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ARTICLES

JUDICIAL REVIEW OF THE REFUGEE STATUS DETERMINATION PROCEDURE FOR VIETNAMESE ASYLUM SEEKERS IN HONG KONG: THE CASE OF DO GIAU

*Arthur C. Helton**

I. INTRODUCTION

A recent Hong Kong court decision¹ has begun to draw into question the validity of the refugee status determination used in the colony for Vietnamese asylum seekers. The decision, which quashed a determination denying refugee status to an individual asylum seeker,² will likely lead to additional judicial challenges to Hong Kong's refugee status procedure and intensify the debate regarding the mandatory repatriation of Vietnamese to Vietnam.³

This Article describes the background to the continuing arrival of the Vietnamese boat people in Hong Kong. The efforts of the international community to cope with the arrivals are discussed, including the United Nations Comprehensive Plan of Action⁴ (CPA) concerning Indo-Chinese refugees, and the estab-

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1. *R v. Director of Immigration and Refugee Status Review Board ex parte Do Giau and others* (1990 MP No. 570, 622, 623, 624, 636, 931, 932, 933, and 934) Supreme Court of Hong Kong, High Court, Miscellaneous Proceedings (Mortimer, J.). A copy of the final judgment, dated April 15, 1991, is on file with the *Brooklyn Journal of International Law*.

2. *Id.* at 65.

3. See *N.Y. Times*, Sept. 23, 1990, at A9, col. 1.

4. *Office of the United Nations High Commissioner for Refugees: International Conference on Indo-Chinese Refugees*, (Agenda Item 111(c)), at para. 10, U.N. Doc. A/

ishment of status determination procedures in Hong Kong in connection with the CPA. The facts of the case in question and the court's decision are described, and the correctness and import of the decision are analyzed.

II. BACKGROUND

Sixteen years after the fall of Saigon the international community continues to attempt to cope with the displacement of Vietnamese boat people. After South Vietnam surrendered in April 1975, a stream of Vietnamese began to leave. Reasons for flight included harsh "re-education" of those associated with the old regime, the persecution of ethnic Chinese, deterioration of living conditions coupled with food shortage, drought, flood, and a desire to avoid military service under the new regime. By 1979, some 600,000 Vietnamese had left.⁵

The magnitude of the exodus and harsh reactions by neighboring countries in the region provided the impetus for the world's first effort in 1979 to address the problem. Governments in the region refused to allow the boat people to land, and many of the Vietnamese perished in the South China Sea.⁶

The crisis inspired an international response. On May 31, 1979, the British Prime Minister proposed to the Secretary General of the United Nations (Secretary General) that an international conference be convened to deal with the problem.⁷ A meeting was called, and sixty-five countries attended the conference from June 20-21, 1979. In his opening statement, the Secretary General underlined the crucial importance of maintaining the principles of "first asylum" and "non-refoulement"⁸ for refu-

44/523 (Sept. 1989) [hereinafter 1989 Conference].

5. See Wain, *The Indochina Refugee Crisis*, 58 FOREIGN AFF. 160, 166 (1979).

6. U.S. COMMITTEE FOR REFUGEES, UNCERTAIN HARBORS: THE PLIGHT OF VIETNAMESE BOAT PEOPLE 4 (1987).

7. *Meeting on Refugees and Displaced Persons in South East Asia: Report of the United Nations High Commissioner for Refugees*, (Agenda Item 83), at para. 6, U.N. Doc. A/34/627 (Nov. 1979) [hereinafter 1979 Conference].

8. This is the principle that no refugee should be returned to a country where his or her life or freedom would be endangered. See Helton, *What Is Refugee Protection?*, 2 INT'L J. REFUGEE L. 119, 126 (1990). *Non-refoulement* provisions are included in several United Nations instruments, including article 33 of the 1951 Convention and 1967 Protocol relating to the Status of Refugees. The Convention relating to the Status of Refugees of 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention]; Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. A similar provision is included in article 3 of the Declaration on Territorial Asylum. G.A. Res. 2312 (XXII) (Dec. 14, 1967), 1967 U.N.Y.B. 758.

gees arriving either by land or by sea, recognizing that countries of asylum expected reassurance that they would not bear the final burden and that all refugees would be resettled abroad in other countries.⁹ The conference focused on the need for international burden sharing to increase resettlement opportunities within the international community, thereby easing the strain on Indo-Chinese countries and Hong Kong which could no longer absorb the flow of asylum seekers.¹⁰

The rate of departure fell from approximately 25,000 per month from January to July to about 4,000 per month from August to December in 1979, primarily as a result of enforcement efforts undertaken by Vietnam to stop unauthorized departures.¹¹ The conference arrangement for resettlement stabilized the situation and established a framework in which to consider the problem. Consequently, the issue largely dropped out of public discussion.

The 1979 conference arrangement began to unravel when arrivals outstripped falling resettlement quotas in the late 1980s. In Hong Kong, arrivals began to exceed resettlement departures in 1986 after Vietnam suspended its orderly departure program to the United States, which was to accept refugees from within Vietnam for resettlement. As the number of refugees taken for resettlement in third countries dwindled, the number seeking asylum increased. In Hong Kong, the number of arrivals increased from 3,395 in 1987 to 18,446 in 1988. In May 1989 over 8,900 asylum seekers arrived in Hong Kong, bringing the total over 37,000.¹²

United States domestic law reflects this policy. See 8 U.S.C. § 1253(h) (1991). Even states not parties to the United Nations instruments are bound to respect *non-refoulement* as a fundamental principle of customary international law. See G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 97 (1983); Conclusion No. 6 (XXVIII), in *United Nations High Commissioner for Refugees (UNHCR), Conclusions on the International Protection of Refugees*, Executive Committee of the High Commissioner's Programme 14 (1980) [hereinafter (*UNHCR*), *Conclusions*]; *Report on the Twenty-Eighth Session of the Executive Committee of the High Commissioner's Programme* at para. 53, U.N. Doc. A/AC.96/549 (Oct. 1977).

9. 1979 Conference, *supra* note 7, at para. 12.

10. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *Refugees*, June 1989, at 21. The conference participants agreed that Indo-Chinese countries and Hong Kong would provide first asylum to Vietnamese boat people while the international community would offer final settlement opportunities. OXFAM, *VIETNAMESE BOAT PEOPLE AND REFUGEES IN HONG KONG* para. 2 (1989).

11. B. WAIN, *THE REFUSED: THE AGONY OF THE INDOCHINA REFUGEES* 79 (1981).

12. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *INHUMANE DETERRENCE: THE TREATMENT OF VIETNAMESE BOAT PEOPLE IN HONG KONG* 8 (1989) [hereinafter *LAWYERS*

To deter arrivals, on June 16, 1988, Hong Kong initiated a screening and detention policy. Vietnamese who arrived in the colony after that cutoff date would be examined to determine refugee status and potential resettlement abroad. Those screened as refugees would be held in camps pending resettlement. Those pending adjudication and those rejected for status would be detained pending return to Vietnam.¹³

III. THE UNITED NATIONS COMPREHENSIVE PLAN OF ACTION

A further international response was organized. On June 13 and 14, 1989, representatives of seventy-five governments met at an International Conference on Indochinese Refugees in Geneva.¹⁴ The purpose of the conference was to endorse a plan to cope with the continuing flight of Vietnamese asylum seekers. Specifically, the governments sought to establish procedures to screen asylum seekers on a region wide basis to determine which among them deserved resettlement as refugees. In addition, the participants attempted to organize the detention and possible return, including deportation, to Vietnam of those rejected for status.¹⁵

Central to the CPA was the establishment of refugee status determination processes in the region.¹⁶ Implementing such screening procedures had been problematic in the past; processing applicants for refugee status was fraught with delays. Moreover, extremely few asylum seekers were screened as genuine refugees with a "well-founded fear of persecution" in Vietnam. As of April 1989, for example, only three of over 1,300 Vietnamese cases had been recognized by the Hong Kong authorities as entitled to refugee status.¹⁷

COMMITTEE].

