IN THE COURT OF APPEAL

1993, No. 164
(Civil)

Headnote

Judicial Review - Decision of Director as confirmed by Refugee Status Review Board rejecting Vietnamese migrants' claim to refugee status quashed by High Court judge - Effect of s13F(8) "ouster of jurisdiction" provision - statutory scheme under Part ILIA Immigration Ordinance examined by Court of Appeal - Whether procedural fairness required Immigration Officer's notes of interview to be read-back to applicants - In so far as Ex parte Do Giau [1992]1 HKLR 287 required "read back" as a matter of law it is over-ruled - English authorities calling for a "more rigorous examination" by High Court judges inapplicable in the Hong Kong context - Appeal allowed and decisions of Director of Immigration and Refugee Status Review Board restored.

IN THE COURT OF APPEAL

1993, No. 164
(Civil)

BETWEEN

LE TU PHUONG	1st Applicant (1st Respondent)
DINH THI BICH CHINH	2nd Applicant (2nd Respondent)

and

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

Coram: Hon Nazareth, Litton and Bokhary JJ.A.

Date of hearing: 19 and 20 April 1994

Date of delivery: 28 April 1994

J U D G M E N T

Litton, J.A., giving the judgment of the court:

The appellants in this appeal are (1) the Director of Immigration and(2) the Refugee Status Review Board ("the Board"), a statutory body set up under Part IIIA of the Immigration Ordinance to review decisions made by the Director under s13D(1) of the Ordinance. The orders under appeal, made by Liu J on 8 September 1993, are as follows:

(1) An order of certiorari to quash "the decision by the Director of Immigration made on or about 20 February 1992 rejecting the

Applicants' claim for refugee status and refusing them permission to remain in Hong Kong pursuant to s13A(1) of the Immigration Ordinance" and

(2) an order of certiorari to quash the Board's decision pursuant to s13F(5) of the Ordinance dated 10 April 1992 rejecting the Applicants' claim for refugee status and ordering that their detention by virtue of s13D(1) of the Ordinance be continued pending their removal from Hong Kong.

These orders were made after hearings on affidavit evidence before Liu J lasting from 27 October 1992 to 23 June 1993 totalling 59 hearing days in court.

Two startling points should be noted at the outset. As to the first order, the Director of Immigration made no order on 20 February 1992: what happened on that day was that an immigration officer made a written report and recommendation to his superior officers. The Director did not make his s13A(1) order refusing the applicants permission to remain in Hong Kong until a week later, 28 February 1992. As to the second order, s13F(8) says: "A Board shall not be required to assign any reason for its decision and a decision of a Board shall not be subject to review or appeal in any court": an "ouster of jurisdiction" provision on which argument seems to have been "reserved" by counsel in the court below, with the result that the judge brushed it aside in his judgment.

The respondents in this appeal are a husband (Mr. Le) and wife (Mrs. Le), former residents of Vietnam (the "applicants" referred to in the judge's order). They together with their four daughters arrived in Hong Kong without any travel documents on 27 August 1990. They had left Vietnam in the

previous month and travelled overland to Macau; from Macau they took a boat to Hong Kong.

Legislative history

By the time this family arrived in Hong Kong, the legal machinery, set up in consultation with the United Nations High Commissioner for Refugees ("UNHCR") to deal with the "second wave" of Vietnamese migrants was already in place. The background to the addition of Part IIIA to the Immigration Ordinance in 1981, and the successive legislative amendments to the Ordinance since then to deal with the increasing influx of Vietnamese migrants, have been comprehensively dealt with in the judgment of Jones J in re Tran Quoc Cuong and Khuc The Loc (1991)2 HKLR 312 and Mortimer J in Ex parte Do Giau (1992)1 HKLR 287, and need not be repeated here.

Screening process: background

Upon the respondents' arrival in Hong Kong they, in accordance with standard practice, were given a pamphlet, in Vietnamese, produced by the office of the UNHCR, setting out the procedures under which they, together with all Vietnamese asylum seekers who arrived in Hong Kong after 15 June 1988, would be "screened" to determine whether they could claim refugee status. At that time, because of the huge influx of migrants into Hong Kong in the previous two years, there was a considerable backlog of cases awaiting screening. In the meanwhile, the applicants and their children were held in a detention centre pending the Director's decision under Section 13D(1) of the Immigration Ordinance to grant or refuse them permission to remain in Hong Kong.

