1996 M.P.No. 4157

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

BETWEEN

CONG VAN HA	1st Applicant
CONG HIEN TUONG	2nd Applicant
CONG HIEN QUYNH	3rd Applicant
CONG HIEN PHUONG	4th Applicant

and

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

Coram: The Hon. Mr. Justice Yeung in Court
Dates of Hearing: 14th, 17th and 18th of March, 9th, 12th, 13th and 14th of May 1997
Date of Handing Down of Judgment: 26th May 1997

J U D G M E N T

This is an application for a Judicial Review by the Applicants against the decision of the Director of Immigration (The Director) and the decision of the Refugee Status Review Board (The Board) refusing them refugees status and that they should be detained pending removal from Hong Kong.

The First Applicant CONG VAN HA (Cong) arrived in Hong Kong on 17.5.1989 with the Second Applicant CONG HIEN TUONG (HT), the Third Applicant CONG HIEN QUYNH (HQ) and the Fourth Applicant CONG HIEN PHUONG (HP) from Vietnam.

HT, HQ, and HP are the children of the relatives of Cong. But according to Cong, she had in effect adopted them in the early 1980s'.

Having arrived in Hong Kong in May 1989, Cong was detained under s.13D(1) of the Immigration Ordinance (The Ordinance) pending a decision on her refugee status. She was interviewed by Immigration Officer Ip Ka Man (Ip) on 12.4.1991. Ip finalised his assessment and his recommendation that Cong should be screened out was put up to the Senior Immigration Officer Mrs. Chan Tong Suk-kan (Chan) on 4.9.1991. Chan also concluded that Cong was not a refugee as defined in the 1951 Convention and 1967 Protocol and her decision was endorsed by the Chief Immigration Officer Lam Hoo-cheung on 18.10.1991 and the decision was then made known to Cong on 29.11.1991.

As Cong had been classified as a non-refugee, she was not permitted to remain in Hong Kong and was being detained pending removal from Hong Kong under s.13(D)(1) of the Ordinance.

Cong's application to the Board for a review of the decision was not entertained as it failed to reached the Board in time although a

Notice of Application and Representation for review prepared by the Agency For Volunteer Service (AVS) was submitted to the Board on 27.12.1991.

HT, HQ, and HP (the Children) were classified as unaccompanied minors. Their applications for refugees' status were considered separately on the basis that Cong was not their natural mother.

HT, HQ, and HP were considered to be non-refugees by the Special Committee of the UNHCR.

Their applications to the Board also failed and they were detained pending removal in December 1992.

The applicants applied to quash the decision of the Director and the decision of the Board classifying them as non-refugees, leave having been granted on 4 December 1996. They also seek an extension of time under Order 53 (4)(1) of the Rules of the Supreme Court to seek such relief.

It appear that the delay was partly caused by the delay in the process of the application for legal aid by the applicants. Shortly after the decision of the Board denying HT, HQ, and HP their refugee status, Cong applied for legal aid with a view to challenge the decision in early 1993. Due to the back-log of applications by the Vietnamese asylum seekers, legal aid was not granted to her until 19 August 1996 and the

present proceeding was commenced after negotiations with the Crown were unsuccessful.

At the commencement of the hearing of the case, Mr. Chan, on behalf of the respondent took a preliminary point on the delay in seeking to set aside the ex-parte order granting leave. The court concluded that Mr. Chan was entitled to take such a preliminary point despite the argument by Mr. Kat to the contrary. On the other hand the court took the view that the decision could possibly involve an element of discretion and decided to deal with the issue of delay together with the substantive merit of the case.

Cong was an ethnic Chinese whose family had been living in Vietnam for many generations. She was a Chinese teacher in primary schools. Before 1978-79, the ethnic Chinese community in Vietnam as a whole was vibrant and prosperous. Cong enjoyed a reasonable standard of living, professional employment, professional status and security of home.

The diplomatic relationship between China and Vietnam deteriorated dramatically in 1978 and the two countries were at war. The Vietnamese government turned against its own ethnic Chinese community and there was an anti-Chinese campaign.

Discrimination against and persecution of the ethnic Chinese became official government policy. Chinese were dismissed from their jobs and children were removed from school. Police and militiamen harassed them in their homes. Their houses and property were confiscated. Chinese were ordered to leave Vietnam for China.

Hundreds of thousands of ethnic Chinese in Vietnam did go to China and settled there. The border between the two countries closed in July 1978.

Many Chinese families remained in Vietnam for various reasons. Those who remained and Cong was one of them, continued to be persecuted in one form or another. They were not allowed to work in the jobs for which they were trained. They were prevented from obtaining licenses to operate other business. Many were forced to work as illegal workers and were subject to excessive punishment purely on account of their ethnicity.

Cong said herself was forced to work illegally by giving private Chinese lessons to neighbours by day and by hawking at night for fear of being arrested too frequently. Despite her effort, she was arrested at least twice a month and was subject to excessive punishment, including confiscation of goods as well as physical abuse.