13. LAWYERS COMMITTEE, *supra* note 12, at 10-11. Hong Kong declared that the screening procedures would be carried out under United Nations criteria to determine if Vietnamese arrivals were genuine refugees having a "well-founded fear of persecution" under the 1951 Refugee Convention and the 1967 Protocol. Peterson, *Hong Kong Announces Tightening of Refugee Acceptance*, Reuters (June 15, 1988) (NEXIS). The 1951 Refugee Convention and the 1967 Protocol are the primary sources of international obligations toward refugees. Hull, *Displaced Persons: The New Refugees*, 13 GA. J. INT'L & COMP. L. 755, 759 (1983).

14. 1989 Conference, *supra* note 4, at para. 10.

15. LAWYERS COMMITTEE, *supra* note 12, *passim*.

16. LAWYERS COMMITTEE, *supra* note 12, at 13.

17. LAWYERS COMMITTEE, *supra* note 12, at 4. For a discussion on the introduction of screening in Hong Kong, see Mushkat, *Refugee in Hong Kong*, 1 INT'L J. REFUGEE L. 449 (1989).

The CPA seeks to establish a "consistent, region-wide refugee status determination process to be conducted in accordance with national legislation and internationally accepted practice."¹⁸ Consultations were undertaken by the office of the United Nations High Commission for Refugees (UNHCR) with concerned governments resulting in a recognition that international criteria should govern status determinations, that the office of UNHCR should have ready access at all stages of the procedure, and that the authorities should cooperate with nongovernmental organizations.¹⁹

IV. PROCEDURES IN HONG KONG

Upon interception in Hong Kong waters, Vietnamese boat people are informed that they are illegally entering the territory. If they insist on remaining, a status determination procedure is to be carried out in accordance with the strictures of the 1951 Convention and 1967 Protocol relating to the Status of Refugees²⁰ and the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status²¹ under a Statement of Understanding between the UNHCR and Hong Kong authorities.²² The UNHCR is an exclusive source of legal advice and assistance to asylum seekers in the screening and review procedures, and is to have access to the Vietnamese for this purpose.²³

Interviews are conducted by an Immigration Department officer, who is assisted by an interpreter. The officer completes a questionnaire and makes a recommendation on the case, including an assessment of the applicant's credibility. Legal counselors of the UNHCR have access to the examination to monitor the screening interview. The interviewer's recommendation is reviewed by superiors, who make the final decision regarding refu-

18. *Note on National Procedures for the Determination of Refugee Status*, Annex I, at para. 1, U.N. Doc. A/Conf. 148/4 (May 1989).

19. *Id.* at paras. 1, 24.

20. 1951 Refugee Convention, *supra* note 8; 1967 Protocol, *supra* note 8.

21. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURE AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (Geneva, Sept. 1979) [hereinafter HANDBOOK]. It has come to be recognized as an authoritative source of guidance for adjudicators. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

22. Interview with Michael Hansen, Refugee Coordinator, Security Branch, in Hong Kong (May 24, 1990); *see also* LAWYERS COMMITTEE, *supra* note 12, at 26.

23. LAWYERS COMMITTEE, *supra* note 12, at 26.

gee status. If the final decision is negative, the applicant is to be informed of the denial and of the right to appeal. At the time of notification of the denial, a copy of the Immigration Department file is given to UNHCR and a legal consultant at the Agency for Volunteer Service, established by UNHCR, so that they may consider assisting asylum seekers with a review. An objection to the status determination must be lodged with the Immigration Department within fourteen days of notice of the determination. Within four to six weeks, the applicant must submit a written statement for review.²⁴

On May 31, 1989, a Refugee Status Review Board (RSRB or Review Board) was established by legislation as a reviewing body. The RSRB is headed by a former judge and is organized in four two-person panels whose members are drawn from the civil service and the community at large. A positive decision by one panel member suffices to overturn a negative screening decision. While legal assistance may be offered to some applicants in preparing cases for review, no legal representation is permitted at the review itself. Oral evidence is not given at the Review Board, although some asylum seekers are reinterviewed by Board members. UNHCR monitors some of these second interviews.²⁵

As of April 1991 the Director of Immigration has completed screening for 22,606 persons, of whom 3,028 were accepted as refugees (thirteen percent), including on family unity grounds, and 19,578 were denied refugee status (eighty-seven percent). The RSRB has reviewed the cases of 16,993 persons. Upon review the Director of Immigration's decision has been upheld for 15,520 persons and overturned for 1,478.²⁶

The screening procedure in Hong Kong has been very controversial. Worthy cases have been reported rejected, including Vietnamese who had been subjected to harsh re-education and forced labor measures.²⁷ Amnesty International has criticized the procedure as having "critical flaws" and has made recommendations to enhance the procedure, including the provision of more systematic legal counseling and requiring the RSRB to

24. See LAWYERS COMMITTEE, *supra* note 12, at 21.

25. See LAWYERS COMMITTEE, *supra* note 12, at 21.

26. HONG KONG GOVERNMENT FACT SHEET: VIETNAMESE BOAT PEOPLE IN HONG KONG, EXECUTIVE SUMMARY (Apr. 1991) (Status Determination Procedures).

27. See N.Y. Times, Feb. 25, 1990, at A3, col. 1; N.Y. Times, Jan. 18, 1990, at A11, col. 1.

state reasons for negative decisions on appeal.²⁸

The screening interviews have been criticized as intimidating and humiliating for the applicant. This atmosphere inhibits persons from providing important details of their lives in Vietnam that would demonstrate they have a genuine fear of persecution and therefore warrant refugee status. Most applicants do not understand the reasons underlying particular questions because they have received no legal counseling prior to the interview. Without such advice, applicants cannot respond adequately to questions designed to elicit evidence of persecution. In addition, the immigration officer conducting the interview may exacerbate the applicant's confusion by asking questions in a random fashion. This piecemeal approach to the examination hinders the applicant's ability to clearly describe his or her experiences in Vietnam. Moreover, the duration of the interview

28. AMNESTY INTERNATIONAL, MEMORANDUM TO THE GOVERNMENTS OF HONG KONG AND THE UNITED KINGDOM REGARDING THE PROTECTION OF VIETNAMESE ASYLUM SEEKERS IN HONG KONG 51, 52 (Jan. 1990). In 1989, the Lawyers Committee for Human Rights reported and recommended that:

10. In practice, the screening process does not provide an adequate basis for determining whether asylum seekers have valid claims. Examiners have not given the benefit of the doubt to applicants in the screening process. Sufficient guidance has not been provided to applicants or examiners. In some instances, examiners do not fully answer the interview questionnaires. Translation services provided by the Hong Kong authorities are sometimes inadequate. In many cases, examiners do not even inform the applicants of the purpose of the examination. Little, if anything, is done to create an atmosphere which would engender trust and disclosure. Generally, examiners fail to ask the probing questions necessary to help an applicant articulate a claim for refugee protection. The training of adjudicators is inadequate, and most interviewers lack knowledge of conditions in Viet Nam.

11. Several steps should be taken immediately to improve the interview process. Vietnamese asylum seekers should be provided with a written explanation in Vietnamese of the screening process, including criteria and procedures. Legal counseling should be readily available to asylum seekers prior to interviews. Examinations should be recorded on tape, so that a record exists that an attorney or a UNHCR representative can review in the event an asylum seeker decides to appeal an adverse determination and in order to monitor the adjudication process generally. Rejected applicants should be informed of the reasons for an adverse decision and provided with ready access to counsel to appeal.

12. A special task force of well-trained, professional adjudicators should be assembled by Hong Kong to perform refugee status determinations, outside the ambit of the immigration authorities. The use of immigration examiners in refugee status adjudications is generally inappropriate, given their immigration law enforcement background, which is fundamentally incompatible with the humanitarian standards necessary to decide asylum cases and fairly assess the claims of asylum seekers.

