FACV No. 2 of 1998

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 2 OF 1998 (CIVIL)
(ON APPEAL FROM CACV No. 198 OF 1997 and CACV 200 of 1997)

Civil Appeal No. 198/97

Between:

THANG THIEU QUYEN	**3rd Appellant**
HO QUAY NGUYEN	**7th Appellant**
CHU MING HONG	**37th Appellant**
HOANG VIET SINH	**96th Appellant**
TRAN HOA BUU	**103rd Appellant**
TUONG CAN QUANG	**106th Appellant**
DIEP MINH QUANG	**117th Appellant**
	(Applicants)

- and -

THE DIRECTOR OF IMMIGRATION	**1st Respondent**
THE SUPERINTENDENT OF HIGH ISLAND DETENTION CENTRE	**2nd Respondent**
	(Respondents)

Civil Appeal No. 200/97

AND BETWEEN

LONG QUOC TUONG and 111 OTHERS	**1st Appellant Appellants (Applicants)**
- and -	
THE DIRECTOR OF IMMIGRATION	**1st Respondent**
THE SUPERINTENDENT OF HIGH ISLAND DETENTION CENTRE	**2nd Respondent (Respondents)**

Court:	Chief Justice Li, Mr Justice Litton PJ, Mr Justice Ching PJ, Mr Justice Bokhary PJ and Sir Anthony Mason NPJ
Date of Hearing:	16 and 17 July 1998
Date of Judgment:	23 July 1998

J U D G M E N T

Chief Justice Li :

In this appeal, we are concerned with administrative powers of detention under the Immigration Ordinance ("the Ordinance"). It is common ground (and rightly so) that they are subject to the implied limitation that they can only be exercised reasonably. The question is whether the applicants' current detention is lawful. On a habeas corpus challenge, the judge held that it was not and ordered their release. The Court of Appeal reversed him. As a result of undertakings given to the High Court by the Director of Immigration ("the Director"), the applicants are not presently in detention.

The applicants are 119 individuals and their families. They are ethnic Chinese and had lived in Vietnam. They left that country in the aftermath of the Sino-Vietnamese War and lived in Mainland China for periods of between 5 and 15 years. They then came to Hong Kong and were detained on arrival. 16 of them had been removed to the Mainland but subsequently returned to Hong Kong.

Apart from 3 of them, the applicants arrived in Hong Kong between July 1989 and August 1994. The 3 applicants, namely

Mr Phu Tuu Minh (A114), Mr Diep Minh Quang (A117) and Mr Hoang Thien Tuong (A118), are late arrivals; they arrived in April or May 1996. I shall refer to them as "the 3 applicants" and the other 116 Applicants as "the applicants". In this judgment, I shall first deal with the applicants and then separately with the 3 applicants. Their respective cases are different.

After the resumption of the exercise of sovereignty on 1 July 1997, it is appropriate that I refer to China as the Mainland.

THE APPLICANTS

The facts

Since their arrival in Hong Kong, the applicants have been successively detained under different detention powers in the Ordinance. Their detention can be divided into three periods:

(1) From their arrival to 10 January 1997.

(2) From 10 January 1997 to the making of removal orders starting from June 1997 that they be sent back to the Mainland.

(3) Thereafter.

I shall refer to them respectively as the 1st, 2nd and 3rd period of detention. Before dealing with them, I shall first refer to the scheme in Part IIIA of the Ordinance.

Part IIIA of the Immigration Ordinance

Persons who had lived in Vietnam immediately before coming to Hong Kong, either directly or indirectly following a brief stop on the Mainland, to seek asylum are classified by the immigration authorities as Vietnamese Migrants (VMs). They have a special position in the immigration law of Hong Kong. The scheme in Part IIIA which bears the heading "Vietnamese Refugees" applies.

Under section 13A(1), an immigration officer:

> "may permit any person … who was previously resident in Vietnam and who has been examined under section 4(1)(a) … to remain in Hong Kong as a refugee pending his resettlement elsewhere."

Section 4(1)(a), which is not part of Part IIIA, provides:

> "For the purposes of this Ordinance, an immigration officer … may … examine any person on his arrival or landing in … Hong Kong, or if he has reasonable cause for believing that such person landed in Hong Kong unlawfully, at any time."

Pending a decision to grant or refuse him permission to remain, he may be detained under the authority of the Director. Section 13D(1) provides:

> "… any resident or former resident of Vietnam who -
>
> (a) arrives in Hong Kong not holding a travel document which bears an unexpired visa issued by or on behalf of the Director, and
>
> (b) has not been granted an exemption under section 61(2),
>
> may, … be detained under the authority of the Director in such detention centre as an immigration officer may specify pending a decision to grant or refuse him permission to remain in Hong Kong or, after a decision to refuse him such permission, pending his removal from Hong Kong, …"

After a screening process, permission to remain as a refugee pending his resettlement elsewhere will either be granted or refused. Where it is granted, there is no power to detain him further pending resettlement elsewhere. But the Director has the power to remove him from Hong Kong. Section 13E(1) provides:

> "The Director may at any time order any Vietnamese refugee or person detained in Hong Kong under section 13D to be removed from Hong Kong."

In relation to a person screened in as refugee, this would be to the place where he would be resettled. He can be detained until he is so removed. Section 32(1)(a) provides:

> "A person who is to be removed from Hong Kong under section 18 or 13E … may be detained until he is so removed, …"

Where permission to remain as a refugee pending his resettlement elsewhere is refused, he may be detained under the Director's authority pending his removal: The second limb of section 13D(1) ("… after a decision to refuse him such permission, pending his removal from Hong Kong …"). On such refusal, the Director must serve a notice notifying him of his right to apply for a review: Section 13D(3). The review is by the statutory Refugee Status Review Board: Section 13F. Unless it comes to a different conclusion, a person refused permission to remain as a refugee would be removed from Hong Kong. He would be repatriated back to Vietnam pursuant to section 13E..

1ST PERIOD OF DETENTION

On arrival, the Applicants were classified by the Director as Ex-China Vietnamese Illegal Immigrants (ECVIIs). This is the administrative classification given to persons who at one time lived in

Vietnam but who subsequently lived on the Mainland. In contrast to Vietnamese Migrants, the Director did not apply the Part IIIA scheme to them.

Instead, the Director invoked a different set of provisions. These are the provisions regularly applied to illegal immigrants including those from the Mainland. An immigration official refused them permission to land under section 11(1). That provides:

> "An immigration officer … may, on the examination under section 4(1)(a) of a person who by virtue of section 7(1) may not land in Hong Kong without the permission of an immigration officer …, give such person permission to land in Hong Kong but … may refuse him such permission."

That refusal made them liable to removal under section 18(1)(a) and removal orders were made. That provides:

> "Subject to subsection (2) an immigration officer … may remove from Hong Kong … a person who, pursuant to any examination whatsoever under section 4(1)(a), is under section 11(1) refused permission to land in Hong Kong."

Section 18(2) imposed a 2 months time limit for such removal. The Director then ordered their detention under section 32(1)(a) until removal.

In August 1993, the detention power used by the authorities shifted to section 13D(1). The second limb of this provision authorises detention of any resident or former resident of Vietnam under the authority of the Director "after a decision to refuse him such permission [to remain in Hong Kong] pending his removal from Hong Kong". The reason for the shift was this. By virtue of section 18(2), persons could not be removed under section 18(1)(a), the provision previously relied on, if he had been in Hong Kong for more than 2 months. This time limit, by virtue of section 18(3), did not apply to persons who had been previously resident in Vietnam, but this bar on its application was to expire on 31 December 1993. By August 1993, it was clear that the Legislature would not be extending this beyond that date. Since the applicants could not practically be removed within 2 months, section 18(1)(a) could no longer be used as the basis for the removal orders and without such orders, the Director could not detain until removal under section 32(1)(a). From August 1993, the Director decided to detain the applicants instead under the second limb of section 13D(1) pending removal to the Mainland.

