1995 No. MP 3644

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

TRAN VAN TIEN and OTHERS Applicants

and

(1) THE DIRECTOR OF IMMIGRATION

(2) THE REFUGEE STATUS REVIEW BOARD Respondents

Before: The Hon. Mr. Justice Keith in Court
Dates of Hearing: 27th-31st May, 3rd-7th and 10th-11th June 1996
Date of Handing Down of Judgment: 31st July 1996

[(i) In determining whether an asylum-seeker has a "well-founded fear of being persecuted" within the meaning of Art. 1A(2) of the 1951 Convention relating to the Status of Refugees, the asylum-seeker's fear has to be assessed by reference to all the known

facts, and the assessment is not confirned to those facts which induced the asylum-seeker's fear. The degree of likelihood of persecution which is required to be established does not have to make persecution probable : a real chance of persecution is sufficient.

(ii) In determining claims for refugee status by asylum-seekers from Vietnam, the Refugee Status Review Board is not obliged to consider international instruments relating to human rights to decide what conduct amounts to persecution, nor is it obliged to take into account any guidelines for determining refugee status other than those set out in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.

(iii) Where an administrative decision is made in ignorance of or contrary to the true facts, evidence is admissible to show the true facts on which the decision should have been based, provided that it is shown that the facts placed before or found by the decision-maker were plainly wrong.]

J U D G M E N T

INTRODUCTION

The Applicants are ethnic Chinese from Ha Tuyen Province in North Vietnam. They claim that in 1979 they were forcibly removed from their homes and confined in concentration areas reserved for ethnic Chinese. They allege that while in those areas their civil liberties were disregarded, they were subjected to harsh and arbitrary laws, and they were forced to live in conditions of isolation, poverty and squalor. Eventually, they managed to escape to China, and from there they came to Hong Kong. Once in Hong Kong, they applied for refugee status but their applications were refused. In these proceedings, the Applicants challenge the various decisions that they had not established a well-founded fear of persecution, and were therefore not refugees within the meaning of the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol to it ("the 1951 Convention").

THE FORM WHICH THE PROCEEDINGS HAVE TAKEN

There are 120 Applicants in all. 61 of them are heads of their households, and the remaining 59 are dependants or members of their families. Separate decisions in relation to each of the 61 households were

made. Indeed, each of the cases were considered on their individual merits, because whether an asylum-seeker has a well-founded fear of persecution involves an evaluation of the subjective state of his mind.

Despite that, the cases of all the Applicants had been included in one application for leave to apply for judicial review. That approach was said to be justified on the basis that all the Applicants shared a number of common characteristics, and that the treatment to which they were subjected in Vietnam, which is alleged to have caused each of them to have a well-founded fear of persecution, is broadly similar. However, whether that is factually correct or not, it was undoubtedly the case that each of the decisions challenged would have to be considered separately. Accordingly, although the form which the Notice of Application took was akin to that of a class action, the fact was that the application had to be treated as separate applications for judicial review made by the heads of each of the 61 households.

At an interlocutory stage in these proceedings, I took the view that it would not be possible to hear and determine all these applications together. In my judgment, the only practicable course to adopt was that which was adopted in *R. v. The Director of Immigration and the Refugee Status Review Board ex p. Do Giau* [1992] 1 HKLR 287, and that was to hear and determine first the cases of a handful of the Applicants. I directed that those Applicants should be as representative as possible of any sub-groups which might exist amongst them, because the aim was to enable the decisions in the cases of those Applicants to be as reliable a guide as was possible to the likely outcome of the cases of the other Applicants. In the

event, four "test" Applicants were chosen by the parties, and it is their cases which I have considered. They were:

Nong Van Sui (Applicant 37),
Chu Van Cam (Applicant 49),
Voong Khac Luong (Applicant 78), and
Tran Kai Hung (Applicant 102).

I trust that I will be forgiven for referring to them for convenience as A1 - A4 respectively. However, when I refer to "the Applicants" in this judgment, I refer to all the Applicants and not merely A1 - A4, unless otherwise stated.

THE DECISIONS CHALLENGED

The procedure for determining whether an asylum-seeker from Vietnam should be accorded refugee status was established in consultation with the Office of the United Nations High Commissioner for Refugees ("the UNHCR"). Put simply, the asylum-seeker is initially interviewed by an immigration officer in order to obtain personal data and to record his claim for refugee status. He will then be interviewed by an immigration officer in greater detail on the basis of a questionnaire drafted by the UNHCR. His family will also be interviewed. The officer's decision, which is made in the name of the Director of Immigration ("the Director"), and which is recorded on the file together with the officer's reasons, is then passed to a senior immigration officer or a chief immigration officer, depending on the apparent complexity of the case, for endorsement or

review. An appeal against the refusal of refugee status is by way of review by the Refugee Status Review Board ("the Board").

According to the Notice of Application, the decisions challenged are not merely the decisions of the Board relating to the Applicants. The decisions of the Director relating to the Applicants are also challenged. However, Mr. Paul Harris for the Applicants realistically accepted that any defects in the decision-making process at immigration officer level could be cured on the review by the Board. Moreover, he was concerned about the length of time which would elapse if the whole of the screening process had to begin again. The screening at immigration officer level can be a lengthy process, and Mr. Harris wanted to avoid that if possible. Accordingly, if the Applicants' claims for refugee status have to be reconsidered, Mr. Harris wants them to be reconsidered only by the Board. That would not be possible if the decisions of the Director were quashed, because the Board's jurisdiction only arises once a decision has been made by the Director not to accord the asylum-seeker refugee status. For these reasons, the decisions of the Director relating to the Applicants are no longer challenged, though that does not mean, as Mr. Harris was careful to point out, that he accepted that these decisions were not flawed.

DELAY

The Applicants' Notice of Application for leave to apply for judicial review was filed in court on 28th November 1995. That was a very long time after A1 - A4 were informed that the Board had refused their claims for refugee status. The delay was 31 months in the case of A1, 26

months in the case of A2, 23 months in the case of A3 and 28 months in the case of A4. Delays of this magnitude would in the vast majority of cases make applications for judicial review quite impossible to mount.

Section 21K(6) of the Supreme Court Ordinance (Cap. 4) provides:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the Court may refuse to grant -
> (a) leave for the making of the application; or
> (b) any relief sought on the application,
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

Section 21K(6) reproduces section 31(6) of the Supreme Court Act 1981. In *Caswell v. Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738, the House of Lords gave the words "undue delay in making an application for judicial review" in section 31(6) a restricted meaning. It was held that the words referred to a failure to comply with the requirements of Ord. 53 r. 4(1) of the Rules of the Supreme Court in the U.K. That provides:

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

Ord. 53 r. 4(1) of the Rules of the Supreme Court in Hong Kong is in identical terms. There was therefore "undue delay" on the part of A1 - A4 in applying for judicial review of the decisions challenged, unless "there is good reason for extending the period within which the application [should have been] made."

