1996 M.P. No. 2037

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

MISCELLANEOUS PROCEEDINGS

BETWEEN

VAN CAN ON and others Applicants

and

(1) THE DIRECTOR OF IMMIGRATION

(2) THE DIRECTOR OF LEGAL AID

(3) THE CHAIRMAN OF THE REFUGEE STATUS REVIEW BOARD Respondents

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Before : The Hon. Mr. Justice Keith in Court

Dates of Hearing : 3th, 4th and 7th October 1996

Date of Handing Down of Judgment : 19th December 1996

[On appeals against the refusal of legal aid to challenge decisions refusing to accord refugee status to asylum-seekers from Vietnam, procedural fairness requires their solicitors to be provided with copies of such of the screening documents as the Director of Legal Aid proposes to rely on or refer to at the hearing of the appeals or has supplied to the Registrar of the Supreme Court for the purpose of the appeals.]

J U D G M E M T

THE FACTS

The Applicants in these applications for judicial review are asylum-seekers from Vietnam. They sought asylum in Hong Kong. They were all refused refugee status by the Director of Immigration and later by the Refugee Status Review Board ("the Board"). They wished to challenge those decisions. They therefore applied for legal aid to enable them to do so.

In order to enable the Director of Legal Aid to determine those applications, copies of various documents concerning the Applicants were supplied to her by the Director of Immigration. They were supplied to her on condition that they were to be used only to enable her to assess the merits of the applications for legal aid, and on condition that she did not supply them to anyone else. The Director of Immigration did not supply copies of the documents to the Applicants. That was because he is only prepared to supply copies of such documents to asylum-seekers or their representatives if a request is made to him within three months of the asylum-seekers being informed of the decision of the Board. That practice is said by him to be "an extra-statutory concession". Because more than three months had elapsed since the Applicants had been told of the decisions to refuse them refugee status, the Director of Immigration was only prepared to let the Director of Legal Aid see the documents. Nor were copies of the documents supplied to the Applicants by the Director of Legal Aid. That was because she regarded herself as bound by the condition laid down by the Director of Immigration that she could not supply them to anyone else.

In due course, the Applicants' applications for legal aid were refused by the Director of Legal Aid. The Applicants lodged appeals against the refusal of legal aid with the Registrar of the Supreme Court pursuant to section 26(1) of the Legal Aid Ordinance (Cap. 91) ("the Ordinance"). In order to enable the Registrar to determine the appeals, the Director of Legal Aid supplied copies of the various documents to the Registrar. When one of the appeals was heard by Master Jones, the Applicant's solicitors complained that they had not seen the documents on the basis of which Master Jones was being asked to decide the appeal. Master Jones adjourned the hearing of the appeal, and recommended to the Director of Immigration that copies of such documents which the Director of Legal Aid wished to refer to on the appeal, or which would otherwise be relevant, be released to the Applicant's representatives. The Director of Immigration refused to provide the Applicant's solicitors with copies of the documents relating to the appeal before Master Jones, as well as the documents relating to similar appeals. So too did the Director of Legal Aid. Their refusal to do so are the decisions challenged in these proceedings.

THE CURRENT PROCEEDINGS

A total of 68 Applicants have been granted leave to apply for judicial review of these decisions. However, 11 of them have withdrawn their applications, and I am therefore concerned only with the remaining 57. In addition, I am only concerned with the decision of the Director of Legal Aid not to provide the Applicants' solicitors with copies of the relevant documents. That is because the decision of the Director of Immigration not to provide the Applicants' solicitors with them is no longer challenged.

THE NATURE OF THE DOCUMENTS

The documents supplied by the Director of Immigration to the Director of Legal Aid, and by the Director of Legal Aid to the Registrar, were copies of the following documents:

(i) the notes made by the immigration officer who interviewed the asylum-seekers of what the asylum-seekers said in the course of the interview;

(ii) the reasons for the recommendation of the immigration officer to the Director of Immigration that the asylum-seekers be refused refugee status;

(iii) the decision of the Director of Immigration refusing to grant the asylum-seekers refugee status;

(iv) a transcript of any evidence given to the Board;

(v) the decision of the Board refusing to grant the asylum-seekers refugee status;

(vi) the reasons for that decision.

