by an immigration officer and confirmed by the Refugee Status Review Board ("the Decision Makers") is obliged in law to admit evidence of country conditions submitted before it which demonstrates that the Decision Makers in rejecting the applicant's claim for refugee status
>
> (a) did not have before them sufficient material to enable them to apply properly or at all the objective test in determining whether the applicant's professed fear of persecution was well-founded"

or in the alternative words of the judge below:

> "This same point is put more bluntly (but it amounts to the same argument) that evidence can be given in this regard to show that the tribunal whose decision is under attack was incompetent to carry out its decisions fairly."

That an Immigration Officer could not properly carry out his duties in this respect without some knowledge of the conditions which pertained in Vietnam is, I think, self-evident. But if authority is wanted it can be found, for example, in R. v. Secretary of State for the Home Department: ex. p. Sivakumaran [1988] AC 958 at 992 where Lord Keith said:

> "It is a reasonable inference that the question whether the fear of persecution held by an applicant for refugee status is well-founded is likewise intended to be objectively determined by reference to the circumstances at the time prevailing in the country of the applicant's nationality."

and later, when rererring to possible persecution, at 993:

> "Whether that might happen can only be determined by examining the actual state of affiairs in that country."

It is reflected too in the United Nations Handbook where it says at paragraph 42:

> "As regards the objective element, 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 statement 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."

In Mr. Fung's submission the need for fresh evidence is to illustrate, by comparison with the evidence already before the judge of what had in fact been made available to the Immigration Officers or the Board (which material is to be found in Bundles C and F), what was not known to those two decision-makers; or, as he frequently put it, to show the lacunae that existed in their knowledge. To that end Mr. Fung has taken us through the relevant affidavits, reports and other documents by way of a detailed analysis under various heads of "Targets of Persecution" and "Forms of Persecution", some of which latter he suggests to be peculiar to Viethan. They are succinctly set out in Paragraphs 17 to 19 of his skeleton argument, although some items have been removed in the course of his reply this morning.

In my view this approach to the admission of fresh evidence is not open to the Applicants. It finds no place in any of the Grounds on which Relief is Sought filed on their behalf, all of which are, I think, identical. I do not accept that it can be brought within paragraph 1(k) which reads:

> "The immigration officer failed in the premises to take into account relevant considerations or took into account irrelevant considerations in reaching his decision."

That is to my mind something entirely different.

Objection on these lines was taken before the judge below with the observation, we are told, that had this approach been made known in advance to the Respondents the Bundles C and F would have been considerably augmented. It is clear that the judge upneld the objection saying:

> "I rule out the general evidence as being admissible simply to show what may or may not have been available to him (i.e. the Immigration Officer) without reference to what was in fact available to him known to the parties but not yet known to me."

The second reason put forward by Mr. Fung is that the evidence will support an attack upon the lines that the decisions were Wednesbury unreasonable, i.e. ground 6 of the Re-amended Notice of Appeal, an approach that the judge below rejected out of hand. He said:

> "Further, general evidence of this nature, in an attempt to show that there was a 'Wednesdbury unreasonableness' is certainly not admissible, and no authority for this startling proposition has been advanced. It would be quite wrong in principle in proceedings for a judicial review to allow such evidence."

At the close of his judgment in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223 Lord Greene summarised at p. 233 the relevant principie:

> "I do not wish to repeat myself but I will summarize once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere."

From that exposition alone I am satisfied that unreasonableness as a factor by itself, what might be termed the second limb in Wednesbury, can only be judged with regard to what was known to the inferior tribunal at the time. Some support for this can be found in the concluding remarks of Lord Russel in Secretary of State for Education and Science v. Tameside Metropolitan Borough [1977] AC 1014 at 1076 and he said:

> "I would add this. The question whether the Secretary of State was justified in his conclusion that the proposals of the local authority were unreasonable falls to be decided at the date of his conclusion, June 11: that is common ground. I would not however subscribe to the view that facts subsequently brought forward as then existing can properly be relied upon as showing that the proposals were not unreasonable unless

> those facts are of such a character that they can be taken to have been within the knowledge of the department."

The English Divisional Court may have taken a different view in Re "H" unreported CO/826/86 31st July 1987. But we understand that in accordance with English practice no objection was taken to the inclusion of further evidence there. I also note that in the United Kingdom there is no particular body of officers nor any tribunal which spends its whole time dealing exclusively with refugees from one particular jurisdiction. This seems to me a significant difference between the two jurisdictions.