When the screening procedure was first set up in 1989, an establishment of 70 Immigration Officers was employed, with a view to processing 404 Vietnamese migrants per week. However, for various reasons, including disturbances in the detention centres and poor response to calls for attendance at interviews, this rate was not maintained. Eventually, an increase in the establishment of Immigration Officers did take place: but not until 1992.

The "second wave" of Vietnamese migrants was not, of course, anticipated by the Hong Kong Government. In the year 1987, there were 3,395 arrivals. This was an increase of about 50% over the previous year. However, in the year 1988, there were 18,328 arrivals, and the figure jumped to 34,112 in 1989. The result of all this was that, by the time the respondents arrived in Hong Kong, they had to wait for a considerable time for their first interview. It was not until 5 December 1991 that they were first examined by an Assistant Immigration Officer, under s4(1)(a) of the Ordinance, with a view to ascertaining their personal particulars and identity.

Section 4(1)(a) examination

On 14 January 1992 the husband was first interviewed by an Immigration Officer, Mr. K.N. Ng, through a Vietnamese interpreter. The interview was conducted in accordance with the procedures laid down in the UNHCR Handbook, for the purpose of determining the husband's refugee status, as defined in the 1951 Convention and 1967 Protocol relating to the status of refugees. Although the 1951 Convention and 1967 Protocol were never extended to Hong Kong by the United Kingdom Government, the Hong Kong Government has, by a Statement of Understanding reached with the UNHCR, agreed to abide by the Convention and Protocol, and likewise the UNHCR Guidelines for the determination of refugee status. According to the

1951 Convention the term "refugee" means a migrant who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

The examiner's primary functions, according to the UNHCR Handbook, are:

(i) To ensure that the applicant presents his case as fully as possible and with all available evidence;

(ii) assess the applicants' credibility and evaluate the evidence (if necessary giving the applicant the benefit of the doubt) in order to establish whether, objectively, there exists a "well-founded fear of persecution" and, subjectively, whether such fear genuinely exists in the case of the applicant;

(iii) relate these elements to the relevant criteria of the 1951 Convention, in order to arrive at a conclusion as to the applicant's refugee status.

In the case of the husband, the examination took place, first of all, over a period of five days, between 14 January and 23 January 1992. Anyone who has seen the notes taken by the Immigration Officer concerned, MR. K.N. NG, and read his affidavit, would have been impressed by the thoroughness with which he performed his difficult task: a fact generously acknowledged by Mr. McCoy, Counsel for the respondents, at the hearing of the appeal before us.

The wife was then interviewed by the same officer over a period of three days and, arising out of what the wife said, the husband was interviewed again on 18 February 1992.

Following the conclusion of these interviews, and with commendable speed, Mr. K.N. Ng prepared a detailed report setting out all the relevant facts

starting from 1963 when Mr. Le, then 16 years of age, settled in Hanoi with his mother and younger brother. The whole thrust of the report was, needless to say, to relate the facts of the case to the Convention criteria for refugee status. A relevant consideration was, obviously, the issue of race, as Mr. Le is ethnic Chinese and his claim to refugee status was based partly on persecution on account of race. The claim was also based partly on religion and imputed political opinion.

In the course of his report, Mr. Ng gave his evaluation of Mr. Le's claim to refugee status at different points and concluded that, in his view, the applicants had not established a well-founded fear of persecution for the reasons set out in the 1951 Convention and 1967 Protocol.