LAWYERS COMMITTEE, *supra* note 12, at 5.

may not permit the asylum seeker to provide a complete account of his or her treatment in Vietnam. Some examinations last only one hour. Even if the applicant does provide a detailed narrative, crucial details may be lost in translation. Interpreters present during the screening interview frequently speak a dialect that differs from that of the asylum seeker. This communication barrier increases the risk that the applicant will misconstrue the interview questions and that the examiner will be insensitive to subtleties in the asylum seeker's answer.²⁹

29. One commentator described the screening interviews in the following terms:

The case of Phan Hai, a fisherman from South Vietnam, provides an illustrative example. I spoke with Mr. Hai for hours at a time on several different occasions. He told me that after the communist takeover in April 1975, the communists tortured his mother and father before his very eyes, sent his father to a re-education camp where he was paralysed and almost killed, banished his family from their village, forcing them to live illegally on a tiny fishing junk, and expelled him from public school though he was only fourteen years old. Mr. Hai said that he himself was brutally tortured after having evaded the draft because, among other reasons, "I did not believe that I should fight for a government that treated my family so badly and denied us all of our rights as human beings." At the time of his departure, Mr. Hai had been living in hiding for seven years and was in fear for his life.

Shortly after his arrival in Hong Kong in April 1989, Mr. Hai was briefly interviewed for basic information by a Hong Kong official who, he says, "bade me with his hand to kneel down in front of him." The official spoke in a "harsh and shrill" tone and constantly banged on the table, causing Mr. Hai such fear that he could not even remember the names of his children. Mr. Hai told me that four months later he was interviewed for one hour by a Hong Kong immigration officer, to determine his refugee status. He said that he only learned of the interview the day before, and he was given no prior legal counselling or advice, or any written information about the interview. He described his interview as follows:

". . . the immigration officer [said] I should tell him the story about why I left Vietnam. I began to answer this question, but [he] interrupted me and went on to the next question. I tried to go back to the question about why I had left Vietnam, but [he] and the interpreter started laughing with each other. The immigration officer jumped from question to question from before 1975 to after 1975 without any kind of order or relation between them. I asked [him] to give me time to tell my story, but he threw his pen on the desk and said just answer the questions asked . . . I had the impression he just wanted to get it over with as quickly as possible. . . . He and the interpreter made fun of and laughed at me. Sometimes, they would pause and look at each other between questions showing expressions of disbelief. At one point, the immigration officer said that I had come to Hong Kong and now I had some meat to eat so that I must feel good. I felt so humiliated that I broke down and cried. I told him that I did not come for meat but because I feared persecution. They just laughed at me some more."

Wolf, *A Subtle Form of Inhumanity: Screening of the Boat People in Hong Kong*, 2 INT'L J. REFUGEE L. 161, 163-64 (1990).

V. THE CASE OF DO GIAU

Mr. Do Giau is a twenty-four-year-old Vietnamese man. He came to Hong Kong on July 16, 1988, along with his sister, her husband and their two children. His younger brother also accompanied him on the same boat. When they were apprehended by the Hong Kong authorities they were detained at the Whitehead Detention Centre.³⁰ Mr. Do's family had been "badly ill-treated since 1975 following the collapse of the government of South Vietnam."³¹ Mr. Do's father served in various government positions in South Vietnam. He was a soldier from 1951 to 1955, during which period he was wounded. He also served as hamlet chief from 1967 to 1969, being promoted to village chief in 1970, a position he held until 1975.³² Mr. Do's family was relatively wealthy and well-known because of his father's administrative position over an area with a total population of about 30,000 to 40,000 persons.³³

In 1975, Mr. Do's mother and four sisters were killed in a communist invasion. After the communist takeover in 1975, Mr. Do returned with his family to their home in Hue. Shortly after returning, his father was arrested and detained in the village police station. His father was then publicly denounced and beaten, and sent for long-term "re-education" in a camp.³⁴ Five years later, Mr. Do's father returned in poor condition.³⁵ Mr. Do's father reported torture, including beatings and confinement under onerous circumstances. He reported forced labor, including clearing thick jungle in areas where mines had been laid. These mines sometimes killed workers who stepped on the explosives.³⁶

As to himself, Mr. Do reported that he and other siblings had been prevented from going to school and undertaking uni-

30. Affirmation of Do Giau, March 2, 1990, at paras. 1, 2 (copy on file with the *Brooklyn Journal of International Law*) [hereinafter Affirmation of Do Giau].

31. *Id.* at para. 4. Commentators continue to report human rights violations in Vietnam. See generally AMNESTY INTERNATIONAL, VIETNAM: RENOVATION (DOI MOI), THE LAW AND HUMAN RIGHTS IN THE 1980's (1990).

32. Affirmation of Do Giau, *supra* note 30, at para. 4.

33. Affirmation of Do Giau, *supra* note 30, at para. 5.

34. Affirmation of Do Giau, *supra* note 30, at paras. 7, 8.

35. Mr. Do described his father's deteriorated condition:

I could not even recognize him because he was just skin covering bones. He was hunched over as a result of his sufferings and could not stand straight. He had lost most of his hair and teeth. He was suffering from malaria, which he still has today. From then on, he has been a weakened man.

Affirmation of Do Giau, *supra* note 30, at para. 8.

36. Affirmation of Do Giau, *supra* note 30, at para. 8.

versity studies. The communist authorities had confiscated their family farm in January of 1976.³⁷ He and the other children were sent to a New Economic Zone (NEZ) which was located in the middle of mountainous jungle. All of the NEZ inhabitants had ties with the previous government and military of South Vietnam.³⁸ The NEZ was patrolled by armed security forces to prevent escape. NEZ inhabitants lived under primitive conditions, without electricity or running water. The work included leveling the ground and removing mines and live grenades.³⁹

These harsh living conditions were aggravated by inadequate medical care and education.⁴⁰ When Mr. Do's father was released from the re-education camp in 1981, he joined his family in the NEZ. One of his brothers, who was arrested for protesting the failure to grant him permission to leave the NEZ, was tortured by the police.⁴¹ Mr. Do escaped from the NEZ to Hue where he was expelled from school after he could not produce his family registration documents.⁴² He also asked permission to become a construction worker. The request was refused. According to Mr. Do, "They said that my family still had a 'blood debt' and that I had not fulfilled the criteria to do any work for the government."⁴³

Mr. Do refused to comply with a draft order for military service he received in 1986. He fled upon learning that army security forces had decided to arrest him, and hid with relatives in another locale.⁴⁴ Mr. Do was then arrested in connection with an escape attempt organized by his brother. According to Mr. Do, he was tortured and interrogated by the local police about the escape.⁴⁵ After three days of confinement, he was released and

37. Affirmation of Do Giau, *supra* note 30, at paras. 9, 10.

38. Affirmation of Do Giau, *supra* note 30, at paras. 10, 11.

39. Mr. Do described this aspect of the work in detail:

We had to dig up the mines and the grenades with our bear [sic] hands. I saw many people killed and injured doing this work. My brother's arm was injured and is still partially paralysed as a result. I was always very afraid and had nightmares about being blown up. Sometimes I woke up screaming. I had to do this work, clearing the forest and removing the mines, 11 to 12 days a month for three months.

Affirmation of Do Giau, *supra* note 30, at para. 14.