Some of the documents may well have been provided to some of the Applicants. But in the cramped conditions of detention centres for Vietnamese who have not been granted refugee status, a number of those documents may have been mislaid. In any event, the majority of the Applicants were not provided with the documents, with the exception of

copies of the actual decisions, i.e. items (iii) and (v). I shall refer to these six classes of documents as “the screening documents”.

THE APPLICANTS' PRIMARY CASE

The Applicants' primary case is simple. Fairness requires that a complete set of the screening documents should be made available to the Applicants. Only then will their solicitors know in full the factual basis on which the Registrar was going to be asked by the Director of Legal Aid to confirm that the Applicants do not have reasonable grounds for challenging the decisions of the Director of Immigration and the Board. In addition, fairness requires that copies of any documents actually supplied to the Registrar should be made available to the Applicants' solicitors. Only then will they be able to make informed representations to the Registrar as to why the documents he has been supplied with show that reasonable grounds for challenging the decisions complained of exist.

The duty to make prior adequate disclosure of relevant materials is one of the accepted elements of procedural fairness:

> "If prejudicial allegations are to be made against a person, he must normally ... be given particulars of them before the hearing so that he can prepare his answers. In order to protect his interests he must also be able to controvert, correct or comment on other evidence or information that may be relevant to the decision; indeed, at least in some circumstances there will be a duty on the decision maker to disclose information favourable to the applicant, as well as information prejudicial to his case. If material is available before the hearing, the right course will usually be to give him advance notification; but it cannot be said that there is a hard and fast rule on this matter, and sometimes natural justice will be held to have been satisfied if the material is divulged at the hearing, which may have to be adjourned if he cannot fairly be expected to make his reply without time for consideration ... If relevant evidential

> material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing": de Smith, Woolf and Jowell, "Judicial Review of Administrative Action", 5th ed., paras. 9-018, 9-019.

Different considerations may apply in respect of documents which can properly be characterised as confidential or which are immune from disclosure in the public interest, but no question of confidentiality or public interest immunity arises in this case. After all, the Director of Immigration is willing to supply the screening documents to asylum-seekers from Vietnam provided that a request is made for them within the time which he has ordained.

In a careful and moderate submission, Ms. Selina Lau for the Director of Legal Aid argued that procedural fairness to the Applicants did not require the supply to their solicitors of a full set of the screening documents. She took four points: these proceedings were premature; the Applicants' interests could be met if the gist of the documents was explained to their solicitors; the Applicants would already have been aware of the substance of the screening documents; and the issue of what procedural fairness required in these circumstances had already been decided in *Bui Thi Chin v. Director of Legal Aid* [1994] 1 HKC 441. I shall deal with each of these arguments in turn.

(i) Premature. Ms. Lau pointed out that there was no question of any procedural unfairness in the way in which the Director of Legal Aid reached her decision not to provide the Applicants' solicitors with copies of the screening documents. If it was unfair for the Applicants' solicitors not to have copies of them, that unfairness arose only as a result of the Director

of Legal Aid's decision. The correct way to challenge that unfairness, argued Ms. Lau, was to wait until the legal aid appeals had been determined. If the appeals failed, it would then be open to the Applicants to seek judicial review of the dismissal of the appeals.

I cannot go along with this argument. A similar argument was originally deployed in *R. v. Secretary of State for the Home Department ex p. Hickey (No. 2)* [1995] 1 WLR 734. By the time the case came before the Divisional Court, the argument had been abandoned. However, Simon Brown L.J. dealt with the issue of principle which the point raised at pp.757F-758A:

> "[Counsel] submitted that the court could not properly entertain what he argued was a free-standing procedural challenge -- an application to quash a refusal to disclose material before any substantive decision had been taken. The argument was based upon Otton J.'s decision in ... *R. v. Secretary of State for Defence ex p. Sancto* [1993] C.O.D. 144, [in which he] ruled that such an application is 'premature... in effect, an application for discovery in an administrative process.' It is sufficient for present purposes to note that [counsel] no longer maintains this stance. Rather he now accepts that the court does indeed have jurisdiction to intervene in advance of a substantive ... decision. I have no doubt that his concession is rightly made. The court's jurisdiction to entertain a procedural challenge cannot be limited to ex post facto review. Albeit not hitherto expressly decided, the court's recognition of this position is implicit in decisions such as *R. v. Parole Board ex p. Wilson* [1992] Q.B. 740. That is not to say, however, that the courts will readily intervene to regulate procedures in advance of a substantive decision. Generally, no doubt, they will in their discretion refuse to do so. The present cases, however, are clearly exceptional. To decline relief here on grounds of prematurity would plainly be wrong."