The general persecution of the ethnic Chinese began to abate in general in early 1980s' The relationship between China and Vietnam improved since the mid-1980s. Attempts were made by the Vietnamese government to gradually reintegrate the ethnic Chinese back into Vietnamese society and to restore to them full rights of citizenship. Indeed border trade between the two countries resumed in late 1988 and people were allowed to visit relatives in the other country.

Cong however claimed that she continued to be persecuted in the early 1980s. HT, HP and HQ whom she had adopted could not receive suitable education as they were refused household registration.

In early 1983 Cong was caught for teaching Chinese from a Taiwanese book. She was detained and compelled to undertake not to practice her teaching profession again. After her release, she was forced to live alone.

Cong had to arrange her aged "milk mother" to look after the children and due to financial difficulties, the children lived a very poor and deprived childhood and she could only visit them about once for a few hours every two weeks. Due to the inadequate facilities, the education level of the children suffered.

Cong also claimed that her house was forcibly occupied by a local cadre and his wife since mid-1976 and progressively she was relegated to living in a cupboard space under the stairs in 1984. Despite her complaint, the situation did not improve. Instead she was assaulted by the cadre and his wife. She mentioned an incidents in November 1984 when the cadre's wife used a heavy jade bracelet to beat her on the head and used her two fingers to squeeze her eyeball.

Cong also mentioned an incident in 1985 when she infringed the rule of not allowing anyone to stay at her home and she was detained and beaten by the police. She also said she was forced to attend the monthly political indoctrination meetings at the home of a local Vietnamese communist party leader throughout the 1980s. She said the group leader often made unwanted sexual advances to her.

Cong said the situation was such that she was forced to separate from her children. She had to put up with such intolerable

conditions and she decided to leave Vietnam in 1989. She successfully left Vietnam by taking a chance to visit her sick brother in China.

She said her "milk mother" had passed away. She said she believed it would be unlikely that she would be permitted to return to her home as she believed that the cadre and his wife had confiscated it with the support of the local authorities. She also said her mother and two siblings live in Canada and if she and her children are recognised as refugees, they should be able to join them in Canada.

Much of what Cong said in her affirmation as set out above was not mentioned by her in her interview on 12.4.1991 according to Ip. Ip also said when Cong described the effect of certain events on her, she also put them in a way different from her affirmation. For example, she never mentioned her wish to teach children and the disappointment of not being able to teach and she did not produce her teaching qualification certificate. She never described her employment since 1978 as being menial, unlawful, dangerous or poorly paid casual employment. She did not say that her sister had to sent money to her from Canada to enable her and her children to survive.

Cong stated in her affirmation that she was viewed with suspicion by the Vietnamese because of her education and the "capitalist background" of her family and that she was beaten on numerous occasions as a result of hawking illegally. Ip said those were not said. She also did not tell Ip that she believed that children had a right to learn the language of their parents and to learn Chinese, or that she constantly lived with feelings of fear and insecurity until she fled Vietnam. Ip also

said her account of how she came to be with the children in her affirmation differed from what she said in the interview.

Ip said during the interview, Cong told her that the three children were the children of a distant relative. She only said she had de facto adopted three children, not four and she did not say the fourth child was not able to come to Hong Kong. She never said she tried to apply to have the children to be placed on her household registration, nor any attempt to curry favour with the responsible officials to achieve such purpose. She only said the authorities would not allow the children to reside with her as her residence was in the city while they lived in the rural area. But she was not prohibited from living with the children in the rural area.

She never said that the children could not be placed on her household registration or receive education because of her ethnic Chinese background. She never said she attempted to have the children enrolled in local schools 3-4 times but failed. She only said the children received no education for economic reasons.

According to Ip, Cong never mentioned the effect of loosing her teaching job when she was dismissed in 1978 and she produced no teaching qualification certificate. She never said her employment since 1978 had been menial, unlawful, dangerous or poorly paid casual employment. She never mentioned that her sister had to send her money to enable the children to survive.

She did mention her hawking activities but not that she was viewed with suspicion by the authorities because of her education and

the "capitalist background". She only said she could not obtain a business licence as all Chinese business was under strict control at that time.

She had not mentioned of being beaten as a result of selling groceries illegally. She did mention being hit by a security officer and had her goods confiscated. Ip considered that to be related to her illegal hawking activities and there was no direct relationship between this incident and her Chinese race and therefore not relevant.

Cong also did not mention of her belief that children had the right to learn the language of their parents and to learn Chinese. She never said she lived with a feeling or insecurity. Her account to Ip of how she came by the children was not the same as what she stated in her affirmation. She said they were children of a distant relative.

Cong never said she was pained by the denial of education suffered by the children. There was no suggestion that her application to get household registration for the children so that they could go to school was rejected because she was ethnic Chinese. She never said she tried to enrol the children in local school despite lack of household registration. The only reason she advanced was economic reason.