Mr. Fung contends that the words "wednesbury unreasonableness" in the grounds of appeal are apt to include what I would term the first limb of Wednesbury, i.e. the tribunal has refused or neglected to take into account matters which it ought to have taken into account. He relies upon the explanation given by Lord Greene at p. 229 of the report:

> "For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.

For my part I do not think the words are normally taken to extend that far. But if indeed that should be the correct interpretation ground … is naturally subsumed in the last approach put forward by Mr. Fung. It is this approach which has principally occupied our time in this appeal and is set out in the second paragraph of the first ground of the Notice, namely, that the learned judge was obliged to admit evidence which demonstrates that the Decision Makers made a material error of fact in determining that the Applicant's professed fear of persecution was not well-founded.

This proposition is based upon observations in Tameside, first by scarman,… (as he then was), in the Court of Appeal at p. 1030:

> "Secondly, I do not accept that the scope of judicial review is limited quite to the extent suggested by Mr. Singnam. I would add a further situation to those specified by him: misunderstanding or ignorance of an established and relevant fact."

and again by Lord Wilberforce at p. 1047 in the house of Lords:

> "If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the Court must inquire whether those facts exist"

Further support can be found in the words of sir Robin Cooke in Daganayasi v. …inister of Immigration [1980] NZLR 131 and in New Zealand Fishing Industry Association Inc. and the Minister of Agricultural and Fisheries [1988] 1 NZLR 544.

I would most respectfully suggest that this approach must be in accordance with basic principles, for if the Court may properly interfere when the inrerior tribunal has not taken into account some matter which it should have done, the Court must also be able to do so when the inferior tribunal has got that matter wrong. But it must be something that is plainly wrong or, as the judge below put it, "established and unassailable to be erroneous". Courts must in no circumstances allow themselves to be enticed into the evaluation of a fact which is properly within the exclusive jurisdiction of the tribunal.

It must also be a material fact as is accepted by the ground or appeal itself. At times the judge below uses, as did prof. Wade in his …th Edition of Administrative Law, instead the word "decisive". But I do not read that as intending any meaning different from that usually attributed to the word "material" in this context.

I should pause to note at this stage that Mr. Thomas abandoned his Respondents' Notice which suggested that this view of the law was incorrect.

With this view in mind the judge below invited submissions as to the particular errors sought to be relied upon. A written submission was handed in with regard to the decisions of the Immigration Officers, a copy of which has been passed to us, and we understand that oral submissions were made with regard to the Board. Having read the evidence de bene esse the judge compared the submissions with the records and concluded that no error or estabilshed fact material to the decision making had been demonstrated, at least at that stage.

As I have indicated earlier we have been taken in the course of this appeal through all the relevant material. I have re-read it again in my own time. The written testimony, as one would

expect in the circumstances, is presented very differently from much of the official information but overall I find no significant difference or omission. Like the judge I find nothing to indicate that either the Immigration Offices or the Board were ignorant of any material fact or got any such fact plainly wrong.

It is well established that a judge may exclude evidence which can in no way properly advance the claim of the litigant. In that sense it is irrelevant. In my view the judge was correct so to exercise his discretion in the present instance.

Order 53 rule 6(2) provides that:

> "The Court may on the hearing of the motion or summons ... allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application."

It is now apparent that the judge was not entertaining the application below under this provision but under a paragraph of a Summons for Directions which had been adjourned for his consideration. But even had he been so considering the matter, I note that the provision gives no entitlement to the Applicant. It is still a matter of discretion; and for the reasons I have ventured to suggest the discretion would almost inevitably have been decided against the Applicants.

The remaining grounds of appeal are either covered by the views I have already expressed or relate to observations of the judge, which whether correct or not, can have no effect upon the conclusion to which I have come. For my part I would therefore dismiss the appeal.

Kempster, J.A.:

For the reasons given by my Lord, the Vice President, I agree that this appeal should be dismissed.

Clough, J.A.:

I agree.