In my view, the present cases are also exceptional. An important question of principle is raised. The fate of 57 legal aid appeals turns on it. It would be a waste of time and money if the appeals were permitted to proceed without a ruling on whether the Applicants should be provided with the screening documents they seek, only for the appeals to be reheard all over again if the dismissal of the appeals is subsequently set aside for procedural unfairness. I agree with Ms. Lau that usually a global approach to the kind of problem raised in this case would be inappropriate, because each case depends on its own facts. However, since the issue of principle is common to all the Applicants, it makes sense to decide the issue of principle now.

(ii) Gist. The requirements of fairness are not engraved on tablets of stone. They depend on the circumstances of each case. Those circumstances include the nature of the inquiry, the character of the decision-making body, the kind of decision it has to make, and the statutory framework in which it operates. The duty to make prior adequate disclosure of relevant materials has to be seen in that light. Not every case requires the disclosure of all relevant documents or even the disclosure of all the documents in the possession of the decision-making body. In some cases, the requirements of fairness have been held to be sufficiently met by the disclosure of the gist of what the documents in the possession of the decision-making body contained.

Ms. Lau argued that in legal aid appeals of the kind to which this case relates, procedural fairness does not require the Applicants' solicitors to be provided with a complete set of the screening documents. If there is something in the screening documents which the Registrar wishes to hear from the Applicants' solicitors on, he can inform them of what the

screening documents say on the point, and can invite representations from them.

In evaluating this argument, it is necessary to remember that appeals to the Registrar under section 26(1) of the Ordinance against the refusal of legal aid are not judicial proceedings. In *Bui Thi Chin*, Liu J. (as he then was) held that when the Registrar of the Supreme Court (or a judge of the Supreme Court to whom the Registrar has referred any appeal under section 26(4) of the Ordinance) is hearing such an appeal, he is exercising an administrative function, even though that function is quasi-judicial in nature. However, it is also necessary to remember that the appeal to the Registrar does not take the form of a review of the decision of the Director of Legal Aid. The Registrar is not deciding whether the decision of the Director of Legal Aid was one which it was reasonably open to her to make on the materials before her. He is deciding whether, in his view on the materials before him, legal aid should be granted. The whole structure of section 26 of the Ordinance suggests that the Registrar is exercising an appellate jurisdiction, rather than a supervisory one.

The grounds on which the decisions of the Director of Immigration and the Board can be challenged are numerous. For my part, I do not see how the Applicants' solicitors can tell whether such grounds exist without seeing the screening documents. Without seeing the reasons of the immigration officer or the Board, the Applicants' solicitors will not know the primary facts which were found. Without seeing the interview notes or the transcript of the evidence, the Applicants' solicitors will not know whether it was open for such primary facts as were found to be found. Without seeing the reasons, the Applicants' solicitors will not know whether, in reaching the ultimate conclusion that the asylum-seekers did

not have a well-founded fear of being persecuted, relevant considerations were ignored, whether irrelevant considerations were taken into account, or whether the ultimate conclusion could rationally be reached on the primary facts which were found.