The fact remains, however, that I gave all the Applicants leave to challenge those decisions. In those circumstances, Mr. Harris argued that section 21K(6) limits the extent to which I can now give effect to any delay on the part of A1 - A4. It is only if the delay has caused hardship, prejudice or detriment to good administration, he says, that I can give effect to that delay, and then only by refusing to grant A1 - A4 any relief relating to these decisions.

That argument may well be correct in the usual run of applications for judicial review, but it ignores the unusual features of the present application. When granting leave, I made the following observation:

> "The circumstances of each of the Applicants are so different that this is not a case in which I can form a concluded view as to whether there has been delay on their part which disentitle them [from] relief. Accordingly, although I am extending the period within which the application for judicial review may be made, the issue of delay will have to be revisited. In these circumstances, I do not propose to treat section 21K(6) of the Supreme Court Ordinance (Cap. 4) as limiting the extent to which effect could then be given to any delay on the part of the Applicants."

If I decide, on all the material now before me, that time should not have been extended, I shall not feel inhibited from refusing to grant relief on that ground, even if the case does not fall within section 21K(6).

In deciding whether delay should prevent any of the Applicants from being granted the relief to which they would otherwise be entitled, I have borne three things in mind:

(i) It is necessary to focus on the cases of each individual Applicant. Although they have a number of common characteristics, their circumstances are nevertheless sufficiently different to warrant separate consideration.

(ii) It has been necessary to find out from each of A1 - A4 why his application was not filed earlier. It would not have been right for me simply to guess what those reasons were. That was graphically illustrated by a statement in the Notice of Application that the Applicants were misled by the notices of determination which each of them had received from the Board. The notices stated that the decisions were "not subject to a review or appeal in any Court". If that was what the Applicants believed, and if the Notice of Application was filed promptly after they had discovered that the Board's decisions could be challenged, it would obviously have been appropriate to extend the time. However, the statement in the Notice of Application had not been verified by any of the Applicants. It had been verified by Mr. Anthony Bennett, a clerk with Pam Baker & Co., the

Applicants' solicitors. It struck me that this might have been a lawyer's point rather than one which had actually operated on the minds of the Applicants. Accordingly, in the course of the hearing, I said that I thought that affidavits or affirmations should be sworn or made by A1 - A4, so that I could see whether this point (and others in the Notice of Application) could be relied on. It turned out that none of A1 - A4 alleged that they had in fact been misled by the statement in the notices of determination.

(iii) Mr. Harris wanted me to address the question of delay only after I had addressed the merits. If I had come to the conclusion that, but for delay, the decisions of the Board should be quashed, the consequences to A1 - A4 of the Board's errors were far too serious for relief to be denied to them simply because of delay. I reject that argument. It would not be right for me to address the merits if delay on the part of A1 - A4 would inevitably deprive them of any relief to which they would otherwise be entitled, but in determining whether it was right for me to extend time, I have assumed, in favour of A1 - A4, that they would succeed on the merits.

Before I turn to the individual circumstances of A1 - A4, there are five conclusions of a general nature which I have reached:

(i) The refusal by the Board to accord refugee status to an asylum-seeker from Vietnam is not necessarily the end of the road for him. That is because there is an agreement between the Government of Hong

Kong and the UNHCR under which the UNHCR may request that an asylum-seeker who has not been accorded refugee status by the Board should nevertheless be treated as a refugee. All asylum-seekers would have known that. The UNHCR's refusal to exercise its power under this mandate has even acquired a colloquial term amongst detainees: it was known as "the 3rd chicken wing" (the refusal of refugee status by the Director being "the 1st chicken wing", and the refusal of refugee status by the Board being "the 2nd chicken wing"). In my view, it was not unreasonable for any of the Applicants to wait until it was known whether the UNHCR would be exercising this right before taking any steps to challenge the Board's decision. After all, if they were to be treated as refugees by this route, the legality of the Board's decisions would be irrelevant.

(ii) I have no doubt that the bush telegraph in detention centres for Vietnamese migrants would have told the overwhelming majority of the Applicants that it was possible for them to apply for legal aid to have the question of their status reconsidered. However, it may well be that they did not know that the application for which they could apply for legal aid had to be made promptly, and I am therefore prepared to proceed on the basis that the Applicants were unaware of the urgency of applying for legal aid. I also note the practical difficulties of applying for legal aid from a detention centre in which each Applicant was just one of many. Such evidence as there is suggests that legal aid application forms are not available in detention centres, and that meant that the Applicants had to get in touch with the Legal Aid Department to get one. They would only have got one when an officer of the Legal Aid Department arrived at the detention centre

to help those who had requested such forms to complete them. The effect of all that is that I have decided that I should not be too critical of those Applicants who, for one reason or another, allowed time to elapse between being notified of the refusal by the UNHCR to request that they be treated as refugees and applying for legal aid.

(iii) The Applicants should not be regarded as guilty of any culpable delay during the time that their applications for legal aid were being processed. As Ackner L.J. (as he then was) said in *R. v. Stratford - on - Avon District Council ex p. Jackson* [1985] 1 WLR 1319 at p.1324A:

> "... it is a perfectly legitimate excuse for delay to be able to say that the delay is entirely due to the fact that it takes a certain time for a certificate to be obtained from the legal aid authorities and that, despite all proper endeavours by an applicant, and those advising her, to obtain a legal aid certificate with the utmost urgency, there has been some difficulty about obtaining it through no fault of the applicant."

That applies even if it took, as here, an immensely long time for applications to be processed. It was never asserted that the Applicants were responsible for that. Accordingly, the reason why it took so long for the applications to be processed is irrelevant. In those circumstances, it is regrettable that Mr. Robert Brook, another clerk with Pam Baker & Co., expressed the opinion in one of his affirmations that there appears to have been a policy not to process applications for legal aid by asylum-seekers from Vietnam. That view is strongly disputed by the Legal Aid Department, and much time and effort was unnecessarily spent in refuting Mr. Brook's claim. As it is, it is wholly unnecessary for me to determine

whether Mr. Brook's opinion is correct, but for the record the Legal Aid Department points to the enormous number of applications which it had to process and the considerable amount of work which processing applications involved, in particular, applications for legal aid to challenge decisions of the Board relating to refugee status.

(iv) Some of the Applicants undoubtedly knew that they could lodge an appeal from the refusal to grant them legal aid. However, that does not mean that any delay in lodging such an appeal or any decision not to lodge such an appeal should necessarily tell against them. It could only tell against them if, as a result, the Notice of Application could have been filed earlier than it was.

