HCAL000041A/1997

1997 A.L. No.41

IN THE HIGH COURT OF HONG KONG

COURT OF FIRST INSTANCE

ADMINISTRATIVE LAW LIST

BETWEEN

LONG QUOC TUONG AND OTHERS	Applicants
and	
(1) THE DIRECTOR OF IMMMIGRATION	Respondents
(2) THE SUPERINTENDENT OF HIGH ISLAND DETENTION CENTRE	

Coram: The Hon. Mr. Justice Keith in Court

Dates of Hearing: 11th & 12th August 1997

Date of Handing Down of Judgment: 26th September 1997

JUDGMENT

INTRODUCTION

The Applicants are ethnic Chinese. They used to live in Vietnam. However, they fled from Vietnam because of the treatment of ethnic Chinese in Vietnam in the

aftermath of the Sino-Vietnamese war. They settled in China instead. They claim that in China they were not accorded rights analogous to those enjoyed by Chinese citizens. As a result, they fled to Hong Kong. They have been in detention in Hong Kong ever since. In this application for habeas corpus, they seek their release from detention.

This is not the only set of proceedings in which most of the Applicants have been involved. On their arrival in Hong Kong, they were not recognised as persons to whom Part IIIA of the Immigration Ordinance (Cap. 115) applied. Accordingly, their requests for permission to remain in Hong Kong as refugees pursuant to section 13A(1) of the Immigration Ordinance pending their resettlement elsewhere (i.e. their claims for refugee status) were not considered. A number of the Applicants sought to challenge the refusal of the Director of Immigration to consider their claims for refugee status. Those claims were dismissed by the High Court *(Nguyen Tuan Cuong v. The Director of Immigration* [1995] 3 HKC 373) and by the Court of Appeal ((1996) 6 HKPLR 62), but they were eventually allowed by the Privy Council ((1996) 7 HKPLR 19). Accordingly, their claims for refugee status are currently being considered, but their case is that, as a result of the ruling of the Privy Council, their detention has become unlawful. All references in this judgment to sections of an Ordinance are references to sections of the Immigration Ordinance unless otherwise stated, and all references to "the Director" are references to the Director of Immigration.

THE CURRENT PROCEEDINGS

There are 119 Applicants in all. At an early stage in the proceedings, it was recognised that it would not be possible to consider individually the cases of all of them. It was decided that the cases of a handful of the Applicants would be heard and determined first. Those Applicants would be as representative as possible of any sub-groups which might exist amongst them, so as to enable the decisions in the cases of those Applicants to be as reliable a guide as was possible to the likely outcome of the cases of the other Applicants. In the event, the cases of 7 of the Applicants were selected to be heard and determined first. The cases of the other Applicants were adjourned *sine die*.

Broadly speaking, the Applicants fall into 3 categories: (i) those whose claims for refugee status have now been assessed, (ii) those whose claims for refugee status are still pending, and (iii) new arrivals. All 3 categories were represented in the 7 Applicants who were selected to have their cases heard first. However, since their selection, those of the 7 Applicants whose claims for refugee status were then pending have now had their claims for refugee status assessed. Accordingly, none of the 7 Applicants now come into category (ii). When I was told of that at the commencement of the hearing, I asked whether the case of another Applicant who still fell within category (ii) should be added to the list of those whose cases were to be heard first. Neither Ms. Gladys Li S.C. for the Applicants nor Mr. Dennis Mitchell S.C. for the Respondents thought that such a course was necessary. Henceforth, all references in this judgment to "the Applicants" are references to the 7 Applicants whose cases were selected to be heard and determined first.

THE DETENTION OF ECVIIS

The Applicants have all been classified as Ex-China Vietnamese Illegal Immigrants ("ECVIIs"). That is the administrative classification given to persons who at one time lived in Vietnam, but who subsequently settled in China. They are to be contrasted with persons who had lived in Vietnam immediately before coming to Hong Kong, and who had come to Hong Kong, either directly or indirectly following a brief stop in China. Persons who fall into that category were classified as Vietnamese Migrants ("VMs"), and had their claims for refugee status considered pursuant to section 13A(1), which provides (so far as is material):

> "An immigration officer or a chief immigration assistant may permit any person ... who was previously resident in Vietnam ... to remain in Hong Kong as a refugee pending his resettlement elsewhere."