Following this decision, the applicants who were in detention, having arrived before August 1993, were served with a refusal notice.

After reciting the refusal of permission to land under section 11 and the detention under section 32(1)(a), it stated that "without prejudice thereto", a section 13D(1) detention order had been made pending removal under section 13E. It informed each such applicant that removal would be effected when administrative arrangements therefor were completed and that since "you have been established as having resided in China rather than Vietnam prior to your arrival in Hong Kong, you will not be subject to any screening procedure in respect of claims to refugee status".

Those applicants who arrived after August 1993 were served with a refusal notice. This stated that after a section 4 examination, "it has been established that you have resided in China rather than Vietnam prior to your arrival in Hong Kong"; that permission to land was refused under section 11; that continued detention under section 13D had been authorised pending removal to the Mainland.

Although section 13D(1) in Part IIIA was used from August 1993 to justify detention, they had not been screened for refugee status, as the refusal notice stated. The Director's policy was not to screen applicants

once it was established that they resided on the Mainland immediately prior to arrival rather than Vietnam, and that they should be removed back there.

Their removal back to the Mainland was taking sometime to arrange since Mainland authorities at first wanted to verify their particulars before accepting them. The verified ones were returned. In late 1994, there were meetings both here and on the Mainland including a visit by Mainland officials to interview the remaining ECVIIs. In March 1995, the Mainland authorities agreed to take the "unverified" ECVIIs back in bulk to holding centres in various provinces before transferring them back to their respective farms after verification In June 1995, a number of "unverified" ECVIIs were returned.

In July 1995, whilst preparations were being made to return the remaining ones, leave was granted to the ECVIIs to challenge the Director's action on judicial review in *Nguyen Tuan Cuong and Others v. Director of Immigration* ("*the Nguyen case*"). In those circumstances, the plan to return the remaining ECVIIs to the Mainland had to be postponed. A number of applicants were applicants in those proceedings.

The Nguyen case

This was contested to the Privy Council [1997] 1 WLR 68, (1996) 6 HKPLR 62 (Court of Appeal), [1995] 3 HKC 373 (1st Instance). In November 1997, the Privy Council by majority upheld the challenge and ordered by mandamus (i) that the Director deal with each applicant under section 13A(1) either giving or refusing him or her permission to remain as a refugee pending resettlement elsewhere; and (ii) that in the event of any refusal of such permission, the Director serve on each person so refused a notice under section 13D(3) of his or her right to apply for a review under section 13F(1). See [1997] 1 WLR at 77D, (1996) 6 HKPLR at 78H - I.

The majority explained how they reached this result thus (at 75E - H):

> "… where section 13A provides that the appropriate officer may permit a previous resident of Vietnam to remain in Hong Kong as a refugee, there must impliedly be provided a power in that officer to refuse permission to such a person. Thus at least when the present applicants arrived in Hong Kong waters in their boat and it was known at once, or within a very short time, that they were previous residents of Vietnam, there was a duty on the immigration authorities to ask them whether they were seeking to remain in Hong Kong as refugees. Clearly they were and equally, in the light of the administrative decisions which the director had taken, his decision on such a request would have been to refuse it.
>
> Indeed, in substance this is what has already occurred. By electing to be placed in a detention centre after the playing to them of the recorded message, the applicants implicitly sought permission under section 13A(1) of the Ordinance to remain in Hong Kong as refugees pending resettlement elsewhere. No other

> provision of the Ordinance provides for such permission, and the recorded message, however discouraging, clearly held out some hope of it. By the formal refusal notices, if not earlier, permission was equally clearly refused. Thereupon it became the duty of the director under section 13D(3) to cause to be served notices of the right to apply for review. …"

Their Lordships held that by the conduct of the applicants, and that of the immigration authorities, *de facto*, permission had been sought and refused. This triggered the obligation to serve the notice of the right to apply for review which had not been fulfilled.

However, since the Director had in fact never operated the screening procedure, the majority ordered that the question of permission to remain as a refugee be reconsidered afresh by the Director. In granting the order, the majority observed:

> "An order in these terms will allow reconsideration by the director of the question of permission under section 13A(1) in the light of current circumstances, with an opportunity for review in the event of refusal."

In *the Nguyen case*, the applicants maintained a claim for damages. This claim was not dealt with and is now proceeding in the High Court.

The double backers

For the sake of completeness, I should mention that there are 16 applicants who after their first arrival in Hong Kong were removed back to the Mainland and then subsequently came back. They have been called "the double backers". They include Mr Tran Hoa Buu (A103) and Mr Tuong Cam Quong (A106). The facts relating to them were before Keith J, and the others are presumably in a similar position. They were removed back to the Mainland in January 1995 and came back in December 1995. Before January 1995, they were dealt with under the various sections in the Ordinance as set out above with a shift to the use of the second limb of section 13D(1) (pending removal) after August 1993. When they returned in December 1995, they were refused permission to land under section 11 and detained pending removal under section 32(1)(a). Then, removal orders were made under section 19(1)(b). Under this provision, removal orders may be made by the Director against persons who might have been removed from Hong Kong under section 18(1) if the 2 months time limit in section 18(2) had not passed. And detention orders were made under section 32(3A). (A person subject to a removal order under section 19(1)(b) may be detained pending removal.) For the purposes of the present appeal, the double backers are in the same position as the other applicants.

2ND PERIOD OF DETENTION

The Director's action following the Nguyen case

Following the Privy Council decision, the task of screening the applicants began. On 10 January 1997, the Director authorised their detention under the first limb of section 13D(1) pending a decision to grant or refuse permission to remain in Hong Kong as refugees pending resettlement elsewhere. This was in place of the previous detention under the second limb of section 13D(1) pending removal from Hong Kong.

Screening

In conducting the screening, it was considered that since the applicants had lived on the Mainland since fleeing Vietnam, the criteria used had to be adapted in the light of the principles contained in Conclusion 58 adopted by the Executive Committee of the United Nations High Commission for Refugees (UNHCR) in 1989. This document dealt with the problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection and contained the following principles:

> "(e) Refugees and asylum-seekers, who have found protection in a particular country, should normally not move from that country in an irregular manner in order to find durable solutions elsewhere but should take advantage of durable solutions available in that country through action taken by governments and UNHCR …
>
> (f) Where refugees and asylum-seekers nevertheless move in an irregular manner from a country where they have already found protection, they may be returned to that country if
>
> (i) they are protected there against refoulement [i.e. expulsion or return] and
>
> (ii) they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them …"

The Mainland was regarded as a country in which ECVIIs such as the applicants had already found protection. Accordingly, in deciding whether they should be granted permission to remain as refugees pending their resettlement elsewhere and, if so, whether they should be resettled on the Mainland, three matters were taken into account:

(1) Whether they had in fact been resettled on the Mainland before coming to Hong Kong.

(2) Whether they wished to be resettled in a country other than the Mainland.

(3) Assuming that they could not be resettled anywhere other than on the Mainland, whether their return there would satisfy the conditions in Conclusion 58(f).

3RD PERIOD OF DETENTION

Decisions after screening

From the end of June 1997, the Director began to make decisions after screening. A decision was contained in a notice of determination in these terms:

(1) The Director was satisfied that the applicant is a refugee from Vietnam in the Mainland who has been detained under Part IIIA and therefore permits him to remain in Hong Kong as a refugee under section 13A.

