CACV000135/1990

IN THE COURT OF APPEAL 1990, No. 135

(Civil)

BETWEEN

NGUYEN HO
NGUYEN CUONG
NGUYEN NGOC LANH
NGUYEN TAN LOC
DO GIAU
ALL OF WHITEHEAD DETENTION CENTRE HONG KONG, ASYLUM-SEEKERS — Applicants

and

DIRECTOR OF IMMIGRATION — 1st Respondent
REFUGEES STATUS REVIEW BOARD — 2nd Respondent

1990, No. 139

(Civil)

BETWEEN

DAO DUC LINH
TO DANG MINH
TRAN THI VAN
DANG NGOC CUONG
ALL OF WHITEHEAD DETENTION CENTRE HONG KONG, ASYLUM-SEEKERS — Applicants

and

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

Coram: Hon. Sir Derek Cons, V.P., Kempster, J.A. & Sears, J.
Date of hearing: 21st September 1990
Date of delivery of judgment: 25th September 1990

JUDGMENT

Sir Derek Cons, V.P., delivered the judgment of the Court :

This is an appeal from the refusal of Hooper J. to appoint a "court expert" under Order 40 of the Rules of the Supreme Court. The request had been made on behalf of five out of nine Applicants who have leave to take proceedings by way of judicial review against the Director of Immigration and the Refugee Status Review Board. The individual applications have been consolidated into two sets of proceedings, leading to two appeals, which, like the proceedings below, we have heard together for convenience.

All nine Applicants are natives of Vietnam currently detained in the Whitehead Detention Centre. In their applications for judicial review, which are expected to be heard in the High Court commencing on the 19th November, they seek various reliefs with regard to the several procedures, commonly called the screening process, which led to their being refused refugee status.

Put briefly the essential structure of the process would appear to consist of :

(1) an initial interview with an Immigration Officer, not always completed on one occasion. Of necessity the interview is conducted through an interpreter and includes the putting by the officer of a standard questionnaire;

(2) if the Immigration Officer concludes against refugee status the file is reviewed by a Senior Immigration Officer; and

(3) if the decision is confirmed there may be an appeal to the Refugee Status Review Board. This will be a "paper appeal" held in private, although the Board may call for the attendance of the applicant or the Immigration Officer. (In none of the cases with which we are concerned did this happen.) In addition to the documents prepared by the Immigration Department the Board may also look at other documents presented to it, and in particular, at submissions prepared on behalf of the applicant by a lawyer or a member of the Agency for Volunteer Service, who we understand are usually lawyers qualified in jurisdictions other than our own and who give their services without fee.

The need for a court expert - and it is only <u>the need</u> with which we are for the moment concerned - is said to arise from allegations of incompetence laid against the several interpreters who were engaged in the initial interviews between the five Applicants and Immigration Officers. Incompetence at that stage must, of course, not only have an adverse effect upon the officer's own consideration, but may be reflected in that of his senior and in the deliberations of the Board. The question which would be submitted to the court expert would, we understand, be something along the lines of "are the interpreters in question competent to perform what is necessary at interviews of this kind?"

The allegations of incompetence are supported by the affirmations of each Applicant. We take two as examples, one from each appeal. Thus

> "The interpreter had a northern accent. He did not understand many of the words I used. For example, he did not understand military terms and did not know what a serial number was. He had trouble understanding that I was an ex-soldier and seemed to think I was an ex-laborer. He also did not understand words relating to my work as a fisherman. For example, he did not understand the term "engine-boat." Also, both the immigration officer and the interpreter appeared to be confused about my forced labor. I know this because toward the end of the interview, I was asked how many people in the local area had to do the "community labour" besides me. I had already

explained that what I had to do was forced labor because I had a "blood dent." : per Nguyen Cuong.

"The interpreter for the second interview was very nice, but she did not speak Vietnamese fluently. She did not understand much of what I was saying and I am afraid she interpreted wrongly. For example, when I told her that I was ploughing the fields and clearing the jungle, she did not understand the words that I was using. Even after I explained it to her, I was not sure that she understood. This sort of thing happened many times.": per Dao Due Linn.