Such persons were detained under section 13D(1), which provides (so far as is material):

> "... any resident or former resident of Vietnam who ... arrives in Hong Kong [without valid travel documents] may, whether or not he has requested permission to remain in Hong Kong, be detained under the authority of the Director ... pending a decision to grant or refuse him permission to remain in Hong Kong or, after a decision to refuse him such permission, pending his removal from Hong Kong."

However, section 13A(1) was not applied to ECVIIs. Instead, a different set of statutory provisions was invoked in their cases. First, they were refused permission to land in Hong Kong under section 11(1). That refusal made them liable to be removed from Hong Kong under section 18(1)(a). Removal orders were made under section 18(1)(a), and that triggered the power of the Director to authorise their detention under section 32(1)(a) until they were so removed.

By the summer of 1993, it became apparent that section 32(1)(a) would shortly no longer be available to detain those classified as ECVIIs pending their removal from Hong Kong. That was because section 18(2) provided that a person could not be removed from Hong Kong under section 18(1)(a) if he had been in Hong Kong for more than 2 months. That had not been a problem in the past, because section 18(3) had disapplied section 18(2) to persons who had been "previously resident in Vietnam". Section 18(4) had provided that section 18(3) would expire on 31st December 1990 unless the Legislative Council determined otherwise. In fact, section 18(3) had been extended, but it was not going to be extended beyond 31st December 1993. That meant that after 31st December 1993 ECVIIs could only be detained under section 32(1)(a) for 2 months. Since it took much longer than that to effect their removal from Hong Kong, a new detention power had to be used. The power which the Director was advised to use was the power of detention under section 13D(1) pending removal from Hong Kong, i.e. under the second limb of section 13D(1). That is the power which was used to detain all ECVIIs from the autumn of 1993.

This advice turned out to have a side-effect which had not been appreciated. Sears J. held in *Nguyen Tuan Cuong* in the High Court that the consequence of the ECVIIs being detained under section 13D(1) was that they became entitled to have

their claims for refugee status considered under section 13A(1). However, the declined to exercise his discretion to grant the ECVIIs any relief. When the case eventually got to the Privy Council, the facts were analysed differently. The majority of the Privy Council held that the Director must be taken to have considered whether the Appellants should be granted refugee status, and that the Director must be taken to have refused them such status. That meant, according to the Privy Council, that they had been denied the opportunity to have their claims for refugee status reviewed by the Refugee Status Review Board. It was no doubt because there had been only a deemed refusal of refugee status under section 13A(1) that the Privy Council ordered the Director to determine again whether the Appellants should be granted refugee status and allowed to remain in Hong Kong pending their resettlement elsewhere.

As a result of this ruling, ECVIIs could no longer be detained under section 13D(1) *pending their removal from Hong Kong*, because that power only arose once they had been refused permission to remain in Hong Kong as refugees, and whether such permission should be granted had now to be considered afresh. Accordingly, it was decided to detain them under section 13D(1) *pending the decision to grant or refuse them permission to remain in Hong Kong as refugees,* i.e. under the first limb of section 13D(1). All ECVIIs in Hong Kong who had previously been detained under the second limb of section 13D(1) were from 9th January 1997 detained under the first limb of section 13D(1).

THE SCREENING AND RE-DETENTION OF ECVIIS

The criteria which had been used for determining whether to grant permission to remain in Hong Kong as a refugee under section 13A(1) were not thought to be appropriate for ECVIIs: after all, they had, by definition, settled in China at some time in the past. Accordingly, it was necessary to adapt the criteria to reflect their particular circumstances. In particular, it was decided to give effect to certain views adopted by the Executive Committee of the UNHCR in 1989. Those views were expressed in Conclusion 58, which was headed "Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection". That Conclusion recorded the following principles:

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

China was regarded as a country in which ECVIIs had already found protection. Accordingly, in deciding (a) whether ECVIIs should be granted permission to remain in Hong Kong as refugees pending their resettlement elsewhere, and (b) if so, whether they should be resettled in China, 3 factors in particular were taken into account in relation to each of them:

(i) whether they had in fact been resettled in China before coming to Hong Kong,

(ii) whether they wished to be resettled in a country other than China,

(iii) assuming that they could not be resettled anywhere other than in China, whether their return to China would satisfy the conditions laid down in Conclusion 58(f).