(v) The Notice of Application was filed by the Applicants' solicitors before A1 - A4 had been granted legal aid. For all I know, it was filed before <u>any</u> of the Applicants had been granted legal aid. The fact that the Applicants' solicitors were acting without the prospect of remuneration means that I should not look too critically at the speed with which they set about the task of drafting and filing the Notice of Application. In any event, the logistics of obtaining instructions from so many potential applicants, the need to research the case, and the desirability of producing a coherent, comprehensive and well-argued Notice of Application for leave, would inevitably have taken a considerable amount of time. Mr. Bennett's 2nd affirmation tells me that Pam Baker & Co. first visited the Applicants on 30th September 1995. That does not lie easily with the evidence culled from records of the Correctional Services Department that A1 was visited by representatives of Pam Baker & Co. before then, but I am prepared to

assume that what Mr. Bennett meant was that it was on 30th September 1995 that Pam Baker & Co. began to take instructions from those detainees who had come from Ha Tuyen Province. In the circumstances, I do not think that Pam Baker & Co. can be accused of tardiness in taking two months to draft and file the Notice of Application.

Against this background, I turn to the individual circumstances of A1 - A4. The relevant dates are as follows:

Applicant	Date of decision of Board refusing refugee status	Date of notification to Applicant of decision of Board	Date of notification to Applicant of refusal of UNHCR to request refugee status	Inquiry by Applicant of Legal Aid Department relating to legal aid	Date of application for legal aid	Date of notification to Applicant of refusal of legal aid
A1	19/3/93	30/4/93	5/7/93	3/8/93	16/9/93	6/7/95
A2	10/9/93	27/9/93	3/12/93	-	-	-
A3	21/12/93	7/1/94	18/7/94	10/3/95	9/5/95	31/1/96
A4	5/7/93	28/7/93	23/8/94	5/8/93	16/9/93	21/7/95

I can deal with the cases of A1 and A4 together. I think that A1 could have got in touch with the Legal Aid Department a little sooner than 3rd August 1993, but it may be that even if he had he could not have completed an application form for legal aid prior to 16th September 1993. Again, both A1 and A4 could have lodged an appeal against the refusal of legal aid, but even if they had I do not think that it would have resulted in a Notice of Application being filed on their behalf before 28th November 1995. Having regard to all the circumstances, there was, in my view, good

reason in their cases for extending the period within which their applications for leave to apply for judicial review should have been made.

The cases of A2 and A3 are more difficult. It took A3 almost 8 months to inquire about legal aid, and A2 did not apply for legal aid at all. However, they give different explanations for their inaction. A2's evidence is that he did not apply for legal aid because he had heard from those of his friends who had applied for legal aid that they had received no response to their applications. I have no reason to doubt that explanation, and I proceed on the basis that it is correct. The delay on the part of the Legal Aid Department in processing applications for legal aid meant that A2's belief that any application which he might submit would not be processed at all, though incorrect, was reasonable. Since he was entitled to think that without legal aid he had reached the end of the road in arguing that he should be accorded refugee status, he was entitled to think that there was nothing more that he could do.

As for A3, his evidence is that he simply did not know about legal aid, that he only learned of the existence of the Legal Aid Department sometime after he was transferred from Whitehead Detention Centre to High Island Detention Centre, and that he got in touch with the Legal Aid Department as soon as friends told him its address. I am sceptical about the truth of that explanation: after all, according to his own evidence, he arrived at High Island Detention Centre on 7th April 1994, over 11 months before he first got in touch with the Legal Aid Department. However, I think it would be wrong for me to reject his evidence as untrue without having heard him give oral evidence. That I have not done. Accordingly,

despite my misgivings, I propose to treat him as one of those exceptional detainees who only discovered late in the day about the possibility of applying for legal aid.

In all the circumstances, there was, in my judgment, good reason in the cases of A2 and A3 for extending the period within which their applications for leave to apply for judicial review should have been made. In the case of each of them, having regard to the factual basis on which I am prepared to treat them, it was not practicable for them to apply for legal aid since (a) they did not know of the availability of legal aid or (b) they believed on reasonable grounds that it would not be granted, and (c) they believed on reasonable grounds that without legal aid no further step could be taken to question their status as non-refugees.

THE TEST OF REFUGEE STATUS

The statutory regime which governs the procedure for determining whether an asylum-seeker from Vietnam should be accorded refugee status is contained in Part IIIA of the Immigration Ordinance (Cap. 115). However, the Ordinance does not contain a definition of "refugee". For what constitutes a refugee in international law, one has to go to the 1951 Convention. Art. 1A(2) provides, so far as is relevant for present purposes, that a refugee is a person who

> "... owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to

> such fear, is unwilling to avail himself of the protection of that country ..."

The Government of Hong Kong has always accepted that claims for asylum by asylum-seekers from Vietnam will be determined on the basis of this test of refugee status. It was therefore the test adopted by the Board.

The Board did not, in the cases of A1 - A4, identify what "a well-founded fear of being persecuted" actually meant. Nor is there any evidence before me as to whether there is a consistent interpretation of those words which the Board invariably adopts. That is not all that surprising since their construction has not been addressed by any court in Hong Kong. I do not see how I can avoid deciding what they mean because it is claimed, amongst other things, on behalf of the Applicants that the conclusion of the Board that the Applicants were not refugees was Wednesbury unreasonable, i.e. "so outrageous in its defiance of logic ... that no sensible person who had applied his mind to the question to be decided could have arrived at it": Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 at p.410G. Without deciding what "a well-founded fear of being persecuted" actually means, I cannot decide whether the Board's conclusion that the Applicants did not have a well-founded fear of being persecuted was Wednesbury unreasonable.

(i) Fear. The asylum-seeker must have a genuine fear that he will be persecuted. It follows that even if reasonable people in the position

of the asylum-seeker have a genuine fear of persecution, the asylum-seeker cannot claim to be a refugee unless he has such a fear himself.

(ii) Assessment of the fear. The question whether the fear is well-founded must be assessed by the Board upon an objective basis in the light of the facts and circumstances known to the Board or established to the Board's satisfaction. That was the unanimous view of the House of Lords in *R. v. Secretary of State for the Home Department ex p. Sivakumaran* [1988] 1 AC 958. This view has been followed in other jurisdictions: see, for example, the judgment of McHugh J. in the High Court of Australia in *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412 at p.448. Accordingly, the objective facts to be considered by the Board are not confined to those which induced the asylum-seeker's fear.

(iii) Extent of the fear. Many different expressions have been used to explain the degree of likelihood of persecution which the words "a well-founded fear of being persecuted" entail. No less than three different expressions were used by the members of the House of Lords in *Sivakumaran*: "a reasonable degree of likelihood" (Lord Keith of Kinkel and Lord Goff of Chieveley), "a real and substantial risk" (which Lord Goff said meant the same thing), and a "real and substantial danger" (Lord Templeman). In *Chan Yee Kin*, four members of the High Court of Australia preferred the phrase "a real chance". The exception was Gaudron J. who at p.435 resisted what she described as the "natural tendency [for judges] to invest an expression such as 'well-founded fear' with some degree of specificity". For my part, I think that it is necessary to identify

the degree of likelihood which the Convention definition of "refugee" entails. Following the analogous reasoning of Lord Goff in *R. v. Gough* [1993] AC 646 at p. 670 in the context of the appropriate test for determining bias, I prefer a phrase which shows that the test involves determining whether there is a real possibility rather than a likelihood (i.e. a more than 50:50 probability) of persecution. For that reason, phrases like "a real and substantial risk" or "a real chance" best connote the idea which the words "a well-founded fear of being persecuted" entail.