(Sir Derek Cons)	(M.E.I. Kempster)	(P.G. Cough)
Vice President	Justice of Appeal	Justice of Appeal

Representation:
Daniel Fung, Q.C., G.J.X. McCoy & Michael Darwyne (M/S. Robin Bridge & John Liu) assigned by D.L.A. for all Applicants/Appellants
Michael Thomas, Q.C., & B.W.K. Whaley, Crown Solicitor for 1st & 2nd Respondents

Annexure 3

3rd December, 1990 MORTIMER, J.
10:06 a.m. Court resumes

COURT: I wonder if I could just be assisted about a matter. I think Daganayasi - if that's the right pronunciation - is in the bundle. I wonder if someone could tell me which number it is.

MR THOMAS: 28.

COURT: I am greatly obliged. Thank you. I am dealing with an application to call fresh evidence made on behalf of the applicants in these proceedings for judicial review. It is an application to call evidence which was not before the tribunal in each of the 9 cases in which the decision is being reviewed. The evidence relates to "country conditions" and its general nature can be seen at a glance from the index to the affirmation of NGUYEN Dien-tu, which has been put before me.

The evidence relates in particular to targets of persecution in Vietnam; that is classes of people who were persecuted at the material times and the nature of the persecution practised. Those targets and the nature of the persecution are said to fall within the guidelines of the International Convention and Protocol. For example, the applicants seek to call evidence that certain classes of persons were targeted for conventional reasons (about which there is no issue) and that also their families were

targeted for 3 generations thereafter so that they became "bad families" or "black families" and were regarded as owing a "blood debt" to their country. These included not only those who came from South Vietnam but also those from the North.

They seek to call also evidence of the nature of the persecution practised. To give it some flavor, what is sought to be proved relates to forced re-location in new economic zones; re-education; forced labor; imprisonment and it's consequences; the forcible entry into cooperatives; the deprivation of home registration cards; official harassment and police surveillance; substituted military service; the denial of educational opportunities; and employment sanctions. Some of those items overlap, for example, the effects of deprivation of a home registration card.

I will try to fairly summarize the arguments advanced by the applicants although this is not an easy task. The arguments have been multitudinous and they have not always been consistent. Some matters raise arguable points and, I regret to say, other arguments are simply untenable in this type of proceeding.

One of the main arguments - at one time abandoned and later reinstated - is that whereas it is the duty of the immigration officer and each decision maker to be informed of "country conditions" when assessing a claim for refugee status, the information available in this case in the guidelines and associated documents, was outdated, inadequate and misleading. The effect, it is said, was that immigration officers misunderstood the nature of persecution described, misunderstood the meaning of the terms used, did not understand the nature of the treatment feared, and the nature of the treatment meted out to others. Further they were not able in some cases to be able to properly assess credibility for the reason that the assessment was made with insufficient, unavailable or erroneous information of the true facts. It is further submitted that without this general evidence it is not possible for this court to assess what evidence would have been available to the decision maker if a fair procedure had been accorded to each applicant by giving him proper notice of the hearing and by affording him proper advice or information as to what would be required of him to establish refugee status. Also it would not be possible for this court to assess, it is said, whether any decision challenged was unreasonable in the Wednesbury sense.

It is submitted that fresh evidence may be given to show what information was available to the tribunal as compared with information which ought to have been within its knowledge to carry out its function fairly. This same point is put more bluntly (but it amounts to the

same argument) that evidence can be given in this regard to show that the tribunal whose decision is under attack was incompetent to carry out its decision fairly.

Further, and perhaps more importantly, it is submitted that the court will hear fresh evidence to prove that the tribunal whose decision is under review, made a serious error of a material fact. In support, counsel for the applicants submit that having regard to the gravity of the issue in refugee cases and the principle that the decisions should be subject to rigorous examination - see ex-parte Bugdavcay, [1987] 514 at 531 F and G, per Lord Bridge - "the emergent" principle described in Professor Wade's Administrative Law, the 6th ed., P.330, that the court will quash a decision on the grounds of a decisive fact being wrong, misunderstood or ignored is now good law. Further, see - Secretary of State for Education, and Thameside [1977] A.C. 1014 Scarman, LJ (as he then was), at 1030 E; and Ld. Wilberforce at 1047 D/E; Ld. Diplock at 1065 B. Also see - the Obiter dicta of Sir Robin Cooke in Daganayasi the Minister of Immigration, [1982] NZLR 130, at 145-149; and finally New Zealand Fishing Industry Association Inc., and the Minister of Agricultural and Fisheries, [1988]1, NZLR 504 Cooke at page 552.