There was no mention of a cadre and his wife making a claim to her home. There was no mention of the arrest and detention for 3 months in 1983 and as a result the children had to live with an uncle and on release she was ordered not to live with the children which constituted particular harsh punishment as the children regarded her as

their natural mother. The only matter she advanced for not living with the children was because her residence was in the city and their residence was in the rural area and she paid an old lady to look after them.

Cong did not say she needed a permit to visit the children and that the permit was difficult to get due to her race and adverse history. The only reason she did not live with the children was because she had to earn a living in city.

There was also no mention of forcible confiscation of her property resulting in her having to live in a closet space nor an assault and threat by a cadre and his wife. When mentioning the incident in 1988 of a friend stayed overnight, she did not mention of being assaulted which caused her to loose consciousness and her collar bone to be broken.

Cong also did not mention of having to attend political indoctrination meetings and the unwelcome sexual advances from the party leader and she did not mention of having to pay a bride to go to Quang Ninh to visit her brother.

It is fair to say that the details supplied to Ip and recorded during the interview and the allegation as set out in Cong's subsequent affirmation contained substantial discrepancies.

Cong was interviewed by Immigration Ip Ka Man on 12.4.1991. His report and recommendation to screen out Cong as a

refugee was submitted to Senior Immigration Officer S.K.Chan on 4.9.1991 and Chan confirmed such decision on 24.9.91.

In the legal ground of challenge as set out in the original application for leave, attack was made only of the decision of Chan. There was no suggestion that Ip had not properly discharged his duty and function as the officer interviewing Cong at all.

At the commencement of the hearing, Mr. Kat, on behalf of the applicants, seek to amend the Notice of Application. The effect of the application was to include as a ground to quash the decision screening Cong out as a refugee on the basis that the record made by Ip of the interview on 12.4.1991 was incomplete and inaccurate. It was alleged that the matters omitted by Ip were relevant and should have been recorded and submitted to Chan who made the decision of not granting Cong the refugee status.

The suggestion was that the failure to submit an accurate and complete record for the consideration by Chan constitute procedural irregularity and/or procedural unfairness.

It is important to bear in mind that in the original application for leave to apply for judicial review, the complain by Cong was that Chan took into account irrelevant matters or was irrational and/or had failed to take into account relevant matters. It was also alleged that Chan failed to apply the relevant Handbook procedures and criteria in considering the evidence and making his decision.

The original grounds relied on by Cong as set out in the legal grounds of challenge did not involve any dispute as to what was said or not said during the interview of Cong by Ip on 12.4.1991. There was no allegation that Ip had failed to make a complete and accurate record of the interview in such grounds of challenge although they were mentioned in her affirmation in support of the application..

If the application for amendment was allowed, one of the primary matters that had to be resolved would be whether the record made by Ip of the interview on 12.4.1991 was complete and accurate. That would possibly involved cross-examination of Ip and Cong and perhaps others who were present during the interview.

The interview of course took place almost 6 years ago. No one, neither Ip or Cong could reasonable be expected to have an independent recollection of what was said or not said during the interview.

The detail allegations of Cong were only revealed in her affirmation in support of the present application affirmed on 25.11.1996, some 5 and a half years after the interview in question. Some of the details in her affirmation were not disclosed in her Notice of Application and Representation to the Review Board on 27.12.1991 for a review of the decision when such Notice of Application and Representation was clearly prepared with some degree of "expert or professional advice."

It is fair to say that some of the discrepancies arising out of her letter in Chinese the translation of which was subsequently referred to in recommendation of the UNHCR as well as the Representation made

to the Board by Agency For Volunteer Service was in fact the result of error in the translation.

But much of the details of her experience as set out in her latest affirmation was only mentioned for the first time in the affirmation. In that regard, I am in the fortunate position of being able to read her letter in Chinese.

She stated in her letter that the children lived with her uncle and she was able to visit them once every few day and she never complained the separation had any effect on her. She never mentioned that the children were deprived the chance of education. She did not mentioned the attempt to put the children under her household registration and the failure of which resulted in their not able to attend school.

Yet in her affirmation, great emphasis was placed on the effect of not being able to live with the children when in fact she would see them once every few days. She also emphasised on the deprivation of their chance of receiving proper education.

There were also the discrepancies as to whether she was detained for one month or three months in 1983 and what in effect were the sexual advances towards her by the communist party leader. Her description of the origin of the children in her affirmation also differed greatly that of her letter. In her letter, she described two of the children as those of his elder brother from an adulterous relationship. She said the other girl was one of the two girls taken to her by their natural mother in

1982 so that she could maintain them for a period of time. In her affirmation the children were all described as children of his brother by different wives.

It was not difficult to understand why she chose to place emphasis on certain events which were not mentioned in the earlier documents.

It would be naive for the court not to recognise that people in Cong's position will have their knowledge on the criteria for refugees improved with the passage of time. It would also be naive for the court not to recognise that their stories of what happened to them when they were in Vietnam would be tailored in accordance with such improved knowledge in order to increase their chances of being screened in as refugees..

It would be difficult, if not impossible to place any reliance on their evidence in such circumstances.

