HCAL80/1997

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO.80 OF 1997

BETWEEN

TRAN THANG LAM	1st Applicant
AND OTHERS	2nd – 116th Applicants

and

THE DIRECTOR OF IMMIGRATION	Respondent

Before : Hon Stock J in Court

Dates of Hearing : 24-28 and 31 January and
1-3, 8-11, 14, 16-18 February 2000

Date of Judgment : 20 April 2000

J U D G M E N T

STAGE TWO

This is the second stage of the determination of substantive, as opposed to interlocutory, issues in this judicial review. The extensive background to the case is summarised in the judgment delivered by this court in September 1998 (see *Tran Thang Lam v. The Director of Immigration* [1998] 2 HKLRD 789, 797-802). What is challenged by the applicants are removal orders by the Director of Immigration ("the Director") in the summer of 1997. The Director decided that the

applicants were refugees from Vietnam in China and allowed them to remain in Hong Kong under the provisions of section 13A(1) of the Immigration Ordinance; but then made removal orders under section 13E of that Ordinance, because the view was taken that these applicants, who had lived for many years on the Mainland before coming to Hong Kong had, on the Mainland, been granted durable solutions, and that the Mainland authorities had offered to take them back and resettle them, and that there was no reasonable ground for the applicants to refuse to accept that offer. These determinations had been made after a screening exercise which engaged the attention of a number of immigration officers who then put their recommendations before Mr P.T. Choy ("Mr Choy"), then Assistant Director of Immigration, who decided the cases on behalf of the Director, being empowered by law to do so.

This screening exercise followed a decision of the Privy Council in *Nguyen Tuan Cuong & Others v. Director of Immigration & Others* [1997] HKLRD 73, as a result of which the Director was ordered to consider the applicants' claims to remain in Hong Kong as refugees and, if the result was adverse to the applicants, then to serve a notice on the applicants which would have triggered a review by the Refugee Status Review Board.

Before the hearing of the first stage of the substantive application for judicial review, the applicants had been given leave to amend the grounds of their application, and by the time of that hearing the issues were so numerous, and the evidence so voluminous, that it was decided that the case could best be managed by isolating a number of central issues for my determination : that might or might not dispose of the

case, but even if it did not, it might make the remainder of the case, and the determination of a number of outstanding interlocutory issues, easier to manage. We have called the July 1998 hearing of the five substantive issues then identified the first stage of the main or substantive hearing.

The main issues at that first stage were decided against the applicants. The main issues then decided are evident from the conclusions summarized at page 855 of the September 1998 judgment :

> "CONCLUSIONS
>
> The answers therefore to the questions posed are as follows:
>
> (1) (a) The Director, having determined in an exercise conducted under s.13A of the Immigration Ordinance (Cap.115) that the applicants were refugees from Vietnam in China, was bound to permit them to remain in Hong Kong pending resettlement, but was not in the circumstances of this case bound to provide them with an opportunity to seek resettlement in a country other than China.
>
> (b) The Director was entitled, as a matter of law, and in the circumstances of this case, immediately after granting such a person permission to remain under s.13A, to make a removal order under s.13E.
>
> (2) None of the reasons given by the Director in the notices of determination for making the removal orders was bad as taking into account irrelevant considerations, or as failing to take into account relevant considerations, or as resulting from a misconstruction of law or documents relied upon. Although the Director has (or has probably) misread the intended effect of a passage in the judgment of the Privy Council in *Nguyen Tuan Cuong & Others v Director of Immigration & Others* [1997] HKLRD 73, [1997] 1 WLR 68, the misreading is of no consequence since the Director's conclusion as to the applicants' entitlement or lack of it was, as a matter of law, correct. Accordingly, the Director has by that misreading not misdirected herself in law or unlawfully fettered her discretion.

(3) The Director was not required to put to the applicants country condition evidence before making a final determination about them.

(4) The Director was (generally) not required to provide the applicants with copies of previous statements made by them which were used in the decision making process by the Director so as to enable them to comment upon or correct them.

(5) The Director was not, in the circumstances which prevailed, obliged to notify the applicants of her proposed decision to make removal orders under s.13E, or to state the grounds upon which she proposed to make her decision, or to provide documents relied upon."

In May 1999, I delivered a judgment upon an application to re-re-amend the application for leave. The applicants were, to a large extent, unsuccessful, although a few further amendments, which I saw as mere extensions of allegations for which leave had already been given, were permitted.

In the result, the outstanding contentions which fall for consideration at this the second substantive stage of the case are as follows :

(1) It is asserted that the Director of Immigration in the person of Mr P.T. Choy was biased or predisposed to disbelieve the applicants; and that his findings in each and every case that they had been settled on the Mainland, and the reasons for those findings, constituted an *ex post facto* rationalization which has little to do with the merits of any particular case.

(2) No evidence : it is said in effect that there is no evidence on which the Director could properly conclude that the applicants were provided with a durable solution on the Mainland —

they had still not been naturalized or assimilated there and had not obtained the rights of nationals; that the evidence showed that they were denied the rights of refugees and not protected from refoulement; and that there was no evidence that the applicants would now be afforded such rights if returned.

I. BIAS AND PREDISPOSITION

This is an allegation that Mr Choy was predisposed to disbelieve whatever he or his officers were told by the applicants. There are advanced a number of particulars in support of that contention.

Without derogating from the individual attacks that are embraced by each of those separate grounds of complaint, the main thrust of the attack is that Mr Choy had, as far back as 1995, self-evidently committed himself to a stance against the applicants, when the applicants launched their proceedings in the *Nguyen Tuan Cuong* case; and that it is obvious from a reading of the affirmations which Mr Choy had placed before the court in that case, that he had come to an irrevocable view that all of those who came to Hong Kong from the Mainland and had lived on the Mainland for some years, having earlier been refugees from the turmoil on the Sino-Vietnamese border in the late 1970s, had been settled on the Mainland with household registration and the right to benefits that came with such registration, and that accordingly none had reasonable excuse to refuse the Mainland's offer to take them back. There was, so the argument ran, no preparedness by him to accept even the possibility that there might be some who had "fallen through the cracks", and who had not been absorbed by registration.

Whilst it is recognized by the applicants that the question for Mr Choy was not whether they had been settled by registration immediately before coming to Hong Kong but rather whether they had, at some stage, had household registration even if subsequently they had moved for their own reasons to places where they did not enjoy such registration, Mr Choy's mindset, it is said, was that they had each and every one of them been settled at some stage, and that nothing was going to budge him from that conclusion. The decisions in this case were, in other words, predetermined. What we have, so the argument goes, is a man so set in earlier conclusions that even without any conscious bias, he was nonetheless inevitably, even though, perhaps, unconsciously, biased against these applicants.

In order to persuade me that that was so, Mr Dykes took me to evidence filed by Mr Choy in 1995 and also in 1997, and to the respondent's case in the Privy Council, and to correspondence signed by Mr Choy. Then Mr Marshall took me to the hefty affirmation evidence filed by Mr Choy for the purpose of these proceedings in answer to many of the allegations.

THE NEED FOR ORAL EVIDENCE

But in the end, I had to hear Mr Choy's own evidence on the matter. I was, throughout the case, troubled by the fact that the language of Mr Choy's affirmations was so unlike any language that Mr Choy was likely to use, indeed so unlike the language that would be used by any lay person, no matter how well-versed in English and no matter how senior a civil servant, as significantly to diminish their utility. It is common

practice that affirmations are drawn by legal advisers. Clients give instructions, and the affirmation is drafted so as to reflect those instructions in a chronological and orderly manner. But the language should be language which is the deponent's language in the sense that the deponent readily follows it and can say that it accurately represents precisely what he would wish to say. It must be language with which he can deal if he is asked to testify further to the matters deposed (see *Alex Lawrie Factors Limited v. Morgan & Others*, The Times, 18 August 1999). Whilst the client might wish to say that he has been advised by his lawyers that such and such is the position in law, lengthy passages from judgments and complex analysis of the law will have no place whatsoever in such affirmations. But Mr Choy's affirmations were riddled with them. In these circumstances, I permitted cross-examination. I wanted to know from Mr Choy's own mouth what his mindsets, if any, and assumptions and views at key times, were. I shall in due course return to his evidence, and to what I made of it.

I have also heard oral evidence from six other witnesses. There was a specific allegation that certain of the applicants had been told by immigration officials that the screening process was a formality and, at the time the screening interviews were conducted, that decisions had already been made to send the applicants back to the Mainland. This was not an issue that I could decide on the conflicting affirmations. I had to hear the complainants, and those against whom the complaints were made.

RELEVANT HISTORY

Something in the order of 280,000 ethnic Chinese went to China from Vietnam in 1978 and 1979. By mid-1988, 20,268 of that category had arrived in Hong Kong, and in mid-1993 there was a sudden influx into Hong Kong of more than 2,300 within a spell of two months. Over 23,700 have been returned from Hong Kong to the Mainland. Until 1995, the Chinese authorities would not take any such person back unless he or she had first been verified, by which I mean, identified as having settled previously in a particular place on the Mainland. There remained in Hong Kong by October 1994 a residual group, including the applicants, who had not been thus verified, and as a result of discussions, a team of Mainland officials came to Hong Kong in November 1994 and interviewed all those who remained. The number was 502, of whom 156 were immediately identified as having previously been settled on a specific resettlement enterprise on the Mainland. 40 were thus verified shortly after. They were all repatriated. It is said that as for the rest, the Mainland authorities were satisfied that, although specific locations had not been identified, the migrants had nonetheless all previously been settled, but that because of information or misinformation provided by the migrants, it had been difficult to locate their places of settlement. The Mainland authorities were confident, however, that these places would be identified in due course. This, according to the evidence I have received, was all made clear at a meeting in Shenzhen in March 1995 at which the Mainland officials stated that although some had not been verified, in that their identities had not been traced to their originating farms, the Mainland authorities were nonetheless prepared to take them back because they were satisfied that they had in fact been settled and registered on the Mainland.

In June 1995, 60 of those who remained were returned and upon or after their return, all were identified as having been settled in Guangdong (25 of the migrants), and in Guangxi (35 of them). That left a core of migrants in Hong Kong, constituting or including these applicants but, before they could be returned, they made their application for judicial review which became the *Nguyen Tuan Cuong* swathe of hearings.

The applicants had not been screened for refugee status and were refused permission to land, purportedly under section 11(1) of the Immigration Ordinance. They had been detained, however, under section 13D of the Ordinance, a provision empowering detention of former residents of Vietnam. No notices were served advising them of any right to apply for a review to the Board under section 13F. So they applied for judicial review of the decisions of the Director. At issue was the proper construction of Part IIIA of the Ordinance, in particular whether the applicants, having been detained under section 13D, were entitled to or had in effect received a determination under section 13A — and if there had been such a determination, then an entitlement to review by the Board arose. Then there was in issue whether by reason of a taped notice on their arrival, they had acquired a legitimate expectation that they would be given rights under Part IIIA. The judges at first instance and the Court of Appeal were at one that on the facts of the case the applicants had in effect been refused permission to remain as refugees under Part IIIA and had been detained under section 13D, so that they ought to have been given the chance to put their case to the Review Board. But, both at first instance and in the Court of Appeal, relief was, in the exercise of the courts' discretion, refused. In the Court of Appeal, the respondent amended the respondent's notice to read :

> "In addition to deciding to refuse relief for the reasons set out, the learned judge should have also refused relief on the ground that such relief would be futile in that no useful purpose would be served by screening the applicants due to the acceptance by China of the applicants for settlement and resettlement and in accordance with the evidence before the court."

Two of the three judges in the Court of Appeal thought that the grant of relief would not assist the applicants because none claimed to be a refugee from China and also because "China has undertaken not only to take the applicants back but also to accord each household registration with all that entails" (*per* Mortimer JA, as he then was, at [1996] 6 HKPLR 62, 83). He thought that the Director's powers were wide enough for him to order removal under section 13E even if the applicants were given refugee status, and added that "as a former resident of China when China is prepared to take back and accord rights, the chances of him being resettled in any other part of the world within a reasonable time, or at all, must be so remote that they can be ignored". He was of the view that any relief granted would do no more than raise false hopes. Mayo JA, as he then was, was of the same opinion (see pages 85E-F). Bokhary JA, as he then was, wished to exercise discretion in favour of the applicants, saying that it was not clear beyond reasonable argument that they had all become properly resettled in China so that their Vietnamese refugee status was lost, and referred to a chance "even if only a slim one" of the applicants obtaining what they wanted at the hands of the Director or, if necessary, the Refugee Status Review Board.