40. Affirmation of Do Giau, *supra* note 30, at paras. 16, 17.

41. Affirmation of Do Giau, *supra* note 30, at para. 20.

42. Affirmation of Do Giau, *supra* note 30, at para. 21.

43. Affirmation of Do Giau, *supra* note 30, at para. 22.

44. Affirmation of Do Giau, *supra* note 30, at paras. 23, 24, 25.

45. Mr. Do described his treatment:

I was taken to the local police station where I was interrogated and tor-

resumed hiding.⁴⁶

Mr. Do was arrested again in July of 1987 and was severely beaten. Although he was released to go back to the NEZ, Mr. Do refused to return and again went into hiding.⁴⁷ He left Vietnam for Hong Kong on July 9, 1988.⁴⁸

Mr. Do was interviewed by an Immigration Department officer on July 26 and August 9, 1989. He was denied asylum on September 6, 1989, and appealed the negative status determination to the RSRB. He received notice of the refusal of his appeal on December 7, 1989.⁴⁹

VI. THE JUDICIAL REVIEW

Mr. Do Giau sought judicial review of the administrative rejection of his refugee claim in March of 1990 with the assistance of lawyers appointed by the Hong Kong Legal Aid Department.⁵⁰ The litigation was an unusual cooperative effort between lawyers in Hong Kong, Britain, and the United States. After a visit to Hong Kong in January to lay the groundwork for a challenge, lawyers from Britain and the United States continued to provide backup assistance to the solicitors and barristers in Hong Kong.⁵¹ After preliminary proceedings, the case proceeded to hearing in November 1990. The hearing lasted thirty-six days, spanning the period from November 19, 1990 to January 28, 1991. A sixty-eight page decision was rendered on February 18, 1991.⁵²

The first issue the court considered concerned the admis-

tured. I was surrounded by three security officers who took turns beating me up. I was beaten so hard that I passed out. They poured water on me and threw me in a cell. During the interrogation, they thought I was one of the organizers so they asked me many questions about how the escape was planned.

Affirmation of Do Giau, *supra* note 30, at para. 27.

46. Affirmation of Do Giau, *supra* note 30, at paras. 27, 28.

47. Affirmation of Do Giau, *supra* note 30, at para. 30.

48. Affirmation of Do Giau, *supra* note 30, at para. 31.

49. Affirmation of Do Giau, *supra* note 30, at para 3.

50. See N.Y. Times, Feb. 24, 1991, at A3, col. 1. On the remedy of judicial review under English law, see S. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 17, 18 (1987) [hereinafter S. LEGOMSKY].

51. N.Y. Times, Jan. 18, 1990, at A11, col. 1. An intervention from the office of the UNHCR and expert affidavits were organized by lawyers in the United States for submission in the litigation in Hong Kong.

52. R v. Director of Immigration and Refugee Status Review Board *ex parte* Do Giau and others (1990 MP No. 570, 622, 623, 624, 636, 931, 932, 933, and 934) Supreme Court of Hong Kong, High Court, Miscellaneous Proceedings (Mortimer, J.).

sion of evidence regarding conditions in Vietnam.⁵³ The court refused to admit general evidence of conditions in Vietnam. It concluded that such evidence was inadmissible because information on country conditions did not relate to procedural irregularities or unfairness in the status determination procedures. The decision, however, acknowledged that evidence of conditions in Vietnam might be "necessary" with respect to information a particular applicant was unable to bring to the attention of the interviewing officer.⁵⁴

53. Extensive expert affirmations on conditions in Vietnam were offered by Mr. Do's counsel from Stephen Denney, an archivist at the Indochina Archive of the Institute of East Asian Studies, University of California at Berkeley, and Nguyen Dinh Tu, a Vietnamese journalist who had worked in that capacity since 1945, and who was imprisoned on political grounds from 1975 to 1988, when he was released, and in 1989 fled to Hong Kong where he was given refugee status. Messrs. Denney's and Nguyen's affirmations are on file with the *Brooklyn Journal of International Law*.

54.

[T]his evidence does not go to show procedural irregularity or unfairness in relation to the hearings. If at any stage in the future, it becomes necessary to consider what a particular applicant wanted to bring to the notice of the immigration officer but was not able to bring before him, I suppose it is possible that some part of this evidence may become admissible but at present, it is not.

* * *

Similarly, unless the matters to which the evidence is directed, can be demonstrated to the court, general evidence of "country conditions" in order that this court should be generally informed as a background to its enquiry cannot be admitted. This also would be wrong in principle having regard to the limited nature of the court's powers in judicial review proceedings.

Director of Immigration ex parte Do Giau, 1990 Supreme Court of Hong Kong, at 9 (copy on file with the *Brooklyn Journal of International Law*).

An interlocutory appeal on the question of the admissibility of expert evidence was taken, and the Court of Appeals ruled:

[W]e have been taken in the course of this appeal through all the relevant material. I have re-read it again in my own time. The written testimony, as one would expect in the circumstances, is presented very differently from much of the official information but overall I find no significant difference or omission. Like the judge I find nothing to indicate that either the Immigration Officers or the Board were ignorant of any material fact or got any such fact plainly wrong.

It is well established that a judge may exclude evidence which can in no way properly advance the claim of the litigant. In that sense it is irrelevant. In my view the judge was correct so to exercise his discretion in the present instance.

R v. Director of Immigration and Refugee Status Review Board ex parte Do Giau and others, decision of the Court of Appeals, 1990, No. 185, (Civil) 13 Dec. 1990, Sir Derek Cons, VP, Kempster and Clough, JJA, at 12 (copy on file with the *Brooklyn Journal of International Law*).

A. *Contentions of the Parties*

Mr. Do based his appeal on several grounds which the court summarized at the hearing on the merits.⁵⁵

First, he submitted that the examination conducted by the immigration officer was unfair and therefore was either procedurally irregular or in breach of the rules of natural justice. He based the argument that the interview was unfair on factors that stemmed from omissions made before and after the examination and on the manner in which the examination was conducted. In addition, Mr. Do argued that the failure to record the interview properly also contributed to the unfair nature of the entire examination.⁵⁶

Second, Mr. Do argued that a decision based on "a plain mistake of fact" can be quashed as a legal matter. Accordingly, the immigration officer's decision to deny Mr. Do refugee status should have been reversed because it was based on a number of factual errors. Those errors related to:

- (1)The type of New Economic Zone in which the applicant lived and worked for many years.
- (2)The nature of conscriptive labour which his father was required to carry out there and which he was required to carry out.
- (3)The consequences of a loss of household registration when he left the New Economic Zone.
- (4)The effect of him receiving a draft for military service.
- (5)The erroneous recording of the fact that he worked in a state-owned rice mill and its consequences.⁵⁷

55. *Director of Immigration ex parte Do Giau*, 1990 Supreme Court of Hong Kong, at 18.

56.

Mr. Fung [Mr. Do's counsel] . . . submits that the immigration officer's examination lacked fairness and therefore was procedurally irregular or was in breach of the rules of natural justice. Three broad matters are advanced:

- (1)Omissions before the examination.
- (2)The manner in which the examination was conducted and the failure to record the examination properly.
- (3)Omissions at the conclusion of the examination.

Id.

57. *Id.* at 18, 19. The court added that [some] of these matters are put in other ways. It was argued that the immigration officer wrongly concluded that the applicant was not a target for persecution because he had received papers drafting him for military service and also, that the officer had erroneously recorded his employment in a state-owned rice mill, took this into account adversely to the applicant and therefore concluded erroneously that he was not targeted for persecution. On these matters and

Third, Mr. Do argued that the immigration officer failed to fulfill the procedural requirements for screening as set forth under Hong Kong immigration law.⁵⁸ Mr. Do based this contention on the ground that the immigration officer had breached Regulation 7(b) of the Immigration Ordinance by failing to make available to the Review Board all material upon which his decision was based. This breach arose because the officer had destroyed his original notes of the interview which were therefore unavailable for review.⁵⁹

In addition to attacking the immigration officer's denial of refugee status, Mr. Do also charged that the Review Board's affirmation of the decision should be reversed as procedurally unfair and in breach of the rules of natural justice. Mr. Do argued that the Review Board's decision was unfair because he was not permitted to attend the hearing on his case. Thus, he was not permitted to address factual disputes that had arisen between himself and the immigration officer concerning the initial examination. Moreover, he was not able to explain differences in the evidence the immigration officer had recorded and evidence advanced on appeal to the Review Board. Also, Mr. Do argued that the Review Board should have given reasons for its decision despite section 13F(8) of the Hong Kong Immigration Ordinance which does not contain such a requirement.⁶⁰

Mr. Do argued further that the infirmities and errors in the adjudication of his claim constituted an abuse of discretion standard as enunciated in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*⁶¹

others, it is submitted that the immigration officer's decision was unreasonable and perverse in the *Wednesbury* sense.