To expect the court to resolve the dispute as to facts as to what was said or not said in an interview between two persons, both of whom could not reasonably be expected to have any independent recollection of the event and at least one of whom would likely tailor her evidence in order to achieve her purpose would put the court in an almost impossible position in the circumstances of the present case.

I must not ignore that in Judicial Review cases, the court is acting only in a supervisory role and not an appellate role. It is not the

primary function of the court to try to resolve dispute or mistakes as to facts.

I could not ignore that this was an application for judicial review under Order 53. An application for leave to apply for judicial review should be made promptly and in any event within three months from the date when the ground first arose unless there was good reason to extend such period.

The ground arose almost 6 years ago. I agreed with Mr. Marshall's observation that allowing the application to amend in effect amount to granting leave to Cong to apply for judicial review on those new grounds. I was of the view that if the original application had included the proposed new grounds, it was unlikely that leave would be granted on such grounds for the reasons that I have mentioned.

I was satisfied that the proposed amendment was just a logical step to bring her case in line with her recently improved story.

To allow the application to argue on the proposed new grounds in my view was an encouragement to fish for new and hitherto unperceived grounds of complaint and it would not be in the interests of the high standards of public administration.

I therefore refused the application to amend the Notice other than the cosmetic amendment to the paragraph entitled "Irrationality" on page 17 of the Notice as indicated by Mr. Kat on behalf of the applicants.

Despite my decision on the application to amend, Mr. Kat still argued that the Board had failed to take into consideration relevant matters, matters not appearing in the record of the immigration officer but claimed to have been said by Cong during the interview.

He suggested that such evidence in the form of the recent affirmation of Cong should be admitted as evidence to show what material was before Ip and whether essential procedural requirements were observed. He suggested that such fresh evidence also showed the decisions reached by the immigration officer and the Board were plainly wrong. Mr. Kat relied on *R. v. Environment Secretary, ex parte Powis [1981]* WLR 584, *In re an application for judicial review by PC 17503, Lo Wing-tong* [1990] 1HKLR 325.

If Mr. Kat's contention is correct. Then every time a illegal immigrant has been screened out as a refugee, he can always suggested that his account to the immigration officer has not been accurately and completely recorded and such allegation can then be introduced at the Judicial Review hearing to show what materials were before the immigration officer and that procedural requirements had not been observed which resulted in a wrong decision or finding. I found such suggestion difficult to accept. It will turn every Judicial Review hearing to a de nova rehearing of the application.

In a Judicial Review hearing, the court is primarily concerned with matters which were before the decision maker. As Lord Denning M.R. observed in *In re Stalybridge etc.* [1965] 1 W.L.R. 1320 at page 1326,

> "We have to apply this to the modern procedure whereby the inspector makes his report and the Minister gives his letter of decision, and they are made available to the parties. It seems to me that the court should look at the material which the inspector and the Minister had before them, just as it looks at the material before an inferior court, and see whether on that material the Minister has gone wrong in law. We were referred to two cases: In re Butler, Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936 and *In re Ripon (Highfield) Housing Confirmation Order*, 1938, *White and Collins v. Minister of Health*. They were decided at a time when the report of the inspector was not open to the parties. There was no letter of decision. There was nothing but the formal order of the Minister. It was necessary, therefore, for affidavits to be received showing what was the material available before the Minister. They were received in those cases for that purpose. Nowadays, when the material is available, it seems to me that the court should limit itself to that material. Fresh evidence should not be admitted save in exceptional circumstances. It is not correct for the court to approach the case absolutely de novo as though the court was sitting to decide the matter in the first instance. The court can receive evidence to show what material was before the Minister; but it cannot receive evidence of the kind which was indicated in the present case so as to decide the whole matter afresh.
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> I think that the preliminary point taken on behalf of the Minister, namely, that this is not a matter for fresh evidence, ought to be upheld, and I would allowed the appeal accordingly."

The circumstances in which fresh evidence can be properly admitted in a Judicial Review proceedings are carefully set out in *Lo*

Wing-tong (supra) and in *Nguyen Ho and Others v. Director of Immigration and another* [1991] HKLR 576.

In view of the grounds upon which relief was sought for the applicants and my refusal to allow them to amend such grounds, there was no basis upon which the fresh evidence could be admitted.

As to the question of whether the immigration officer or the Board had made wrong finding of facts. It could be resolved by the court without the need for fresh evidence.

One of the very important points emphasised by Mr. Kat was that in considering Cong's case, the immigration officers had not paid regard or sufficient regard to the "Handbook on Procedures and Criteria for Determining Refugee Status" of the UNHCR.

It was suggested that there was a legitimate expectation that the guidance in the Handbook would be applied and failure to do so was a failure to take relevant matters into account.

It must be remembered that the screening officers of the immigration department dealing with Vietnamese immigrants were specially trained to do the job, admittedly a very difficult task. They had been supplied with the relevant publications on procedures and criteria for determining refugee status. There were training courses as well on job studies before they could interview the Vietnamese immigrants on their own. It was wrong to suggest that the immigration officers had not

taken the handbook criteria into consideration because they had not expressly said so.