Those of the Applicants whose cases have been considered afresh have been given permission to remain in Hong Kong as refugees pending their resettlement elsewhere. They thus came within the definition of "Vietnamese refugees" in section 2(1), and became liable to orders for their removal from Hong Kong under section 13E(1). However, it has also been decided that the country in which they are to be resettled should be China. Accordingly, orders for their removal to China have been made, purportedly under section 13E(1). The making of such orders has triggered the power of the Director under section 32(1)(a) to detain than pending their removal to China, and it is that section under which their current detention has been authorised.

THE LIMITED NATURE OF THE PROCEEDINGS

It may be that on these facts the detention of some or all of the Applicants prior to 9th January 1997 was unlawful. However, it would be wrong for me to express any view on that topic. I say that for 2 reasons. First, since this is an application for *habeas corpus*, I am only concerned with whether their current detention is lawful. Ms. Li does not suggest that their current detention is automatically unlawful simply because their detention prior to 9th January 1997 may have been unlawful. Secondly, whether their detention prior to 9th January 1997 was unlawful is to be decided in the claim for damages which the successful Appellants in *Nguyen Tuan Cuong* are pursuing. For the reasons given in the judgment delivered on 30th May 1997 in *Tran Dat v. The Superintendent of Whitehead Detention Centre* (HCMP 3562/94), I do not want to pre-empt the outcome of that claim by making findings as to the legality of any earlier period of detention unless it is necessary for me to do so in order to decide the legality of the Applicants' current detention.

I should add that I was told that those of the Applicants who the Director has ordered be removed to China (purportedly pursuant to section 13E(1)) would be challenging those removal orders. Since reserving my judgment, leave to apply for judicial review of those orders (and of the consequential detention authorised under section 32(1)(a) has been granted. However, Ms. Li was content for the Applicants' current application for *habeas corpus* to proceed on the assumption that the removal orders purportedly made under section 13E(1) had been validly made, and that the detention of the Applicants pending their removal to China had been validly authorised under section 32(1)(a).

THE LENGTH OF THE DETENTION

The Applicants' primary case is as follows. In *R. v. The Governor of Durham Prison ex p. Hardial Singh* [1984] 1 WLR 704, it was held that a statutory power of detention is subject to various implied limitations. In *Tan Te Lam v. The Superintendent of Tai A Chau Detention Centre* [1996] 2 WLR 863, the Privy Council held that these limitations apply to the power of detention conferred by section 13D(1). Two of those limitations, suitably adapted to reflect the circumstances of the Applicants, are said to be relevant to their cases:

(i) A power of detention is to be regarded as limited to a period which is reasonably necessary to achieve the purpose for which the power was granted. Accordingly, if the only power which could lawfully be used to authorise the detention of asylum-seekers from Vietnam was granted to the Director to enable them to be detained (a) pending decisions to grant or refuse them permission to remain in Hong Kong, and (b) if such permission was refused, until their removal from Hong Kong was effected, the power of detention was limited to such time as was necessary for such decisions to be made and for their removal from Hong Kong to be effected.

(ii) The person under whose authority people are being detained must take all reasonable steps within his power to ensure that the only purpose for which the detention could lawfully be authorised is achieved within a reasonable time. Accordingly, the Director had to take all reasonable steps within his power to ensure that (a) the decisions to grant or refuse the Applicants permission to remain in Hong Kong would be made within a reasonable time, and (b) if such permission was refused, their removal from Hong Kong would be effected within a reasonable time.

Applying these principles, Ms. Li contends that the Applicants' current detention is unlawful because it would have ended by now if their requests for permission to remain in Hong Kong as refugees had been considered when they should have been considered. Those requests would have been considered years ago. If it had then been decided that they should be removed to China, they would have been removed to China by now, and would no longer have been in detention. If it had been decided that they should not be removed to China, but that they should be resettled in a country other than China, they would have been released from detention by now. It may be that the correct power of detention has been used since 9th January 1997 to detain them pending the determination of their requests, and that the correct power of detention has been used since the making of the recent removal orders in their cases. However, none of that affects the argument that their detention would have ended sooner if their requests for permission to remain in Hong Kong as refugees had been considered when they should have been.

Mr. Mitchell did not dispute the application of the *Hardial Singh* principles to the present case. He took two general points: the Applicants did not have the right to be "screened" (i.e. to have their claims for refugee status considered) as soon as they arrived in Hong Kong; and the Applicants were to blame for their continuing detention by not agreeing to return to China. I shall deal with each of these arguments in turn.