In view of the way the proceedings were conducted by Counsel in the court below (not Mr. McCoy), it is worth pointing out that what MR. K.N. NG did in the course of the lengthy interviews was, in terms of the Ordinance, a s4(1)(a) examination, in accordance with the UNHCR Handbook. Whilst he undoubtedly evaluated the evidence, and related the evidence to the Convention criteria, it was not his function to make a decision under s13D(1). He forwarded his recommendation to his immediate superior, a Senior Immigration Officer, who then discussed the case with him. The Senior Immigration Officer then recorded his views in a minute which was forwarded to the Chief Immigration Officer. It is clear from that minute that the discussion was thorough, and the two officers brought their minds to bear upon the Convention criteria. The Senior Immigration Officer's conclusion was that there was nothing in the account given that would justify refugee status being accorded to the applicants. The Chief Immigration Officer endorsed the views of his two subordinate officers and asked for authority from the Assistant Director of

Immigration to further detain the applicants under s13D(1) of the Immigration Ordinance pending their removal from Hong Kong.

S13D(1) decision

The formal decision to refuse the applicants' permission to remain in Hong Kong was then made by the Director of Immigration on 28 February 1992. In the notice of that decision, the applicants were told that if they were aggrieved by the decision, they could apply to the Refugee Status Review Board for a review, within 28 days of receiving the notice.

It follows from what is said above that there was only one decision made, which was susceptible to judicial review: that of the 28 February 1992. However, when leave was sought from the court to issue proceedings for judicial review, the application referred to the "decisions" of the Immigration Officer, Senior Immigration Officer and Chief Immigration Officer, and the grounds of impeachment covered five and a half pages: of such complexity and with such minutiae of detail, with reference to what the husband is recorded to have told the Immigration Officer at the interviews, and how the applicant's account was "natural" and "logical" etc., that it is not surprising the proceedings got off to a bad start. To an extent the court was being invited to "re-try" the case, on the "facts" disclosed by the applicants, and to reach a conclusion different from that of the Immigration Officer. The successive amendments of the grounds on which relief was sought, allowed by the judge, made the case even more complex on paper. The Immigration Officer's report of the account given by the applicants and his own conclusions were dissected and put under different headings. An example is Ground 1: "The decision of the Immigration Officer displays errors of law upon the face of the record and is liable to be reviewed by this court for illegality".

Under Ground 1 we see a number of "Particulars" of which the following is an example:

> c) The Immigration Officer erred in law in making a negative decision on the basis of lack of credibility:
>
> Particulars
>
> i) In order to find that a claimant's evidence is not credible and can therefore be dismissed an inferior tribunal must find that the evidence is either a) internally inconsistent or b) contradicted by other credible evidence or c) inherently suspect or incredible; the applicant's statements must be "coherent and plausible, and must not run counter to generally known facts" - Handbook, para. 204.
>
> ii) the Immigration Officer found no evidence of (a) or (b), and could only be relying upon (c);
>
> iii) in his reasons the Immigration Officer does not argue lack of plausibility except in relation to the priest's letter to the mother, (page 2) and the alleged anti-government activities, (p.4). Neither is illogical, since the priest may have felt a letter would avoid the need to be seen with the mother, and "anti-government activities" is a standard accusation which may not lead to imprisonment; besides the Applicant did not himself claim that he had been engaged in such activity: see p.8.
>
> iv) according to the Handbook, "it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized", para.203;
>
> v) in any event, "untrue statements by themselves are not a reason for refusal of refugee status", (para. 199);
>
> vi) any suspected lies in this case should be weighed against the generally high degree of detail, of consistency and of logic in the Applicants' claims, which emerges in spite of the examining officer's conducting an "in-depth interview with Mr. Le to assess the credibility of his statements", (p.M2) and any unsubstantiated lies

> ought not to be used as a ground for defeating the Applicants' legitimate expectation of being recognised as refugees.

How it was thought proper to subject the Immigration Officer's "decision" (meaning his report and recommendation) to this kind of analysis is difficult to imagine. Unfortunately, this point, germane to the exercise of the jurisdiction of the court under Order 53 of the Rules of the Supreme Court, seems to have slipped the judge's notice as the hearing proceeded. Liu J, at the beginning of his judgment (p.306 line 1) said: "One could not be over-reminded that the supervisory courts are merely concerned with the decision-making process-and not the decision itself" but then, in the remaining pages of his judgment, proceeded to subject the "decision" to a microscopic examination: one, as Mr. McCoy aptly remarked, more appropriate to a scholar of the Dead Sea Scrolls than to a judge in judicial review proceedings.