There is nothing which suggests that the Board approached its task in a manner inconsistent with these principles, though I think that the "Guidance Notes for Officers of Vietnamese Refugees Division" will have to be amended slightly. For example, the notes refer to a "realistic likelihood" of persecution as being the objective test which the asylum-seeker has to satisfy.

RELEVANT CRITERIA RELATING TO ASYLUM-SEEKERS FROM VIETNAM

In determining whether an asylum-seeker from Vietnam should be accorded refugee status, the Board takes into account the criteria laid down in the Handbook on Procedures and Criteria for Determining Refugee Status, 2nd ed., issued by the UNHCR in 1988 ("the Handbook"), although all references in this judgment to paras. in the Handbook are references to the 1st edition of the Handbook issued in 1979, because that was the edition which was exhibited. Mr. Harris argued that that is not enough. He

contended that the Board should also take into account the following materials:

(i) those international human rights instruments which determine what constitutes persecution, or which seek to protect rights the deprivation of which would amount to persecution, and

(ii) guidelines dated 10th February 1992 on the application of the criteria in the Handbook to Vietnamese migrants in South-East Asia.

In order to evaluate that argument, it is necessary to identify two international instruments relating to asylum-seekers in South-East Asia, because Mr. Harris' argument was that in failing to take these materials into account the Board erred in law and failed to give effect to the Applicants' legitimate expectation that their claims for refugee status would be considered in accordance with these international instruments.

(i) The Statement of Understanding. In September 1988, the Government of Hong Kong and the UNHCR reached an understanding relating to the treatment of asylum-seekers from Vietnam who arrived in Hong Kong. That understanding was set out in a Statement of Understanding ("the SOU"). In para. 1, the Government of Hong Kong reaffirmed its undertaking that the determination of refugee status for asylum-seekers from Vietnam would be in accordance with the 1951 Convention "and UNCHR Guidelines". Section B(1) stated:

> "The Hong Kong Government confirms that appropriate humanitarian criteria for determining refugee status will be applied. These criteria, based on the ... Handbook ..., take into account the special situation of asylum seekers from Vietnam."

(ii) The Comprehensive Plan of Action. In June 1989, a Comprehensive Plan of Action ("the CPA") was adopted by the governments of those states represented at an international conference on Indo-Chinese refugees. The U.K. was represented at the conference. Section D of the CPA dealt with refugee status. It provided:

> "(b) The criteria [for determining refugee status] will be those recognised in the 1951 Convention ..., bearing in mind, to the extent appropriate, the 1948 Universal Declaration of Human Rights and other relevant international instruments concerning refugees ...
>
> (c) The Handbook ... will serve as an authoritative and interpretative guide in developing and applying the criteria."

International human rights instruments. The reference to "international instruments concerning refugees" in Section D(b) of the CPA does not, in my view, require the Board to trawl through international human rights instruments to decide what conduct amounts to persecution. The Handbook contains sufficient material for the Board to decide that question for itself. I note that the Handbook accepts that various attempts to formulate a definition of "persecution" have met with little success. But although persecution is difficult to define, I do not think that it is all that

difficult to recognise, and the Handbook maps out a clear path for the Board to follow:

> (i) Para. 51 infers, from Art. 33 of the 1951 Convention, that a threat to life or freedom for one of the reasons prohibited by the Convention is always persecution — as would other serious violations of human rights.
>
> (ii) In paras. 52 and 53, the Handbook gives guidance as to the circumstances in which "other prejudicial actions or threats" amount to persecution.
>
> (iii) In paras. 54 and 55, the Handbook addresses the circumstances in which discrimination can amount to persecution. Less favourable treatment than that afforded to other groups of persons will not normally constitute persecution by itself, but it may do if the treatment is so serious as to amount, for example, to "serious restrictions on [a person's] right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities".

All in all, the Handbook contains a sufficiently comprehensive analysis of the criteria for determining what conduct amounts to persecution to absolve the Board from the obligation to examine the source materials which identify the impact of international human rights instruments on the rights of refugees. I accept that this is not exactly what section D(b) of the CPA says, but I think that that is the idea which lies behind it.

Guidelines. According to a memo. which accompanied the February 1992 Guidelines, they were draft guidelines only, and "for internal UNHCR use" unless clearance had been given "for possible outside distribution". However, these Guidelines had been received by the Board in March 1993, and I must therefore assume that the draft had been both approved within the UNHCR and circulated for use by bodies responsible for determining applications for refugee status by asylum-seekers from Vietnam.

Does the Board take the Guidelines into account? I think I must assume that it does not. In her 3rd affirmation, the Chairman of the Board, Mrs. Wilma Croxen, stresses the fact that the Board is guided by the Handbook, but she does not refer at all to the Guidelines. It may be that the reliance which Mr. Harris was going to place on the Guidelines was not appreciated when Mrs. Croxen made that affirmation, but no further evidence on the topic was filed even when it had been appreciated that the Guidelines were going to form a not unimportant plank in Mr. Harris' argument.

However, I am not persuaded that the Board is obliged to take the February 1992 Guidelines into account. I do not regard them as being included in the reference to "UNHCR guidelines" in para. 1 of the SOU. Section B(1) of the SOU shows that the reference to "UNHCR guidelines" is a reference to the Handbook. Although, therefore, the Board would have been wise to supplement its use of the Handbook by reference to the

February 1992 Guidelines, I cannot say that it was under an obligation to do so.

For these reasons, I do not think that the Board erred in law in not taking international human rights instruments and the February 1992 Guidelines into account when considering the cases of the Applicants, nor did the Board fail to give effect to such expectations as the Applicants may have had that their claims for refugee status would be considered in accordance with the SOU and the CPA.

THE BACKGROUND TO THE APPLICANTS' CLAIMS FOR REFUGEE STATUS

The background against which the Board had to assess the Applicants' claims for refugee status was spelt out in Mrs. Croxen's 3rd affirmation. She dealt at some length with (a) the circumstances in which many ethnic Chinese were forced to move to isolated villages in Ha Tuyen Province, (b) the conditions to which they were subjected there, and (c) the gradual improvements in the conditions which ethnic Chinese in Vietnam in general, and those in Ha Tuyen Province in particular, began to experience in the mid to late 1980s. I summarised the effect of (a) and (c) in the ruling which I delivered on 3rd June relating to the admissibility of parts of the evidence on which the Applicants proposed to rely. I do not intend to reproduce passages in that ruling in this judgment, but a copy of the ruling is annexed to this judgment.