Finally, it is said that in refugee cases, fresh evidence of "country conditions" is normally adduced as a matter of practice without objection. And if all else fails, this evidence ought to be admitted in the discretion of the court exercising what has been described as a discretion "in the wider interests of justice" see - ex-parte Momin Ali, [1984] 1 WLR, 663 at 670 B per Sir John Donaldson, M.R. This later case is one which was dealing with additional evidence on fresh evidence on appeal and not at first instance in a judicial review.

The admission of this evidence is strongly resisted by the respondent on the grounds that this is evidence which the applicant in each case has not demonstrated to be admissible. The submission is that the evidence is not admissible in judicial review because it is not in any permissible category of fresh evidence and that even if the emergent rule is good law, no issue relating to a decisive error of fact has been demonstrated and if none is then the applicant's submission fails in limine.

Both parties have made extensive submissions relying upon cases (to which I will refer) which decide what categories of evidence of fresh evidence are admissible in this type of proceedings.

Much argument has been directed to the document which was produced at my instigation or request by the applicants, this seeks to identify the facts in the information available to the decision makers which were erroneous, absent or misleading and which were material to the decisions made. To this document I will return. On its basis the respondent submits that the application fails in limine.

The respondent relies upon the fundamental nature of the enquiry into the fairness of the decision-making process which is undertaken in these proceedings, and rely upon the limited scope of the court's powers which are well known and need not be restated. It is pointed out that these proceedings not being proceedings by way of appeal or by way of rehearing - have only limited categories of fresh evidence which may be called apart from the evidence which was before the tribunal. Fresh evidence, says the respondent, may be called only within the categories set out in ex-parte Johnson's Trust, [1974] 1 QB, 24 and ex-parte Powis, [1981] 1, WLR 584; save for the refinement that in the first category of evidence described in ex-parte Powis (that fresh evidence can be admitted to show what material was before the tribunal) has been refined to include evidence of matters which were not before the tribunal but which ought to have been.

The respondent further submits that even if the emergent rule is good law, it is limited to proof that the decision maker took into account or failed to take into account a material or decisive fact which is shown to be erroneous and yet is unassailably true, and that but for this, there is a real likelihood that the tribunal might have come to a different decision and as the applicants have not been able to point to such a decisive and unassailable fact, the application must fail. Having regard to the limitations and scope of the court's power in judicial review, and accepting that a rigorous examination must be accorded to decisions in refugee cases evidence may be admitted to establish the following matters:

1. the material which was or was not before the tribunal;
2. a fact or facts upon which the jurisdiction of the tribunal depends;
3. evidence of procedural errors of unfairness;
4. misconduct or bias of the tribunal; and
5. fraud or purger which would vitiate the proceedings.

See - ex-parte Johnson's Trust (Supra), and ex-parte Powis (Supra) as extended to include what was not before the tribunal.

Additionally, in relation to the so-called "emergent principle", I would hold that if it is demonstrated that the finding of a tribunal depended upon a material and decisive fact (either physical or mental) which is established unassailably to be erroneous (by agreement or otherwise) and that the true fact was known or available to the tribunal at the time of its decision, then, if there is a real likelihood that the tribunal would have come, or might have come, to a different decision if the error had not been made, that decision will be vitiated.

The authority for this proposition, is to be found in Thameside (Supra), Scarman, LJ at 1030 E, said:-

> "I do not accept that the scope of judicial review is limited quite to the extent suggested by Mr. Bingham. I would add a further situation to those specified by him - misunderstanding or ignorance of an established and relevant fact. Let me give two examples. The fact may be either physical, something which existed, or occurred or did not, or it may be mental, an opinion."

Lord Wilberforce, at 1047 D and E, said:-

> "if a judgment requires before it can be made the existence of some facts, then although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account. Whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge."

There is some further support to be found in the speech of Lord Diplock at 1065 B.

The proposition receives further persuasive support in Daganavasi (Supra). In that case, page 145-147, Sir Robin Cooke considers among others, the Thameside case but it is to be noted his Obiter dicta is not supported by his colleagues.