Id. at 19. See *infra* note 61.

58. Hong Kong does not have its own citizenship or nationality law; however, it has enacted immigration procedures embodied in the Immigration Ordinance. Clarke, *Hong Kong Immigration Control: The Law and the Bureaucratic Maze*, 16 HONG KONG L.J. 342 (1986). See also LAWS OF HONG KONG IMMIGRATION ORDINANCE (1987 ed.) [hereinafter IMMIGRATION ORDINANCE].

59. *Director of Immigration ex parte Do Giau*, 1990 Supreme Court of Hong Kong, at 19, 20.

60. *Id.*, at 20.

61. *Id.* at 20. See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 KB 223 (CA), in which Lord Greene summarized the relevant principle:

I do not wish to repeat myself but I will summarize once again the principle applicable. The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of

The Hong Kong government denied that there was any procedural unfairness relating to the immigration officer's examination or the Review Board hearing. With respect to Mr. Do's contention that the examiner's decision was based on "a plain mistake of fact," and therefore flawed, the government contended that no such mistake had been demonstrated. Alternatively, the government asserted that a decision can be challenged based on "a plain mistake of fact" only where such facts are known to or available to the decision-maker. In this case, the examining immigration officer could not have known that he misconstrued facts given by Mr. Do during the interview. Accordingly, the decision was not flawed. The government also argued that the immigration officer did not wrongly take into account matters relating to Mr. Do's military draft or his employment by a state-owned rice mill as evidence that refugee status should be denied. The government disputed Mr. Do's claim that the immigration officer had not followed statutory procedure as set forth in the Immigration Ordinance because he had made available to the Review Board the notes upon which his decision was based. Finally, the government argued that neither the immigration officer's nor the Review Board's decisions were unreasonable or perverse under the *Wednesbury* standard of review.⁶²

the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere.

Id. at 233. This articulated principle is similar to concepts of abuse of discretion in United States jurisprudence. See S. LEGOMSKY, *supra* note 50, at 175.

62. The court summarized the arguments of counsel for the Hong Kong Government as follows:

- (1) That there was no procedural unfairness relating to the immigration officer's examination or the Review Board hearing.
- (2) That if "a plain mistake of fact" is a ground upon which a decision may be flawed, this is limited to mistakes of fact known to or available to the decision-maker at the time of his decision and further that no such mistake is demonstrated in this case.
- (3) That no mistake over the application of the proper policy criteria was made nor is it shown that the wrong standard of proof was applied by either tribunal.
- (4) That the immigration officer did not wrongly take into account matters relating to the draft or employment in a state-owned rice mill. These were matters for the evaluation of the evidence by the officer.
- (5) That the immigration officer's and the Review Board's decisions are not demonstrated to be *Wednesbury* unreasonable or perverse.

Counsel for Hong Kong also contended that the notion of what is a "fair procedure" must be determined by regard to "all of the circumstances."⁶³ According to Crown counsel, the following factors should be considered:

- (1) The problems created by the number of Vietnamese arrivals and the failure of the resettlement programme.
- (2) The fact that the screening arrangements were made with the consent, support and cooperation of the UNHCR.
- (3) That the courts distinguish between the exercise of powers to remove those who are unlawfully in Hong Kong and the exercise of powers to refuse entry to Hong Kong.⁶⁴

Additionally, counsel for Hong Kong argued that Mr. Do could prevail only if he could "demonstrate that he has suffered some specific injustice or prejudice" and that any flaws in the immigration officer's decision were "cured" by proceedings before the RSRB.⁶⁵ Counsel submitted that "the court must not involve itself in evaluation and assessment of the evidence" and that the question of whether a refugee applicant's "subjective fear of persecution" is "objectively well-founded" are issues "which can only be decided by the [administrative] tribunals."⁶⁶ As "perfection can never be achieved" in the decision-making process, counsel argued that the immigration officer's and RSRB's decisions should receive judicial deference.⁶⁷ Further, Hong Kong counsel argued that the RSRB need not give reasons for decisions and that the court's jurisdiction to review the RSRB's decisions had been "ousted" by statute.⁶⁸

B. *The Court's Decision*

In terms of review of the claim of "plain mistake of fact"⁶⁹

(6) That the immigration officer did follow the statutory procedure in that he made available the notes upon which his decision was in fact made . . .

Id. at 21, 22. See also *supra* note 61 for a discussion of the *Wednesbury* principle.

63. *Director of Immigration ex parte Do Giav*, 1990 Supreme Court of Hong Kong at 22.

64. *Id.*

65. *Id.* at 23.

66. *Id.*

67. *Id.*

68. *Id.* at 24.

69. *Id.* The court explained:

After the submissions concerning the allegation of plain error of fact about the effect of the applicant's draft for military service, I specifically ruled that in Stephen Denney's affirmation of 18th April 1990, the formal paragraphs 1-4

by the adjudicatory authorities, the court preliminarily rejected a narrow scope of review. The court reasoned that if there is proof that a decision-maker made a "material and decisive error of fact" not actually known to him but easily ascertainable, such evidence could be sufficient to demonstrate that the decision was flawed. The court cautioned that such a determination "depends upon the facts of the case." According to the court, material or decisive facts would be those which were the primary basis for the decision or facts which had to be taken into account for the decision to be reached.⁷⁰

The court also ordered, on the application of Mr. Do's counsel, the cross examination of the Hong Kong Immigration Department interviewer on the application of Mr. Do's counsel.⁷¹ The evidence elicited from the immigration officer regarding the conduct of the interview did not trouble the court except for the issue of translation errors. Addressing this matter, the court concluded that "[t]here can be no doubt that the double interpretation and the choice of words involved led to some errors . . . between [what] was said in Vietnamese and [what] was eventually recorded in English."⁷² Additionally, the court stated that "minor errors may have been made by the applicant in his account and by the immigration officer in his record."⁷³ Finally,

and paragraph 32 together with Nguyen Dinh Tu's affirmation dated 28th June 1990 formal paragraphs 1-9, and paragraphs 86 and 87 should be admitted. I also admitted evidence from the respondent in reply.

Id. at 26. The cited paragraphs from Messrs. Denney's and Nguyen's affirmations concern their expert qualifications as well as discrimination in military service.

70.

I do not accept that the court powers are quite so limited. If it is demonstrated that a decision-maker made a material and decisive error of fact, which although not actually known to him or available in his department but was then easily available, generally known and unquestionably true, so that by inference it must be assumed to have been within the knowledge of the department, then if the other conditions are satisfied, this may be sufficient to show that the decision was flawed. But much depends upon the facts of the case. I would just add this that usually a material or decisive fact will be one which is a condition precedent to jurisdiction; or one which is the only or the primary basis for the decision, or a fact which the tribunal had to take into account in order to reach its decision.

Id. at 25.

71. *Id.* at 27. The giving of evidence is an unusual occurrence in judicial review proceedings under English law. See S. LEGOMSKY, *supra* note 50, at 19-21.

72. R v. Director of Immigration and Refugee Status Review Board *ex parte* Do Giau and others (1990 MP No. 570, 622, 623, 624, 636, 931, 932, 933, and 934) Supreme Court of Hong Kong, High Court, Miscellaneous Proceedings (Mortimer, J.) at 32.