AVS submission

On 25 March 1992 a notice of application was made on behalf of the applicants to the Board for a review of the Director's decision. This was in the form of a detailed written submission, prepared by a lawyer employed by the Agency of Voluntary Service ("AVS"), an agency which deals with refugees and in particular Vietnamese migrants. The general ground put forward was that Mr. Le had a "well-founded fear of persecution should he return to Vietnam by reason of his nationality, or, in the alternative, the cumulative effective of ethnicity, imputed political opinion and religion". Prior to making the submission, the AVS lawyer was given copies of all the relevant documents: the notes of interview, Mr. K.N. Ng's report and recommendation etc. In para. 5 of the submission, the AVS lawyer said:

> "The First Applicant (Mr. Le) has not had the opportunity to read the Immigration Department's files regarding his case nor have the files been read to him in Vietnamese. However, he is in general prepared to rely on the facts set out in the Immigration file in relation to this incidence."

The lawyer then went on to clarify one matter relating to Mr. Le's mother's contact with a priest from the local church.

In regard to another matter the account in the AVS submission differed from the account in the interview: In the interview, Mr. Le said that after he had allowed three Chinese friends to stay in his house, in March 1990, he was fined 100,000 dongs and was released upon paying the fine; (100,000 dongs was not a large sum; the family was apparently earning at that time approximately 4m dongs per month); in the AVS submission, he was allegedly held for three months in a tricycle store by the police, and was taken out for interrogation each day; (though, after one month, he was allowed home for one day mainly because there were no washing facilities at the police station). In most other respects the AVS submission coincided with Mr. Ng's notes of interview.

Review by the Board

Prior to reviewing the case, the Board had asked to re-interview Mr. Le. This took place on 7 April 1992. Prior to putting questions to Mr. Le the Board said:

> "This is not the actual hearing of the application for a review and we have not come here to ask you to repeat the whole of your life history or other events which led to your coming to Hong Kong and claiming refugee status. Our intention today is to ask you some questions in order to assist the Board in arriving at the right conclusion. You are under no obligation to answer any of the questions put to you by this Board unless you wish to do so."

The Board, upon Mr. Le expressing his willingness to answer questions, then probed a number of areas of concern. For example, in relation to Mr. Le's loss of household registration in Hanoi ("Ho Khau") there was this exchange:

"Q15 You did not succeed in retrieving your Ho Khau after applying for many times. You then gave up in 1983?

A In 1983, the local authorities summoned me to the office. I said to the authorities that I would not mind if they did not give back my Ho Khau to me. However, they should give my children Ho Khau.

Q16 You eventually gave it up in 1983?

A Yes, I gave up. Also, my wife and father-in-law had applied for Ho Khau for our children, but they were unsuccessful too."

And then, of particular relevance to what now remains as a central issue of this appeal, namely, the question of "read back", there is the following:

"Q24 The IO (Immigration Officer) also recorded that you tried many times to resume Ho Khau?

A Perhaps I had not made myself clear.

Q25 The IO recorded that you thought it was useless to pursue with the authorities and so you did not make any attempt after 1983. If you were away from home all this time, how could you make numerous applications to retrieve your Ho Khau?

A I got it wrong to the IO. My wife applied, not me.

Q26 While you were away from Hanoi, could your wife apply to retrieve your Ho Khau when you were not there?

A When I returned home in 1983, my father-in-law told me he had tried many times to resume Ho Khau for my children. When the IO asked me whether my family had tried to resume our Ho Khau, I simply answered yes, but I really meant that my wife and father-in-law applied, not me".

The Board then probed the question of the applicant's alleged detention after the visit by the three Chinese to his home in March 1990. The account the applicant gave varied significantly from the AVS submission. The questioning proceeded thus:

"Q44 You said police questioned you. How frequent?

A They detained me for questioning from time to time, about 10 to 15 days each time.

Q45 How many times in a month?

A I cannot remember, but I was summoned quite often. Sometimes, I was detained five to seven days, just sitting there to answer questions.