(i) Right to screening. Mr. Mitchell argued that nowhere in Part IIIA of the Immigration Ordinance were asylum-seekers originally from Vietnam (whether those who had come directly from Vietnam or those, like the Applicants, who had settled in China in the meantime) accorded the right to have their requests for permission to remain in Hong Kong as refugees considered. The only possible source of such a right is section 13A(1), and that is merely a permissive section: it confers powers on immigration officers, not rights on asylum-seekers. Accordingly, to the extent that the Privy Council decided that ECVIIs were entitled to have their requests considered, that entitlement could only have arisen when Part IIIA was applied to them, and that was when they begin to be detained under the second limb of section 13D(1).

I cannot accept this argument. It is inconsistent with the reasoning of the majority of the Privy Council. The majority held (pp.29H-30B) that once it was realised that the Appellants in that case

> "were previous residents of Vietnam, there was a duty on the immigration authorities to ask them whether they were seeking to remain in Hong Kong as refugees... By electing to be placed in a detention centre after the playing of the recorded message [on their arrival in Hong Kong waters and which told them that if they chose to remain in Hong Kong they would be subject to a screening procedure to determine whether they had a genuine claim to refugee status], the Appellants implicitly sought permission under section 13A(1) of the Ordinance to remain in Hong Kong as refugees pending resettlement elsewhere... [Such] permission was ... refused. Thereupon it became the duty of the Director under section 13D(3) to cause to be served notices of the right to apply for review."

If there was a duty on the Director to find out whether they sought permission to remain in Hong Kong as refugees, there must have been the concomitant duty to consider whether such permission as was sought should be granted, especially as the Director was found to have refused such permission. I accept that the Privy Council was concerned with whether the Appellants had had the right to have their requests for permission to remain in Hong Kong as refugees considered at all, rather than when such a right, if it had existed, had arisen. But the reasoning of the majority of the Privy Council for concluding that the right existed also answers when the right arose. It arose when it was known that the Appellants - and therefore those of the Applicants in the present case who were either Appellants in *Nguyen Tuan Cuong* or whose cases are on all fours with them - had previously lived in Vietnam and were seeking permission to remain in Hong Kong as refugees.

Mr. Mitchell pointed out that such rights as section 13A(1) gives are accorded to persons who were "previously resident in Vietnam". He submitted that that referred only to persons who had been resident in Vietnam immediately before coming to Hong Kong. It did not refer to persons who, having been resident in Vietnam at some time in their lives, had spent the previous few years in China. I cannot accept this argument either. Although the phrase "previously resident in Vietnam" is used in section 13A(1), the phrase "resident or former resident of Vietnam" is used in section 13D(1). In the course of argument, I suggested to Mr. Mitchell that "resident" in section 13D(1) referred to someone who had been living in Vietnam immediately

before coming to Hong Kong, and that "former resident" in section 13D(1) referred to someone who had lived in Vietnam at some time in the past. Mr. Mitchell felt unable to argue against that. In those circumstances, the phase "previously resident in Vietnam" was intended to cover both kinds of resident, not merely those who had been resident in Vietnam immediately before coming to Hong Kong. Apart from anything else, the fact that the majority of the Privy Council described the Appellants as "previous residents of Vietnam", when the Privy Council knew that they had lived for some time in China, shows that the Privy Council did not regard section 13A(1) as limited in the way Mr. Mitchell suggested.

(ii) "Self-induced" detention. In *Tan Te Lam*, Lord Browne-Wilkinson said at p.876F-H:

> "The large majority of those in detention do not wish to return to Vietnam and have declined to apply for voluntary repatriation. The evidence shows that, if they did so apply, most of them would be repatriated in a comparatively short time, thereby regaining their freedom. If follows that, in such cases, the Vietnamese migrant is only detained because of his own refusal to leave Hong Kong voluntarily, such refusal being based on a desire to obtain entry to Hong Kong to which he has no right... In their Lordships' view, the fact that the detention is self-induced by reason of the failure to apply for voluntary repatriation is a factor of fundamental importance in considering whether, in all the circumstances, the detention is reasonable."

Since the Applicants' detention would have ended long ago if they had agreed to return to China, Mr. Mitchell argues that it is not open now for the Applicants to contend that their detention is unlawful.