As for the Privy Council, the majority held that there had in effect been a decision to refuse permission under section 13A to remain in Hong Kong as refugees, wherefor a Refugee Status Review Board notice

ought to have been served. Sir John May ([1997] HKLRD 73, page 81) said :

> "... The first issue on a review is likely to be whether the applicants have lost their status as refugees from Vietnam because of settlement in China. They claim, with supporting evidence, that in China they have been denied, *inter alia*, rights to work, to the education of their families, to marry, to own land, and to legal residence by household registration. There are even claims of a risk of being forced back to Vietnam. These various claims may be contested, and it is not a function of their Lordships in this appeal to attempt either to resolve them or to forecast how they will be resolved. If, however, they are made out, it would be open to the review board to find that the applicants have never lost their Vietnamese refugee status; and perhaps to find further that, within the meaning of s.13A(3)(a), they have reasonable excuse for not accepting any offer of resettlement in China. Nor can the possibility of their obtaining resettlement elsewhere be dismissed at this stage as altogether negligible.";

and at page 82 :

> "The majority of the Court of Appeal held that relief should not be granted, even though the statutory right to it had been made out, on the ground that the only possible consequence of granting it would have been that the applicants would still in the end have all been sent back to China. This was not a conclusion which commended itself to Bokhary JA as he said :
>
> > 'I do not think that one can go so far as to say that it is inevitable. Unless one assumes that the Director's mind is closed and will remain closed — which I do not assume — things are not as clear cut as that.'
>
> Their Lordships are of the same view. It is at least possible that if these applicants obtain a review, the chance of some of them being resettled elsewhere than in China might well attract a Review Board, as it has in other countries such as Australia. On the material before their Lordships, a number of the applicants may have relatives in countries other than China where they could obtain ultimate refuge."

The order that was then made was as follows :

> "An order of *mandamus* requiring the Director of Immigration to consider the applicant's claim to remain in Hong Kong as a refugee in accordance with Part IIIA of the Immigration Ordinance ...;
>
> an order of *mandamus* requiring the Director to notify the applicants of his decision regarding their claim to remain in Hong Kong as a refugee, and if adverse, to serve or cause to be served a notice on the applicants in accordance with section 13D(3)."

There was no suggestion, nor any application, that this new exercise be entrusted to some new decision-maker who had not been involved in the original exercise.

For the purpose of the *Nguyen Tuan Cuong* judicial review, Mr Choy made a number of affirmations. The bulk of the attack, (though not the entire attack), under the heading "Bias" stems from the tenor and content of these affirmations.

THE PARTICULARS OF COMPLAINT

The particulars of complaint in the notice of application under this head are these :

> "53. Furthermore the Director of Immigration was predisposed to disbelieve the Applicants and/or acting in bad faith and no fair determination of their claims could be made in the circumstances. The facts and matters relied on are:
>
> (1) the decision-maker was Choy Ping Tai ('Choy'), an Assistant Director of Immigration.
>
> (2) Choy has been intimately involved over the past few years in defending the merits of an unlawful policy which was designed to secure the Applicants'

summary removal to the Mainland as if they were illegal immigrants with no rights under Part IIIA Immigration Ordinance, Cap 115.

(3) Choy has always maintained that the Mainland had settled all ethnic Chinese from Vietnam arriving there during and after the Sino-Vietnamese conflict.

(4) Choy relied exclusively on his own understanding of what conditions are like in the Mainland for ethnic Chinese who fled there from Vietnam.

(5) Choy did not find even one single claim made by the 116 Applicants that they had not been settled in the Mainland to be made out.

(6) It was not necessary for Choy to be the decision-maker. The definition of 'Director' in s 2 Immigration Ordinance, Cap 115 would have enabled the decisions to have been taken by the Director, the Deputy Director, any other assistant Director and any member of the Immigration Service of the rank of senior principal immigration officer.

(7) Choy never interviewed the Applicants. In several cases, the interviewing Immigration officer admitted that the interview with the Applicant was a formality and that the decision had already been made to send the Applicant to China.

(8) In related habeas corpus proceedings Choy deposed on 4 August 1997 in an affirmation … that evidences his mind was closed to making favourable decisions in respect of the Applicants. In particular it evidences his belief that the Mainland had settled all refugees from Vietnam and there had been no instances of refoulement; see paragraph 52 of his affirmation. By that date Choy had not finished making the decisions which are the subject of challenge. The decisions challenged were made on 27 June 1997, 21 July 1997, 1 August 1997, 8 August 1997 and 6 October 1997.

(9) In a letter dated 21 May 1997 to the Applicants' solicitors …, more than a month before any of the challenged decisions had been made, Choy referred to the fact that screening was underway and that he hoped that the Applicants *would not take hasty and ill-advised judicial review proceedings*.

(10) The Security Bureau approached resettlement countries with a view to seeing whether the Applicants could be accepted by them before the Applicants' refugee status had been recognized. The Security Bureau did not, as in other cases, make use of the UNHCR to facilitate the possibility of resettlement. The evidence of Choy was that the 'full position' (ie., Respondent's position only) had been put to the resettlement countries.

(11) Choy has referred throughout to the Applicants as illegal immigrants (ECVIIs) when, as found by the Privy Council, they were asylum seekers.

(12) The Director of Immigration appears to have adopted deliberately a procedure for making determinations about refugee status that deprived the Applicants of having any adverse decision udners.13A(1) reviewed by the Refugee Status Review Board, an independent body. By establishing a procedure which resulted in the Director recognizing the Applicants as refugees granted permission to remain in Hong Kong pending resettlement elsewhere but at the same time ordered their removal under s.13E, the Applicants were deprived of the opportunity of having an adverse decision under s.13A(1) reviewed by the Refugee Status Review Board which could have resulted in their release from detention under s.13F(5). An adverse decision under s.13A(1), which would be totally consistent with the Director's views about the status of the Applicants as persons whose claim to refugee status had been satisfied elsewhere, would have been that the Director recognized that an Applicant was a refugee but refused him/her permission to remain in Hong Kong pending resettlement elsewhere on account of the fact that his refugee status had been recognized in a country from which he would not be refouled."

MR CHOY'S EARLIER STATEMENTS

Paragraphs 2 to 4 can conveniently be examined by reference to passages in the affirmations to which Mr Dykes draws my attention and in respect of which Mr Choy was cross-examined. I do not intend to

repeat each, for that would be a most lengthy exercise indeed. I shall take what I hope is a fairly representative sample :

> In August 1995, Mr Choy said in an affirmation that :
>
> " These persons were resettled in hundreds of farms spread over China but mainly in five provinces ... The provincial governments have a name list of the Vietnamese in their provinces and the farms have detailed records on all families and individuals.
>
> China is a signatory country to the 1951 Convention and the 1967 Protocol relating to the status of refugees. According to the estimates of the Chinese, about 285,000 ethnic Chinese Vietnamese were properly resettled in China as refugees after leaving Vietnam in 1978 and 1979. These refugees were provided with protection recognised by the international community under the efforts of the Chinese government and the United Nationals High Commissioner for refugees.
>
> Having settled in China, they would given household registration, jobs on the farms and school places for the children. ..."

And in the same affirmation :

> "The Hong Kong government always holds the opinion that we should return to China the refugees who had been provided with appropriate and continuing protection by the Chinese government with the active involvement of the UNHCR."

And, yet further :

> "ECVIIs are former residents of Vietnam who had been granted asylum or resettlement in China."

When referring to the residual cases in Hong Kong in August 1994, he said :

> "These are very difficult cases. We have formed the view that some ECVIIs have purposely made false reports or used false

> identities to frustrate the attempts made by the Chinese authorities to positively identify them as former residents of China."

As to the attitude of the Mainland authorities :

> "The Chinese authorities indicated to us that they believe the ECVIIs in Hong Kong have genuinely been settled or resided in China for some years, but because of their refusal to advise of their correct background in China, it would be difficult to verify their originating farms."

And, finally, for the purpose of the sample I have chosen :

> "... screening [of Vietnamese migrants under the Statement of Understanding] ... was not [designed] for persons such as the applicants who have already been offered protection by China which is a resettlement country for Vietnamese refugees."

Passages such as these, it is said, evidence a settled and unacceptable disposition on the part of Mr Choy, prior to the decisions he was required to make in 1997 in relation to these applicants; a mind-set that all had in fact been settled; such that no fair and unbiased approach by him was possible.

MR CHOY'S ORAL TESTIMONY

Mr Choy was, for a number of reasons, at a disadvantage in giving testimony. First, he was dealing with matters that occurred some considerable time ago. That is a problem which faces many a witness, but the more salient point is that the order for his cross-examination was made one day before he was required to give evidence and a day prior to heavy commitments that engaged him before the Legislative Council. The time for refreshing his memory was therefore very short. There was a noticeable difference between the quality of the evidence on the first day

of his testimony and that on the second. I was satisfied that he was an honest witness doing his best to recall events. He struck me as highly knowledgeable about his area of expertise (by which I mean the history, plight, and circumstances of those ethnic Chinese who left Vietnam for the Mainland in and after 1978 or 1979), and I am satisfied that the expertise which is represented by the affirmations is real. He was at times too ready to accept matters put to him, and that holds true for cross-examination as well as for re-examination. So, for example, there were occasions when he accepted that a part of an earlier affirmation was in error where in my judgment it was not. Conversely, in re-examination, he was taken to passages and asked to confirm them when sometimes he did so too readily. But I do not think that that was a sign of any dishonest or disingenuous approach. The subject was vast, the events a long time ago, and some of the passages put to him so convoluted that it would have been preferable for him to say that he had no idea what the phrase meant. It is also true that Mr Choy was not completely comfortable with his English phraseology. That comment is not intended offensively, but is a comment that I am bound to make because there was many an instance when the very words he used hid quite a different meaning, to which one became attuned as one became more familiar with his evidence. His oral evidence became more cogent and telling with the passage of time.

THE ASSESSMENT BY THE MAINLAND AUTHORITIES

The point that Mr Choy emphasized in his evidence was that in November 1994 and in March 1995 the conclusion that had been reached as to the status of the applicants was a conclusion that had been reached *by the Mainland authorities* based upon *their* records and, more

particularly, upon the interviews which *they* had conducted in Hong Kong in November 1994. It was not then a question of Mr Choy making findings of his own whether this applicant or that applicant had or had not been settled; whether this applicant or that applicant had been given household registration. What the Hong Kong authorities had done was to provide to the Mainland authorities with the personal particulars of applicants, and photographs and addresses, and it was for the Mainland authorities then to conduct their investigations. They did so. They had on the spot in November 1994 come to clear conclusions in relation to at least 100 persons, and thereafter had satisfied themselves that the remaining applicants had in fact been settled, even in the case of those whose settlement at a particular farm had not been verified. There was some suggestion in his evidence that the Hong Kong authorities nurtured a residual concern at one stage that some of the applicants might not have been settled, even though the Mainland authorities were prepared to take them back. But this concern was laid to rest by the meeting of March 1995. The Mainland side was satisfied that all had been settled. If they could not, upon their return, verify some, then they would resettle them any way. But the only reason the Mainland authorities would do that was because they were satisfied that the individuals in question had originally been settled. There was, he emphasized, no reason that he could see for the Chinese authorities to wish or agree to resettle anyone who had not been registered originally. The Hong Kong authorities had by March 1995 no reason to disbelieve their Mainland counterparts. It is true that he had said in correspondence in dealing with the few double-backers in 1996 — correspondence with the solicitors acting for those double-backers — that they had been properly settled. But that is what he then believed, and he had probably checked the records before

writing those letters. His understanding at that stage was that the double-backers had been verified.

CONTEXT

It is, as with so much in this case, vital to examine the applicants' contentions and complaints in their proper context. The 1995 affirmations of Mr Choy are, in my view, clearly doing little more in those passages to which Mr Dykes has taken me, than to place the history and background of those then called ECVIIs before the courts. Indeed some of the earlier paragraphs in the August 1995 affirmation about which so much is said are paragraphs under the heading "Background". When Mr Choy says those persons were "resettled in hundreds on farms", he is referring in general to the thousands who had crossed into China from Vietnam in 1978 and 1979. "Having settled in China, they were given household registration, jobs on the farms and school places for the children" is a reference back to ethnic Chinese "who were properly resettled in China as refugees". Where he said in 1995 : "All the applicants have got through the examination and were found to be ECVIIs," — another passage used in support of this suggestion of predetermination — he was not then suggesting that each has been screened by the Hong Kong authorities in order to determine whether each had had household registration on the Mainland. Rather, in true context, it is referable to a broad earlier description of a process by which arrivals were categorized either as those who had come directly from Vietnam; or those who were Chinese illegal immigrants posing as ex-Vietnam migrants; or, finally, those who had fled from Vietnam and remained on the Mainland for some years before coming to Hong Kong : and if one only

looks back to earlier parts of the affirmation, it ought to be evident that that is the point of the 'examination' to which he makes reference.

The fact is that the questions before the Privy Council and the lower courts were questions different from the issues that the Director was required to address as a result of the Privy Council decision. The issues before the courts in *Nguyen Tuan Cuong* were whether the applicants had in effect applied to remain as refugees; whether in other words, that part of the Ordinance that dealt with the right of claimants to Vietnamese refugee status had been engaged; and, if so, whether, given the failure by the Director to screen or given his refusal to permit them to remain as refugees, the court should grant them relief, particularly in the light of the unequivocal offer of the Mainland authorities to settle all the applicants on the Mainland. 23,000 who had been to Hong Kong had thus far been verified. By the time Mr Choy had made the affirmation of August 1995, the Mainland authorities had represented that all had been settled. But that had not been an exercise conducted by Mr Choy. There had in fact been no individual screening exercise to determine the issues raised by Sir John May's "first issue" passage. Such examination of household registration questions as had been conducted had been conducted by the Mainland authorities and not by the Director. Mr Choy adds that he had then had no reason to doubt the conclusions that had been reached, even though he was aware that some had not been verified.