Further support can be found in another New Zealand case. Again, the same judge, now president of the Court, in the New Zealand Fishing Industry Association case, to which I have already made reference. At page 552, line 18 he said this,

> "Of course, Mr. Parker, for the respondent, is clearly right in his submission which is based upon Lord Justice Scarman's observations in Thameside, that to jeopardize validity on the grounds of mistake of fact, the fact must be an established one or an established and recognized opinion and that it cannot be said to be a mistake to adopt one of two differing points of view of the facts, each of which may reasonably be held".

And further at page 557, line 24, he says:-

> "In principle, I have already accepted the approach of counsel for the respondent to the ground of error of fact. Applying the principle here, I think there are too many inconclusive and arguable matters, affecting all the figures put forward for the industry, both before and after the order in counsel to make it safe to find that the minister acted on a material mistake of fact. He demonstrates there the limits of the principle of law, which he is accepting."

Support for this proposition can also be found in Hollis and the Secretary of State for the Environment and Others, [1982] P and CR 351 at 360. Glidewell J. (as he then was) said,

> "I therefore conclude that if it be shown as it is shown to my satisfaction in this case, that there was material that was within the possession of and thus must be assumed to have been within the knowledge of the Secretary of State, but clearly showed that what had been put before the inspector on a material issue was wrong, the court is entitled to, and in an appropriate case should, look at that material to see whether that fact is established. If it is established, then it is right to say, that the Secretary of State

> might well have come to a different conclusion had he looked at that material and thus to quash his decision".

In the instant cases there are serious issues concerning the hearing before the immigration officers. These issues relate to the accuracy of the notes taken, to whether anything further was said by certain applicants and if so, what, and whether some were prevented from giving their accounts. There are issues as to whether the immigration officers appeared to be giving any serious consideration to the evidence given to them; whether, the immigration officers correctly evaluated what was being said to them and what evidence was before them, and whether they understood it fully. In relation to what happened in front of the officers at the hearings these are factual matters. In addition to those matters I have described, no doubt many other arguments and submissions will be advanced. However, until these important issues are resolved, in my consideration of the admissibility of evidence, I have for the time being at any rate, to accept that the decisions were made on the basis of the information which appears in the notes of the interviews, and that those notes of the interviews are accurate. Any decision upon the admissibility of the evidence with which I am presently dealing, does not impinge in any way upon the admissibility of evidence of the applicants relating to what happened at the interview. Indeed the applicant's own evidence of his personal experience in Vietnam as to what happened to himself, what happened to others and what were the conditions in Vietnam will always be of greater importance and perhaps paramount importance to the decision maker than any information which he may have of "country conditions" by way of a background to his enquiry. I must approach my consideration of the admissibility of this general evidence of "country conditions" with that in mind.

Having invited the applicants to make submissions and bring to the attention of the court, any errors of established facts which are material to the decisions that were made so that I am able to evaluate the issues upon which the evidence will be called and to see what the evidence will prove in relation to the decision making. I have been provided with the written submissions to which I have already adverted, and having considered those submissions, they do not demonstrate any decision when compared with the record made which shows any error of established fact which is material to the decision making. The nearest that any submission came was in relation to Mr. Nguyen Ho, the first applicant. In the reasons for determination, 4B on page 58, Mr. IP, the officer records, "his younger brother had to perform conscriptive labor which was a compulsory policy of the government. Every family had to send one for the work and one for the public good. Eventually, his family could pay bribes to exempt his duty". Submissions were made that there was a complete misumderstanding of the effect of conscriptive labor, but when reference is made to the

notes of the interview - to be found on page 52 of bundle A1 - one finds that the immigration officer has recorded, "only his younger brother in the family had only called up for conscriptive labor, indeed all families had to send one for the work. He had to work for a period of 3 months and his main duty was to saw trees for irrigation projects. He escaped after 3 weeks work and back to the village. The authorities tried to look for him and his family gave bribes to the officials for exemption of his duty. He was not called up anymore."

Whereas, there may be a considerable issue as to what was said or what actually took place before Mr. IP at the interview, that is an issue which I have not yet resolved and for the moment I must regard that as being an accurate record of what did take place. On that basis the submission that evidence should be called to show what conscriptive labor is, falls to the ground - certainly at this stage.

The other submissions also fail on the basis that the matters complained of were simply an evaluation by the immigration officer of the material before him. The application to call fresh evidence to vitiate any of the decisions for a "mistake of fact" fails in limine. No issue has been demonstrated. And nowhere is it shown that the information provided or available or relied upon in any material or decisive way, was erroneous, inadequate or misleading.