In the light of that, the disclosure by the Registrar to the Applicants' solicitors of the gist of the screening documents is not a satisfactory substitute for the disclosure of the documents themselves. Such summary of the screening documents as the Registrar chooses to give the Applicants' solicitors may well not tell them whether reasonable grounds for challenging the decisions complained of exist. In any event, such a course would place an intolerable burden on the Registrar. He would had to go through all the screening documents himself to see whether any grounds for challenging the decisions complained of exist. If copies of the screening documents had been disclosed to the Applicants' solicitors prior to the hearing, they would have been able to go through the screening documents themselves. They might conclude that there was no basis for challenging the decisions complained of, in which case the appeal would presumably no longer be pursued. On the other hand, if they concluded that there was a basis for challenging the decision, they could refer the Registrar to those passages in the screening documents which supported that assertion. After all, it is for the Applicants to show that reasonable grounds for challenging the decisions complained of exist: see section 10(3) of the Ordinance. Prior disclosure of the screening documents to the Applicants' solicitors would enable them to make succinct and concise submissions on why the decisions complained of are susceptible to challenge, and would obviate the need for the Registrar to embark on a time-consuming trawl through all the screening documents himself.

(iii) Substance. When an application for legal aid is made, the Director of Legal Aid may refer the application to counsel or a solicitor to investigate the facts, and to make a report or give an opinion on the application. The Director of Legal Aid may also require the applicant to attend for an interview. These powers are given to the Director of Legal Aid by sections 9(c) and (d) of the Ordinance. It is apparent from the documents which have been produced relating to the 1st Applicant, Van Can On, that when the Director of Legal Aid refers the application to counsel or a solicitor, the report or opinion made or given to the Director of Legal Aid will be provided to the Applicants' representatives, together with the notes made by counsel or the solicitor if he interviews the Applicant. In addition, it is apparent from *Bui Thi Chin* that when the application for legal aid is considered internally by a legal aid officer, the reasons for the refusal of legal aid are communicated to the applicant. Thus, in *Bui Thi Chin*, a 20 page document setting out the reasons for the refusal of legal aid was supplied to her.

Ms. Lau argued that these documents give the Applicants' solicitors more than sufficient material to identify the grounds on which the decisions complained of could be challenged. They therefore rendered the supply of copies of the screening documents unnecessary. I cannot agree. I am prepared to accept that an examination of the report or opinion of counsel or the solicitor, or the reasons of the legal aid officer, would show why they thought that reasonable grounds did not exist for challenging the decisions complained of. But the whole point of the appeal is to question the views they have reached. If the Applicants' solicitors cannot see the primary documents on which those views had been based, they would not be in a position to consider whether an alternative view is possible.

Ms. Lau also argued that supplying copies of the screening documents is unnecessary because the Applicants have already "gone through the exercise once with the legal aid officer". I cannot go along with this argument either. I am prepared to accept that in the interview with the legal aid officer, or with counsel or the solicitor, the Applicants will have been asked whether they have any complaint about the procedure adopted by the immigration officer and the Board. That enables the legal aid officer, or counsel or the solicitor, to arrive at an informed view as to whether the decisions complained of can reasonably be challenged on the ground of procedural impropriety. But I do not think that the interview helps the person conducting the interview to reach an informed view as to whether the decisions complained of can reasonably be challenged on other grounds. Whether they can will depend, not on what the Applicants said in interview, but on what the screening documents reveal.

Finally, Ms. Lau reminded me that reg. 7 of the Immigration (Refugee Status Review Board) (Procedure) Regulations requires certain documents to be made available for inspection by an asylum-seeker's representative. Those documents are the determination of the immigration officer not to recommend refugee status for the asylum-seeker, and the materials on which that recommendation was based, including the notes of interview. However, there is a difference between the right to inspect the documents and the right to study them in one's own time. In any event, the really important documents are the reasons of the immigration officer and the Board, and reg. 7 does not apply to them.

(iv) *Bui Thi Chin*. *Bui Thi Chin* was an appeal by an asylum-seeker against the refusal of legal aid to challenge decisions of the Director

of Immigration and the Board refusing to accord her refugee status. In his impressive judgment, Liu J. concluded that procedural fairness to the asylum-seeker did not require the supply to her representatives of a full set of the screening documents. Not surprisingly, Ms. Lau relied heavily on this decision.

In a powerful passage in his judgment, Liu J. said that to require the Director of Legal Aid to supply the documents would be tantamount to giving into a "fishing" expedition. He put it in this way at pp.452H-453A:

> "... when no reasonable cause for complaint exists, one should not be given a licence to embark on a pains-taking fault-finding exercise with official files and documents. That would be wasteful and disruptive ... it stands to reason that one should not be allowed inspection of official files and documents merely for going through the decision making process with a fine-tooth comb in the hope of unearthing some shortfalls in an otherwise apparently flawless exercise."