And it is simply not accurate to assert that the immigration authorities in Hong Kong, including Mr Choy, assumed willy-nilly that all those who came from the Mainland and had previously fled there from Vietnam had been settled on the Mainland. There is correspondence

before me which evidences recognition by the Hong Kong authorities as far back as 1992 that only those who had been settled on the Mainland would be taken back, and clearly implicit in that correspondence is recognition that some might not have been settled. But it is said by Mr Dykes that Mr Choy's signature is not on that correspondence; that it is the correspondence of some other official. Assuming against the respondent that that correspondence, even though part of the history of the case, had not come to Mr Choy's attention, I note that in an affirmation by him of 14 December 1994, he referred to the cases of a number of "ECVIIs" in respect of whom numerous submissions had been made to seek their re-entry into the Mainland but to no avail. He there said that in November 1994, Mainland officials had come to conduct interviews of all ECVIIs in Hong Kong and that those very applicants to whom that affirmation refers had been interviewed but that "the Chinese side has officially confirmed that they would not accept them back since they had never been resettled in China". They were then released. In the same affirmation he referred to others who were shown to have been held in the Fang Cheng Closed Camp (a camp for ethnic Vietnamese whom the Chinese would not accept for settlement) and were therefore not to be sent back. All these people were subsequently settled in the United Kingdom. Other Fang Cheng cases were allowed to stay in Hong Kong or were sent abroad. This evidence gainsays the argument that Mr Choy was never prepared to accept that people arrived in Hong Kong who had not been settled on the Mainland.

THE WEIGHT OF THE EVIDENCE

Allied to the suggestion that Mr Choy had shown a strong propensity to disbelieve the applicants, and had made broad sweeping statements suggesting that people in the applicants' position had been settled, is a complaint that he failed to find even one single claim made out. This is all part of the complaint of an illegitimate predisposition. These are statements and assertions easy to make in a vacuum. But the exercise upon which Mr Choy was engaged was not an exercise conducted in a vacuum. The truth of the matter is that there was before Mr Choy a wealth of evidence from a number of cogent sources which made the claims of the applicants very difficult for them to prove. That wealth of evidence could not be ignored by Mr Choy, or for that matter by anyone else.

The order of the Privy Council that the Director should carry out an examination of individual claims did nothing to alter the facts on the ground. It did not mean that the Privy Council decided that there had been some finding of fact by or on behalf of the Director that was fundamentally flawed; that some vista had been opened which revealed that ethnic Chinese from Vietnam had not in fact been settled. There was nothing in any of the judgments to suggest that the evidence of the UNHCR about the settlement of ethnic Chinese from Vietnam in the years immediately following the war with Vietnam was erroneous.

Now, if the truth of the matter is that the chances of any people falling through the cracks of a system in place on the Mainland in 1979 and during the six or so years that followed, were remote or most

exceptional, then the order made by the Privy Council does not alter that truth. The order did not and could not purport to require Mr Choy or anybody else to change the evidence to suit the Privy Council order, or to suit individual hopes raised by that decision. The Director was required to carry out an intellectually honest exercise to determine on the evidence whether in any individual case and, despite the firm *general* conclusion to which he had come, a person had, after arrival on the Mainland from Vietnam, never been settled, and had therefore a good excuse to reject the offer of (re)settlement now made.

At the time of the exercise — the *Nguyen Tuan Cuong* screening exercise (as it has been called in this hearing) — which started in 1997, Mr Choy was already possessed of a great deal of evidence from a number of sources, including sources that could fairly be regarded as independent — for example, the UNHCR — that pointed very strongly against the notion that ethnic Chinese could, or would wish to, slip the net of, and the benefits that came with, registration, and that they could remain on the Mainland for years on end, particularly in the period 1979 to about 1984, without ever having obtained household registration. And that was the key question — not whether having obtained such registration, an applicant then went to some other place on the Mainland where he or she had none. And if the evidence pointed ever so strongly against the notion that ethnic Chinese could have fallen through the net, then that was the background against which he was entitled, indeed duty bound, to examine the case. There was in the Privy Council and in the court at first instance no determination of the strength of this evidence, and no reason at all why the strength of the evidence should be discarded or ignored.

Mr Choy's own evidence to this court about the rigidity of the system on the Mainland in the years during and after the Cultural Revolution was compelling. The system by which farms were operated communally was a system that lasted until 1984 or 1985. That system meant that the sale of agricultural goods, oil, vegetables, rice and other essential commodities were controlled by the government, as were schools and clinics; and access to train and bus and ferry tickets was also through registration. It was, in short, well-nigh impossible during a six or seven year period from 1978 for people to get by, to manage at all, without registration. Even if one went to a market for vegetables, one had to produce an official ticket. True, he said, there may have been corruption, but that was expensive. What is more, Mr Choy had difficulty in seeing a reason why people would *wish* to slip this net. Those who were to be settled overseas were ethnic Vietnamese — for them, there were camps such as the camps in Fang Cheng and Nanning. As for ethnic Chinese, they were either picked up upon entry into China from Vietnam, or else themselves reported or volunteered for registration. That was the general picture. He spoke, too, of the general policy of the Mainland authorities between 1978 and the mid-1980s to accept all ethnic Chinese who entered China from Vietnam. So, who might have fallen through the cracks? Mr Choy thought that a person who entered the Mainland later than the six or seven year period in question in which the rigid system was enforced, might have fallen through the cracks because the system thereafter became less strict. Similarly, someone who was shown to be a Fang Cheng refugee would not be someone who had been registered. Or there was the less likely possibility that someone had stayed in some remote area without having to travel, or to attend school.

The evidence in support of Mr Choy's assessment, his general assessment, is very strong. Having looked at other material, I do not for a moment think that it has been unfairly coloured by him. He had evidence from the Mainland authorities; from the UNHCR; from the record of a meeting of the Australian Senate in which the views of the Australian government and of the UNHCR were expressed; the experience of his own visits to farms in four provinces on the Mainland; the visits of Mainland officials to Hong Kong and their assessments; evidence as to the considerable resources that had been injected by the Mainland authorities into the absorption of ethnic Chinese from Vietnam; evidence about the attitude of the Mainland authorities at the time to absorption of ethnic Chinese, not only from Vietnam but from other areas of Southeast Asia too; literature that he had read; and his knowledge of conditions on the Mainland during the Cultural Revolution and in the years that immediately followed that era.

The objective evidence suggests that the Mainland authorities took their Convention responsibilities very seriously and that there was a vast pre-existing machinery for the absorption of Indo-Chinese refugees, run to a significant extent by those who had themselves been refugees, monitored by the UNHCR, and in respect of which considerable sums had been expended. So too it seems accepted, and the history would suggest, that the Mainland authorities would not want those who had not been registered. The suggestion that there may have been those who had fallen through the cracks came from the evidence of the Australian Deputy Secretary of Immigration, Mr Richardson, before the Australian Senate, when he said that "working from first principles it is possible for some people arriving at that time [late 1970s, early 1980s] to have fallen through

the cracks ...," adding, as I read it, a suggestion that even that was "extremely unlikely".

In so far as it is suggested that Mr Choy's acceptance of assurances by Mainland authorities and of favourable literature was slavish, or naive, it is pertinent to note the assessment of the UNHCR as explained in 1995 to the Australian Senate by Mr Fontaine of the UNHCR :

> "UNHCR has been present in China, has been involved in the programme in China since 1980 and we have had an office in China since 1981. ... The Chinese government has put in place a fairly substantial programme and administrative structure for the purpose of integrating these people into China. This programme is one which involves a vast allocation of resources by the Chinese government to help integrate these people into China."

Mr Fontaine spoke of the fact that there was already in place, before the 1979-80 influx, machinery to cope with the arrival of these people from Vietnam, machinery which had been put in place to receive overseas Chinese who were fleeing from other countries in Southeast Asia to China :

> "This is very significant because it explains in part the care with which the Chinese have approached this caseload. It makes it possible to understand why the members of this group had been treated in a way which some people might consider exceptional, in the light of the information which is generally available about China.
>
> Another aspect of this is that many of the officials who run this programme of integration of these Vietnamese refugees are themselves people who are overseas Chinese refugees who fled to China from Southeast Asia. The most outstanding example is Guangdong Province where, from the level of the director of the programme to the lower level, you find that the Indonesian Chinese are key people in managing this programme. That explains a lot of things they do, in terms of trying to make the life of these people as acceptable as possible, which would be

> difficult for others to understand, in the light of the information about China."

He spoke of the vast administrative structure that existed to deal with these people, and that he himself criss-crossed China to monitor implementation of UNHCR financed projects and "to ensure that protection of these people was properly carried out." He did that between October 1990 and December 1992 :

> "What I can say and what the UNHCR knows is that we do not as a group have any information that would lead to the conclusion that as a group these people have protection problems in China of great significance. ... The Chinese have lived up to their responsibilities under the convention. ... I guarantee you that they take [the convention] very seriously with respect to this caseload of Indo-Chinese refugees."

He addressed the question of those who had gone to third countries in recent times, for example, to Japan, and who had been returned, and that he had visited farms to which these people had then been returned and he had no complaints from them. On the question of registration :

> "... we can start with the assumption that the overwhelming majority of this caseload were registered at some point."

That was the background against which Mr Choy was operating. That was the evidence he already had. He said that despite the views he held about the generality of the matter, based on that evidence, and despite the result of the exercise which the Chinese authorities conducted in Hong Kong in November 1994 and the views that they had then reached, there was, as a result of the Privy Council decision, now a different and new task upon which the Hong Kong authorities had not hitherto specifically directed themselves. This was whether, despite the

strength of that evidence, some may nonetheless have slipped the net — whether some may have stayed so close to the border, for example, that they were never registered; why they would not have sought registration despite the many obvious advantages of doing so; whether some had come to Hong Kong before they had had time to register; whether some had travelled to a remote region; or whether some were not ethnic Chinese at all, and for that reason not been registered.

The protestations by Mr Choy that he was open-minded in the exercise that he conducted are protestations that are of little avail — not because I think that he believes other than that he was fair, but because bias may often be an unconscious syndrome to which even the most conscientious can fall prey. The question is whether it has been shown that Mr Choy, consciously or unconsciously, closed his mind to the possibility that some applicants had indeed reasonable cause not to accept the offer of resettlement on the Mainland. Was the approach to decision-making fair? Was he intellectually honest or had he in fact already decided that the applicants could not or would not succeed? If the latter, then it matters not whether analysis by Mr Marshall or by Mr Choy or by anyone else can now demonstrate that there was evidence to justify a decision in this case or that.

Against the background I have explained, I do not think that anything sinister can be drawn from the fact that Mr Choy did not find any one claim made out. Nor do I think it correct to assert that he relied exclusively on his own understanding of what conditions were like; and in so far as he relied on what he himself and other officers had ascertained from visits to the provinces, he was entitled to do so. The sweeping

statements he made in affirmations for the 1995 proceedings were made in a particular context that I have explained, and do not show that he was in the present exercise shutting his mind to any question of someone slipping the registration net.

BIAS AND PREDISPOSITION : THE LAW

In so far as Mr Dykes' submissions appeared to be based on the footing that there were circumstances here that gave rise to the appearance of bias, the phrase "appearance of bias" is only appropriate to distinguish actual bias from a real risk of bias. The principles which the courts in Hong Kong now follow are those established by *R. v. Gough* [1993] AC 646; as explained in *R. v. Inner West London Coroner, ex p Dallaglio & Another* [1994] 4 AER 139; and in *Locabail (UK) Limited v. Bayfield Properties Limited and Another* [2000] 1 AER 65. The cases show that in judicial or quasi judicial proceedings, bias is presumed where the decision-maker is shown to have a direct interest in the outcome of a case. In such cases, disqualification is automatic. Cases of actual or presumed bias aside, the courts are concerned with cases in which there is said to be a real danger or likelihood of bias — likelihood, in the sense of a real possibility, rather than probability of bias. "... Having ascertained the relevant circumstances the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour the case of a party to the issue under consideration." (*per* Lord Goff in *Gough* [1993] AC 646, 670). It is unnecessary in these cases for the court specifically to ask how matters would have appeared to the reasonable

bystander, because the court is expected to personify the reasonably well informed member of the public. And the court in *Locabail* added that it was "dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided".

Mr Dykes suggested, and I think rightly, that these principles apply not merely to judicial proceedings or those acting as judicial or quasi judicial adjudicators, but to the decisions of administrative bodies as well. That proposition is supported by the judgment of Sedley J in *R. v. Secretary of State for the Environment, ex p Kirkstall Valley Campaign Limited* [1996] 3 All ER 304, 323 :

> "Not only is there ... no authority which limits the *Gough* principle to judicial or quasi judicial proceedings; there are sound grounds of principle in modern public law for declining so to limit it. The concrete reason, which is not always given the attention it deserves, is that in a modern state the interest of individuals or of the public may be more radically affected by administrative decisions than by the decisions of courts of law and judicial tribunals."

It is to that case, too, that Mr Dykes points for its reference to predetermination, for the important principle that : "... the decision of a body ... will be struck down if its outcome has been predetermined whether by the adoption of an inflexible policy or by the effect of surrender of the body's independent judgment." (see page 321).