As for (b), i.e. the conditions to which ethnic Chinese were subjected in Ha Tuyen Province, I merely referred in the ruling to the fact that Mrs. Croxen had described them as "undeniably harsh". It is unnecessary for me to recount those conditions in this judgment, though Mrs. Croxen made the point that the conditions had to be viewed in their context. The standards which would be expected in a western country are not those which prevailed in Vietnam in the 1980s, and in some aspects of daily life in remote rural communities, such as healthcare and education, there was little to choose between the facilities provided to ethnic Vietnamese and those available to ethnic Chinese. On the other hand, the conditions to which the ethnic Chinese in Ha Tuyen Province were subjected undoubtedly had a high persecutory content. That is obvious from the large number of ethnic Chinese from Ha Tuyen Province who have been granted refugee status. A total of 433 ethnic Chinese from Ha Tuyen Province have arrived in Hong Kong. 10 of them returned to Vietnam voluntarily without being screened. Of the remaining 423 who underwent screening, 291 were found to be refugees: 182 by the Director, 60 by the Board and 49 under the UNHCR mandate.

INTERNAL EXILE

Mr. Harris argued that the forced movement of ethnic Chinese to isolated villages in Ha Tuyen Province was comparable to some of the most shocking events in recent history: the confinement of Jews to ghettos in Eastern Europe by the Nazis, the exile of dissidents in the Soviet Union to Siberia, the banishment of black people in South Africa to Bantu homelands and the requirement to do forced labour in the Chinese

countryside during the Cultural Revolution. It is said that the Board must have lost sight of the fact that ethnic Chinese in Vietnam were subjected to "internal exile" in the aftermath of the war between Vietnam and China in early 1979. Otherwise, the Board would inevitably have concluded that their treatment had amounted to persecution.

It would, I think, be dangerous to take these analogies too far. Only those who were already living in the northern provinces of Vietnam were sent to villages in Ha Tuyen Province. Even then, many of them did not have to go very far. Some were only required to travel a few miles, or to settle in villages a few hours' walk away from their original homes. Others were required to move from border areas where there were sporadic outbursts of shelling. It may be that some of the settlers were from the cities, and were unused to life in a remote rural community, but for others it was the only life they had known. In any event, I do not discern anything which suggests that the Board lost sight of the indignity of being forced to leave one's home because of one's race, and of the hardship of having to adapt to life as peasant farmers which many ethnic Chinese must have had to endure for the first time. It would not have been necessary for the Board to spell that out on each of the many occasions on which it had to assess the claims to asylum of ethnic Chinese from Ha Tuyen Province.

For these reasons, I reject the broad sweep of Mr. Harris' argument. The fact that the Applicants were subjected to "internal exile" did not of itself inevitably render their treatment as amounting to persecution. Different considerations would apply, for example, to (a) a peasant farmer who was required to move to less fertile land a few miles

away, and (b) a professional man from the city who was required to uproot himself and his family from his home, and to live instead a considerable distance away on remote barren land forced to eke out a living from unproductive soil. The circumstances of each of the Applicants had to be looked at on a case-by-case basis by the Board, because what might have amounted to persecution for one may not have amounted to persecution for another.

In any event, the ultimate question for the Board was not whether the Applicants had been persecuted in the past. The question was whether they had a well-founded fear of being persecuted in the future if they were returned to Vietnam. If an asylum-seeker had been persecuted in the past, it would not be surprising if he feared that he would be persecuted in the future. But whether that fear was well-founded is another matter altogether. If the conditions which he would be facing on his return to Vietnam would be unlikely to cause him to fear that he would be persecuted, the fact that he had been persecuted in the past assumes far less significance. I have not discerned anything which suggests that the Board did not approach its task in this way.

REPATRIATION

Mr. Harris argued that one important factor was not taken into account by the Board when considering the cases of the Applicants in general, and A1 - A4 in particular. That was where they would be sent to live once they were returned to Vietnam. Their fear of persecution would be much more likely to be well-founded if they had to return to the isolated

villages in Ha Tuyen Province from which they had fled than if they would be permitted to live where they had originally been living. Indeed, Mr. Harris argued that a return to the very place from which A1 - A4 had fled to avoid persecution should inevitably have led the Board to conclude that they had established a well-founded fear of persecution.

There is nothing to suggest that the Board addressed the question of where A1 - A4 were going to be returned to if they were to be repatriated to Vietnam. Ms. Dale Watson for the Respondents asserted that the Board assumed that they would be returned to the villages to which they had originally been forced to move. I do not normally proceed upon assertion, but I am prepared on this occasion to proceed on that basis because Mr. Harris' argument about the irrationality of the Board's decisions was predicated on that assumption.

However, I do not think that the return of the Applicants to the villages from which they had fled should inevitably have led the Board to accept their claims for refugee status. It depended on a whole range of other considerations. How long would they have had to stay there before being permitted to move? What restrictions on the freedom of movement still existed for ethnic Chinese living in Vietnam? To what extent were ethnic Vietnamese not subject to such restrictions? And perhaps most important of all, to what extent were there still concentration areas reserved for ethnic Chinese, and to what extent had there been an improvement in living conditions there? The received wisdom of the Board on that topic was summarised by Mrs. Croxen in her 3rd affirmation. In addition to para. 23 which I quoted in my ruling, Mrs. Croxen said this:

> "24. Knowledge of Vietnam gained since 1989 and country of origin information obtained from the Director of Immigration and UNHCR was used to help to determine cases. By 1993 the amelioration of conditions for Ethnic Chinese in Vietnam was well documented in that information and this was also supported in case files. Several Board members, including myself, had also visited the country and could obtain first hand information concerning the current conditions in Vietnam.
>
> 28. In addition to the country condition information, the Board has received information from UNHCR in relation to the monitoring of returnees in Vietnam which is also relevant in any consideration of a claim for refugee status. While accepting the existence and conditions of the Chinese Concentration Areas of the 1970s and 80's, recent reports indicate that living conditions and freedom of movement has gradually improved during the 1980s in Ha Tuyen with some Ethnic Chinese being allowed to return to their pre 1978 homes. Interestingly, when Moc Lam was visited, it was observed that the area still lacks a basic infrastructure, school and clinic for its Vietnamese and Chinese inhabitants. Clearly, in this poor remote area, facilities are restricted for all citizens. UNHCR found no current persecution of Ethnic Chinese in the areas visited or any discrimination met by returnees."

I suspect that in some of the passages in para. 28 Mrs. Croxen may have been referring to information received by the Board <u>after</u> the decisions challenged, and I have therefore ignored for present purposes those passages to which that might apply.