(2) The Director found that:

(a) He was granted a durable solution and protection on the Mainland in terms of paragraph (e) of Conclusion 58.

(b) He has moved in an irregular manner from the Mainland to Hong Kong.

(c) The Mainland will accept him back and will protect him against refoulement to Vietnam and will treat him in accordance with basic human standards as required by paragraph (f) of Conclusion 58.

(d) In terms of the majority judgment in the *Nguyen case*, he has lost entitlement to consideration in Hong Kong for resettlement overseas other than on the Mainland by return there.

(3) In consequence of the above findings, the Director has ordered his removal to the Mainland under section 13E and his detention pending that removal under section 32(1)(a).

The applicants were detained pending removal pursuant to such a decision.

In July 1997, the Mainland authorities reiterated that they would accept the return of all ECVIIs in bulk including unverified ones. They would be held in one holding centre in Guangdong Province (as opposed to a number of centres in various provinces as envisaged in 1995) and this would enable repatriation from Hong Kong by land with much greater expedition and efficiency.

The decision of the judge

In June 1997, the applicants challenged their current detention by habeas corpus proceedings. The returns to the writs rely on the removal orders to the Mainland under section 13E and the detention orders made under section 32(1)(a) for detention pending that removal as set out in the notice of determination referred to above.

During the hearing on 11 and 12 August 1997, Keith J was informed that the applicants would be seeking leave to apply for judicial

review of the removal orders to the Mainland. On 23 August 1997, papers seeking leave were lodged. On 15 September 1997, Keith J granted leave. This was before he gave judgment in these habeas corpus proceedings. The judicial review proceedings are now being heard in the High Court.

Keith J first dealt with 7 "sample" applicants (including one of the 3 applicants) and gave judgment on 26 September 1997. On 9 October 1997, he gave judgment on the remaining 112 applicants, the Director not suggesting any relevant differences between them and the 7 applicants. Of the total of 119 applicants, as noted above, I shall deal separately with the 3 applicants. As to the 116 applicants, who have been referred to as the applicants in this judgment, Keith J held that their detention had become unlawful on the basis that they would by the time of the hearing have been released from detention but for the Director's failure to consider their application for permission to remain as refugees. He ordered their release.

Court of Appeal

On 12 December 1997, the Court of Appeal (Mortimer VP, Godfrey and Rogers JJA) overruled Keith J's decision on the applicants. They held that in habeas corpus proceedings, the focus must be on the

return to the writ. The applicants were detained for the purpose of removal to the Mainland and it is not suggested that the time taken to achieve that purpose was unreasonable; the previous history is not relevant to the exercise of the present power to detain to enforce the removal order. The Court of Appeal granted leave to appeal to this Court.

Undertakings by the Director

The applicants were not re-detained following the Court of Appeal's judgment. In November 1997, before that judgment, the Director gave an undertaking to a judge in the High Court in the judicial review proceedings that in the event of her succeeding in the Court of Appeal, she would not seek to re-detain the applicants until judgment in the Court of First Instance in the judicial review proceedings. In January 1998, the Director applied for leave to be discharged from that undertaking. That application has been adjourned *sine die* with liberty to restore. (I note that the 3 applicants are not applicants to the judicial review proceedings as explained below and are therefore not dealt with by the Director's undertaking. But presumably, they have not been re-detained. Nothing turns on whether they have been.)

Summary of the detention periods

In summary, the position was as follows.

1st period of detention

This was from arrival to January 1997 when the screening of the applicants began following *the Nguyen case*. They had been refused permission to land. Prior to August 1993, they were detained under section 32(1)(a) pending removal to the Mainland under section 18(1)(a). After August 1993, they were detained under the second limb of section 13D(1) pending removal to the Mainland. As they were informed, their claim to refugee status was not considered as they had resided on the Mainland rather than Vietnam prior to arrival in Hong Kong.

2nd period of detention

In January 1997, the Director detained them under the first limb of section 13D(1) pending a decision on refugee status and then screened them on criteria adapted in accordance with Conclusion 58 of the Executive Committee of the UNHCR.

3rd period of detention

Following screening, decisions were made starting from June 1997 (i) permitting them to remain as refugees under section 13A, (ii) ordering their removal to the Mainland under section 13E, (iii) detaining them under section 32(1)(a) pending such removal. They were so detained at the time these proceedings came before Keith J. That removal was not carried out because of the judicial review challenge to the removal orders.

The Hardial Singh principles

In *Reg v Governor of Durham Prison Ex parte Hardial Singh* [1984] 1 WLR 704, Woolf J laid down the principles in relation to a statutory detention power. There, an Indian national had been a lawful immigrant into the United Kingdom. Following the commission by him of two criminal offences, a deportation order had been made by the Secretary of State who ordered his detention pending his removal. He had been detained for nearly five months at the time he applied for habeas corpus. Woolf J said at p. 706:

> "Although the power which is given to the Secretary of State …to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained … pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery

> of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention. In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

These principles represent the proper approach to the statutory construction of any statutory power of administrative detention. They were applied by the Privy Council in *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97 which concerned the power to detain a Vietnamese migrant pending his removal from Hong Kong under the second limb of section 13D(1) of the Ordinance for repatriation to Vietnam. The Privy Council stated (at p. 111):

> "… Their Lordships have no doubt that in conferring such a power to interfere with individual liberty, the legislature intended that such power could only be exercised reasonably and that accordingly it was implicitly so limited. The principles enunciated by Woolf J in the *Hardial Singh* case [1984] 1 WLR 704 are statements of the limitations on a statutory power of detention pending removal. In the absence of contrary indications in the statute which confers the power to detain 'pending removal' their Lordships agree with the principles stated by Woolf J. First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal. Secondly, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised. Thirdly, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time.

> … the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances."

Since on the facts there was no prospect of the removal of the applicants from Hong Kong as they would not be accepted by Vietnam for repatriation, they were released from detention.

The issue in the present case

We are concerned with the lawfulness of the detention when the proceedings were heard by Keith J. The applicants were detained under section 32(1)(a) detention orders following section 13E removal orders for removal to the Mainland. We are concerned with the 3rd period of detention and the relevant orders that were made from June 1997. The crucial issue in this appeal is whether the past periods of detention can affect the lawfulness of the current detention.

Ms Li SC, for the applicants, submitted that they can and that they render the current detention unlawful. She argued that the Director should have considered the applicants' claim to refugee status under Part IIIA as the Privy Council in *the Nguyen case* directed and this should have been done soon after arrival. Had she done that, the applicants would have

been at liberty here or on the Mainland or elsewhere by the time the habeas corpus proceedings were heard. Hence, continued detention was unlawful. The detention power has been spent. She accepts that the applicants can be re-detained for imminent removal. But as removal is not imminent because of their judicial review challenge, the applicants cannot be re-detained for the moment.

Mr Ma SC, for the Director, submitted that the lawfulness of the current detention is what is in issue. As there is a valid removal order, detention pending removal would be valid.

I am unable to accept Ms Li's submission. There are valid removal orders under section 13E(1). True it is that the removal orders are under challenge, leave to apply for judicial review having been granted. But they remain valid unless and until successfully challenged. That being so, the applicants can be lawfully detained under section 32(1)(a) as persons who are to be removed from Hong Kong under section 13E.

The current detention is for a period necessary to effect removal.