Q46 Can you indicate roughly how frequent?

A Sometimes once, sometimes two to three times a month and sometimes a few times a month.

Q47 How long did you have to stay there when you were summoned?

A 15 - 20 days were the longest, and 5 - 7 days were the shortest.

Q48 How long did this go on?

A From 1979 to the time I left Vietnam, excluding the time I was in the south".

It is clear, from the terms of s13F of the Ordinance, that the Board has wide powers to review the decision of the Director, including the examination process of the Immigration Officers leading up to the decision. Since the Board is provided with all the relevant Immigration Department papers and files, it follows that if there is some perceived defect or unfairness in the decision- making process, this can be corrected by the Board.

Moreover, the Board is empowered to make further inquiries into the facts, which is what the Board actually did in this case. The Board can receive fresh evidence. The Board is empowered to correct errors in the Director's decision-making process: indeed, it has wider and more flexible scope than a High Court Judge exercising supervisory powers under Order 53 of the Rules of the Supreme Court. It is therefore not surprising that s13F(8) states:

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

Ouster of jurisdiction

The effect of this clause was considered by Mortimer J in Ex parte Do Giau [1992]1 HKLR 287 at p138-9. The matter boils down to a single proposition: Was the Board's "decision" a nullity? In other words, can it be said that the Board had acted outside its jurisdiction and had not come to a "decision" in terms of the Ordinance?

In Do Giau there was a fundamental flaw in the Immigration Officer's findings which was carried through to the Board: It was taken as an undisputed fact that the applicant had worked in a state-owned rice-mill and was therefore able to lead a normal life. The effect, as Mortimer J pointed out at p320 line 15, was that in making its decision the Board relied upon evidence which had

never been given to the immigration officer. The applicant sought to correct this error in the written submission to the Board but his evidence on the point was overlooked. The applicant was therefore unheard on a point crucial to his case. This rendered the "decision" a nullity.

How is the decision of the Board in this case said to be a nullity? We have attempted to read Liu J's judgment several times, and have not been able to discern the basis upon which the decision of the Board was quashed. He referred at p319 to the provisions of s13F(8) and went on at p320 to say:

> "In our statutory framework, the Board need not give reasons. It is not a judicial body. It functions in an administrative or executive capacity".

He then referred to a further safeguard in the arrangements between the Hong Kong Government and the UNHCR, whereby the UNHCR might ask that an asylum seeker be "mandated in" as a refugee, despite the rejection of his application by the Board. The judge referred to the fact that Mr. Le did, in this case, make further submissions to the UNHCR which, after having received copies of the interview notes and all relevant papers, decided nevertheless not to support the application. The judge then said at p327:.

> "The husband applicant should really have been given some idea what, in the case as a whole, the Board was inquiring into. The wife applicant should likewise have been, for the same parity of reasoning, told. The concluding question [whether Mr. Le had anything to add] cannot be fairly taken as an invitation to the husband applicant to address on any or any new issues. The husband applicant had been explicitly told that his participation was somewhat restricted. On what must be a different basis for evaluation before the Board, at least the issues which the Board found necessary to examine again should have been, in the circumstances of this case, clearly identified to the applicant".

It is difficult to see the basis of this criticism. The suggestion that Mr. Le might not have realised what the Board was "inquiring into" is odd. Soon after his arrival in Hong Kong Mr. Le had in his hands the pamphlet explaining what "screening" was about. Mr. Le was illiterate, but there is no suggestion his wife was likewise. It is difficult to see the basis of the judge's conclusion that Mr. Le was ignorant of the Board's purpose.

"Read back"

Mr McCoy, with characteristic candour, told us at the hearing that he could not support the judge's general approach in this case. We wholly agree with Mr. McCoy. At the conclusion of his judgment (at p.329) the judge said:

> "It would be unproductive to seek to relate the multifarious grounds on which relief is sought to the conclusions I have reached. Suffice it for me to say, for the decisions questioned, I make an order in terms of the orders sought in paragraphs 1,2,4 and 6 of the relief."