I cannot accept this argument. Lord Browne-Wilkinson's remarks were made in the context of asylum-seekers who had not been granted refugee status. They were awaiting their repatriation to Vietnam. There was no issue concerning their status or the country to which they were to be returned which was still to be decided. They had exhausted such rights to claim refugee status as the Immigration Ordinance had accorded them. However, the Applicants are in a very different position. Until recently, they had not had their claims that they should not be returned to China considered. If they had agreed to return to China, they would have been giving up their claims to be resettled in a country other than China before those claims had been adjudicated upon.

THE SIX APPLICANTS IN CATEGORY (i)

Against this background, I turn to the question of fact which the Applicants' case raises: would the Applicants' detention have ended by now if their requests for permission to remain in Hong Kong as refugees had been considered when it was known that they had previously lived in Vietnam? I deal first with the 6 Applicants who fall into category (i):

Thang Thieu Quyen (A3),

Ho Quay Nguyen (A7),
Chu Minh Hong (A37),
Hoang Viet Sinh (A96),
Tran Hoa Buu (A103),
Tuong Can Quang (A106).

I trust that I will be forgiven for referring to them for convenience by their numbers.

One thing is plain: even if their requests to remain in Hong Kong as refugees pending their resettlement to China had been considered when they should have been, they would still have been in detention in July 1995. That is because up to then the Director had been attempting to return them to China (albeit despite not having considered their claims to be treated as refugees), but had not been able to do so. There is no suggestion that the Director had not made reasonable efforts to effect their return before July 1995. The only reason why those efforts had ceased in July 1995 was because that was when the proceedings in *Nguyen Tuan Cuong* were commenced. The crucial question is whether the 6 Applicants could have been returned to China since July 1995 if attempts to return them there had continued.

Over 23,700 persons classified as ECVIIs have been returned to China since 1979. By August 1994, 502 persons classified as ECVIIs remained in Hong Kong. They had not been returned because the Chinese authorities had not been able to identify them from the particulars which had been provided. It has been suggested that that was because some of them (including some of the 6 Applicants in category (i)) had given false particulars when they had been interviewed on their arrival in Hong Kong. It is not necessary for me to make any findings of fact on the issue: the problem was resolved by subsequent events.

First, the problem was partially met by a Chinese delegation which visited Hong Kong in 1994. Its members interviewed all persons classified as ECVIIs. The delegation identified a significant number of them, and the majority of them were returned to China. Secondly, the remaining ECVIIs were discussed at a meeting held in March 1995 between officers of the Immigration Department and the Chinese authorities. At that meeting the Chinese authorities agreed to take all the ECVIIs back: they would be returned to the provinces in China where they had claimed to have settled, and they would be detained in holding centres in those provinces until they could be identified. As a result of that agreement, one group of 60 ECVIIs, who had claimed to have settled in the province of Guangxi, were returned to Guangxi in June 1995, and two groups of 22 ECVIIs in all, who had claimed to have settled in the province of Hainan, were returned to Hainan in July 1995.

On these facts, therefore, and subject to any of the Applicants who come within category (i) not falling within the general pattern which I have described, the 6 Applicants are likely to have been returned if attempts to return them had continued. Since those attempts had been curtailed because of the legal challenge to the refusal to consider their requests for permission to remain in Hong Kong as refugees, their continued detention was attributable to the original decision not to consider their

requests. In other words, they would no longer have been in detention now: they would have been returned to China by now.

In relation to those of the Applicants who were Appellants in *Nguyen Tuan Cuong*, this analysis is not affected by the application for judicial review which has recently been brought. If those Applicants' cases had been properly considered when they should have been, and if it had been decided then (as it has recently been) that they should be resettled to China, the application for judicial review would have been brought that much earlier. It would have been brought when the Applicants' advisers were considering the position of ECVIIs in Hong Kong, i.e. in July 1995 when the proceedings in *Nguyen Tuan Cuong* were commenced. If the application for judicial review had been dismissed, the Applicants would have been returned to China by now, even allowing for the appellate process to take its course. After all, the time which elapsed between the institution of the proceedings in *Nguyen Tuan Cuong* and the delivery of the Privy Council's judgment was 16 months.