Removal is possible within a reasonable time and it is not alleged that the Director has failed to take reasonable steps to ensure that that will be done. Indeed, the Director wishes to and is able to implement the removal orders and there is no practical obstacle to removal here or as far as the Mainland is concerned. In July 1997, the Mainland authorities had reiterated that they would accept all ECVIIs including unverified ones. On removal back to the Mainland, the applicants would be at liberty. What has held up removal is the judicial review challenge by the applicants and not any act or omission on the part of the Director.

Ms Li accepts that, but for the long period of detention before the latest removal orders, there would be no case for concluding that the present detention is unreasonable or that it became unreasonable, after the commencement of the judicial review proceedings by the grant of leave in those proceedings. So the length of the past detention is central to the applicants' case.

The past detention cannot render the current detention pending removal invalid. Although Part IIIA contains a scheme, the detention powers conferred are respectively for different purposes. Section 13D(1)

has two limbs. There is a power to detain pending a decision to grant or refuse permission to remain as a refugee pending resettlement elsewhere: First limb. There is then a power to detain after a decision to refuse permission to remain pending removal from Hong Kong: Second limb. As in this case, where permission to remain is granted but a removal order is made under section 13E, there is a power to detain under section 32(1)(a).

In the circumstances of a particular case, a particular power to detain, say pending a decision, may have been unreasonably exercised having regard to its purpose. The authorities may be taking an excessive amount of time for making a decision. This would render continued detention unlawful under that power. But after a decision has been made, say to refuse permission, a different detention power is engaged, that of detention pending removal. This has to be reasonably exercised having regard to the purpose of removal. Even if previous detention under the power previously engaged (pending decision) was unlawful, this would not affect the exercise of the power presently engaged.

Similarly, after a decision to grant permission to remain as a refugee and to remove to the Mainland, as in this case, a yet different

detention power is engaged, which has to be exercised reasonably having regard to the statutory purpose which is detention pending removal to the Mainland. And again, even if previous detention under a different power was unlawful, this would not affect the lawfulness of the current detention under this power which has to be judged having regard to its statutory purpose and the circumstances relating to such detention.

True it is that the *Hardial Singh* principles require that the period of detention must be reasonable. What is reasonable is to be determined by reference to the statutory purpose. Here, the power of detention is being exercised in connection with the ultimate purpose of removal and that purpose, subject to the judicial review proceedings, will be achieved.

The relevant power in section 32(1)(a) to detain a person to be removed from Hong Kong is expressed as a power to detain "until he is so removed". The power is not specifically limited to "for the purpose of removal", let alone "for the purpose of immediate removal". No doubt the Ordinance contemplates that a removal, pursuant to an order, will be effected in a reasonable time. What is reasonable will again depend upon

the circumstances of the particular case. Here, for the reasons already stated, removal will take place as expeditiously as the circumstances allow.

Whilst lawfulness of the current detention would not be affected by previous detention, where there was a previous lengthy period of detention under a power then engaged, the Director should bear this in mind in getting on with matters as expeditiously as is practicable under the power of detention currently engaged.

I am of course conscious that we are dealing with the liberty of the individual which is long cherished by the common law. As regards complaints as to past detention, I would observe that the applicants are pursuing a claim for damages when those complaints will be properly considered. Nothing in this judgment should be taken as affecting that claim one way or the other. As regards any detention pending their judicial review challenge, apart from the Director's present undertaking, the Court dealing with that challenge can consider the question of interim relief and take the previous history into account.

Accordingly, I would dismiss with costs the appeals of the applicants, that is the 116 applicants.

THE 3 APPLICANTS

I turn to consider the position of the 3 applicants, Mr Phu Tuu Minh (A114), Mr Diep Minh Quang (A117) and Mr Hoang Thien Tuong (A118).

The facts

The 3 applicants arrived in April or May 1996 for the first time. The facts relating to Mr Diep (A117) were before Keith J and the other two are in a similar position. They were refused permission to land under section 11 and detained under section 32(1)(a) pending removal from Hong Kong. As they could not be removed within 2 months, a removal order was made under section 19(1)(b) and thereafter, they were detained under section 32(3A) pending removal. They have not sought to challenge the action taken by the Director on judicial review. But they have not yet been removed to the Mainland.

They maintain that they were former residents of Vietnam and seek to be recognized as refugees on arrival in Hong Kong. But the authorities have not screened them with a view to making a decision on their refugee status. After examination under section 4, they were classified as Ex-China Vietnamese Illegal Immigrants (ECVIIs), that is, previous residents of Vietnam who had lived for some time on the Mainland and who were not accorded screening. Whereas the 116 applicants had been detained under Part IIIA and were screened as ordered in *the Nguyen case*, the 3 Applicants had never been detained under that Part. On the Director's approach, detention in fact under Part IIIA is what on the majority judgment in the Privy Council distinguishes the 116 applicants from the 3 applicants.

The decision of the judge

Keith J held that Part IIIA applied to Mr Diep (and hence the other two applicants in a similar position) and that on the majority judgment, they should have been treated as having requested permission to remain as refugees. But they have not been screened. So the current removal and detention orders are invalid and he ordered their release. He

said they should have been detained under the first limb of section 13D(1) (pending a decision) and he saw no reason why on their release, they should not be re-detained under such provision.

The Court of Appeal

The Court of Appeal by majority reversed Keith J. Mortimer VP held that the 3 Applicants were not entitled to be treated under Part IIIA and on his reading of the majority judgment, the Privy Council did not hold they were entitled. He held that the Director has a discretion in the matter. Godfrey JA agreed to reversing the judge but did not deal with the 3 Applicants. Rogers JA dissented and agreed with Keith J's approach. He held that they should have been dealt with under Part IIIA on his reading of the majority judgment.

The issue in relation to the 3 applicants

The issue is the circumstances in which on a proper construction of the statute, the scheme in Part IIIA has to be applied.

Ms Li for the 3 applicants, relying on the majority judgment, submitted that they should have been screened under Part IIIA as previous

residents of Vietnam seeking refugee status. Alternatively, she argued that their request had *de facto* been refused by the section 11 refusal to land and they should have been served with the section 13D(3) notice of the right to apply for a review.

Mr Ma submitted that the Director has a discretion whether to deal with them under Part IIIA. On his submission, this discretion is an open-ended one. He argued that on the majority judgment, the critical fact was that the applicants *had been detained under section 13D(1) in Part IIIA (pending removal)* and thus the Director had by her own conduct treated them as within that Part.

I shall first consider the matter apart from authority. What is the position as a matter of construction of the statutory scheme?

In 1981, the Legislature enacted Part IIIA to deal with Vietnamese refugees and has subsequently amended it. (I note that as from 9 January 1998, the Legislature has decided that Part IIIA would cease to apply to new arrivals following the end of the port of first asylum policy.) Part IIIA includes the safeguard of a review by the statutory

Refugee Status Review Board of any decision to refuse refugee status. There are provisions dealing with detention centres designated for the detention of persons under section 13D. For persons who have been screened in as refugees and permitted to remain pending resettlement elsewhere, they are issued with Vietnamese refugee cards and there are provisions providing for the conditions of stay that may be imposed, such as residence in specified refugee centres (which are different from detention centres), not taking up employment, business or education. It is apparent from these provisions that their position is a special one in our immigration law.

As the Legislature has gone to the length of prescribing a special regime to govern Vietnamese refugees, a regime which includes the review safeguard, it would make little sense to interpret the Ordinance as conferring on the authorities after a section 4 examination, an open-ended discretion whether to deal with them under Part IIIA at all.

