1997 A.L. No. 37

IN THE HIGH COURT OF HONG KONG
COURT OF FIRST INSTANCE
ADMINISTRATIVE LAW LIST

BETWEEN

NGUYEN NGOC NHAT Applicant

and

(1) THE REFUGEE STATUS REVIEW BOARD

(2) THE DIRECTOR OF IMMIGRATION Respondents

Before : The Hon. Mr. Justice Keith in Court
Date of Hearing : 3rd July 1997
Date of Delivery of Judgment : 3rd July 1997

J U D G M E N T

INTRODUCTION

The Applicant is an asylum-seeker from Vietnam. He arrived in Hong Kong on 18th April 1991. He was then 28 years old and single. He was refused refugee status by the Director of Immigration. He asked for his

case to be reviewed by the Refugee Status Review Board ("the Board"), but by a decision which was served on the Applicant on 18th August 1994, the Board confirmed the Director of Immigration's determination that the Applicant was not a refugee. He now applies, with the leave of Sears J., for judicial review of that decision of the Board.

DELAY

The Applicant's Notice of Application for leave to apply for judicial review was filed on 27th May 1997. That was over 33 months after the Applicant knew that the Board had confirmed the decision that he was not a refugee. Ms. Margaret Crabtree for the Board contends that relief should not be granted to the Applicant in view of this inordinate delay. I reject that contention for two reasons (each of which by itself would be sufficient to prevent the delay from disentitling the Applicant from the relief he claims):

(i) The Applicant applied for legal aid to challenge the decision of the Board on 17th October 1994. That was within two months of being notified of it. He was finally issued with a legal aid certificate on 20th May 1997. That was only seven days before his Notice of Application was filed. I do not know whether there was any delay on the part of the Applicant between the initial refusal of legal aid and the lodging of his ultimately successful appeal against that refusal, but delays in the processing of legal aid

applications, and in the ultimate grant of legal aid, should not count against an applicant: see *R. v. Stratford-on-Avon District Council ex p. Jackson* [1985] 1 WLR 1319 at p.1324A and *Tran Van Tien v. The Director of Immigration (No. 2)* (1996) 7 HKPLR 186 at p.194D-F.

(ii) The Court of Appeal has said that asylum-seekers from Vietnam, who are detained in detention centres in Hong Kong, have only limited access to legal advice. For that reason, and for the other reasons given in *Moc A Pao v. The Director of Immigration* (HCMP 4280/96), delays in seeking to challenge adverse decisions on refugee status should not be held against Vietnamese asylum-seekers. I note that Yeung J. came to a different view in *Cong Van Ha v. The Director of Immigration* (HCMP 4157/96), but *Moc A Pao* was not cited to him as the decision in *Moc A Pao* was not handed down until after the hearing in *Cong Van Ha* had been concluded.

In the interests of compleness, I should add that when Sears J. granted the Applicant leave to apply for judicial review, he did not expressly extend the Applicant's time for applying for leave to apply for judicial review. Since he granted the Applicant leave, however, he must implicitly have extended the Applicant's time. In *R. v. Criminal Injuries Compensation Board ex p. Avraam*, "The Times", 6th

June 1997, the Court of Appeal in England held that once the court has extended an applicant's time for applying for leave to apply for judicial review, delay cannot disentitle an applicant from the relief to which he would otherwise be entitled, unless the delay "would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration": see section 31(6) of the Supreme Court Act 1981, which is identical to section 21K(6) of the Supreme Court Ordinance (Cap. 4). This has not been the approach in Hong Kong. In a number of cases, it has been held that a judge is entitled to revisit the issue of delay at the substantive hearing even if hardship, prejudice or detriment is not present: see, for example, *The Association of Expatriate Civil Servants of Hong Kong v. The Secretary for the Civil Service* (HCMP 3037/94) and the *Moc A Pao* case itself, though in those cases the court at the leave stage expressly reserved its right to reconsider the question of delay at the substantive hearing. It is unnecessary to decide whether the approach in *Avraam* should be preferred to that currently adopted in Hong Kong, but it should be noted that Ms. Crabtree did not have any instructions on whether there was hardship, prejudice or detriment sufficient to warrant the refusal of such relief as the Applicant would otherwise have been entitled to.

THE APPLICANT'S CASE

The Applicant's case before the Board was based on the treatment of his father and its effect on the treatment of him. His father had served in the ARVN. Following the defeat of the South Vietnamese forces in 1975, he was captured. After 18 months' imprisonment "for re-education", he managed to escape and joined "an anti-government

organisation for restoring the old regime". He was arrested within a few months "for carrying out some kind of anti-government activities". In the next few years, he had a number of spells in prison "for re-education" in connection with these activities. When he was released from prison in 1983, he was subjected to a number of restrictions, but apart from that he led an unremarkable life. However, "he also assisted in anti-government activities". In November 1989, a close friend informed him that the organisation had been uncovered. He was fearful for his safety, and fled from Vietnam with his second wife (the Applicant's step-mother). He came to Hong Kong where he was granted refugee status. He now lives in the U.S.