73. *Id.*

the court described the manner in which the "alleged deficiencies" in the notes taken by the immigration officer during the interview could have occurred:

The applicant's evidence on certain matters could itself have been mistaken or incomplete; the interpreter's version either of question or answer could have been mistaken; his choice of words could have been inappropriate; and the immigration officer's interpretation or choice of words from the Cantonese similarly could have been mistaken or inappropriate; and further he could have erred in transcribing his note. Alternatively, the applicant may have later wished to change what he actually said in order to gain some advantage.⁷⁴

Based on this analysis, the court focused on one specific instance in which the interpreter had mistranslated Mr. Do's meaning. The court concluded that Mr. Do had never actually said that he had worked in a "state-owned rice mill." According to the court, "this was recorded as a consequence of an error of interpretation or understanding."⁷⁵ The court also noted that the issue of whether Mr. Do had ever been employed by the government was raised for the first time in his application for review.⁷⁶ To avoid unnecessary evidentiary conflicts in the future, the court recommended that all notes taken during screening interviews be preserved. Saving interview notes would eliminate questions concerning the accuracy of the transcript which would be available for inspection if necessary.⁷⁷ The court also noted that records of the training seminar given to interviewers indi-

74. *Id.* at 32, 33.

75. *Id.* at 34.

76. The court explained its reasoning as follows:

This was recorded as a consequence of an error of interpretation or understanding. I note the immigration officer first checked the bio-data with the applicant. He corrected the applicant's place of birth in his own hand No similar correction appears in the employment section where the words "self-employed" are recorded The immigration officer gave evidence that he noticed this discrepancy on checking (that is the discrepancy in the bio-data) but did not correct it because the error was obvious from the later note of the interview. This I do not accept. If a discrepancy had been obvious to the officer requiring correction at the time when he checked the bio-data, he would have either corrected the bio-data or at least he would have made some reference to the discrepancy in the later note. Also, it is highly likely that when recording the later inconsistency, not only would he have noted that inconsistency but he would also have asked further questions to resolve it.

Id. at 34.

77. *Id.* at 39.

cated that the disposal of any interview records was prohibited.⁷⁸

In terms of assessing whether the refugee status determination in this case was fair, the court identified the pertinent considerations:

[T]he circumstances to be taken into account include the importance of the decision to the asylum seeker and its possible effects; the nature of the decision itself; the framework of statute and policy within which the decision is taken; the immigration officer as the decision-maker or the review board in its case; the assistance with which they are provided by way of information about "country conditions" and training; the manner in which the screening process was established — by consultation and agreement with and the assistance of, the UNHCR; the procedure which was in fact adopted (for example, the use of the questionnaire); the provision of a system of review; and the nature of the problem which the screening procedure was designed to resolve.⁷⁹

The court dismissed the argument of Hong Kong's counsel that scarcity of resources must be considered in evaluating the fairness of the procedure at issue,⁸⁰ and found jurisprudence on the issue from other jurisdictions to be essentially irrelevant.⁸¹

78. The court stated: "It is to be noted that in the record of the [training] Seminar . . . there appears the words 'under no circumstances should any records of interview be eliminated.' I agree and endorse that advice." *Id.* at 39.

79. *Id.* at 40.

80. The court stated:

Mr. Thomas further submits that I ought to take into account the resources available or made available for dealing with the problem. I have no satisfactory means of considering this objectively but as the procedure was established by the Hong Kong Government it seems to me that it is the duty of those who establish the procedure to establish one which is objectively fair in all the circumstances.

Id. at 41.

81. The court reasoned:

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. The circumstances of the present case are paramount.

Id. While such a narrow approach by the court may be permissible in evaluating the fairness of a national system, it would constitute error in interpreting the meaning of the terms of the international refugee treaties. Comparative jurisprudence should be considered in the construction of common treaty terms. See Helton, *INS v. Cardoza-Fonseca: The Decision and Its Implications*, 16 N.Y.U. REV. L. & SOC. CHANGE 35, 45 (1987-88). Such a narrow approach also ignores applicable international guidelines. See *infra* notes

On the issue of whether the interview procedure was fair, the court focused on several specific problems. The court acknowledged that errors in translation "should be avoided where possible" but concluded that "double interpretation cannot be avoided in any practical way."⁸² Conceding the significant import of "double interpretation" regarding the question of fairness, the court asserted that "fairness *requires* that . . . contemporaneous notes [taken during the interview] should be read back . . . to the asylum seeker" during or at the conclusion of the procedure to ensure accuracy and completeness.⁸³ According to the court, "[t]his would give the opportunity to [both] check the correctness of the [interview] notes and to add anything" which the applicant may want considered. Further, this procedure would give the immigration officer the opportunity to ask supplemental questions if he considers further details "valuable to his inquiry or fair to the applicant."⁸⁴ The court concluded that reading the notes taken during Mr. Do's interview would have eliminated the error about his employment in a state-owned rice mill and elicited crucial details about his departure from the NEZ in which he lived and Vietnam.⁸⁵ Additionally, the court asserted that apparent inconsistencies in the record might have been resolved, clarifying in particular whether Mr. Do's move to the NEZ was voluntary and detailing the living conditions in the zone.⁸⁶

99-107 and accompanying text.

82. R v. Director of Immigration and Refugee Status Review Board *ex parte* Do Giau and others (1990 MP No. 570, 622, 623, 624, 636, 931, 932, 933, and 934) Supreme Court of Hong Kong, miscellaneous proceedings (Mortimer, J.) at 45.

83. *Id.* at 46 (emphasis added).

84. *Id.*

85. *Id.*

86. In addressing the issue of fairness, the court stated:

It goes without saying that double interpretation ought to be avoided where possible, but having regard to the scale of the problem faced in the screening process I am quite satisfied that this double interpretation cannot be avoided in any practical way. It is and should be regarded as an unusual feature of the process, regrettable, unavoidable but nevertheless of considerable importance in this inquiry. Anyone who has had experience of double interpretation must be well aware of the difficulties and problems which it creates.

Having regard to the risks of error and misunderstanding and the importance of the record in the decision making process and the likely effect of the decision I have no doubt that 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. This would give the opportunity to check the correctness of the note and also it would give the opportunity to add any-

The court also found that several factors inherent in the Hong Kong interviewing procedure compounded the factual errors that occurred during the applicant's examination. First, the court concluded that lack of legal counsel significant. In addition, the applicant could only "get a fair deal" if the immigration officer was "careful to sympathetically elicit" complete and accurate information as the basis of a refugee status determination.⁸⁷ The court suggested that an asylum seeker who is able to provide a full narrative of "his own experiences, his fears and the conditions in Vietnam as he saw them" would be hindered from rendering such an account in the absence of a sympathetic attempt on the part of the interviewer to obtain the information.⁸⁸

A basic infirmity in the case was the interviewer's failure to apprise Mr. Do of the reasons his application for refugee status was proposed for rejection. The court explained that "the failure to read back the note did involve a real risk of injustice, if not actual injustice because it is probable that:

- (1) The error about state employment would have been corrected.
- (2) Clarification of the inconsistencies in the note would have been elicited especially about the possible voluntary na-

thing with which on second thoughts the applicant may wish to deal. Further, it would give the immigration officer the opportunity to ask supplemental questions if he considers further details may be of value to his enquiry or fair to the applicant.

Had this been done in this case there is a real likelihood that the error about his employment in a state-owned rice mill would have been corrected and that further details about his departure from the NEZ and his situation between leaving the NEZ and Vietnam would have been obtained.

Also, there is a real likelihood (not certainty) that the apparent inconsistencies in the record would have been resolved. In particular, it may well have become clear whether the applicant really said at the interview that the family's move to the NEZ was voluntary and more information about the conditions there may have been elicited.

Id. at 45, 46 (emphasis added).

87. *Id.* at 47.