It is true that section 13A(1) confers a discretion. An immigration officer may permit any person who was previously resident in Vietnam and who has been examined under section 4(1)(a) to remain as a

refugee pending his resettlement elsewhere. But this is a discretion *to permit or to refuse*. It does not confer a general discretion on the immigration authorities *whether to entertain his application at all*.

Considering the scheme in that Part, particularly section 13A(1), I hold that the authorities would have *an implied duty to consider* whether to give permission to the person concerned to remain in Hong Kong as a refugee pending his resettlement once they are satisfied on examination under section 4 that the person (i) was previously resident in Vietnam and (ii) is maintaining a bona fide claim to refugee status.

I turn to consider whether the majority judgment in *the Nguyen case* is of any assistance on this matter. In that case, the Director had undoubtedly detained the applicants there under the second limb of section 13D(1) in Part IIIA (pending removal) from August 1993 shifting from powers previously used for reasons already referred to. And consequently, the majority judgment formulated this point for decision in these terms (at p. 73A):

> "… as to the proper construction of Part IIIA of the Ordinance, namely whether, *the applicants having been detained under section 13D,* they were entitled to or at any rate received a determination under section 13A of their claim for refugee

> status and as part of that, whether they are entitled to a review of their position by a Refugee Status Review Board under section 13F of the Ordinance." (emphasis added)

But when it came to analyzing the position in the passage (at 75E-H) which I have already set out above under the heading of *the Nguyen case*, the majority said that when the applicants arrived in Hong Kong waters in their boat and it was known that they were previous residents of Vietnam, there was *a duty* on the part of the immigration authorities to ask whether they were seeking to remain in Hong Kong as refugees.

At that stage, there could not have been any question of any detention under the second limb of section 13D(1) (pending removal). We are here at the section 4 examination stage. Once there is a duty to ask whether asylum is sought, it follows that if the answer is yes, there would be a duty to consider the request under the Part IIIA scheme. In my opinion, this was the view the majority was expressing and provides some support for the view I have expressed on statutory construction.. In this respect, I am in agreement with Keith J and Rogers JA in the Court of Appeal as to the effect of the majority judgment. As the Director had in fact detained them there under section 13D(1) in Part IIIA, it may be that

their view was *dicta*.

Accordingly, I would allow with costs the appeals of the 3 applicants.

Mr Justice Litton PJ:

I agree.

Mr Justice Ching PJ:

I also agree.

Mr Justice Bokhary PJ:

Liberty of the person under the law is what this case is about. One of these refugees seeking asylum in Hong Kong had been in detention here for eight years from 1989 until released in 1997 by Keith J's order which order the Court of Appeal then set aside. Does our law permit even so great a deprivation of liberty and indeed further deprivation of liberty still? The backdrop to the case is that aspect of this part of the world's recent history constituted by the sad phenomenon of the "Vietnamese Boat People."

Narrowing it down, we come to some 287,000 ethnic Chinese residents of Vietnam who fled that country for Mainland China during and in the aftermath of the Sino-Vietnamese hostilities of the late 1970s and early 1980s. Of those persons, some 23,000 came eventually to Hong Kong. Most have since returned to the Mainland. The 119 appellants now before the Court are the ones still here. Some of them are heads of families. And when their family members are included, the number of persons affected by the outcome of this appeal grows to almost 300. Many of that number are children.

All of the appellants arrived in Hong Kong by boat. Most of them first arrived here between July 1989 and August 1994. I will refer to them as "the early arrivals". Three of them first arrived here in April or May 1996. I will refer to them as "the late arrivals".

This final appeal is from a judgment of the Court of Appeal (Mortimer VP and Godfrey and Rogers JJA) delivered on 12 December 1997. That judgment was unanimous in regard to the early arrivals and by a majority, with Rogers JA dissenting, in regard to the late arrivals. It

set aside orders for the appellants' release made by Keith J (on 26 September 1997 in regard to seven of them and on 9 October 1997 in regard to the other 112 of them) in *habeas corpus* proceedings.

Shortly stated, all of that arose in this way. The Director of Immigration has made orders for the removal to the Mainland of all the appellants. For a long time she had tried to remove the early arrivals as illegal immigrants. She now proposes to remove them as Vietnamese refugees. As for the late arrivals, she proposes to remove them as illegal immigrants, doing so without considering their claims for Vietnamese refugee status.

All the early arrivals are pursuing a judicial challenge to the orders for their removal to the Mainland as Vietnamese refugees. Whether the late arrivals would pursue a similar course if the Director were to re-classify them as Vietnamese refugees but nevertheless order their removal to the Mainland is irrelevant to their present appeal.

At one stage all the appellants had been in detention pending removal. But they are all physically free now, having been so since being released pursuant to Keith J's orders for their release. They were

not re-detained after the Court of Appeal's decision. Indeed the Director has undertaken not to re-detain the early arrivals until after judgment at first instance in their judicial review challenge to the removal orders. But that undertaking does not extend beyond judgment at first instance; there is a pending application by the Director to the High Court for her release from that undertaking; and no undertaking has been given in respect of the late arrivals.

The question is whether, leaving aside any undertaking, the appellants are entitled to be physically free at the present time.

What the Nguyen Tuan Cuong case decides

The decision of the Privy Council in *Nguyen Tuan Cuong v. Director of Immigration* [1997] 1 WLR 68 is of vital importance in the present case. That is so for the following two reasons.

The first reason concerns the early arrivals. Initially the Director classified the early arrivals as illegal immigrants: more particularly as "Ex China Vietnamese Illegal Immigrants" (abbreviated to "ECVIIs"). She refused to consider their claims for Vietnamese refugee

status until she was ordered to do so by the Privy Council (whereupon she re-classified all of them as Vietnamese refugees).

It was in the *Nguyen Tuan Cuong* case that the Privy Council ordered her to consider those claims. And it was essentially the time which the early arrivals had spent in detention as ECVIIs while fighting their case ultimately to the Privy Council that forms the foundation of Keith J's finding that their further detention would be unlawful. Here Keith J reasoned along these lines. If their claims for refugee status had been entertained *when* those claims should have been entertained, none of them would still be in detention. Either they would already have been returned to the Mainland and be at liberty there; or they would be at liberty in Hong Kong pending their resettlement in some other country; or they would be at liberty in some such country having been resettled there.

I turn now to the second reason. It concerns the late arrivals. Keith J held that the late arrivals' detention was unlawful because (i) it was for the purpose of their removal to the Mainland as ECVIIs without any consideration of their claims for Vietnamese refugee status and (ii) such removal would be unlawful because they had the right to have those

claims considered under Part IIIA of the Immigration Ordinance, Cap. 115.

It was on the authority of the Privy Council's decision in the *Nguyen Tuan Cuong* case that Keith J held that the late arrivals had that right.

So much for why the *Nguyen Tuan Cuong* case is of vital importance in the present case. I turn now to consider what that case really decided. It is necessary to do so because conflicting views as to the same were taken in the courts below in the present case. (I pause here to indicate that, save where the contrary appears, all the references to statutory provisions which follow are to those of the Immigration Ordinance, Cap. 115).

Those conflicting views are as follows. Keith J and Rogers JA took the broader view of what the *Nguyen Tuan Cuong* case decided. They held that it decided that the Director is under a statutory duty to deal with all Vietnamese asylum-seekers, including those who had been in the Mainland, under Part IIIA. Mortimer VP took the narrower

view: holding that all that the Privy Council decided was that since the applicants there had been detained under s.13D, they must be treated as having received a determination under s.13A of their claim for Vietnamese refugee status. Godfrey JA's judgment is silent on the point.