These principles of law are, I think, as between the advocates before me, common ground. But there are two points, crucial to the present case, that need stating :

1. Rules of fairness are not rigid, divorced from the circumstances of a case or from the nature of the decision-making body or the context in which the decision is made. The statements of law in *Gough* are statements of law and principle designed in the context of judicial decision-making, and whilst the essential principles apply outside decision-making by judges and magistrates and arbitrators and extend to administrative decision-making, nonetheless "what amounts to bias is not a fixed quantity but a function of the procedure under scrutiny and the events occurring in the course of it." (see Sedley J in *R. v. Manchester Metropolitan University, ex p Nolan*, unreported, 14 July 1993). The same point has been made in *R. v. Avon County Council, ex p Crabtree* [1996] FLR 502, in which Neill LJ emphasized that the rules of natural justice "must alter according to the context".

2. Sedley J refers to predetermination as objectionable, as does Isaac J in *Dickason v. Edwards* [1910] 10 CLR 243, 260, upon which Mr Dykes relied. But there is, in my judgment, a cardinal difference between predetermination or illegitimate predisposition, on the one hand and, on the other, legitimate predisposition. The words 'predetermination' and 'predisposition' have in the present case been used freely and interchangeably. They should not have been. Care must be taken before attributing to the idea of predisposition a uniformly pejorative air. There are circumstances where a decision-making body possessed of thorough experience and background knowledge relevant to a task at hand may well be disposed to a view or a certain decision before it hears objections or representations from an interested party . But so long as it acts fairly and assesses the representations fairly, the fact that it was possessed of copious relevant information disposing it to a certain view

and was skeptical about the representations which it knew it was about to receive, does not disqualify that body from taking a decision, even though one might say that there was a predisposition towards a certain decision (see, for example, *R. v. Amber Valley District Council, ex p Jackson* [1985] 1 WLR 298). If one were still actively looking through the eyes of the bystander and suggested that in such a situation someone other than the body with that experience and knowledge should take the decision, that bystander would, I think, say that that was an unrealistic, wasteful and artificial approach. "In considering the fairness of a decision, a court must look carefully at the administrative structure of the body that makes the decision and at the nature of the decision itself. Most decisions taken by administrative bodies have to be taken by those with knowledge of the facts. The members comprising such bodies may, because of previous knowledge of some policy, have a predisposition towards a certain result. That does not mean, however, that such a body cannot reach a fair decision. Furthermore, the courts must be careful not to treat the decision-making process of such bodies as though the bodies were judicial tribunals." (*per* Neill LJ in *Crabtree*).

The key point is whether the predisposition is connected or unconnected with the merits. That is the point made by Simon Brown LJ in his analysis of *Gough* in the case of *Dallaglio*, at page 151 :

> "Injustice will have occurred as a result of bias if 'the decision-maker unfairly regarded with disfavour the case of a party to the issue under consideration by him'. I take unfairly regarded with disfavour to mean was predisposed or prejudiced against one party's case *for reasons unconnected with the merits of the issue*." (*Emphasis added*)

And if a decision-maker has spent months or years in familiarizing himself with country condition evidence, with the history of a group of people and their fate at the hands of a particular government, then if he forms a view — even a strong view — about the circumstances in which those people have lived, have moved about a country, have been treated; about the likelihood of refoulement of those persons given the circumstances in which they arrived in that country, the ethnic group to which they belonged, the money and machinery deployed to settle them, the views of an international and independent monitoring body such as the UNHCR — or matters of that kind; then the views with which he comes to the problem and to the representations of an individual claimant, are not views that are divorced from the merits. They are based on acceptable evidence, and so long as he nonetheless genuinely attends to that which individuals have to say, whether it be to persuade him that he is wrong about a particular conclusion, or that the conclusion which he had previously reached does not apply to that individual, then he is not acting unfairly.

THE PRESENT CASE

And that, I believe, is the position in this case : that there was a predisposition to a view that those in the position of the applicants had been settled, and that was because of the weight of the evidence that Mr Choy had accumulated over a period of years. Yet that is not to say that the predisposition was illegitimate, or that he could not in individual cases reach a fair decision; and it is not to say that he *predetermined* their individual cases. I note also that considerable resources went into the screening exercise. There was training for it. I have seen notes taken by individual immigration officers. I have heard Mr Choy's detailed analysis

of some of the cases in which he came to a decision. I am satisfied that this was not a charade, but merely that the evidence was weighted against the applicants, but not for any sinister or improper reason.

OTHER PARTICULARS

In arriving at my conclusion on the question of bias and predetermination, I have addressed the other particulars of complaint set out in paragraph 53 of the notice of application :

(1) Choice of decision maker

It is said that Mr Choy made the decisions when there was no need for him to do so. Allied to this complaint is the suggestion that he, Mr Choy, had "been intimately involved over the past few years in defending the merits of an unlawful policy" treating the applicants as if they were illegal immigrants; this primarily being a reference to his stance in the *Nguyen Tuan Cuong* court proceedings.

The fact that a decision-maker acting in good faith takes a decision that is subsequently held by a court to have been an incorrect decision does not of itself disqualify that decision-maker from starting afresh and applying the law correctly. Such a decision is lawful unless and until it is set aside by a court of competent jurisdiction (see *R. v. Secretary of State for the Home Department, Ex p Cheblak* [1991] 1 WLR 890, 894).

There is also implicit in this complaint, as framed, a contention that Mr Choy chose to pursue a policy which he *knew* to be

unlawful. The applicants do not begin to show that. It is apparent in a case of this nature that Mr Choy, in the *Nguyen Tuan Cuong* case, was in material respects acting upon legal advice. He took the view that the applicants were not entitled to screening and might be treated as illegal immigrants, but he was held to be wrong as a matter of construction of the statute. It hardly follows that he had deliberately chosen a course that he knew to be unlawful.

There was no order made that someone else take over the decision-making process for the new question which arose by reason of the Privy Council's judgment, and which then had to be addressed by the Director. There was no suggestion by the applicants at any stage of the *Nguyen Tuan* Cuong proceedings, that Mr Choy should not be involved in the new process; and indeed no such suggestion thereafter, even once it became clear that he was in the middle of decision-making. If the applicants' solicitors did not know beyond peradventure that Mr Choy was to be the decision-maker, they must have known that that was a real possibility. There is no merit in this complaint. It is said that someone other than Mr Choy could have made the decisions in the 1997 exercise. There was, in my judgment, no need for anyone other than Mr Choy to be the decision-maker. Indeed any other course was quite impractical. He was the man with intimate knowledge of this case, and on the evidence I have heard, and which I accept, no other person of suitable rank had that background. It would have added considerable resource and training problems to appoint some other senior officer to take charge.

(2) The habeas corpus proceedings complaint

Here the complaint is that in the middle of the 1997 decision-making process, Mr Choy made an affirmation which demonstrated that he had closed his mind against decisions favourable to any applicant.

Following the decision of the Privy Council, the Director had re-detained the applicants under section 13 of the Immigration Ordinance, pending screening. In June 1997, there was issued an application for a writ of *habeas corpus*. The allegation was that the Hong Kong Government had unlawfully prolonged the detention of the applicants. On 14 July 1997, Keith J, as he then was, ordered a number of the applications to be heard on 11 August 1997, and for the purpose of the applications Mr Choy made an affirmation. It is dated 4 August 1997.

There are many passages in that affirmation of the same sweeping nature as those in the affirmation of 1995 to which I have already referred. Not only of the same sweeping nature, but exact repeats of many of the 1995 assertions; for example, that "according to the statements of the Chinese about 285,000 ethnic Chinese Vietnamese were properly resettled in China as refugees"; that the normal screening procedure for Vietnamese migrants was "not designed for persons such as the applicants who have already been offered protection by China," and so on.

In an affirmation of 30 December 1999, Mr Choy explains the background to the filing of the August 1997 affirmation : that the evidence had to be filed in a great rush; that that coincided with a busy time when the decision-making process in the screening exercise was in its final stages, and when there was a new team of legal advisers acting for the

Director; and, he says, it was, in the circumstances, agreed that there would be drafted a general background affirmation setting out all relevant general matters explaining the context in which the detention orders had been made, and that there were to be a further seven affirmations by Mr Choy dealing with a number of individual applicants; all running, with exhibits, to some 300 pages. It was decided to re-use material affirmed by Mr Choy in the *Nguyen Tuan Cuong* case. He says — and the truth of what he says should be obvious to anyone who reads the 1995 affirmations — that many of the paragraphs in the 1997 *habeas corpus* affirmation are word for word the same as paragraphs in the 1995 affirmation. In his oral evidence Mr Choy explained that the affirmation of August 1997 was a "cut and paste job", much of which was put together by an assistant at a time when he, Mr Choy, had much else to do.

In my judgment, the *habeas corpus* affirmation point is a non-point. I say that for a number of reasons. The argument is that the affirmation shows that Mr Choy had, at the time when he was still considering individual cases and purporting to decide whether people had 'fallen through the cracks', already determined that there were no people who had fallen through those cracks. But the paragraphs upon which Mr Dykes relies do not address the 1997 screening exercise. They do no more than state the view which he had taken *generally* before that exercise. It does not differ from the view he now expresses or the view he held at the time of the exercise, namely, that it was most unlikely indeed for anyone to have fallen through the cracks. It is quite clear that the affirmation was indeed a "cut and paste job", taking vast chunks from the 1995 affirmation, and cobelled together for a *habeas corpus* application brought before the court in haste in the early summer of 1997.

In so far as it is open to Mr Dykes to argue that the passages in the 1995 affirmation showed a mindset, the repetition of these passages in 1997 do not add anything to the case of the applicants, for it is self-evident that this was not, in 1997, an unqualified statement of present belief. That that is so is clear from paragraphs 57 onwards of the August 1997 affirmation, since there is much there which informs the court that there had, since the Privy Council decision, taken place an extensive screening exercise, which had required training, and for which there was gathered country condition information, and that interviews had been conducted precisely in order to ascertain whether the applicants interviewed had been accepted as refugees and accorded treatment normally available in resettlement countries, and whether they had relatives overseas. Of course if one were to take in isolation those parts of the affirmation which state as a fact that all the 'ECVIIs' had been resettled, one might well be startled by such bland assertions in the middle of a screening exercise. But to take those passages in isolation is to be unfair to the truth and to the witness. Whilst Mr Choy was, in the course of oral evidence, ready to admit that these passages were in error, I rather think that, had he had time to digest the *whole* — and there was much to digest — he would not have been so quick with that admission.

(3) The letter of 21 May 1997

This particular complaint was that in May 1997 when screening was already underway and before decisions had been made, Mr Choy had written to the applicants' solicitors, saying that he hoped that the applicants would not take hasty and ill-advised judicial review

proceedings. This is said to indicate that he was already then minded to make adverse decisions.

This allegation, like others, is entitled to assessment in proper context. The letter of 21 May 1997 was a letter in reply to one from the applicants' solicitors dated 19 May 1997. That letter made a number of complaints and then said :

> "Should any of the decisions of the your department be negative, our clients are entitled to a review by the RSRB. The department's decisions must be issued forthwith in order for that review to take place."

A copy was sent to counsel for the respondent as well as to Mr Choy. (Why to Mr Choy if, as was suggested in argument, those representing the applicants did not appreciate that he would be the decision-maker, or involved in the decision-making process, it is difficult to say.) What the response said was that :

> "We hope that you and your clients will not take hasty and ill-advised judicial review proceedings as a matter of mindset, but it is of course your clients' privilege to apply to the court for leave for judicial review."

That was a letter written, according to Mr Choy, on legal advice. I accept what he says. Quite what it meant is not easy to determine, but I do not think that this court would be justified in reading into it predetermination by the Director of the issues he was to address in the 1997 screening exercise.

(4) The approach to the Consulates

Here the point is that the Security Branch of the Hong Kong Government approached consulates to put before them the question of possible resettlement of the applicants and yet did so at a time when decisions had not been made; when the cases had not all been considered by Mr Choy and that, unlike past practice, no use was made by the Hong Kong Government of the good offices of the UNHCR in this approach to these consulates. There was no chance, says Mr Dykes, that *before* any applicant had been shown not to have been settled on the Mainland, any consulate would agree to resettle him. The cart was placed before the horse. The approach to the consulates was part, in other words, of an elaborate charade. Furthermore, the letter sent to the consulates, which was disclosed by the respondent in the course of this hearing, was, Mr Dykes says, a gloomy letter which, by its terms and tenor, weighed against any prospect of acceptance of the applicants by any prospective resettlement country.

The letter to one of the consulates which I have seen, and which I gather is in the same terms as that sent to the other consulates, is dated 1 May 1997, signed by Ms Sally Wong of the Security Branch (as it was then known). "I am writing," she begins, "to explore the possibility of your country accepting any of the ex-China Vietnamese listed in the annex for resettlement in your country." She goes on to explain the background to the request, speaking in general terms about ECVIIs, who were recognized by China and given protection there. She explains that the former policy of not according to ECVIIs the same treatment as asylum seekers from Vietnam was challenged in the courts and that a judgment was handed down in favour of the applicants in November 1996. She points out that the applicants had claimed that they had been denied

basic rights in China. A screening exercise had been started in accordance with the judgment of the Privy Council in which the Director was "to examine whether the ECVII was recognized as a refugee in China. The Director ... will then assess if the ECVII was afforded reasonable protection and whether he will be protected upon return there". In parallel, she (the Director) will assess whether the ECVII is accepted by any other country for resettlement. If the ECVII is found to have been given reasonable protection in China and there is no offer of resettlement from another country, he will be removed to China. "In the process of screening the Director ... has obtained information on individual ECVII's overseas connection and preferred country of resettlement. Persons on the attached list have indicated that they wish to settle in your country. I should be grateful if you could look at the list to see if any of those ECVIIs would be considered for resettlement."

