1995 No. MP 3644

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

BETWEEN

TRAN VAN TIEN
and OTHERS — Applicants

and

(1) DIRECTOR OF IMMIGRATION

(2) REFUGEE STATUS REVIEW BOARD — Respondents

Before : The Hon. Mr. Justice Keith in Court

Date of Hearing : 13th February 1996

Date of Delivery of Judgment : 13th February 1996

J U D G M E N T

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 to 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 seek to challenge the various decisions made by the Director of Immigration ("the Director") and the Refugee Status Review Board ("the Board") 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. On 19th December 1995, I granted the Applicants leave to apply for judicial review of those decisions. The Respondents now apply for that leave to be set aside.

Having read the helpful written submissions of Ms. Dale Watson for the Respondents and Mr. Paul Harris for the Applicants, and having heard brief arguments from them today, I have decided that the leave to apply for judicial review of a few of the decisions challenged should not be set aside, and since the challenge to those decisions will therefore have to go to a full hearing, the less that I say about the merits of the application in relation to those decisions the better. It is sufficient for me to state that I remain of the view that the grounds on which relief is sought disclose a sufficiently arguable case to merit investigation at a substantive hearing.

However, there are three matters which cause me concern. The first relates to the form which these proceedings have taken. The grounds on which relief is sought do not set out the circumstances of the Applicants

individually. For that it is necessary to go to the evidence. As it is, there are 120 Applicants. 61 of them are heads of their households, and the remaining 59 are dependents or members of their families. Separate decisions in relation to each of the 61 households were made by the Director, and in most of the cases subsequently by the Board. Indeed, the Director and the Board considered each of the cases on their individual merits, because whether a particular Vietnamese migrant had a well-founded fear of persecution involved an evaluation of the subjective state of his mind.

Despite that, the cases of all the Applicants have been included in one Notice of Application for leave to apply for judicial review. That approach is said to be justified on the basis that all the Applicants share 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 is undoubtedly the case that each of the decisions challenged will have to be considered separately, and that will involve, in relation to each of the decisions,

(i) identifying the information which the Director and the Board had about the cases of the individual Applicants,

(ii) deciding whether the Director and the Board correctly applied the relevant principles of

international refugee law to the information which they were provided with, and

(iii) deciding whether the conclusions reached by the Director and the Board were conclusions which were reasonably open to them on the information provided to them, or whether they were so outrageous in their defiance of logic that they must be regarded as having taken leave of their senses.

Although the form which the Notice of Application takes is akin to that of a class action, the fact is that the Application has to be treated as separate applications for judicial review made by the heads of each of the 61 households.

I have no doubt whatever that it will not be possible to hear and determine all these applications together. In my judgment, the only practicable course to adopt is that which was adopted in *R. v. Director of Immigration and Refugee Status Review Board ex p. Do Giau* [1992] 1 HKLR 287, and that is to hear and determine first the cases of a handful of the Applicants. Those Applicants should be as representative as possible of any sub-groups which may exist among them, because the aim is to enable the decisions in the cases of those Applicants to be as reliable a guide as is possible to the likely outcome of the cases of the other Applicants.

I propose to leave it to the good sense of the parties' legal representatives to decide which of the Applicants should be selected for this

purpose, but despite the fact that the Applicants are said to come from as many as 25 different concentration areas, I do not think that it would be necessary for more than 4 or 5 households to be chosen. Accordingly, the formal order I make today is that the Respondents' application to set aside the Applicants' leave to apply for judicial review be adjourned sine die, but when the representative Applicants have been agreed upon, I shall then formally order that the Respondents' application to set aside those Applicants' leave to apply for judicial review of the decisions relating to them be refused.

Once judgment has been delivered on the cases of those Applicants, I shall then decide whether the Respondents' application to set aside the other Applicants' leave to apply for judicial review of the decisions relating to them should be granted or refused. If the parties' legal representatives are unable to agree which households should be chosen for this purpose, they are to have liberty to apply to me for such directions as are appropriate, but I shall be disappointed if common ground on that issue cannot be achieved.

The second matter which gives me cause for concern is the reliance which the Applicants place on the cases of other ethnic Chinese from Ha Tuyen Province who had arrived in Hong Kong. A number of them were regarded by the Director or the Board as refugees. The Applicants wish to contend at the substantive hearing that since there are no valid grounds for distinguishing their own cases from those ethnic Chinese from Ha Tuyen Province who have been treated as refugees, the Director

and the Board must have erred in some way in not treating them in that way.

I do not think that that argument has any chance of success. Since refugee status depends in part on the state of mind of the applicant for asylum, the fact that other people have been treated in the same or broadly similar way cannot be decisive. In any event, it would not be possible to see why those with whom the Applicants seek to be compared were treated as refugees by the Board because the Board gives reasons only when Vietnamese migrants are screened out, and not when they are screened in.

However, what I regard as decisive is the fact that if the decision in relation to a particular Applicant is found on analysis not to be flawed when considered on its merits, the fact that someone with a comparable background was treated as a refugee by the Director or the Board seems to me to be irrelevant, unless it can be said that, by reason of other decisions, the Applicant had a legitimate expectation that he would be treated in the same way, or that there was so consistent a pattern of treatment of other persons from Ha Tuyen Province that the only inference to be drawn is that the treatment of the Applicant was flawed in some way. No such suggestion is made on behalf of any of the Applicants in this case. Indeed, the figures which I have been provided with by Ms. Watson (without objection from Mr. Harris) show that an individual Applicant could not have regarded what happened to any other ethnic Chinese from Ha Tuyen Province as any indication at all as to what was going to happen to him. 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 screened in as refugees : 182 by the Director, 60 by the Board and 49 under the UNHCR mandate. Of the 132 who were screened out, 12 were repatriated to Vietnam under the Voluntary Repatriation Scheme, 9 were repatriated to Vietnam under the Orderly Repatriation Programme, and the remaining 111 are among the Applicants in the present case. It is impossible, in my view, for the Applicants to say that there was such a consistent pattern of ethnic Chinese migrants from Ha Tuyen Province being screened in that (i) in failing to screen the Applicants in, the Director or the Board must have erred in some way, or (ii) the Applicants had a legitimate expectation that they would themselves be screened in. Accordingly, the Applicants do not have leave to rely on the cases of those ethnic Chinese from Ha Tuyen Province who also arrived in Hong Kong and who were screened in. The fact that I am permitted to limit an applicant's leave to particular grounds was something which I decided in *Association of Expatriate Civil Servants of Hong Kong v. Secretary for the Civil Service* (HCMP 3037/94).

The third matter which gives me cause for concern relates to delay. In 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."

Despite the submissions of Ms. Watson, that remains my view today. In selecting the representative households to be chosen, the parties' legal representatives should obviously choose households which highlight the various issues which arise on delay.

(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.