No one can dispute that the guidance in the handbook must be applied "with sympathy and common-sense". On the other hand the guidance in the handbook was just a guidance. They should not be applied as if they are statutory provisions, a point clearly made in *Tran Van Tien and others v. The Director of Immigration and another* [1996] 7 HKPLR 215 when Litton VP states at P. 221;

> “As can be seen, this is complex set of guidelines. It would be absurd to suggest that they can or should be applied as if they were enshrined in statute defining rights and obligations.”

and at P. 228,

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

Mr. Kat relied on a significant number of English authorities and leading textbooks as to the approach that the court should adopt in Judicial Review cases. It must be remembered however that when dealing with Vietnamese immigrant, the situation in Hong Kong is unique and unprecedented. Special procedures have been established to deal with the screening process and separate and independent statutory provisions have been enacted to deal with such procedures. Such distinction has been long recognised as Sir Derek Cons, V.P. observed in Nguyen Ho's case (supra) at page 582,

> "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."

Similar observation was made by Litton, J.A. in _*Director of Immigration and another v. Le Tu Phuong and another*_ [1994] 2 HKLR 212 at Page 224,

"......there are two major differences between the United Kingdom scheme and the position in Hong Kong :

(i) United Kingdom immigration officers are required to conduct their interviews and assess the credibility of asylum seekers at the numerous points of entry, more or less on the spot, with no particular knowledge of the conditions of the countries from which the asylum seekers come. Asylum seekers entering the United Kingdom come from all over the globe. In Hong Kong, immigration officers discharging their functions and duties under Part IIIA of the Immigration Ordinance have undergone programs of training to deal uniquely with migrants from Vietnam; the interviews are conducted many months after the migrants' first arrival; the migrants would have had ample time to prepare their stories before the interviews.

(ii) The asylum seeker in the United Kingdom has on paper a statutory right of appeal to an adjudicator, but s. 13(3) of the Immigration Act 1971 specifically requires that the asylum seekers be "refouled" to the country of origin, the country from which they escaped because of fear of persecution, before the right of appeal can be exercised. This is in stark contrast to the Hong Kong scheme where the asylum seeker has the assistance of an AVS lawyer for the purposes of his appeal and the lawyer is provided with all the relevant documents in the immigration files, including the notes of interview. There is the additional safeguard of the UNHCR "mandate", which allows the UNHCR to finally review the case and over-rule the decision of the Board. The risk of injustice in Hong Kong is therefore far less than in the United Kingdom where there is in effect only the court which stands between the asylum seeker and "refoulement"."

It must be remembered that the court has a limited role to play in Judicial Review cases. As Litton VP said in *Tran Van Tien v. Director of Immigration (No.3)* [1996] 7 HKPLR 215 at page 224 of the judgment;

> "It is worth emphasising, once again, the limited role of the courts in these cases. The duty of determining refugee status is give, first of all, to the Director of Immigration and then, or on review, to

the RSRB whose *decision shall not be subject to review or appeal in any court*: s 13F(8). As this court said in *Le Tu Phuong v. Director of Immigration & Anor* [1994] 2 HKLR 212 at 220-221, it is only when the High Court, in the exercise of its supervisory jurisdiction under Order 53 of the Rules of the Supreme Court, concludes that the decision of the RSRB is a nullity that the court can properly intervene: that is to say, the RSRB has acted outside its jurisdiction and failed to come to a 'decision' in terms of the Ordinance. The RSRB would have done so if, on the unquestioned material before it, the only rational decision is that, at the time of the decision, the appellant had a well-found fear of persecution. This, as can be seen, is an extreme proposition. To say that a statutory board, charged with the duty of reviewing the determination of refugee status, has acted irrationally or perversely is a strong statement.

As Lord Russell of Killowen said in *Secretary of State for Education v. Tameside MBC* [1977] AC 1014 at 1075B:

> "History is replete with genuine accusations of unreasonableness, when all that is involved is disagreement, perhaps passionate, between reasonable people."

In *Nguyen Ho and others v. Director of Immigration and Another* (supra) Sir Derek Cons, VP also said at page 583:

> "I would most respectfully suggest that this approach must be in accordance with the basic principles, for if the Court may properly interfere when the inferior 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 unassailably 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 was with the above principle and approach in mind that the court should consider the complaint by the applicants.

In the legal ground of challenge against the decision of Chan, Cong raised two matters, namely that when Chan concluded that she had not been affected by her dismissal from her profession as a teacher financially and was able to lead a normal life and that his reason for disbelieving Cong's subjective belief of surveillance for her illegal practice of her profession were irrational.

It was also suggested that Chan had failed to take relevant matter into account and failed to apply the handbook in the following areas, namely, her rights to liberty and security of the person; to equality before the law and to equal protection; to use her own language in community with others of her group; to protection of her family and for its establishment and for the care and education of dependent children; not to have her home arbitrarily or unlawfully interfered with and to gain her living by work which she freely chose or accept.