88. The court explained the errors in the interviewing procedures as follows:

It is at this stage that the applicant had received no counselling becomes of relevance. Although he could give a perfectly satisfactory and full account of his own experiences, his fears and the conditions in Vietnam as he saw them, it is in the nature of the proceedings that he will only get a fair deal if the immigration officer is careful to sympathetically elicit full information and to ensure (as far as he is able) that the information he receives and records and upon which his decision is based, is both full and accurate.

Id. at 47.

ture of the NEZ [residence] and the applicant's departure from it.

(3) Further details would have been disclosed about the period between him leaving the NEZ and departing from Vietnam.⁸⁹

The court stressed in its opinion that the immigration officer's understanding that the applicant had obtained state employment was a material factor in his decision to deny refugee status: "The reasons show that he regarded this (inter-alia) as being important if not conclusive that the applicant could not have had a well-founded fear of persecution."⁹⁰

The court reasoned further that

[t]he immigration officer's [mis]understanding about [the] employment [issue] probably coloured his thinking during the interview to the extent that he did not seek further details about. . . [Mr. Do's] departure from the NEZ and the period thereafter because it would [have been] unnecessary for his determination. If the employment point had been rectified he would undoubtedly have gone into this [aspect of Mr. Do's life] in detail.⁹¹

Taking these circumstances into consideration, the court concluded that the interviewer's failure to read his notes back to Mr. Do during the examination was "more than a 'technical' irregularity." Because Mr. Do was unable to correct the examiner's misunderstanding about the employment issue, there was a "real risk" that the error affected the negative status decision.⁹²

The court then turned to the issue of whether the immigration officer's decision denying the applicant refugee status was unreasonable. It concluded that because the interviewer materially relied on the erroneous belief that the applicant had undertaken state employment, the decision to deny refugee status was unreasonable.⁹³ That matter was taken into account by the im-

89. *Id.* at 52-53

90. *Id.* at 53.

91. *Id.*

92. *Id.*

93. The court explained its decision as follows:

I also find as part of my decision, that having taken into account and relied upon in a most material manner that the applicant said in the interview that he had state-employment when on my finding he said no such thing, this renders the decision unreasonable in the *Wednesbury* sense.

migration officer when he should not have done so.

In sum, the court asserted that “the immigration officer’s decision was flawed on the grounds of procedural irregularity, a breach of natural justice and unreasonableness, and subject to the effect of the review the decision must be quashed.”⁹⁴

Having concluded that the initial status determination was flawed, the court considered the government’s contention that the error was cured during the proceedings before the Review Board. The court rejected the government’s position and declined to deny relief to the applicant on this ground. The court’s opinion focused on the influence the immigration officer’s flawed decision had upon the Review Board. “The record of proceedings before the Review Board shows that this error was never corrected and became part of the Review Board’s decision. Indeed the issue of fact was either never appreciated or was never considered.”⁹⁵ Furthermore, the court did not believe the applicant should have been “placed at the disadvantage of seeking to correct, in a written statement,” an assertion that he had never made which negatively influenced both the immigration officer and the Review Board regarding their decisions to deny refugee status. In sum, the RSRB proceedings did not cure the errors that formed the basis of the immigration officer’s decision.⁹⁶

Finally, the court considered whether the Hong Kong Immigration Ordinance precluded review of the Review Board’s deci-

Id. at 54; *see supra* note 61.

94. *R v. Director of Immigration and Refugee Status Review Board ex parte Do Giau and others* (1990 MP No. 570, 622, 624, 636, 931, 932, 933, and 934) Supreme Court of Hong Kong, miscellaneous proceedings (Mortimer, J.) at 54.

95. *Id.* at 59, 60.

96. The court analyzed the proceedings before the Review Board:

[T]he record of proceedings suggests that the immigration officer’s flawed decision substantially influenced the Board. This is a matter upon which I have already touched and I will further consider when dealing with the submission that the court’s jurisdiction to review the Review Board’s decision is ousted by the Ordinance

Further, the applicant himself ought not to have been placed at the disadvantage of seeking to correct, in a written statement, something which on my finding he never said to the immigration officer and which influenced both his decision and the decision of the Review Board. The record of proceedings before the Review Board shows that this error was never corrected and became part of the Review Board’s decision. Indeed the issue of fact was either never appreciated or was never considered.

I reject the respondent’s submission that I ought to exercise my discretion not to allow relief on the basis that flaws in the immigration officer’s decision were cured by the Review Board review. They were not so cured.

Id.

sion. According to the court, the Immigration Ordinance permitted it to assert jurisdiction over the matter if the Review Board's decision could properly be deemed a nullity. As such, the "ouster clause" in the Immigration Ordinance would be inapplicable to the court's jurisdiction to consider the Review Board's determination.⁹⁷

In this case, the court found no ouster, explaining:

[I]n making its decision the Review Board relied upon evidence which had never been given to the immigration officer. The applicant was placed in the position of seeking to correct this error in his written submission to the Review Board. His efforts failed. His evidence on the point was overlooked. He remained unheard on the point and evidence he had never given was accorded weight.

The results of the procedural irregularity or unfairness in the immigration officer's decision were repeated and continued through the Review Board hearing. On this matter, the Review Board failed to comply with the requirements of natural justice. It failed to take into account that which it was required to consider and based its decision on evidence never given which it had no right to take into account.

. . . [T]hese flaws are of such a nature that the Review Board's decision is a nullity so that Clause 13F(6) [of the Hong Kong ordinance] does not oust the court's jurisdiction to review that decision. It should be quashed as a nullity.⁹⁸

VII. ANALYSIS OF THE DECISION

At issue in Do Giau's decision were basic elements of refugee status determination. In general, international refugee law does not seek to prescribe the procedures to be followed by governments in determining refugee status claims. Hong Kong, of

97. The court framed the question of the application of the ouster clause in the Hong Kong ordinance as follows:

The question for my consideration is whether the Board's decision (right or wrong) was made within its field of inquiry or jurisdiction so that it is protected from review by this court or whether the decision is properly to be held to be a nullity so as not to be a decision at all within the Review Board's jurisdiction.

Id. at 62.

98. *Id.* at 64, 65. In March 1991 this case and the following eight cases were settled by the parties upon an arrangement whereby the Hong Kong authorities would re-determine the cases of the individuals under panels established from the Refugee Status Review Board composed of members who had not previously been involved in the determinations. N.Y. Times, Mar. 31, 1991, at A11, col. 1.

course, might be said to have agreed to abide by certain international standards under the CPA. In that connection, a Note on Fair and Efficient Procedures was issued in 1990 by the UNHCR in connection with the judicial challenge in Hong Kong.⁹⁹ In the Note, the UNHCR described its monitoring role in the Hong Kong procedure as involving counseling of asylum seekers, monitoring of screening interviews, advice on general policy issues to the government, and legal assistance to deserving asylum seekers who take appeals. Specifically, the UNHCR emphasized the following relevant requirements:

The applicant should receive the necessary guidance as to the procedure to be followed (para. (e)(ii) of Conclusion No. 8).¹⁰⁰ Given the vulnerable situation of an asylum seeker in an alien environment, it is important that he/she should on arrival receive appropriate information on how to submit his/her application. Such advice is most effective on an individual basis and is provided in many countries by legal counselling services, funded by government, UNHCR or non-governmental sources.

The applicant should be given the necessary facilities, including the services of a competent interpreter for submitting his case to the authorities concerned: (para. (e)(iv) of Conclusion No. 8).¹⁰¹ This requirement entails, first of all, that the applicant should be given the opportunity to present his/her case as fully as possible. As refugee status is primarily an evaluation of the applicant's statement, the quality of interview is crucial to a proper determination of the claim. Paragraphs 196-205 of the Handbook¹⁰² deal with this aspect of the procedure and make it clear that "while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner"¹⁰³ and also that the examiner should "ensure that the applicant presents his case as fully as possible and with all

99. *Note on the subject of the role of UNHCR in the Hong Kong procedure for refugee status determination* (copy on file with the *Brooklyn Journal of International Law*) [hereinafter *UNHCR Note*].