The decision to send this letter at the time that it was sent caused me concern, before I heard the evidence of Mr Choy, but, on balance, I do not think that the criticism levelled against its timing holds water. Neither the timing, nor the terms of, the letter are such as to persuade me that it evidences predetermination of the cases of individual applicants.

Mr Choy's oral evidence was that these consulates were experts in these matters. The consulates that represented resettlement countries were well aware of these cases. The letter was not drafted by Mr Choy but he saw it and was given the opportunity to comment on the draft, although he did not do so. There was absolutely no point in going to the UNHCR for assistance in the resettlement of the applicants for their

view was one that they had long espoused, namely, that the applicants were in fact refugees who had been recognized and settled on the Mainland. The first decisions, which are the subject of this application for judicial review, were sent out to the solicitors for the applicants at the end of June. Mr Choy says that by 1 May he had, he thinks, made a small number of the decisions but held his hand in conveying them until the letter to the consulates was sent out. He had been consulted about the letter. He says that it was recognized that if and once an applicant had been screened out — in other words, had been told that he had been given adequate protection on the Mainland — the chance of another country accepting that applicant was gone. It was not entirely futile to approach countries prematurely, as it were, because previous experience suggested that occasionally, as a matter of mere goodwill, countries accepted a number of those seeking resettlement even though, for example, court cases were still in train. And if, after these letters were sent, it had been decided in any particular case that an applicant had not been given protection on the Mainland, then an approach could be made afresh with the benefit of that added and important information. In short : if after investigation it were found that an applicant seeking resettlement had in fact been settled on the Mainland, the chance, slim though it might have been, of a resettlement country *then* accepting the applicant became even slimmer; if, on the other hand, an applicant was found not to be settled, then he could stay in Hong Kong, and avenues for settlement overseas could be explored afresh.

I take the view that this was not an unreasonable stance, and it is not shown that the approach to the consulates at this stage demonstrated some charade or predetermination. In so far as it has the hallmarks of an exercise scant with signs of hope, that is a produce of the real position of

the applicants and their history. Generally speaking, their chances of resettlement, as was recognised by the courts in the 1995 litigation, was slim indeed.

(5) Nomenclature

The complaint in paragraph (11) of paragraph 53 of the Notice of Application is that Mr Choy has, throughout these proceedings, referred to the applicants as "ECVIIs", illustrative, it is said, of a negative mindset; for the point is that they are not illegal immigrants; their status is that of refugees, and before the summer of 1997, claimants for refugee status. I agree that it would have been more appropriate to refer to the applicants as claimants or, after the determinations in the summer of 1997, as refugees; but I hardly think that this evidences predetermination on Mr Choy's part. He explains that this terminology, used more latterly, was merely a convenient continuation of earlier labelling; and I accept that.

(6) Paragraphs 53(12) and 53(7)

The complaint in paragraph (12) of paragraph 53 that the Director of Immigration adopted deliberately a procedure designed to deprive the applicants of review by the Refugees Status Review Board is not one pursued by Mr Dykes at the second stage hearing, but he takes that course *only* because of the conclusions as to law reached by this court at stage one of this application. No doubt he reserves the right to argue elsewhere that those conclusions were wrong.

So, too, the complaint in the first sentence of paragraph 53(7), that Mr Choy never interviewed the applicants, is a complaint not pursued at this second stage.

(7) Suggested admissions by immigration officers

What remains under the allegation of bias and predetermination is that part of paragraph 53(7) of the notice of application that asserts that several officers "admitted that the interview with the applicant was a formality, and that the decision had already been made to send the applicant to the Mainland". To decide this issue, I heard the oral evidence of three applicants and three immigration officers.

(i) Ms Lai Yen

I have heard the evidence of Ms Lai Yen and in response, that of Mr Ip, the immigration officer who interviewed her. Ms Lai is aged only 24 and is a quietly-spoken young lady. She was interviewed by Mr Ip for three and a half days. Her testimony related to events some two and a half years ago, and one could not expect her — or Mr Ip for that matter — to recall fine detail. In some instances she was asked in cross-examination about affirmations she had made in 1997 and was unable to be clear about certain aspects, but I do not hold that against her because that was also a long time ago and because she did not come specifically prepared to answer questions about such affirmations.

Her evidence was that in the course of the screening exercise, Mr Ip said to her that whether or not she was screened out, she had to

return to China;.she had been sent back once before and could be sent back on this occasion.

The allegation which she makes is not one upon which I am prepared to act. I find that it is not established. There are features of the history of this case which sit ill with her contention, and features of her evidence which did not ring true. In particular, I have seen the very detailed record of interviews taken by Mr Ip and heard his own testimony. It is acknowledged that he interviewed this lady for over three days. It seems unlikely that this officer would spend three days interviewing her and making notes carefully recorded, only to suggest to her that it was all a charade. But more particularly, had he said that which he is alleged to have said, it was bound to have struck her then and there as a most devastating thing to say, the meaning of which for her could not possibly have escaped her understanding. Yet she concedes that she then told no one about it, neither her colleagues at the detention centre where she was held, nor the lawyers who were already then acting for her and had been her lawyers for several years in relation to her fight to avoid precisely that which the officer said she could simply not avoid, namely, return to the Mainland. She explains the silence which she maintained with her friends, by saying that it was her own personal matter. As for her solicitors, she says she did not tell them because the importance of what had been said did not occur to her until much later. Her allegation is one that does not appear in affirmations made that August or September by her, and she only volunteered the information, she says, after someone else had made a like allegation to the solicitors at a meeting in December, when the solicitors asked for details about the interview. I have also had the advantage of hearing the evidence of Mr Ip. I am satisfied that he did not

say to her that which she alleges. It may be that Mr Ip explained to her what the interview was all about and what was at stake and that, prompted by comments by a fellow applicant at a meeting in December, she has somewhat distorted in her own mind the effect of what he said. Nor was her evidence altogether satisfactory insofar as she has suggested in evidence that when she was to be interviewed she did not know that she would be asked about her treatment in China; that she did not know what Mr Ip was going to ask her about. In all the circumstances, this is most unlikely.

(ii) Nguyen Tuan Cuong

Mr Nguyen was the lead applicant in the case that went to the Privy Council; the case in which the applicants were successful. He had much, it seems to me, to expect from the new screening exercise. He is the applicant who has at all times asserted that he belonged to a special group, namely, those who had been kept at the Fang Cheng Camp in Guangxi. Those kept there were said to be available for resettlement overseas, and it was known that it was not the policy of the Hong Kong Government to send members of that group back to the Mainland. His surprise and outrage therefore, must, if his evidence is true, have been considerable when, as he asserted in his testimony, two officers told him that the screening exercise was a mere formality that had to be observed because he had happened to win the Privy Council case. He said that he was told that by Mr Law who took from him bio-data information and then by Mr Ip who interviewed him over a period for three or so days. He, too, however, made no complaint about the matter at the time or immediately afterwards — not until the same time as the others complained in

December 1997. The interviews of Mr Nguyen took place in April 1997, so he kept these matters to himself for some eight months; indeed, not even when the result in fact went against him did he complain. His explanation is that he did not think that what he had been told was a matter of importance. I accept that Mr Nguyen is a man of little education, and I appreciate that he is not legally trained and cannot be expected to grasp the importance of all events in the course of interviews. But I cannot accept that even for a man of such little education, against the history of this case to which he has been a party, at all times represented, that he would not have been fully aware of the magnitude of what it was that, according to him, was being said to him by both these officers. So, too, I find it extraordinary that either officer would say such a thing when at the same time they had taken copious notes of interview, including, in the case of Mr Law, that the applicant said, and wished it to be known, that he wanted to go to the United States of America and that he had relatives there. It makes no sense. Why would they do so?

The screening interviews of both Ms Lai and Mr Nguyen were conducted by Mr Ip, a Senior Immigration Officer. He was a very careful witness who gave the impression of being quiet and efficient and conscientious. I was impressed by his evidence. He was, I am satisfied, very careful to be correct, and I am quite sure that his evidence was truthful.

I also heard the testimony of Mr Law, who is the officer who took the personal details — the "bio-data" it is called — from Mr Nguyen. He occupied the post of an Immigration Assistant, a post he has held for many years. Mr Law's function in this exercise, indeed, in all exercises

of this kind, was very limited. He was not involved in any briefing about the object of the exercise. He was just told to take details from which the first few pages of personal information about date of birth and family membership and standard of education — matters of that kind — could be completed. He then moved on to the next application, and did the same thing. He was a witness quite devoid of any guile in his approach to the evidence; and the manner of it and the role he played, and the rank he holds, persuaded me that he is a truthful man, and was telling the truth on this occasion. It would have been a strange thing for an assistant performing this function to offer such a suggestion to Mr Nguyen, and without anything which was there to prompt such a remark. There was no suggestion of hostility between the two; no suggestion that Mr Law said something of the same kind at all to others from whom he took these details. I have to say, having heard the evidence of Mr Law, as well as the evidence as a whole, that I found the suggestion one that is not only not proved, but is simply not credible.

(iii) Mr Daon Cuu De

Mr Daon Cuu De was the third applicant from whom I heard oral evidence, and the effect of his evidence was much the same as that of the others. He was interviewed over a period of about three days and in his case, too, an officer, Mr Chan, is said to have told him on the second day that the screening process was obligatory as a result of the Privy Council decision but that, screening or no screening, there was no difference, for this applicant would have to return to the Mainland as well. He was interviewed in April and he, too, made no complaint to anyone, whether to friends or to fellow applicants or to his lawyers, until

December 1997. He says that he was at a meeting then with his solicitor, and he did not hear anyone tell the solicitor about such comments made by immigration officers, but heard that someone had made such an allegation. The lawyer, according to his evidence, asked if such a comment had been made to him, and then he appreciated for the first time that the matter was of importance.

It would be odd enough for one applicant to whom such comments had been made to fail, for months on end, to say anything about the charade that was, on these accounts, evidently taking place, and for one applicant to fail to appreciate that the comment was devastating in its import. But for all three who have been giving this testimony to fail to say anything to anyone for about eight months, and for all three not to appreciate that the comment was of any significance, is startling indeed. I have also listened and noted the testimony of Mr Chan who interviewed Mr Daon. And I am satisfied also that his evidence, which denied any such comment about foregone conclusion, was truthful.

It may be that the immigration officers or some of them told the applicants what was at stake in the interviews; that the choice was between allowing them to stay and sending them back. And it may be from that that the witnesses, after their disappointment, and with the passage of time, assumed from such comments an implication or hint or tone which suggested that they were at serious risk of failure, and then convinced themselves that something more sinister was in fact said. It may also be that the allegations have been invented. It is not necessary for me to decide which. But it suffices to say that in the event I find that the allegation which is contained in paragraph 53(7) of the Notice of

Motion, that officers told the applicants that the result was a foregone conclusion, is an allegation which is not made out.

BIAS AND PREDISPOSITION : CONCLUSION

I have considered also the cumulative effect of the allegations of bias and predisposition, but in the result I am satisfied that the claim that the Director of Immigration, through Mr Choy, was biased, or acted in bad faith, or was unacceptably predisposed to disbelieve the applicants, is a claim that is not made out.

II. NO EVIDENCE

In the second main limb of Stage Two of this case, it is said that there was no evidence upon which the Director could properly conclude that a durable solution had been provided on the Mainland to the applicants, and in this regard attention has been focussed on the issue of household registration, and upon the suggested treatment of those who have earlier been returned to the Mainland — the double-backers.

In support of this ground, Mr Dykes invited me to look at a number of test cases. The respondent said that they were not good test cases, not helpful or representative, and so he chose two others. At an interlocutory hearing in December 1999, I wondered aloud how the test cases would help me, because in the judgment of May 1999, I suggested that the detailed study of the evidence which I had then conducted tended to show that claims in individual cases that an applicant had not been settled appeared to have been determined primarily on the basis of evidence from the Mainland authorities as to what had happened to

individuals whose identities had been traced, and by country condition evidence; rather than upon suggested disparities and accounts given by applicants even though that appeared to have played some part.

I was told by Mr Dykes, in response, that such are the errors which could be demonstrated by these test cases, that had Mr Choy been aware of them he would have taken a different view of the general evidence upon which he had relied. Unless I was to forage through the mass of material in relation to each applicant to decide which cases merited choice as a test case, I had to rely upon counsel; and therefore the only practical way forward was to accept the applicants' choice of four tests case and to permit, further, two test cases chosen by the respondent. In the event, the respondent selected two cases, but the applicants have conceded that in relation to those two, it cannot be argued that there was no evidence upon which the Director could properly come to the conclusion that each had been provided with a durable solution on the Mainland. I have therefore concentrated on the four cases selected by the applicants.

THE LAW

Mr Dykes does not contend that there was no scintilla of evidence capable of supporting Mr Choy's conclusions. Rather, he says, such evidence as there was, was not logically probative. Relying on the Privy Council decision in *Mahon v. Air New Zealand* [1984] 1 AC 808, he argues that the findings by Mr Choy that the applicants had been provided with a durable solution on the Mainland should have been, but were not, ".. based upon some material that tends logically to show the existence of facts consistent with the finding and that the reason in support of the

finding, if it be disclosed, is not logically self-contradictory." (*per* Lord Diplock at page 821).