I do not think that the position would have been any different if the application for judicial review had been allowed. It would then have been for the Director to reconsider, according to the principles which the Court would have laid down on the application for judicial review, whether the Applicants should be resettled in China. If it had been decided that they should not be, they would have been released from detention then in the same way as other asylum-seekers whose claims to refugee status had been allowed. In that event, I think it much more likely than not that the Applicants would have been released from detention by now. If the Director had decided that they should be resettled in China, I think it much more likely than not that they would have been returned to China by now.

With all these considerations in mind, I turn to the individual cases of the 6 Applicants in category (i).

A3 and A7. A3 and A7 fall into the general pattern which I have described. They arrived in Hong Kong in December 1990 and May 1991. In A3's case, there is an issue as to whether he returned to Vietnam from China before coming to Hong Kong, but it is not necessary to resolve that issue for the purpose of these proceedings. Similarly, A7's claim that he too returned to Vietnam from China before coming to Hong Kong does not affect the legality of his current detention. They were both Appellants in *Nguyen Tuan Cuong*. For the reasons I have given, I think it much more likely than not that had their requests for permission to remain in Hong Kong as refugees being considered when they should have been, they would no longer be in detention now - either because they would already have been returned to China, or because they would have remained in Hong Kong at liberty pending their resettlement to some other country. On the application of the *Hardial Singh* principles, their continued detention is unlawful, and I order their immediate release.

A37. A37 does not fall into the general pattern in three respects. First, he did not arrive in Hong Kong until July 1993. Secondly, he was one of the ECVIIs whose identity was verified by the visiting Chinese delegation in November 1994. In the normal course of events, he would therefore have been returned to China shortly afterwards. However, he had earlier in November 1994 been arrested for an offence of assault, committed while he was in detention, and he had to remain in Hong Kong for

the law to take its course. In due course, he was convicted and sentenced to 3 years' imprisonment. He was released from prison in January 1997. Thirdly, he was not one of the Appellants in *Nguyen Tuan Cuong*.

In my view, these particular features relating to A37's case do not mean that the would still have been in detention now if his request for permission to remain in Hong Kong as a refugee had been considered when it should have been. His return to China had not been effected by the date of his arrest, and he could not therefore have been returned to China until January 1997 at the earliest. I accept, of course, that his request for permission to remain in Hong Kong as a refugee would have been decided by then, and that an order for his removal to China would have been made. It is plain, I think, that since his release from prison he would have been returned to China by now, but for any challenge which would have been made to the order for his removal. The question is whether that challenge would have been disposed of by now, because if it would have been, he would not, for the reasons I have given, have been in detention now.

I accept that the fact that he was not one of the Appellants in *Nguven Tuan Cuong* means that he is not likely to have been a party to the application for judicial review which would have been made in July 1995 challenging the removal orders which would by then have been made as a result of the refusal of their claims to refugee status. But there is no reason why his future would not have been governed by the result of that case. Since the Applicants in that case would no longer have been in detention now, it follows that A37 would not have been in detention now either. Accordingly, on the application of the *Hardial Singh* principles, his continued detention is unlawful, and I order his immediate release.

A96. There is only one thing which distinguishes A96's case from that of A3 and A7: A96 arrived in Hong Kong much later than them - in August 1994. It may be that, had his request for permission to remain in Hong Kong as a refugee been considered, it would not have been adjudicated upon for some time. But once it had been adjudicated upon, and an order for his removal to China had been made, he would have been regarded as in exactly the same position as A3 and A7. Indeed, he too was one of the Appellants in Nguyen Tuan Cuong. It follows that there is no relevant distinction between his case and that of A3 and A7. Accordingly, his continued detention is unlawful, and I order his immediate release.

A103. A103 first arrived in Hong Kong in January 1993. He was one of the ECVIIs whose identity was verified by the visiting Chinese delegation in November 1994, and he was returned to China in January 1995. However, he came back to Hong Kong in December 1995. He was not an Appellant in *Nguyen Tuan Cuong*, of course, because he had not been in Hong Kong when the proceedings were commenced. He was not returned to China because of the suspension of the return to China of all ECVIIs in Hong Kong while the case of *Nguyen Tuan Cuong* was going through the courts.

I have not found A103's case easy, but I think that the correct analysis of it is as follows. His request for permission to remain in Hong Kong as a refugee was not considered when he arrived in Hong Kong in January 1993. Had it been considered, I believe that it would have been adjudicated upon by November 1994 at the latest.