100. UNHCR, CONCLUSIONS, *supra* note 8, at 17 (1980). Conclusions of the Executive Committee of the UNHCR Programme are among "soft-law" sources that provide interpretive and informing principles on issues of international refugee protection. The Executive Committee is a group of governments that meet annually in Geneva to oversee the work of UNHCR and issue written "conclusions" on issues of protection at those meetings.

101. *Id.*

102. *See* HANDBOOK, *supra* note 21.

103. HANDBOOK, *supra* note 21, at para. 196.

available evidence."¹⁰⁴ The interviewer therefore has a particular responsibility to ensure that the interview is comprehensive and the records reflect accurately what has been said. The reference to "necessary facilities" could, in UNHCR's view, also include legal advice and representation, if the applicant requires these in order to present his case properly.

If the applicant is not recognized, "he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or different authority, whether administrative or judicial, according to the prevailing system" (para. (e)(vi) of Conclusion No. 8)¹⁰⁵ . . . Although this requirement is phrased in general terms, in UNHCR's view the notion of "appeal for a formal reconsideration" includes some basic principles of fairness applicable equally to judicial or administrative reviews, such as the possibility for the applicant to be heard by the review body and to be able to obtain legal advice and representation in order to make his submission; for the reconsideration to be based on all relevant evidence; and for a consistent and rational application of refugee criteria in line with the guidelines established in the UNHCR Handbook.¹⁰⁶ UNHCR believes that the notion of fairness also requires the review body to provide the grounds for its decision, so that the applicant can be reassured that he has had a fair hearing and the criteria have been applied properly.

The application should be examined by "qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs."¹⁰⁷ An understanding of the application of refugee criteria as well as a knowledge of the situation in the country of origin are necessary, in particular, for assessing an applicant's credibility and the well-foundedness of his fear of persecution.

The applicant should be granted the benefit of the doubt if his statement is coherent and plausible and does not run counter to generally known facts.¹⁰⁸ Because of problems of obtaining evidence to substantiate a refugee claim, and the serious consequences which could result from an erroneous decision, the evidential requirements should be approached with flexibility.¹⁰⁹

104. HANDBOOK, *supra* note 21, at para. 205.

105. UNHCR, CONCLUSIONS, *supra* note 8, at 17.

106. See HANDBOOK, *supra* note 21.

107. HANDBOOK, *supra* note 21, at para. 190.

108. HANDBOOK, *supra* note 21, at paras. 203-204.

109. UNHCR Note, *supra* note 99, at paras. 4-9 (footnotes added to quotation).

While the court in Do Giau's case was correct to reject an unduly narrow approach to judicial review and the general policy justifications advanced by the crown, it failed to appreciate fully how its observations about the paucity of legal assistance and adequate interpretation for Vietnamese asylum seekers in Hong Kong finds direct support in these international standards.¹¹⁰ The failure to invoke these basic principles is perhaps the greatest shortcoming of the decision. Other aspects of the status determination procedure in Hong Kong, including the failure of the RSRB to receive oral evidence or to give grounds for its decision, while not found by the court to render the proceedings in Do Giau's case unfair, also clearly fail to meet international standards.¹¹¹

The Hong Kong High Court's decision is couched in relatively narrow terms to provide specific relief in an individual case.¹¹² Notwithstanding its apparent narrowness, aspects of the decision could have considerable consequence. For example, the court's conclusion that it was not ousted from jurisdiction because the review is of executive error in the nature of a breach of natural justice sets the stage for additional judicial review challenges. The courts in Hong Kong are thus likely to assume a more interventionist role in the future in refugee cases.

While it cannot fairly be said that the decision ruled invalid the Hong Kong status determination procedure, the court in Do Giau's case made several observations which draw into question the basic adequacy of the screening and review procedure in Hong Kong. The paucity of legal counseling is a general fea-

110. In the United States, courts and commentators have suggested that such procedural protections are required by the Constitution. *See, e.g.,* *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) (accurate and complete translation of official proceedings required in order to comport with constitutional protection of right not to be returned to a place of persecution); Note, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157 (1985).

111. Written reasons for denial are required in the United States asylum procedure. 8 C.F.R. § 208.15. The decision of the Court not to admit expert evidence failed to respect the international principle of requiring adjudicators to be fully qualified to render a decision and to accord the benefit of the doubt to applicants. *See UNHCR Note, supra* note 99, at n.105.

112. There is no class action mechanism available to courts in the United Kingdom, including Hong Kong, to require decisions on general issues with common factual and legal predicates. *Compare* FED. R. CIV. P. 23. The absence of such a mechanism has undoubtedly limited the role of the United Kingdom courts in addressing patterns and practices of executive illegality. *Compare* *McNary v. Haitian Refugee Center*, 59 U.S.L.W. 4128 (1991).

ture.¹¹³ The provision of legal counseling undoubtedly would assist in the development of more coherent claims, and should result in increased positive recognition decisions in the first instance as well as facilitating the development of appropriate administrative records for judicial review of negative decisions.

Additionally, the court's suggestions regarding the difficulties of double interpretation point to a fundamental weakness in the procedure. Interpretation is frequently the weak link in asylum adjudication systems. A double interpretation procedure, like that used in Hong Kong, can only compound inaccuracies and errors. Presumably, substantial numbers of rejections could be judicially reviewed on these grounds alone if prejudicial misinterpretations can be identified.

Also, the court's virtual direction that the notes of the interviews be read back to and subscribed by the individual applicants is one that is of significant potential in terms of future challenges to the procedure. If heeded, this admonition will assist reviewing authorities and the courts in ascertaining whether improper factors are being considered, or whether a failure to consider pertinent factors, has resulted in an unfair determination.

In sum, the decision in Do Giau's case provides the foundation for further judicial intervention and activism in the Hong Kong courts.¹¹⁴ The judiciary will increasingly be called upon to measure government policies concerning refugees against the strictures of legal entitlements.¹¹⁵

In any event, the pendency of the litigation clearly has had salutary effects. One improvement in the process was the decision in April 1990 by the RSRB to give reasons in connection with the denial of refugee status.¹¹⁶ This improvement was implemented in October 1990, and there are still problems with the

113. Only recently have the authorities countenanced pilot projects to attempt legal counseling for Vietnamese boat people prior to their interviews in the status determination procedure in Hong Kong. See *South China Morning Post*, May 27, 1990, at 2. The experience is too early to be definitive in terms of the utility of the initiative.

114. The litigative effort has also contributed to the development of a growing group of lawyers in Hong Kong who are growing increasingly accustomed to utilizing the courts to protect the human rights of refugees.

115. See, e.g., *South China Morning Post*, March 12, 1991, at 1 (possible forthcoming challenge to the detention of Vietnamese).

116. Telephone interviews with UNHCR officials, in Geneva (Oct. 1990 and Jan. 1991). Anonymity was requested by the officials.

sufficiency of reasons given.¹¹⁷ But the overall approval rate is rising. From July through December the rate increased from nineteen to twenty-five percent in terms of first instance decisions approved, and from six to eight percent in terms of reversals of negative decisions on appeal.¹¹⁸ In sum, progress has been made on refugee protection issues in Hong Kong, and the courts have been, and will continue to be, instruments to achieve such progress.

VIII. CONCLUSION

Fundamentally, the decision of the Hong Kong High Court in Do Giau's case is one that has both juridical and political significance. It will raise the level and intensity of the legal and political debates on whether the screening and review procedure in Hong Kong is fair, preliminary to any decision to countenance the mandatory return of Vietnamese boat people to Vietnam when rejected for refugee status. Further judicial pronouncements are inevitable, and should clearly establish the courts as mediators between claimed sovereign prerogatives and the human rights of refugees.

117. *Id.*

118. *Id.*