I rule that the general evidence relating to "country conditions", the subject of this application, is not admissible to demonstrate error of an established fact.

I turn to the other grounds argued, bearing in mind the limitation imposed upon fresh evidence which can be given in these proceedings - whatever may have been accepted in other cases by agreement or without objection cannot affect or vary the fundamental nature of these proceedings and the law applicable to admissibility. A failure to require the proper rules of admissibility to be observed in these proceedings as in others, can easily blur the true issues and this applies even to proceedings before a judge alone.

I accept Mr. Thomas's submissions that Bugdavcay is not an authority for the admission of this type of fresh evidence. Indeed, the question of fresh evidence in the way that I am considering it here, was not an issue in those proceedings at all and was not at any stage considered by the court. Indeed, when Lord Bridge was expressing the principles which have to be applied to this type of case, that is, the type of case where an applicant's life or liberty may be at risk, he had very clearly in mind the limitations on the scope of the power of the court in making a judicial

review and it must follow because of that he had much in mind the limitations on the evidence that can be given in such proceedings. The same can be said of all those judges who considered the difficult problems raised in the Thameside case. On the Court of Appeal in that case Scarman, LJ (as he then was), said at P.1029 B:-

> "As always with judicial review, it is vital to determine and then strictly to follow the correct judicial approach to the problem placed before the court".

Evidence of what was or was not before the tribunal can of course be given. Here, it is suggested that the information before the immigration officer was flawed and therefore he was not competent to make his decision. In spite of the fact, that there has been full discovery and that his decisions and notes have been considered, there has been nothing put before me to show that there was here an omission of material information before him or within his power which effected the decision and I rule out the general evidence as being admissible simply to show what may or may not have been available to him without reference to what was in fact available to him known to the parties but not yet known to me. Nor can evidence simply be admitted in this general way to demonstrate in some uncertain way some inability on the part of an immigration officer to be able to assess credibility properly.

Submissions were made that this evidence should be admitted on the basis that it establishes a jurisdictional fact. This is the 2nd category in ex-parte Powis. This argument in my judgment is untenable. A jurisdictional fact is one which is a necessary precedent to the tribunal having jurisdiction to make its decision. It is not submitted in this case, for example, that any applicant did not come from Vietnam nor are any of the other jurisdictional matters raised which would have shown that the tribunal did not have jurisdiction to make its decision.

Further, this evidence does not go to show procedural irregularity or unfairness in relation to the hearings. If at any stage in the future, it becomes necessary to consider what a particular applicant wanted to bring to the notice of the immigration officer but was not able to bring before him, I suppose it is possible that some part of this evidence, may become admissible but at present, it is not.

Bias and fraud are not alleged here, but impropriety is. For example, laughing at some of the things said by the applicants, but this evidence is not relevant to that.

Further, general evidence of this nature, in an attempt to show that there was "Wednesbury unreasonableness" is certainly not admissible, and no authority for this startling proposition has been advanced. It would be quite wrong in principle in proceedings for a judicial review to allow such evidence.

Similarly, unless the matters to which the evidence is directed, can be demonstrated to the court, general evidence of "country conditions" in order that this court should be generally informed as background to its enquiry cannot be admitted. This also would be wrong in principle having regard to the limited nature of the count's powers in judicial review proceedings.

On the same basis, I find it impossible to admit this evidence in what has been called the "wider interests of justice". If evidence is ever admitted on this basis - and I would certainly accept that if the interests of justice were demonstrated to make admission of evidence necessary within the ambit of judicial review, I would certainly accept the principle but nothing has been advanced beyond what I have already described and no concrete submissions have been made to indicate that I should exercise a discretion to admit evidence on this basis. I do not do so.

I rule therefore, that the evidence which is sought to be adduced by the applicants is at present inadmissible. I make this decision without considering the form in which the evidence is proposed. I make no ruling whether the evidence can be given in the form proposed, and because of the many issues of fact, which I still have to decide, I cannot rule that in each of the 9 cases, this evidence or any of it will never become admissible in the course of the case. That may depend upon some of the issues of fact, which later have to be resolved. Similarly, I make no ruling upon the question raised by Mr. Thomas for the respondents as to whether the points raised by the applicants on this admissibility argument have been properly pleaded.