Ms. Watson argued that the involvement of the UNHCR in monitoring the conditions to which asylum-seekers from Vietnam are subjected to on their return to Vietnam is not without significance. 12 of the ethnic Chinese from Ha Tuyen Province who were not accorded refugee status had already been repatriated to Vietnam under the Voluntary Repatriation Scheme ("the VRS"). The VRS is sponsored by the UNHCR, and the UNHCR does not sponsor any repatriation programme which results in returnees being subjected to persecution. I am not inclined to give any weight to this argument. The VRS is a mammoth exercise, and the fact that the UNHCR is happy to sponsor the return of asylum-seekers to Vietnam under the VRS does not mean that, prior to the decisions of the Board which are challenged, it had addressed in terms the conditions to which the few ethnic Chinese from Ha Tuyen Province had returned.

OTHER ETHNIC CHINESE FROM HA TUYEN PROVINCE

Originally, Mr. Harris wished to rely on the fact that there were many ethnic Chinese from Ha Tuyen Province who were accorded refugee status. He wanted to argue that since there were no valid grounds for distinguishing their cases from the Applicants, the Board must have erred in some way in not granting them refugee status. I refused to give Mr. Harris leave to rely on the decisions in the cases of those accorded refugee status in order to show inconsistency on the part of the Board. In the light of that, Mr. Harris merely reminded me that virtually every ethnic Chinese from some districts in Ha Tuyen Province were granted refugee status. It was said that that was a relevant factor which the Board failed to take into account when it decided not to accord refugee status to those of the

Applicants who came from those districts. Even if this argument is correct, A1 and A3 are the only Applicants of the 4 test Applicants who can rely on it.

Although Mr. Harris disavowed any intention of going behind my ruling, I think that that is what he was doing. Properly analysed, his argument is an attack on lack of consistency under the guise of an allegation that a relevant factor was ignored. But in any event, I do not accept the premise on which the argument is based, namely that everyone from the same village or district was treated in such a similar way, and the impact of that treatment on them was unlikely to have been so different, as to render the conclusion of the Board as to the status of ethnic Chinese from the same village or district a relevant consideration. The fact that the Board came to different conclusions about ethnic Chinese who came from the same village or district could well have been attributable to the variation in treatment of individuals, and their individual ability to cope with their lot.

NONG VAN SUI (A1)

A1 was born in May 1969 in Ha Tuyen Province. His father had been a lumberjack, and his mother a supervisor in a government factory. There was no evidence before the Board as to where his family had been living, but in 1979 they had been forced to move to a village in the Ham Yen District. There was no evidence as to how far that was from their original home. It is possible, therefore, that A1's family had never been peasant farmers before, that they had been required to move from the town to the countryside, and that that could have been a considerable distance

from where they had originally lived. Although the Board did not expressly acknowledge these possibilities in its decision, they were obvious from the documentary materials on which the Board reached its conclusion. I cannot infer that the Board ignored them.

The Board concluded that A1 had not been persecuted while he had been in Vietnam. I do not think that the Board can be said to have erred in reaching that conclusion, despite the fact that it may have been that his family had been subjected to "internal exile" a long way from where they had originally lived, and had been forced to adapt to an unrewarding life to which they were unsuited. It has to be remembered that A1 was only 20 when he finally left Ham Yen District in March 1990. By then, the only life he could be said to have known were his years living in the countryside. The Board would have been entitled to conclude that what could have amounted to the persecution of his parents did not amount to the persecution of him.

A number of criticisms are made of the Board's decision, which taken together are alleged to amount to such a serious of defects that the decision is too flawed to survive:

(i) A1's claims. The Board referred to A1's "claims" without stating whether it accepted that his claims were true. I do not think that that was an entirely satisfactory course to adopt, but it did not matter because I read the Board as having considered whether A1 could be said to have been persecuted on the assumption that his claims were true.

(ii) Education. A1's schooling was interrupted, and he had to be taught at home by his brother. I have already mentioned the Board's view that in remote rural communities the educational facilities available to ethnic Vietnamese were no better than those available to ethnic Chinese. However, even if, in Ham Yen District, ethnic Vietnamese could go to school and ethnic Chinese could not, that constituted, in the view of the Board, discrimination rather than persecution. That was a view which the Board was entitled to take, even if another view was also possible. Having said that, it was, I think, unwise for the Board to describe those ethnic Vietnamese children who went to school as "privileged". They may have been privileged in relation to other ethnic Vietnamese children who did not live in an area where schooling was available. But their privileged position when compared with other ethnic Vietnamese children did not mean that ethnic Chinese children who were denied local schooling were not deprived. The same applies to the comments which the Board made about healthcare.

(iii) The family home. The Board noted that although the life which the family had to endure was hard, the family had been "given a house and land to farm on." In this respect, the Board was in error: A1's family had built the house themselves on the land they were allotted. This error was unfortunate, but I do not think that it invalidated the Board's decision. Looking at its decision as a whole, I think that the Board would inevitably have come to the same conclusion even if it had appreciated what the true position was.

(iv) The family's exceptional circumstances. A1's family attempted to escape in 1988. Only A1's elder sister was successful. As a result, A1's father was detained for 14 days, the family was required to perform one month's unpaid labour, and their land was confiscated. They had to rent other land to earn their living. The monotony and misery of their lives caused A1's mother to commit suicide in 1989. All these matters were referred to in the Board's decision, though when the Board in one of its concluding paragraphs summarised them, the Board did not refer to the confiscation of the land. It was suggested by Mr. Harris that that shows that the Board temporarily forgot that the land had been confiscated, but I do not believe that to be the case since its confiscation was referred to twice by the Board elsewhere in its decision.

Because the Board concluded that the treatment of A1 in the past had not amounted to persecution, the Board's view as to the conditions to which he would be returning was less relevant than would otherwise have been the case. In the final analysis, the Board's conclusion that A1's life in Ham Yen District, though harsh and discriminatory, did not amount to persecution was not one which was so outrageous that it could properly be characterised as irrational. The same applies to its conclusion which followed from that - namely that A1 did not have a well-founded fear of persecution if he was returned to Vietnam.

CHU VAN CAM (A2)

A2 was born in December 1961 in Ha Tuyen Province. He came to Hong Kong with his wife, who he married in Vietnam and who is ethnic

Vietnamese. They have 2 children with them in Hong Kong, one of whom was born in Hong Kong. A2's father had been a supervisor in a government co-operative in Ha Tuyen Province, though there was no evidence before the Board as to where the family had been living. Towards the end of 1978, A2 and his mother had been forced to move to a village in Na Hang District. Again, there was no evidence as to how far that was from their original home. It is therefore possible that, like A1, A2's family had never been peasant farmers before, that A2 and his mother had been required to move from the town to the countryside, and that that could have been a considerable distance from where they had originally lived, though it has to be remembered that A2 was still only a young man at the time. Again, the Board did not expressly acknowledge these possibilities in its decision, but I cannot infer that the Board ignored them.