There were the further suggestion that the restriction on her right to earn a living by teaching Chinese, the excessive and arbitrary punishment for teaching Chinese and illegal hawking, forced parting from HT, HP and HQ as well as the excessive punishment from the local

PSB officer, cell leader and his wife had not been taken into consideration.

With respect, much of the matter complained of were not supported by the materials upon which Chan made his decision.

It was fair to point out according to the record of the interview of Ip, Cong's main complaints were as follows:

(1) She was dismissed from the school where she had been teaching right after the launching of the anti-Chinese campaign. She then had to run a hawking business. She did not have any licence as all Chinese business were under strict control and she also worked as a tutor teaching Chinese.

(2) In 1983 a local security officer found a book published in Taiwan which book was purchased before the fall of Saigon. She was arrested and taken for inquiry. She said she believed she had been followed for a long period to see if she was dishonest. She was then forced to write an undertaking not to be a private teacher any more as the authority did not encourage the study of Chinese. She was then threatened that if she resumed teaching Chinese, she would be sent to the NEZ. She did not receive any physical violence. She then made a living by running the grocery stall. In 1978, she was punished for having no licence and her goods were confiscated. She did not say that such punishment was due to her being an ethnic Chinese.

(3) As her hawking business did not earn enough, she began giving private Chinese lesson to students in 1983 by going to their homes. The

security officers would sometimes checked her handbag but she was able to hide her book and the secret tuition was not discovered.

Cong had not been involved in any political activities and had no trouble in her religious activity in the form of ancestor worship. She was issued with a family registration card in 1983 and she encountered no difficulty before 1983 for holding no such registration card.

Although Cong was called to perform forced labour in 1975 because of her previous service with the south Vietnamese Government, she was not forced to go to the NEZ as others were and she needed not put up with more forced labour after 1978.

Chan had all such matter in mind when she accepted the recommendation of Ip to screen Cong out as a refugee.

Chan made no mention of the children other than they had been adopted by Cong obviously because it was not considered matters pertaining to the children were relevant to her refugee status. On the matter before Ip, the children did not live with Cong because she was from the city and they were from the rural area. Cong was able to visit them regularly and could have lived with them. The only reason advanced by her for not living with the children was because she had to earn a living in the city.

Economic reason was the only reason for the children not to receive proper education. She was able to take the children to visit his

brother in China and then returned to Vietnam before they finally left in 1989. There was no basis for the suggested forced parting. The observation that Cong was able to lead a normal life could not be faulted bearing in mind that Chan must have in mind the special "country conditions" of which she was an expert. After all, Cong was able to make a living in the city. She was able to support three adopted children with the help of a neighbour and she was able to visit them regularly. There was also valid basis for rejecting her perceived difficulty arising out of her giving Chinese lessons to children.

The conclusion reached by Chan that Cong did not have a well-founded fear of being persecuted simply could not be said to be Wednesbury unreasonable.

Mr. Kat spent significant effort in suggesting that it was wrong not to consider Cong and HT, HP and HQ as one family unit as the children were dependant on her.

There could not be any dispute that Cong had given a number of accounts as to the "sources" of the children and on that basis the Board and UNHCR rejected the suggestion that the children were accompanied minors. The Board suggested that "Cong did not assume care of the minors with an intent on her part to provide a permanent parental role to the minors. Ha (Cong) was not able to find the minors' various parents and she financially supported the minors from 1983 through their illegal departure in 1989. However, after 1983, the minors' direct care was provided by other adults in Vietnam."

In any event, when dealing with Judicial Review application, the court is not concerned with technical procedural irregularity or breach of natural justice. The court is concerned with actual injustice or a real risk of injustice. As Mortimer, J. said in *The Queen v. Director of Immigration and the Refugee status Review Board, ex parte Do Giau and others* [1992] 1 HKLR 287 at page 314;

> "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] PCR 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."

Cong had been screened out as a refugee and the children could not have been screened in by reason of their relationship with Cong. They were then assessed by the Special Committee of UNHCR on their own rights. After having been screened out by the Special Committee, they also had the benefit of the attention by the Board which agreed with the decision of the Special Committee.

At the time of the Board's consideration, the three children were all less that 16 years of age. HT was born on 29.6.1978, HP on 12.11.1978 and HQ on 19.11.1979.

The main complaint related to the children not being able to live with Cong after her arrest in 1983 and that the children were not able to receive proper education.

The Board dealt with such matters as follows:

> "From 1981 to 1989, Ha (Cong) worked as an illegal hawker and did illegal tutoring at her home. She was able to adequately support herself and the minors. From 1981 to late in 1983, the minors lived in the home of Ha in Ho Chi Minh City.
>
> In 1983, Ha was issued a household registration card. The minors names were never on this household registration card.
>
> In 1983, Ha was arrested for operating a Chinese school in her home which was unlicensed and illegal and detained for 3 months. Following her arrest, the minors went to live with uncle CUNG MAN in the rural area. When she was released, her ho khau was restricted to live by herself and that no one could visit her house.
>
> Ha states although the minors did not live in her home from 1983 to 1988, she provided full financial support for the minors. Ha states the minors always had adequate food, shelter and clothing.
>
> In Vietnam, the only education the minors received was informal tutoring. The area in which they lived

> from 1983 to 1988 was not served by a public school because it was too remote. None of the children who lived in that area attended school. The minors were taught by the nanny who looked after them several hours a day. In Hong Kong, the minors PHUNG and TUONG are currently in grade 6 and the minor QUYNH is in grade 5."