Mr. William Marshall Q.C. for the Director of Immigration adopted that argument, and reminded me of the authorities which discourage discovery in judicial review proceedings, and do not allow discovery at all before leave to apply for judicial review has been granted.

I see the force of that argument, but it must be remembered that the screening documents are not on the periphery of an appeal of this kind. They go to the very heart of it. The Applicants' solicitors have no idea whether the exercise conducted by the immigration officer and the Board was a "flawless" one until they have seen the screening documents. The last thing I want to do is to encourage the lodging of appeals on the off chance that the disclosure of the screening documents might turn something

up. But if the screening documents are the only documents from which the reasons for not granting the Applicants refugee status can be discerned, I see no basis for denying the Applicants' solicitors a sight of them.

I appreciate that this view produces what appears at first blush to be an undesirable anomaly. If the Applicants had applied for leave to apply for judicial review without having first applied for legal aid, they would have had to do without the screening documents, unless they had sought them within the period of the "extra-statutory concession" imposed by the Director of Immigration. By applying for legal aid, and then appealing against the refusal of legal aid, the Applicants would obtain the equivalent of pre-action discovery of the screening documents. But I do not think that that is as anomalous as it sounds. The threshold for the grant of leave to apply for judicial review is a relatively low one: does the material disclose matters which, on further consideration, might demonstrate an arguable case for the relief claimed? The threshold for the grant of legal aid is a much higher one: has the applicant shown reasonable grounds for taking the proceedings? The fact that discovery cannot be obtained for the purposes of the former does not necessarily mean that discovery should not be obtainable for the purposes of the latter.

Liu J. also based his conclusion on the fact that the screening documents are not supplied to applicants by the Director of Legal Aid when the Director of Legal Aid considers their application for legal aid. In those circumstances, Liu J. thought that there was no good reason for requiring the documents to be supplied when an appeal is lodged. I see the force of that argument as well, but I am not persuaded by it. The question is whether procedural fairness requires the Applicants' solicitors to be provided with copies of the screening documents for the purposes of the

appeal. My conclusion on that issue does not depend on what procedural fairness required at an earlier stage. What procedural fairness requires when the application for legal aid is first made is not necessarily the same as when an appeal from the refusal of legal aid is lodged.

For all these reasons, therefore, I have reached the conclusion that on appeals against the refusal of legal aid to challenge decisions refusing to accord refugee status to asylum-seekers from Vietnam, procedural fairness requires their solicitors to be provided with copies of such of the screening documents as the Director of Legal Aid proposes to rely on or refer to at the hearing of the appeals or has supplied to the Registrar for the purpose of the appeals.

THE EFFECT OF SECTION 9

It will be remembered that the Director of Immigration supplied copies of the screening documents to the Director of Legal Aid on condition that she would not supply them to anyone else. The Director of Legal Aid's original stance was that even if procedural fairness would otherwise have required her to supply copies of the screening documents to the Applicants' solicitors, she should not be compelled to do so, because that would put her in breach of the duty she owed to the Director of Immigration. That was an argument which appealed to Liu J., because in determining what the requirements of procedural fairness were, he said at p.452D-E:

> "There does not seem to be sufficient justification for persuading the Director of Legal Aid to breach her confidence by parting with the documents."

I cannot go along with this argument. The Director of Legal Aid is "entitled to be supplied free of charge" with various documents. They include "a copy of the pleadings and any other document in any relevant proceedings", and "a transcript of the evidence in any proceedings to which the appliction relates and, in the event of there being any other relevant proceedings ..., with a transcript of the relevant evidence in such other proceedings": sections 9(a)(ia) and (ii) of the Ordinance. Mr. Marshall developed an interesting and subtle argument to the effect that the word "proceedings" in sections 9(a)(ia) and (ii) refers only to court proceedings. In my view, the term is wide enough to cover the Applicants' claims to be accorded refugee status by the Director of Immigration and the Board. Accordingly, sections 9(a)(ia) and (ii) are wide enough to cover all six classes of documents in the screening documents. That was conceded by Ms. Lau, who on this issue adopted a stance different from that of Mr. Marshall.