The Privy Council pointed out (at pp 74E-75E) that:

(1) All the Hong Kong judges who had dealt with the case held that each applicant's detention had indeed followed a decision under s.13A(1) so that, subject to the discretion issue, all the applicants were entitled to the relief sought.

(2) It was solely on the discretion issue that the applicants had lost in the Hong Kong courts: at first instance and by a majority in the Court of Appeal.

(3) The position of Vietnamese immigrants in the immigration law of Hong Kong was a special one: shown by and resulting from the material history of the past 20 years, and confirmed by the enactment of Part IIIA.

(4) The legislation embodied a scheme of immigration control and imposed on the Director a broad statutory duty to administer such scheme fairly and properly.

(5) Since s.13A provides that the appropriate officer may permit a former resident of Vietnam to remain in Hong Kong, there was an implied power in that officer to refuse such permission.

Then the Privy Council continued (at p.75E-G) that:

> "Thus at least when the present appellants arrived in Hong Kong waters in their boat and it was known at once, or within a very short time, that they were previous residents of Vietnam, there was a duty on the immigration authorities to ask them whether they were seeking to remain in Hong Kong as refugees."

And then the Privy Council summed-up the position thus (at p.76E-F):

> " In all the circumstances in their Lordships' opinion there was a failure on the part of the Director of Immigration to comply with the statutory duty that Part IIIA of the Ordinance placed upon him and that accordingly, subject to the discretion point, the applicants were entitled to relief."

As to such relief, the Privy Council's order appears from p.77C-D of the report of their Lordships' decision read together with the report of the case when it was before the Court of Appeal, (1996) 6 HKPLR 62 at p.78 H-I). It was an order of *mandamus* (i) that the applicants' claims for refugee status be determined under s.13A and (ii) that they be served with notices of their right to apply for a review of any adverse determination. If any doubt remains, that shows that the broader view of the Privy Council's decision is the correct one. If the narrower view were correct, the order would simply have been that the applicants be served with notices of their right to apply for a review.

The conclusion in the applicants' favour on the basis of statutory right rendered it unnecessary for the Privy Council to decide the legitimate expectation issue. But it is pertinent to note their Lordships made no secret of the fact that they leaned in the applicants' favour on that issue, saying (at p.76F-G) that:

> " In addition to founding his argument on what he contended was the proper construction of Part IIIA of the Ordinance, counsel for the applicants also submitted that as a result in particular of the tape recorded message which was read to them on their arrival in Hong Kong waters the applicants were entitled to claim a legitimate expectation that the promises in that message would be honoured and that they could expect to be screened for refugee status within a few days. On the foregoing approach it becomes unnecessary to consider as a separate point that argument based on the doctrine of legitimate

> expectations. It is enough to say that any suggestion that the message was mere window dressing would be unattractive."

Finally I would point out that the Privy Council made (at p.75C) this general statement which is apposite to — and only to — a broad approach:

> "In their Lordships' opinion the position of Vietnamese immigrants in the domestic immigration law of Hong Kong is a special one. This is shown by and no doubt has come about as a result of the material history of the past 20 years. It is also confirmed by the presence of Part IIIA in the Hong Kong Immigration Ordinance."

The principles governing powers to detain pending removal

While it is convenient to give them a name (taking it from Woolf J's decision in *Reg v. Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704) and legitimate to describe them as principles, it should be borne in mind that the *Hardial Singh* principles are really canons of statutory construction. Thus they may be expressly excluded. That has not happened here. But it should be mentioned for the sake of completeness that where those principles are so excluded, such exclusion may be open to a successful constitutional challenge. Where, as in the present case, they are not excluded and therefore operate, they give rise to certain implied restrictions on statutory powers to detain people pending

their removal.

Those restrictions (as the Privy Council said in *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* [1996] 2 WLR 863 at p.873 D-E) are:

> "First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal. Secondly, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised. Thirdly, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time."

Since further detention is not authorised where it becomes clear that removal *is not going to be* possible within a reasonable time, it necessarily follows that further detention is also not authorised in the even more obvious instance where it is clear that removal *has not been* possible within a reasonable time.

The foregoing represents the superstructure of the principles with which we are concerned. Of course the matter does not end there. For no edifice can be erected in the air. It must have its foundations in the ground. And here we come to an underlying canon of construction inherent to the very concept of liberty under the law. I will not attempt to

express this canon more cogently than the Privy Council did in the *Tan Te Lam* case. It is the one which dictates the view, in the absence of express provision to the contrary, that (as their Lordships put it at p.873C) "in conferring such a power to interfere with individual liberty, the legislature intended that such power could only be exercised reasonably and that accordingly it was implicitly so limited." Clearly that forms the infrastructure of these principles.

So the test is one of reasonableness. What is reasonable depends on the circumstances. And since liberty is the thing to be protected, it behoves the courts to ensure that the protection is not lost through too narrow a view of the circumstances. Even as the courts strive for a focused view, so must they guard against taking a blinkered one.

Protection from excessive detention

Ms Gladys Li SC for the appellants has advanced two main arguments on behalf of the early arrivals. Each of those arguments is summarised in the appellants' printed case, the first in these terms:

> " The Court of Appeal's refusal to consider the underlying cause of the

> [early arrivals'] detention permits the [Director] to profit, or take advantage, from her own wrongdoing. The effect of the Court of Appeal's decision is to have allowed the [Director] to justify the prolonged detention of the [early arrivals] on the basis that she acted unlawfully in refusing to fulfil her statutory obligations until ordered to do so by the Privy Council.
>
> It is a long established principle of law that a party should not be permitted to profit from her wrongdoing. The common law should not be developed in such a way as to reward the party who has committed the wrong, allowing that party to further penalise the party who was the victim of the original wrong and who has come to the court with clean hands."

As for the second of those two main arguments, its summary in that printed case runs thus:

> " There is no good reason for adopting the Court of Appeal's narrow interpretation of the [early arrivals'] 'current cause of detention' over Mr Justice Keith's interpretation. The [early arrivals'] cases involve circumstances apparently never before dealt with by a Court in a common law jurisdiction. While there is consequently no authority directly on point, cases involving similar principles have been considered and resolved in favour of the [early arrivals]. In determining the law in respect of the [early arrivals'] case, the Court should have in mind that one of its primary roles in habeas corpus proceedings is to prevent substantive injustice to detainees. It is the gaoler's failure to deal with the [early arrivals] in accordance with law that has caused the [early arrivals'] prolonged detention. The long settled principles that liberty is to be favoured over detention and that any ambiguities in the law should be resolved in favour of an applicant where fundamental rights and liberties are at stake, are relevant. At the time of their applications for the writs, they faced further and lengthy denial of their liberty and substantive injustice thereby. For all these reasons, Keith J's decision should be reinstated."

I am not disposed to think of the Director in terms of a wrongdoer seeking to benefit from her own wrong. There is no reason to doubt that she was throughout endeavouring to do her public duty in conformity with the law.

That leaves the remainder of the first main argument: which is directed to the need to see that the early arrivals do not suffer. That, in the present context, blends in naturally with the second main argument: the theme of which is that the law leans in favour of liberty. The law does indeed do that.

I turn now to the Court of Appeal's approach of the present case. Immediately after saying that the "focus of these proceedings must be on the return", Mortimer VP immediately continued by saying that the early arrivals "are detained pending removal to China, that is the purpose." But the fact of the matter is this. Throughout the period of detention of which they complain as being too long, right from the time when they were first classified as ECVIIs, the early arrivals have been detained for that very purpose i.e. removal to the Mainland.

Godfrey JA took the view that the argument on which they succeeded at first instance brought into consideration factors "wholly extraneous" to the legality of the exercise of the power under which they "are *currently* detained."