The Board had clearly taken into consideration the children not being included in Cong's household registration and that they had to live in the rural area with Cong's uncle. The Board had clearly taken into consideration the lack of proper educational facilities available to the children when they were in such a remote area and there was no valid basis for suggesting that those matters had not been taken into consideration.

The fact remained that they were adequately housed, fed and clothed and were properly taken care of by adults. Although they received no formal education but that was a common phenomenon and they were able to receive tutoring from a nanny.

I cannot see how the decision that the children did not have any well-founded fear of being persecuted could be Wednesbury unreasonable.

On the substantive merit of the case, on the evidence before the court, the refusal to grant Cong, HT, HP and HQ refugee status could not be subject to any valid attack.

In deference to counsel's argument, I ought to deal with the issue of delay as well.

The decision of Chan to screen Cong out as a refugee was served on her on 29.11.1991 and the period within which to review such decision expired on 27.12.1991. There were subsequent correspondence between Cong, her sister and the AVS concerning her status. On 13.2.1992, a letter was sent to Cong by the Board to the effect that her application for review could not be entertained. The Board also sent a letter to Cong's sister in Canada that further application should be made to UNHCR for the mandate consideration. There could be no doubt that as far as the Board was concerned, the decision to screen her out was final.

In the mean time, the Special Committee of UNHCR was considering the case of the children and a decision was made by the immigration officer on 29.9.1992 to screen out the children as refugee which decision was confirmed by the Board on 21.1.1993.

In or about April 1993, Cong allegedly wrote to the Director of Legal Aid with a view to seek legal representation and a formal application was made on her behalf as well as on behalf of the children. A decision to refuse the application for legal aid by the Director of Legal Aid was made in November 1995 after a lapse of about 30 months. There was the subsequent appeal against the refusal of legal aid and a decision was made to grant them legal aid in August 1996.

As far as Cong was concern. there were two periods of inactivity, namely from end of 1991 or early 1992 when the final decision to screen her out was made and she was informed of the same to May 1993 when she applied for legal aid, and from May 1993 to November 1995 when the Director of Legal Aid was considering her application.

The second period of delay applied also to the children.

Cong, in trying to explain the first period of delay suggested that she understood her case "would be considered by the Review Board when her children's case was decided by the Board."

It was pointed out by Mr. Kat that in the months of May to July 1992, Cong had been interviewed 3-4 times in connection with the application by the children which interviews supported Cong's belief.

As for the period when consideration was being given to their application for legal aid, any delay was only attributable to the Director of Legal Aid with no fault on the part of Cong or the children.

Mr. Kat suggested that leave having been granted by the court on an ex-parte basis, the court will only refuse the relief on the ground of delay if the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

There had been substantial argument between counsel on the interaction between Order 53 Rule 4 and Section 21K(6) of the Supreme Court Ordinance Cap. 4. Reference had been made to the cases *Regina v. Dairy Produce Quota Tribunal for England and Wales, Ex parte Caswell and another* [1989] 1 W.L.R. 1089 and *Re Nguyen Van Loi* M.P No. 3741 of 1992.

In Nguyen Van Loi's case Keith J. said at page 10 of his judgment:

> "The statutory equivalent of that sub-section (section 21K(6)) in the United Kingdom is Section 31(6) of the Supreme Court Act 1981. In ex p. Jackson, the Court of Appeal held that the sub-section only bites where the Court is satisfied that there is good reason for extending time under Ord. 53 r. 4(1). In such a case, the Court retains a discretion under Section 31(6) nevertheless to refuse to grant leave. I have not considered the application of Section 21K(6) to this case because I am not satisfied that good reason for extending time under Ord. 53 r. 4(1) exists."

Recently the Court of Appeal in Hong Kong also had the opportunity to consider the question of the approach to "good reason" for the delay. In *Pang Hon Wah and others v. The Attorney General* C.A. No. 239 of 1996 Litton J.A. said at P. 14 of the judgment the following:

> "For the Court to extend time, there must be "good reason".
>
> Findlay J. , however, did not apply his mind to this question. Adverting to the fact that the ex parte judge (Keith J.) thought there was good reason for

extending time, Findlay J went on to say (p11-K of his judgment):

> "I do not sit as an appellant body from the decision of Keith J and I do not think there was any sufficient material non-disclosure that would justify my interference with his decision."
>
> This approach was plainly erroneous. The decision of the ex parte judge was, by its very nature, provisional. The inter partes summons before Findlay J raised delay as a distinctive ground for refusing leave and it was the judge's function at the inter partes hearing to deal with that. In so determining he was not, in any way, acting in an appellate capacity. He was exercising the High Court's original jurisdiction to determine the issue inter partes, for the first time."