I rule therefore that this evidence is inadmissible.

MR FUNG: I am very grateful for your Lordship's ruling. In view of the implications of your ruling, I wonder if your Lordship would give us a bit of time just to consider that matter.

COURT: Yes, of course.

MR FUNG: We are in your Lordship's hands as to how long you would give us. I know this is not the normal time for a morning break. I don't know whether your Lordship would wish to take an early break.

COURT: Well, I can certainly do that. How long do you think, Mr Fung, you would like? Of course, you should have such time as you reasonably require.

MR FUNG: I think a quarter to twelve would be sufficient.

COURT: Yes. Certainly. I shall say a quarter to twelve. Thank you.

11:09 a.m. Court adjourns

Annexure 4

Affidavits and Affirmations (together with their exhibits) which were before the court. (Not all admissible).

1.	Affirmation of Do Giau	2/3/90
2.	Supplemental Affirmation	2/1/91
3.	Supplemental Affirmation of Do Giau	8/1/91
4.	Supporting Affirmations	
	(admitted to show what evidence Do Giau may have been able to adduce before the Immigration Officer and the Review Board)	
	(i) Affirmation of Do Thi Loi	26/7/90
	(ii) Affirmation of Do Ngoc	26/7/90
5.	Affirmation of Ip Ka Man Para 1-26 in Nguyen Ho's application	7/9/90
6.	Affirmation of Ip Ka Man in this application	7/9/90
7.	Affirmation of Lai Ngoc Lan	7/9/90
8.	Affidavit of Michael John James Hanson	7/9/90
9.	Affirmation of Francis William Blackwell	4/7/90
10.	Affirmation of William Yan Kam Fun	30/7/90
11.	Affirmation of Lau Kwong Lun	6/9/90
12.	Affirmation of Lau Kwong Lun	2/1/91
13.	Affidavit of Amirali Nasir	2/1/91

14.	Affirmation of Leung Wai Kwong	15/12/90
15.	Supplementary Affirmation of Leung Wai Kwong	18/12/90
16.	Affirmation of Nguyen Dinh Tu Paragraphs 1-9, 86 and 87	28/7/90
17.	Affirmation of Stephen Denney Paragraphs 1-4, and 27 - 32	18/4/90
18.	Affirmation of Cheng Pui Lan	16/1/91

Annexure 5

17th December 1990 Mortimer, J.

MORTIMER J. This is an application by Mr Fung - for the applicant Do Giau - for an order for the attendance for cross-examination of the immigration officer who interviewed him and whose affidavit is before the court; also for a similar order in relation to the interpreter who was present at that interview and whose affidavit is also before the court.

By Order 53 rule 8 (i) the power to order attendance for cross-examination under Order 38 rule 2 (iii) is available in judicial review proceedings. This amendment to the previous situation was made in 1977. Before 1977, applications to cross-examine were in practice, never made. Since 1977 such applications have been rare and if made, leave will be given only where the justice of the case so requires.

Mr Fung submits that there are factual issues between the immigration officer and the applicant involving the interpreter as to what happened at the interviews relating to what was said, what was or was not recorded and whether the interview was conducted in a fair manner. He submits these issues are relevant and material to the decisions made by the immigration officer and his reasoning, and further that they are relevant to my decision as to whether the interview was fairly conducted. He submits that the disputes or issues on the affidavits cannot be resolved justly and properly without the makers of those affidavits being available for cross-examination.

Mr Thomas, for the respondents, strenuously resists this application submitting that the court should not permit cross-examination and that it is not necessary for the just resolution of this matter. He submits that the power given to the court should be rarely exercised and leave should only be given in the clearest case. He relies upon a number of authorities.

I have been assisted by a feast of authority in this matter. Mr Thomas particularly relies upon George v. the Secretary of State [1979] L C R 689, the judgment of Lord Denning; upon Inland Revenue Commissioners ex-parte Rosminster [1980] A.C. 952 at 1027; upon the Home Secretary ex-parte Zamir [1980] A.C. 930 at 949, the speech of Lord Wilberforce; and upon the Nottingham Board of Prison Visitors ex-parte Mosley. "The Times" 23rd January 1981.