That phrase in *Mahon* ("… some material that tends logically to show … facts consistent with the finding …") was, it seems, drawn from *R. v. Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 QB 456, and it is important to see what, according to that judgment, the phrase means :

> "The requirement that a person exercising quasi judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the accounts of some future event, the accounts of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his." (*per* Diplock L.J., as he then was, at page 488)

Mr Dykes contends that especially in cases in which fundamental rights are at stake, the courts will not defer to the decision-maker simply because he claims to be an expert and will, especially in such cases, subject the findings of fact to anxious scrutiny; for which proposition he relies on *R v. Secretary of State for the Home Department, Ex parte Turgut*, 28 January 2000 (unreported). That is no doubt so, and no one could reasonably say that Mr Choy's fact finding in this case has been subject, in the course of this hearing, to anything other than microscopic scrutiny. But it is always the case that "the court's role

even in a case involving fundamental human rights remains essentially supervisory. … It must not adopt the role of primary decision-maker." (*per* Simon Brown L.J. in ***Turgut***); and albeit after such scrutiny as the case may warrant, it remains the position that a finding of fact by a decision-maker to whom has been entrusted that function will not be thrown over unless plainly wrong :

> "Where the existence or non-existence of a fact is left to the judgment in discretion of a public body and that fact involves a broad spectral ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom parliament has entrusted the decision-making power, save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

See R v. Hillingdon London Borough Council, Ex parte Puhlhofer [1986] 1 AC 484, 518.

COUNTRY CONDITION EVIDENCE

Mr Dykes first attacks Mr Choy's reliance on country condition evidence. He points to reliance by Mr Choy on literature by a Mr Rewi Alley, and Mr Dykes says that the book by Mr Alley has self-evidently a pro-Chinese Government agenda, and that it paints an unrealistic rural utopia. It is further argued that Mr Choy has relied upon statements by Mainland officials about the treatment of refugees without demonstrating any awareness that they might be self-serving statements.

I see no sufficient reason why, at the time Mr Choy took them into account, these sources of evidence should have been discarded by him, nor why they should be treated as having no probative value. But, that

aside, they formed but a part of Mr Choy's knowledge of country condition evidence, supported by visits to the Mainland provinces where the resettlement farms were established, and the extensive experience of the UNHCR. I have referred earlier in this judgment to the evidence of the UNHCR before the Australian Senate. It is evidence, couched in firm terms, of the durable solution provided to those ethnic Chinese who fled Vietnam for China, and can hardly be said to lack probative value.

THE FOUR TEST CASES

I turn now to the four cases selected by the applicants as cases by which to test this allegation that Mr Choy's findings were based on material bereft of probative value, and were illogical.

(1) Nguyen Tuan Cuong

This is an unusual case on its facts. Mr Nguyen claims to have been an inmate of the Fang Cheng Camp in Guangxi. If he was, then he would have belonged to a group of ethnic Vietnamese whom the Chinese authorities had refused to settle. He would in turn have been eligible for resettlement as a refugee from Vietnam. Mr Dykes contends that there was in relation to his case no evidence which, upon a fair appraisal, could logically show that he was settled on the Mainland as Mr Choy suggests.

Mr Nguyen came to Hong Kong in April 1991. He was then aged 19 years. He says, in an affirmation filed in the present proceedings, that he left Vietnam in 1980 or 1981 with a family friend, Mr Hoang Boa, who was looking after him after he, Nguyen, was separated from his

parents. He and Mr Hoang were blown by a storm on to the Chinese coastline and arrested and then taken to Ninh Minh Refugee Centre. In 1983, Mr Hoang left the Mainland and was resettled in Canada.
Mr Nguyen says that he escaped from the Centre in 1983 and was then arrested and detained in prison. After that, he went to Guangdong Province and after failing to find work, went back to the Ninh Minh Centre but since that was closed, he eventually found his way to Fang Cheng. Life there was harsh and so he came to Hong Kong in 1991. He was never settled on the Mainland or registered there.

The argument by Mr Dykes has concentrated to a significant extent on the rejection by Mr Choy of this applicant's claim that he was a former resident of the Fang Cheng camp. It was a claim which was supported by four former Fang Cheng residents who arrived in Hong Kong with Mr Nguyen. Yet Mr Choy has rejected this evidence; in particular it is said that Mr Choy did not ask the authorities responsible for maintaining the records for that camp, to check whether this applicant might have been registered under another name, most pertinently the name of Hoang who had, according to Mr Nguyen, in effect, adopted the applicant as part of his family. This question of registration at that camp was, Mr Dykes asserts in his skeleton argument, "the critical issue in *Nguyen's* case. If it had been confirmed that Nguyen had been an inmate at that camp, then suspicions about the veracity of other facets of Nguyen's story to the authorities would have fallen away." It is said that the failure to verify whether Mr Nguyen was registered under Hoang's name "offends the *Mahon* requirement of listening to the evidence that conflicts with the finding fairly. … There was therefore no evidence that entitled [Mr Choy] to draw the conclusion that *Nguyen* had not been in the camp".

In the light of the copious evidence on this issue that I have seen and heard, I find untenable the suggestion that there was no probative evidence to support the conclusion that Nguyen was not a Fang Cheng resident; as I do the suggestion that Mr Choy's overall conclusion about this applicant's prior settlement on the Mainland is one unsupported by probative evidence. And I am satisfied that it was not incumbent on Mr Choy to make inquiries beyond those that were in fact made.

There is uncontested evidence that the Hong Kong authorities sent repeated submissions to the Chinese authorities — in 1991, 1992, 1993 and 1994 — for verification of Mr Nguyen's status. In September 1991, the Chinese authorities advised that Mr Nguyen was not an ex-Fang Cheng resident, but that four of his boat mates were; and in April 1994 they again reported that he was not a resident of Fang Cheng camp. In so far as it is said that by not checking whether Mr Nguyen was registered under Mr Hoang's name, Mr Choy was "wilfully turning away from a source of evidence which could easily have proved (or disproved) the truth of Nguyen's story," and that it was merely assumed that the camp records were perfect (and this consequential disbelief of Nguyen's Fang Cheng claim is then, it is said, used to undermine other aspects of Nguyen's story) — the suggestion of some wilful desire to find that Nguyen was not an ex-Fang Cheng resident makes no sense to me. Why, one asks, would Mr Choy not want Mr Nguyen to be an ex-Fang Cheng resident? Others were accepted by the Hong Kong authorities as being ex-Fang Cheng residents, and were simply allowed to remain here for the purpose of resettlement. And the fact is that there were repeated attempts to verify Mr Nguyen's claim. Why would that be done if the authorities were content to ride roughshod over the truth? The Mainland authorities

represented in the clearest of terms, and more than once, that their records revealed that Nguyen was not an ex-Fang Cheng resident. As for the accuracy of their records, Mr Choy made no blindly faithful assumption in that regard : he told the court that he had seen the Fang Cheng record himself. What is more, he was satisfied that the records were thoroughly organized and complete and he, Mr Choy, was well acquainted with Mr Zhang, the chief administrator and investigator of these cases in Guangxi. As for the suggestion that he did not check whether Mr Nguyen might have been registered under the name of Hoang, as Hoang's adopted son, Mr Choy replied that he had talked to officials in Guangxi about the possibility of a minor being registered under a foster family and the answer was that that would never been the case. The list at Fang Cheng is known to Mr Choy as being a very comprehensive list, with every name and every detail, regardless of age. And Mr Choy also points to a fact not insignificant in this regard, relevant to the likelihood of Mr Nguyen having been an inmate of a camp designed primarily for ethnic Vietnamese: that Mr Nguyen's mother was ethnic Chinese, and his father half ethnic Chinese, and that Mr Nguyen himself spoke Cantonese. And, further than all of this, the Mainland authorities had agreed to take Mr Nguyen back, and Mr Choy's previous experience showed that the Mainland authorities would simply not consider taking back ex-Fang Cheng residents. He goes on to point out that since Mr Hoang was relocated overseas, that could only be because the Mainland authorities did not recognize him as qualifying for local settlement, which suggests that if Mr Nguyen had been registered at the camp he, too, would have been viewed as eligible for relocation overseas.

I fail to see how, in the light of this evidence, it can be suggested with any cogency that the finding that Mr Nguyen was not a Fang Cheng resident can be said to be a finding that is not supportable, either by reason of the evidence or by reason of the approach to the investigative process.

It is suggested that Mr Choy has been "picky" in finding disparities in the various statements and affirmations made by Mr Nguyen over the years; and has shown no appreciation of errors or omissions that can be made by officers in the taking of statements. I have to say that the analysis by Mr Choy in his affirmation dated November 1997, of these differences, is an extraordinarily detailed one, so much so that I questioned him whether they were all to mind when he was making his decision. He pointed out that the *Nguyen* case was a particularly difficult one. He had indeed noted a lot of discrepancies at the time he made his decision; and when preparing his affirmation he had drawn a table and noted the discrepancies and discussed them with counsel. Yet most of them he had found when making his decision, though the affirmation contained some supplemental or additional ones. I accept that there is a difference between a revelation for the court's benefit of the history of claims made by an applicant and drawing the court's attention to disparities in them, on the one hand, and, on the other, an analysis of, and the conclusion reached by, the decision maker at the time of his decision; and I accept that Mr Choy had, for better or for worse, been advised to set out *seriatim* the thrust of each statement made by Mr Nguyen at the various stages of his claims in Hong Kong, and I note too that there is a different part of the affirmation in which he turns to his findings at the time of his decision and his reasons for them.

In the event, whether or not the question of disparities should have been explained with greater clarity, unencumbered by such detail, I am satisfied that Mr Choy's actual approach at the time of his decision making was, in Mr Nguyen's case, neither unfair nor suspect. I do not think that he can justly be accused of not appreciating the realities of interviewing situations. He is a very experienced immigration officer, and he was aware of the relatively junior rank of the officer who took the arrival statement. And it is the fact that in relation to the discrepancies to which he refers in his affirmation of November 1997 he said that though he noted discrepancies : "some may not matter because of his extreme youth in 1979 and 1980", although he thought that some were glaring (and I accept from him that he did notice apparently material discrepancies at the time of his decision). And indeed some discrepancies are glaring, not least the fact that when he first came to Hong Kong Mr Nguyen was not saying that Hoang was someone who took him under his wing in Vietnam and who took him from Vietnam to the Mainland, but rather that he met him for the first time after he, Nguyen, had fled from Vietnam with his father. But what Mr Choy emphasized in his oral testimony was that what he could and did draw from statements made on several occasions by Mr Nguyen were facts which Mr Nguyen had put forward that were not contentious, such as the composition of his family and their ethnicity, and the duration of Mr Nguyen's stay on the Mainland; against which facts he, Mr Choy, could test the claim of non-settlement. There were, he said, many facts of this kind against which Nguyen's claims could be and were tested, in particular by Mr Choy's knowledge of country condition evidence. So, for example, it was a fact, as always asserted by Mr Nguyen, that his mother was ethnic Chinese; and that was highly material in assessing the question of residence as a Fang Cheng camp

inmate. So, too, Mr Choy noted that the evidence about the refugee programme on the Mainland at the material times showed that "*Nguyen* would have been in a priority category for settlement as a young unaccompanied minor. There were very many such cases and the evidence shows they were allocated to farm units and provided with caregivers and schooling." In essence therefore, factors such as these, and the fact that Nguyen was shown not to have been registered as an inmate at Fang Cheng, were key factors in deciding what to believe; and Mr Nguyen's family background, his separation from that family at a young age, the period in time and duration of his sojourn on the Mainland, and Mr Choy's knowledge of policy and country condition evidence, were key factors in deciding what was likely in fact to have happened to Mr Nguyen in those years. In my judgment, this was a valid approach, and these were factors which Mr Choy was entitled to take into account in his assessment whether Mr Nguyen was truthful, and whether he had remained an unabsorbed refugee on the Mainland.

In the circumstances which I have described, I am satisfied that there was ample probative evidence upon which Mr Choy could properly conclude that Mr Nguyen had not been a Fang Cheng resident, and upon which he could reject Nguyen's claims of non settlement on the Mainland, and conclude that he had in fact been properly settled there.

(2) Lai Yen

Ms Lai Yen was born in 1976. She left Vietnam in 1978. The account she gives to the court in her affirmation is, very broadly, as follows : that she fled Vietnam with her mother in 1979 and lived across

the border in China where her mother met a man whom she describes as her step-father. There they applied for registration but were refused because they had not been sent there by the government to settle. In 1984, they were forced to leave and they went to Hainan, where her parents again applied for registration but were refused. The school accordingly did not allow her to attend, save on payment of twice the normal fees but, even so, she was the subject of discrimination. Property they had was confiscated, and then, when her mother, in 1990, fell pregnant, there was pressure for an abortion because of the Mainland's one-child policy. They fled to Beihai. There again they could not obtain registration, and in 1993 their household was demolished, so she fled that year to Hong Kong. In March 1995, she was returned to the Mainland. She was flown to Hainan, but there told that she could not live there because she had no registration, and when she said that she had lived in Beihai before she first went to Hong Kong, she was told to return to Beihai. That is what she did. She could not obtain registration there, so that she could not secure employment save for casual labour, and she was unable to trace her parents. She decided to return to Hong Kong. And that is what she did. It is asserted that the Director could not in these circumstances properly find that she had been granted a durable solution.