Had the applicants shown good reason for the delay, in the case Cong, a delay of about three and a half years and in the case of the children about two and a half years.

As for the first period of delay of about one year on the part of Cong, the suggestion was that she thought her case was being considered by the Board together with that of the children. On the evidence, there was absolutely no ground for her so thinking. As early as January 1992 in the correspondence with her as well as her sister who lived in Canada, the Board had made it clear to them that her case could not be further considered by the Board as she was out of time and that her only recourse was to approach the UNHCR for mandate consideration. There was no good reason for the delay of the first period of one year by Cong.

As for the delay of two and a half years by the applicants, the question I have to consider was whether the delay on the part of the Director of Legal Aid in processing the application for legal aid by the applicants was a blanket answer to delay on their parts.

Delay in applying for judicial review by applicants in similar cases where the applicants had applied for legal aid and the delay was due to the delay in the process of their application by the Legal Aid Department had been dealt with sympathetically in the past. In *Tran Van Tien v. Director of Immigration (No.2)* [1996] 7 HKPLR 186 Keith J. said at Page 196:

> "The delay on the part of the Legal Aid Department in processing applications for legal aid meant that A2's belief that any application which he might submit would not be processed at all, though incorrect, was reasonable. Since he was entitled to think that without legal aid he had reached the end of the road in arguing that he should be accorded refugee status, he was entitled to think that there was nothing more that he could do."

In *Nguyen Tuan Cuong v. Director of Immigration (P.C.)* [1997] 1 W.L.R 68 at page 76, Sir John May in delivering the majority judgment said at P. 76:

> ".......In so far as the respondents sought to seek to uphold a decision not to grant relief on the ground of unnecessary delay, their Lordships note that a majority of the Court of Appeal in Hong Kong would not have refused relief on this ground. As Mortimer J.A. said in his judgment-"it would be a

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

Legal advice in closed camps may be limited, it does not mean that an applicant can simply sit back and relax in the belief than any suggestion of delay in taking out a judicial review application, no matter how long the delay is, can be met with the infallible reply, namely, "But I have applied for legal aid !"

In *Regina v. Stratford-on-Avon District Council and another, Ex parte Jackson* [1985] 1 W.L.R. 1319 Ackner L.J observed at Page 1323:

> "We do not derive any assistance from considering these cases, which, of course, only to civil suits involving private law proceedings and have no relation to judicial review, which involves public law proceedings. In judicial review proceedings there is no true lis inter partes or suit by one person against another: see *Reg v. Secretary of State for the Environment, Ex parte Hackney London Borough Council* [1983] 1 W.L.R. 524, 538-539, We agree with Forbes J. that it is a perfectly legitimate excuse for delay to be able to say that the delay is entirely due to the fact that it takes a certain time for a certificate to be obtained from the legal aid authorities and that, despite all proper endeavours by an applicant, and those advising her, to obtain a legal aid certificate with the utmost urgency, there has been some difficulty about obtaining it through no fault at all of the applicant."

In the present case, the applicants had made no attempt at all to try to find out what was happening to their legal aid applications. For

the 30 months after they made the application until their applications were rejected, they just sat back and did nothing at all.

It is perhaps relevant to bear in mind that Cong clearly is a well-educated person and was aware of her right. After her appeal to the Board was rejected, she repeatedly wrote in Chinese and in English to the Chairman of the Board, pleading and complaining.

Her sister in Canada Cong Van Kin also wrote to the Chairman complaining about the delay in the handling of the appeal of Cong to the Board. In one of the letter, she suggested that she "shall consult with my lawyer and report the matter to United Nations in New York if the matter does not straighten out." There was also a letter to the Chairman of the Board written in English by Cong which letter was sent to the Board via an address in Canada.

In *Attorney General v. Tran Quoc Cuong and another* [1995] 5 HKPLR 208**,** the Court of Appeal in Hong Kong took the view that a period of 30 months during which the applicant had taken no step to press for legal aid to be granted constituted inordinate and inexcusable delay.

In the present case, I am satisfied that no good reason had been advanced for the substantial delay in taking out the judicial review application. I would have dismissed the applications on the ground of delay as well.

In these circumstances, the applications by the applicants are dismissed.

I also make an order nisi that the applicants are to bear the costs of the application to be taxed if not agreed and that their own costs are to be taxed in accordance with the legal aid regulations.

The order nisi on costs will be made absolute 14 days after the handing down of this judgment.

(Wally Yeung)
Judge of the High Court

Mr. Nigel Kat instructed by M/S Pam Baker & Co. for the Applicants

Mr. W. Marshall QC of the A.G.'s Chambers for the Respondents (on 14th, 17th and 18th of March 1997)

Mr. Anthony Chan instructed by the A.G.'s Chambers for the Respondents. (on 9th, 12th and 13th of May 1997)