Para. 6 of the "relief" is as follows:

> "6 An Order of Mandamus directing that the Applicant's claim to be recognised as refugees be examined afresh by another Immigration Officer and that he make a decision in accordance with law" (emphasis added).

If the judge had simply said: "Re-interview the applicants but make sure that the notes you take are read back and interpreted to them" that would have been clear, though immensely time-consuming. That is not what he said. The judge had many other criticisms of Mr. Ng, of a nebulous nature; he seemed to have thought that Mr. Ng had not related the facts of the case to the Convention criteria, when that was not so. The judge said that Mr. Ng's reasons when dealing with “the issue of loss of nationality” were “laconic and impertinent”(p.324). We fail to understand the basis for that remark. Mr Ng

analysed the applicant's credibility by reference to known facts and did so against the back ground of the Convention criteria. In our view, Mr. Ng's reasons were concise and plain. In criticizing Mr. Ng the judge did so in terms which were unclear. How, in these circumstances, was the Director to comply with the judge's order of mandamus? What additional requirements for an examination were required, before the Director could make a decision under s13D(1) "according to law"? If the Judge himself was unable to relate the "multifarious grounds" on which relief was given to the "conclusions" he had reached, how was an Immigration Officer approaching the task anew to do better?

Mr. McCoy, who realistically recognised and frankly admitted the difficulty in supporting Liu J's decision, said that there was only one line of argument by which he could attempt to do so. He formulated that argument like this:

(1) Fairness demands that the Immigration Officer's notes of interview be read back to the applicant to enable the applicant to correct errors or to put forward further facts;

(2) Although neither the UNHCR Handbook nor the statutory rules imposed this requirement, the attainment of fairness, in the eyes of the law, requires this additional procedural safeguard to be introduced;

(3) s13D(1) of the Ordinance should be construed in such a way that a "decision" to refuse an applicant permission to remain in Hong Kong reached without this procedural safeguard is not a "decision" contemplated by the legislature;

(4) accordingly, when the Board purported to review the "decision" under s13F(1), it was in effect reviewing a nullity. It must therefore follow that, despite the "ouster of jurisdiction" clause in s13F(8), the Board's "decision" was in itself a nullity.

In our judgment, the law would be doing a grave disservice to the community were it to tie the Immigration Officers' hands by artificial rules and procedural red tape. The circumstances under which an interview may proceed could vary widely. The ages and social backgrounds of applicants would differ. Some applicants may give clear and coherent accounts: perhaps, in the eyes of the officer, too glib and coherent to be credible. Others may be fumbling and discursive, and it may be difficult for the officer to pin the applicant down to a coherent account. It may be necessary, as the interview proceeds, to go back to points already covered: and, in this sense, there would be a "read back", or partial "read back".

In this case, Mr. K.N. Ng had clearly set about his task most thoroughly and conscientiously; indeed Mr. McCoy has categorised it as "exemplary". We agree. Assuming that Mr. Ng had read back the whole of his notes of interview to Mr and Mrs Le - or, perhaps more accurately, the interpreter had interpreted into Vietnamese the notes taken in the English language - what might have been achieved? It is now said in Mr Le's affirmation, filed in support of his application for judicial review, that he was "forced" north to the Chinese border with his mother in 1978. Mr. Ng categorically denies that, in the interview, they said they were "forced" to return to China; Mr. Le's account referred to persecution and troublesome approaches by security officers on the one hand, and on the other hand, Mr. Le's mother's

wish to depart, coupled with a reluctance to leave the younger brother behind. (In real life people's motives for doing things are often mixed, as Mr. Le in effect was understood to have been saying). Assuming that, in the course of a read-back, which in this case would have taken place over one month after the first interview, Mr. Le had wished to correct his evidence by suggesting that they were "forced" to go to China in 1978, what would Mr. Ng have done? If he had simply noted this new version, there would then have been a contradiction in Mr. Le's statement. If Mr. Ng were to reopen the whole episode, would the credibility of the applicants have been improved in the eyes of the examiner?