Mr Choy has attested that he received information from the Mainland that Ms Lai had in fact, and contrary to her claims, been registered at Nandao Farm, Sanya City, Hainan. He finds as a fact that that is where the family was settled as far back as 1978 or 1979 with household registration and with all the consequential benefits of registration. He found that when she was returned in 1995 she chose not to stay there but to go to Beihai where her family lived. He found that it

was likely that she received schooling in Hainan until about 1990 when her family chose to go to Beihai. "Since China has verified her residence in Hainan", he says, "her claims in May 1997 to the Director had no credibility and were materially at odds with her own previous claims."

Mr Dykes argues that this makes no sense. Here was Mr Choy who had asserted in the Privy Council proceedings that "the Chinese [authorities] have a very comprehensive and accurate record of the residents of the refugee camps in China," and who has further stated that in a straightforward case it took between three to six months to verify particulars of registration; and yet in relation to this young lady, who had given her true name, it took something like two years to verify her residence in Hainan, and that there is no explanation for that lapse of time. What is more, it is said to be illogical to suggest that Ms Lai rejected registration in Hainan when returned there in 1995 in favour of the life of an illegal non-registered person in Beihai, with all the disadvantages that come with that status.

Now, when Ms Lai first came to Hong Kong in July 1993 she was then aged 16 or 17 years. She completed her registration form and gave two addresses : one on Nandao Farm, Sanya City, Hainan; the other as "near the market at Qiaobei of Qiaogang Town, Beihai". She there signed a note saying that she left Vietnam in 1978 "to Hainan and I voluntary entered Hong Kong for examination." No names were there provided of relatives : her mother, for example, or her step-father or her step-brothers. In November 1994, she was one of those who were interviewed by Mainland authorities who came to Hong Kong to see whether those not yet verified, could be verified as having settled on the

Mainland. It is said that a number were identified at once as having settled previously on the Mainland. We do not have any record of the interview with Ms Lai then conducted. But be that as it may, she was returned to Hainan. The Mainland authorities agreed then to allow the ethnic Chinese (ex-Vietnam) in this group back to the Mainland and to resettle them. In June 1995, 60 of the outstanding number were returned to the Mainland and in July, 22 to Hainan. Ms Lai Yen was one of those 22. All 60, according to the evidence, were subsequently identified as having been settled on the Mainland, some in Guangxi and some in Guangdong.

Ms Lai returned to Hong Kong in early April 1996 and she then signed a statement. In it she talks of going straight from Vietnam to Nandao Farm in Hainan after arrival in China. "The head of the brigade was Truong Qui Long and the witness of our settlement was Hua … ." She describes events thereafter and moving to Beihai in 1991 and how in 1995 she was "repatriated to my place of domicile." In this regard, Mr Choy said in his oral testimony that whilst it is true that she does not there say in terms that she was registered, the reference to being sent to a brigade and the reference to repatriation to her place of domicile is indicative that she was in fact settled there at Nandao Farm. Where later she refers to not having household registration, she has then arrived in Hong Kong from Beihai and it is there, in Beihai, that she had no household registration. He points out also that in her account there are two periods of residence on the Mainland : first, across the border from Vietnam and then later in Hainan, in both areas and at both times allegedly without registration. These periods were both in the early years to which he had referred in his testimony when he had described the communal farm

system; how in the years 1979 until about 1984, it was so difficult to get by without registration; the significant incentive to seek registration; and he thought it most unlikely indeed that there could be two such instances of residence without registration. Moreover, he noted that Ms Lai had arrived on the Mainland in 1978; claimed education up to secondary third year; had two brothers born on the Mainland in 1982 and 1986; and that the education that she had received, and the availability of medical services for the children, and the family profile — a family of five, were all indications that this had been a unit with registration; otherwise, he thought, they could not have survived.

Mr Choy points to the fact that in her screening interview in 1997, Ms Lai asserted that upon arrival at Nandao Farm, she was told that she was not registered there and was given money and told to go back to Beihai. This was a significant occurrence if true, yet, remarks Mr Choy, there is no mention of it in her 1996 arrival statement in which she merely says that she was repatriated to Hainan and that she then went to look for her mother in Beihai. At one stage she said that close to her return to Hong Kong in 1996, she had travelled from Guangdong to Beihai to ask her mother for money before setting off for Hong Kong; yet in 1997, she asserted that when she went to Beihai before her return to Hong Kong, the family were not there; her mother had been taken away for sterilization; suggestions not made in her 1996 statement. Indeed, in that statement, she had said that her family were “all living in Beihai”.

But such inconsistencies to which he refers are by no means at all the centre point of Mr Choy’s reasoning, though it might be said that they provided some cause in themselves for doubting her veracity. At the

centre of his reasoning is the fact that the Mainland has told him that this lady was registered in Nandao Farm in Sanya, Hainan. He saw no reason not to accept that information as accurate. He also took into account country condition evidence. He rejected the suggestion that the family moved to Beihai because of the Mainland's one-child policy and its effect on the mother who was said to have been pregnant at the time of the move; not least because he applied his knowledge of official attitudes to those who had come from Vietnam, who he said were treated differently when it came to the one-child policy. His conclusion was that this lady and her family, as with so many others, preferred life in Beihai or the prospects which life there offered, to life on the farm in Hainan, and that that is why they left, and that that is why she did not want to stay in Hainan when returned there in 1995.

It is evident from material that I have been shown that his conclusions about the tendency of refugees to move from places of settlement to Beihai, and his conclusions about the different attitude to the one-child policy, when it came to those who had arrived on the Mainland from Vietnam, are not conclusions peculiar to Mr Choy. In proceedings before the Australian Senate in February 1995, Mr Fontaine, Regional representative of the Office of the UNHCR, spoke of the assumption that could safely be made that the overwhelming majority of the caseload were registered at some point. There was, he said, a sizeable population of squatters living in Beihai because Beihai had become a highly successful fishing co-operative and in Beihai they were living better lives than in the communities they had left. Even when sent back to their original localities, they would swiftly return to Beihai. He described Beihai as "a privileged area". As for the one-child policy, he said that the Vietnamese

refugees have much larger families than the Chinese because the one-child policy is applied more leniently to them.

It can hardly, in the circumstances, be said that Mr Choy had reached a decision in Ms Lai's case which was not based on probative evidence. I would have thought that he had good reason to reach the conclusion he did. The fact that it took a long time to verify her place of registration is a fact, but it does not render his finding nugatory. There may be many reasons for such delay. Mr Marshall has speculated about some of them. There were, in July 1993, quite a number who came in from Beihai, and the fact is that hers was not a case which, like so many before her, could ready be resolved. But that does not mean that her account was true, simply because it took a long time to resolve. I have been taken to other cases which took a long time to resolve in which subsequent verification of prior settlement on the Mainland appears to be beyond question.

(3) Ta Minh Hieu

Mr Ta was born in June 1976. He went to the Mainland from Vietnam in 1981. He came to Hong Kong in August 1994. So he had been on the Mainland for 13 years before he came to Hong Kong, and was aged 18 years when he arrived. The essence of his story as recounted in evidence filed for these particular proceedings is that his parents fled Vietnam and came to Hong Kong without him in the late 1970s. He was left with his grandfather. He had not heard from his parents since 1979. In 1981 he and his grandfather were driven out to the Mainland, and once they were across the border they fled to Beihai. His grandfather

attempted to register there but was told that it was too late. So they were never registered. In 1991 his grandfather passed away, and this applicant went to Guangdong to live with an uncle. He asserts that during a household check in 1992 he was arrested, and that he was forced across the border back into Vietnam by public security officers. On arrival in Vietnam, he was questioned by the authorities and because he had no household registration there, he was told to go back to the Mainland. He did, but did not think it safe to stay there, so he fled to Hong Kong, arriving here in August 1994.

In Mr Ta's case there has been no verification by the Chinese authorities of registration or settlement. What has happened is that Mr Choy simply does not accept the account he has been given and has concluded that Mr Ta has, in order to avoid verification either chosen not to give his true particulars or, perhaps because he was so young during the material time, that he has genuinely little recall of the true particulars.

Mr Dykes says that it is evident that Mr Choy is, in the absence of verification, straining to find against Ta, relies on minor inconsistencies, contradicts himself when it comes to his attitude to non-registration, and that his findings are purely speculative in the face of a consistent account by Mr Ta.

Mr Choy concludes that Mr Ta and his grandfather came to China as refugees and that since the border was a fortified area with many troop movements and there was a place for receiving and settling refugees, it is more likely that the grandfather and grandson were intercepted and received as refugees by the administrative apparatus that was in place.

He thinks it more likely that Ta was settled with his grandfather on a farm or in Beihai where they had registration or the right to it. Mr Dykes' complaint is that for this conclusion there is simply no evidence; it is all pure supposition. The conclusion is not warranted, he says, by probative evidence or by the facts.

But Mr Choy has provided reasoning for his conclusions and I do not think that an examination of Mr Choy's approach warrants the judgment about that approach which Mr Dykes would have me make.

Mr Choy noted that this young man is a member of the Yao minority group which is an ethnic Chinese group. Ta spoke Cantonese and not Vietnamese. Ta was but five years old or so when he went to the Mainland and lived there for some 13 years. Not only did he live there for 13 years at a tender stage of his life, but the years included those from 1979 to 1984 when it was particularly difficult to evade registration, and when there was scant incentive for doing so. As for the account of living in Beihai for 10 years, Mr Choy cannot accept that that could have happened *unless* the grandfather and Ta had been registered somewhere on the Mainland.

Mr Dykes posed the question why any one should choose to live in a shack in Beihai, unregistered, rather than on a farm elsewhere where one would have the benefits of registration. Mr Choy's knowledge of Beihai and its circumstances seems to me to be particularly thorough, and his answer to this question is not only believable in itself but is also supported by other evidence to which I shall refer. He told the court of discussions he had held with the Vice-Mayor of Beihai when he visited

Beihai, and the authorities there had paid particular attention to those living in illegal structures such as that described by Ta. People living in such structures for such a long period as described by Mr Ta would inevitably have been examined by the authorities. The sojourn of such people in those structures was a matter tolerated by the authorities but only so long as the occupants had registration elsewhere on the Mainland, and it was hoped by the authorities that they could persuade these people to take up low cost housing instead. As for the suggestion that people would choose to live in a shack in Beihai even when registered elsewhere on the Mainland, it is far from the astonishing suggestion that Mr Dykes says it is. It is a point dealt with before the Australian Legal and Constitutional Legislation Committee of the Senate in February 1995 by the UNHCR representative :

> "The squatter population is made up of people who were properly registered in other parts of China … who found themselves dissatisfied with their lives in the communities where they were situated and therefore decided to go to Beihai because Beihai was a highly successful fishing co-operative. … In Beihai they were living better than in the communities they left. This is why every time the Chinese put them on buses and sent them back to their localities of origin, they would come right back to Beihai. The authorities used to complain to me that when they returned to Beihai they would find these people had already been there before the authorities who took them to their locality of origin. Why? Because the economic conditions in Beihai were better than in their locality of origin. What I mean is that these people who were squatters in Beihai where, in terms of Chinese Law, illegally living in Beihai. It does not mean that they were not registered in China. What it means is that they could go to their communities of origin if they chose to and live there legally. … One of the problems that we find a lot of people do not understand is that Beihai is a privileged area. The survey that was done by UNHCR showed that the refugees in Beihai have a level of income twice that of Chinese nationals in Beihai."

As for the contention that the applicant Ta had been refouled in 1991 to Vietnam, it is a contention which Mr Choy rejects. Mr Choy's country condition knowledge tells him that the Chinese authorities have, as part of their policies, respected minority groups; and all the factors to which I have referred spelt to Mr Choy circumstances which tell strongly against refoulement. In 1991, when Ta is said to have been refouled, he would have been aged only 16 years and given Ta's ethnicity, Mr Choy can see no reason why the Chinese authorities, to whom the fact that Ta's native tongue was Cantonese would have been obvious, would have wished to refoule him. Nor has there been a single case that has come to his attention of refoulement of an ethnic Chinese who came from Vietnam during this period : no complaints of that kind either by countries party to the Comprehensive Plan of Action, or by the UNHCR. In addition to this, there arises what on the face of the documents is a stark contradiction between the arrival statement of Ta, and his screening statement in 1997. In June 1997, when interviewed for the purpose of the screening exercise required by the Privy Council decision, he asserted that in 1993 he was taken by the public security officers to the Vietnamese border, transported alone to the border and handed over to the Vietnamese authorities where he was questioned for half an hour and then asked to walk back to China. This is in direct contrast to the account allegedly given by the applicant to the immigration officers in his arrival statement in August 1994, in which he talks of going on his own by car, which he took, to Vietnam and asking if he could be registered there. He was then asked questions directed quite clearly at this issue of refoulement, and there is in that statement no hint of it. I am, however, conscious of the fact that there is a suggestion in earlier applications that these statements (and indeed statements of other applicants) might not be reliable. But even so, even putting aside this

contradiction, Mr Choy has pointed to much that is a logical basis upon which he was entitled to conclude that Ta had been properly settled on the Mainland; that he had had household registration; but that he or his grandfather had chosen, for the same reason as adopted by so many others, not to avail themselves of it. I cannot properly interfere with this finding on the suggested footing that there is no evidence to support it.