Accordingly, since the Director of Legal Aid has a statutory entitlement to be supplied with copies of the screening documents by the Director of Immigration unconditionally, the conditions on which the Director of Immigration had supplied them to her were not binding on her. Since they were not binding on her, she should not have regarded herself as bound by them. It follows that she would not be in breach of any duty she owed to the Director of Immigration if she supplied copies of the screening documents to the Applicants' solicitors because she has always been free to disregard the conditions imposed by the Director of Immigration.

Liu J. noted in *Bui Thi Chin* at p.458B-C that if the Director of Legal Aid disregards the conditions imposed by the Director of Immigration, it may make the Director of Immigration more reluctant to

provide her with copies of the screening documents in other cases in the future. That would make it extremely difficult for the Director of Legal Aid to evaluate applications for legal aid in an informed way, and for the Registrar to evaluate appeals from the refusal of legal aid properly. Mr. Marshall made the same point. I do not share this concern. Section 9(a) entitles the Director of Legal Aid to be supplied with the documents. She has a statutory right to be supplied with them. Her right to be supplied with them imposes a corresponding duty on the Director of Immigration to supply them to her if she asks for them. He may well be more reluctant, as a result of this judgment, to supply the screening documents to her, but once she requests them, he has no power to refuse.

The Applicants' reliance on section 9(a) of the Ordinance enabled Ms. Lau to take a more compelling point. The Director of Legal Aid's statutory right under section 9(a) to be supplied with the screening documents by the Director of Immigration is exercisable by her only to enable her to "make such enquiries as [she] thinks fit ... as to the merits of the case". She has no right to the screening documents for any other purpose. She therefore has no right to supply copies of them to anyone else. I cannot go along with this argument either for two reasons:

(i) The Director of Legal Aid's power to make enquiries as to the merits of the case is a wide one. In an appropriate case, she could ask the solicitor of an applicant for legal aid what are the grounds for taking the proceedings for which legal aid is sought. If she had asked the Applicants' solicitors that, they may well have informed her that they did not know what

grounds were available to the Applicants until they had seen the screening documents. In those circumstances, she would have had to provide them with the screening documents because only then could she have been able to carry out the exercise of determining whether there was any merit in the proposed challenge to the decisions complained of.

(ii) It is difficult for the Director of Legal Aid to say that she has no right to supply copies of the screening documents to anyone else when she has supplied them to the Registrar. I understand entirely why she supplies them to the Registrar. Without them, the Registrar has no material at all on which to determine the appeal. But if she supplies them to the Registrar, in order to enable him to make a fair and informed determination of the appeal, she cannot deprive the Applicants' representatives of the same documents if a fair and informed determination of the appeal is not possible without the Applicants' representatives being able to make representations on them.

THE EFFECT OF SECTION 24

A solicitor is under a duty to keep his client properly informed. That includes supplying his client with any documents which come into his

possession and which are material to the subject-matter of his retainer, regardless of the source of those documents. Accordingly, documents should not be passed to a solicitor if the documents are not to be passed to the solicitor's client. If such documents are passed to a solicitor, the person supplying them cannot complain if the solicitor shows them to his client. These principles appear from para.8.03 of the Hong Kong Solicitors' Guide to Professional Conduct issued by the Law Society of Hong Kong.

Ms. Gladys Li Q.C. for the Applicants argued that these principles apply to the relationship between an applicant for legal aid and the Director of Legal Aid. That is because section 24(1)(a) of the Ordinance provides that the same "privileges and rights as those which arise from the relationship of client, counsel and solicitor acting in their professional employment shall arise from ... the relationship between an applicant for legal aid and the Director." Accordingly, the Director of Legal Aid is said to be under a duty to supply copies of the screening documents to the Applicants' solicitors.

That argument was said to be reinforced by reg.3(2) of the Legal Aid Regulations, which requires every application for legal aid "to be accompanied by such documents as may be required to enable the Director to determine ... whether it is reasonable that a certificate should be granted." Since the Director of Legal Aid obtains the screening documents from the Director of Immigration <u>on behalf of the applicant for legal aid</u>, so that a proper assessment can be made as to whether it is reasonable for a certificate to be granted, copies of the screening documents should not be withheld from the Applicants.