As we see it, the key to a proper interview is the accurate ascertainment of the facts. There would be instances where, in dealing with a murky area, "read back" of part of the notes of interview would be desirable. There could be circumstances where the whole of the notes should be read back. But it should be observed that the section 4(1)(a) examination of Vietnamese migrants generally takes place years after the events to which the interview relates. An interviewee's after-thoughts, days or weeks after the notes were first taken, may not necessarily assist in the ascertainment of the truth.

In our judgment, the process adopted by MR. K.N. NG was, in this case, unimpeachable. Take the incidence of Mr. Le's younger brother Bao who had been imprisoned by the authorities. In Mr. Ng's affirmation of 2 October 1992 (which went before the judge wholly unchallenged) para 12 he said:

> "12. As interviewing officer I was interested in the Bao incident because, depending on the facts that were given by Mr. Le, it was, quite possibly, a relevant matter despite having occurred 18 years before Mr. Le's departure from Vietnam. At p7(a) and 7(i) of my notes I carefully asked why Bao was arrested and the only answer and

> elaboration from Mr. Le that I received was the fact that despite repeated requests by his mother no official reason was given. I again asked when dealing with Bao at p.7(k) and received substantially the same answers with the addition that the church had not revealed to him or his mother the reason for Bao's arrest..."

This was the approach adopted by Mr. Ng in the interview. It is difficult to see how, procedurally, it can be faulted. Assume that Mr. Ng had conducted the interview perfunctorily, and then, at the end had read the notes of interview (in English) back to the applicant, would the procedure have been fairer in the eyes of the judge?

"Highest standards of fairness"

The judge, at p317, said:

> "What ultimately falls to be decided is this: can justice be achieved without read back in these claims of gravity? The answer must be a resounding No. Our procedure without read back before Do Giau was insufficient to ensure attainment of the highest standard of fairness".

The judge did not, in fact, consider what fairness required in the context of the Hong Kong statutory scheme and local conditions, beyond saying that "read back" was essential. He said, at p313:

> "English judges have been highly critical of the absence of read back in asylum cases. Read back is now an accepted practice in England".

He failed to appreciate that 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 s13(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 is in the context of a situation where, in effect, the asylum seeker has a "one shot" chance of persuading the authorities that he has a well-founded fear of persecution that the English courts call for a "more rigorous examination" and "the most anxious scrutiny" in such cases: a line of approach which Liu J. appears to have adopted uncritically as being applicable in Hong Kong: see p314 of his judgment and the English cases there referred to. Contrast Mortimer J's approach in Do Giau at p309 where he said:

> "However, it is right to give some consideration to the problem and its magnitude for it would benefit little an asylum seeker if he were detained for years awaiting a decision which is then taken following the fairest procedure which man could devise. It is, of course, not the duty of either the decision-maker or those who institute the procedure to establish or to seek to establish one which is the fairest that can be devised. A procedure which is fair in all the circumstances is what is required and that will also be a procedure which is practical.
>
> It follows from this that what has been decided to be a necessary feature of a fair procedure in other jurisdictions and in other circumstances even in asylum cases where the same criteria are applied are not necessarily applicable here and I do not find myself greatly assisted by many of those decisions."

Do Giau

Liu J. also appears to have thought that Mortimer J in Do Giau had decided that, within the "framework of statute and policy in Hong Kong" (see p316), the law required "read-back" in every case: thereby, in effect, interstitially weaving into the fabric of the regulations a procedural requirement which simply is not there. This is a misreading of Mortimer J's judgment in Do Giau.

What Mortimer J said in Do Giau at 314 was this:

> "Of course, some irregularities are so fundamental that injustice can easily be inferred. There are many illustrations. Here, the failure to read back the note did involve a real risk of injustice...".

The most glaring error in the Immigration Officer's determination in Do Giau was the mistake concerning state employment in a rice-mill. Mortimer J had heard evidence and was able to conclude on the facts before him that if the notes of interview had been read back to the applicant there was a real possibility that the factual mistake would have been corrected. The error concerning employment coloured the thinking of the immigration officer to an important extent. This error was carried through to the decision of the Board, and remained uncorrected.