The rest are in similar vein and include at times adverse criticism of the interpreters' attitude.

In the detailed reasons for his decision the judge dealt individually with the case of each Applicant and concluded that none had satisfied him that the matters suggested had resulted in any prejudice to the Applicant concerned. In addition the judge noted that in some instances there was nothing to indicate any particular mistranslation, and that in two instances the submission presented on their behalf to the Board acknowledged that the Applicants were "content to rely on the facts recorded by the Immigration Officer during the interview".

Mr. Tang, who appears as he did below for the Applicants, suggests that the judge took the direct allegations in isolation, overlooking the effect of the affirmations as a whole, and in particular those parts which criticise the answers recorded by the Immigration Officers to the standard questionnaire. He has taken us in detail through the relevant parts of each affirmation to illustrate the many instances where the recollection of the Applicant differs from that recorded by the officer, contending that the differences are equally consistent with poor interpretation as with the failure on the part of the officer to perform his duties faithfully. The instances cover a wide range of differences. Some relate only to the interpretation put upon the facts related to the officer; some appear to be mistakes in matters such as dates of enlistment or forms of employment; finally there are flat denials that particular questions were ever asked. A question denied more than once is "are there any other points not covered by the questions above which the interviewee wishes to ask?" , with the recorded answer "nil". It is difficult to think that a difference of that nature, if it does in fact exist, could have been caused by poor interpretation.

The affirmations were not read in full to the judge at the hearing below. However it is apparent from the observations in his ruling that he had done so by himself before he gave his decision nine days later. We see no reason to think that when he did so he overlooked the passage to which Mr. Tang now draws our attention. On the contrary, we take his conclusion to have been that, taking the evidence as a whole, - which would include those passages, - it simply did not give him sufficient concern that the interpretation had been incompetent to warrant his appointing a court expert. That is a conclusion which we find to be well within the discretion accorded to him by the rules.

Even so, as is well known, this court will interfere if we are satisfied that in all the circumstances the exercise of a judge's discretion is plainly wrong. To that end we enquired of Mr. Tang the advantages he foresaw from the appointment of a court expert, as opposed to an expert put forward by himself alone. These would appear to be that the various interpreters in question might not be willing, or permitted by Government, to submit themselves to the tests which his private expert would probably wish to carry out; that the Respondents might be more willing to accept the conclusions of an independent expert rather than one proffered by the Applicants; and that there would be a natural saving in time and expense if there were only one expert called at the hearing rather than two.

It has to be accepted that a private expert might be faced with more difficulties in executing practical tests than one appointed by the court, but it does not necessarily follow that lack of a court expert will produce two experts at the hearing. The Respondents have already filed affidavit evidence which Mr. Thomas, who also appears as he did below, suggests would exclude the possibility of any finding of total incompetence; and he has instanced other possible witnesses who might assist, although not experts in the sense we are now considering. He has in addition emphasised what he would suggest as unsatisfactory features of such expert evidence, namely a lack of any objective standard of competence and the difficulty of relating competence at the present time to performance at a previous stage or at a particular interview.

Taking all these considerations into account we are not satisfied that the judge was plainly wrong, if wrong at all, as to which our opinion is not material.

For these reasons we dismiss the appeals, and thus find it unnecessary to consider, or to call upon Mr. Thomas to support, the further questions which have been raised in the Respondent's Notice.

(Sir Derek Cons) Vice President	(M.E.I. Kempster) Justice of Appeal	(R.A.W. Sears) Judge of the High Court

Representation:
Michael Thomas, Q.C. & K.L. YUEN, Sr. Crown Counsel (Crown Solicitor) for the Respondents.

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Robert Tang, Q.C.,	(No. 135/90.
& G.J.X. McCoy	(
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	(D.L.A. for Applicants in Civ. App. No.
	(139/90.