Ms. Lau's response is not without force. She pointed out that a solicitor's duty to keep his client properly informed is predicated on the existence of a retainer, i.e. on the giving of instructions to the solicitor to act on behalf of the client in a particular matter. An application for legal aid to the Director of Legal Aid has nothing to do with the conventional notion of a retainer. The Director of Legal Aid is simply acting in her capacity as the administrator of the legal aid scheme, exercising a power conferred on her by statute. Accordingly, the screening documents passed to her by the Director of Immigration are not sent to on behalf of the applicant. They are sent to her in order to enable her to carry out her statutory function.

In view of the conclusions I have reached on the requirements of procedural fairness and the effect of section 9 of the Ordinance, it is not necessary for me to reach a final view on this argument. My inclination, though, is that the absence of a retainer in the conventional sense is not significant. It is important to note that section 24(1)(b) of the Ordinance provides that the same privileges and rights as those which arise from the relationship between solicitor and client arise from the relationship between a person who has been granted legal aid and the Director of Legal Aid. A retainer in the conventional sense exists in such a case. Why did the legislature enact section 24(1)(a) if it was not to put an applicant for legal aid and a person who has been granted legal aid on the same footing? It follows that the presence or absence of a retainer in the conventional sense was not regarded by the legislature to be important. If that is right, there is no basis for denying an applicant for legal aid the same rights, including the right to be provided with documents which come into the possession of the Director of Legal Aid, as those enjoyed by a person who has been granted legal aid.

CONCLUSION

In this judgment, I have not addressed each and every one of the arguments which have been canvassed before me, but I have dealt with all of those on which my ultimate conclusion depends. In summary, procedural fairness required the Director of Legal Aid to supply the Applicants' solicitors with copies of the screening documents for the purpose of the appeals under section 26(1) of the Ordinance, and neither section 9 of the Ordinance nor the terms imposed on the Director of Legal Aid by the Director of Immigration prevented the Director of Legal Aid from supplying them.

ALTERNATIVE REMEDIES

In the course of the hearing, I expressed my concern that the Applicants' solicitors might have been able to get copies of the screening documents without having to resort to these proceedings. I recognised that on an appeal to the Registrar against the refusal of legal aid, the rules relating to the discovery of documents under Ord.24 do not apply, because Ord.24 relates only to actions begun by writ. However, it occurred to me that it might still be open to the Applicants' solicitors to apply to the Registrar on the hearing of the appeals

(a) for an order for the production of the documents by the Director of Immigration under Ord.38 r.13(1), or

(b) for authorisation to issue a subpoena to the Director of Immigration to produce the documents under Ord.38 r.14(5), or

(c) for an order for the production of the documents by the Director of Immigration under Ord.55 r.7(2).

It was contended on behalf of the Applicants that none of these options were available to the Applicants. That was because appeals to the Registrar of the Supreme Court against the refusal of legal aid do not amount to proceedings to which the Rules of the Supreme Court apply. That contention was based on the decision of Liu J. in *Bui Thi Chin* that appeals from the refusal of legal aid are not judicial proceedings. Because the proceedings are not judicial proceedings, Liu J. ruled that he had no power to order discovery or production of documents because the Rules of the Supreme Court do not apply to proceedings which are not judicial proceedings.

I do not question the correctness of Liu J.'s view as to whether the proceedings are judicial proceedings. What I began to question when I came to write this judgment was whether that conclusion necessarily meant that the Rules of the Supreme Court do not apply to the proceedings. Ord.1 r.2(1) provides that save for certain immaterial exceptions, the Rules of the Supreme Court "shall have effect in relation to all proceedings in the Supreme Court". This rule does not appear to have been cited to Liu J.: no reference was made to it in his judgment. Nor was this rule cited to me. In the absence of argument, I thought that the words "all proceedings in the Supreme Court" could be wide enough to cover an appeal to the Registrar of the Supreme Court against the refusal of legal aid, even if those

proceedings are not judicial in nature. If that was right, it would have been open to the Applicants' solicitors to obtain the screening documents by applying to the Registrar in the course of the hearing of the appeals for orders of the kind I have mentioned.