To say that read back in one isolated case might have corrected an injustice does not erect this practice into a requirement of law. At p311 in Do Giau Mortimer J said :

> ".... fairness requires that the contemporaneous note of the interview should be read back again through interpretation to the asylum seeker at the end of the interview, or during it, in order to check (a) its accuracy and (b) its completeness".

The emphasis here is on accuracy and completeness : not upon some ritualistic requirement of the law. The judge envisaged the possibility of read back either at the end of the interview or during it : suggesting that flexibility is important, and the question how best to proceed must be left to the judgment and discretion of the examiner.

Do Giau did not erect "read back" as a legal requirement. If it had, we would over-rule it to that extent. The law does not require formalism. It requires something better.

That said, we would add that generally-speaking read-back of the notes taken by an interviewer is desirable, to eliminate the possibility of error and misunderstanding: particularly when the interview takes place at short notice, and is narrowly focussed, such as a police investigation.

Conclusion

Standing back from this case and looking at the result, what has been achieved in terms of good administration? The judge, in the exercise of the court's supervisory jurisdiction under Ord.53 of the Rules of the Supreme Court, has ordered that the applicants go through the screening process all over again: taking away resources which would otherwise have been used for other applicants. Delay in the whole screening process would inevitably be caused. Delay can, in a borderline case, make the difference between re-settlement in another country or repatriation to Vietnam because, as the conditions in Vietnam improve, so the perception of a "well-founded fear of persecution" shifts.

The judge, in quashing the decisions of the Director and of the Board gave no clear guidance as to how the interviews and the evaluation exercises should be conducted, nor how the Board should have discharged its statutory functions. If all that he had meant was that the notes of interview should be read back, he could have made a simple order to that effect: he would not have required that the s4(1)(a) examination be conducted afresh by another immigration officer. And he never asked himself the question: Would the defect have been cured if the notes had been read back to the applicants by the Board? The judge never made clear how the new officer should act and what fresh material is required to be put before the Director before a "decision" by the

Director is "in accordance with law". How can a system of administrative law work like that?

Reading the notes of interview one cannot help but be sympathetic towards the applicants. The authorities in Hanoi appear to have acted oppressively and it could not have been purely by choice that Mr. Le absented himself from his family for three years by going down south between 1980 and 1983: though he did see his wife on occasional visits to Hanoi. Life under a socialist regime in Hanoi was difficult. But, as Lord Templeman said in Sivakumaran [1988]1 AC 958 at 966F: "Danger from persecution is obviously a matter of degree and judgment". Who is better placed to exercise that act of judgment than the Director of Immigration, with detailed reports on the circumstances of Vietnam, against which the applicants' claim to refugee status can be measured?

In our judgment the judge's criticisms of the decision-making process, leading to the Director's decision of 28 February 1992 to refuse the applicants' permission to remain in Hong Kong, and likewise the Board's decision of 10 April 1992, are unfounded. The process and the review were not in anyway contrary to law. In our judgment MR. K.N. NG's conduct of the s4(1)(a) examination was exemplary and his reputation has been unfairly tarnished. Further, there is no legal requirement of read-back. Mr. Ng did more, in the way of getting to the bottom of what he had to check, than mere reading back could have achieved.

Certain aspects of Liu J's judgment have demanded our attention. Others have not. It would be unsafe for persons engaged in refugee screening to pick through his judgment with a view to seeing what (if anything) is left of it. They would be well advised, therefore, simply to lay it respectfully to one side.

The appeal is allowed. The judge's orders in the court below must be discharged and we so order.

In concluding this judgment we wish to acknowledge our thanks to counsel: to Mr. Marshall Q.C. and his junior Mr. Thomas Law for the very comprehensive written submissions handed in a few days before the hearing began; and also to Mr. McCoy who clearly perceived the flaws in Liu J's judgment and at an early stage of the hearing informed us that he would not be seeking to uphold the validity of the judge's approach. This has enabled us to complete the appeal, fixed for eight days, in one-and-a-half days.

(G.P. Nazareth)	(Henry Litton)	(K. Bokhary)
Justice of Appeal	Justice of Appeal	Justice of Appeal

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