That would have resulted in an order for his removal to China. Since he was in fact returned to China in January 1995, that is when his return to China would have taken place. That is when his detention would have ended, because an application for judicial review of the order for his removal to China, which would have postponed his resettlement to China, would not have been launched then. That is because the appropriate proceedings for ECVIIs were not commenced until July 1995.

What, then, would have happened to him on his return to Hong Kong in December 1995? The application for judicial review which would have been proceeding through the courts would not have been the *Nguyen Tuan Cuong* case (because I am assuming for the purpose of this exercise that the ECVIIs' requests for permission to remain in Hong Kong as refugees had been considered), but the application which has recently been made. A103 would have remained detention while that application was pending, because although he would not have been a party to that application, it would have been recognised that whether he should have been returned to China in January 1995, and whether he should be returned to China in the future, would depend on the outcome of that application. In the circumstances, I believe that there is no relevant distinction between his case and that of A3 and A7. Accordingly, his continued detention is unlawful, and I order his immediate release.

I should add that Mr. Mitchell strongly argued that the only reason why A103 is still in detention is because he chose to come back to Hong Kong, having already been returned to China. If his detention was not self-induced, Mr. Mitchell asked rhetorically, what is? I cannot accept this argument. Any asylum-seeker who comes to Hong Kong knows that he is going to be placed in detention while his claim to refugee status is being considered. That does not mean that the detention is self-induced. It simply means that he recognises that detention is the price he has to pay for his claim to refugee status to be considered. What distinguishes those of the Applicants whose cases I have considered so far is that their detention would have ended by now if their claims to refugee status had been considered.

A106. A106 first arrived in Hong Kong in July 1989. He was classified as an ECVII, and he was treated in the same way as other ECVIIs. However, by 1992, his identity had not been verified. Because there was no confirmation that he had come from China, he was in April 1992 classified in addition as a VM. That was a device which the Immigration Department used in respect of a small number of persons who had originally been classified as ECVIIs. It was seen as a way to bring the consideration of their cases to a head. In August 1992, his claim to refugee status was dismissed, and that decision was confirmed by the Refugee Status Review Board in December 1992. By November 1994, he had been regarded as an ECVII again, because he was interviewed by the visiting Chinese delegation, and his identity was verified. Accordingly, he was returned to China in January 1995.

Ms. Li told me that A106 was one of the Appellants in *Nguyen Tuan Guong*. That is surprising because like A103 (who was not one of the Appellants in *Nguyen Tuan Cuong*) A106 had already been returned to China by July 1995. However, like A103, A106 came back to Hong Kong in December 1995. He was still regarded as an ECVII, and again like A103 he was not returned to China because of the suspension of the return to China of all ECVIIs in Hong Kong while the case of *Nguyen Tuan Cuong* was going through the courts.

The only difference between A106's case and that of A103 is that A106's request for permission to remain in Hong Kong as a refugee was considered and adjudicated upon him before he was returned to China. However, I do not regard that as a relevant difference between their cases. As a result of the majority decision of the Privy Council in *Nguyen Tuan Cuong*, the "screening" of a VM takes a very different form from the "screening" of an ECVII. I have already referred to the adaptation of the criteria to reflect the particular circumstances of ECVIIs. One only has to look at the result of the two set of screenings of A106 to see that the screening under the two regimes is very different. When A106 was first screened, he was found not to be a refugee from Vietnam. When he was recently screened under the new regime, he was found to be a refugee from Vietnam, albeit one who had settled in China. Since there is no relevant difference between A106's case and that of A103, his continued detention is unlawful, and I order his immediate release.

AN ALTERNATIVE ARGUMENT

Ms. Li advanced an alternative argument relating to the Applicants in category (i), based on the fact that the Director is seeking to return the Applicants to a country, i.e. China, in which it is alleged they have been offered a durable solution and protection, despite the fact that since 1st July Hong Kong has been part of that country. International Tefogee law, she claims, does not recognise the concept of asylum or protection being offered by one part of a country but not by another part of it.

Since I have decided that the 6 Applicants' detention is unlawful on other grounds, I do not need to address this interesting argument. In any event, if it has any merit at all (which I doubt), it can be advanced on the application for judicial review, which directly challenges the legality of the removal orders which have been made against the Applicants.