The relevance of this is that the existence of alternative remedies, generally speaking, would result in the court hearing an application for judicial review exercising its discretion to decline to grant the relief sought. If the Registrar, on an appeal against the refusal of legal aid, has power to make orders for the production of relevant documents against the Director of Immigration under Ord.38 r.13(1), Ord.38 r.14(5) or Ord.55 r.7(2), it is arguable that the existence of these remedies militates against the grant of relief in these proceedings. Before giving judgment, I wished to give the parties the opportunity to make submissions to me on this issue, even though that would significantly delay the handing down of this judgment. As a result, I have had the benefit of written submissions from the parties on the issue.

My concern about Ord.1 r.2(1) has now been laid to rest. Ord.1 r.2(1) must be read subject to section 54(1) of the Supreme Court Ordinance (Cap.4) which provides that rules of court may be made in respect of "all causes and matters whatsoever in or with respect to which the Supreme Court has jurisdiction". It is plain that the factors which led Liu J. to conclude that appeals against the refusal of legal aid are not judicial proceedings would also have led him to conclude that they do not come within the jurisdiction of the Supreme Court. It follows that the Rules of the Supreme Court do not apply to such appeals, and the Applicants do not have any remedies alternative to those sought in the present proceedings. In any event, Ms. Li reminded me that when the court

is considering whether the availability of other remedies should deprive an applicant of relief to which he would otherwise be entitled, it is necessary for the court to consider whether it was reasonable for the applicant not to pursue those remedies. I have concluded that even if the remedies provided for by the Rules of the Supreme Court had been available to the Applicants, it was reasonable for the Applicants not to have pursued them in view of Liu J.'s ruling in *Bui Thi Chin* that such remedies were not available to them.

RELIEF

The decision of the Director of Legal Aid not to provide the Applicants' solicitors with copies of the screening documents for the Applicants' appeals against the refusal of legal aid was communicated to the Applicants' solicitors by letter dated 12th April 1996. I make an order of certiorari quashing that decision. In the normal course of events, the quashing of a decision in public law requires the decision-maker to reconsider the matter. That is not appropriate in this case, because there is nothing for the Director of Legal Aid to consider: I have ruled that procedural fairness required the Director of Legal Aid to supply the Applicants' solicitors with copies of the screening documents. In these circumstances, I make an order for mandamus requiring the Director of Legal Aid to supply the Applicants' solicitors with copies of such screening documents in relation to each of the Applicants as have been supplied to her, and which she intends to rely on or refer to at the hearing of the Applicants' appeals under section 26(1) of the Legal Aid Ordinance against the refusal of legal aid or which have already been supplied to the Registrar of the Supreme Court.

I see no reason why costs should not follow the event, and I therefore make an order nisi that the Director of Legal Aid pays to the Applicants their costs of these proceedings to be taxed if not agreed. I was told at the commencement of the hearing that the decision of the Director of Immigration not to provide the Applicants' solicitors with copies of the screening documents was no longer challenged, but the Director of Immigration nevertheless remained a party to the proceedings in order to support the stance taken by the Director of Legal Aid. In these circumstances, I make an order nisi that there be no order as to the costs of

the Director of Immigration. Finally, although the Chairman of the Board was named as a party to the proceedings and relief was sought against her, the decisions in respect of which relief was sought did not include any of her decisions. I do not think it likely that she has incurred any legal costs over and above those incurred by the Director of Immigration, and I therefore make an order nisi that there be no order as to her costs.

Finally, I have not regarded this as an easy case at all, and I wish to express my thanks to all counsel for their comprehensive and well-presented arguments, and for making my task less difficult than it might otherwise have been.

(Brian Keith)
Judge of the High Court

Ms. Gladys Li Q.C. and Mr. Philip Dykes, instructed by Messrs. Pam Baker & Co., for the Applicants.

Mr. William Marshall Q.C. and Ms. Joyce Chan, Crown Counsel, for the 1st and 3rd Respondents.

Ms. Selina Lau, instructed by Messrs. Lo & Lo, for the 2nd Respondent.