I referred at the outset of this analysis of Ta's case to a suggested inconsistency or contradiction in Mr Choy's approach to the question of registration. It arises in this way : Mr Choy said in an affirmation in November 1997 that he did not accept that lack of education was necessarily a consequence of not being registered in Beihai, and he appeared to accept that for a 10-year period the applicant lived in Beihai unregistered. "I found that life in Beihai for unregistered persons who were refugees from Vietnam was accepted in Qiaogang Town in the period 1981 to 1991…. Information relevant at the time make it clear that Beihai and Qiaogang became an increasing haven for refugees from Vietnam who could earn more there as unregistered persons than they could as registered persons on the farms on which they had been settled." Mr Dykes asserts that this statement sits in stark contrast with the fact that in October 1997 Mr Choy said in a letter to a Director of Reception and Settlement of Indo-Chinese Refugees on the Mainland that the suggestion that refugees managed to stay illegally in the Mainland without household registration for more than 10 years since the early 1980s was, with other suggestions, "very ridiculous and totally unsubstantiated". I do not think that there is the inconsistency which Mr Dykes suggests. In the first place, it is obvious that in the letter of October 1997, Mr Choy was addressing a general proposition : it was his response to an assertion that

some were never registered on the Mainland, even from the very beginning. That is quite a different matter from an assumption that there were those who were registered but then moved from their original place of registration to another place where they stayed unregistered for some time. But, more particularly, it is quite clear from the evidence as a whole that Beihai is viewed by Mr Choy and by others (including Mr Fontaine to whom I have referred) as an exceptional case, and an exceptional place.

(4) Tran Hoa Buu

Tran was born in 1974. He fled with his family to the Mainland from Vietnam in 1979, so that he was then aged only five years. He first came to Hong Kong in January 1993. He was then aged 19 years. He was sent back to the Mainland in January 1995, but he returned to Hong Kong in December 1995. So he is one of the double-backer cases.

His case is as follows : that on arrival in China from Vietnam, he and his family went straight to the Feng Chang area (not to be confused with Fang Cheng where the closed camp for Vietnamese refugees was situated) to the Hua Shi Forestry Farm where a maternal uncle lived, but that he and his family never had household registration there, or anywhere else for that matter. Schooling proved problematic because of lack of registration, and he was the subject of bullying and teasing. In 1991, his family returned to Vietnam, and he has not heard from them since. He wandered around the Mainland for a few years, and fled to Hong Kong in 1993. In January 1995, he was returned to Nanning in Guangxi Province. There he was put on a bus and simply told to go back from whence he came. He was given 15 yuan and an envelope with “Hua Shi Forestry

Farm" written on it, and that is where he went. But he was not registered there and was told so, and he has a letter from the Office of Regional Settlement in the Feng Chang Autonomous Region saying that he was not registered there. It is dated 13 February 1995. So he had nowhere to go, and he therefore, in due course, made his way back to Hong Kong after leading a transient life on the Mainland. In other words, he asserts that he has never been absorbed into Mainland society, has never been recognized by the Chinese authorities as a refugee, was treated shoddily when he went back to the Mainland in 1995, and has every good reason to decline the offer by the Mainland authorities to settle him there.

Despite the letter from the Feng Chang official, Mr Choy decided that Tran had indeed been granted a durable solution as a refugee and had been granted protection on the Mainland before 1993; that the Mainland was prepared to accept him back and that he would be restored to a durable solution there. A cardinal piece of information was that Mr Tran was in fact registered and had been registered in Quigang Zhen, Beihai, Guangxi; and had been registered there at some stage before his departure for Hong Kong in 1993. That is information that Mr Choy had been given by Mr Tan Serong, the Deputy Director of the Office of Reception and Settlement of Indo-Chinese Vietnamese Refugees in Guangxi. If Mr Choy was entitled to accept that evidence, then it seems to me that that is the death knell of the assertion that there was, in Mr Tran's case, no probative evidence upon which Mr Choy could logically arrive at the conclusion at which he did arrive.

Mr Dykes argues that Mr Choy has, in his rush to make an adverse finding, overlooked a number of key factors and, in the same rush,

has assumed that the applicant contrived falsely to persuade officials on the Mainland to send him to the Hua Shi Farm on his return in 1995 knowing full well that he was not registered there, so that he could avail himself of that non-registration when he subsequently returned to Hong Kong. He says that Mr Choy is suggesting that when Tran went back in 1995 to the Mainland, it was already known by the Director that he, Tran, had been settled in Beihai whereas it is evident from a number of factors that no one then thought that Tran was settled in Beihai, to wit the following factors :

1. he was flown from Hong Kong not to Beihai but to Nanning which is nearer to the Hua Shi Forestry Farm;

2. he was given an envelope in Hong Kong with his personal details on it which suggested he was to go to Hua Shi after arrival on the Mainland; and

3. there is evidence in an affirmation from Mr Choy that in January 1996 Mr Tran was, over a long distance telephone call, confirmed by the Mainland authorities to have been settled at the Hua Shi Forestry Farm.

None of these contra-indicators are dealt with, says Mr Dykes, by Mr Choy in his affirmations, and the evidence is such, Mr Dykes asserts, that Mr Choy was not entitled to conclude that Mr Tran was settled in Beihai. Had he been settled there, he would have returned there and not to Hua Shi where self-evidently he was not settled. It is said that the letter upon which Mr Choy relies contradicts other compelling evidence.

The problem with this attack is that the premise upon which it is based is not sound. Mr Choy does not in truth assert that before Tran's

return to the Mainland there had been recorded verification of Tran's registration on the Hua Shi Farm. His evidence, which I accept, is that at the stage Tran was returned, the mode of verification was not based on records checked by the Chinese authorities. Before the Mainland authorities came to Hong Kong in 1994 to interview ethnic Chinese ex-Vietnam migrants, previous submissions had failed to result in positive identification at Hua Shi. The verification, such as it was, came in November 1994 as a result of interviews that the Chinese officials had had with Tran in Hong Kong and at a time when those officials did not have their records in Hong Kong. He says that he thinks that they checked their records when they returned; but that was his assumption. Mr Choy assumes that they had asked Tran a host of questions about his life on the Mainland and were convinced from what they had been told that he had been registered, and that he had been registered in Hua Shi. What happened when Mr Tran went back, according to the information conveyed to Mr Choy by the Mainland authorities, was that they checked and found that he belonged to Beihai and he was redirected there, but that he went to Hua Shi instead and obtained the letter he has produced. The fact that he was put on an aircraft to Nanning instead of to Beihai is, according to Mr Choy, neither here nor there because all or many of these people were sent in groups to Nanning. Nanning is the capital of Guangxi and although some flights did go to Beihai, that tended to be the case if there was to be interrogation on return, but the authorities did not want that to happen at Nanning which is a busy airport.

As for the fact that in January 1996 there was a call saying that Tran had been registered in Hua Shi, Mr Choy is unable to be certain what happened save that the call was likely to have been one not directed

at individuals but at confirmation of a list. At the end of the November 1994 interviews, the Mainland authorities were satisfied that Tran was registered at Hua Shi Farm. Hong Kong then sought to obtain the Mainland's permission for Tran's return and, obviously, Hong Kong's record of him was that he was registered in Hua Shi; so that on the name list submitted to the Mainland officials, the Immigration Department put down Hua Shi. But there were other names on that list, and the telephone call of January 1996 probably related to an impending repatriation, by a chartered flight, of a group. Either the Mainland authorities telephoned or Hong Kong telephoned the Mainland authorities, and those authorities confirmed that the list of the persons to be repatriated was in order, and the assumption therefore was that Mr Tran was cleared for Hua Shi.

Nonetheless, Mr Choy is satisfied that the June 1996 confirmation was categorical and accurate.

If more than this verification in June 1996 be required, Mr Choy says that he finds it in the statements made by the applicant in records of interview in 1993 in which Tran said that the family had been "arranged by the Chinese public security officers to live in Hua Shi Farm". He talks there of studying at school, and Mr Choy says that the description of family activities and his schooling have the hallmarks of privileges connected with refugees status, and that the reference to public security officers settling them corresponds with the fact that public security officers worked alongside resettlement officers on the Mainland.

He also points out in his evidence that he fails to see how this applicant could have gone all the way from Vietnam straight to the forestry

farm without registration. He refers to a statement made in 1995 by the applicant in which he described the elder and younger brother : "With the arrangement of the Chinese authorities, we, a family of five, were arranged to live at Hua Shi Forestry Farm and worked as carpenters". Mr Choy says that this is a typical family profile at the time and the reference to 'arrangement' is, and can only be, a reference to official settlement. It may be, he says, that the family were first registered at Beihai and then moved to the forestry farm because, perhaps, they knew people there. He points out that the applicant would have been very young at the time of these events and that his memory of events may not be very accurate. He takes the view that the authorities would not have allowed the family to stay at Hua Shi, unless registered somewhere on the Mainland.

He also points to the fact that Mr Tran's solicitors said that there was a tape between Mr Tran and the Mainland officials to support his case, but that none has ever been produced.

The fact of the matter is that the authorities on the Mainland insist that this applicant had been registered there, and they have identified the place of registration. Mr Choy has provided a credible explanation for his acceptance of that assurance. He has also pointed to features of Mr Tran's family profile and history which persuade him that this applicant was settled on the Mainland.

It is not shown that Mr Choy's findings in the case of Mr Tran are based on evidence that is not logically probative. Mr Choy was, in my judgment, entitled to come to the conclusion at which he arrived.

NO EVIDENCE : CONCLUSION

Mr Dykes' contention that an examination of these four cases would demonstrate such errors on Mr Choy's part that had he been made aware of them, he would have come to a different view of the general evidence upon which he relied is a contention which has not been made good. Upon an examination of the cases and of Mr Choy's reasons for coming to the conclusions at which he arrives, I am satisfied that the applicants do not come close to showing that the decisions or any of them were unsupported by probative evidence. Nor is the case made out that the country condition and other evidence upon which Mr Choy concluded that the applicants had enjoyed on the Mainland a durable solution was evidence which lacks sufficient cogency or force or probative value that he ought not to have relied upon it. It is not for this court to say whether it would have arrived at the same conclusions. It is only for this court to say whether the evidence was such as to entitle Mr Choy to arrive at his conclusions and, in my judgment, the evidence clearly passes that threshold.

III. RESULT

It follows that the two heads of attack which have been the subject of this second stage hearing have not been brought home by the applicants.

In the light of these findings and the findings which are evidenced by my judgment of September 1998, it follows that the attack on the removal orders made in June, July, August and October 1997 (and the decisions to make those orders), which are the subject of this judicial review, fails. I am satisfied that they were decisions and orders that were

lawfully made. The application for an order of *certiorari* to bring up those decisions (and orders) and to quash them is therefore rejected.

I note that there is also an application to quash the decisions of the Director, made at the time of the decisions to make the removal orders, to order the detention of the applicants under section 32(1)(a) of the Immigration Ordinance, pending removal. There have been addressed in the proceedings before me no separate arguments specifically against the detention orders, in other words additional to those arguments affecting the removal orders, and it was unnecessary to do so because the validity of those original decisions to detain depends in this case on the validity of the removal orders. (I should add that the *continued* detention of the applicants was by the time of the hearings before me not a live issue because the applicants had by then be released.) The removal orders were valid, and in this application I see nothing to impeach the validity of the decisions, made at or about the time of the removal orders, to detain the applicants pending their removal. So the applications to bring up and quash those decisions are also rejected.

The only other relief sought was in respect of a decision by the Secretary for Security, said to be made on behalf of the Director, that applicants with Vietnamese spouses might be removed to the Mainland without their spouses and children, and that their spouses and children might be removed to Vietnam; and the applicants sought a declaration that it would be unlawful to remove applicants with Vietnamese spouses without their spouses and children. As I pointed out in the judgment of September 1998, I was told that that decision was not to be implemented, and I am not asked to make a determination about it.

Accordingly, this application for judicial review is dismissed.

COSTS

That leaves the question of costs. While costs should follow the event, I shall in this case qualify the order. I have referred in my judgment of May 1999 to the extraordinary length and complexity of evidence filed in this case by the respondent and to the unnecessary and lengthy analysis of law in affirmations filed on his behalf. I note too that the hearing of this application was extended by the need to hear Mr Choy's oral evidence, and that need was occasioned largely by the fact that this court was unhappy about the manner in which the affirmations on his behalf were drawn. I am in the circumstances of the view that the applicants should pay to the respondent only 80% of his costs of this application for judicial review. Accordingly, there will be a costs order *nisi* to that effect, such costs to be taxed, if not agreed.

There were an unusually large number of interlocutory applications in this case, including applications for directions, to strike out, for amendments, for discovery and for cross-examination; and in respect of quite a few of these applications costs were reserved. I shall in due course hear the parties in relation to those costs reserved if, in the absence of agreement, it proves necessary to do so.

(F. Stock)
Judge of the Court of First Instance,
High Court

Mr Philip Dykes, S.C., leading Mr Matthew Chong, instructed by
Messrs Pam Baker & Co., for the Applicants

Mr W.R. Marshall, SC, leading Mr Wesley Wong, SGC
of Department of Justice, for the Respondent