He submits further that cross-examination is not necessary here to resolve the issues because a) the issues are of marginal relevance to the decisions and so are not to be regarded as material, b) because of the lapse of time and the obvious difficulties which the immigration officer will have in remembering this individual case, and c) the issues between the witnesses are not relevant because if any defect in the interview is shown, it is cured by the later proceedings. He further submits that the cross-examination, if allowed, would be of no value.

The most useful statement of the court's approach to the decision which I have to make and the discretion which has to be exercised is to be found in the words of Lord Diplock in O'Riley and Mackman [1983] 2 A.C. 237 at 282(B) to 283(A). In part of that citation, he says:

> "It may well be that for the reasons given by Lord Denning in George v. the Secretary of State for the Environment, it will only be on rare occasions that the interests of justice will require that leave be given for cross-examination of deponents on their affidavits in applications for judicial review. This is because of the nature of the issues that normally arise upon judicial review. The facts, except where the claim that the decision was invalid on the ground that the statutory tribunal or public authority that made the decision failed to comply with the procedure prescribed by the legislation under which it was acting or failed to observe the fundamental rules of natural justice or fairness, can seldom be a matter of relevant dispute upon an application for judicial review, since the tribunal or authority findings of fact as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers, except on the principles laid down in Edwards v. Bairstow 1956 A.C. 14, 36; and to allow cross-examination presents the court with the temptation, not always easily resisted, to substitute its own view of the facts for that of the decision-making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament. Nevertheless having regard to a possible misunderstanding of what was said by Lane L.J. (as he then was) in ex-parte St. Germain 1979 1 WLR 1401, 1410, your Lordships may think this an appropriate occasion on which to emphasize that whatever may have been the position before the rule was altered in 1977 in all proceedings for judicial review that had been started since that date, the grant of leave to cross-examine deponents upon applications for judicial review is governed by the same principles as it is in actions begun by originating summons; it should be allowed whenever the justice of the particular case so requires".

It follows that leave will not be given if issues can obviously be resolved on the affidavits themselves; or if cross-examination will obviously be of no value in resolving those issues; or if the issues are not material to the decision of the tribunal or the court's decision, or if the issues raised are not relevant.

In most cases there is little or no dispute about the limited matters relevant to the court's review of the decision-making process. However, where there are issues between the deponents which are material and relevant and which cannot obviously be resolved on the affidavits themselves, then cross-examination may be the only just way of resolving those issues.

Where the issues themselves relate to factors affecting the decision of the tribunal, or the fairness of its procedure, cross-examination of course may be especially apposite. Here, many of the issues relate to marginal matters such as the immigration officers' appraisal of the facts. But others are more radical because the attack is upon the whole nature of the interview, the way it was conducted, what was recorded, what was allowed to be said, and what was said.

The materiality and relevance of these matters will be fully argued at a later stage and I cannot make a decision upon the relevance or materiality of some of the matters now. Mr Thomas, it is clear, will seek to argue at a later stage of the proceedings that none of these issues is relevant for reasons to which I have already adverted. And of course if none of those issues are relevant, then it is certain that cross-examination should not be allowed. Further, Mr Thomas submits that the cross-examination will be of no value. Of that, it is difficult to judge at this stage.

Because I cannot rule on these matters finally and possibly on others which affect my decision, so far as the immigration officer is concerned, I make the appropriate order for his attendance for cross-examination on his affidavit because the issues to which I have adverted, if they prove later on my decision to be both material and relevant, can only be resolved in justice by cross-examination, and not upon the affidavits themselves.

However, the evidence which I admit on that cross - examination, I admit de bene esse at this stage and it will be open to further argument later in the case.

As for the interpreter, the issue concerning her is to be found in paragraph 37 of the applicant's affidavit. I read that in full:

> "I was and am also dissatisfied with the interpreter. She had a heavy Chinese accent. She must have left Vietnam a long time ago because she did not understand a lot of the words I used. For example, she did not understand the term "communist infiltrators". She also did not know what I meant when I said that I had to remove mines. I had to give her a lengthy explanation before she finally understood. I had to waste a lot of time explaining things like this".

That is the complaint.

In my judgment, the issues raised by that paragraph do not require cross-examination to resolve them. Indeed, cross-examination would likely be quite valueless, and so I do not give leave for the cross-examination of the interpreter, certainly not at this stage.

If the situation changes after any cross-examination of the immigration officer, and then of course it may be necessary to review this decision.