The Applicant was also subjected to a number of restrictions, including restrictions on his education and employment, but apart from that he lived an unremarkable life until the series of events which led to his flight from Vietnam. The Board correctly summarised what the Applicant had said when he had been interviewed by the immigration officer as follows:

> "In December 1989 when working in the street he was arrested because some anti-government documents belonging to his father had been found in their house. His father had by this time departed from Vietnam. His brother ... and sister ... were also arrested. The family home was sealed off and he was detained in a district prison pending further enquiries. He was released in January 1990 with temporary release documents which, he claimed to the Immigration Officer, he had lost on the way to Hong Kong.
>
> In January 1990 he applied to reclaim his father's house and was advised personally by the district and provincial police and an officer of the land office that the house had been properly and irretrievably confiscated. The piece of farmland also belonging to his father was also acquired by the authorities. This plot of

> ground, 0.1 acre in area, had been bought by his father for his mentally disordered children. He was then taken by the district police for enquiries into his father's anti-government activities and disappearance and in June 1990 taken to a labour camp where he was required to grow crops. He remained there until escaping during the Lunar New Year celebrations in February 1991."

The Applicant did not tell the immigration officer why he had been sent to the labour camp, and although he was asked by the Board why he was sent there, he only answered that question by reference to why the family home had been confiscated, namely that it was alleged that his "father had used his house and his land to organise activities against the government".

THE BOARD'S CONCLUSION

The Board did not believe that the Applicant had been telling the complete truth. The Board found that two of the Applicant's complaints had never happened: no incriminating documents had been found at the family home, and the family home had not been confiscated. These findings of fact are not challenged by Mr. Paul Harris for the Applicant.

Although the Board disbelieved the Applicant on those two parts of his story, there is a substantial issue as to whether the Board disbelieved any other parts of his story. Ms. Crabtree contends that the Board rejected the whole of the Applicant's version of events from December 1989. In other words, it did not believe that he had been arrested in December 1989, or that he had been re-arrested and imprisoned in January 1990, or that he had been detained in a labour camp in June 1990, or that he had escaped from the labour camp in February 1991. However, if the Board had disbelieved the Applicant on those issues, I would have expected the Board

to have said so. As it was, the only things which the Board expressly said it disbelieved the Applicant about related to "the documents he claims were found in his house and that he was arrested and questioned about" (para. 15), and "the incident with the documents and the claimed consequential compulsory acquisition of the family property" (para. 27). No help can be derived from the Board's conclusion which - in relation both to the Applicant and his two brothers whose cases the Board considered at the same time - was simply as follows:

> "Having considered all the matters advanced by the Applicants and the prescribed persons on [their] behalf, the Board does not accept the credibility of the Applicants' claim for refugee status. Such are the discrepancies in the evidence, the Board finds that the Applicants have not discharged the burden required to establish such a status, nor have they raised a doubt of such a nature which would enable this Board to give them the benefit thereof, as provided for in the proper criteria which have been applied."

Since the only parts of the Applicant's story which the Board expressly said it disbelieved related to the documents and the confiscation of the home, I must assume that those were the only discrepancies in the Applicant's evidence. I must therefore assume that the Board did not reject the Applicant's story about the imprisonment of his father for re-education, about the Applicant's own imprisonment and subsequent detention in a labour camp as a result of his father's anti-government activities, and about his own escape and flight from Vietnam.

The crucial question for the Board, therefore, was: in the light of those parts of the Applicant's version of events which the Board must be assumed to have accepted, did the Applicant have, in July 1994, a well-

founded fear of being persecuted for a Convention reason if he was returned to Vietnam? In order to determine that, the Board would have had to decide four issues:

(i) whether the Applicant's father's imprisonment for re-education, the Applicant's own imprisonment and subsequent detention for an indefinite period in a labour camp as a result of his father's anti-government activities, and the Applicant's subsequent escape and flight from Vietnam would have caused the Applicant to fear that he would be ill-treated on his return to Vietnam;

(ii) if so, whether that fear was well-founded;

(iii) if so, what form that fear of ill-treatment would take and whether it would amount to persecution;

(iv) if so, whether the reason for that ill-treatment, namely his father's anti-government activities and his own escape and flight from Vietnam, constituted a Convention reason.

The Board does not appear to have addressed those issues. Having read the Board's reasons with care, it looks to me as if the Board concluded that <u>because</u> the Applicant had lied about the documents and the confiscation of his home, <u>therefore</u> he had not established his claim to

refugee status. Indeed, that is what the Board expressly said in para. 27 of its reasons:

> "The incident with the documents and the claimed consequential compulsory acquisition of the family property never having happened, [none] of the three Applicants had a well-founded fear of persecution at the time that they left Vietnam."

That does not follow. The Board still had to decide whether the Applicant had established his claim to refugee status on the basis of those parts of his story which the Board must be assumed to have accepted. The fact that the Board did not do that meant that its decision was flawed to that extent.

CONCLUSION

In those circumstances, I make an order of *certiorari* quashing the decision of the Board confirming the determination of the Director of Immigration that the Applicant is not a refugee, and I make an order of *mandamus* requiring the Board to re-consider the Applicant's claim to refugee status according to law.

(Brian Keith)
Judge of the Court of First Instance

Mr. Paul Harris, instructed by Messrs. Pam Baker & Co., for the Applicant.

Ms. Margaret Crabtree, instructed by the Department of Justice, for the Respondents.