Rogers JA said: “Much though I would like to deal with it on the basis that the matter can be looked at globally, I do not see that that can be right.”

I respectfully agree with Godfrey JA that the courts are concerned with the power under which the early arrivals are “*currently* detained.” But I am unable to share his view that the considerations upon which Keith J proceeded were extraneous to the legality of the exercise of that power. No power of detention can be exercised in a vacuum. It must be exercised against a background. And of course its impact is not felt once and for all at the moment of exercise. By its nature detention is a continuing thing. So its effect on any sentient being is a growing one. Such growth starts from the point in time when the detention is first imposed. And that point in time is fixed by when lock and key became a reality rather than by when the latest section or subsection relied upon was invoked to maintain the detention.

None of that is to say that invoking the correct provision is not important. The early arrivals, who had to go all the way to the Privy

Council before they could get themselves dealt with under the appropriate statutory scheme, would be the first to stress that importance. The point is that one cannot say that nothing else matters. To say so would be to substitute a formalistic approach for the humanistic one which is the very essence of the principles by which people are protected from the rigours of excessive detention.

In my judgment, it is accordingly necessary when applying those principles to take into account the whole period of physical detention pending removal without ignoring any part of it.

Habeas corpus and judicial review in partnership

The basis on which the Court of Appeal decided against the early arrivals is not entirely clear. Possibly it was the view that the substantive law offers no relief against further detention in cases like theirs. Or possibly it was the view that *habeas corpus* offers no process by which such relief can be pursued.

If it was the former, then it has been answered by what I have already said as to the substantive law. And if it was the latter, then the

short answer to it is that the *Tan Te Lam* case is itself a *habeas corpus* case, and the substance of *habeas corpus* in Hong Kong is the same now as it was then. Prior to 1 July 1997 ss1 to 9 and 16 of the Habeas Corpus Act 1679 and the whole of the Habeas Corpus Act 1816 applied to Hong Kong by virtue of the Application of English Law Ordinance, Cap. 88. Since that date the place in Hong Kong of those English statutes has been taken by s.22A of the High Court Ordinance, Cap. 4. That section contains detailed *habeas corpus* provisions faithful to the "freedom of the person" and "no arbitrary or unlawful detention" guarantees extended to all persons in Hong Kong, whether or not they be residents, by the architectonic liberalities of articles 28 and 41 of our own constitution the Basic Law.

While that short answer may be sufficient for the determination of the early arrivals' appeal, I consider it appropriate to say a little more on the role of *habeas corpus* in cases like these. Due respect for the Court of Appeal calls for that. And so do the interests of the law's clarity and future development.

There are decided cases, or at least statements in them, which

might, if taken in isolation, cast doubt on the appropriateness of *habeas corpus* proceedings in situations such as we have here. The sentiment which underlies those cases or statements is a legitimate one: being a desire to keep *habeas corpus* short and simple. I daresay that the learned judges of the Court of Appeal had that desire. And I respectfully share it with them.

But it must be remembered that keeping *habeas corpus* short and simple is not an end unto itself. Rather is it a means to an end. That end is to maintain the effectiveness of *habeas corpus*. And what *habeas corpus* must always be is effective according to the needs of the time.

Sometimes for better and sometimes for worse, times change. In recent times the world has witnessed a sharp rise in the mass displacement of human beings and in the growth of increasingly elaborate powers for dealing with them.

Looking at past cases in isolation renders no more than a series of snapshots of the law’s state at various stages of its development.

It is questionable whether that synchronic approach is ever a satisfactory way of discovering the present state of the law in any area. It certainly will not do in the area of the law with which the present case is concerned. As Taylor LJ said in *Reg v. Home Secretary, ex parte Muboyayi* [1992] 1 QB 224 at p.269 F-G, *habeas corpus* is a "flexible remedy adaptable to changing circumstances".

Habeas corpus is so much a part of a culture of liberty that it must itself be studied as a culture should be: diachronically with full regard to its historical development as a continuous process. From such a study there emerges a theme. For over the ages (subject to a few shameful episodes such as the *Five Knights' Case* (1627) 3 State Trials 1 and a few wrong turns of the kind identified by Professor Wade (who needs no introduction) in his recent article "Habeas Corpus and Judicial Review" (1997) 113 LQR 55) the judges have maintained *habeas corpus* as, to adopt Professor Wade's expression in that article, "the prime protector of personal liberty".

In the present case, none of the appellants has sought by way of *habeas corpus* anything which comes instead within the province of

judicial review. The proper process for challenging the removal orders is judicial review. And it is indeed in judicial review proceedings that the appellants are challenging the removal orders. What they seek by way of *habeas corpus* is their liberty pending the resolution of their judicial review challenge to the removal orders.

That is to run the two processes in tandem, each along its proper path. The partnership between *habeas corpus* and judicial review is a natural one born of symbiosis. *Habeas corpus* has long been a metaphor for liberty. And more recently judicial review has become a metaphor for the rule of law.

The appellants have resorted to both *habeas corpus* and judicial review. But they have not attempted to make either perform the function of the other.

Foundations of freedom: on rock or sand?

In the course of the argument it was suggested that the question of the early arrivals' liberty be postponed to some later stage when it may be possible to raise it. Perhaps, it was suggested, their

liberty could be raised in some proceedings in the nature of a bail application to be launched within the judicial review challenge. Or, it was suggested, they may perhaps take out an application within that challenge for a stay of the detention authorisations. Bail is discretionary. So are stays.

So here I turn again to the authority of Professor Wade. At p.62 of the article to which I referred earlier, after referring to the jurisprudence of the House of Lords, the Privy Council and the European Court of Human Rights, he says:

> " The message from these authorities is surely clear. All the accepted grounds for judicial review, i.e. for claiming that some administrative act or decision is unlawful, ought to be equally available on habeas corpus if they affect the prisoner's right to his liberty. Instead of making the expansion of judicial review into a pretext for restricting the right to habeas corpus, the grounds for seeking both remedies should expand in parallel, since exactly the same principle of legality is in issue in both. Whether there is an 'underlying administration decision' is quite irrelevant. The question is whether the prisoner's detention is lawful or unlawful. The prisoner ought to be able to rely on any ground, which, if made good, would entitle him to his release. To this he is entitled as of right, as has been clear law for centuries. To bar him from any part of this right, and to tell him to start separate proceedings where relief is merely discretionary, cannot be justifiable."

And then he quotes the words of Lord Shaw of Dunfermline in *Scott v. Scott* [1913] AC 417 at p.477:

> "To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand."

Unless prompt removal can be effected

The *Hardial Singh* principles are not there to punish or make life difficult for immigration or detaining authorities. Nor are they there to lay out a field for forensic games. They operate in a realistic way to give individuals reasonable protection against the rigours of excessive detention pending removal.

As to their operation, it must be borne in mind, as Lord Atkin had to dissent to say in *Liversidge v. Anderson* [1942] AC 206 at p.245 but has since gained universal acceptance, that "every imprisonment is prima facie unlawful and that it is for the person directing imprisonment to justify his act". And indeed the maxim in point is "*In favorem vitae, libertatis et innocentiae omnia praesumuntur*" (which means that in favour of life, liberty and innocence all possible presumptions are made).

Where someone has been detained for an unreasonably long period pending removal, that generally but not inevitably means that he may not be detained for a further period pending removal. It is not a question of never, but rather of hardly ever. For it would be unrealistic

to construe the relevant statutory powers to mean that he may not be detained even if it can clearly be seen that he can and will be removed promptly under a lawful power lawfully exercised.