A2's father had been arrested in 1977 for joining an anti-governmental organisation. He was sent for re-education without trial. A2's mother had been arrested at the same time, but she had been released a few months later suffering from mental illness. She died in 1985. Towards the end of 1986, A2's father was released from his long period of detention. He came to live with A2. There was an issue as to whether A2's father was engaged in political activities while in Na Hang District, but in August 1988 he left the District to rejoin the anti-governmental organisation with which he had been previously associated. When his departure was discovered, A2 was arrested, and interrogated for 3 days. He manage to escape, and for the next 10 months he lived in a cave, working during the day on the farm of a friend. In due course, A2 heard of the death of his father. He managed to meet up with his wife again. They travelled to

China together, and eventually made their way to Hong Kong. Although the Board did not accept much of what A2 claimed, these facts were among the facts which the Board accepted.

This short description of A2's life in Vietnam leaves out a number of incidents which A2 claims occurred. They include the incident referred to on p.16 of my ruling, and the circumstances in which A2's wife became pregnant with the child born in Hong Kong. In relation to the former, I have already ruled that the Board's finding of fact that the incident did not occur cannot be challenged. In relation to the latter, there is no challenge to the Board's conclusions that (a) if the child is A2's, he had no cause for complaint, and (b) if the child is the product of A2's wife's affair with a public security officer in Vietnam, it had no effect on A2's claim for refugee status.

A number of criticisms are made of the Board's decision relating to A2, which taken together are alleged to amount to such a series of defects that the decision is too flawed to survive:

(i) A2's father. It is said that the Board failed to give sufficient weight to the impact on A2 of his father's detention for such a long time to undergo re-education. I reject that criticism. The weight which the Board gave to particular facts was a matter entirely for the Board. Its relevance was whether the treatment of A2's father over the years had contributed to A2 having, by the time that the Board considered his case, a well-founded fear of being persecuted on his return to Vietnam. A reading of the decision as a whole shows that the Board had the treatment of A2's father

well in mind. It almost certainly regarded the treatment of A2's father as persecutory. It did not expressly spell out the effect of that treatment on A2's belief as to how he would be treated in the future, but there is no basis for supposing that the Board did not take its impact into account when determining whether A2 had a well-founded fear of being persecuted on his return to Vietnam, or that the Board failed to give it proper weight.

(ii) A2's credibility. Two respects in which the Board regarded A2 as having been less than honest related to his father. First, the Board was not convinced that A2 was being truthful when he claimed that his father had refused to provide him with details of his political activities for fear of incriminating him. Secondly, the Board was not persuaded that A2 had been detained and accused of being associated with his father's anti-governmental activities. I doubt whether I would have been as sceptical as the Board was about these assertions, but it is not as if there was no basis for the Board's scepticism. In any event, even if the Board had been too sceptical of what A2 had been saying in these two respects, a fair reading of the decision as a whole shows that even if A2 had been believed on those two matters, it would not have affected the Board's overall view as to whether he had been telling the truth on a whole range of other matters on which he was disbelieved. The same comment applies to what the Board perceived to be a difference between (a) what A2 had said when interviewed by the Board about whether his father had been engaged in political activities when he was in Na Hang District and (b) what A2 had originally said on the topic when interviewed by an immigration officer. I have not discerned any difference of substance between the two interviews, but the question mark over A2's overall credibility would not have been

removed if the Board had appreciated that on this minor issue there had not been a shift in A2's evidence.

Ultimately, the Board's approach to A2 was similar to its approach to A1. It concluded that the treatment of A2 in the past had not amounted to persecution. Accordingly, the Board's view as to the conditions to which he would be returning was less relevant than would otherwise have been the case. Having read with care the materials which the Board had in relation to A2, I cannot characterise as irrational the Board's conclusion that, although A2 had been subjected to various discriminatory measures because he was ethnic Chinese, which must have included his "internal exile", those measures when taken cumulatively did not amount to persecution. If his treatment in the past had not amounted to persecution, there was nothing irrational in the Board's ultimate conclusion that A2 did not have a well-founded fear of persecution if he was returned to Vietnam.

VOONG KHAC LUONG (A3)

A3 was born in September 1962 in Ha Tuyen Province. His father had been a farmer. In 1979, his family was forcibly moved to a village about 20 kms. away. By that time, A3 had already completed his schooling. Unlike A1 and A2, the idea of "internal exile" to a different life a considerable distance from his original home was not a possible scenario in A3's case. That is not to say that life for A3 was not harsh. The Board found that the conditions which he had to endure were difficult, that the hardship which he suffered was considerable, and that his family was treated unfairly and in a manner which amounted to discrimination.

The Board referred to three important incidents in A3's life:

(i) The death of his father. Initially, A3's father had refused to move from his home. He was severely beaten up, and died shortly after the move from his injuries. The Board was alive to the fact that the persecution of A3's father in 1979 was relevant to whether A3 had a well-founded fear in 1993 of being persecuted on his return to Vietnam.

(ii) The treatment of his brother and sister-in-law. In 1989, A3's sister-in-law was raped by a local official. No action was taken against him. The shame caused A3's sister-in-law to commit suicide a month later. To avenge his wife's death, A2's brother attacked the official with a knife, and on his subsequent conviction he was sentenced to 12 years' imprisonment. Mr. Harris criticised the Board for saying that this incident was "unrelated to any Convention ground", and was relevant only "to assessing the subjective aspect of [A3's] claimed fear". He claimed that the incident could only have occurred because the family was in the power of local officials as a result of their forced move to the area, and it was relevant also to the Board's objective assessment of the conditions which A3 would confront on his return to Vietnam. I do not agree with the first of those criticisms. When the Board said that the incident was unrelated to any Convention ground, I read it as saying that A3's brother and sister-in-law were not singled out for the treatment which they received because they were ethnic Chinese. I agree with the second criticism, but even if the Board had treated the incident with the relevance it deserved, a fair reading of the decision as a whole shows that the Board's ultimate conclusion

would have been just the same. Without wishing to minimise A3's anguish at the treatment of his family, these events impacted much more on his brother and sister-in-law than on him.

(iii) A3's protests. A3 claimed that at a meeting in January 1990 he protested at the treatment by the authorities of ethnic Chinese. He was forced to go into hiding, and that led to his departure from Vietnam with his brother a month later. However, the Board found as a fact that this incident did not happen.

A further criticism of the Board related to the language which it used in the concluding paragraph of its decision. It said:

> "These and many other factors leave the Board satisfied that the Applicant has no well founded fear of persecution upon return to Vietnam by reason of his Chinese ethnicity." (My emphasis)

Mr. Harris claimed that that is unsatisfactory. It left A3 not knowing the full reasons as to why his claim for refugee status had been refused, and it meant that the Court could not carry out its supervisory function properly. I reject this criticism. What the Board was doing in its decision was identifying the more significant factors which caused it to reach the conclusion which it did. The factors which the Board did not specify were either the less important ones or those which applied to all cases.