THE APPLICANT IN CATEGORY (iii)

Diep Minh Quang (A117) is the only one of the 7 Applicants in category (iii). He arrived in Hong Kong in May 1996. He claims that on his arrival he was treated as if he was one of the countless illegal immigrants who clandestinely come to Hong Kong in large numbers from China. The Director, however, claims that he was discovered on his arrival to have lived in Vietnam before settling in China, and that he was therefore treated as an ECVII. It is not necessary from me to resolve this conflict of evidence, because it is common ground that he is an ECVII. Accordingly, Part IIIA of the Immigration Ordinance applied to him, and in view of the majority decision of the Privy Council in *Nguyen Tuan Cuong*, he should be treated as having requested permission to remain in Hong Kong as a refugee pending his resettlement elsewhere.

That request has never been properly considered. Would it have been considered and adjudicated upon by now if it had been appreciated when he arrived that that was what he was entitled to? I think it probably would have been, but I think it equally likely that (a) if he had been found to be a refugee from Vietnam in China (as all other ECVIIs have recently been found to be), the country to which his resettlement would have been ordered would have been China, and (b) he would not have been returned to China by now, because he would have been an Applicant in the

judicial review proceedings for which leave has recently been given. He would therefore still have been in detention now.

That is not quite the end of the matter. When A117 arrived in Hong Kong, he was initially dealt with in the way in which ECVIIs had been dealt with before the autumn of 1993. In other words, he was refused permission to land in Hong Kong under section 11(1), and an order for his removal from Hong Kong was made under section 18(1)(a). He was then detained under section 32(1)(a) pending his removal from Hong Kong. When it was appreciated that he would not be removed from Hong Kong within 2 months of his arrival in Hong Kong, an order for his removal was made under sections 19(1)(b)(i) and 19(1)(b)(ii). That triggered the Director's power to authorise A117's detention under section 32(3A) pending his removal from Hong Kong.

However, A117's detention under section 32(1)(a) and subsequently under section 32(3A) was unlawful. It pre-supposed that lawful orders for A117's removal from Hong Kong had been made. In fact, the order made for his removal had not been lawfully made: since he had been entitled to have his request for permission to remain in Hong Kong as a refugee pending his resettlement elsewhere considered under Part IIIA of the Immigration Ordinance, no order for his removal could have been made until it had been considered. The power of detention which should have been used in his case was the first limb of section 13D(1). Accordingly, because he is currently detained under a power a power which has not been lawfully triggered, his current detention is unlawful, and I order his immediate release. I should add that at present I see no reason why he should not be re-detained, as soon as the Director authorises his detention under the first limb of section 13D(1).

CONCLUSION

I cannot leave this case without expressing my considerable sympathy for the predicament which the Director has faced over the years. It is undoubtedly the case that the Applicants' circumstances posed complex legal issues. The judgments of the various judges in the High Court, the Court of Appeal and the Privy Council in *Nguyen Tuan Cuong* reveal a variety of different approaches. Even in the Privy Council, there was a strong dissenting judgment from two of the judges. It is not suggested that the Director failed to take reasonable steps to inform himself, when the issue relating to the ECVIIs first arose, about what their rights in law were. Nor can the Director fairly be criticised for taking a course of action which, with the advantage of hindsight, and with the knowledge of the ultimate decision of the majority of the Privy Council, is now known to have been flawed. However, as the Director, I am sure, appreciates, none of this affects the question which I have had to decide. The fact of the matter is that the Privy Council decided that the Applicants were entitled to have their requests for permission to remain in Hong Kong as refugees properly considered, and that had not been done until this year.

Accordingly, for the reasons I have given, I declare that the continued detention of the 7 Applicants is unlawful, and I have ordered their immediate release from detention. As for the remaining 112 Applicants, the parties will need time to consider the impact of this judgment on their cases, and I leave it to the parties to decide whether and when their cases should be brought to the court's attention again. Finally,

at present I see no reason why costs should not follow the event. I do not think that the 2nd Respondent should be liable for costs, since he is only a party to the proceedings as a result of the orders made by the Director. Accordingly, the order nisi which I make as to costs is that the Director of Immigration pays to the Applicants their costs of these proceedings, to be taxed under the Legal Aid Regulations if not agreed.

(Brian Keith)
Judge of the Court of First Instance

Representation:

Ms. Gladys Li S.C., instructed by Messrs. Pam Baker & Co., for the Applicants

Mr. Dennis Mitchell S.C. and Mr. Anthony K.K. Chan, instructed by the Department of Justice, for the Respondents