But that is not the position here. All of these persons came from the Mainland hoping to be resettled elsewhere as Vietnamese refugees. For a long time, they were wrongly detained as illegal immigrants from the Mainland pending their return there. Finally they won recognition of their Vietnamese refugee status. It must have been appreciated by all concerned, including the Director, that any attempt to return them to the Mainland, now as Vietnamese refugees, would be challenged.

There is no evidence that the Director thought, at the time when she first made orders for their removal to Mainland as Vietnamese refugees, that they would not even be able to obtain leave to challenge those orders by way of judicial review. But if she thought that, then she would have been wrong, for they have succeeded in obtaining such leave. And they cannot be prejudiced by her having been wrong.

Nobody could ever have had any doubt that a judicial review challenge of this nature and magnitude would take a very considerable period to determine.

In my view, the latest detention authorisations were unlawful from the outset. But even if they were not, detention thereunder would have been unlawful by the time Keith J made the first orders for release. For by that time, leave to challenge the latest removal orders by way of judicial review had been obtained (from Keith J himself who granted such leave after he had reserved his judgment and before he handed it down).

So even if the detention authorisations were lawful when first made, further detention thereunder would nevertheless, in all the circumstances past and prospective, have become unlawful by the time when leave to bring a judicial review challenge against the removal orders was obtained.

If that challenge were ultimately to fail and it then appeared that lawful removal could be effected promptly, detention pending the same would, in my view as presently advised, be lawful. But that time, if

it ever comes, has not yet come.

The question of fact and degree

Rightly in my view, none of the members of the Court of Appeal suggested that Keith J's orders for the release of the early arrivals would be wrong even if the detention period prior to their screening-in as Vietnamese refugees was to be taken into account. Each member of the Court of Appeal held against those orders on the sole basis of the erroneous view that such earlier period of detention had to be ignored.

It has been said on the Director's behalf that she had no crystal ball by which to foretell the Privy Council's decision in the *Nguyen Tuan Cuong* case. But in regard to the application of the *Hardial Singh* principles that is nothing to the point. There in no question, in situations like the present, of punishing those who detain. The concern is to relieve those who have been detained for too long.

Upon a broad survey of the legal landscape, including but not confined to the areas in which liberty is involved, it will be observed that the loss or restriction of legal rights and powers through undue delay is a

commonplace of the law.

Such a loss or restriction can occur in a civil context (as in the dismissal of an action for want of prosecution) or a criminal context (as in the stay of a stale prosecution). It can occur in respect of substantive rights under primary legislation (such as statutes of limitation) or procedural rights under subsidiary legislation (such as time limits under rules of court). It can occur at common law (as in the case of the first two examples given) or in equity (as in the case of laches).

Legal rights and powers involve, on the one hand, persons who can enforce or exercise them and, on the other hand, persons against whom they can be enforced or exercised. And where the law operates to take away or restrict a legal right or power for undue delay, it does not do so to penalise the former class. Rather does it do so to relieve the latter class.

I would emphasise that by citing one more example. Take a man who has been convicted by a jury and sentenced by the judge to a term of imprisonment. If he appeals to the Court of Appeal and it

appears he would have served the whole or a large part of his sentence before his appeal can be disposed of, that would provide a basis on which a single judge of the Court of Appeal might in all the circumstances grant the prisoner bail pending appeal. But none of that operates with the objective of depriving the state of the right to keep him in custody. The objective is of course to avoid any undue inroad into his liberty through his appeal being rendered nugatory or unacceptably less valuable by the excessive passage of time.

So Keith J's finding that the early arrivals' removal had not been effected within a reasonable time was one of fact and degree made on the correct principles.

Any appellate court would be slow to interfere with a first instance finding of fact and degree of that kind. In my view, Keith J's finding is plainly right. But even if its correctness were debatable, that would not be enough to reverse it on appeal, especially in a final appeal after it had survived an intermediate appeal.

Result in regard to the early arrivals

In my judgment, the orders for release in respect of the early arrivals were rightly made and should be reinstated.

Turning to the late arrivals

The late arrivals are the 114th, 117th and 118th appellants. There is no suggestion that their claims for Vietnamese refugee status had been seen (whether at their examinations under s.4(1)(a) or at any other stage) as frivolous. Both sides have proceeded throughout on this basis: (i) there is no material difference between their positions; and (ii) what holds good for the 117th appellant Mr Diep Minh Quang, the facts in regard to whom have been looked at more closely than those in regard to the other two, holds equally good for them.

If the orders for the late arrivals' removal to the Mainland are unlawful, then so necessarily would their detention pending such removal be unlawful. I read the legislation to mean that it was the Director's duty to deal with them under Part IIIA. And it is clear from what I have already said about the *Nguyen Tuan Cuong* case that I understand the Privy Council to have read the legislation in the same way. But the Director has not dealt with the late arrivals under Part IIIA. So the

removal orders which she made against them is the product of a breach of such statutory duty. Those removal orders are therefore unlawful. And it follows that the present detention of the late arrivals, being detention pending removal under unlawful removal orders, is likewise unlawful.

I should mention the argument advanced by Mr Geoffrey Ma SC for the respondents that the Director had a discretion, the exercise of which was susceptible of judicial review, to deal with asylum-seekers previously resident in Vietnam either under Part IIIA or under the other provisions of the Immigration Ordinance.

But the power under s.13A to permit a person who was previously resident in Vietnam to remain in Hong Kong as a refugee pending his resettlement elsewhere is a power, that section expressly provides, exercisable by immigration officers or chief immigration assistants.

So if the discretion contended for by Mr Ma exists, it would be one exercisable by immigration officers and chief immigration assistants. That would mean that, at the discretion of such officers and

assistants, persons could be dealt with in one of two ways. The first is under Part IIIA (so that refusals may be reviewed by the Refugee Status Review Board). And the second would be under the other provisions of the Immigration Ordinance (so that the exercise of the discretion to deal with the matter outside of Part IIIA is susceptible of judicial review as might be any decision made under the provisions of the Immigration Ordinance other than those within that Part).

I decline to construe the statute as countenancing such an uncertain state of affairs in an area concerning personal liberty.

Result in regard to the late arrivals

In my judgment, the orders for release in respect of the late arrivals were also rightly made and should also be reinstated.

Conclusion

I would allow this appeal in its entirety: in respect of all the early and late arrivals alike. In my judgment, none of them should be further incarcerated unless and until the time comes for his or her lawful and prompt removal to the Mainland. Meanwhile none of them should

even be put at risk of further incarceration, with his or her liberty uncertain and dependent on what may or may not happen by the exercise of some discretion in some other proceedings whether at first instance, on appeal or even final appeal yet again. It is often said that justice delayed is justice denied. That is never more true than where liberty is concerned. Liberty delayed is certainly liberty denied.

The law owes better than that to all of the appellants: not least of all to the refugee who came to our shores seeking asylum and has already been incarcerated for eight long years for doing so.

In my judgment, all the appellants are entitled to their liberty.

Sir Anthony Mason NPJ:

I agree with the Chief Justice.

Chief Justice Li:

The Court is unanimous in the appeals of the 3 applicants and their appeals are allowed with costs. As to the appeals of the 116 applicants, the Court by majority (Mr Justice Bokhary PJ dissenting), dismisses their appeals with costs.

Ms Gladys Li SC and Mr Hectar Pun (instructed by M/S Pam Baker & Co and assigned by Director of Legal Aid) for the Appellants

Mr Geoffrey Ma SC and Mr J Fok (instructed by the Department of Justice) for the Respondents