Ultimately, the Board based its conclusion that A3 did not have a well-founded fear of persecution on his return to the Vietnam on two

grounds. First, it concluded that despite the discrimination and hardship which A3 had experienced in Vietnam, that had not amounted to persecution. Secondly, it expressly referred to the "significant amelioration of living conditions concerning those of Chinese ethnicity". I appreciate that national improvements in conditions would not necessarily prevent local officials continuing to be hostile to A3, but the Board rejected A3's claim that local officials would have it in for him on his return, because it did not believe that he had gone public with his criticisms. As it is, I cannot characterise as irrational the Board's conclusion that A3's treatment in Vietnam had not amounted to persecution. If his treatment in the past had not amounted to persecution, there was nothing irrational in the Board's ultimate conclusion that A3 did not have a well-founded fear of persecution if he was returned to Vietnam.

TRAN KHAI HUNG (A4)

A4 was born in September 1961 in Ha Tuyen Province. His parents had been government workers in the coal mining industry. There was no evidence about the nature of his father's work, but his mother had worked in the kitchens. His family was forcibly moved to a village in the Chiem Hoa District in 1978, but A4 gave the immigration officer who interviewed him conflicting estimates as to how far that was from the family's original home. At one stage, he said that it was about 3 - 4 kms. away, or about an hour's walk, but earlier he had said it was about two hours' walk away. On these facts, it is possible that A4's family had never been peasant farmers before, and that they had been required to move from the town to the countryside, but A4 was still a relatively young man at the

time. As with other Applicants, the Board did not expressly acknowledge these possibilities in its decision, but I cannot infer that the Board ignored them.

A number of criticisms are made of the Board's decision relating to A4, which taken together are said to amount to such a series of defects that the decision is too flawed to survive:

(i) A4's father. A4's father was imprisoned without trial for 6 years up to 1985 in connection with his political activities. Exactly the same criticisms are made of the Board as the criticisms relating to the weight which the Board attached to the impact of the detention of A2's father on A2. I reject those criticisms for precisely the same reasons as I rejected the criticisms of the Board's decision on the topic relating to A2.

(ii) A4's brother. The Board discerned an inconsistency between what A4 and his brother respectively told the Board about the extent to which the authorities interfered with the family's life as farmers. That criticism was based on what was contained in a statement made by A4's brother. Mr. Harris argued, from the language the Board used in describing the supposed inconsistency, that there was no inconsistency in fact, but I cannot possibly judge the issue for myself without seeing the brother's statement. The Respondents were not pressed for discovery of this statement, and in the circumstances I do not see how this criticism of the Board can be taken further.

(iii) The rape of A4's sister. A4 claimed that in 1990 his sister was raped by a public security officer. The public security officer denied raping her, and A4 was charged with making false accusations and undermining the relationship between the authorities and the public. A4 and his brother were beaten and detained. They manage to escape, and that was when they left Vietnam. The Board assumed that these claims were correct, but rejected the assertion that the rape of A4's sister and the treatment of A4 amounted to persecution. Its basis for doing so was that the treatment of A4 and his sister was not officially sanctioned, and that they were the victims of corrupt officials who were acting on their own. The criticism of the Board was that whether the treatment of A4 and his sister was officially sanctioned was irrelevant. I agree. If as a result of the policy to treat ethnic Chinese in a discriminatory way local officials felt free to take the law into their own hands, the authorities could not wash their hands of the matter by saying that the officials were not entitled to behave as they did. In any event, persecution can take place even when it has not been organised by the high organs of government. However, that is not the end of the matter. What the Board found was that the incident "had no Convention basis". I assume that by that the Board meant that A4 and his sister were not singled out for the treatment which they received because they were ethnic Chinese. On that reading of the Board's decision, the criticisms which are made of the Board's treatment of the incident fall away. A4 and his sister were not being persecuted. Like A3's brother and sister-in-law, they simply had the misfortune to come into contact with corrupt officials who treated them with cruelty and disdain for reasons other than that they were ethnic Chinese.

(iv) A4's wife. The Board found that A4's wife had "no independent grounds upon which a claim to refugee status" could be based. The criticism of the Board was that that was wrong. She was entitled to rely on the grounds which other ethnic Chinese who were forcibly moved to isolated villages in Ha Tuyen Province had. In my view, this criticism reads far too much into the Board's words. All that the Board was saying, I think, was that A4's wife had no grounds independent of those of A4.

Ultimately, the Board's approach to A4 was similar to its approach to A1 and A2. It concluded that the treatment of A4 in the past had not amounted to persecution. Accordingly, the Board's view as to the conditions to which he would be returning was less relevant then would otherwise have been the case. Having read with care the materials which the Board had in relation to A4, I cannot characterise as irrational the Board's conclusion that, although A4 had been subjected to various discriminatory measures because he was ethnic Chinese, those measures when taken cumulatively had not amounted to persecution. If his treatment in the past had not amounted to persecution, there was nothing irrational in the Board's ultimate conclusion that A4 did not have a well-founded fear of persecution if he was returned to Vietnam.

CONCLUSION

For these reasons, the applications of A1 - A4 for judicial review of the decisions of the Board refusing to accord them refugee status must be dismissed. However, there are two outstanding procedural matters I must address:

(i) It was on the hearing of the Respondents' application to set aside the leave which I had granted to the Applicants to apply for judicial review that I ordered that the cases of a few "test" Applicants should be heard and determined first. The order which I made was that the Respondents' application to set aside the Applicants' leave to apply for judicial review be adjourned sine die, but I added that when the representative Applicants had been agreed upon, I would formally order that the Respondents' application to set aside those Applicants' leave to apply for judicial review of the decisions relating to them would be refused. I was never asked to make such an order, and I therefore now order that the Respondents' application to set aside the leave to apply for judicial review of the decisions relating to A1 - A4 be refused.

(ii) The question now arises as to what order I should make on the Respondents' application to set aside the leave to apply for judicial review of the decisions relating to the other Applicants, and what directions should be given for the hearing of their cases. Obviously, the parties will want to consider the implications of this judgment, but unless the remaining applications are withdrawn, the cases of the other

Applicants should be listed for directions not less then 6 weeks from today.

Finally, although the Applicants are legally aided, which means that all the legal cost of these proceedings come from public funds, I should, I think, make an appropriate order for costs. I see no reason why they should not follow the event, and I therefore make an order nisi that A1 - A4 should pay to the Respondents their costs to be taxed if not agreed, but that that order should not be enforced without the leave of the Court.

(Brian Keith)
Judge of the High Court

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

Ms. Dale Watson, Senior Crown Counsel, for the Respondents